

UNIVERSITY OF SOUTHAMPTON

LAW AND THE UNDERWATER CULTURAL HERITAGE:  
A Legal Framework for the Protection of the Underwater  
Cultural Heritage of the United Kingdom

[Volume Two of Two]

by

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### PART III: REFORM

## CHAPTER SIX: EXISTING LEGISLATIVE FRAMEWORKS:

### ANALYSIS, COMPARISON AND REFORM

#### INTRODUCTION

In order to review the protective regime for the underwater cultural heritage it is necessary to examine the underlying issues and problems arising therefrom and this is what Chapter Six sets out to do. The issues will be dealt with under five main headings: discovery, excavation, disposal, education, and co-ordination. Analogies will be drawn with the approaches and experiences of other countries. In particular, examples will be drawn from Ireland, Guernsey and Australia. The waters of Ireland and Guernsey are similarly inhospitable to those of the UK. For this reason, and also because both have fairly recent legislation,<sup>1</sup> the position in these jurisdictions may lend some valuable illustrations. By contrast, the waters of Australia are warm and shallow, and attract a large number of sports divers and others. Australia therefore operates a very sophisticated system for the protection of its underwater cultural heritage and its experiences may provide some interesting contrasts.

The issues covered in Chapter Six arise out of the current legislative framework in the UK and will be discussed on the basis that there will continue to be a legal regime for the underwater cultural heritage separate and distinct from that for the land-based heritage. This assumption will be questioned in Chapter Seven, which will consider, inter alia, whether it would in fact be preferable to integrate, as far as possible, the protection afforded to the terrestrial and underwater archaeological heritage. The writer's specific proposals for reform will be outlined in Chapter Eight.

## A. DISCOVERY

### 1. Scope of Protection

In order to examine the scope of the protective regime, it is necessary to look at a number of factors: the type of cultural property to receive protection, its location and the basic form that such protection should take.

#### (a) Type of cultural property to receive protection

In many cases, legislation arises in response to a "crisis" and the PWA 1973 was no exception, having been enacted to deal with specific incidents of looting and destruction of historically important wreck sites.<sup>2</sup> The PWA 1973 was passed quickly to respond to these events by providing protection for important shipwreck sites. Little consideration was given to wider issues and potential incidents which might arise in the future. For example, in 1973 no legal protection was afforded to other types of marine monuments and remains<sup>3</sup> and yet the PWA 1973 was not extended to cover them.<sup>4</sup> Apart from discrete sites comprising remains, there are areas of the seabed where a number of vessels have sunk, for example the Goodwin Sands;<sup>5</sup> and "historic landscapes", for example, the palaeo-valleys which exist in the Solent and English Channel.<sup>6</sup> However, again when the PWA 1973 was enacted, no consideration was given to extending some form of protection to these types of remains.<sup>7</sup>

What is important is that all forms of cultural property should receive protection appropriate to their needs and circumstances. Where there is a separate legal regime for the "underwater" heritage and a separate regime for the "land-based" heritage, where exactly should the dividing line fall between them? Many archaeological remains now found



in the sea were once on dry land, but have been submerged as a result of sea-level changes, e.g. the round-house timbers and hurdle structures found below high-water mark at Birchington in Kent. These and other non-wreck marine remains can now theoretically be protected under the AMA 1979,<sup>8</sup> but would it in fact be better if such remains were protected by the same legislative regime as shipwrecks? In many ways this approach would seem more sensible. For example, in relation to issues of accessibility, enforcement of protective measures, conservation of material, land ownership, and the differing nature of laws applicable on land and at sea, marine sites of all kinds have much in common.<sup>9</sup> Certainly the approach taken by the European and international initiatives examined in Chapter Four has been to treat all forms of underwater archaeological remains in the same way<sup>10</sup> and the fact that the AMA 1979 s.53 has not been activated to protect non-wreck sites in territorial waters suggests that it may not be considered a very appropriate mechanism for providing such protection.<sup>11</sup>

(b) Location

This thesis concerns the underwater cultural heritage, but what exactly is meant by "underwater"? At present the PWA 1973 only extends to territorial waters and the tidal parts of rivers. It does not cover inland waters such as lakes and the upper reaches of rivers and yet these areas are known to contain important archaeological remains. For example, in 1990 blackened timbers thought to have been part of a Viking longship were found by a digger driver which was cleaning a creek leading to the river Blyth at Southwold in Suffolk. Carbon dating placed the timbers in the late tenth century.<sup>12</sup> The provisions of the Irish National Monuments (Amendment) Act 1987 which cover historic wrecks, specifically include protection for sites "on or in land covered by water".<sup>13</sup> It appears that the reason why it was decided to treat inland waters and marine sites in the same way was that in Ireland the same

individuals dive in both areas and it was felt appropriate therefore that they should be covered by the same legislative provisions. It is possible to argue that all underwater sites should receive the same protection because they have important features in common, for example the accessibility of sites, the need for immediate conservation of material, and so on. That being said, however, there are instances where lakes or rivers dry out for long periods and then have more in common with ordinary land sites.<sup>14</sup> Furthermore, there are remains in waterlogged sites, e.g. marshlands and other wetland areas which - in terms of accessibility - have more in common with land sites, but - in terms of the waterlogged nature of the remains - have more in common with underwater sites. In fact, as such sites are excavated they sometimes gradually become underwater sites. What is essential is that there is no gap in the legal regime of protection and that there is a mechanism whereby remains, wherever situated, receive appropriate protection.<sup>15</sup>

Another problematic area is on the coastline. Many marine-orientated laws, including the PWA 1973, protect sites up to the high-water mark but do not provide protection for sites that straddle the two regimes - land and marine. By contrast, the Australian Commonwealth Historic Shipwrecks Act 1976, s.7(1), allows a protected zone to be declared over an area "consisting of sea or partly of sea and partly of land". The Western Australian legislation<sup>16</sup> states that "[a] maritime archaeological site may be situated below low-water mark, on or between the tide marks, or on land, or partly in one place and partly in another".<sup>17</sup> This would seem to cover most eventualities! There are probably no right or wrong answers to these issues. It is simply necessary that a clear-cut decision is made, based on sound reasoning, which provides comprehensive and logical cover for the national archaeological heritage.<sup>18</sup>

A further issue of importance is the geographical scope of application of the protective legislation. At present the PWA 1973 only applies to UK territorial waters.<sup>19</sup> However, quite a large number of other countries, including France, Australia, Ireland, Norway and Spain, have extended the application of their underwater heritage laws to other maritime zones, for example the contiguous zone or continental shelf.<sup>20</sup>

(c) Site-specific protection

There are fundamental problems with a system, such as that in the UK, which only provides protection for certain designated underwater sites.<sup>21</sup> First, designation inevitably gives notice that a site might be worth investigating. For example, in May 1985 a Spanish Armada vessel was found in the shallow waters of Streedagh Strand in Co. Sligo, Ireland. A temporary preservation order was immediately placed on the wreck under the Irish National Monuments Acts of 1930 and 1954. Within days a group of sub-aqua divers from Belfast arrived on the site and were only prevented from diving on the wreck by a community watch group which had been organised by the administrator of the Sligo county museum.<sup>22</sup> The main method used in the UK to overcome this problem is to protect a designated site by having a licensee working it regularly. Such a policy of "exploitation" is the subject of much criticism.<sup>23</sup>

The second problem with site-specific protection is the rationale used for the selection of the sites to receive protected status. There are no obvious criteria. Under the PWA 1973, the phrase "on account of the historical, archaeological or artistic importance" of the site is used and this has been adopted by the Irish National Monuments (Amendment) Act 1987 and Guernsey's Wreck and Salvage Law 1986<sup>24</sup> too. There is a preponderance of similar phrases in the antiquities legislation of the world.<sup>25</sup> Apart from the words "historical",

"archaeological" or "artistic", words such as "scientific", "ethnographical", "prehistorical", could, and have, all been used. Whichever words are adopted, careful thought must be given to their meaning.<sup>26</sup> For example, would the words "historic" or "historical" be interpreted as covering twentieth century remains?<sup>27</sup> The Australian Commonwealth Historic Shipwrecks Act 1976 applies to an "historic shipwreck", which is defined in s.5 as "the remains of a ship that...are of historical significance." The first wreck declared as an "historic shipwreck" under the Act was that of a Japanese submarine which was sunk in 1942 by the Royal Australian Navy.<sup>28</sup> Off the south coast of England, near Bognor, lie landing craft, tanks, submarines, a field gun, a section of a Mulberry Harbour, and British and German warships, all from World War II, which are considered by some historians as worthy of protection and preservation.<sup>29</sup> Under the PWA 1973 the youngest vessel so far designated is the Iona II, a passenger ferry which sank in 1864 near Lundy Island. The reason for her designation was that she represents a one-off design for a fast passenger ferry for the Clyde and is also a good example of an early Federal blockade runner.<sup>30</sup> Clearly, not all vessels that had sunk in 1864 would be of historical interest but some, such as the Iona II, would have a special history and for this reason would be regarded as worthy of protection.<sup>31</sup> Allen<sup>32</sup> suggests that a wreck such as the Titanic<sup>33</sup> should be considered as an "historic wreck" from the time of its sinking simply because the magnitude of the disaster and its notoriety makes it worthy of preservation. He rightly draws a distinction between wrecks which have an "intrinsic historic value" by virtue of their age, and wrecks which possess historic significance for reasons other than age. Iona II would fall into the latter category.<sup>34</sup>

The word "importance" can be contrasted with words such as "value", "significance" or "interest". The term "significance" is probably of narrower scope than "interest", but is there any difference between

"importance" and "significance"? The meaning of such words has been the subject of much debate among cultural heritage specialists, particularly in the US.<sup>35</sup> Again, the choice of terms requires careful thought because of the different interpretations that could be applied. The system of site selection in the UK is not ideal, yet critics cannot readily suggest viable alternatives.

The AMA 1979 s.1(3) uses the phrase "of national importance" to refer to monuments which may be scheduled. The term was clearly used to limit the number of protected monuments. National and local inventories list about 600,000 archaeological sites, but only 13,000 are actually scheduled.<sup>36</sup> The JNAPC, in its policy document Heritage at Sea, suggests that underwater archaeological sites of "national importance" should receive protection. However, this only raises the questions: what is of "national" importance and who should decide? Under the AMA 1979 the Secretary of State makes the decision on the basis of set criteria.<sup>37</sup> Apparently, it has always been implicit that:-

"the ultimate object of scheduling is the preservation of the evidence of the history of the country, and for this the schedule should contain the best representative selection of monuments for preservation that can be made on academic and practical grounds."<sup>38</sup>

A factor of particular relevance to underwater sites is that it is difficult to determine what is of national importance if the entire resource is not known.<sup>39</sup> Furthermore, if the wrecked vessel actually had no connection with the UK at all, and was just sailing past the shores of the UK, can it be said to be of "national" importance? Allen<sup>40</sup> suggests that ancient wrecks will be of international historical significance, while a modern wreck might be of historical significance only to one or two states. Whether a wreck which is of "international historical significance" but which has no historical connection with the UK can be said to be of "national" importance to the UK is arguable. Nonetheless, such a wreck clearly should receive protection. One irony

of any system based on protecting remains of a certain level of significance or importance is that their significance or importance must be demonstrated and, in the case of underwater sites, survey processes may result in destabilisation and consequent deterioration. Where there is a system of site-specific protection, it may be necessary to have some form of temporary designation order which can be placed on a site while investigations take place to see if it meets the criteria for full designation. Under the Australian Commonwealth Historic Shipwrecks Act 1976, s.6, wrecks may be given provisional protection for up to five years in order to allow research and assessment to take place.<sup>41</sup>

Where there is a system of site-specific protection for archaeological remains, a question arises as to exactly what is comprised in the site. With wrecks in particular, it may be very difficult to specify the limits of archaeological evidence as material associated with a wreck may be scattered for some distance. A sinking ship will often leave a trail of deposits as material becomes detached before the hull reaches the seabed. The PWA 1973 s.1(1)(a) provides protection to a site which "is, or may prove to be, the site of a vessel lying wrecked on or in the sea bed". This phrase does not cover a case where the vessel itself has been completely destroyed and can no longer be called a vessel. The Irish National Monuments (Amendment) Act 1987 s.3(1)(a) remedies this omission by providing protection for a site that "is or may prove to be the site where a wreck or an archaeological object lies or formerly lay". Under the PWA 1973 efforts are made to limit the radius of sites in order not to unduly interfere with other legitimate activities in the marine zone. For this reason, the protected area may well not extend to all remains associated with the wreck.

There may be areas of the seabed which are known to be of high archaeological potential, where a number of wrecks are known to have

been lost and their remains are likely to be well-preserved.

Environmental factors, such as an open or sheltered coast, the depth of the wreck, a hard or sandy bed, currents, etc., will obviously have an effect on the preservation of wrecks.<sup>42</sup> In the UK the Goodwin Sands are probably the best example of such an area.<sup>43</sup> These Sands lie off the eastern coast of Kent in the narrowest part of the English Channel and contain the remains of an estimated 1,000 historic wrecks,<sup>44</sup> often lying over one another. Fenwick has called the area "the largest and most important repository of well-preserved wrecks in the world".<sup>45</sup> Between the Sands themselves and the coast there is an area known as the Downs which was one of the most important anchorages in the world during the days of sailing ships.<sup>46</sup> Often 150 or 200 ships would anchor there to await a fair wind before setting sail and the Sands themselves were notorious for causing ships to founder.<sup>47</sup> This area has been left relatively unscathed by the interference of divers because of strong tides and currents, and constantly shifting sands. Nonetheless, some important historic wrecks have already been found, e.g. the Northumberland, Stirling Castle and Restoration, battleships lost in 1703,<sup>48</sup> and the Admiral Gardner, an East India Company vessel.<sup>49</sup> Many of the wrecks are likely to be well-preserved because of the soft sands and silts in which they are buried.<sup>50</sup>

There is an argument that areas such as the Goodwins, with high archaeological potential, should be subject to restrictions on activities within them.<sup>51</sup> Such a safeguard could simply be a preparatory stage to identifying and protecting individual sites. A surveying and inventory process may well identify areas of high potential before identifying discrete sites.<sup>52</sup> In such a case there will be a time lag before the identification of individual sites when arguably the area should receive some form of protection.<sup>53</sup> The AMA 1979 makes provision for the designation of "archaeological areas" on land and a similar concept could be implemented at sea.<sup>54</sup> However, there are problems with creating

restricted areas in the marine zone which are well illustrated by the considerable difficulties found in designating Marine Nature Reserves under the Wildlife and Countryside Act 1981.<sup>55</sup> If diving and other activities were completely prohibited in the area, commercial interests would undoubtedly argue that there may be other wrecks - not of archaeological but of commercial interest - in the area and that diving restrictions were an unreasonable interference with their legitimate activities. It may, however, be possible to prohibit certain activities, such as trawling, dredging, or any form of development, until a full archaeological survey has been undertaken and has been independently assessed.<sup>56</sup> A secondary problem with designating quite a wide marine area would be that enforcement of restrictions would be even more difficult than is presently the case with discrete sites.<sup>57</sup>

There are also "historic landscapes" in the marine zone, which need to be taken into account in drawing up a protective regime. Protection for such landscapes may not be achieved by an "area" designation because their limits may be too wide and ill-defined. For such landscapes therefore, some form of blanket protection may provide the most appropriate form of protection.<sup>58</sup>

The old French law<sup>59</sup> appeared to make a distinction between isolated objects and sites. Isolated objects apparently did not receive any protection and, when recovered, would be returned to the finder. A site, however, would receive protection and could only be interfered with under licence.<sup>60</sup> This distinction led to sites being taken apart piece by piece and material being reported as though it was an isolated object.<sup>61</sup> There seems to be no valid archaeological reason to make such a distinction and it may lead to the loss of valuable information. It is true that an isolated object may not be of great historical worth by itself because it is the association of finds which is of importance, but an isolated object may well have been part of the contents of a



vessel which were scattered over the seabed, perhaps for some distance. The finding of the object may lead to the discovery of more objects or an entire wreck site. Furthermore, to distinguish between isolated objects and sites in such a way may lead finders to claim - as appears to have been the case in France - that an object was an isolated find, when in fact it came from a site. It would be very difficult to disprove such a claim.

(d) Blanket protection

A very significant difficulty with site-specific protection is that important, but as yet unknown, sites may be destroyed, perhaps accidentally or carelessly by dredging or other commercial operations, or by natural processes.<sup>62</sup> It appears that there are many undesignated sites in UK waters of potentially great historical and archaeological worth. At present these sites lie undiscovered or unsurveyed and little is known of them, yet they probably hold a wealth of archaeological information. One of the criticisms that has been made of the JNAPC's policy document, Heritage at Sea, is that it focussed on the protection of "nationally important sites" and did not really address the question of management of the total archaeological resource.<sup>63</sup> The designation of archaeological sites of national importance amounts to protection for only a very small percentage of the total resource. Some countries have dealt with this problem by providing some form of "blanket" protection based on age, sometimes in conjunction with site-specific protection, e.g. in Ireland and Guernsey. The Irish National Monuments (Amendment) Act 1987, s.3(4), provides that there must be no interference with any wreck over 100 years old, or any archaeological object. However, it is also possible for specific sites to be protected by an underwater heritage order, which prohibits operations directed to the detection or location of a wreck or archaeological object within the restricted area and may cover sites less than 100 years old. Despite

this option, it appears that no underwater heritage orders have yet been made because the blanket protection has been found to be sufficient.<sup>64</sup>

Blanket protection systems tend to use two ways of stating the cut-off point for protection. A "moving date" system can be used whereby all material more than, say, 50 or 100 years of age is protected; or reference can be made to a fixed date, e.g. all material submerged prior to 1945 is protected. Where a fixed date is used, it is often a date of historical significance, for example Guernsey's Wreck and Salvage Law 1986, s.15(a), uses 1946, so the protection is clearly intended to cover World War II wrecks.<sup>65</sup> The problem with a fixed date is that, as time goes by, it will need to be amended. Guernsey's legislation actually uses a combination of both methods: s.15 provides that a "historic wreck" means, inter alia, "a vessel which has lain wrecked for not less than 50 years or since any date prior to 1946 whichever period is shorter". This is a very clumsy provision,<sup>66</sup> but presumably its purpose was to ensure that World War II wrecks received protection, even before they were 50 years old. International and European initiatives have used a moving date, rather than a fixed date, system. The 1985 draft European Convention affords protection to all remains over 100 years old, and the ILA's 1992 draft Convention uses a 50 year cut-off point.<sup>67</sup> Usually the date, whether it is a fixed or moving date, refers to the period since the property was lost, e.g. the sinking of a vessel, or the submersion of other material. If it referred to the age of the property, there may be unfortunate consequences for the owners or insurers of old vessels which sink. They may find they cannot have their vessels salvaged, or even that they lose ownership rights to them.<sup>68</sup>

Once an age system of whatever kind is decided upon, a difficulty arises in deciding exactly when the cut-off date or age for protection

should be. Depending on the type of protection being afforded, this date or age may signify the cut-off point for salvage law, and the divesting of ownership rights. Guernsey's Wreck and Salvage Law 1986 divests ownership rights for property subject to blanket protection; the Irish National Monuments (Amendment) Act 1987 does not. The Council of Europe's minimum requirements in Recommendation 848 (1978) recommended that existing salvage and wreck laws should not apply to property over 100 years old.<sup>69</sup> By contrast, the 1985 draft European Convention, although again providing protection to property over 100 years old, stated that it did not affect the rights of identifiable owners or the law of salvage.<sup>70</sup> The ILA's 1992 draft Convention simply avoids these issues altogether by making no mention of ownership and by "encouraging", rather than requiring, State Parties to exclude property over 50 years old from salvage law.

Because of the potential interference with rights, the decision regarding the cut-off date or age cannot be taken from a purely archaeological point of view; instead it will depend partly on what is deemed to be of "historical" or "archaeological" importance and partly on the other interests which must be taken into account, e.g. those of commercial salvors, amateur divers and wreck owners. In determining the cut-off date, much depends on what restrictions would be imposed by the protective measures. Presumably, unauthorised interference with a protected site would be an offence, but would this include only deliberate interference or also that which was careless or inadvertent? Any restriction on interference will effectively prevent the ordinary application of salvage laws and will be of interest to commercial salvors.<sup>71</sup>

In domestic cultural protection laws generally, the cut-off period for protection can range from 500 years (in the Yemen Arab Republic) to 30 years (in the Federated States of Micronesia), although 100 years is

common.<sup>72</sup> As far as underwater property is concerned, Denmark has chosen to protect all wrecks over 150 years of age; Norway, Sweden and Finland those over 100 years of age. The Danish, Norwegian and Swedish legislation provides for ownership of protected property to pass to the state if no owner can be found, and therefore ownership rights are preserved where they still exist. Finland, on the other hand, cuts off the ownership rights to protected property. Guernsey's Wreck and Salvage Law gives protection to all wrecks over 50 years old and vests ownership of these wrecks in the States of Guernsey. Under Bermuda's Wreck and Salvage Act 1959, s.28, "historic wreck" means wreck which is "not less than fifty years old, or has been abandoned by the owners thereof, and is of historic interest or value". Section 29 of that Act vests title to historic wreck in the state of Bermuda.<sup>73</sup> In the UK, the commercial interests of salvors and insurers have traditionally been strong and continue to be so. The Salvage Association would like a date no earlier than 1860 to be the cut-off point for protecting historic wreck, after which commercial interests would take precedence. It is interesting to note here that insurers, including Lloyd's of London, have recently been awarded a share of an estimated \$1 billion cargo from the SS Central America which sank in 1857.<sup>74</sup> No doubt the insurers would not be happy to see such rights divested from them. However, there are wrecks of legitimate historical interest after this date<sup>75</sup> and, from the point of view of the cultural heritage, "there is no justification for using age as a criterion".<sup>76</sup> Arguably, a 1960s computer might be of importance to students of the history of technology. Furthermore, there may be old wrecks of little historical or archaeological interest which could be made available to amateur divers.

It seems, therefore, that some discretion is required in determining what should receive protection. The Council of Europe's minimum requirements in Recommendation 848 provided that "[p]rotection

should cover all objects that have been for more than 100 years beneath the water, but with the possibility of discretionary exclusion of less important objects...once they have been properly studied and recorded, and the inclusion of historically or artistically significant objects of more recent date."<sup>77</sup> This provision affords flexibility so that some older material may be excluded from, and some younger material may be included within, the general definition of underwater cultural property. Such flexibility may help assuage the concerns of divers and salvors, and archaeologists and historians. Guernsey's Wreck and Salvage Law 1986, s.15, provides that "historic wreck" does not include anything "declared by the [Ancient Monuments] Committee not to be historic wreck", so certain material may be excluded from the general definition. The Scandinavian countries, on the other hand, provide that all wrecks and associated objects which have been underwater for 100 years are protected, but that later items may be included at the discretion of the relevant authority.<sup>78</sup> This solution provides for the discretionary inclusion of material. However, the Council of Europe's minimum requirement appears to strike a reasonable and potentially acceptable balance between the various interests concerned. Important World War I and World War II vessels could perhaps be included by virtue of the provision for inclusion of historically or artistically significant objects of more recent date.<sup>79</sup>

## 2. Restrictions Imposed on Protected Property

### (a) Site-specific protection

Where the protective regime is based on the protection of specified sites, exactly what sort of restrictions should be imposed on the sites? In order to avoid unnecessary interference with other legitimate uses of the sea or other area of water, usually the

protection afforded is to restrict the type of activities allowed in the designated area, rather than to prohibit activities in the area altogether.<sup>80</sup> Under the PWA 1973, s.1(3), a person commits an offence if, without the authority of a licence:-

"(a) he tampers with, damages or removes any part of a vessel lying wrecked on or in the sea bed, or any object formerly contained in such a vessel;

(b) he carries out diving or salvage operations directed to the exploration of any wreck or to removing objects from it or from the sea bed, or uses equipment constructed or adapted for any purpose of diving or salvage operations; or

(c) he deposits, so as to fall and lie abandoned on the sea bed, anything which, if it were to fall on the site of a wreck (whether it so falls or not), would wholly or partly obliterate the site or obstruct access to it, or damage any part of the wreck".

A person also commits an offence if he "causes or permits any of those things to be done by others".<sup>81</sup> These three categories of restriction appear to be fairly standard in domestic laws protecting the underwater cultural heritage.<sup>82</sup>

Restrictions imposed on a site have to be very carefully framed, otherwise the unscrupulous will find ways of circumventing them. The PWA 1973, s.1(3), is prima facie worded to cover all possible situations, but it is interesting to note that the Irish National Monuments (Amendment) Act 1987, which appears to be based on the PWA 1973, adds a prohibition on the carrying out of survey operations and also prohibits the carrying out of diving, survey or salvage operations directed to the detection or location of material. It is not known to the writer whether these additions were made to cover known methods of evasion of the PWA 1973, or were simply thought to make the wording more comprehensive. Guernsey's Wreck and Salvage Law 1986, s.18(4), is very similar to the PWA 1973 s.1(3), except that, as regards (b), it provides more generally that no person shall "carry out any diving or salvage operation or use equipment constructed or adapted for diving or salvage operations" in a restricted area. An offence would probably be easier to prove under Guernsey's provision because there is no need to prove

intention. A restriction which could be considered as an addition to those in the PWA 1973 is to forbid anchoring over designated sites. Breach of such a restriction would probably be fairly easy to detect and it would also help prevent damage to the site by anchors. However, it may be that fishermen would be unhappy about such a restriction.

Enforcement of site-specific designations might be easier if activities within designated areas were prohibited rather than simply restricted. However, in the marine zone this may not be politically acceptable and, in any event, the main problem in the UK has been in proving that prohibited activities took place in the designated area because it is difficult to precisely fix co-ordinates.<sup>83</sup>

(b) Blanket protection

Similar issues, in respect of the restrictions to be imposed, arise in the case of blanket protection for the underwater cultural heritage. Restrictions can be imposed – in the same way as for site-specific protection – upon interference with the protected property, but obviously it may be much more difficult to enforce such restrictions because it will be difficult to distinguish vessels and divers carrying out perfectly legitimate activities on non-protected property and those carrying out unlawful activities on protected property. The Irish National Monuments (Amendment) Act 1987 provides, in s.3(3) and s.3(4), for almost identical offences in relation to those sites subject to an underwater heritage order and the sites of wrecks subject to blanket protection, i.e. those over 100 years old. The only distinction is that, in respect of sites subject to blanket protection, there is no prohibition on the carrying out of diving, survey or salvage operations directed to the detection or location of sites. However, there is provision that anyone who finds a wreck subject to the blanket protection, i.e. one over 100 years old, must report it within four

days.<sup>84</sup> The Irish provisions regulating interference are based on strict liability. By contrast, Guernsey's Wreck and Salvage Law 1986 provides that, unless licensed, no person shall "tamper with, damage or remove any historic wreck not within a restricted area which he knows or reasonably ought to know to be historic wreck". This seems fairer as it may not always be easy for a finder to determine whether a site or object is, or is not, over a certain age, but it requires an extra element of proof.<sup>85</sup>

### 3. Enforcement

According to Dean,<sup>86</sup> enforcement is probably the single greatest problem relating to the protection of wreck sites. He believes that the PWA 1973 is being evaded: by non-licensees recovering from licensed sites and by licensees not declaring under the terms of their licence. Evasion by non-licensees is the really difficult problem: the local receiver will generally keep an eye on what licensees are bringing ashore and the ADU undertakes regular inspections of the work on licensed sites. Also, it may be possible to detect evasions by discrepancies in the annual reports which must be made by licensees.

The present system of designation in the UK relies for its enforcement to a great extent upon the regular presence of licensees on the site. For reasons given elsewhere,<sup>87</sup> this system is far from satisfactory. However, by the very nature of most wrecks (lying perhaps some distance out to sea) it is not easy to take other enforcement measures.<sup>88</sup> Even frequent patrolling of sites by public officials, e.g. the police, harbour boards or coastguard, or by members of the general public employed to keep vigilance,<sup>89</sup> may not be very effective. According to Dean,<sup>90</sup> the Langdon Bay designated wreck is probably the best "policed" site because the harbour master's watch



tower overlooks the site, is manned 24 hours a day and its staff keeps a look-out for illegal activities on the site. Even so, there has been at least one instance of illegal taking. This site is bordered on two sides by a harbour wall and therefore it is relatively easy to tell if a boat is in the designated area. However, in open water, it is virtually impossible to be sure that a boat is within the exact co-ordinates of a designated site. This problem arises partly because designated sites are sometimes limited too tightly in terms of their extent, often to avoid interference with other activities.<sup>91</sup> It is exacerbated by the fact that sometimes the co-ordinates of the designated area are wrong: the ADU once caught someone red-handed on a site but later found that the designated area was not over the wreck and for this reason a prosecution could not be brought.<sup>92</sup>

The PWA 1973 makes no specific provision for enforcement. By contrast, the PMRA 1986, s.6, provides quite extensive enforcement powers to "authorised persons"<sup>93</sup> to board and search vessels and to make seizures.<sup>94</sup> It is notable that such provision was made despite the fact that the PMRA 1986, like the PWA 1973, was a Private Member's Bill.

The Australian Commonwealth Historic Shipwrecks Act 1976 provides, in ss.23-25, for the appointment of inspectors who are given wide powers to enforce provisions relating to the protection of designated historic wreck sites. The powers, like those in the PMRA 1986,<sup>95</sup> are reminiscent of those afforded to receivers under the MSA 1894 in relation to wreck brought ashore.<sup>96</sup> For the purpose of ascertaining whether an offence has been or is being committed, or to obtain evidence in relation to an offence, inspectors may - where they have "reasonable grounds for believing" it necessary to do so - board and search a ship and require a person to answer questions.<sup>97</sup> Inspectors may also, without warrant, arrest a person if they reasonably believe

that the person has committed certain serious offences under the Act and that proceedings by summons would not be effective. There are also powers of seizure and forfeiture of vessels and equipment. Such a system of regional inspectors may be more appropriate to Australian conditions than those in the UK because the likelihood of interference in the warm, shallow waters of Australia is much greater than in the inhospitable waters around the UK. However, the availability in the UK of such powers might well be desirable, especially were there to be some form of blanket legislative protection.<sup>98</sup> Probably, in the UK, it would be more appropriate to have a small, central task force of inspectors, rather than regional units. Such a job would fit in well with the tasks already undertaken by the ADU.<sup>99</sup> The unit could be called upon when problems arise in a particular area or with a particular site. Obviously, they would need to have the power to board and search vessels, seize equipment and so on. Severe penalties for infringement and knowledge that prosecutions would be brought would provide support. Penalties for infringement of the Australian Commonwealth Historic Shipwrecks Act 1976 can be severe: up to \$5,000 and/or up to two years imprisonment for individuals; heavier fines of up to \$25,000 for companies (together with seizure and/or forfeiture of vessels and equipment).<sup>100</sup> Such a system would, however, be extremely expensive and Dean believes that enforcement, in the long-term, needs to be through education.<sup>101</sup>

Enforcement through education certainly appears to have been the approach taken in Ireland. So far, there have been no prosecutions under the Irish National Monuments (Amendment) Act 1987. This is partly due to the fact that no one has been caught red-handed, but also to a policy of taking a lenient view while the process of education is taking effect. The Office of Public Works which is responsible for policing the Act gives warnings, but would only prosecute persistent offenders. Together with the National Museum of Ireland, its approach has been to

educate divers through the establishment of a network of diver contacts, the organisation of training programmes for diving clubs and encouraging the involvement of amateur divers in project work and surveys. The keys to enforcement in the Irish situation are believed to be education and involvement.<sup>102</sup> It should be noted, however, that the position there is rather different from that in the UK because there are only about 1,000 active divers in Ireland. It is therefore relatively easy to build up a system of diving contacts and enforcement based on a "bush telegraph".<sup>103</sup> The main problem of policing actually appears to have been in respect of foreign divers who do not know, or possibly care, about the restrictions.<sup>104</sup>

#### 4. Identification of All Underwater Cultural Property of Archaeological Importance

There seems to be little doubt that there is a large number of wrecks of historical and archaeological significance lying, as yet undiscovered, around the shores of the UK. Larn, who has compiled an extensive index of wrecks around the UK coast, estimates that the total number may be as high as 200,000.<sup>105</sup> Obviously, not all these wrecks will be of historical or archaeological interest or importance, but quite a large number are likely to be. So far, for example, very few wreck sites have been found which date from the Roman occupation of Britain, or earlier.<sup>106</sup> Nonetheless, the large amount of imported material found on land shows that a significant amount of trade must have taken place during this period. Dean suggests<sup>107</sup> that the main reason for the lack of discoveries of such wrecks may be that large metal objects, such as cannons and anchors, which are common on later sites, are often the first sign of a wreck. They can be easily seen and, even when totally buried, readily detected by remote sensing devices. These objects obviously do not exist on earlier sites and, therefore, very careful seabed survey would need to take place to find them.

(a) Threats to underwater sites

Some may argue that undiscovered sites of archaeological importance receive the best protection by being left undiscovered, rather than being found and, for example, receiving site-specific legal protection. However, it is becoming increasingly clear that such sites are under threat, both from natural causes and also from commercial development. Such threats tend to be less easy to foresee and prevent on marine sites than on land sites.

The Goodwin Sands provide a good example of a natural threat. In 1979 a wreck was found in an area which, a year or so before, had shown no evidence of any remains. Winter storms, probably combined with large-scale dredging nearby, had completely changed the topography of the seabed and had uncovered the vessel. Her structure was virtually intact<sup>108</sup> and showed little sign of having been uncovered by the sand since her sinking in 1703.<sup>109</sup> On this site, and two others subsequently found, many artefacts had been well-preserved by the sands.<sup>110</sup> These included copper kettles, scrubbing brushes, wooden bowls, a gaming board, a pewter dining service, leather hats, shoes and book covers. Once the first vessel was uncovered, the scouring action of the tide rapidly undermined the hull and artefacts were washed away, or deteriorated rapidly because their protective cover had been removed. Long before a full excavation was completed the sand began to move back over the wreck, its weight clearly in danger of crushing the vessel.<sup>111</sup> Later the remains fell apart. Ten other British warships were known to have been lost on the Goodwins in the "Great Gale" of 1703 and they too are no doubt subject to the sandbank movements.<sup>112</sup>

Another wreck in a similar state is the South Edinburgh Channel wreck in the Thames Estuary. This vessel was revealed from the side when one of the navigational channels in the estuary started to

move.<sup>113</sup> It was identified as a semi-intact merchantman of the end of the eighteenth century, with a cargo of metal and other items. Poor diving conditions meant that the wreck could be little investigated before it disappeared into the estuarine sediments again. However, it was clear that – while exposed – its lightly built hull was visibly disintegrating and that, by the time it disappeared, it was in a much more broken down state.<sup>114</sup> It seems that sedimentation movements on the seabed may cover a site for extended periods, perhaps as long as 40 years, before exposing it again.<sup>115</sup> Clearly, wrecks subject to such unstable conditions should be identified and targeted for special rescue measures.<sup>116</sup>

As well as natural depredations, wrecks are increasingly threatened by human activities such as fishing, pipeline and cabling laying, port and marina development, breakwater construction and clearing of navigation channels. Such activity can directly interfere with archaeological remains<sup>117</sup> and can also indirectly cause a threat by triggering off erosion and sedimentation patterns in the vicinity. A potential problem is the outflow of sewage effluent into the sea. Nutrients in the sewage encourage microbial growth, a high level of which has been found to destroy wrecked timbers.

One particular activity which has potential to damage or destroy sites on a large scale is aggregate extraction. Because of its high bulk weight and low value per tonne, local supplies of aggregate are important for regional development. Also, the choice of sites for extraction is fairly limited because the material required must be clean and well-graded. For these reasons, both authorised<sup>118</sup> and unauthorised dredging occurs in various defined areas around the coast of the UK. Authorised dredging is actively encouraged by the government. In a DOE News Release<sup>119</sup> announcing a new procedure for the issuing of dredging licences, the then Environment Minister, Christopher Chope, said:

"dredging should be encouraged wherever this is possible without introducing a risk of coast erosion or unacceptable damage to sea fisheries and the marine environment". He did not mention the potential impact on the cultural heritage. The scale of aggregate extraction should not be underestimated: approximately 20 million tons of sand and gravel for the construction industry are dredged from the seabed around the UK coast each year.<sup>120</sup> The extent of interference by dredging with undesignated sites<sup>121</sup> is unknown, but the threat is obvious<sup>122</sup> and, as yet, interference cannot be detected until it is too late and material is being spewed out of a dredger's suction pipe. Even then the dredger operators may well not report a find in case it results in their operations being delayed or stopped altogether.

Because of these threats, both natural and man-made, there is a need for a systematic programme to survey the seabed and to draw up a comprehensive inventory. The information gathered could then provide the basis for a management programme for underwater sites.<sup>123</sup>

#### (b) Seabed survey

It is very easy to call for a thorough survey of the territorial seabed to identify sites of particular importance, or those subject to potential threats. After such survey, a rational excavation policy could be established and due account taken of underwater archaeology when, for example, applications for dredging licences were under consideration. Unfortunately, there are serious practical barriers to carrying out such a survey. Simply locating sites is not enough: the sites then need to be inspected to test their fragility and value. There are difficult questions concerning who is going to carry out the survey and inspection operations, and who is going to pay for them. Nonetheless, despite the potential barriers, it is notable that extensive surveys have been undertaken in other countries, for example, the

Seabed surveys are already being undertaken by the Royal Navy, commercial seabed operators and fishermen, and results exist, although on a very piecemeal basis. Unfortunately, seabed operators in particular are unenthusiastic about making their records available to archaeologists, presumably for fear that the archaeologists will spot something that interests them! The Royal Navy may be sensitive about making its records generally available,<sup>126</sup> although it may be willing to give some assistance, and fishermen may or may not be happy to co-operate according to their particular inclinations.

There is an educational trust registered with the Charities Commission called the Marine Archaeological Survey, which was formed in 1982 "to promote the identification of archaeologically important sites in the maritime zone".<sup>127</sup> Its voluntary membership comprises archaeologists, historians, geophysicists, and electronic engineers whose advanced underwater survey equipment has been donated, or is on loan. Since its creation, the Marine Archaeological Survey has worked mainly on the south-east coast of Britain. In 1983, it identified 98 significant contacts in just 7.5 sq. km. of seabed in the North Goodwin Sands. Scientific data was collected on two eighteenth century wrecks, and video records were made on twentieth century wrecks in varying states of decay. In 1985, work in the Thames Estuary located an eighteenth century ship's rudder, and recorded Roman and medieval pottery fished up in the area. When possible, the Marine Archaeological Survey will undertake work for other bodies, for example it surveyed a seventeenth century wreck off Yarmouth on the Isle of Wight for the Solent Archaeological Survey team, and also surveyed a medieval wreck thought to date from between the eighth and twelfth centuries off the coast of Suffolk for the National Maritime Museum. The organisation is developing an educational role through exhibitions, lectures and a

training programme. Despite being inundated with requests for survey work, it is underfunded and restricted by its part-time voluntary nature.<sup>128</sup>

The ADU undertakes some survey work in order to provide the Advisory Committee on Historic Wreck Sites with information on which to base its decisions concerning the designation of sites. Unfortunately, the ADU's contract only permits survey work necessary to locate and investigate specific wreck sites.<sup>129</sup> Time constraints too, mean that effort can seldom be directed towards recording material and sites not included in its work schedule.

There is clearly a need for other, properly equipped and staffed, organisations to carry out surveys, specifically for the purposes of an archaeological inventory. Where the funding is to come from for such organisations is unclear. It is unlikely that the government would provide all the funding required for a comprehensive survey of the territorial seabed, but it might be prepared to provide some, if more could be raised by private means.<sup>130</sup> If funding became available, it seems likely that more organisations would be created to undertake the surveys.<sup>131</sup>

One way of preventing destruction of valuable material through commercial development, without the need for a comprehensive seabed survey, would be to require commercial operators to undertake pre-disturbance seabed surveys.<sup>132</sup> The results would have to be independently assessed to identify finds of archaeological significance.<sup>133</sup> Organisations such as the Marine Archaeological Survey or ADU could be employed to do this. If a site of historical interest was discovered, the principle of "rescue" archaeology could be applied, whereby (as is the case with land sites) development or recovery is delayed while the site is surveyed or excavated.<sup>134</sup> Requiring



commercial operators to pay for pre-disturbance seabed surveys, rather than making provision for a comprehensive seabed survey, would shift the burden of paying for this form of protection of the underwater cultural heritage from the public to the private sector, in line with the current political philosophy.

(c) Inventory of underwater sites

In its policy document Heritage at Sea, the JNAPC called for a comprehensive inventory resulting from a systematic programme of survey, believing this to be the key to establishing an effective management programme for underwater sites.<sup>135</sup> An archive of data would facilitate the identification of sites of historical importance and areas of high archaeological potential, and would therefore make it possible to more readily evaluate the UK's underwater cultural heritage. Such a record could be kept on either a national or a local level, or both.

Already much knowledge exists of underwater sites which could form the basis for an inventory. There are historical records of ship sinkings, but only a very small proportion of these provide an accurate location. Historical records are kept, for example, in the Historical Marine Archives of Lloyds, which cover virtually every known commercial shipping loss throughout the world for the past 200 years. The National Maritime Museum also has a record, which has been compiled from documentary sources, of about 10,000 wrecks worldwide, including about 4,000 in British waters. As mentioned earlier, Richard Larn, a private researcher, has compiled an extensive index of wrecks around the UK coast.<sup>136</sup>

The second type of record which already exists is of finds located on the seabed. The most comprehensive inventory, covering 25,000 wrecks, is that maintained by the Royal Navy's Hydrographic Department,

but its purpose is to chart potential hazards to shipping. For this reason, old sites which no longer protrude significantly above the seabed are removed from the record. The advantage of this record, however, is that the sites are accurately located. Extensive remote sensing and other surveys are undertaken by civil engineers and mineral extractors, but these surveys are very piecemeal and may be difficult to collate.

The Royal Commission on the Historic Monuments of England (RCHME)<sup>137</sup> holds a record of nearly 200 "underwater" sites in its National Archaeological Record.<sup>138</sup> Most of these sites are actually of vessels found on land or on the foreshore, and also of submerged structures other than wrecks. The government's White Paper, This Common Inheritance<sup>139</sup> issued in September 1990, announced the preparation of a central record of historic wrecks by the RCHME.<sup>140</sup> A one-year pilot project, in co-operation with the Isle of Wight and Hampshire County Councils, commenced the following October and the full-scale National Record for Maritime Sites was launched in June 1992.<sup>141</sup> The new section of the National Archaeological Record will include sites within the whole of England's territorial waters to the current limit of 12 nautical miles, and will have a cut-off date of 1945. The record will be funded by the DNH.<sup>142</sup> Information relating to known shipwrecks, submerged land sites and isolated finds will be included. Records indicating the archaeological potential of an area will also form an important part of the inventory. These will be derived from historical records of losses, geophysical survey and reports of unidentified obstructions encountered on the seabed by fishermen or dredging companies.<sup>143</sup> In this way, areas of high archaeological potential can be identified. Baroness Park of Monmouth, Chairperson of the RCHME, in officially launching the new record, stated:-

"The creation of a national inventory has a crucial role to play in the emergence of a co-ordinated approach to the problem of meeting competing demands. Records relating to the location,

nature and condition of archaeological material on the foreshore and on the seabed are fundamental to making a reasoned contribution to any assessment of the impact of a proposed development. The inventory will also...assist in developing policy related to the management of archaeology underwater."<sup>144</sup>

Regional records also exist. The Marine Archaeological Survey<sup>145</sup> is developing a record for the south-east coast. Some coastal counties, for example, the Isle of Wight, Pembroke, East Sussex, Essex and Shetland, are adding underwater sites to their county SMRs.<sup>146</sup> Some of this work is being done on a piecemeal basis, but in the Isle of Wight there has been a programme of survey and diver assessment of sites to provide information for the SMR. The Isle of Wight Maritime Heritage Project was established in 1986 to evaluate the underwater archaeological resource to the limit of territorial waters around the Island.<sup>147</sup> The project comprised the largest full-time team involved in foreshore and seabed survey<sup>148</sup> and the material collected was added to the county's SMR. The project was funded by the Manpower Services Commission,<sup>149</sup> but when its funding was withdrawn by the government in 1988 because of the introduction of Employment Training, the Isle of Wight Trust for Maritime Archaeology was established to provide permanent funding for survey within the area. An application made in 1988 to English Heritage for funding was turned down on the basis that the proposal was "not suitable for [English Heritage's] funding at this time."<sup>150</sup>

There has been some debate within the Association of County Archaeological Officers as to whether there should be an official extension of SMRs to offshore sites. One of the problems is that county council powers normally extend only to the low-water mark<sup>151</sup> and in such cases the inclusion of seabed sites in county SMRs can only occur on a very informal basis. Some County Archaeologists were sceptical about the validity of their undertaking responsibility for seabed sites and no doubt this feeling was promoted by under-staffing

and under-resourcing. In a paper given to the Association of County Archaeological Officers by David Tomalin, the Isle of Wight County Archaeological Officer, he argued that marine sites were "as much of terrestrial concern as...of nautical interest" because there was evidence of many archaeological land sites submerged beneath the sea.<sup>152</sup> After careful consideration, the Association of County Archaeological Officers agreed in May 1991 to extend their SMRs to cover marine sites. In a letter to the Chairman of the JNAPC, dated 16 May 1991, the then Chairman of the Association of County Archaeological Officers, Michael Hughes, said:-

"...it would seem a natural extension of our land-based roles to accept information on maritime archaeological finds including their location... Although the Association's members are extremely busy people, I gather that the number of likely reported finds in any one year would be at a reasonable level and one that we could cope with quite adequately."

Whether the Association of County Archaeological Officers would be prepared to handle the amount of information likely to arise from a comprehensive survey is unclear. Furthermore, the majority of County Archaeological Units are located within Planning Departments and their very *raison d'être* is to fulfil a consultative role in the planning process.<sup>153</sup> Whilst county councils have no statutory responsibility for the marine zone, County Archaeological Officers are likely to receive little support for extending their remit beyond low-water mark.

At present, there is no formal system for information regarding casual finds reported to the receiver to be made available to the County Archaeologists. There is, however, a need for such information to be assimilated into the local SMRs. Sometimes the cumulative evidence of finds over a number of years can reveal the pattern of seabed sites. For example, records of underwater finds kept in the Isle of Wight SMR led to the discovery of the Yarmouth Roads wreck and the finding of the Dover Bronze Age wreck arose from "informed response" to

a wreck report.<sup>154</sup> Both wrecks are now designated under the PWA 1973.

When the Western Australian Museum Act Amendment Act 1964 was passed, which vested the sole right of working historical wrecks in coastal waters in the Western Australia Museum, those in possession of material recovered before the passing of the legislation were allowed to keep it provided that their ownership was registered with the Western Australia Museum. A similar sort of amnesty could be initiated in the UK which would enable details of the material to be taken which could be added to the inventory. In such a way, a large amount of otherwise unobtainable information could be made available for the record.

There is a need for the standardisation of county-based records and this should probably be co-ordinated by the RCHME<sup>155</sup> as the body maintaining the national record. Work has already been done by the RCHME on developing the parameters of the record and data standards which will be passed down to the regional SMRs. There are plans for two levels of record: Level One is based on documentary evidence and Level Two on field observation. The record sheets are very detailed. That for Level One includes details such as the name of the local authority or port authority in whose area the vessel was found, the vessel's position, the name of its owner and any salvor, details of excavations which have taken place, voyages the vessel undertook with type of cargo and name of master, and a detailed physical description of the vessel. The Level Two record sheet includes details of the condition of the vessel, its depth, potential threats, percentage of vessel surviving, percentage of vessel threatened and details of artefacts found. Parts of the record have restricted confidentiality. Obviously there is a need to retain confidentiality in respect of sensitive data, including site location.<sup>156</sup>

Evidently there needs to be a national co-ordinated record to enable an assessment of the national archaeological resource and the working out of priorities. The combination of regional data collection points and a centralised data archive having overall management is probably the best way forward and a framework for this has already been laid. A comprehensive survey and inventory scheme could form the basis for a management programme for the underwater cultural heritage.<sup>157</sup> Such programmes have been operating in Australia and the US for a number of years.<sup>158</sup> In Sweden, the National Maritime Museum has been compiling a register of wrecks through the collection of data by local groups and study circles.<sup>159</sup> Private diving clubs have co-operated with the local groups and provincial museums to enhance the register.<sup>160</sup> Local contacts initiated through a survey programme could provide valuable support for any management programme. In the UK there are various academic and voluntary bodies which may be willing to provide help, e.g. the "Coast Watch" supporters,<sup>161</sup> the British Sub Aqua Club, the Nautical Archaeology Society, and University and adult education groups.

## 5. Reporting

Despite the DTp's recent proposals for centralisation of the receiver service,<sup>162</sup> it would seem to be more sensible in many ways for finds to be reported to a local, as opposed to a central, body. This would encourage reports to be made and enable physical inspection to take place if necessary. Another drawback of the DTp's recent proposals is that they do not provide a mechanism for archaeological assessment of finds and non-archaeologists will certainly not be able to identify all objects of archaeological significance. The following examples show the difficulties of recognising archaeological material in certain circumstances. In one case, a fisherman who caught amphora in

his nets thought it was a bomb; in another, a diver thought that the astrolabe he had found was a handwheel from a steam valve; and in a third, the finders of some Bronze Age axe heads assumed they were wedges for holding railway lines in place!<sup>163</sup> The proposal in the 1984 Consultative Document that all finds should be reported to designated local points in the Museums Service has been the subject of some criticism<sup>164</sup> and it might in fact be more appropriate for reports to be made to the County Archaeological Unit.<sup>165</sup> These Units have the expertise to evaluate finds and also have knowledge of local coastal archaeology which may help them to link the find to a specific archaeological entity. Also, and importantly, the find could be recorded in the county SMR and so add information to the inventory.

The Council of Europe's minimum requirements in Recommendation 848 (1978)<sup>166</sup> provided that a single authority should be given primary responsibility for dealing with both land and underwater finds and determining their significance. At present there is no system in the UK for the reporting of archaeological finds from land sites except in the case of treasure trove,<sup>167</sup> although the reporting of finds from marine sites to the County Archaeologist might foreseeably lead to a system of reporting of finds from land sites to the County Archaeologist too.

Whether all finds should be reported directly to an archaeological reporting point is debatable. Obviously, County Archaeological Units would be less than keen about receiving reports of archaeologically worthless scrap metal, old rope and other objects. In some jurisdictions, the local police have duties in this regard, for example in Northern Ireland and the Republic of Ireland<sup>168</sup> and a Consultation Paper on Portable Antiquities from land sites issued by the DOE in 1988 did suggest that the police might provide a reporting point for land antiquities.<sup>169</sup> However, it seems extremely unlikely that the police force in the UK, facing increasing crime figures and reorganisation,

would agree to undertake such a task. Someone has to do the donkey work of sorting out potentially significant from clearly insignificant material and, since the reason for the task is to benefit archaeological interests, then logically it would make sense for an archaeological body to undertake this work. Also, the examples given above show that archaeological material may be "sifted-out" by a non-archaeologist if there was a two-tier system of reporting points.

It would probably be unreasonable to expect finders to take finds direct to the County Archaeological Unit, which may be some distance from the coast. For example, in Hampshire the office is situated in Winchester which is 12 to 15 miles from the nearest coast and a good deal further from other parts of the county's shoreline. For this reason, reports in the first instance could be made in writing on a standard form, which could be made readily available at sub aqua clubs, harbour master's offices and other points on the coast. If the Archaeological Unit decided, after seeing the written report, that the find might be of archaeological significance, it could request that the finder take the object to the Unit for inspection. This could be made a legal duty and it may be possible to provide an incentive for doing so in the form of a refund of travel expenses.

In the UK at present, only objects brought ashore are subject to the reporting requirement in the MSA 1894. There is no legal requirement that the discovery of archaeological material which is not brought ashore should be reported, or that the discovery of an archaeological site should be reported. Obviously, it is even more important that a site should be reported than an individual find and such reporting should therefore be made obligatory. At present it is perfectly legal for a dredging company to uncover evidence of archaeological material and simply dredge right across the area, causing damage or destruction to the site. It may be that, in order to enforce



a duty to report sites, there would need to be some form of special incentive, otherwise the finder might keep knowledge of the site a secret and quietly raise material from it.<sup>170</sup> Where there is a requirement that all archaeological finds, whether or not brought ashore are declared, there need to be established criteria setting out the type of find which should be reported. The criteria for the obligation to report should be far wider than for the question of protection: it is important that all potentially important discoveries are reported, whether or not they are eventually considered to be worthy of protection. Even material not worthy of protection may be worth recording and may lead to the discovery of more significant material. The decision as to what should and should not be reported should be clearly laid down so that it does not have to be made by the finder. For example, it may be best if finders were encouraged to report all marine finds of man-made origin, so that they did not have to make a decision about whether a find might have archaeological significance.

Clearly, reporting should be obligatory,<sup>171</sup> but the success of any system of reporting - obligatory or not - ultimately depends upon its encouragement and enforcement.<sup>172</sup> It is felt by many that a short period of published warnings in appropriate diving journals and magazines, an amnesty for the return of undeclared material,<sup>173</sup> followed by the prosecution of some offenders, would probably reduce the amount of undeclared material significantly. The duty to report needs to be made well known, perhaps through a system of public education<sup>174</sup> and it must be clear that infringement of the duty is a serious offence and will be subject to penalties reflecting its seriousness.<sup>175</sup> It should be a condition of any licence to survey or excavate a designated site that all finds are reported and there should also be a reporting clause in contracts for marine development work, e.g. petroleum exploration, pipeline and cable-laying, dredging, construction of harbour works, etc. For example, s.44 of the Norwegian Royal Decree of 8 December 1972

relating to petroleum exploration and exploitation reads: "Any discovery having historical interest, such as shipwrecks etc., made during exploration for and exploitation of petroleum, shall immediately be reported to the Ministry."<sup>176</sup> Such contractual protection clauses may be reinforced by a similar clause in any voluntary code of conduct.<sup>177</sup> The reporting requirement should provide that reports should be made as soon as possible after discovery, perhaps imposing a time limit, as is the case in Ireland.<sup>178</sup> As well as imposing a legal duty to report on the finder, there should also be a similar duty on any person who becomes aware of the find.

The UK government has suggested that a voluntary code of conduct could be established for the reporting of archaeological finds on land.<sup>179</sup> It seems unlikely that a voluntary code would be enough to encourage reporting of material from marine sites, especially in view of the monetary value of some archaeological objects from shipwrecks.

## 6. Temporary Handling

Waterlogged material quickly deteriorates and falls apart if left in the open air. For this reason, where material is raised from underwater sites there is a need for its temporary conservation while its fate is being determined. The MSA 1894 requires that finds should be handed over to the receiver of wreck, but this procedure was found to be impractical in the majority of circumstances because the receiver service did not have appropriate facilities to conserve waterlogged material, or sufficient storage space.<sup>180</sup> It has therefore been the practice for material from wreck sites designated under the PWA 1973 to be left in the care of the licensees, while other material brought ashore is generally left in the possession of the finder, while entitlement to it is determined.<sup>181</sup> Unfortunately, finders (other than

licensees) are not necessarily going to have appropriate conservation facilities, any more than the receiver. Also, finders may well not be willing to expend much time, effort or money on conservation if ultimate entitlement to the find is uncertain. Determination of entitlement to casual finds should therefore be as speedy a process as possible and there should be a system whereby the finder is reimbursed expenses should the item be claimed by the owner or a museum. Advice on conservation, and also facilities for conservation, should be available to casual finders who may then be able to provide short-term care themselves, or pay for the services of a conservation laboratory. If County Archaeological Units became a part of the reporting process, as suggested above, it may be desirable for them to have small units capable of providing temporary conservation of marine material, backed up by some central facilities for larger finds.

However, the conservation of material from underwater sites is very expensive and limits must be placed on the amount of material recovered. Where isolated objects are found, it may well be necessary to bring them ashore because they may not be found again and it may also be necessary for a sample of material from a site to be brought ashore in order that the site may be identified and assessed. Also, material may sometimes be accidentally recovered by fishermen, dredgers, etc. Apart from these situations, there is a strong argument for a requirement that, except in the case of licensed excavations, archaeological material should generally be left in situ and discoveries simply reported.<sup>182</sup>

## 7. Rewards

The issue of rewards, in the writer's view, is probably the most difficult issue of all to resolve, partly because there is disagreement

about the need for rewards at all and also because it is unclear who should, or would, provide the necessary funding.

In the UK, salvage law provides a system of reward for the reporting of finds. However, as has already been argued,<sup>183</sup> the law of salvage "is seriously dysfunctional for preservation of the underwater cultural heritage".<sup>184</sup> A salvage reward is only payable for material recovered and it is based on the value of that material. It therefore encourages finders not to report, but to recover, as much as possible as quickly as possible; in the process of so doing they may destroy valuable archaeological evidence.<sup>185</sup> Once the material is brought ashore, there may not be the facilities to provide for its conservation. The salvor's goal is financial reward and this is completely incompatible with the aims of cultural protection laws. Under the existing UK framework, the administrators of the PWA 1973 appear to foster the aims of those with a commercial motive by awarding them licences to excavate designated wreck sites and by allowing them to sell, without restriction, the material recovered. The only concession made to archaeological principles is to require that licensees use archaeological techniques in their excavation work. For museums to acquire unclaimed wreck, they must either pay salvage rewards based on the commercial value of the find, or buy material on the open market. There is no valid argument for the retention of the application of salvage law to cultural property.<sup>186</sup> The Council of Europe's minimum requirements in Recommendation 848 (1978)<sup>187</sup> urge the removal of underwater cultural property from the salvage regime and the ILA's 1992 draft Convention "encourages" such removal.<sup>188</sup> Heritage at Sea provided that "[t]here is a fundamental need to separate underwater cultural property from commercial salvage".<sup>189</sup> Prott and O'Keefe argue that salvage law should be "expressly excluded from applying" to the underwater cultural heritage<sup>190</sup> and the introduction to a UNESCO publication on the underwater cultural heritage states: "if no clear distinction is drawn

between salvage and archaeology, then many sites will be lost to the destructive attentions of commercial salvors and amateur souvenir hunters".<sup>191</sup> The US Abandoned Shipwreck Act of 1987 expressly excludes the law of salvage from abandoned wrecks to which the Act applies.<sup>192</sup> Although the 1989 Salvage Convention does not specifically exclude the application of salvage law from the underwater cultural heritage, it is possible under the Convention for Contracting States to make a reservation in order to take underwater cultural property out of the salvage regime.<sup>193</sup> The problem is that if you do take the cultural heritage out of the salvage law framework, what - if anything - do you replace it with?

Many<sup>194</sup> would argue that, in order to be effective, a reporting system needs to be reinforced by a good system of finders' rewards in order to encourage anyone making a find (whether of a site or an individual artefact) to report it. In essence, the reward would be for honesty. Without such incentive finds may go unreported, either because the finder wants to keep the find or sell it, or through laziness, or because reporting of the find may result in interference with the finder's commercial activities. Ideally, a finder's reward should be payable by the government, either directly through the appropriate department, or indirectly by providing museums with adequate funding to pay rewards for material they wish to acquire.<sup>195</sup>

The need for rewards financed by government appears to be recognised by other countries, although there is variation in the form such rewards take. In Denmark, Finland and Norway, rewards seem to be discretionary and based upon the reasonableness of the circumstances. However, a discretionary basis for rewards may encourage dishonesty because of the uncertainty in knowing whether or not an award will be made. In fact this appears to be the most serious problem to have arisen under the Australian Commonwealth Historic Shipwrecks Act 1976,

where rewards are based on ministerial discretion.<sup>196</sup> A way of overcoming the uncertainty of a discretionary reward system would be to have a standard system of fixed finders' rewards, possibly unlinked to the commercial value of the find. This indeed was recommended in the Council of Europe's minimum requirements in Recommendation 848 (1978). Clearly it would be necessary to ensure that the rewards were adequate, especially in the case of valuable finds. In Finland and Norway, in order to encourage declaration, an enhanced reward is available for the recovery of precious metals.<sup>197</sup> The Council's recommendation that there be a differentiation of awards between an artefact and a site, heavily weighted in favour of the latter, would encourage the reporting of sites as opposed to the recovery of artefacts. Under the Australian Commonwealth legislation, the Minister may offer and pay a reward to the person who first furnishes a description of the location of a particular historic shipwreck, thereby encouraging the finding of new sites.<sup>198</sup> Prott and O'Keefe suggest<sup>199</sup> that there could be an initial reward when a site is reported, followed by a further reward payable on completion of excavation or, if the site is not excavated, after the lapse of a statutory period, e.g. two years. This would allow an assessment based on the actual archaeological value of the site, or its estimated value if not excavated.

Exactly how monetary awards based on the value of a find should be assessed is a matter of debate, for example the full archaeological value of the find could be given; or the commercial value of the find, e.g. its metal value; or a percentage of the commercial value. The intrinsic value of an object may be very small, whilst its archaeological value may be much more significant, but harder to quantify. Alternatively, the figure could be completely divorced from the value of the find. The Australian Commonwealth legislation deliberately did not lay down guidelines for the assessment of rewards on the basis that each case should be decided on its merits and many factors needed to

be taken into account.<sup>200</sup>

One tends to think of rewards in monetary terms, but they could take a different form.<sup>201</sup> An acknowledgement of the finder's role could be made in publications on the survey or excavation of the site and on any display of artefacts recovered. The finder could also receive an official record detailing the find. The chance of being allowed to participate in any survey or excavation operations might also encourage reporting. Obviously, these forms of reward would be of particular interest to the amateur diver. A monetary reward may be necessary for other finders, e.g. professional divers and treasure hunters. One form of non-monetary reward, which would probably be of interest to amateur divers and treasure hunters alike, is to give the finder preference in the allocation of a licence to survey or excavate the site. This seems to be what – in practice – happens under the PWA 1973. Where a site is nominated for protection under the PWA 1973 by the finders, their reward for so doing is generally the award of a licence to survey and later to excavate the site. However, the writer does not feel that this is a good practice since the finder may well be an amateur diver or treasure hunter with no archaeological training or experience.<sup>202</sup>

In many cases individual finds are likely to be returned to the finder, possibly after assessment and recording, in lieu of a reward because they will not be wanted in a public collection. This is akin to the practice with treasure trove: if finds are not required by a museum, they will be returned to the finders or, if they so desire, sold on their behalf by the British Museum.<sup>203</sup> Under the Bermuda Wreck and Salvage Act 1959, historic wreck vests in the state but the receiver of wreck may, with the approval of the Governor, "release, to the finder of an historic wreck, such wreck... and in such case and upon such release the title to such articles shall pass to such finder".<sup>204</sup> Where wreck is not released to the finder, compensation is payable instead. Under

the Australian Commonwealth Historic Shipwrecks Act 1976 individual coins or artefacts have been awarded to finders of historic wreck, in recognition of their honesty.<sup>205</sup> What is important is that a find is reported in the first place so that its significance can be assessed and a record made.

Amongst the archaeological community, there is some disagreement about the need for rewards. This is confirmed by Prott and O'Keefe who state that "[r]ewarding the finder of an object is an aspect that arouses vigorous response, both for and against, among persons interested in this topic."<sup>206</sup> There is an argument, for example, that people should obey the law without the need for a promise of reward. This argument has been used by Dean,<sup>207</sup> who opposes the giving of finders' rewards. He thinks such rewards will not influence the decision of a finder as to whether or not to report. He cites as an example that although the finders' reward system in Australia is often used to illustrate how such rewards may work, in fact the rewards may not be making much difference. This seems to be supported by Green,<sup>208</sup> although he argues that the reluctance of finders to report sites in Australia is due to the uncertainty as to what they will receive. Interestingly, under both the Irish and Guernsey legislation,<sup>209</sup> there is no provision for rewards to be payable to finders of material which is subject to blanket protection, although provision is made for "salvage" to be payable to licensees working on designated sites.

It could be argued that a strong and effective penalty system for non-reporting, together with a good system of enforcement, and tight controls over the sale and export of cultural property, provide the answer. Dean, on the other hand, would argue that "[t]he best means of ensuring compliance with the duty to report is not legal but educational: a high level of community awareness of the significance of the cultural heritage, a pride in it and a general determination to



preserve it is the best motivation for compliance."<sup>210</sup> This policy certainly seems to have been successful in Ireland.<sup>211</sup> In the UK, a combination of approaches may be most appropriate. The government would almost certainly not be prepared to fund a very extensive reward system, but might be persuaded to provide some funding for rewards, as it does - indirectly - on land.<sup>212</sup> Various forms of non-monetary reward could also be made available, penalties for non-reporting could be increased and a policy of education initiated.<sup>213</sup>

## B. EXCAVATION

### 1. Excavate Now, Mothball or Protect in Situ?

Until very recently it has been government policy in the UK to encourage the survey and excavation of "protected" wrecks by the issuing of licences to most sites designated under the PWA 1973. One pretext for this policy was the argument that licensees on a site can provide protection for it. Arguably this policy of survey, followed by excavation, has not changed substantially, although the DNH may be more sensitive than the DTp to concerns about its archaeological validity. Nonetheless, the basic policy of the Advisory Committee on Historic Wreck Sites still appears to be to allow anyone who can show a certain amount of skill, competence and resources to excavate designated sites. This is quite out of line with the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, which applies to land sites. Article 19 of this Recommendation provides that authority to undertake excavations should be granted to institutions represented by qualified archaeologists or to persons offering "unimpeachable scientific, moral and financial guarantees". The reference to "moral...guarantees" presumably refers to the motives of the excavators. It has already been pointed out<sup>214</sup> that the Advisory

Committee on Historic Wreck Sites does not appear to question the motives of those applying for licences under the PWA 1973, many of whom intend simply to sell the artefacts raised in order to fund further excavations.<sup>215</sup>

A policy of encouraging excavation on the most important known sites is considered by many to be premature. The value of archaeological sites is that they provide a source of information and, from an archaeological point of view, as much information should be gleaned from them as possible. This can only be done if the highest archaeological standards and state-of-the-art techniques are applied. Clearly, techniques and technology will be far more advanced in the future than now and so arguably this source of information should be left untouched for as long as possible.<sup>216</sup> This argument is supported by the archaeological practice of leaving "witness areas": portions of a site which are left untouched by any excavation and remain available for future excavation when techniques improve. The 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations makes provision for witness areas:-

"Each Member State should consider maintaining untouched, partially or totally, a certain number of archaeological sites of different periods in order that their excavation may benefit from improved techniques and more advanced archaeological knowledge. On each of the larger sites now being excavated, in so far as the nature of the land permits, well defined "witness" areas might be left unexcavated in several places in order to allow for eventual verification of the stratigraphy and archaeological composition of the site."<sup>217</sup>

This Recommendation is aimed primarily at archaeological sites on land and some national legislation relating to land sites makes provision for witness areas.<sup>218</sup> However, there is no reason why the principle should not be applied to underwater sites as well.<sup>219</sup> Adequate funds are not available to allow the excavation - using the highest present day standards - of all known sites. Also, museums do not have the resources to acquire the artefacts recovered<sup>220</sup> or to conserve them,

nor in the present political and economic climate are they likely to have in the foreseeable future.

When a ship is lost at sea there is an initial period of rapid decay lasting for some years before natural protective forces begin to slow down the rate of decomposition. The site eventually becomes covered with sand and silt and will reach a state of "natural stability" in which it can remain protected for centuries unless disturbed by natural or human forces.<sup>221</sup> Once disturbed, biological reactions begin again, or speed up, and materials begin to deteriorate. How far some surveying techniques disturb the natural stability of sites is not yet known for certain. However, excavation not only disturbs the stability but actually destroys the site and the objects are moved from a safe to a very hostile environment. Blackman has said that "[t]he best means of preserving an underwater site is to leave it where it is".<sup>222</sup>

There are therefore strong arguments for leaving sites undisturbed unless they are threatened in some way, for example, by sandbank movements<sup>223</sup> or dredging activities.<sup>224</sup> However, an apparently valid argument for a policy of excavation is that threats may not be evident until the damage is done, e.g. by sediment build-up, chemical pollution, sewage outflow, multiple wrecks, unauthorised dumping and dredging. For this reason, potential threats to sites must be determined by a programme of survey and assessment. If the importance and vulnerability of each site could be assessed, sites could be prioritised and the resources available for excavation could be channelled to those in most need. The allocation of resources would be a vital component of any management policy for underwater cultural property.

There is growing support for, and investigation into, the reburial of underwater sites. For example, the JNAPC's policy document, Heritage

at Sea, stated that "[c]ontrolled sampling and survey may provide a cost-effective alternative to complete excavation of a site, possibly followed, where practicable, by re-burial of the remains."<sup>225</sup> In many cases, some sheet-piling to allow sand to build up over the wreck may be all that is required.<sup>226</sup> There are already examples of wrecks preserved in situ in the UK. For example, part of the bow structure of the Mary Rose remains in the Solent,<sup>227</sup> the plan being to preserve it in situ for future generations. Divers visit the site about twice a year to monitor its condition and undertake testing of methods for in situ preservation and seabed storage of material.<sup>228</sup> Also, the Yarmouth Roads designated site, thought to contain the remains of the Spanish ship Santa Lucia which sank in 1567, was reburied in 1988 after limited excavations had taken place, until funds became available for further excavation.<sup>229</sup> Important historic wrecks, or parts of wrecks, have also been preserved in situ by other countries. For example, the remains of a sixteenth century Basque whaling ship are being stored in the mud of Red Bay, Labrador, for future generations to raise if they want to do so.<sup>230</sup> In situ preservation should not be thought of as a cheap option to excavation however. Sandbags or aggregates (which are required in tons), or artificial membranes and mats, are very costly and so is the labour to place them.<sup>231</sup> Therefore, there is a need for management of the underwater resource and the prioritisation of sites for reburying.

The Second Southern Hemisphere Conference on Maritime Archaeology, held in March 1982,<sup>232</sup> recommended that maritime archaeological activities in Australia should be restricted to historical research, documentation, inspection and survey and that no extensive excavations be carried out without adequate expertise, storage and conservation facilities. The only exception would be in the case of rescue archaeology and then only under competent supervision.<sup>233</sup> Under the Irish National Monuments (Amendment) Act 1987 the policy has been to

issue licences to dive and licences to survey, but the only excavation licences have been issued for the purposes of rescue. Furthermore, excavation licences are only given to qualified archaeologists, rather than to amateur divers as is the case in the UK.<sup>234</sup>

So far in this section, consideration has been given to the "mothballing" of sites, in other words the postponement of excavation until resources are available. Consideration should also be given, however, to the possibility of the creation of underwater heritage parks in which a wreck is protected in situ with no intention of later excavation. Controlled public access to such parks might help to fund protective measures.<sup>235</sup> Underwater heritage parks could be created either by government or private initiative, possibly in conjunction with other types of marine protected area, as has happened in the clear waters off Australia, Florida and Israel.<sup>236</sup> In Israel, a wreck which had become the basis of a beautiful coral reef was not fully excavated in order that amateur divers and tourists could enjoy the environment.<sup>237</sup> In the US, the USS Monitor was designated as a marine sanctuary under the Marine Protection, Research and Sanctuaries Act of 1972<sup>238</sup> and an underwater national park has been under consideration in Ontario.<sup>239</sup>

## 2. Amateurs' Interests<sup>240</sup>

In the majority of cases it is amateur divers who find underwater sites and there is little doubt that this will continue to be the case. However, the present policy in the UK of allowing the finder of an historic wreck to become a licensee in charge of survey and excavation is questionable, especially as the requirement that there be an archaeological adviser or director does not appear to provide an adequate safeguard.<sup>241</sup> Even so, the interests of amateur divers and sub aqua clubs need to be borne in mind as their services are essential

for search and location of underwater sites and for the enforcement of protective measures. Also, with training and supervision, the amateur diver can play a valuable part in survey and excavation work. Such amateurs have been called the "backbone of maritime archaeology"<sup>242</sup> and Blackman believes that, rather than excluding them from involvement, "the preferable solution is to involve the 'amateur' as far as possible and to seek to educate him in archaeological principles and practice."<sup>243</sup> An alternative to allowing amateurs to take part in excavation activities, would be for amateurs to be involved in the initial stages, e.g. search and location, surveying of sites, etc., while actual excavation is left in the main to professional archaeologists. This has been the case in Ireland where a state-funded<sup>244</sup> training programme is being undertaken by the National Museum of Ireland, which then involves local diving clubs in survey work. The few excavations taking place, however, are undertaken by professional archaeologists.<sup>245</sup> By allowing amateurs to take part in archaeological activities, and by training and educating them, they will probably learn to respect the law so that they comply with it voluntarily.<sup>246</sup>

Under the Australian Commonwealth Historic Shipwrecks Act 1976, declaration of a wreck as "historic" means that diving may take place for recreational and educational value but that divers must not damage the wreck or take anything away from the site. Some historic shipwrecks are protected by a no-entry zone, in which case a permit is required to enter the area and dive on the site.<sup>247</sup> Dean believes that public access to sites is important and that at least some protected sites should be available to divers on the basis that they can look, but cannot touch. However, such a policy would be difficult to police effectively and probably should be activated only after a concerted education campaign.<sup>248</sup>

It may be that a system of categorisation of historic wrecks according to their relative importance might be found appropriate so that the more important the wreck the greater the level of expertise required of divers working on the site. Both Tomalin and Rule have advocated the ranking of sites<sup>249</sup> and this seems to be an eminently sensible and useful idea. One of the recommendations of Heritage at Sea was that there should be a grading of sites according to their importance, or importance and vulnerability.<sup>250</sup> Some sites could be mothballed, some subject to rescue archaeology by qualified archaeologists, some available for survey by amateurs under the supervision of qualified archaeologists, some available on "a look but do not touch basis", and some part of an underwater heritage park. There will always be a desire on the part of amateurs to dive onto, explore and work wrecks and there should be sites available for such activities.<sup>251</sup>

Archaeology in the UK, both on land and underwater, has always relied on an enthusiastic workforce of amateurs and the education and training of amateur divers is essential. There is recognition that education is almost equally as important as legislation for the protection of the underwater cultural heritage.<sup>252</sup> Sport diving provides a major threat to this heritage and there is a need to educate the diving community about the significance of the underwater heritage and the need to protect it.<sup>253</sup> Roper has said:-

"While it is important to recognise the limited role of entirely untrained sports divers (for whom the basic rule 'look but do not touch' must apply), every encouragement should be given to informing those divers about the cultural heritage and to basic training in aspects of underwater survey and excavation. Such training should of course only be put to use under official archaeological supervision, but it is a means of backing up the slender body of professionals in this field."<sup>254</sup>

The ADU has been instrumental in drawing up a code of underwater archaeological practice,<sup>255</sup> which is intended to set basic standards,

but other publications are required, for example explaining the reporting procedure,<sup>256</sup> and giving a "first aid" guide for underwater finds.

Since the mid 1980s a training programme has been developed by the Nautical Archaeology Society.<sup>257</sup> Courses are run by the Society, and by the Society in conjunction with other bodies, e.g. University extra-mural departments.<sup>258</sup> It is based on a certification scheme to ensure well-defined standards of training aimed at promoting proper standards of archaeology, and at educating divers to take an interest in the protection of the marine heritage. The scheme is in four parts consisting of a weekend course, a lecture series, a two-week field school and practical experience.<sup>259</sup> Once all four parts are in operation, the JNAPC is advocating that the scheme receive official endorsement by the DNH, perhaps by an insistence that at least the leaders of teams working on designated sites have undertaken the training. The government has already shown the beginnings of support for the scheme by providing funding for a nautical archaeology training officer for the Nautical Archaeology Society<sup>260</sup> and it appears that sport diving associations have given a very positive response to the scheme.<sup>261</sup>

## C. DISPOSAL

### 1. Ownership Claims<sup>262</sup>

Where a wreck or other cultural property over a certain age, for example, 100 years, is concerned, claims to the rights of the original owners are only possible by their successors in title.<sup>263</sup> Having to "bow" to such rights, either by releasing artefacts to the claimants or by purchasing artefacts from them, is strongly resented by the Museums Service and similar institutions. Acquisition by the Crown of all rights



to underwater cultural property over a certain age,<sup>284</sup> for example 100 or 150 years, would be a solution to this problem but may be politically unacceptable because of the effective "blanket" confiscation of private rights, or more importantly perhaps in the UK, because of the potential interference with commercial interests. Problems may also arise where the property of foreign citizens is affected: some states may claim that the expropriation of such property is contrary to international law. Furthermore, it should not be forgotten that a state will not only assume the rights of ownership, but also the liabilities.<sup>285</sup>

Nonetheless, Guernsey's Wreck and Salvage Law 1986, s.16, vests ownership of wreck over 50 years of age (found in territorial waters) in the States of Guernsey; no compensation is payable for loss suffered as a result. This legislation has not been in operation sufficiently long to assess the effects of the blanket confiscation of rights, but a cut-off point of 50 years is likely to be seen in the UK as causing unreasonable interference with commercial interests and a period of 100 or 150 years would probably be more acceptable.

In practice it appears that there are very few ownership claims to property over 100 years of age and such claims that are made are generally by states rather than individuals. As far as claims by states other than the UK are concerned, these may be resolved through co-operation agreements. Probably the best example of such an agreement is that between the Netherlands and Australia,<sup>286</sup> by which the Netherlands transferred all its right, title and interest in Dutch East India vessels lying off the coast of Western Australia, to Australia.<sup>287</sup> In return, Australia agreed to allow the Netherlands to hold a representative sample of items recovered.<sup>288</sup> A committee, known as ANCODS (Australian Netherlands Committee on Old Dutch Shipwrecks), was established to administer the agreement and it has been seen as "an unusually harmonious example of successful international co-operation".<sup>289</sup> The sole right of excavating the wrecks is vested in the

Western Australian Museum. Once material is recovered, it is treated at a conservation laboratory and then divided into three representative collections, one for the Netherlands, one for the Commonwealth of Australia, and one for Western Australia.<sup>270</sup> Under the agreement, Australia appears to pay for costs incurred in searching for vessels and in recovering articles, but expenditure incurred by the Committee is shared.<sup>271</sup>

There are other examples of such agreements. One exists between France and the US over the confederate raider CSS Alabama. After some dispute over a claim by the US to ownership of this vessel,<sup>272</sup> in 1989 the French government recognised US title and the two governments signed an agreement relating to the protection and study of the wreck.<sup>273</sup> A committee, similar in nature to that under the Australia/Netherlands agreement, has been set up to administer the arrangement. In respect of HMS Birkenhead, a British ship which sank in South African waters in 1852 with men from nine British regiments on board,<sup>274</sup> an agreement reached in 1989 between the British and South African governments provided that representative samples of salvaged material identifiable with a particular British regiment or institution be offered without charge to that regiment (or its successor), or to such institution.<sup>275</sup>

Apart from such formal agreements, in some countries, such as Denmark and Norway, there appears to be a practice of notifying other countries which are thought to have a special connection with a newly-discovered wreck.<sup>276</sup> Under the Danish Protection of Historic Shipwrecks Act 1963, the Keeper of National Antiquities had a duty to negotiate with any country having an interest in a wreck which was to be excavated. Although this provision has since been repealed by new legislation, it remains the practice to consult those countries with an interest.<sup>277</sup> In fact, as a result of such consultations, some of the

material from Lord Nelson's ship, St. George, which was wrecked off Jutland in 1811, is being held by the National Maritime Museum in Greenwich.<sup>278</sup>

Although, as yet, there has been no formal agreement between the UK and countries with wrecks in UK territorial waters, there have been a number of informal agreements. For example, in the case of the Amsterdam,<sup>279</sup> a Dutch East Indiaman that sank in 1749 off Hastings, a special arrangement was reached between the UK and the Netherlands to allow most items recovered from the wreck site to be exported under a general licence, namely those that (a) could not immediately be identified as of national importance to the UK, or (b) even if identified as such needed immediate conservation work in the Netherlands.<sup>280</sup> In 1974-75 the "Foundation for the East India Company Ship Amsterdam" was established in Amsterdam. The Foundation began limited underwater excavations using Dutch and British divers in 1984 and, in recognition of the British efforts to save the Amsterdam, it agreed to make available part of the collection of discoveries for display in the Shipwreck Heritage Centre at Hastings.<sup>281</sup>

All the European and international initiatives in the field of underwater cultural property have avoided stating specifically that ownership rights are to be divested and this illustrates the difficult nature of the issue. The Council of Europe's minimum requirements in Recommendation 848 (1978) do not mention ownership, but instead state that wreck and salvage laws should not apply to protected items. Since one of the main purposes of wreck laws is to return material to its rightful owner, the Recommendation seems to be advocating that ownership rights should not be recognised. Both the 1985 draft European Convention and Article 303 of the 1982 Law of the Sea Convention<sup>282</sup> expressly have no impact on the rights of identifiable owners and the ILA's 1992 draft Convention makes no mention of

ownership, instead basing its provisions on the control of activities.

The reason for all these avoidance tactics is probably that a provision for what amounted to the confiscation of private rights would be politically unacceptable in some countries and may have held up general agreement on the initiative.

In view of the number and type of ownership claims that are likely to be made, it could be argued that there is no need for the government to resort to blanket confiscation of ownership rights. The rights that do exist could be dealt with without the need for this measure and, therefore, any opposition to the confiscation of rights can be avoided. In the Irish National Monuments (Amendment) Act 1987, protection is given to wreck sites over 100 years old and archaeological objects, but the original ownership rights are recognised and dealt with by the one year claim period under the MSA 1894. The 1989 French law apparently recognises the rights of an owner and provides that written permission must be sought from the owner before archaeological work takes place.<sup>283</sup> Legislation in Norway, Sweden and Denmark provides for state ownership if no owner can be found and this may help to clarify situations where an owner does not come forward to claim the wreck. An alternative method of clarifying the ownership position would be to institute some sort of statutory presumption regarding abandonment, for example deeming that ownership has been abandoned where no action has been taken in respect of the property during a certain period. Spain has a fairly drastic provision along these lines which provides that the state becomes owner of a wreck where the owner has made no efforts to exercise his rights for three years. In the UK, a 100 year period may be more acceptable.<sup>284</sup>

Prott and O'Keefe favour a solution based on blanket confiscation of rights on the ground that it prevents delay in establishing entitlement.<sup>285</sup> Delays are an irritant to amateur divers and museums,

and in some cases may also prevent or impede costly emergency conservation measures being taken. As Prott and O'Keefe point out, such a solution would not prevent recognition that another state may have a special interest in the wreck and the working out of an arrangement similar to that between Australia and the Netherlands. O'Keefe suggests<sup>286</sup> that a government must make a decision as to whether "it can now be recognised that public interests in the underwater cultural heritage outweigh private interests".<sup>287</sup> However, an interesting argument for a more flexible approach to ownership is raised by Van Meurs.<sup>288</sup> He points out that there is a distinction between archaeological material found on land and that found at sea. On land, nearly all material found would be of relevance to the state's cultural heritage, but in territorial waters the presence of material may simply be fortuitous and not of any great relevance to the coastal state. For this reason he believes that a flexible approach to property rights is required.

On balance, the assumption of ownership rights after a period of time in which the only claimants would be successors in title of the original owners, combined with a recognition of the special interests of some states in certain wrecks and a willingness to enter into co-operation agreements, would be the writer's preferred option.<sup>289</sup> Such an assumption of rights on the part of the government would show that it gave greater weight to the public interest in cultural property over, say, 100 years old, than to the rather tenuous ownership claims of private individuals, but it would also allow for the recognition of the interests of other states. It would prevent delays caused by claim periods and would create greater certainty.

## 2. Acquisition by Museums

The ability of museums to acquire, store and preserve artefacts from marine sites is a factor which needs to be taken into account in designing a protective framework for the underwater cultural heritage. At present there is no procedure in the UK to ensure that the public interest in underwater cultural property is safeguarded by requiring material of archaeological or historical importance to be lodged in museums for public enjoyment and scholarly research.

Traditionally, museums have tended to deal with material from land sites rather than marine sites. The reason for this is that, until the 1960s, little excavation of underwater remains took place. Even now few museums, even those on the coast, have coherent collection policies for underwater archaeological material, particularly that from marine sites, and very few museums employ archaeologists with a particular interest in marine archaeology.<sup>290</sup> Many museums are reluctant to accept material from marine sites: "most museum curators would turn pale at the prospect of suddenly being confronted with a dozen feet of waterlogged wood...".<sup>291</sup> This is partly because of cost implications: the volume of material from underwater sites poses a problem of much greater scale than ever met on land and waterlogged material requires specialised storage and preservation facilities and trained conservators. It is also partly due to constraints on developing new areas of collecting interest owing to cut-backs in resources.<sup>292</sup> Most museums in the UK are publicly funded, by central government or by local authorities; others are funded by companies, by charitable trusts, or by local societies.

The initial problem facing museums considering the acquisition of underwater cultural property is the cost of such acquisition. At present, a commercial philosophy reigns and a museum must generally

wait until material is for sale on the open market before it gets a chance to acquire it. Even if a private arrangement can be made, as in the case of relics from HMS Invincible,<sup>293</sup> the museum will usually have to pay the finder a reasonable commercial rate. Little can be done to remedy this situation until the issues of ownership, the exercise of Crown rights to unclaimed wreck, and rewards have been sorted out. However, the position of publicly accessible museums must be taken into account when these issues are being considered.

The Irish National Monuments (Amendment) Act 1987 makes some interesting provisions in this regard. Section 3(10) of the Act provides that if an archaeological object, removed from an area restricted by an underwater heritage order,<sup>294</sup> is left unclaimed after the one year period provided in the MSA 1894 (which applies in Ireland also), the Director of the National Museum of Ireland may make one of two requests. He/she may request that the receiver deliver the wreck to the Director to retain on behalf of the State, or may request that the wreck be sold. Where the wreck is retained by the museum, the museum must pay the receiver's fees and expenses and, to the salvor, such amount of salvage as appears to the Director of the National Museum to be reasonable in all the circumstances. Such an arrangement allows the museum a first option to acquire material instead of having to compete on the open market, as is the case in the UK.

South Africa also has an interesting system relating to the issuing of permits to salvage wrecks older than 50 years. A permit will only be issued allowing such salvage if the application is accompanied by a letter from a collaborating museum undertaking to accept material from the wreck site. Once the permit has been issued, the collaborating museum must be consulted on a regular basis with regard to the disposal of finds and it may select up to 50% of the finds (i.e. 50% of the items recovered, rather than 50% of the value of the material).<sup>295</sup>

In dividing the material, the items must be chosen alternately by the museum and the salvor, the museum having first choice. The salvor must pay various official charges on the value of the material not selected by the museum; by contrast the museum is not liable to such charges. If the material is of particular historical value, the collaborating museum must be given up to six months to obtain funds to buy additional material from the salvors to prevent dispersal of the collection.<sup>296</sup> This arrangement gives greater weight to the interests of the salvor/finder, than that in Ireland.

The volume of material that can be recovered from underwater sites is often far greater than that recoverable from land sites and certainly it seems that even a large increase in funding would not allow museums to cope satisfactorily with uncontrolled and indiscriminate recovery of marine finds. For this reason it would be better to place controls on the amount of material being recovered.<sup>297</sup> Also, a policy of selection is probably necessary, whereby a distinction is made between items which should be kept and those which can, after initial researches, be disposed of. The historical value of retention of all material must be weighed against the very real problems of storage which would be raised. For example, is there any real value in keeping one hundred identical musket balls?<sup>298</sup> Some would accept the sale of a proportion of a large group of identical objects once proper samples had been taken and the group had been studied as a whole. Others would assert that future generations might glean valuable information inaccessible at the present time from studying the group in its entirety. Undoubtedly, at least to the non-archaeologist, there is force in the argument that a good representative collection, well cared for, is worth far more than a large collection uncared for.

The archaeological principle of integrity of the find, which means that items found together should be kept together, in the case of



shipwrecks can mean that a home is required for a large amount of material. It may not be easy to find a museum with adequate space and facilities to house such a collection. Therefore, guiding principles to regulate dispersal between museums may be helpful. In this, the agreement reached between the Netherlands and Australia relating to historic Dutch shipwrecks off the coast of Western Australia<sup>299</sup> provides some valuable examples. This agreement recognised that:-

"In modern archaeological practice sites are no longer regarded merely as a source of important individual items, but rather as a body of material whose collective value far outweighs the importance of the individual pieces and in which the relationship of the individual objects within the sample are [sic] a major part of its historical value".<sup>300</sup>

Therefore, the agreement states that the sharing of material from any one site is "best regarded as the accommodation in several localities of a corporate entity rather than its division into parts." In light of this, the agreement goes on to state various considerations regarding partition. In particular, those institutions which hold parts of the collection<sup>301</sup> should contract not to disperse them further and should also agree to allow samples to be brought together when required for study and analysis. The agreement provides that there should be three representative collections, one Dutch, one Australian and one Western Australian. A committee (ANCODS) undertakes the allocation of material between the three. One significant point is that the arrangement gives primacy to the cultural and historical value of the objects, rather than their monetary value.<sup>302</sup> This is because allocation is undertaken on the basis of the historical significance of the objects, rather than their monetary value. For example, where there are three or more objects of the same type, the Dutch and Australian representatives have first and second choice and the remainder goes to the Western Australian collection. In return, Western Australia will usually be allocated any rare or unique item. However, in some cases this procedure is varied. A rare item may be of greater value if housed in

one of the other collections to which it may more naturally belong. For example, rare coins from the Vergulde Draeck were allocated to the Netherlands because they would fill gaps in the extensive collections of coins already held there.<sup>303</sup>

Conservation of material that has been recovered from underwater sites tends to be much more expensive than the conservation of material from land sites.<sup>304</sup> Waterlogged material requires special treatment otherwise it will simply dry out and fall apart.<sup>305</sup> The costs of conservation treatments may remain high for a long period after retrieval. Another practical factor is the nature of wreck material, which is often very bulky, especially the timbers. The funds, facilities and expertise are simply not available to provide conservation if there is an uncontrolled rate of retrieval. Only limited resources are available in the UK and for this reason there must be some form of prioritisation and selection of sites for excavation.<sup>306</sup> As previously mentioned,<sup>307</sup> in Ireland where there is a backlog of material requiring conservation, the only excavations undertaken under the National Monuments (Amendment) Act 1987 are for rescue purposes. Funding for conservation of material retrieved from rescue excavations may be sponsored at least in part by the government (as is the case with land sites).<sup>308</sup>

Conservation laboratories are in existence, for example those of public museums and the Area Museums Services. Also English Heritage and its equivalents have conservation units. However, these established facilities deal at present almost exclusively with archaeological material from land sites and there is a need for extra funding to be made available to pay for increased storage space, additional staff and so on, to cope with material from marine sites. A recent development is the establishment of two commercial conservation workshops specialising in marine conservation. The problem is how should their services be

paid for?

Heritage at Sea recommended that museums should be encouraged to develop a nationally integrated collection policy for material from marine sites and that the need for funding for this purpose should be investigated.<sup>309</sup> The government must come to recognise that underwater cultural property deserves to be treated equally to material from land sites. It should therefore provide a "top-up" on the annual purchase grant for national museums to pay for acquisition of marine material, conservation, staff, new buildings, etc. In the initial years, the "top-up" would have to be of a pump-priming nature, but it could be reduced thereafter. Ideally, consideration should be given to the creation of a museum of nautical archaeology equipped with the requisite facilities, perhaps as an extension to the National Maritime Museum. Controls over the raising of material would help to limit the resources required. Nonetheless, without some increase in funding very little can be done to safeguard the public interest in this part of the cultural heritage.<sup>310</sup>

#### D. EDUCATION

The key to a successful protective regime for underwater archaeology probably does not so much lie with legislation as with education. Prott and O'Keefe have said that: "[m]any states...have...found that a judicious programme of public education, and especially where the underwater cultural heritage is concerned, the education of amateur explorers and diving clubs, has often proved more effective than the enactment of apparently draconian measures which cannot be properly enforced."<sup>311</sup> Even among many land archaeologists, underwater archaeology appears to be treated as an "academic subordinate" to traditional land archaeology.<sup>312</sup> It has been said that this is due, in

part at least, to "a lingering incognizance of the nature and content of the underwater cultural heritage".<sup>313</sup>

There is a need to educate divers, treasure hunters, government and local officials, museums and land archaeologists, and the public at large, to increase awareness of the special importance of the underwater cultural heritage and of the threats to which it is exposed. A sense of responsibility needs to be fostered among the community as a whole. At present the image that many have of the underwater cultural heritage is one of treasure ships and the material rewards to be gained by treasure-hunting.<sup>314</sup> This image is to quite a large extent fostered by television and radio coverage and newspaper articles. A prime example was the enormous publicity given to the auction of 180,000 pieces of Chinese porcelain recovered from the wreck of a Dutch East Indiaman lost in the South China Sea.<sup>315</sup> The fact that a treasure hunter may be destroying valuable archaeological evidence is not usually drawn to the public's attention.

Education would help to encourage voluntary compliance with the legal regime of protection and may provide a large "police force" willing to enforce such compliance. In some countries, for example Poland and Portugal, a town, or local group or organisation has been encouraged to sponsor a monument, essentially taking responsibility for monitoring the site.<sup>316</sup> Education would also assist in providing enthusiastic volunteers to help with surveying, excavating and so on, and may help to harness sources of funding through sponsorship and donations.<sup>317</sup> The programme to protect the Dutch East India wrecks found off the coast of Western Australia appears to have received a great deal of support and co-operation from the general public, amateur divers and the fishing community.<sup>318</sup> Publicity material emphasises that the general public can become involved in, and can enjoy, the underwater cultural heritage; that it can be a source of recreation as well as education.

The enormous amount of enthusiasm generated by the Mary Rose project (evidenced by the fact that the lifting of the hull on 11 October 1982 was shown live on television<sup>319</sup>) shows that the underwater cultural heritage can excite public interest. Once interest is generated, the public will become receptive to education. There are many ways in which the public can be both interested and educated: through museums dealing with nautical archaeology, e.g. the Shipwreck Heritage Centre at Hastings; travelling and static exhibitions,<sup>320</sup> articles in the media, materials available to schools, films and videos and printed publicity.<sup>321</sup> It is important that the message is clear and that the methods of communication are well designed and imaginative. As the JNAPC's policy document, Heritage at Sea, points out, "[i]t is essential to identify areas of public resistance and misunderstanding as well as areas of public receptiveness."<sup>322</sup> The objectives should be to both enthuse and influence. Special interest groups such as divers, land archaeologists and museums need to be targeted specifically and education needs to be undertaken through training too. Land archaeologists can be trained to dive and divers can be trained in underwater archaeological and conservation methods. In Norway, for example, professional divers employed in underwater oil exploration and exploitation activities are trained in the recognition of underwater remains.<sup>323</sup>

The effects of public education will only manifest themselves over a period of years. This has been the case with environmental concerns, the most successful programme of education in this field probably being Greenpeace's "Save the Whales" campaign. Whales are almost certainly a more emotive subject than underwater cultural property, but it is very interesting to note the high profile which whales now have in the public imagination. This has only happened through a concerted campaign of long duration. Any campaign must be a continuing one and this requires an organisation to administer it, together with some public funding.<sup>324</sup>

## E. CO-ORDINATION

In the JNAPC's policy document Heritage at Sea, there was a proposal for the establishment of a "maritime heritage protection agency" to co-ordinate protective measures and administer the legislation.<sup>325</sup> However, in the government's response to Heritage at Sea<sup>326</sup> it stated that it was "not persuaded of the need" for such an agency. If some of the issues discussed in this chapter are going to be dealt with satisfactorily, for example a survey and inventory programme and a public education campaign, there clearly needs to be an overall management body. The present administrative structure in England for the protection of wrecks is that the ADU advises the Advisory Committee on Historic Wreck Sites, which in turn advises the DNH. The DNH itself, which may have - at most - three or four members of staff involved in administering the PWA 1973, would not seem to be appropriate to take on responsibility for overall co-ordination. Neither would the Advisory Committee, which is of only a part-time nature. The ADU is currently far too small, but could be enlarged and given greater powers. However, the writer believes that its place is at the "coal-face" of underwater archaeology, in other words it works well as a mobile inspectorate and in this respect its powers and funding could be increased. It should inspect, survey, assess, etc. It has the experience and skill to do this, comprised as it is of marine archaeologists, rather than managers. Gale suggests that the county Archaeological Units might be able to embrace some management functions, but this would obviously only be on a regional basis<sup>327</sup> and it would still be necessary to have a body at national level to oversee the work.

The functions of English Heritage,<sup>328</sup> the government agency which manages the land-based archaeological heritage are, inter alia, to promote the preservation of ancient monuments and historic buildings

and to promote the public's enjoyment of, and advance their knowledge of, such monuments and buildings.<sup>329</sup> Its role "is to bring about the long term conservation and widespread understanding and enjoyment of the historic environment for the benefit of present and future generations using expert advice, education, example, persuasion, intervention and financial support."<sup>330</sup> It may provide educational facilities, advice and information and contribute towards the cost of research. The status of the agency is a body corporate and it runs on a profit-making basis, although the Secretary of State may agree to provide it with sums towards expenditure.<sup>331</sup> English Heritage may form companies for the object of publication of informative material, the production of souvenirs, sale of literature and souvenirs and the provision of public facilities. A semi-independent agency akin to English Heritage could be established to have responsibility for the management of every aspect of the UK's underwater cultural heritage. It could administer the surveying and inventory arrangements, decide on which sites required protection and priorities for excavation, organise excavators and provide funding for rescue archaeology.<sup>332</sup> It could also be responsible for public education. Such a body in the underwater heritage field could potentially run on a near break-even basis. It would accord with the present government's deregulatory policies and yet afford the underwater heritage treatment appropriate to its importance.<sup>333</sup>

However, it seems much more likely that the government would be prepared to see the underwater cultural heritage being taken within the remit of English Heritage, rather than providing for a separate agency to deal with it. Since Scottish Heritage and Cadw are now dealing with historic wreck in Scotland and Wales, there are persuasive arguments for English Heritage taking over responsibility for historic wreck in England. This indeed is the approach advocated by the writer and it will be explored further below.<sup>334</sup>

Obviously, if the government was willing to invest a certain amount of funding into the management of the underwater cultural resource, ways do exist of reducing its overall financial commitment.<sup>335</sup> For example, commercial sponsorship has already proved successful on a number of occasions, both in the UK and abroad. Sweden provides an excellent example of a sponsored excavation. A Swedish warship, the Kronan, which sunk in 1676 off the east coast of Sweden, was rediscovered in 1980 and survey and excavation work has been taking place under the supervision of a regional museum. The wreck has proved to be one of the richest finds of nautical artefacts from the seventeenth century. This investigation has relied totally on donations and sponsorship to fund it. Sponsorship has been provided by many companies, but the principal sponsor has been the Swedish Tobacco Company. It appears that the tobacco company's interest in the project stems from its own interest in the history and use of tobacco: among the 17,000 or more items recovered from the site, have been clay pipes, a silver pipe scraper, a tortoiseshell snuff box and a collection of snuff bottles.<sup>336</sup> Another example of commercial sponsorship relates to the Dutch East Indiaman Amsterdam. The Amsterdam Foundation is planning an ambitious project to take the hull of the vessel (which currently lies on the foreshore near Hastings) back to the city of Amsterdam and there display it in a transparent basin as part of a harbour-front development.<sup>337</sup> It is the intention of the Foundation that its proposals will be financed through sponsorship and already a number of companies, including the Dutch salvage company Smit Tak, and engineering companies, have shown an interest.<sup>338</sup> It is interesting to note that the Foundation did not have much success in obtaining funding when its proposals were modest, but that companies suddenly took an interest when the proposals became more ambitious!<sup>339</sup>

In the UK there has been some institutional support for wreck excavation, providing an indirect government subsidy, for example



Liverpool Museum's sponsorship of the Mary, the royal yacht of Charles II which lies off Anglesey; and the BBC's sponsorship of the Trinidad Valencera a Spanish Armada vessel lying off Donegal. In order to encourage such support and sponsorship, an enormous amount of effort has to be made to encourage and inspire companies to envisage the benefits of such projects. The Swedish example is interesting because of the link between the tobacco company and some of the objects being recovered. Perceiving such a link and exploiting it requires imagination and organisation.

The raising of the Mary Rose excited great public interest and the popularity of the resultant museum bodes well for future historic wreck projects. Underwater excavations inspire the popular imagination and this interest needs to be harnessed. Lectures, exhibitions and other fund-raising activities can be employed. It certainly should not be necessary to sell artefacts in order to raise funds for further excavations: as Margaret Rule, Research Director of the Mary Rose Trust, put it, "You can only sell an object once; you can sell a museum many times."<sup>340</sup> The creation of a charitable trust for each wreck that was being excavated would probably facilitate public support and commercial sponsorship.<sup>341</sup>

The assistance of volunteers has proved to be of great importance on many sites. The partial excavation of the Stirling Castle before it was re-engulfed in the sands of the Goodwins<sup>342</sup> provides an example of successful co-operation between various groups of volunteers. The help was enlisted of five sports divers, the local dry land amateur archaeology society and a local fisherman. The fisherman provided help in the form of his knowledge of the local waters and also his boat. The non-diving amateur archaeologists provided administrative back-up, conservation and drawing skills. They recorded all the artefacts and conserved many of them, organised publication of the preliminary results

of the excavation and liaised with the authorities, sponsors (who provided equipment such as an underwater television set and a side-scan sonar) and conservation laboratories.<sup>343</sup>

Much can be learnt from the underwater heritage management schemes of Australia, although it should be borne in mind that Australia has the added complication of a federal system of government. The implementation of the Australian Commonwealth Historic Shipwrecks Act 1976 is viewed as a co-operative effort, involving the Commonwealth Government, the State Governments and the Australian people.<sup>344</sup> The Historic Shipwrecks Act 1976 is administered on behalf of the Commonwealth by delegated authorities in the States and Northern Territory. For example, the delegated authority in South Australia is the State Heritage Branch of the Department of Environment and Planning. The delegated authorities have day-to-day responsibility to:-

- . survey, identify and assess shipwrecks
- . recommend protection under the Act
- . issue permits to applicants wishing to dive on shipwrecks protected by prohibited entry zones
- . arrange protection for declared historic shipwrecks
- . devise management plans for declared historic shipwrecks
- . oversee the recovery, conservation and exhibition of relics from declared shipwrecks
- . provide publicity for historic shipwrecks and maritime archaeological matters generally.<sup>345</sup>

Reports of finds are usually made to the delegated authority in the relevant State which then assesses the significance of the find and makes a recommendation on its historical significance to the Minister. Members of the Commonwealth, State and Territory Police Forces are identified as inspectors and are assisted by inspectors appointed from the State departments responsible for fisheries, navigation and harbours, environment and planning. These inspectors carry out their duties relating to historic wrecks in association with their other tasks.

The general public may become involved in the programme through membership of maritime archaeological associations in each State. These bodies have aims broadly compatible with Commonwealth and State objectives and offer individuals the opportunity to become involved in activities which range from research, surveys, field recording, and artefact analysis to public speaking, training, education and publication programmes.<sup>346</sup> The associations provide a group of experienced divers and researchers, who act as an example to the rest of the diving community.<sup>347</sup> The State authorities collaborate with the associations to undertake survey and excavation work, etc. For example, in South Australia amateur divers have been involved in surveying and marking a shipwreck trail around Wardang Island and have also been involved in surveys of more than 600 wrecks located in the coastal waters. Much emphasis is placed by the legislation and its administration on promoting public co-operation. In fact, one of the criteria for declaring a wreck "historic" under the Commonwealth Historic Shipwrecks Act 1976 is where it is of value as a tourist, educational and recreational resource.<sup>348</sup> It is also recognised that one cannot expect people to respect the protective laws unless they are provided with a good reason: this should be provided by the interpretation of the significance of shipwrecks through a public display of the research, survey and excavation work.<sup>349</sup> The Australian National Maritime Museum in Sydney was established by the Australian Government to preserve and display the underwater cultural heritage of Australia. The Museum's exhibition was due to open in late 1991.<sup>350</sup> Each State also has a museum responsible for research into, and display of, material recovered from that State's coastal waters, for example the South Australian Maritime Museum, which opened in 1986.

The management programme in Australia is very ambitious, but it does provide an example of what can be done. It seems clear that a successful management scheme in the UK would require a body to have

direct and full-time responsibility for the management of the underwater cultural heritage. It is submitted that, without such a body, a true management scheme would be impossible. Certainly a management body would require some initial government outlay and continuing support but, once a scheme was in place, a great deal could be achieved through sponsorship, donations, public education, and the enlistment of support from a wide range of enthusiastic volunteers. It is conceivable that the task could be undertaken on a near break-even basis after initial pump-priming.

## CONCLUSION

The JNAPC's policy document Heritage at Sea, and associated campaign<sup>351</sup> have brought many of the issues considered in this chapter to the attention of the relevant government departments, which appear willing – in some measure – to co-operate. If English Heritage was prepared to take over responsibility for underwater archaeology (and there are indications that it is showing increasing interest)<sup>352</sup> this would be a great step forward. Almost certainly, it would not be willing to do so unless provided with additional funding by the government. If this were to happen, a number of improvements could be made, especially in relation to creating a proper management policy for the underwater archaeological resource.

However, it is a great pity that the government still seems unwilling to accept that there is a need for legislative change. Without such change, many of the issues discussed above, such as the scope of protection, duty to report, reward system and ownership claims, will remain in their current unsatisfactory state.

## NOTES

1. The National Monuments (Amendment) Act 1987 (Ireland) and the Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Law 1986. See Appendix 22 and Appendix 21 for extracts.
2. See Chapter Three, A., above. This was also the case with the Irish National Monuments (Amendment) Act 1987 which was a direct response to the discovery of a Spanish Armada wreck in May 1985, and with the Western Australia Museum Act Amendment Act 1964 which was a response to allegations of looting and destruction of the Dutch East Indiaman, the Vergulde Draeck: Prott & O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.112. Cf. the PMRA 1986, see Chapter Three, E., above.
3. Including aircraft. This position was not rectified until the enactment of the AMA 1979 s.53. For details, see Chapter Seven, A.1(a) below. Military aircraft now receive protection under the PMRA 1986: see Chapter Three, E., above.
4. In fact, prior to the AMA 1979, boats on land above the high-water mark were not afforded legal protection, although this position was remedied by the AMA 1979.
5. See further, A.4(a) below.
6. See further, thesis Introduction.
7. The AMA 1979 Part II provides for designation of areas, but in the Parliamentary Debates to the Act it was stated that there was no intention to use this designation in territorial waters: see further, Chapter Seven, A.1(a) below.
8. Although in practice a marine monument has never been so protected: see further, Chapter Seven, A.1(a) below.
9. These issues are explored in detail in Chapter Seven, A.2., below.
10. See generally, Chapter Four. The 1989 French law applies to "bien culturels maritimes" or "maritime cultural property", a change from the previous legislation which applied only to wrecks: see Firth, op. cit., p.60.
11. See further, Chapter Seven, A.1(a) below.
12. "Digger may have found Viking long ship", The Times, 1 May 1991. The head of the Suffolk Underwater Studies Unit was reported as saying that it was expected to be a rich archaeological site.
13. National Monuments (Amendment) Act 1987, s.3(1).
14. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.116.
15. For the writer's specific proposals, see Chapter Eight, B.1(a) below.
16. Maritime Archaeology Act 1973.
17. Prott and O'Keefe, "Final Report on Legal Protection of the Underwater Cultural Heritage", op. cit., p.62.
18. The writer's proposals in this respect can be found in Chapter Eight.

19. Cf. the PMRA 1986: see Chapter Three, E., above.
20. This issue has been looked at in some detail in Chapter Four, C.1., above and will be returned to in the thesis Conclusion.
21. Under the PWA 1973, 37 wreck sites currently receive protection. Cf. under the Australian Commonwealth Historic Shipwrecks Act 1976, as at April 1991, 147 wrecks had protected status.
22. Letter to the Editor from the President of the Maritime Institute of Ireland, The Irish Times, 11 July 1985.
23. See further, Chapter Three, C.5., above.
24. Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Law 1986, brought into force in April 1987.
25. See Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.168 for a list of examples.
26. In order to counter the problem of definitional vagueness, under Canada's proposed Archaeological Heritage Protection Act, a detailed list of archaeological sites and artefacts and classes thereof to which the protective measures apply, will be established by regulation: M. Haunton, "Canada's Proposed Archaeological Heritage Protection Act" (1992) 1 IJCP 395.
27. Cf. the problems that have arisen in interpreting the meaning of "objects of an archaeological and historical nature" in Art.149 of the 1982 Law of the Sea Convention: see Chapter Four, C.2(a) above.
28. J. Amess, "Operation of the Commonwealth Historic Shipwrecks Act", in Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology (1983). Quite a large number of other wrecks dating from the 1930s and 1940s have since been declared "historic": Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit.
29. See, e.g., P. Marsden, The Historic Shipwrecks of South-east England, op. cit. The PMRA 1986 could be used to protect British and German warships and submarines, see further, Chapter Three, E., above.
30. She was bought by an American to break the Federal blockade of Confederate supply routes, but sank at the start of her first trans-Atlantic voyage: personal communication with C. Dawes, Heritage Sponsorship Division, DNH, 6 November 1992. She was designated under the PWA 1973 in January 1990 (SI 1989, No.2294).
31. See discussion of the interaction of the PMRA 1986 and PWA 1973, especially with regard to age and historical significance, in Chapter Three, F., above.
32. Op. cit., p.12.
33. See further, Chapter One, A.3(b) and Chapter Four, C.1(f) above.
34. Cf. the criteria for designation of wrecks proposed by the JNAPC in its policy document, Heritage at Sea: see Chapter Five, C.3(b) above.
35. See Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.169 et seq.
36. A. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", unpublished paper (1990), p.1. This statistical imbalance may to some extent be redressed by the Monuments Protection Programme: see Chapter

Seven, B., below.

37. See Appendix 16. See Chapter Five, C.3(b) above, for the criteria proposed in Heritage at Sea for the selection of wreck sites of "national importance".

38. T. Darvill, et al, "A question of national importance: approaches to the evaluation of ancient monuments for the Monuments Protection Programme in England" (1987) 61 Antiquity 393 at p.394.

39. See A.4., below.

40. Op. cit., p.13.

41. Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit. An alternative system would be to combine a form of blanket protection with site-specific designation. See further, A.1(d) below. For the writer's specific proposal to deal with this issue, see Chapter Eight, B.1(d) below.

42. See C. Cederlund, "Systematic registration of older sinkings and wrecks in Swedish waters" (1980) 9 IJNA 95, at p.102. See also, Muckelroy, Maritime Archaeology, op. cit., pp.160-165, who investigated the effects of environmental factors on preservation of wreck material and sites.

43. A sandy seabed is much more likely to contain preserved wrecks than a rocky one: Muckelroy, Maritime Archaeology, op. cit., pp.160-165.

44. "The Archaeology of the Sea", Seascape, Introductory Issue, p.26. See also, H. Basford (ed.), A Survey of Isle of Wight Archaeology: The Vectis Report, Isle of Wight County Council (1980). There is a breakdown of these wrecks by period in Redknap "Surveying for Underwater Archaeological Sites:- Signs in the Sands", op. cit.

45. Fenwick, op. cit., p.131.

46. D. Lyon, "The Riddle of the Sands: The Goodwin Sands Wrecks and the Problems of Recording Them", in Proceedings of the Second Southern Hemisphere Conference on Marine Archaeology (1983), p.237.

47. In fact they have been dubbed the "great ship swallow": see Redknap, "Surveying for Underwater Archaeological Sites", op. cit., p.11.

48. See further, A.4., below.

49. See further, Chapter Three, C.3., above.

50. Marsden, The Historic Shipwrecks of South-east England, op. cit.

51. See thesis Introduction for details of archaeological material caught up by fishing nets or dredged up in the Goodwins.

52. See further, A.4., below.

53. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", op. cit.

54. See further, Chapter Seven, A.1(a) below. However, under the AMA 1979 such designation only allows time and access for rescue archaeology and does not provide in situ protection.

55. After more than ten years, only two small reserves have been declared and proposals for both of these led to considerable opposition

and years of difficult negotiations: S. Gubbay, Marine Protected Areas (1991), p.2. See further, Chapter Seven, D., below.

56. See further, Chapter Seven, C.2., below.

57. For enforcement generally, see A.3., below.

58. See A.1(d) below.

59. Loi 62-1262, Decret 61-1547.

60. Prott and O'Keefe, "Final Report on Legal Protection of the Underwater Cultural Heritage", op. cit., p.65. The practical effect of the combined operation of the MSA 1894 and the PWA 1973 in the UK is much the same.

61. Firth, "Archaeology Underwater in France", op. cit., p.61. The position in France has now been remedied with all "maritime cultural property", whether sites or isolated objects, receiving equal protection under the Loi 89-874 of 1989: ibid. at p.60.

62. For further details of these threats, see A.4., below.

63. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", op. cit., p.1.

64. Personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.

65. Cf. the PMRA 1986, under which it is possible to designate vessels which sank or stranded on or after 4 August 1914, the outbreak of World War I: see Chapter Three, E., above.

66. Cf. the clumsiness of the PMRA 1986, which also uses a combination of a fixed and a moving date system: see Chapter Three, E., above.

67. See further, Chapter Four, B.2(a) and D.2(a) respectively.

68. For ownership issues, see Chapter One, A., above.

69. See Chapter Four, A.2., above.

70. In Art.2(7). See further, Chapter Four, B.2(b) and B.2(c) above.

71. Cf. restrictions on interference imposed by the PMRA 1986: see Chapter Three, E.1., (especially E.1(c)), above.

72. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.177.

73. Ibid. at p.214.

74. For details of this case, see Chapter One, A.3(b) and C.6., above.

75. Cf. the difficult issues concerning the separation of the jurisdictions of the PWA 1973 and the PMRA 1986: see Chapter Three, F., above.

76. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.177.

77. See further, Chapter Four, A.2., above. Cf. the definition of underwater cultural property in the 1985 draft European Convention, Chapter Four, B.2(a) above.



78. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, *op. cit.*, p.178.

79. If a solution along these lines was adopted in the UK, there would be a potential jurisdictional conflict with the PMRA 1986 (see Chapter Three, E., and F., above). The writer's own proposals as to how such a conflict might be resolved can be found in Chapter Eight, B.3(b) below.

80. *Cf.* the PMRA 1986: see Chapter Three, E.1(a) and (b) above.

81. There are certain exceptions regarding the carrying out of emergency action or statutory functions: s.3(3). See further, Chapter Three, C.3., above.

82. Prott and O'Keefe, "Final Report on Legal Protection of the Underwater Cultural Heritage" *op. cit.*, p.64. *Cf.* the offences under the PMRA 1986, see Chapter Three, E.1(a) and (b) above.

83. See A.3., below.

84. National Monuments (Amendment) Act 1987 s.3(6) (Ireland).

85. *Cf.* the PMRA 1986, under which offences in relation to "protected places" are not subject to strict liability because the location of such places will usually be unknown, but offences in relation to "controlled sites" are based on strict liability since the location of such sites will be published. See further, Chapter Three, E.1(a) and (b) above.

86. Leader of the ADU, in a personal communication with the writer, January 1990.

87. See Chapter Three, C.5., above.

88. The more accessible sites, for example those on the foreshore (e.g. the Amsterdam), or in mud flats (e.g. the Grace Dieu) are particularly vulnerable and represent a priority concern. However, measures can be utilised to protect these sites which are not available to sites out at sea: see Chapter Three, C.6., above.

89. In Ireland, use was made of Community Watch Committees to enforce Protection Orders on several wrecks made under the National Monuments Acts 1930 and 1954. The Maritime Institute of Ireland and local museums oversaw such groups and at one meeting that was held almost 100 people pledged their support: The Irish Times, 11 July 1985.

90. Personal communication, January 1990.

91. See Chapter Three. The area of sites designated under the PWA 1973 seems to range from about 50 to 300 metres radius. Wrecks declared as "historic wrecks" under the Australian Commonwealth Historic Shipwrecks Act 1976 have protected sites varying from 50 to 800 metres radius: Australia's Historic Shipwrecks: Museums Beneath the Sea, *op. cit.* *Cf.* the PMRA 1986, which provides, in s.1(5), that any two points on the boundary of a controlled site in international waters should be no more than two nautical miles apart. This suggests that controlled sites under the PMRA 1986 were envisaged to be significantly wider than sites designated under the PWA 1973. The restriction in s.1(5) of the 1986 Act was apparently inserted in order to avoid suspicion on the part of other states that the UK was claiming excessive jurisdiction: see H.C. Debates, Vol.90, Col.1228 (1985-86).

92. See further, Chapter Three, C.3., above.

93. See Chapter Three, E.1(d) above.

94. For details of these powers, see Chapter Three, E.1(d) above.
95. See Chapter Three, E.1(d) above.
96. See further, Chapter Two, A.3., and A.5., above.
97. Commonwealth Historic Shipwrecks Act 1976, s.23(1) (Australia).
98. The Australian Commonwealth Historic Shipwrecks Act 1976 only affords protection to designated wrecks; it does not provide any form of blanket protection.
99. See further, Chapter Three, C.2., above.
100. As at June 1991: Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit.
101. See B.2., and D., below.
102. Information on the practice in Ireland has been obtained in a personal communication with Nessa O'Connor, National Museum of Ireland, 30 September 1992.
103. Personal communication with Nessa O'Connor, National Museum of Ireland, 30 September 1992.
104. It is felt that this problem may be alleviated, in part at least, by a publicity campaign and the distribution of leaflets and posters: personal communication with Nessa O'Connor, National Museum of Ireland, 30 September 1992.
105. Heritage at Sea, op. cit., p.25.
106. M. Dean, "Evidence for possible prehistoric and Roman wrecks in British waters" (1984) 13 IJNA 78. The Roman conquest took place in 43 A.D.
107. Ibid.
108. Martin Dean, personal communication, January 1990.
109. Lyon, op. cit., p.238. The vessel was designated under the PWA 1973 in 1980.
110. The three vessels are thought to be the Stirling Castle, Northumberland and Restoration, which were cast onto the sands and lost during a violent storm in 1703.
111. Martin Dean, personal communication, January 1990.
112. HMS Invincible also appears to have been threatened by sandbank movements: McDonald, op. cit., p.15.
113. Blackman, op. cit., p.38.
114. Lyons, op. cit., p.240.
115. Dean, "Evidence for possible prehistoric and Roman wrecks in British waters" op. cit.
116. See A.4(b) and (c) below.
117. See the examples given in thesis Introduction.

118. For the licensing procedures, see Chapter Seven, C.2., below.
119. No.265, 8 May 1989.
120. DOE News Release No.265, 8 May 1989.
121. For the position regarding sites designated under the PWA 1973, see Chapter Seven, C.2., below.
122. For evidence of the threat in the Goodwin Sands, see thesis Introduction. At various historic ports in the Mediterranean, South America and elsewhere, hundreds of wrecks are being lost each year as a result of dredging operations: see R. Marx, "The Disappearing Underwater Heritage" [1983] 35 Museum 9. Other instances of damage and destruction caused by commercial operations are listed in Blackman, op. cit., p.38.
123. For further details, see Chapter Seven, B., below.
124. See G. van der Heide, "Consequences of Finding Historical Shipwrecks in the Netherlands", in Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology (1983) p.143.
125. See D. Switzer, "United States of America", in Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology (1983) 133 at p.134.
126. Such records may give the location of subsea transmitters and other devices which the Navy may wish to remain confidential.
127. Marine Archaeological Survey, The Marine Archaeological Survey: A Service to Maritime History. The Marine Archaeological Survey is establishing a regional marine sites register (see (c) below). See also M. Redknap, M. Fleming, "The Goodwins archaeological survey: towards a regional marine site register in Britain" (1985) 16 World Archaeology 312.
128. JNAPC, Heritage at Sea, op. cit., p.26. Other charitable trusts with similar aims are being formed gradually, e.g. Suffolk Underwater Studies and Essex Underwater Studies: Fenwick, op. cit., p.133.
129. In April 1991, the government made some funding available to the ADU in this respect: see Chapter Five, C.6., above.
130. E.g. through sponsorship, donations, etc. See further, E., below.
131. On land in recent years, a large number of archaeological units, both private and public, have been created to meet the need for archaeological investigations. See further Chapter Seven, B., and C.1., below.
132. Many surveys are already carried out under dredging licences from the Crown Estate Commissioners. It may be possible to persuade the Commissioners to make it a condition of the licence that there is independent assessment for cultural remains. See further, Chapter Seven, C.2., and Chapter Eight, below.
133. In both Finland and Sweden there is provision for "rescue" archaeology in the case of large public and private works. The person undertaking such works must pay some or all of the costs of the "rescue" measures where reasonable in the circumstances: Roper Report, op. cit., pp. 100 and 126. For further discussion of this issue and of commercial codes of conduct, see Chapter Seven, C., below.
134. See further, Chapter Seven, C.1., below.

135. JNAPC, Heritage at Sea, op. cit., p.25.

136. He estimates that the total for the UK may be as high as 200,000: JNAPC, Heritage at Sea, op. cit., p.25.

137. The RCHME was established by Royal Warrant in 1908 for the purpose of making records of historic buildings and archaeological sites throughout England to provide information to a wide range of users. The records are open to the public. See further, the RCHME's "England's national body of archaeological and architectural survey and record" and "A Guide to the National Monuments Record", publicity brochures.

138. Of 150,000 records altogether. The National Archaeological Record is administered by the RCHME as part of the National Monuments Record. It only covers England, but there are similar records in Scotland and Wales.

139. See further, Chapter Five, C.4., above.

140. The Commissions in Scotland and Wales have been asked to take on similar tasks. Care should be taken in allocating responsibility for the marine boundaries between these areas, e.g. the Severn Estuary and the Solway Firth. In October 1989, clearly in anticipation of this announcement, the RCHME commissioned a report on the practical implications of creating a national underwater record. The report was called Testing the Water by A. Gale. A new Royal Warrant was issued to the RCHME on 5 May 1992 by the Secretary of State for the National Heritage. The Warrant extends the RCHME's remit to cover England's territorial waters.

141. The difficulties of setting up such a record are explored in A. Gale, Testing the Water (1989). Gale suggests that a record created from existing sources of information "will be no more than an eccentric folly" (*ibid.*, at p.65) unless it forms a basis from which to develop a dynamic, as opposed to static, record. This means that there must be a correlation between the potential archaeological resource, represented by the documentary records, and the actual archaeological resource, represented by - in the main - surveying and reporting.

142. RCHME Press Release, 25 June 1992.

143. Ibid.

144. Ibid.

145. See (b) above.

146. See Gale, Testing the Water, op. cit., pp.36-37, for an interesting analysis of the extent of county SMR activity in the intertidal and marine zone.

147. It also provides an advisory service to underwater projects and fulfils a curatorial role for artefacts.

148. Heritage at Sea, op. cit., p.26.

149. In 1987 the Manpower Services Commission provided almost half the staff engaged in archaeology in Britain and provided about one-third of the money for archaeological work: RESCUE, "Archaeological Funding and Legislation: A manifesto for the 1990s" (1991) 54 Rescue News 4.

150. Letter dated 27 May 1988 from D. Tomalin, Isle of Wight County Archaeological Officer, to P. Marsden, Museum of London, who was enquiring about the work of the Maritime Heritage Project. English

Heritage might be more interested if an application was made now: see further, Chapter Seven, B.5., and B.6., below.

151. See, e.g. the Local Government Act 1972 s.72 which automatically annexes to the parish (and hence to the district and county within which it lies) "every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low-water mark".

152. Tomalin, "County Archaeological Policies in the Inter-Tidal Zone and Beyond", op. cit.

153. Gale, Testing the Water, op. cit., p.38.

154. Tomalin, "County Archaeological Policies in the Inter-Tidal Zone and Beyond", op. cit.

155. And its equivalents in Scotland and Wales. For further discussion of the interaction between the National Marine Record and the SMRs, and the JNAPC's proposed Maritime Heritage Protection Agency (see Chapter Five, C.3(b) above), see Gale, Testing the Water, op. cit.

156. Cf. the 1985 draft European Convention, Chapter Four, B.2(g) above.

157. See further, E., below and Chapter Seven, B., below.

158. For details of the Australian programme, see E., below.

159. For further details, see Cederlund, op. cit. This register has been used to compile information relating to the marine archaeological resource which has been inserted into a national development plan for the marine zone (ibid.).

160. JNAPC, Working Group on Coastal and Seabed Survey, Discussion document, second draft. For further information, see L. Barkman, "Inventory of Ancient Monuments Underwater in Sweden", in Proceedings of the First Southern Hemisphere Conference on Maritime Archaeology (1977) p.52.

161. This is a coastal survey project organised by English Nature which is based on directed, voluntary help and collects basic information on the distribution and extent of coastal habitats and human activity that may change or damage them. Co-ordination may enable information to be gathered about archaeological remains on the foreshore and in shallow water.

162. See Chapter Two, B., above.

163. Dean, "Evidence for possible prehistoric and Roman wrecks in British waters", op. cit.

164. See Chapter Five, B.2., and B.3., above. However, in Norway the country is divided into five districts and a local museum is the authority designated in each of these areas to which finds must be reported immediately.

165. In 1988 the Association of County Archaeological Officers offered to assist receivers in this respect: letter from the Acting Secretary of the Association to the DTp, dated 27 June 1988.

166. See further, Chapter Four, A.2., above.

167. This issue is discussed further in Chapter Seven, A.2(b) below.

168. Historic Monuments Act (Northern Ireland) 1971, s.12; National

Monuments (Amendment) Act 1987, s.3(6) (Republic of Ireland).

169. See Chapter Seven, A.1(b) for further details of this consultation paper.

170. See A.7., below regarding rewards.

171. Thereby fulfilling one of the Council of Europe's minimum legal requirements: see further, Chapter Four, A.2., above.

172. See A.3., above and A.7., below.

173. At least in order for it to be recorded: see A.4(c) above.

174. See D., below.

175. The Greek legislation provides in some cases for imprisonment for non-declaration: Prott and O'Keefe, "Final Report on Legal Protection of the Underwater Cultural Heritage", op. cit., p.71.

176. Ibid., at p.120. The exploration or exploitation activities must not destroy or damage the wreck, and the Minister will issue orders as to its treatment.

177. See Chapter Seven, C., below.

178. Section 3(6) of the National Monuments (Amendment) Act 1987 provides that reports should be made within four days.

179. DOE, Consultation Paper on Portable Antiquities (1988). See further, Chapter Seven, A.1(b) below.

180. See further, Chapter Three, A., above.

181. See further, Chapter Two, A.3., above.

182. See further, B.1., below.

183. See Chapters One, Two and Three, above.

184. Prott and O'Keefe, Law and the Cultural Heritage, Vol.1, op. cit., p.126. It seems odd that Guernsey's Wreck and Salvage Law 1986, in s.19(3), provides for the payment of "salvage" to the licensees on protected sites. This reference to salvage in the context of provision for "historic wreck" seems anomalous.

185. See "Archaeologists Deplore Plundering of Historic Wrecks", Archaeology Today, April 1987, p.5.

186. Although in the short-term, salvage law, if sensitively applied, may be of use in the protection of underwater cultural property. It does provide an incentive for reporting and also the concept of "salvor in possession" (see further, Chapter One, C.3., above) may be of use to the underwater archaeologist in protecting a site from interference by others.

187. See further, Chapter Four, A., above.

188. See Chapter Four, D.2(c) above.

189. JNAPC, Heritage at Sea, op. cit., p.9.

190. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.126. See also Dawson, op. cit., p.7-8.

191. UNESCO, Protection of the Underwater Heritage, op. cit., at p.17.

192. This Act represents a compromise between various interest groups: see further, Chapter Four, D.2(c) above. In taking some wrecks out of the salvage regime (and finding law regime), "Congress came down hard on the side of the preservationists": D. Owen, "The Abandoned Shipwreck Act of 1987", op. cit., p.509.

193. See further, Chapter Four, B.2(c) above.

194. Including Prott and O'Keefe, see "Final Report on Legal Protection of the Underwater Cultural Heritage", op. cit.

195. This is what happens in the case of treasure trove: see HM Treasury, Treasure Trove: Report of a Review of Ex Gratia Awards to Finders of Treasure Trove (1988). See further, Chapter Seven, A.1(b) below.

196. J. Green, "Maritime Archaeology in Australia", in Proceedings of the Second Southern Hemisphere Conference (1983), p.33. See further, Amess, op. cit., pp.52-55. In such cases it may be necessary to have some form of appeal mechanism.

197. The remuneration will be at least the metallic value of the object increased by 25% in Finland, or by 10% in Norway: Braekhus, "Salvage of Wrecks and Wreckage", op. cit., p.55.

198. The Government of Victoria, Australia (under the Historic Shipwrecks Act 1981 (Victoria) s.24), offered a reward of \$250,000 Australian for the discovery of a vessel sighted in shifting sands. The ship may have been part of a Portuguese expedition of 1552 which anticipated by two centuries Captain Cook's "discovery" of Australia: The Times, 16 January 1992.

199. "Final Report on Protection of the Underwater Cultural Heritage", op. cit., p.73.

200. Amess, op. cit., p.52.

201. Under the Australian Commonwealth Historic Shipwrecks Act 1976, "it [is] normal practice for the Minister to provide non monetary acknowledgement to individuals in recognition of their contribution towards preserving Australia's shipwrecks": Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit.

202. See generally, Chapter Three above.

203. M. Nash, "The Law of Treasure and Treasure Hunters" [1978] NLJ 1163, at p.1165. See further, Chapter Seven, A.1(b) below.

204. Section 31(2), as cited in Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.214. See ibid. pp.214-5 for further details of this interesting system.

205. Amess, op. cit., p.53.

206. Prott and O'Keefe, "Final Report on Protection of the Underwater Cultural Heritage", op. cit., p.73. Heritage at Sea did not comment on the issue of rewards and the JNAPC has not been able to reach a conclusion on it.

207. Leader of the ADU, see Chapter Three, C.2., above.

208. Op. cit., p.33.

209. National Monuments (Amendment) Act 1987 (Ireland) and Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Law 1986.

210. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.215. See further, E., below.

211. See A.3., above.

212. Through the treasure trove system: see Chapter Seven, A.1(b) below.

213. For the writer's specific proposals for reform, see Chapter Eight, B.1(h) below.

214. See Chapter Three, C.5., above.

215. In South Africa, steps have recently been taken to improve the controls over salvage activities on wrecks over 50 years old. One of the changes has been that, in order to obtain a permit, applicants must indicate their motives and justify the need to undertake salvage on the wreck site. Permits will only be issued for bona fide research reasons: Werz, op. cit., p.4.

216. One marine archaeologist apparently remarked in the 1970s that the discipline was still at the stage of "kitchen" art: Blackman, op. cit., p.37. Whether this could still be said is unknown to the writer.

217. 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, Article 9. The Recommendation generally stresses the non-renewability of archaeological sites and the view that they should only be excavated in order to answer specific research questions.

218. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p. 263.

219. In fact, the Recommendation is currently being revised, at least in part, to extend its coverage to the underwater cultural heritage: ILA, Cairo Report, op. cit., p.16.

220. See C.2., below.

221. R. Brown, H. Bump, D. Muncher, "An in situ method for determining decomposition rates of shipwrecks" [1988] IJNA 143.

222. Blackman, op. cit., p.36.

223. For example, in the Goodwins: see further A.4., above.

224. See, Dean, "Evidence for possible prehistoric and Roman wrecks in British waters", op. cit.

225. Op. cit., p.28.

226. P. Marsden, "Maritime Archaeology in Sussex", presentation at the Maritime Archaeology Conference, organised by Hampshire County Council, Portsmouth, 16 April 1991.

227. Hence the need for the continuation of the designation order for the site.

228. A. Hildred of the Mary Rose Trust in a presentation at the Advisory Committee on Historic Wreck Sites' meeting with licensees, 25 November 1992.



229. Isle of Wight Trust for Maritime Archaeology, op. cit., p.19.
230. R. Grenier, "A Basque Whaling Ship at Red Bay, Labrador", in S. Langley and R. Unger (eds.), Nautical Archaeology: Progress and Public Responsibility, pp.84-98. Over 1200 drawings of all the different pieces of wood have been made in three dimension. The pieces will be carved to scale so that the ship can be recreated as a model less than four metres long. The aim of the project is to discover the techniques used in designing and building the vessel.
231. B. Ferrari, in a presentation to the Advisory Committee on Historic Wreck Sites' meeting with licensees, 25 November 1992.
232. W. Jeffery and J. Amess (eds.), Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology (1983).
233. The Conference urged the Commonwealth Government to seek international agreements so that these principles could be adopted internationally, ibid.
234. Personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992. One reason for this policy is that there is a backlog of pre-1987 material which requires conservation and therefore conservation facilities are not available for newly raised material.
235. Blackman believes such an idea "deserves detailed consideration": op. cit., p.43.
236. Margaret Rule, Director of the Mary Rose Trust, has suggested that such a park could be established in the clear waters off Cornwall where there are many historic wrecks: personal communication with the writer, 1985. For a discussion of marine conservation areas, see Chapter Seven, D., below.
237. Prott and O'Keefe, "Final Report on Protection of the Underwater Cultural Heritage", op. cit., p.64.
238. See further, Chapter Four, C.1(d) above.
239. S. Langley, "The Law and Nautical Archaeology in Canada", op. cit., p.23. See also S. McClellan, "Fathom Five Provincial Park - A Successful Experiment", in S. Langley and R. Unger, (eds.), Nautical Archaeology: Progress and Public Responsibility (1984), pp.32-36.
240. In the US, recognition has been given to the interests of professional salvors, for example the Abandoned Shipwreck Act of 1987 provides for the recognition of "the interests of individuals and groups engaged in shipwreck discovery and salvage" (see further, Chapter Four, D.2(c) above). However, in the US there is a large and vociferous "treasure salvage" industry, operating in particular off the Florida coast (see, e.g. The Independent Magazine, 21 November 1992). Such an industry does not exist in the UK and therefore such interests do not need to be taken into account.
241. See Chapter Three, C.5., above.
242. For example, by Andrew Saunders of English Heritage, in JNAPC, Notes of a Conference on Nautical Archaeology, the Royal Armouries, 30 January 1988.
243. Blackman, op. cit., p.42. This view is supported by Roper, op. cit., p.23.

244. By means of the National Lottery: personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.

245. Personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.

246. It is very difficult to enforce otherwise: see A.3., above.

247. Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit.

248. See D., below.

249. In interviews with the writer.

250. Muckelroy proposed a system of five classifications based on degree of survival: Maritime Archaeology, op. cit., p.164. Degree of survival is one of several factors which would need to be taken into account in order to assess "importance".

251. For the writer's own proposals regarding categorisation, see Chapter Eight, B.1(d) below.

252. For example, see JNAPC, Heritage at Sea, op. cit., p.32.

253. See further D., below.

254. Roper Report, op. cit., p.23. Roper points out that reservations about the involvement of amateur divers tend to be most prevalent among archaeologists working in the Mediterranean area and the strongest support for such involvement comes from archaeologists working in northern countries. As Roper points out (p.22), "evidently...the warmer water and holiday element in the Mediterranean is an important factor in consideration of the seriousness of amateur involvement there."

255. Dean, Guidelines on acceptable standards in underwater archaeology, op. cit.

256. e.g. An update of "Notes for the guidance of finders of historic wreck" issued in 1984 by the DTp's Marine Directorate.

257. This can be contrasted with Denmark, where - since 1972 - the Danish Amateur Divers' Union has sponsored courses in practical maritime archaeology with teachers from museums and government agencies. The divers on the course can take part in surveying and excavation activities: Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.334.

258. Heritage at Sea, op. cit., p.32.

259. For details, see Heritage at Sea, op. cit., pp.34-36. The total number of those who have attended Part I is nearly 1,500: J. Adams, Nautical Archaeology Society Training Officer, in a presentation given to the Advisory Committee on Historic Wreck Sites' meeting with licensees, 25 November 1992.

260. See Chapter Five, C.6., above.

261. J. Adams, in a presentation given to the Advisory Committee on Historic Wreck Sites' meeting with licensees, 25 November 1992.

262. This issue has been dealt with in detail in Chapter One, A., above.

263. Such claims are considered in Chapter One, A., above.
264. Presumably linked to the cut-off date for blanket protection, see further A.1., above.
265. See Chapter One, A.2., above.
266. Agreement Between the Netherlands and Australia Concerning Old Dutch Shipwrecks, 1972 Aust. T.S. No. 18, and Schedule to the 1976 Historic Shipwrecks Act. See Appendix 25.
267. It appears that recently discussions have been taking place between the Netherlands and Indonesia in respect of a Dutch East Indiaman found in Indonesian archipelagic waters: ILA, Cairo Report, op. cit., p.3. The exact nature of the discussions is unknown.
268. As to the guiding principles determining dispersal, see C.2., below.
269. Bolton, op. cit. Bolton is a member of the four-person committee. There are two representatives of the Netherlands and two of Australia. Bolton's view that the co-operation has been entirely harmonious is supported by another member of the Committee: J. Bach, "A Brief History of the Australian-Netherlands Committee on Old Dutch Shipwrecks (ANCODS)", in Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology (1983), p.57 at p.63.
270. Bolton, op. cit., p.29. For an interesting discussion of how the division actually takes place, see Bach, op. cit., pp.62-63. See also C.2., below.
271. See Articles 3 and 7 of the Agreement.
272. See Chapter One, A.1(c) above.
273. Ashley Roach, op. cit.
274. See Chapter One, A.1(c) for further details of this wreck.
275. See Appendix 9 for details of the agreement.
276. See Prott and O'Keefe, "Final Report on Protection of the Underwater Cultural Heritage", op. cit., p.67 and Strati, op. cit., p.864.
277. Strati, op. cit., p.864.
278. Ibid. There are also a number of UN General Assembly Resolutions encouraging co-operation: ibid., pp.864-5.
279. See further, Chapter One, A.1., above.
280. Letter from P. Williams, Aviation and Maritime Department, FCO, to A. Firth, University of Southampton, 3 March 1992. It appears that the initial contact by another state asking for permission to carry out an excavation in UK waters should be made through the FCO's Cultural Relations Department.
281. Marsden, The Historic Shipwrecks of South-east England, op. cit.
282. Which applies to territorial waters.
283. Firth, op. cit., p.61.
284. See further, Chapter One, A.2., above.

285. Prott and O'Keefe, "Final Report on Protection of the Underwater Cultural Heritage, op. cit., p.68. O'Keefe raises a further argument in favour of state title: if a government has title to artefacts, this may assist it in trying to recover such artefacts following illegal export: P. O'Keefe, "International Perspective on Maritime Archaeology Legislation", in Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology (1983) p.175. Cf. Att. Gen. for New Zealand v. Ortiz [1983] 2 WLR 809. Canada's proposed Archaeological Heritage Protection Act vests title to most archaeological resources found on federal land (including offshore lands) in Her Majesty the Queen in right of Canada: Haunton, op. cit., p.395. There were apparently two primary reasons for this: first, recourse could be had to the criminal code concerning theft to supplement offences under the Act; secondly to exclude the common law of finders from such resources, ibid., at p.395.

286. O'Keefe, "International Perspective on Maritime Archaeology Legislation", op. cit., p.181.

287. For an interesting discussion of the philosophical and moral justifications for state assumption of rights, see Van Meurs, op. cit., pp.35-36.

288. Op. cit., p.33.

289. For specific proposals for reform, see Chapter Eight, B.1(c) below.

290. Even the National Maritime Museum employs just two marine archaeologists.

291. National Rivers Authority, English Heritage, The Water Environment: Our Cultural Heritage (1990).

292. The annual purchase grant made to national museums (and galleries) by the government has only increased slightly since 1985 and has now been frozen at the 1990-91 figure until 1994-95: C. Maurice, R. Turnor, "The Export Licensing Rules in the United Kingdom and the Waverley Criteria" (1992) 1 IJCP 273 at p.287.

293. See Chapter Three, D., above.

294. Since the provision only applies to material subject to an underwater heritage order, and little need has yet been found to make such orders (see A.1(d) above), there are plans to amend the legislation so that the museum will have priority to material subject to the blanket protection provision in the legislation too: Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.

295. Werz, op. cit. The salvor is responsible for all costs involved in transporting the salvaged material to the museum.

296. Ibid.

297. See B.1., above.

298. The Mary Rose excavation recovered thousands of arrows, longbows and other items of archery, which represent a real storage problem: McKee, How We Found the Mary Rose, op. cit. It appears that, under the terms of its trust, the Mary Rose Trust is bound to preserve for all time all the objects raised: Hildred, op. cit.

299. See further, C.1., above.

300. In the Arrangement attached to the Agreement, see Schedule to the Commonwealth Historic Shipwrecks Act 1976.

301. In this case, the national museums of Australia and the Netherlands, and the Western Australia Museum.
302. Bach, op. cit., p.60.
303. Ibid., at p.62.
304. For an interesting account of the problems faced by conservators in dealing with materials from underwater sites, see V. Jenssen, "Continuing Involvement of Governments: the problems of conservation", in Nautical Archaeology: Progress and Public Responsibility (1984), pp.48-58.
305. The very special treatment required is evident to anyone who has followed the conservation stages of the Mary Rose.
306. See B.1., above.
307. See B.1., above.
308. See further, Chapter Seven, B., below.
309. JNAPC, Heritage at Sea, op. cit., p.31.
310. Perhaps the recent creation of the Department of National Heritage will help to focus attention on these matters.
311. Prott and O'Keefe, "Law and the Underwater Heritage", op. cit., p.177.
312. J. Gifford, et al., "The UNESCO International Survey of the Underwater Cultural Heritage" (1985) 16 World Archaeology 373-376.
313. Ibid., at p.374.
314. One argument against the paying of rewards is that it promotes this image.
315. For example, see The Times, 29 January 1986, The Listener, 15 May 1986.
316. Prott and O'Keefe, "Law and the Underwater Heritage", op. cit., p.194.
317. See further, E., below.
318. Bolton, op. cit., p.28.
319. One BBC programme was watched by nearly three million people: McKee, How We Found the Mary Rose, op. cit., p.144.
320. The JNAPC, in collaboration with the National Maritime Museum, has recently developed a travelling exhibition.
321. The merits and de-merits of these forms of communication are set out in JNAPC, Heritage at Sea, op. cit., pp.37-38.
322. JNAPC, Heritage at Sea, op. cit., p.37.
323. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.332.
324. See E., below.
325. Chapter Five, C.3., above.
326. See further, Chapter Five, C.4(a) above.

327. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", op. cit., and Gale, "Testing the Water", op. cit.
328. This is its common title. Its full title is the Historic Buildings and Monuments Commission for England. It was set up under the National Heritage Act 1983. See further, Chapter Seven, B., below.
329. National Heritage Act 1983, s.33.
330. English Heritage, Exploring Our Past: Strategies for the Archaeology of England (1991), preface.
331. National Heritage Act 1983, s.38.
332. See below for a list of the day-to-day responsibilities of the administrators of the Australian Commonwealth Historic Shipwrecks Act 1976.
333. In 1988 the President of the conservation action group Save said that: "English Heritage is one of the greatest achievements of this government" and it appears that conservationists think that English Heritage has been doing a good job: Sunday Times, 11 September 1988. English Heritage was actually established while Margaret Thatcher was in power.
334. See further, Chapter Seven, especially B., and Chapter Eight, B., below.
335. See, for example, K. Atkinson, "Private enterprise in maritime archaeology" (1987) 11 Bulletin of the Australian Institute of Maritime Archaeology 19.
336. G. Clark, "Exploring Sweden's nautical heritage", Fairplay, 16 March 1989. The excavation or raising of other vessels has also been sponsored, for example that of another Swedish vessel the Wasa, and the Gironia in Northern Ireland.
337. J. Gawronski of the Amsterdam Foundation, in a presentation given to the Advisory Committee on Historic Wreck Sites' meeting with licensees, the Royal Armouries, 25 November 1992.
338. Ibid.
339. And expensive. Financial projections indicate that the display will become profitable after one year: ibid.
340. Croome, op. cit.
341. See further, Chapter One, A.1(c) above. This would accord with the recently announced policy of English Heritage to hive off responsibility for certain ancient monuments on land: see further, Chapter Eight, B.2(a) below.
342. See further, A.4(a) above.
343. Lyon, op. cit., pp.237-241.
344. Amess, op. cit., p.51. The Commonwealth Historic Shipwrecks Act 1976 covers shipwrecks in "Australian" waters below the low-water mark. This protection extends to the limit of the continental shelf. The Act has been proclaimed in all the States of Australia and therefore applies to all Australian waters under Commonwealth jurisdiction. Complementary protective legislation enacted by the individual States covers wreck sites in internal State waters including bays, estuaries, gulfs and other

inlets along their coasts. This legislation is administered by the same authorities.

345. Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit.

346. Ibid.

347. K. Hosty, "Historic shipwreck legislation and the Australian diver: past, present and future" (1987) 11 Bulletin of the Australian Institute for Maritime Archaeology 21. Apparently after the formation of the association in Western Australia, the amount of looting occurring on wrecks in that State declined.

348. Hosty, op. cit., p.22. These criteria are laid down by the Department of Home Affairs and Environment.

349. B. Jeffery, "Some Views on the Historic Shipwrecks Legislation in South Australia" (1987) 11 Bulletin of the Australian Institute for Maritime Archaeology 17.

350. Australia's Historic Shipwrecks: Museums Beneath the Sea, op. cit.

351. For details, see Chapter Five, C., above.

352. See Chapter Seven, B., below.

## CHAPTER SEVEN: REFORM ISSUES: A WIDER PERSPECTIVE

### INTRODUCTION

Protection of the underwater cultural heritage cannot be considered fully if no account is taken of the broader context. What, for example, is the protective regime afforded by government to archaeological remains on land? The underlying principle in Heritage at Sea was that "archaeological sites of national importance underwater should receive no less protection than those on land".<sup>1</sup> What protection do archaeological sites of national importance on land receive? Is it only sites of national importance that receive protection? What sort of protection is afforded to individual artefacts? These are questions which this chapter attempts to answer. An examination of the position regarding land-based archaeology may generate ideas which could be applied in the marine sphere and will illustrate what can be achieved in the form of a protective regime. Furthermore, such an examination is necessary in order to ensure that there are no gaps in, and that there is consistency of approach to, the protection afforded to the archaeological heritage as a whole.

On land, the planning system and environmental protection schemes may afford some protection, directly or indirectly, to archaeology. Consideration will be given to these regimes, both on land and at sea, in order to assess where there is potential for conflict with, or assistance for, the underwater protective regime. The aim of the chapter as a whole is to obtain an understanding of the various legal regimes that exist and to see if an integrated framework can be established.



## A. LAND AND UNDERWATER HERITAGE:<sup>2</sup> COMMON TREATMENT?

The Council of Europe's Recommendation 848 (1978) and associated report<sup>3</sup> emphasised the importance of regarding underwater antiquities as part of our national heritage. One of the minimum legal requirements recommended in Recommendation 848 was that a single authority should be given primary responsibility for dealing with both land and underwater finds<sup>4</sup> and the Roper Report called for the centralisation of all cultural heritage protection in one government service.<sup>5</sup> This has been the case in other jurisdictions, notably Norway, Sweden, Finland, Australia and New Zealand for a number of years. However, until 1 April 1991, it was not the case in the UK. At that date the administrative responsibility for historic wrecks was transferred from the DTp to the DOE, which at that time dealt with land heritage matters. In April 1992 a further transfer took place of all archaeological matters, including the administration of the AMA 1979 and the PWA 1973, to the DNH (for England), Scottish Heritage, Cadw (for Wales) and the DOE (Northern Ireland).<sup>6</sup> One of the most cogent arguments for transferring the administration of the PWA 1973 away from the DTp was its anomalous position within the functions of that department, which resulted in its treatment as a low priority.<sup>7</sup> Those who had campaigned for the transfer felt that, within a department that already dealt with cultural heritage matters and which had responsibility for preserving the land-based archaeological heritage, it was a reasonable assumption that - at the least - the importance of the underwater cultural heritage would be understood and appreciated.

However, with the transfer of responsibility for the PWA 1973 away from the DTp it now appears that a battle had been won, but not the war! Very little actually changed in practice. Different officials now administer the legislation and the operation of the PWA 1973 is under review. Otherwise, the legislation remains the same and the

administrative practices and funding levels have not changed significantly. There has been no move towards a separate agency, legislative amendment or the allocation of extra funding (apart from of an ad hoc nature). In fact, underwater archaeology is being treated essentially in the same way now as it has been since the PWA 1973 came into force. A further problem that remains is the continuing application to underwater cultural property of the wreck and salvage law provisions in the MSA 1894, administered by the DTp. This requires a significant amount of liaison between the two administrative departments and can hardly be called a satisfactory state of affairs.<sup>8</sup> The underwater cultural heritage continues to be treated as the poor relation of the land-based cultural heritage. This becomes increasingly evident as one becomes familiar with the management structure and policies for land-based archaeology.<sup>9</sup>

The crucial factor which is missing is the recognition by government that underwater archaeological remains are worthy of being accorded the same level of protection as remains on land. As will be seen in the course of this chapter, this is manifestly not the case at present. Once this principle has been accepted, a proper management scheme can be initiated, legislative change can take place and funding can be made available for surveys, rescue archaeology, protective and enforcement measures, museum facilities, public education, and so on.<sup>10</sup>

There are various possibilities for the structure of cultural heritage legislation. Land and marine heritage can be afforded the same protective regime;<sup>11</sup> they can be given separate protective regimes in the same piece of legislation;<sup>12</sup> or they can be given separate protective regimes in separate pieces of legislation.<sup>13</sup> So far, this thesis has approached the issue of the underwater cultural heritage with the assumption that it should have its own protective legislative regime distinct from the terrestrial heritage. The basis for this

assumption will now be examined. Is it better that it does have a separate legislative regime or would there be advantages if the two regimes were amalgamated? A question that is frequently asked by marine archaeologists is: would an historic wreck fare better if it was afforded protection under the AMA 1979 rather than the PWA 1973?

I. General Comparison of the Legal Regimes for Protection of Archaeological Remains on Land and at Sea

(a) Protection of sites<sup>14</sup>

The AMA 1979<sup>15</sup> is the primary legislation safeguarding ancient monuments and archaeological remains on land. As is the case with the PWA 1973, the AMA 1979 aims to protect sites of archaeological importance from interference that is likely to damage or destroy their historical value. The monuments afforded protection by the AMA 1979 are listed in a schedule compiled and maintained by the Secretary of State,<sup>16</sup> and any monument that appears to the Secretary of State "to be of national importance"<sup>17</sup> may be added to the list. Although the Act leaves the matter of determining which monuments are scheduled very much to the Minister's discretion, non-statutory criteria were issued in 1983<sup>18</sup> which are intended to aid a professional judgment based on the circumstances of the case. In practice the Inspectorate of Ancient Monuments (consisting of professional archaeologists) undertakes selection upon the advice of English Heritage.<sup>19</sup>

Both the AMA 1979 and the PWA 1973 therefore create systems for the protection of sites considered of particular importance. The sites are chosen by the relevant Secretary of State upon the advice of a specialist panel within each department and after consultations with the various interests involved. However, the PWA 1973 criterion for

designation of wreck sites, "on account of the historical, archaeological or artistic importance" of the vessel or objects found there, can be contrasted with the AMA 1979 statutory criterion that monuments are scheduled if they appear to be of "national importance". One reason for the distinction is probably that the total underwater archaeological resource is unknown and therefore it is difficult to assess which sites are of "national" importance, whereas on land the National Archaeological Record<sup>20</sup> and county SMRs hold a great deal of information, built up over decades, about the archaeological resource.<sup>21</sup> A further distinction is that there are no non-statutory criteria available to aid the decision whether or not to designate under the PWA 1973.<sup>22</sup>

One no doubt unintentional result of the distinction in statutory criterion is that the PWA 1973 may extend protection to sites which are not of "national importance". This is because the criterion under the PWA 1973 is probably less restrictive than under the AMA 1979. Despite this, one notable difference between the two regimes is the number of protected sites in each jurisdiction: 37 under the PWA 1973 and about 13,000 under the AMA 1979. Of course, as a means of indicating the comparative importance of the sites afforded protection, the significance of these figures can only be seen if a rough estimate can be made of the number of sites in existence in each regime. On land, there are approximately 600,000 archaeological sites<sup>23</sup> and therefore roughly 2% of the total resource is afforded protected status. This surprisingly low percentage has been recognised as a defect by English Heritage and a programme is underway to increase the number of protected sites to about 60,000 (roughly 10% of the total resource).<sup>24</sup> By contrast, it has not been possible to approximate the number of underwater archaeological sites. Larn estimated that the number of wrecks of all kinds around the UK coast may be as many as 200,000.<sup>25</sup> By no means all these wrecks will be of archaeological significance and the figure does not take into account non-wreck marine archaeological

sites, but it seems likely that the overall percentage of the total archaeological resource being afforded protection underwater is much smaller than that on land and the current review of scheduled monuments will widen the discrepancy still further.

The foundation of the protection afforded a scheduled monument is that it is an offence<sup>26</sup> for any person to undertake virtually any sort of works to a scheduled monument unless authorised by the grant of "scheduled monument consent".<sup>27</sup> This includes repairing a monument or making alterations to it, as well as demolishing or damaging it. Scheduled monument consent may be granted upon application to the Secretary of State, who has a statutory duty to consult with English Heritage on such applications.<sup>28</sup> Consent may be granted conditionally, e.g. to enable the prior excavation and recording of a site (i.e. rescue archaeology), or to secure the monitoring of the works to allow the recording of archaeological information (known as a watching brief).<sup>29</sup>

Under the AMA 1979 and PWA 1973, therefore, it is possible for interested parties to apply for permission to "interfere" with protected sites. Applications will be considered by a specialist panel in each department and both forms of permission are usually conditional. However, applications will generally be made for very different reasons. In the case of scheduled monument consent, applications will usually be made in order to undertake minor works to a monument<sup>30</sup> and, occasionally, to demolish the monument or to undertake some form of development. In general, scheduled monument consent is not issued for excavations to take place, the policy of English Heritage being that scheduled monuments should be preserved in situ for the benefit of future generations.<sup>31</sup> There is recognition that excavation is destructive and that remains left undisturbed will "certainly yield greater information to future generations armed with more developed recording and analytical techniques".<sup>32</sup> In contrast, applications for

licences to "interfere" with a designated wreck in practice are made only by those wishing to investigate and excavate the site, whether they are interested in exploring its archaeological value or intend to exploit the wreck by raising and selling artefacts. Most designated wreck sites have licensees and the administrators of the PWA 1973 have exercised a policy of allowing survey and excavation, rather than providing protection in situ. This distinction in policies is quite pronounced and is extremely significant in terms of the comparative protection afforded.

Provision is also made in the AMA 1979 for public access to monuments, including scheduled monuments, under the ownership or guardianship of the Secretary of State, or local authority.<sup>33</sup> No such provision is made in the PWA 1973, although it is unclear whether simply diving over a designated site to look at it, but not to interfere with it, would be an offence under the Act.<sup>34</sup> Certainly, the Act appears to be interpreted as making this an offence.

In the context of enforcement, the protection afforded by the two statutory regimes varies significantly. Both the PWA 1973 and the AMA 1979 make unauthorised interference with protected sites an offence, but the PWA 1973 relies for the enforcement of its provisions almost entirely upon the reporting by the licensee of any interference with a designated site. In contrast, the AMA 1979 provides a varied range of protective measures and enforcement powers to prevent the breach of its provisions. For example, the Secretary of State may enter into a management agreement<sup>35</sup> with the occupier of an ancient monument for the purposes of, inter alia, maintaining the monument, restricting its use or making a specific prohibition. Alternatively, persons who have a proprietary interest in an ancient monument may by deed constitute the Secretary of State guardian of that monument.<sup>36</sup> The effect of such guardianship is that full control and management of the monument is

placed in the hands of the Secretary of State and, in return, the Secretary of State is under a duty to maintain the monument. The availability of such an arrangement reflects the willingness of government to accept direct responsibility for the protection of land sites. The AMA 1979 also provides a range of compulsory powers that may be used if it is believed that a scheduled monument is being destroyed or damaged, or if urgent maintenance and repair works are required.<sup>37</sup> For example, an authorised person may at reasonable times enter any land in order to carry out an inspection to ascertain, inter alia, the condition of a scheduled monument or whether any works are being carried out in contravention of the legislation. A national network of Field Monument Wardens has been created to inspect the condition of scheduled monuments and they are available to discuss with landowners and local authorities measures for the improved management of sites. Also, the Secretary of State has the power<sup>38</sup> to acquire compulsorily any ancient monument in order to secure its preservation.<sup>39</sup>

Sites in inland waters may be scheduled and there are at least 29 scheduled crannogs<sup>40</sup> in the inland lochs of Scotland.<sup>41</sup> Scheduled monument consent has not so far been applied for in respect of any of the scheduled crannogs, although it would need to be if such a monument was to be surveyed or excavated.<sup>42</sup>

As well as providing protection for specific sites, the AMA 1979 makes provision for certain areas to be designated as Areas of Archaeological Importance (AAIs).<sup>43</sup> It should be emphasised that designation as an AAI does not provide in situ protection for the archaeological remains within the area; rather it simply allows time and access for excavation and recording to take place before destruction. However, even under the provision for scheduling, it is possible to schedule quite large areas and this has been done where patterns of

land use are non-intensive and there is a single owner, e.g. on Salisbury Plain and in Perthshire. The ability to designate areas, as opposed simply to very restricted sites, would be very useful in the marine zone, although at present there is no such provision in the PWA 1973. However, such a provision should allow for in situ protection, rather than simply providing time and access for rescue archaeology.<sup>44</sup>

The AMA 1979 creates a number of offences relating to ancient monuments, including the use of metal detectors on scheduled sites or in AAIs without consent from English Heritage.<sup>45</sup> The power to prosecute offenders is not limited to the DNH or to English Heritage. Local authorities will often institute proceedings as they are usually the first to be made aware of damage to sites. They also have the archaeological expertise (within the County Archaeological Units) and local knowledge to follow up cases quickly. There is a departmental policy of encouraging criminal proceedings and there is recognition that well publicised, successful prosecutions can provide a valuable deterrent to the wilful damage or destruction of monuments.<sup>46</sup> This is in marked contrast to the dismal failure to obtain prosecutions under the PWA 1973 (or MSA 1894).<sup>47</sup>

To some extent the far greater range of protective measures available under the AMA 1979 is dependent upon the private ownership of land. Certainly, management agreements are applicable only in the context of private land ownership. The concepts of compulsory acquisition and guardianship might in some way be applicable to historic wrecks but this would depend on the government's desire to become responsible for the control and management of wreck sites. Another reason for the greater range of powers available on land is finance. The AMA 1979 makes provision for public expenditure in relation to ancient monuments. Section 24(1) provides that the Secretary of State may "defray or contribute towards the cost of the acquisition by any



person of any ancient monument" and s.24(2) provides that the Secretary of State may defray or contribute towards the cost of the removal of an ancient monument to another place for the purpose of preserving it. Furthermore, s.45(1) provides that the Secretary of State may defray or contribute towards the cost of archaeological investigations "of any land which he considers may contain an ancient monument or anything else of archaeological or historical interest". This provision has been interpreted very widely so as to include all forms of rescue archaeology.<sup>48</sup> The DNH has an annual budget of approximately £10 million for the administration of ancient monuments.<sup>49</sup> In contrast, the PWA 1973 itself makes no provision for funding<sup>50</sup> and only a very limited amount is made available for nautical archaeology from the general departmental budget. Until the ADU was established in 1986, funding was available only for the provision of buoys and signs. Funding for the ADU has increased from approximately £50,000 upon its inception, to £150,000 now.<sup>51</sup>

The AMA 1979 consolidates and amends legislation dating back 100 years<sup>52</sup> for the protection of ancient monuments on land. The considerable length of time in which there has been such legislation, and the allocation of substantial funding to its administration, certainly indicates a belief by government that it has a duty to protect the terrestrial heritage of the nation. Certain problems have also been overcome by amendments to the legislation over the years.<sup>53</sup> In contrast, the potential value of the underwater heritage was not widely appreciated until the early 1960s, when the development of diving techniques and the widespread availability of diving equipment meant that historic wrecks were being discovered for the first time. It was only at this stage, when the wrecks became accessible, that they became subject to interference and plundering. The PWA 1973 was enacted in haste to deal with a particular set of circumstances.<sup>54</sup> Little attention was given to how it would fit in with other legislative



provisions<sup>55</sup> and no attention at all was given to the relative protection afforded to the land and underwater archaeological heritage. The Ancient Monuments legislation in force in 1973 did not provide for scheduling of monuments in territorial waters<sup>56</sup> and therefore was inadequate to deal with the problems that were being faced. In Ireland, when important Spanish Armada vessels were found, the ordinary land-based archaeological provisions were initially applied and protective orders made.<sup>57</sup> However, it was considered that some form of blanket protection was required in the marine sphere so that sites not yet discovered would receive protection too.<sup>58</sup> It was felt that, by the time a site had been brought to the government's attention in order that it could receive a protective order, much damage may already have been done. The legislation was therefore amended to include specific provisions for historic wrecks.<sup>59</sup> This general pattern of development has been followed in other countries with a significant number of shipwrecks off their coasts, notably Denmark, Australia and Guernsey.

There is provision in the AMA 1979 for the protection of historic shipwrecks and other marine monuments by scheduling. Section 53(1) provides that a monument situated on, under, or in the seabed within UK territorial waters may be included in the schedule.<sup>60</sup> However, a site already protected by a designation order under the PWA 1973 may not be scheduled.<sup>61</sup> It is interesting that provision has been made for scheduling of undesignated wrecks as it would appear to produce a jurisdictional conflict in relation to the protection of wreck sites between the two pieces of legislation, and prior to April 1991, between government departments. This may be why, as yet, no underwater site in the territorial sea has been scheduled.<sup>62</sup> One unfortunate consequence of the reticence to schedule marine sites may be that marine monuments other than wrecks have in practice slipped between the two statutory frameworks: the administrators of the AMA 1979 being reluctant to encroach into the marine sphere and the PWA 1973 only applying to wreck

sites. If a marine site was scheduled under s.53, those proposing to dive and excavate the site would require scheduled monument consent. Unfortunately, the main instruments of protection provided by the AMA 1979, i.e. management agreements and guardianship, rely on the land ownership aspect and it therefore seems unlikely that they could be applied in the marine sphere. Nevertheless, the distinction in attitudes towards excavation of the administrators of the PWA 1973 and AMA 1979 may mean that a scheduled wreck site would be preserved in situ rather than surveyed and excavated and in this important respect would be afforded greater protection. Another way in which the AMA 1979 may be preferable is that if a wreck was given scheduled status then, although consent would be required for interference, the public would be allowed access to visit the site. This is seen by many as a necessary public relations exercise and a measure which could aid protection of sites in the marine zone.<sup>63</sup> Furthermore, there is specific provision in the AMA 1979 for funding for rescue archaeology and for the movement of, say a wreck, to "another place" for the purposes of preservation. The latter would be very useful for a project such as that undertaken by the Mary Rose Trust.<sup>64</sup>

#### (b) Protection of portable antiquities

On land and at sea, the situation in respect of portable antiquities is in many respects remarkably similar. In both jurisdictions, there is no general requirement to report objects of archaeological significance. Instead, there are antiquated laws, which apply to some archaeological objects but not others, which exist for purposes no longer required, and the administrators of which now attempt to manipulate in the interests of archaeology.

Surprisingly, under the AMA 1979 there is no general requirement to report objects found on a scheduled site.<sup>65</sup> The only restrictions

on removal of objects under the AMA 1979 apply to those using metal detectors. Part III of the AMA 1979 makes it an offence for anyone to use a metal detector, without prior consent, in a "protected place" (i.e. on a scheduled site or in an AAI), or to remove from such place any object of historic or archaeological interest discovered by use of a metal detector.

The only requirement to report finds on land sites, whether scheduled or not, relates to finds of treasure trove.<sup>66</sup> Under the law of treasure trove, "if articles of gold or silver in coin, bullion or plate have been concealed in the ground or other hiding place with a view to later repossession by an owner who can no longer be traced, such treasure when subsequently unearthed belongs to the Crown."<sup>67</sup> Originally the doctrine was used by the Crown to supplement the national coffers.<sup>68</sup> Now the doctrine is used, not as a source of revenue, but as a means of preserving archaeological artefacts for the nation. Anyone who finds an object which may be of gold or silver must report it to the Coroner (directly, or through the police or a museum).<sup>69</sup> A Coroner's inquest will decide whether or not the objects are treasure trove. Where an object is treasure trove, and a museum wishes to retain it, an ex gratia award based on the full market value of the item, is paid to the finder.<sup>70</sup> Where the object is not required for any museum, it is returned to the finder.<sup>71</sup>

Prott and O'Keefe have stated that "[i]n England, in default of other law comprehensively regulating archaeological discoveries, the law of treasure trove has become important for finds of archaeological significance." Unfortunately, the limitations on the artefacts which constitute treasure trove mean that it only applies in very narrow circumstances.<sup>72</sup> It is therefore perfectly legal for a landowner to have artefacts that do not fall within the requirements of treasure trove removed from the site and sold, without any requirement for

reporting of the find, or recording of the artefacts. This could well have been the fate of the Sutton Hoo ship-burial treasures had it not been for the generosity of the landowner, who made the find a gift for the nation.<sup>73</sup> Furthermore, application of the law of treasure trove may lead to the splitting up of finds from the same site because some of the finds will be treasure trove to which the Crown will be entitled and others will not be treasure trove, in which case the landowner or finder will generally be entitled. The law of treasure trove in its current form is clearly inadequate to deal with the protection of cultural property.<sup>74</sup> Over the years there have been a number of calls for its review and indeed a number of reviews have taken place, but they have not led to amendment of the law.<sup>75</sup>

The law of treasure trove is similar in many respects to the provisions relating to the reporting and disposal of wreck in Part IX of the MSA 1894. Treasure trove law was intended to serve a purpose for which it is no longer required, and is now applied to a situation for which it was not designed. It provides for reporting of a certain type of object which may or may not be of archaeological interest, and it does not provide for the reporting of all archaeological objects. The MSA 1894 provides for the reporting of material derived from a vessel; it does not provide for the reporting of artefacts from other types of marine archaeological site. Both laws lead to the splitting up of artefacts found together, contrary to the archaeological principle of integrity of finds. Both allow the Crown to claim its prerogative rights, although in the case of treasure trove the Crown then exercises those rights positively in the interests of the cultural heritage, by allowing the British Museum to have priority over the finder in acquiring artefacts and also by granting the Museum sufficient funding to pay for rewards. Sadly, this has not been the policy adopted in the marine sphere.

In Scotland, Northern Ireland and the Republic of Ireland the position in respect of land finds is somewhat different. In Scotland all newly discovered ancient objects, whether hidden or lost, and whether of precious metal or not, belong to the Crown. This is because a system of bona vacantia operates, which means that if someone dies intestate and has no relations, the estate goes to the Crown. All objects must be reported, even though the Crown may not always exercise its claim.<sup>76</sup> Where the Crown does exercise its claim, a reward is paid to the finder, according to the value of the find. In Northern Ireland, the Historic Monuments Act (Northern Ireland) 1971, s.12, provides that the finder of any archaeological object must, within 14 days of such finding, report to the Ulster Museum or to a police station, giving the circumstances of the finding and the nature of the object. In the Republic of Ireland, the state is entitled to any object of archaeological or historical significance found on its soil where the owner is not known,<sup>77</sup> and all archaeological finds must be reported.<sup>78</sup> So in all three jurisdictions there are systems that provide for the reporting of all archaeological finds.

In February 1988 the DOE<sup>79</sup> issued a Consultation Paper on Portable Antiquities. It formed part of a review of the arrangements for reporting important archaeological finds, announced in January 1987.<sup>80</sup> The basic question posed by the Consultation Paper was whether there should be a national system for the reporting and recording of casual archaeological finds and, if so, how it should operate. The review sought to address the arrangements for finds falling outside the definition of treasure trove.<sup>81</sup> It recognised that there was increasing concern on the part of archaeologists and others that important archaeological information was being lost through unrecorded removal of objects from the ground. Furthermore, the problem was increasing because of changing farming methods, the spread of commercial developments disturbing archaeological sites, and the

increasing use of metal detectors.

The DOE's 1988 Consultation Paper did not propose a system for the reporting and recording of finds. Instead it posed a number of questions to be answered by the respondents. Some of these questions are of interest in the context of reporting of underwater archaeological finds. They show the type of concerns that may be expressed by the government if a reporting system was proposed and they also provide a useful checklist. The questions were as follows:-

(i) *How widespread is the problem?* There was a request that, in the course of answers to this question, estimates (supported, if possible, by specific evidence) should be given of the number of objects being lost each year.

(ii) *Are the existing laws and controls adequate?* Here there was a request for the description of particular instances where the existing laws appeared to be inadequate.

(iii) *What is the solution?* The Consultation Paper stated that the DOE would "need to be convinced that new controls proposed are fair, reasonable and workable; are capable of being enforced and policed; and that the costs of implementation offer value for money." The Consultation Paper stated that a major consideration would be whether changes should be imposed by legislation or left to a voluntary code of practice.

(iv) *Which finds should be reported?* The Consultation Paper provided that clear and precise definitions were required of finds that must be reported and those which need not be declared. It pointed out that consideration should be given to how "non-experts can reasonably be expected to know whether an object

should be reported or not".<sup>82</sup>

(v) *How should reporting arrangements work?* Sub-questions raised here were: to whom should finds be reported? Within what timescale should finds be reported? What limits if any should there be upon the length of time the recording body may retain the object? What would be the implications of any new system for the work load and resources of the receiving bodies? What form should reporting take? Should there be a national archive relating to casual finds? Should there be a system for voluntary acquisition of important finds by local or national bodies? The paper suggested that obvious options for the reporting authority would be the local police or a local or national museum. It was pointed out that respondents should consider a possible conflict between a requirement that reporting take place within a certain time and the deterrent effect of possible sanctions against delayed reporting. The question was raised as to whether finders should be required to take the find to the reporting authority, or whether the find should be left in situ until a representative of the authority could examine it.

(vi) *Inducements - rewards or fines?* Sub-questions posed here were: should there be a system to encourage the reporting of finds? What would be the resource implications of such a system? Who should be responsible for payment of rewards? How would the value of finds be assessed?

What is significant is that virtually all of the questions are applicable to any consideration of a system of reporting for marine finds and indicate the type of issues which any proposal for such a system would need to address. For example, it would be necessary to provide the government with evidence that significant finds were not



being reported; to explain why the current law was inadequate; to propose a "fair, reasonable and workable" solution, capable of being enforced and policed and, of course, offering value for money! The scope of the questions also indicates that it may well be possible to have a combined system for the reporting and recording of finds from land and underwater sites. Both would need a local reporting point, which should either have archaeological expertise, or which should be able to refer to such expertise. In view of the joint national and county archives now being created to collate information about archaeological sites and finds from land and marine sites,<sup>83</sup> a joint reporting system may well be feasible. The main difference would be that finds from underwater sites would probably require immediate conservation treatment and care in order to preserve them, but there seems no reason why this requirement could not be catered for within the general reporting and handling mechanism.

Approximately 110 responses to the Consultation Paper were received, from a wide range of respondents, including local authorities, landowners, metal detecting groups, museums, archaeological bodies and a number of private individuals.<sup>84</sup> After consideration by the DOE of these responses, the conclusion was reached that "there is a valid public interest in the knowledge represented by casual archaeological finds, but that it was not so great as to warrant a compulsory reporting system".<sup>85</sup> This conclusion was announced by Lord Hesketh in the House of Lords on 13 December 1989.<sup>86</sup> He stated that the problems caused by amateur metal detector users would probably be best dealt with by education and that the real problem "lies with deliberate looting for commercial gain of objects of artistic or archaeological value", although he did not propose a solution to this.<sup>87</sup> He stated that proposals for the system in England and Wales to follow that in Scotland "would go too far" and that the public interest in archaeological finds was not such as to require "nationalisation of finds

in England and Wales". Why the public interest in England and Wales should be less than that in Scotland is unclear and, in any event, a simple reporting mechanism would not necessarily "nationalise" finds, unless ownership was vested in the Crown.<sup>88</sup> The fact that the government decided not to institute a reporting system for finds from land sites, despite acknowledging that there was a problem, does not bode well for any proposals that might be made for a reporting system for marine finds.

In the course of his statement, Lord Hesketh did announce that the DOE would seek a suitable legislative opportunity to amend the AMA 1979 to strengthen controls over finds from scheduled sites. In April 1991, the DOE issued a Consultation Paper on Proposed Amendments to Ancient Monuments Legislation and one of its proposals was that the removal of finds from scheduled sites without consent would be an offence. The 1991 Consultation Paper provided that "[s]uch a measure will significantly tighten the control on scheduled sites and lessen the loss of important archaeological information". In Lord Hesketh's statement in the House of Lords in 1989 he also announced that it was the intention of the DOE to "promote improvements in the administration procedures not involving legislation and dealing with non-scheduled sites - one such option being a code of practice", and this was confirmed by the 1991 Consultation Paper.<sup>89</sup> It appears that the DNH may issue a further consultation paper in respect of the measures suggested in its 1991 Consultation Paper to include revisions and additional measures.<sup>90</sup>

It is a great pity that the government does not seem willing to either broaden the concept of treasure trove in line with the system in Scotland, or abolish it altogether and replace it with a statutory system specifically designed for dealing with portable antiquities. One reason for this reluctance is probably the increased amount of funds which would be necessary to pay for rewards should the nature of finds

for which compensation is payable be widened. Obviously such reluctance would also be applicable for a system of reporting marine finds. The answer in both cases may be to institute a system for reporting all archaeological finds that does not rely on rewards.<sup>91</sup>

## 2. Archaeological Heritage on Land and at Sea: Inherent Characteristics

The archaeological heritage on land differs, in certain respects, from that at sea. The marine archaeological heritage is composed primarily of shipwrecks. By their very nature, ships are designed to be movable, whereas most land monuments were designed to be immovable.<sup>92</sup> In the case of land monuments it is desirable (and usually necessary) to preserve and protect them where they stand, unless the site is to be destroyed, in which case there is a need for rescue archaeology. In the case of wrecks, it has been the general practice to excavate them, record all the valuable information they contain and bring ashore finds, including in some cases the hull of the vessel itself. In some cases, the wreck site may simply contain a scattering of objects, including fragments of the hull. For this reason, and also because there is usually clear evidence of title to land sites, protection of such sites can generally be exercised without involvement with the disposal of property. In the historic wreck sphere, the issue of disposal raises some of the most difficult problems.<sup>93</sup> Recently, however, the policy of excavation of marine sites has been questioned by the archaeological community and calls are increasing for wrecks to be protected in situ for future generations to investigate when archaeological techniques and facilities have improved.<sup>94</sup> A policy whereby historic wrecks were generally protected in situ, unless there was a need for rescue archaeology, would reduce the necessity for separate treatment of land and marine sites. Underwater archaeological sites other than wrecks have much more in common, in this respect, with land sites. In

particular, there is little difference between underwater historic landscapes and historic landscapes on land.

Apart from the greater likelihood of portable material on underwater wreck sites, and the ownership and reward questions which arise in these cases, material raised from marine sites will often be bulky and waterlogged and will therefore require special conservation treatment and facilities. However, these requirements apply equally to material from inland waters and wetland sites and therefore cannot be said to be an inherent difference between archaeological remains on land and at sea.

Virtually all of the territorial seabed is owned by the Crown, but in practice the Crown obviously cannot exercise the same kind of control and user over territorial waters as an owner can exercise over his land. The tight control exercisable by a landowner can be utilised when drafting protective measures. The AMA 1979 has done this in a number of ways, and in particular by management agreements, whereby the occupier of a monument contracts to take care of it. Such a method of implementing protection is unavailable to underwater sites. It is true that a parallel can be drawn between the position of an occupier and that of a licensee of a wreck site. In the latter case, conditions may be imposed upon a licence to ensure that the licensee so far as possible protects the site. However, such protection cannot be relied upon because it encourages the policy of "exploitation".<sup>95</sup>

Preservation of terrestrial monuments may well interfere with the plans of landowners to develop their land or use it for agricultural or other purposes. In a similar way the protection of a wreck site may interfere with the interests of the Crown Estate Commissioners who may wish to issue, for the area in question, dredging licences or licences to fish-farm, which will bring in valuable royalties.<sup>96</sup> Other commercial

interests at sea may be affected too, for example salvage, dredging, construction and fishing, just as the protection of a monument on land may interfere with the interests of planners and developers. When these conflicts arise, whether on land or at sea, there will be a need to weigh the site's archaeological value with the value of the planned commercial use. On land, this process of evaluation takes place through the planning system; at sea little provision is made for such weighing of values.<sup>97</sup>

A further difference of some importance when considering legislative measures is that underwater sites may be affected by laws not applicable on land, notably wreck and salvage laws, which will apply unless expressly excluded. In practice, it may be difficult to exclude these laws because this would divest owners and salvors of their rights in wreck.<sup>98</sup> There may not be a clear cut-off point between commercial and archaeological interests and material of archaeological significance may well also be of value to salvors and insurers. These problems do not arise on land. Also, there are laws applicable to land sites, e.g. real property laws, planning and environmental laws, etc., which may be utilised for the benefit of archaeology but which are not available at sea. However, it would not be impossible to extend the effect of some of them into the marine zone.<sup>99</sup>

An obvious difference between land and underwater sites relates to their accessibility. In comparison with marine sites, land monuments are relatively accessible. This has advantages and disadvantages. Greater control and regulation of access needs to be maintained over land, as opposed to underwater monuments, in order to prevent wanton vandalism and other damage. Of course, there can be difficulties underwater caused by irresponsible divers who either do not know - or do not care - about the damage they may be causing, but there is less likelihood of wanton vandalism. On the other hand, the "policing" of

sites to enforce protective legislation is made considerably easier on land than at sea, because of this greater accessibility. The difficulties which arise in attempting to enforce protective measures at sea have already been discussed.<sup>100</sup> This factor is very important because it means that underwater sites require special protective measures, which would not be applicable to land sites.

Accessibility is also a factor of relevance to public education. On land, the general public is frequently entitled to visit ancient monuments and visits can be supervised by English Heritage and other heritage bodies. Such visits provide valuable revenue to offset the costs of protective measures, and also to some extent justify the large sums of public money spent on land archaeology.<sup>101</sup> The public is able to see what is being done – how the public funds are being spent – and at the same time can be educated about the importance of ancient monuments and the measures that are needed to preserve them. At sea, the need for visits to fulfil educational and public relations roles has been perceived, but there are obvious difficulties. Visits really need to be supervised in order to prevent abuse and this would probably only be possible for a very limited number of sites. Also, only those able to dive would be able to take part. The public as a whole would not be able to do so and, for this reason, there is an argument that some sites should be excavated and museums established in order to provide the general public with displays and information. In this way, the public would be able to see how its money was being used and would, at the same time, learn to appreciate the cultural heritage.

### 3. Is There a Need for Separate Legislation?

When the apparent differences between archaeological remains on land and at sea are analysed, it becomes clear that they are not so very great. However, the inherent differences that do exist between

land and underwater sites, particularly the differences that exist between wreck remains and land remains, result in there being a need for specific legislative provisions to cater for the peculiar needs of the underwater heritage. This is especially the case with regard to protective measures and enforcement. Such provisions could either constitute a separate legislative enactment or be incorporated into the AMA 1979. In Ireland the legislative provisions designed to protect land-based monuments were originally used to provide protection for historic wrecks, but it became clear that these provisions were not adequate to provide for the special needs of the underwater heritage.<sup>102</sup> Therefore, new provisions specifically to deal with historic wrecks were incorporated into the land-based statutory regime.<sup>103</sup>

An argument for having the provisions incorporated into the legislation applicable to land sites is that some consideration might then be given to how the provisions fit in with one another in order to prevent gaps in coverage and to have parallel protective measures - to provide a cohesive whole. In Ireland, the incorporation of the underwater provisions into the land-based legislative regime has led to integration in many respects, e.g. in relation to the reporting system, export restrictions and the use of detecting devices.<sup>104</sup> An argument for separate legislation relating to the underwater heritage is that the people who need to know about the underwater cultural protection laws, e.g. divers, treasure hunters, fishermen, offshore operators, etc., may not find it easy to locate provisions embedded in a land-based statute, and for this reason it might be better to have a separate piece of legislation, aptly named, to which they can refer. On balance, the writer would prefer one piece of legislation incorporating provisions relating to both types of heritage, since this would promote an integrated approach and would also encourage the government to afford equal, although in some respects different, treatment to the underwater heritage as to the land heritage.

## B. MANAGEMENT OF THE LAND-BASED ARCHAEOLOGICAL RESOURCE

The purpose of this section is to outline the system of management applied to the land-based archaeological resource in order to show that requirements identified in the underwater context, such as a comprehensive survey and inventory, funding for survey and excavation, public education, a management agency and so on,<sup>105</sup> are already being provided in a very full and comprehensive way on land. Therefore, the desire to have them implemented in the marine sphere is not as unrealistic as it may appear when the only comparison is the current system of dealing with marine archaeology. The section will also demonstrate that land heritage and underwater heritage currently receive glaringly unequal treatment. There is no archaeologically valid reason for this imbalance: in fact, some might argue that because of the "time-capsule" effect of a shipwreck,<sup>106</sup> and the remarkable preservative effects of water, underwater sites may in some instances yield greater information than land sites and may therefore be more valuable.

Much of the material in this section has been obtained from an English Heritage publication called Exploring Our Past: Strategies for the Archaeology of England.<sup>107</sup> This document reviewed the management of land archaeology during the 1980s and outlined the management strategies for the next decade. It was produced in consultation with many individuals and special interest groups within the archaeology profession and was endorsed by English Heritage's Ancient Monuments Advisory Committee as a framework within which to direct resources in future.<sup>108</sup> The sophistication of the management structures and processes outlined in this document illustrates the potential for similar management of the underwater archaeological heritage.



## 1. Record Enhancement

English Heritage was established in 1983 after the DOE decided that fresh policies were required for ancient monuments "to ensure the best use of archaeological resources based on correctly identified strategic priorities".<sup>109</sup> There was recognition that the basis for information about the archaeological resource needed to be improved in order to facilitate a programme which would preserve a representative sample of archaeological remains and to select the most significant sites on which to concentrate resources. It was also recognised that the compilation of consistent and compatible records of identifiable sites would provide the essential database from which management policies and decisions could be made and therefore resources should be directed towards the county SMRs. For these reasons, English Heritage provided pump-priming funds to increase the number of archaeologists employed within local authorities, the number increasing five-fold between 1983 and 1991. All counties now have at least one full-time archaeological officer who is responsible for the SMR and also advises planning departments. By the end of the 1990s, English Heritage plans that every county should have at least two established posts: Archaeological Officer and Sites and Monuments Records Officer.<sup>110</sup> Every county now has a basic computerised SMR and during the next decade there are plans to link the individual records with the National Archaeological Record held by the RCHME to form a fully integrated national inventory. County SMRs have been enhanced by the funding of survey and aerial reconnaissance projects and there are plans to use Geographical Information Systems (GIS) technologies to provide a national spatially-referenced record. Furthermore, in order to aid their management role, SMRs will be more fully integrated into the planning process and there will be amalgamation with the records of nature conservation, wildlife and other conservation and heritage interests.

The considerable investment which English Heritage has provided at the county level could be utilised for the management of marine archaeology too. Not only does the SMR system exist, it has also been well-resourced. The County Archaeological Officers have already accepted the need for their services in the marine sphere and the SMRs are extending to cover territorial waters.<sup>111</sup> However, in order to parallel the management capabilities of the SMR for land-based archaeology, it would be necessary for special funding to be allocated for the purpose of marine surveys. Such funding is already available for land-based surveys. It appears likely that the SMRs will provide a key management tool in future for land archaeology and there seems no reason why this should not also be the case for marine archaeology.

## 2. Monuments Protection Programme

One of the priorities for English Heritage upon its establishment was the selection of monuments for scheduling within the framework of a sampling policy aimed at ensuring the preservation of a representative sample of each class of monument. It had been obvious for a long time that the Schedule was totally inadequate and unrepresentative as a sample of known archaeological sites and monuments.<sup>112</sup> The rate at which sites were being discovered far exceeded the rate at which the Inspectorate of Ancient Monuments could evaluate them and select examples for scheduling. In 1984 a survey was undertaken of the archaeological resource as recorded by the SMRs and a comparison was made between that survey's results and the Schedule of ancient monuments. The results "confirmed that the Schedule no longer coincided with the consensus of informed opinion as to the monuments which were of most archaeological and historical interest".<sup>113</sup> It was recognised that only a very small percentage of known sites were scheduled, and that the distribution of sites by region and by chronological period was

seriously imbalanced. For these reasons, in 1986 the Monuments Protection Programme was initiated by English Heritage.<sup>114</sup> Its principal objectives were:-

i) to review and evaluate existing information about sites of archaeological and historical interest so that those of national importance could be identified;<sup>115</sup>

ii) to make recommendations to the Secretary of State that those monuments identified as being of national importance should be protected by law, or that some appropriate alternative action should be taken;

iii) to collate information on the condition of those monuments so that the resource requirements for future preservation, and the priorities for action, could be assessed.

A complete review has been undertaken of the scheduling procedures and a new computer-based mapping system has been introduced. Revised procedures have been developed for the systematic and nationally consistent evaluation of monuments to identify those which are of national importance, based on the published criteria. It is envisaged that there may be a significant increase in the number of sites afforded protection, by scheduling or some other mechanism, as a result of the Monuments Protection Programme. A review has suggested that up to 60,000 individual archaeological sites might need to be protected to give a properly representative schedule.<sup>116</sup> The programme is expected to take ten years to achieve its aims.<sup>117</sup>

Clearly a similar initiative could be undertaken for marine archaeology, in order to ensure the preservation of a representative sample of each class of wreck or other form of remains. However, it could only be undertaken once a full survey of the territorial sea had been completed.<sup>118</sup> Once such a survey had been completed, it would then be necessary to undertake field evaluations of each site to determine importance, condition, stability, etc. In this way, priorities for action could be determined.

### 3. Areas of High Archaeological Potential and Historic Landscapes

Two areas perceived in the early 1980s as requiring a management strategy were areas of high archaeological potential and areas of historic landscape.<sup>119</sup> Both were felt to be a valuable, but neglected, source of archaeological information. In the 1980s work began on the classification of historic landscapes, and surveys were undertaken to aid the development of scheduling and management policies for areas of high potential, including uplands, coastal zones, wetlands and river valleys.

It is interesting to note that Exploring Our Past identifies the offshore submerged zone as an area requiring survey and management in the next decade. In this respect, it provides that:-

"Whilst responsibility for offshore wrecks lies with the Department of Transport's underwater archaeological unit, there are large expanses of early Post-Glacial landscapes on the seabed which may contain well preserved occupation sites. Since the seabed is now under greater threat than before from commercial operations such as mineral extraction, there is a recognized need to develop underwater survey which might locate organically preserved prehistoric occupation remains. The Solent may prove to be the most needy, best documented and accessible area for such survey."

If English Heritage is willing to take on responsibility for the offshore zone in respect of remains other than wrecks, surely - if wrecks were taken out of their own separate legislative regime under the PWA 1973 - it may be willing to take on responsibility for them too.<sup>120</sup>

Exploring Our Past also recognises that scheduling affords tight control over discrete and closely defined sites, but can have limitations when applied to wider areas. It therefore recognises that a challenge for the next decade is to develop a range of strategies and techniques which can be applied to whatever is deemed worthy of

preservation.<sup>121</sup> These protective measures may allow continuing but restricted use of the land, e.g. for agricultural activities or for construction. Within the protected areas, the tighter, more restrictive controls provided by scheduling would be reserved for discrete features of importance.<sup>122</sup> The AAI concept may have been intended to apply in a similar way, but in practice its use has been extremely restricted.<sup>123</sup>

An analogy can be drawn with the protection of archaeological remains underwater. Historic landscapes exist underwater as well as on land and, increasingly, a need is being perceived for the protection of these, and other, areas of high archaeological potential. At present, such areas receive no protection at all in the marine zone; on land they do have some protection under the ordinary planning system.<sup>124</sup> It is interesting that English Heritage has identified the need for marine survey: such survey could be used to locate wreck and non-wreck remains. Categorisation of sites has been proposed for historic wrecks with tighter controls being exercised over some sites than others.<sup>125</sup> Furthermore, a concept whereby there are strict controls on activities within small areas, and limited controls on activities within wider areas has also been proposed for the marine zone.<sup>126</sup>

#### 4. Integration with Nature Conservation and Other Countryside Policies

English Heritage has supported certain multi-disciplinary landscape projects, some directed towards the preservation and management of landscapes, others in response to threats from commercial activities. Efforts have also been made to integrate archaeological considerations with countryside policies, in order to reduce the threat to vulnerable areas. Links in the fields of nature conservation, countryside management, and environmental protection have been developed. For

example, MAFF has recognised archaeological management as a major component of its Environmentally Sensitive Areas scheme. The Agriculture Act 1986 provides for the designation and management of Environmentally Sensitive Areas. Section 18 of the Act provides that if it appears to the Minister that "it is particularly desirable, inter alia, "to protect buildings or other objects of archaeological, architectural or historic interest in an area" and that "the maintenance or adoption of particular agricultural methods is likely to facilitate such conservation, enhancement or protection..." he may designate the area as an Environmentally Sensitive Area. The Minister can then make an agreement with a person "having an interest in" the land by which the person agrees to manage the land in accordance with the agreement in return for payments. Initiatives have been taken in various areas, for example in the Somerset Levels, where recognition of their archaeological importance has subsequently been confirmed by their designation as Environmentally Sensitive Areas. Wetlands, in particular, have been targetted because of their high archaeological potential and because of the threats that exist to their survival.

A number of recent statutes impose duties on regulatory bodies to have regard to the desirability of protecting and conserving sites and objects of archaeological interest.<sup>127</sup> The duties themselves are rather nebulous statements of principle - "to have regard to the desirability of protecting" - but they may help to heighten the awareness of statutory bodies of the importance of archaeology and its relevance to their functions and activities. It is, in reality, part of a process of education. For example, as a result of the duty imposed by the Water Act 1989 on the National Rivers Authority to take account of archaeology, the National Rivers Authority, in collaboration with English Heritage, held a conference in June 1990 entitled "The Water Environment: Our Cultural Heritage". The purpose of the conference was to discuss the ways in which the new duty could be undertaken and to

develop a policy on archaeology.<sup>128</sup> Even the Forestry Commission has issued guidelines on archaeological management and appointed archaeological staff. In the next decade, English Heritage plans to strengthen the developing links and "to explore new ways of integrating our concerns for the historic dimension with a broader range of conservation interests".<sup>129</sup>

Certainly, as Prott and O'Keefe have pointed out,<sup>130</sup> the association of the cultural and natural heritage is not an unnatural one. In fact such an association is well accepted internationally, for example through the UNESCO Convention on the World Cultural and Natural Heritage 1972 and the UNESCO Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage 1972. It is unclear what will be the exact impact on such integration of the transfer of responsibility for both land and marine archaeology away from the DOE to the DNH, but it may mean that such initiatives will not be so easy to pursue in the future. In the marine zone, conservation organisations are taking the initiative in developing an integrated approach, including provision for marine archaeology.<sup>131</sup> However, there may well also be great value in imposing statutory duties on such bodies as the Crown Estate Commissioners and the port and harbour authorities to have regard to the archaeological heritage when undertaking their activities, and granting consents for activities, in the marine zone.<sup>132</sup> The imposition of such duties would, as on land, heighten awareness of the archaeological resource and play some part in the general education process.<sup>133</sup>

## 5. Rescue Archaeology Funding

The main objective of English Heritage has been to secure the preservation of archaeological remains in situ wherever possible. Where

this is not possible, provision is made for preservation by record, otherwise known as rescue archaeology. In the early 1980s most funding for rescue archaeology was provided by central government, but during the following decade, projects received funds from a variety of other sources, including the Manpower Services Commission, local authorities and developers. By 1988, developers had begun to accept responsibility for shouldering the costs of archaeological recording arising from their proposals and they alone contributed an estimated £14 million to archaeological research.<sup>134</sup> English Heritage has made it clear that in its view responsibility for producing a record of archaeological remains which are unavoidably threatened by development and which cannot be preserved in situ lies with the developer.<sup>135</sup> As archaeological costs are increasingly regarded as part of the development budget, there has been a significant alteration in the balance of public and private funding for rescue archaeology. As a result, English Heritage has been able to direct its grant support to projects where no other source of funding is available. Nonetheless, of a total budget for archaeological activities in the 1992/93 period of approximately £10 million, English Heritage has allocated £7-8 million to rescue archaeology.<sup>136</sup> During the next decade English Heritage plans to continue funding the total cost of selected projects where all possibilities for saving the site or for attracting the necessary funding from elsewhere have been exhausted. It also plans to fund cases where it is not practicable for a developer to make full provision for the archaeological work required, for example where unpredicted and important evidence emerges subsequent to the granting of planning permission and beyond the resources allocated by the developer for archaeological work.

The success of developer funding for land archaeology is very encouraging and needs to be mirrored in the marine sphere.<sup>137</sup> Developers in the marine zone, such as dredging companies, oil and gas ventures, pipeline and cable laying companies and so on, need to be



persuaded that it should be their responsibility to shoulder the costs of rescue archaeology made necessary as a result of their proposals. If this was the case, public funding would only be required where a site was in danger through natural causes or - as on land - when the significance of the site was only discovered after the developer had settled its budget for the project.

Simon Jenkins, Deputy Chairman of English Heritage has specifically cited "maritime wrecks" as a pressing claim for public money in the archaeological field.<sup>138</sup> English Heritage has funded rescue archaeology for wrecks on land, for example it is currently funding the excavation of a Bronze Age, or possible Stone Age, ship found in Dover in September 1992.<sup>139</sup> It is also funding a survey to establish the extent, form and date of the ancient fish traps found off the coast of Essex in September 1992.<sup>140</sup> It therefore seems absurd if funding cannot be extended to marine wrecks also. In the Parliamentary Debates on the AMA 1979, Mr. Kenneth Marks, Under Secretary of State for the Environment, stated that:

"[a]lthough there is no statutory bar to expenditure of rescue archaeology funds [under the AMA 1979 s.45] on investigations at sea I should make it clear that my Department has no present intention of taking on this responsibility, which may largely be controlled elsewhere and for which we do not have the necessary resources."<sup>141</sup>

At the time this statement was made, responsibility for land monuments lay with the DOE and responsibility for historic wrecks with the DTp, and hence there may have been felt to be a jurisdictional conflict. Now, responsibility for both lies with the DNH, although the remit of English Heritage does not yet extend to administering the PWA 1973. Again, this may be seen to be a problem. It is interesting to note that Historic Scotland, which has responsibility for administering the AMA 1979 and the PWA 1973 in Scotland, has recently agreed to fund rescue work on the seventeenth century wreck off Duart Point, which was

designated under the PWA 1973 in 1992. This site has been badly destabilised by the wash of ferries and quite a lot of material has already been washed away.<sup>142</sup> It appears that English Heritage has recently suggested to DNH officials that it might be willing to fund some rescue archaeology in the marine zone, including for wreck sites.<sup>143</sup> If this is indeed the case, then this would be a significant step forward and may lead to English Heritage taking over full responsibility for administering the PWA 1973 in England, as its counterparts have already done in Scotland and Wales.

## 6. Other Funding

As well as funding for rescue archaeology, English Heritage provides funding for: expenditure on its own estate, i.e. the properties in its care; grants to local authorities and other bodies to support archaeological projects including the county SMRs; some training to improve professional standards; conferences; publications; and services which are provided centrally. Among these central services are the Central Excavation Unit and the Ancient Monuments Laboratory. The Central Excavation Unit provides support for local and regional archaeological units in undertaking rescue archaeology. A review by English Heritage in 1988/89 came to the conclusion that, during the 1990s, the Unit should have a role much more closely integrated to the management needs of English Heritage. This will entail:-

- i) the development and dissemination of improved methods and techniques;
- ii) the provision of advice, based on practical experience, in respect of archaeological activities undertaken and funded by English Heritage;
- iii) the collection and analysis of information for the formation of policies on protection, management and investigation of archaeological sites;
- iv) the undertaking of excavations on sites of national importance;

v) the provision of a mobile field team to undertake impact assessments, excavations, surveys, recording of buildings, evaluations and watching briefs, and to provide a rapid response in emergencies.

The role of the Central Excavation Unit can be seen to be mirrored to some extent in the marine zone by the ADU,<sup>144</sup> although the ADU's activities take place on a much smaller scale. However, if the ADU was provided with greater funding for staff and equipment, it could develop to take on very much the same role as the Central Excavation Unit and, in fact, this was essentially what was proposed by the JNAPC in Heritage at Sea<sup>145</sup> when it recommended the establishment of a maritime heritage protection agency.

The Ancient Monuments Laboratory provides conservation services for excavations funded by English Heritage. The work of the Laboratory is supported by contract staff spread through universities and museums and there are proposals for grouping these staff together into regional archaeological science centres. Since developer funding is becoming more and more prevalent, an area under review is the possibility of charging for the services of the Laboratory.

There would appear to be no practical reason why the Ancient Monuments Laboratory could not deal with material from marine, as well as, land archaeology. In fact, the Laboratory is already exploring ways of preserving waterlogged material as a result of the emphasis being placed on wetland sites. If the service was regionalised, as proposed, it might provide a useful facility for holding unstable marine artefacts while entitlement to them was established. If the Laboratory was utilised in this way, there would be a need to provide it with some extra funding, but the amount of extra funding is likely to be much less than would be necessary to establish special conservation units to deal only with material from marine sites.

## 7. The Management Cycle

English Heritage believes that the management of the archaeological resource is based on a series of stages which form the framework for decision-making and the formulation of strategies.

Together it calls the stages the "management cycle":-

### Stage 1:

Identification, recording and the understanding of the monument or historic landscape.

### Stage 2:

*Option 1* - curatorial management where the main aim is to arrest the natural and man-induced processes of decay through protection and management.

*Option 2* - exploitative management where the archaeological resource can be used for public enjoyment through interpretation and display, or for academic interest through investigation and excavation.

### Stage 3:

Recording - in exceptional circumstances, when preservation is no longer possible, because the value of the archaeological resource is outweighed by some other factor, a site may be excavated to record as much as possible of its structure and form and thus in effect preserve it as a record.<sup>146</sup>

Such a management cycle could have equal application in the marine sphere. Stage 1 represents the survey and inventory process, together with assessment of the findings and creation of strategies and priorities for protective measures, excavation, etc. Stage 2, Option 1 represents protection of sites in situ, perhaps through some work on the site to stabilise it, followed by reburial and regular monitoring. Stage 2, Option 2 represents sites which are investigated or excavated because the facilities are available and the knowledge which may be gained significant; alternatively sites which are accessible to visitors, perhaps on the lines of an underwater park. The final stage represents rescue archaeology which needs to take place on sites which have to be destroyed to make way for development. Underwater, this stage would also provide for rescue archaeology where there is a natural threat to

the site, for example through sandbank movements.<sup>147</sup> The overall objective, as on land, would be to secure the preservation of archaeological remains in situ wherever possible.

#### 8. Integrated Management for the Land and Underwater Archaeological Resource

The examination above shows that there is an enormous difference between the sophisticated treatment being afforded to archaeology on land and the treatment of underwater archaeology. However, it also shows that there is much potential for the integration of the management processes. There is certainly no valid archaeological reason for a line to be drawn at the low-water mark and for underwater archaeology to receive different, and substantially poorer, treatment. Some might argue that it is just unfortunate that an appreciation of the value of the underwater cultural heritage came too late since the current political and economic climate would not allow for the creation of new management structures. It should, however, be remembered that English Heritage was set up in the Thatcher period of office and is intended to run as a profit-making concern.<sup>148</sup> Furthermore, the prevailing political philosophy continues to encourage the hiving off of government responsibilities to independent and semi-independent agencies. Despite some tightening up of controls on funding evident in Exploring Our Past and a noticeable plateau having been reached in funding terms (since 1988/89 at around the £10 million mark), the government is clearly willing to allocate significant resources to land-based archaeology. English Heritage and its sister organisations in Scotland and Wales are in fact responsible for funding much of the current archaeology taking place on land in the UK. The writer believes that an integrated management and funding system should be established for the archaeological resource as a whole. As well-organised and well-

resourced management structures already exist, the amount of extra funding involved to incorporate underwater archaeology would not be so very significant, especially in view of the very large sums of public money already allocated to archaeology.<sup>149</sup>

Progress in this respect may well be made if English Heritage can be persuaded that an integrated approach to the archaeological heritage is the most logical and, in fact, is the only justifiable approach on archaeological grounds. Within English Heritage, underwater archaeology could be allocated its own budget; have its own committee analogous to the Ancient Monuments Committee to provide advice; a Central Excavation Unit of its own based on the ADU; and its own management strategies. The Ancient Monuments Laboratory could deal with material from both land and underwater sites. As the National Archaeological Record and the SMRs have accepted responsibility for recording sites and finds in the marine zone, some integration is already taking place.

Much needs to be done in the marine sphere to encourage and cajole developers and regulatory bodies to take archaeological considerations into account, and again some progress is being made in this respect.<sup>150</sup> As will be seen below, the planning system provides a secondary level of protection for the archaeological heritage on land, but at present there is no equivalent form of control over the marine zone although there are ways that such control could be afforded.<sup>151</sup> A co-ordinated framework for both the land and underwater archaeological heritage certainly appears workable. However, it is unlikely that English Heritage would be willing to take on full responsibility for the underwater heritage unless the government was willing to provide some extra funding and also, possibly, legislative amendment.<sup>152</sup> If this was to happen, underwater archaeology would have the opportunity of being afforded equal treatment with its counterpart on land.

## C. PLANNING AND REGULATORY REGIMES

### 1. The Planning Regime on Land

Apart from receiving protection under the AMA 1979, archaeology on land also receives protection through the town and country planning system. Before any development can take place, planning permission must be granted and archaeology is a material consideration in any planning decision.<sup>153</sup> This means that a local planning authority needs to weigh the relative importance of the archaeology against other material considerations. Should the considerations in favour of the proposed development receive the greatest weight, so that a decision is made to grant planning permission, the local planning authority has the power to impose conditions on the permission, or alternatively, to withhold consent until some form of archaeological agreement has been reached.<sup>154</sup> In this way provision can be made for rescue archaeology.

Recently, the position of archaeology in the planning system has been greatly strengthened by the publication of Planning Policy Guidance Note 16 (PPG 16) relating to archaeology.<sup>155</sup> This guidance note sets out the Secretary of State's policy relating to archaeological remains on land and places new emphasis on the preservation of remains in situ. The policy is summarised thus:

"Where nationally important archaeological remains, whether scheduled or not, and their settings, are affected by proposed development there should be a presumption in favour of their physical preservation".<sup>156</sup>

In cases involving remains of less than national importance the planning authorities will need to weigh the relative importance of archaeology against other material considerations. PPG 16 states that "[t]he desirability of preserving an ancient monument and its setting" is a material consideration in determining planning applications, that

preservation in situ of important archaeological remains is "nearly always to be preferred" and that preservation by record should be regarded as only a second best option.<sup>157</sup>

Within PPG 16, there is a great deal of emphasis upon management of the archaeological resource. It states that:-

"...the key to the future of the great majority of archaeological sites and historic landscapes lies with local authorities, acting within the framework set by central government, in their various capacities as planning, education and recreational authorities, as well as with the owners of sites themselves."

The basic thrust of PPG 16 is that local planning authorities should develop a strategy for the management of archaeological remains in their areas. They should undertake an evaluation of those remains in full consultation with English Heritage and their county SMRs.

Development plans, i.e. structure and local plans, "should include policies for the protection, enhancement and preservation of sites of archaeological interest and of their settings". In particular:-

"Archaeological remains identified and scheduled as being of national importance should normally be earmarked in development plans for preservation. Authorities should bear in mind that not all nationally important remains meriting preservation will necessarily be scheduled; such remains and, in appropriate circumstances, other unscheduled archaeological remains of more local importance, may also be identified in development plans as particularly worthy of preservation."<sup>158</sup>

Development plans are intended to provide an overall strategy for an area, taking into account the need for housing, shopping, recreation, transport, mineral extraction and conservation. The local plans must conform to the structure plans and each structure plan receives the consent of the Secretary of State. They can therefore form part of an overall national strategy.

PPG 16 encourages developers to consider archaeological considerations at a very earlier stage in their planning. It states



that they should make an initial assessment of whether the site is known or likely to contain archaeological remains and to do this they should consult the county SMR or English Heritage. Where there are indications that important archaeological remains may exist, it is reasonable for the local planning authority to request the prospective developer to arrange for an archaeological field evaluation to be carried out before any decision on the planning application is taken. For certain types of development, a formal environmental assessment may be required.<sup>159</sup> Where environmental assessment is necessary, the developer must provide a statement setting out certain information<sup>160</sup> and this includes information relating to any likely significant effects on the cultural heritage. It must also state the measures envisaged to avoid, reduce or remedy adverse effects.<sup>161</sup> The provision by the prospective developer of the results of assessments and evaluation will enable the local planning authority to make an informed and reasonable planning decision. Where applications are not adequately documented, local planning authorities may ask for further information or refuse planning permission.

Where planning authorities decide that preservation in situ of archaeological remains is not justified in the circumstances, and that development resulting in destruction of the remains should proceed, it is reasonable for the local planning authority to withhold permission until the developer has made satisfactory provision for rescue archaeology. Agreement between the developer and the archaeologist may be reached in a number of ways. Voluntary agreements are encouraged wherever possible and the British Archaeologists and Developers Liaison Group<sup>162</sup> has a voluntary Code of Practice which is used in many cases.<sup>163</sup> The Code of Practice places a series of obligations on both the developers and the archaeologists. For example, the developers agree to provide time, on-site facilities and funding for rescue archaeology. In return the archaeologists agree to complete the

work in as short a time as possible and also not to publicly bring pressure on the developers to alter the conditions of the agreement. The Code of Practice submits that "[v]oluntary agreements entered into freely will be generally accepted as more flexible and of greater mutual benefit to all parties than could be provided for by alternative statutory means."<sup>164</sup> The Confederation of British Industry has also produced a code of practice on archaeological investigations, this time for mineral operators.<sup>165</sup>

If attempts at voluntary agreement fail, the local planning authority may impose conditions on the grant of planning permission designed to ensure that rescue archaeology can take place. Such conditions are often phrased negatively to provide that development is prohibited until rescue archaeology has been undertaken. What this effectively means is that if the developer does not pay for rescue archaeology, then rescue archaeology is unlikely to take place and in that case neither will the development.<sup>166</sup>

In the majority of circumstances, developers will pay for rescue archaeology. A major reason for this is probably that it is a good public relations exercise. Payment may take place voluntarily, or it may be the result of a negatively phrased planning condition. Because developers often have to pay for rescue archaeology, they will take it into account when budgeting for the development. Their main concern will be that important archaeological remains may be discovered on the site as a result of investigations which they have allowed and funded. Obviously, the extent and importance of remains may not become evident until an investigation takes place. If important archaeological remains are then found, it is open to the Secretary of State for the National Heritage to schedule remains after planning permission has been granted. However, if this occurs and scheduled monument consent is then refused, or made conditional, compensation is payable to the developer.<sup>167</sup> It is

also open to a local planning authority or the Secretary of State for the Environment to revoke planning permission, but again compensation is payable.

So far, the requirement to pay compensation appears to have been sufficient to deter the scheduling of a monument after planning permission has been granted, or the revocation of planning permission. Instead, compromises appear to have been reached voluntarily. Probably the most well known example of a case where important archaeological remains were found after planning permission was granted was the Rose Theatre. The developers of the site obtained planning permission and agreed to fund an archaeological evaluation. This investigation revealed that the remains of the theatre still existed, despite previous building on the site. The Secretary of State decided not to schedule the remains and an application for judicial review of this decision resulted in the court holding that the Secretary of State was entitled to regard as a relevant factor the risk that compensation might be payable. However, the Secretary of State also took into account the fact that satisfactory protection of the site could be achieved through voluntary means. This was because the developers had agreed to build their office block on stilts over the site, with the theatre being preserved and displayed beneath the development.

Planning controls on land therefore provide an extra level of protection for scheduled sites and provide protection for unscheduled sites of national, regional or local importance. Through the operation of the planning system, developers have come to expect to pay for the rescue archaeology made necessary by their developments. This has resulted in developers funding a considerable amount of the archaeological activities taking place.<sup>168</sup> County Archaeological Officers provide a second tier of management for the archaeological resource. Acting at a local level, they provide the data from which sites of

national importance can be identified. By contributing to development plans they can ensure that consideration is given to preserving sites of local or regional - rather than national - importance. Later, as consultees in the planning process they can ensure that activities do not proceed before there is a thorough assessment of their impact on the archaeological resource. Any decision made on land to allow development to take place will have weighed in the balance the archaeological considerations. In the marine sphere the situation is very different.

## 2. The Regulatory Regime at Sea

The mean low-water mark is the normal limit for local planning authority control, although there are exceptions to this rule, for example in estuaries and harbours where local planning authority control may extend beyond the low-water mark. Outside planning authority jurisdiction, permission to undertake development work may be required from a surprising assortment of bodies.

Virtually all of the seabed lying below mean low-water is owned by the Crown as far as the limit of territorial waters.<sup>169</sup> In rare cases, parts of the seabed have been sold, for example a harbour authority may own the bed of the harbour. Much more frequently, parts of the seabed have been leased, to harbour authorities, fish farming enterprises, etc. Clearly, before any development can take place, the permission of the landowner or lessees must be sought. The Crown Estate Commissioners, on behalf of the Crown, issue leases and licences in respect of activities to take place on the seabed, primarily marine aggregate extraction and marine fish-farming. Under the Crown Estate Act 1961, s.1(3), the Commissioners have a duty "to maintain and enhance [the] value [of the estate] and the return obtained from it, but with

due regard to the requirements of good management". What this effectively means is that they have a duty to operate on a commercial, profit-making, basis.

(a) Dredging

As has already been shown,<sup>170</sup> dredging is an activity which poses a particular threat to the underwater heritage. Dredging is undertaken for a variety of purposes, e.g. by harbour authorities to clear navigation channels and by marine aggregate companies. Here the regulatory regime for aggregate dredging will be examined in detail since this activity is undertaken over wide areas around the UK coast and is therefore likely to have a significant impact on the underwater cultural resource.

In order to dredge for sand and gravel,<sup>171</sup> licences may be required from a number of different bodies. The Crown Estate Commissioners issue licences to areas of the seabed owned by the Crown in return for royalties on the material landed.<sup>172</sup> Such licences will normally be issued only after consultation with various government departments and others whose interests may be affected. This consultation takes place under the "Government View" consultation procedure, as revised in 1989.<sup>173</sup>

An outline proposal for dredging is first submitted to the Crown Estate Commissioners who then undertake informal consultations with bodies with statutory responsibilities in the marine field. In the light of representations received, the Commissioners will consider whether the proposal generates environmental effects which are likely to be "significant" and therefore warrant environmental assessment. One indicator of the type of case for which environmental assessment may be required is if dredging is proposed within 500 metres of a wreck

designated under the PWA 1973.<sup>174</sup> This does not, however, mean that environmental assessment will be requested in all such cases. A formal application for a licence will then be prepared by the proponents of the scheme which will include specific proposals for overcoming or ameliorating any objections raised during the informal consultations, and an environmental statement if required. Once the formal application is received by the Commissioners it is then referred to the DOE<sup>175</sup> for a "Government View". At this stage there will be further consultation with the organisations that previously made a representation and the DOE will consult with other government departments. It appears that the main focus of the Government View procedure is the effect of the proposed dredging activity on patterns of marine sediment and, to a lesser extent, on marine life of commercial interest.<sup>176</sup> Nonetheless, it was DTp policy, and presumably continues to be the policy under the DNH, to ensure that consent would not be granted for dredging in areas designated under the PWA 1973.<sup>177</sup> If - in light of these consultations - the DOE agrees that in the public interest dredging should go ahead, a favourable Government View (perhaps subject to conditions) will result. If a department raises an overriding objection which cannot be overcome, an unfavourable Government View will be issued. On the basis of a favourable Government View, the Commissioners will then decide whether to issue a licence and on what conditions.

In addition to a licence from the Crown Estate Commissioners, proponents of a dredging scheme will require the consent of the Secretary of State for Transport under s.34 of the Coast Protection Act 1949 in relation to operations which may cause obstruction to navigation. Port authorities too may issue licences in respect of dredging to take place within port limits. In certain circumstances a coast protection authority may make an order applying the provisions of s.18 of the Coast Protection Act to its area.<sup>178</sup> This will make it unlawful to excavate or remove any materials on, under or forming part

of any portion of the seashore to which the section is applied without the authority of a licence. Although 30 local district councils have been constituted coast protection authorities,<sup>179</sup> it appears that only the South Wight Borough Council has made an order applying the provisions of s.18 to its area.<sup>180</sup> Furthermore, planning permission may be required from the county council, in its role as the mineral planning authority, if its boundaries extend beyond the low-water mark into an estuary which includes an application area.

(b) Other operations and activities

Statutory consents are required from various bodies for other operations at sea, many of which may have an impact upon the underwater archaeological resource.<sup>181</sup> Again, the DTp, under the Coast Protection Act 1949 s.34, must give consent before operations take place on the seabed, where "obstruction or danger to navigation is caused or is likely to result." Many harbour authorities are empowered by local Acts to permit operations in their harbour areas.<sup>182</sup> Such works may also be undertaken by the harbour authority itself, or under licence from the harbour authority. Control over sea fisheries is exercised jointly by regional Sea Fisheries Committees under the Sea Fisheries Regulation Act 1966, and the National Rivers Authority under the Salmon and Freshwater Fisheries Act 1975. MAFF exercises control over most shell fisheries under the Sea Fisheries (Shellfish) Act 1967. Licensing procedures for dumping at sea and coastal defence works are regulated by MAFF under the Food and Environment Protection Act 1985. The National Rivers Authority must give consent to the erection of structures on certain rivers.<sup>183</sup> Licences for the exploration and exploitation of oil and gas must be obtained from the Department of Energy. Works which may interfere with rights of navigation, and where the necessary authority cannot be obtained elsewhere, will require the permission of Parliament through the private bill procedure, or through

the order-making procedure set out in the Transport and Works Act 1992.

It is unclear how far, if at all, underwater archaeology is considered in these consent procedures. Where the DOE is a consultee in the process, prior to 1992 any designated or scheduled sites in the vicinity of the proposed operation would probably have been taken into account. Whether the newly created DNH has become a consultee in any of the processes is unknown. What is clear, however, is that - at the very most - sites designated under the PWA 1973 will be taken into account. No consideration will be given to non-designated archaeological remains in the marine zone, unless there is a likelihood of significant impact, in which case an environmental assessment will probably be required.<sup>184</sup>

With such a large number of bodies able to give permission for offshore development work, it is not easy to institute an overall management policy for marine archaeology in the same way as on land. Some of the bodies which comprise the marine regulatory regime - notably the Crown Estate Commissioners and the harbour authorities - are also self-regulating and have been said to act as "poacher and gamekeeper". For example, the Crown Estate Commissioners judge whether or not an environmental assessment is required for aggregate dredging proposals,<sup>185</sup> yet this may well conflict with their profit-making objectives. If consent for a particular operation is refused, as a result of environmental assessment, then the Crown Estate will lose valuable revenue. For example, its net income through aggregate royalties was forecast to be £12.5 million in 1992/93.<sup>186</sup> The Commissioners therefore clearly have a vested interest in allowing as much dredging to take place as possible. Indeed, it has been said that they are reluctant to request environmental assessment, believing that the Government View procedure serves the purpose.<sup>187</sup>



In distinct contrast to the position on land, no account is taken of the wider archaeological resource: it is not considered to be a "material consideration" when applications for consent to activities on the seabed are determined (and will only be considered at all if an environmental assessment is required<sup>188</sup>). There is a clear need for a wider perspective to be taken, as on land, so that non-designated sites and areas of high archaeological potential are taken into account in the decision-making procedure, along with the small number of sites designated under the PWA 1973. Provision in this respect would then allow for some sort of management process for the underwater archaeological resource.

(c) Environmental assessment

Provision has been made for environmental assessment in the marine zone, although the provision differs according to the nature of the development<sup>189</sup> and there appear to be several gaps and inconsistencies in the coverage and application of the various regulations. For example, certain fishing operations are not covered, nor are port dredging proposals,<sup>190</sup> and the Crown Estate Commissioners only undertake environmental assessments in relation to aggregate dredging as part of a procedure agreed with the DOE and they are not under any statutory duty to do so. Again, as is the position on land, requests for environmental assessment in most cases should only be made once it has been demonstrated that there is a likelihood of significant environmental effects from a proposed development. On land this approach may be acceptable, from an archaeological point of view, because the presence of archaeological remains can be assessed by referring to the county SMR. Areas of high archaeological potential are therefore identifiable. At sea, it is not yet possible to identify areas of high archaeological potential (apart from in exceptional cases, such as the Goodwin Sands<sup>191</sup>) and it will not be possible to do so until

national and county records are fully developed.<sup>192</sup>

Several environmental assessments have been submitted for marina developments around the Isle of Wight. It appears that, in general, rather than undertaking their own field survey the consultants relied on the county SMR for information regarding marine archaeological remains, despite being told that this provided imperfect information by which to assess the effects of development on the seabed.<sup>193</sup> When consulted by the Planning Department about the proposed developments, the County Archaeological Officer explained that without field survey, the environmental assessments would not be able to make a proper evaluation of the effects of the proposed development on archaeological remains. Planning permission for at least one marina development was therefore made conditional upon an assessment being undertaken of the underwater archaeological resource by remote sensing, even though environmental assessment had already taken place.<sup>194</sup>

Evidently, there are problems in taking full account of the marine archaeological resource, even when an environmental assessment is required. However, unless environmental assessment is required, only sites designated under the PWA 1973 are likely to be taken into account when a decision is made on whether or not to issue a consent.

(d) Voluntary codes of conduct

In view of the success of voluntary codes of practice and agreements between developers and archaeologists on land, the JNAPC – in liaison with the DNH and DOE – has been attempting to develop a voluntary code of practice relating to development on the seabed. The Code of Practice of the British Archaeologists and Developers Liaison Group has been used as a model. A draft has been produced and negotiations are currently underway to obtain its endorsement by the

Crown Estate Commissioners, the aggregate industry and port associations.

In drawing up the Code, care was originally taken to balance the interests of both sides. One of the earlier drafts provided that the Archaeologist would "be fully aware of the costs caused by delays and therefore aim to complete the work in the shortest possible time"; "observe commercial confidentiality with respect to early information on proposed new developments"; "inform the developer of any tax benefits available for financial support of the work". For its part the Developer would "accept that the protection of the archaeological heritage is a legitimate factor to be included in the planning of seabed work"; "at the earliest opportunity seek professional archaeological evaluation of potential development or extraction sites"; "allow adequate time for the negotiation and implementation of desk studies and field surveys by approved archaeologists". However, the latest draft<sup>195</sup> has only a watered down version of these commitments. It provides that the developer should, "[a]t the earliest opportunity...consult archaeologists to establish whether potential development programmes would be likely to affect a site of archaeological interest".<sup>196</sup> It is also "anticipated that seabed developers will give careful consideration to making financial and practical resources available for any necessary maritime archaeological survey and investigation programmes resulting from their development proposals."<sup>197</sup> The commitments undertaken by the archaeologists appear to have been reduced to: "[t]he archaeologists will make available to the developer such information as they possess relating to the proposed development site, and will draw attention to sites of maritime archaeological interest..." and "[t]he archaeologists will be conscious of the potential public relations benefits to developers of publicising their work...".<sup>198</sup> Why the draft has been altered in this way is unknown, but presumably it is because of failure to achieve the agreement of the various parties to a wider range of

duties. It does seem a pity to depart from the British Archaeologists and Developers Liaison Group model, which has proved so successful, and the impact of the Code may well be weakened as a result.

(e) Extension of planning jurisdiction boundaries

At present, there is no unified approach to the regulation of operations and activities affecting the seabed around the UK coast. The division of responsibility is haphazard and, in the case of the Crown Estate Commissioners and harbour authorities, the regulatory body has a vested interest in commercial development. Some efforts have been made, for example by the South Wight Borough Council, to explore avenues for utilising existing legislation and practices to provide some measure of protection for underwater sites. However, the government needs to address the question of a comprehensive planning regime for marine developments.

One way forward may be for coastal counties to extend their boundaries in order to take charge of the regulatory regime for the territorial sea. There is already statutory provision for such extension: the Local Government Act 1972 s.71 gives the Local Government Boundaries Commission express power to review existing county boundaries, so as to extend them to include any area of the sea not included in another county. To be effective, such extension could not take place on an ad hoc basis, but would need to be undertaken in all coastal counties. This would legitimise the County Archaeological Officer's unofficial role in the marine zone, which is illustrated by the inclusion within county SMRs of marine sites.<sup>199</sup> Once planning authorities had achieved jurisdiction over the area beyond low-water mark, it would be possible to set up a planning regime similar to that on land.<sup>200</sup> Gale suggests that this could be done by grouping counties into Coastal Zone Regions which would prepare development plans and

would be responsible for giving planning permission.<sup>201</sup> Such permission would be required in addition to that required from existing licensing authorities. Such a structure would enable the marine archaeological resource to be dealt with by a planning regime in a similar way to the archaeological resource on land.<sup>202</sup> The extension of planning jurisdiction beyond low-water mark is currently under consideration by government.<sup>203</sup>

Some counties have already taken an interest in the marine zone. For example, Hampshire and Wight County Councils have taken part in an initiative to establish the Hampshire and Wight Trust for Maritime Archaeology, the general objective of which is "[t]o promote the education of the public in matters of maritime archaeological interest and to seek to preserve important maritime archaeological sites and artefacts."<sup>204</sup> Other members of the trust include local MPs, representatives of English Heritage, the Royal Navy, the Mary Rose Trust and the RCHME.

#### D. CONSERVATION AREAS IN THE MARINE ZONE

On land, certain areas notable for their landscape or wildlife have received special protection through some form of statutory designation, for example National Parks,<sup>205</sup> Areas of Outstanding Natural Beauty,<sup>206</sup> Sites of Special Scientific Interest,<sup>207</sup> National Nature Reserves<sup>208</sup> and Environmentally Sensitive Areas.<sup>209</sup> These areas are subject to restrictions on their use and are the subject of a management scheme. In some cases, for example Environmentally Sensitive Areas, archaeology is a factor taken into account in the management of the area.<sup>210</sup> In other cases, designation provides protection indirectly for archaeological remains within the area, and it appears that designated areas are likely to contain significant archaeological remains because

they are, by their very nature, areas relatively unscathed by human activity.<sup>211</sup> There are also certain non-statutory areas on land which receive some form of recognition, e.g. Heritage Coasts,<sup>212</sup> and sites designated as "Wetlands of International Importance", especially as wildfowl habitats under the Ramsar Convention on Wetlands of International Importance 1971. Both statutory and non-statutory designations are taken into account when local planning authorities prepare development plans and determine applications for planning permission. None of the designations extends below the low-water mark.

These designated zones on land are paralleled to a limited extent in territorial waters, although restricted areas in the marine sphere have so far proved to be contentious. In the Wildlife and Countryside Act 1981 there is provision for the establishment of Marine Nature Reserves in territorial waters out to three miles.<sup>213</sup> Marine Nature Reserves are the only statutory marine conservation area. The purpose of these reserves is to conserve flora, fauna, geological or physiographical features of special interest in the area and to provide special opportunities for study and research.<sup>214</sup> English Nature has the power to make bylaws to protect Marine Nature Reserves, in particular to prohibit entry into and movement within a reserve; to prevent interference with any animal, plant, or object, or with the seabed itself; and to prohibit the depositing of any rubbish.<sup>215</sup> Unfortunately, the original proposals for a first round of seven reserves were abandoned and only two small reserves have been declared: the waters around Lundy Island off Cornwall in 1986 and an area around Skomer Island off Dyfed in 1990.<sup>216</sup> The problem appears to have been that the government has insisted on virtually complete agreement on the part of all affected user groups before it would proceed with designation.<sup>217</sup> Even the proposals for designation of the existing Marine Nature Reserves were met by considerable opposition and there were years of difficult negotiations before they were declared.<sup>218</sup> In any event,

compromises were made in respect of both areas which have weakened the protection provided. In the Lundy Marine Nature Reserve the main trawling ground was excluded from the bylaw prohibiting trawling and in the Skomer Marine Nature Reserve proposed controls on access have been replaced with voluntary codes of conduct.<sup>219</sup> Proposals for the designation of Marine Nature Reserves in the Scilly Isles and at St. Abbs were dropped after vehement opposition.

The lack of progress with Marine Nature Reserves<sup>220</sup> led English Nature to institute an informal system of Marine Conservation Areas. Areas were designated as Marine Conservation Areas to draw the attention of the Crown Estate Commissioners, when issuing leases and licences for seabed activities, to sites of particular environmental quality and sensitivity. However, a survey of grants of leases for fish farms showed that designation as a Marine Consultation Area appeared to make no difference at all to the likelihood of a lease being granted.<sup>221</sup>

Recognition by the government that there was a nature conservation interest which extended beyond Marine Nature Reserves became apparent in February 1992 when the DOE<sup>222</sup> issued a Consultation Paper on Marine Conservation Areas.<sup>223</sup> This proposes a system of voluntary consultation for activities taking place in certain designated areas. The system, as proposed, only relates to flora, fauna and geological features of interest. There is no mention of underwater archaeology. The proposed system is intended to operate as follows:-

- (i) Sites of marine conservation interest will be formally identified and listed.
- (ii) All bodies, both private and public, taking decisions on proposals that might affect that interest are asked to consult English Nature at the earliest possible stage.
- (iii) All bodies giving formal approvals to such proposals are asked to check that consultation has taken place.
- (iv) Any advice offered by the conservation agencies is to be

given due weight by those decision-makers.

(v) Conservation agencies should be told of the decisions eventually taken in the light of their advice.<sup>224</sup>

Sixteen areas are proposed for designation in the first instance and these are intended to be sites which are important for nature conservation and where there is significant potential for other activities to conflict with this conservation interest. The areas vary in size but generally extend from high-water mark to a maximum of two miles out to sea and several miles along the coastline.<sup>225</sup> Where a Site of Special Scientific Interest already extends from landward to the low-water mark, the Marine Consultation Area begins at the low-water mark. Designated and proposed Marine Nature Reserves are included within the proposed list since the voluntary consultation intended would add to the statutory consultative mechanisms.

It is a pity that the proposal covers only a limited range of interests and that one of the interests excluded is marine archaeology. Also, a system of voluntary consultation appears weak, especially in light of the negligible impact that the original concept of marine consultation areas had on actual decisions made by the Crown Estate Commissioners. It may be useful as an additional control mechanism and as a means of providing regulatory bodies with advice on conservation implications, but it should not replace a statutory system of protection.

Since the enactment of the provisions for Marine Nature Reserves in 1981, conservation bodies have become increasingly dissatisfied with the existing programmes for the protection of marine areas of conservation importance. As a result, the Marine Conservation Society,<sup>226</sup> in consultation with a large number of conservation interest groups, including the World Wide Fund for Nature, Greenpeace and the Royal Society for the Protection of Birds, has produced a discussion



document proposing a statutory designation called a "Marine Protected Area".<sup>227</sup> This proposed designation has much wider objectives than Marine Consultation Areas and is intended to provide a statutory framework for the integrated management of marine resources, including seascapes, geological, physiographical and archaeological features, marine habitats and wildlife, and to fulfil the UK's European and international conservation responsibilities.<sup>228</sup> It is also intended to benefit different uses of the sea ranging from navigation and fishing to research, education and recreation. It was felt that the precise limits of the designations would need to be the subject of discussions, but that they should apply to any intertidal or subtidal area at least to the limits of territorial waters and, if appropriate, beyond.<sup>229</sup> The landward extent of the designations should encompass enough of the coastal fringe to prevent artificial boundaries. The proposal advocates the use of the "precautionary principle" in protected areas, whereby activities are not allowed to proceed merely because there is no evidence to show that they are harmful.<sup>230</sup>

The proposals are for a two-tier system of site protection consisting of "Type 1" areas which would provide strict protection for conservation purposes and "Type 2" areas which would be less restrictive but would provide for the management of activities in order to meet conservation needs. It is possible to draw an analogy between this two-tier structure and the policies being proposed for the protection of land archaeology during the next decade,<sup>231</sup> i.e. tight controls over certain sites of particular importance and lighter controls over some other areas. In Type 1 areas there would be a presumption against any activities unless licensed.<sup>232</sup> Type 1 areas would generally be smaller than Type 2 areas and would often be designated within Type 2 areas so that the Type 2 area could act as a buffer zone. Type 1 areas would generally be permanent, although some controls may operate on a seasonal basis and there may be occasions

where a temporary designation would be desirable to allow a research project to take place, for example an archaeological survey or excavation. Type 2 areas would cover much larger areas and within such areas activities would generally be unrestricted, except for activities expressly prohibited or regulated.<sup>233</sup> A variety of protective measures could be used in these zones such as wardening, seasonal closures, bylaws, voluntary initiatives, etc. It is proposed that any proposed change in, or intensification of, activities in a Type 2 area would have to be notified to a co-ordinating body which would have the power to accept or reject the proposals.<sup>234</sup>

It is envisaged that the Marine Protected Area scheme would remove the need for Marine Nature Reserves and could be used to give greater strength to designations that presently work on a voluntary basis only. The level of protection envisaged would be analogous with Sites of Special Scientific Interest on land, whereby English Nature is empowered to notify certain areas as Sites of Special Scientific Interest to the local planning authority as a signal that English Nature has to be alerted to any development that is proposed that might affect the site.<sup>235</sup>

Exactly how underwater archaeological sites would be dealt with within the two-tier system has yet to be worked out, but a draft paper on this subject has already been produced.<sup>236</sup> This suggests that the strict protection of a Type 1 area would ensure that excavation work could be carried out free of disturbance either on a temporary or permanent basis. The Type 2 area would allow for information to be gathered about remains on the seabed, while maximum access was provided which would allow educational and training activities to be undertaken in controlled conditions.<sup>237</sup> Categorisation of sites, protection for areas of high archaeological potential, and access to sites, all seen as advantageous to the general protection of the underwater cultural

heritage,<sup>238</sup> may be promoted by the Marine Protected Areas approach. In the current draft proposals, the emphasis placed on excavation in Type 1 areas is probably too heavy; rather Type 1 areas should generally provide protection in situ for wrecks of particular importance. Where rescue archaeology is required, temporary designation as a Type 1 area may be desirable.

In general, the proposal for Marine Protected Areas is ambitious and would require a considerable amount of liaison and agreement with national and international regulatory bodies before it could be brought into force. Its greatest strength is that it provides an integrated framework which would afford protection to a wide variety of conservation interests and would be capable of regulating and managing all sea uses. Exactly how Marine Protected Areas would work in practice has not been made clear in the current proposals. For example, would certain Marine Protected Areas be designated to fulfil the needs of particular interest groups or would the area designated have to fulfil the requirements of a number of interests? How many areas are envisaged and what would be their extent? Whether the scheme is too ambitious to ever be fully implemented remains to be seen. In the writer's opinion, it probably is. The enormous contrast between this scheme and the voluntary Marine Conservation Areas proposed by the DOE illustrates the gap in thinking on this issue between the conservation agencies and the government. The government's main concern appears to be to meet its international obligations, which the Marine Nature Reserve designation does not do. Otherwise, it wishes to work within existing legal frameworks wherever possible.<sup>239</sup>

From the viewpoint of underwater archaeology, it is unclear how a Marine Protected Areas scheme would fit in with an overall management policy for the underwater heritage. It is almost certainly too broad a concept to replace a separate strategic management policy for

underwater archaeology. However, the needs of underwater archaeology do to some extent overlap with the needs of other conservation groups. For example, shipwrecks of all ages are known to attract marine life and this means that fishermen tend to trawl over known wreck sites since they are likely to contain fish.<sup>240</sup> Trawling can cause damage to wrecks and it is also known to cause damage to the benthic communities<sup>n</sup> which populate the seabed.<sup>241</sup> The concept of Marine Protected Areas could therefore be usefully employed to provide certain underwater sites with a measure of protection, in the same way that conservation areas on land provide some protection for land archaeology.

#### E. COASTAL ZONE MANAGEMENT INITIATIVES

The coastal zone, including inshore waters, provides many different resources: food, water, leisure, flora and fauna, scenery, archaeology, etc. This means that there are many users making different demands on the area, together with other interests demanding the conservation of its resources. The pressure on coastal resources has led to proposals for some form of integration of the various uses in order to minimise conflicts and manage the use of resources. In other countries there has been a growing acceptance of the need for "coastal zone management", for example in the US, Norway, Denmark, the Netherlands and France.<sup>242</sup> This concept recognises the coastal, inter-tidal and inshore areas as a single coherent unit which requires specialised management policies to conserve it as a region capable of sustaining diverse use of its resources.<sup>243</sup> A need is also perceived for some form of co-ordinated management which crosses the boundaries that have traditionally separated land and sea use management. The coastal zone management approach is favoured by the European Commission which is preparing a Communication that is expected to advocate compulsory strategies for the coastal zone.<sup>244</sup>

Some county councils have produced non-statutory management policies for the coastal zone. One example of co-ordination of the county councils at national level is the "Heritage Coast" policy,<sup>245</sup> the aim of which is to encourage the responsible management of stretches of undeveloped coastline. It is intended to form a key part in the co-ordination of a longer-term management structure which will draw together disparate control interests in the framework of a common management plan. At a local level, counties have been producing their own non-statutory coastal strategies and discussion documents. For example, Hampshire's Planning Officer has prepared a wide-ranging non-statutory policy document, which brings together the County Council's policy on all major issues affecting the coastal environment including maritime archaeology.<sup>246</sup> Hampshire has also produced a discussion document called Hampshire's Coast<sup>247</sup> which provides a framework for the protection and management of important archaeological sites on the shoreline.

Interest in a coastal policy has also been shown by central government.<sup>248</sup> In March 1992 the House of Commons Environment Select Committee published its Second Report on Coastal Zone Protection and Planning.<sup>249</sup> The aim of the Committee's enquiry was to investigate existing policies and responsibilities for planning and protecting the coastal zone with a view to making recommendations to government. It appears that the Committee's deliberations were cut short by the announcement of the April 1992 General Election. For this reason, while the Committee recognised the advantages in adopting a holistic approach to the whole of the UK, the inquiry focussed on England and its shared estuaries with Scotland and Wales.

The Select Committee made a number of conclusions and recommendations, the following being of particular relevance to this thesis:-

(a) The Committee concluded that the coastline should not be seen as a physical or administrative boundary, but that the coastal zone should be treated as one integrated unit, embracing inshore waters, intertidal areas and maritime land.

(b) There was a need to establish a national framework for the strategic planning and protection of the UK coast and there was a need too for a central unit to adopt a national overview of coastal zone policy.

(c) The Committee recommended that the Coastal Zone Management approach should be adopted as the framework for all coastal zone planning and management practices in the UK. Furthermore, it was recommended that there should be a hierarchy of Coastal Zone Management Plans from the national to regional and local levels. The policies in these non-statutory documents should be incorporated in the relevant Development Plans.

(d) The Committee recommended that when the government reviewed marine conservation legislation, it should explore approaches other than those of Marine Nature Reserves and Marine Consultation Areas and one of the options it should consider was the wider concept of Marine Protected Areas. It should also address the issue of linking land and sea conservation areas and consider as an option extending the Sites of Special Scientific Interest mechanism below the low-water mark.

(e) The Committee recommended that the government reviewed the role of the Crown Estate Commissioners and transferred their quasi-planning functions at sea to a more appropriate authority.

(f) The Committee also recommended that the government considered how best to place environmental duties on port and harbour authorities and also duties to consult the relevant statutory bodies over any future developments that may affect the local environment.

(g) Furthermore, the Committee recommended that the government review the application of procedures for environmental assessment within the coastal zone in order to ensure a more equitable and comprehensive coverage of the requirements.

(h) Most significantly, the Committee recommended that the government address the issue of harmonising landward planning control and seaward planning control as far as the 12 mile territorial limit.

The Select Committee's conclusions and recommendations were certainly wide-sweeping and radical, and were welcomed by those interested in reforming the regulatory procedures in the coastal zone. The government's response was therefore eagerly awaited and was published in July 1992.<sup>250</sup>

In relation to (a)-(c) above, the government accepted the definition

of the coastal zone proposed by the Select Committee and stated that it was committed to furthering the management of the coastal zone within a clear framework of national policy, taking into account the interactions between the landward, seaward and intertidal elements of the coastal zone. The government proposed to encourage the preparation of management plans "for those stretches of coast where these are needed".<sup>251</sup> In particular, this would include estuaries which are under particular pressure, but it may also include individual stretches of open coastline. These plans would take account of, inter alia, archaeological interests and would provide input into statutory development plans. The government accepted the need for a national overview of coastal issues and had already set up a standing Inter Departmental Group which would have a key role in developing coastal policies and overseeing the establishment of local management plans.

In respect of (d) above, it was made clear that the government had no intention of using Marine Consultation Areas as a substitute for Marine Nature Reserves. The government would consider the future of the Marine Consultation Area approach in the context of the coastal management plans and in the light of the responses received to the Marine Consultation Area Consultation Document issued in February 1992. The response also stated that "[t]he management plan process would encompass a wide range of aims, including those of Marine Protected Areas".<sup>252</sup> Sites of Special Scientific Interest had not been designed to extend beyond the low-water mark, but any new designation designed to fulfil the requirements of the EC Habitats Directive may in some cases straddle the land/sea divide.

As far as (e)-(h) above were concerned, the government pointed out that there were only limited categories of activity for which it could be argued that the Crown Estate Commissioners acted in a quasi-planning authority role. One of these areas was marine aggregates and the

government would be reviewing the licensing procedures in this regard. The other area was in respect of marine fish farming and the arrangements for control of this activity had only been recently reviewed.<sup>253</sup> In respect of port and harbour authorities the government pointed out that harbour authorities were already under a duty to have regard to the conservation of the natural beauty of the countryside and of flora and fauna in formulating or considering any proposals relating to their statutory requirements.<sup>254</sup> The government understood that the British Ports Federation planned to issue an Environmental Code of Practice which would encourage consultation with local communities, local authorities and environmental agencies and the government intended to build on this by encouraging liaison between ports and other authorities as part of the coastal management plan initiative. Nonetheless, it was pointed out that it was necessary to ensure that "ports can continue to function effectively and to play their full part in the economic and commercial life of the country".<sup>255</sup> As far as environmental assessment in the coastal zone was concerned, the government recognised that application of environmental assessment in coastal areas could be improved and agreed to review the anomalies.

In respect of the Select Committee's most interesting recommendation (from the point of view of this thesis), the government was "not persuaded"<sup>256</sup> that extension of local authority planning powers was necessarily the most effective approach but accepted that it was now time to take the debate further. It therefore proposed to undertake a "more rigorous examination of the issues"<sup>257</sup> and to issue a discussion paper. In this respect, it was stated that:-

"The Government believes that any proposals for changes in the control of development below the low-water mark will need to be clearly justified. Substantial reform must be carried out only if there are clear benefits for the protection of the environment and the effective delivery of policy, and will need to take full account of likely burdens on local authorities and business, and of impact on public expenditure."<sup>258</sup>



The guarded response of the government to all the recommendations of the Select Committee was to be expected. However, the Select Committee's review has opened up a number of avenues through which progress may be achieved and the large amount of evidence collected by the Committee will undoubtedly inform the government's view. The Inter Departmental Group has been working on a discussion paper which is likely to be published in the spring 1993. Already, it appears that any fully-fledged extension of local authority planning jurisdiction into territorial waters is unlikely to receive government support. Instead, it seems that the Inter Departmental Group wishes to tackle the issue of regulation by dividing it into two: the regulation of activities, e.g. yachting, fishing etc., which will be the province of local management plans, and the regulation of development. It is interesting to note that at a workshop in November 1992 to discuss the issue of marine conservation areas,<sup>259</sup> the Secretary of the Inter Departmental Group, together with other government representatives, stated that the aims of government were to work within existing legal frameworks wherever possible, to proceed by a process of co-operation and consensus rather than imposition and to fulfil its international commitments, foremost among which being the EC Habitats Directive. It appears from this, together with discussions with government officials<sup>260</sup> that the government is interested in proceeding through non-statutory mechanisms, the only exception to this being any statutory provision required to fulfil its commitment under the EC Habitats Directive.

In September 1992, the DOE issued PPG 20 on Coastal Planning, which identifies planning policies for the coast. It acknowledges the existence of underwater archaeology by stating that "[t]he coastal zone...has a rich heritage both above and below low-water mark. This includes buildings and areas of architectural or historic interest, industrial archaeology, scheduled and other ancient monuments and other archaeological sites".<sup>261</sup> It notes that although decisions on

development proposals below low-water mark generally fall outside the scope of the planning system, local planning authorities should recognise that onshore development can often have an impact offshore and they should take this into account when making planning decisions.<sup>262</sup> It also states that local planning authorities, in preparing their development plans, should co-operate in order to define policies for the protection of "...historic landscapes and archaeological sites and monuments". Furthermore, it provides that - for estuaries and parts of the open coast - local planning authorities and other agencies and interest groups "may co-operate and prepare estuary or coastal management plans". These management plans should be "taken into account" in preparing and reviewing development plans.<sup>263</sup>

Obviously, PPG 20 gives guidance to local planning authorities and, as yet, their jurisdiction does not extend beyond low-water mark. Therefore, the significance of PPG 20 for the marine archaeological heritage is bound to be limited. However, as mentioned earlier,<sup>264</sup> some coastal county councils are already taking an interest in the marine zone and the Association of County Archaeologists has agreed to include information relating to marine archaeology in their SMRs.<sup>265</sup> Therefore, PPG 20 may encourage local authorities to pay further regard to marine archaeology. Specifically, the provision in PPG 20 that local planning authorities should take into account the fact that onshore development can have an impact offshore may be of some benefit to the offshore archaeological resource. For example, if planning permission has been requested for some kind of effluent outflow pipe, a marina development, or any other development on the coast, the local planning authority should take into account any archaeological remains that exist offshore which may be affected. Pollution from an outflow pipe could precipitate the activities of micro-organisms on a wreck, and the dropping of anchors by boats and yachts could also cause damage. Presumably the local planning authority will check whether there is a site designated

under the PWA 1973 in the vicinity which might be affected and they should also check the county SMR, which will have started to collect information relating to the marine zone. The provisions in PPG 20 relating to development plans and management plans may also be of some assistance in providing protection for the underwater heritage by encouraging specific policies for the preservation, recording and conservation of historic wrecks and other underwater archaeological remains in estuaries, the intertidal zone, and offshore areas which may be affected by onshore developments.<sup>266</sup>

From the point of view of marine archaeology, what is vitally important is that its interests are taken fully into account at this stage while all these initiatives are under consideration. Marine archaeology is obviously just one of many factors which should be taken into account and it will not be able to sway the outcome significantly. However, it must try to achieve as many benefits as possible for itself. This may mean that a statement relating to the protection of marine archaeology is included in the coastal management plans and that the marine archaeological heritage is taken into account when activities, e.g. berthing and fishing, are regulated. As far as other developments are concerned, marine archaeology must be taken into account in the review of marine aggregate licensing procedures taking place and its interests must be represented in any liaison process with port and harbour authorities. If that is the case, gradually its perceived significance will be heightened, as has been the case for archaeology on land<sup>267</sup> and this will assist in the general process of education that is required.<sup>268</sup>

## CONCLUSION

There are currently a number of interesting initiatives taking place on land and at sea which have potential to improve the protection afforded to the underwater cultural heritage. It is the writer's view that the protection afforded to this heritage should mirror, as closely as possible, that afforded to the land heritage. Furthermore, as far as possible there should be integration of the two systems in order to avoid duplication and wasted resources and this would also help to emphasise that both types of heritage deserve to be treated equally.<sup>269</sup>

Possibly the biggest hinderance to such an integrated approach is the unavailability of planning controls below the low-water mark. It is very difficult for marine archaeology to receive equivalent protection to land-based archaeology unless local planning authority control is extended out to the 12 mile territorial limit. If this does not take place, archaeology must become the equivalent of a "material consideration" in the consent-granting processes in the marine zone. In either case, progress must be made with surveying of the territorial seabed in order to provide information for the National Archaeological Record and the SMRs. Such information is necessary if these records are to fulfil a similar function in relation to the underwater resource as the SMRs, in particular, do in respect of the land resource. On land, the statutory designation of conservation areas provides another level of protection for the archaeological resource and, increasingly, as the benefits of integration with nature conservation interests become apparent, this protection is likely to be of a direct, rather than indirect nature.<sup>270</sup> Therefore, it is very important that there is some form of statutory designation in the marine zone and the concept of Marine Protected Areas, if implemented, would provide a level of direct protection for the underwater heritage.

It seems a pity that responsibility for both land and underwater archaeology has now been divorced from planning and other conservation issues by the creation of the DNH, just as the close relationship between these issues was starting to be recognised. The consequence of this division was evident from the content of both the Government's Response to the Environment Select Committee Report and PPG 20 on Coastal Planning, since both made scant reference to archaeology.

## NOTES

1. See further, Chapter Five, C.3(a) above.
2. The term "underwater heritage" in this chapter refers to the marine heritage, i.e. archaeological remains found at sea, rather than to underwater remains in general, which would include remains in inland waters.
3. The Roper Report, op. cit., see further, Chapter Four, A., above.
4. See further, A.1(b) below.
5. Roper Report, op. cit., p. 20.
6. See further, Chapter Three, C., above.
7. See further, Chapter Three, D., above.
8. See further, Chapter Five, C.5(b) and C.6., above.
9. See, in particular, B., below.
10. See generally, Chapter Six, above.
11. As, for example, is the case in Greece.
12. Which has happened in Norway, Finland, and Ireland. Canada's proposed Archaeological Heritage Protection Act falls into this category too.
13. As is currently the case in the UK, as well as in Denmark, France, Guernsey, US, and Australia.
14. This section provides a comparison of the primary legislation protecting archaeological sites on land and at sea, i.e. the AMA 1979 and the PWA 1973. It does not consider any indirect protection afforded to each, for example by the planning system for archaeological sites on land, and by the PMRA 1986 for archaeological sites at sea. These matters are dealt with elsewhere (see Chapter Three, E., above and Chapter Seven, C., below, respectively).
15. Brought into force in 1982. It applies in England, Wales and Scotland. It has been amended by the National Heritage Act 1983. The Historic Monuments Act (Northern Ireland) 1971 applies in Northern Ireland and makes similar provision.
16. AMA 1979, s.1(1). The Schedule came into existence in 1882 by virtue of the Ancient Monuments Protection Act of that year.
17. AMA 1979 s.1(3).
18. See Appendix 16. The previous practice of basing the decision solely on professional judgment without set criteria was recognised as a weakness which could lead to decisions which were not easy to justify: English Heritage, Exploring Our Past, op. cit.
19. Set up by the National Heritage Act 1983 to replace the Ancient Monuments Board. There are other Heritage bodies for Scotland and Wales: Historic Scotland, the Scottish Ancient Monuments and Historic Buildings Division of the Scottish Development Department; and Cadw under the Welsh Office. All the agencies act under the AMA 1979.

20. Administered by the RCHME, see further, Chapter Six, A.4(c) above.
21. Both records are now being extended to include marine sites, see Chapter Six, A.4(c) above.
22. In Heritage at Sea, *op. cit.*, the JNAPC advocated that all historic wrecks of "national importance" should be afforded protection and suggested certain criteria to make the selection: see further, Chapter Five, C.3(b) above.
23. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", *op. cit.*
24. English Heritage's Monuments Protection Programme: for details, see B.2., below.
25. JNAPC, Heritage at Sea, *op. cit.*, p.25.
26. AMA 1979, s.2.
27. Scheduled monument consent has been granted en bloc for certain classes of work by virtue of a "class consents" order, e.g. for limited agricultural and forestry works and for work undertaken by English Heritage: Ancient Monuments (Class Consents) Order 1981 (SI 1981, No.1302), as amended by the Ancient Monuments (Class Consents) Order 1984 (SI 1984, No.222). *Cf.* the general licences that may be granted under the PMRA 1986: see Chapter Three, E.1(c) above. There is no form of "class consent" order under the PWA 1973, but such a concept might be useful: see Chapter Eight, B.1(g) below.
28. AMA 1979, Schedule 1.
29. AMA 1979, s.2(5).
30. PPG 16, Archaeology and Planning (1990).
31. See further, B., below.
32. English Heritage, Rescue Archaeology Funding: A Policy Statement (1991). However, English Heritage recognises that increases in understanding may involve the excavation of scheduled sites in the future. It believes that any decision to excavate will be "constrained by the need to preserve" and should be fully justified: Exploring Our Past, *op. cit.*
33. AMA 1979, s.19. However, such access may be regulated and, in the interests of safety or the maintenance or preservation of the monument, entirely prevented, for such period as the Secretary of State thinks fit.
34. See further, Chapter Three, C.6., above.
35. AMA 1979 s.17.
36. AMA 1979 s.12.
37. AMA 1979 s.6.
38. AMA 1979 s.10.
39. However, it appears that these compulsory powers are treated as final resort measures only and they have been rarely used: DOE, "A Layman's Guide to the Ancient Monuments and Archaeological Areas Act 1979: Notes by the Department of Environment" [1983] LSG 270, at p.271.

40. Crannogs are lake dwellings which date from as early as the Neolithic period, 5,000 years ago. Some crannogs were inhabited up until 300 years ago, and many were important clan strongholds: Scottish Trust for Underwater Archaeology publicity leaflet.
41. Personal communication with Nicholas Dixon, Director, Scottish Trust for Underwater Archaeology, November 1992. English Heritage was unable to inform the writer whether there were any scheduled monuments in the inland waters of England because there are no suitable search criteria which can be used to access this information from the scheduled monument database kept by English Heritage: personal communication with Dawn Abercromby, Records Manager, English Heritage, 29 September 1992.
42. Personal communication with N. Fojut, Principal Inspector, Historic Scotland, 26 October 1992.
43. Part II. This power has not been used in Scotland or Wales: DOE, Consultation Paper on Proposed Amendments to the Ancient Monuments Legislation (1991). As at April 1991, five AAIs had been designated: the historic centres of Canterbury, Chester, Exeter, Hereford and York. No new AAIs will be designated until the effectiveness of PPG16 has been assessed: PPG16, Archaeology and Development (1990) (see further, C.1., below). The reason for this is that it is felt that provision for areas of archaeological significance may be better achieved through the planning process (see further, C.1., below).
44. A need for methods to preserve in situ archaeological evidence in areas, as well as sites, has been recognised by English Heritage and will be addressed in the 1990s: English Heritage, Exploring Our Past, op. cit. See further, B., below.
45. AMA 1979, s.42. Consent is normally given only for bona fide, non-destructive, research purposes, or for the recovery of valuable items of lost property: PPG 16, Archaeology and Planning (1990).
46. Ibid.
47. See further, Chapter Three, C.6., above and Chapter Two, A.5., above.
48. See further, B., below.
49. This has been the departmental budget for the last five years: English Heritage, Exploring Our Past, op. cit., p.32.
50. As a Private Member's Bill, it could not commit significant government funding: see further, Chapter Three, D., above.
51. Sheldon, op. cit., p.1 and Dean, personal communication, 1991.
52. Since the Ancient Monuments Protection Act 1882. In fact, in a global context, the UK was late to implement protective legislation: Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.37.
53. The original act was amended by the Ancient Monuments Consolidation and Amendment Act 1913, the Ancient Monuments Act 1931, the Historic Buildings and Ancient Monuments Act 1953, the Field Monuments Act 1972, and again in 1979. Further amendments have been proposed in a 1991 consultative paper, but have not yet been enacted. It appears that the AMA 1979 was actually rushed through Parliament and for this reason did not undergo a great deal of scrutiny: T. Scrase, "Archaeology and Planning: A Case for Full Integration" [1991] JPL 1103 at p.1107. It is therefore subject to some adverse criticism: see, for example, ibid.
54. See Chapter Three, A., above.



55. Although in the House of Commons Debate on the Second Reading, David Owen M.P. asked whether the government had any intention of covering things of archaeological interest other than wrecks, not covered by the AMA 1979, e.g. underwater settlements: H.C. Debates, Vol.851, Col.1861 (1972-73). He also said: "I...understand that boats on land above the high-water mark are not covered by the Ancient Monuments Acts. It is extraordinary that they should be excluded": H.C. Debates, Vol.851, Col.1866 (1972-73). He was, of course, stating the pre-1979 position and both these matters were attended to in the AMA 1979.
56. Provision was made for scheduling of monuments in territorial waters in the AMA 1979, s.53. See below.
57. Under the National Monuments Act 1930 and National Monuments Act 1954 (Ireland).
58. Personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.
59. By the National Monuments (Amendment) Act 1987 (Ireland).
60. See Appendix 3. One type of monument in territorial waters envisaged as a potential for scheduling were the Solent forts: H.C. Debates, Vol.965 Col.1363 (1978-79). In the Parliamentary Debates, it was stated that archaeological areas under Part II of the Bill would not be designated at sea: K. Marks, Under Secretary of State for the Environment, H.C. Debates, Vol.965 Col.1363 (1978-79).
61. AMA 1979, s.61(8)(b).
62. It will be interesting to see whether a decision is made to schedule the ancient fish traps found off the coast of Essex in September 1992 (see thesis Introduction). At present, no proposals have been considered for the scheduling of this site: personal communication with D. Abercromby, Records Manager, English Heritage, 20 October 1992.
63. See Chapter Six, B.2., above.
64. See further, Chapter Six, D., above.
65. It is, however, open to the Secretary of State, when granting scheduled monument consent, to lay down conditions relating to any archaeological investigation.
66. The doctrine of treasure trove appears to have only been applied to artefacts found on land: N. Palmer, "Treasure Trove and the Protection of Antiquities" (1981) 41 MLR 178 at p.183. Whether its application would be excluded in the case of artefacts found hidden in a river bed or river bank is unclear.
67. Law Commission, Treasure Trove: Law Reform Issues (1987). Whether this definition is a modern limitation of the original doctrine is considered by the Court of Appeal in Att. Gen. of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd. [1982] 2 WLR 397. The only exceptions to the prerogative right of the Crown to treasure trove are where the right to trove belongs to the Duchies of Lancaster or Cornwall, or where the Crown or Duchies have granted franchises to trove.
68. G. Hammond, "Treasure trove: ancient law to preserve archaeological relics" (1982) 56 Antiquity 58. The concept of treasure trove was not unique to English law. It also appeared in old Germanic and Nordic laws, although it has since been abolished in most other jurisdictions: see Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.311.

69. It is interesting to note that the Coroner was responsible for receiving reports of wreck until this duty was taken away from the office by the Coroners' Act 1887, s.44. In 1978, in an examination of the Coroner's responsibility for determining treasure trove, Nash stated that "[i]t does not seem unreasonable that...the Receiver of Wrecks should...be given responsibility for treasure trove": Nash, "The Law of Treasure and Treasure Hunters", op. cit. However, it would seem unreasonable today: on receivers of wreck, see Chapter Two, A.1., and B., above.

70. Such payments can amount to quite considerable sums, e.g. £100,000 for a find at Waltham St. Lawrence in 1978, £135,000 for a find at Pentney in 1980, £262,540 for a find at Thetford in 1981: HM Treasury, Treasure Trove: Report of a Review of Ex Gratia Awards to Finders of Treasure Trove (1988). The grand total paid out between 1977 and 1987 was £1,108,814: ibid.

71. In 1987 the Law Commission produced a paper calling for a review of treasure trove and in 1988 the Treasury published Treasure Trove: Report of a Review of Ex Gratia Awards to Finders of Treasure Trove, which concluded that ex gratia payments should continue to be made in the absence of any illegal or improper behaviour on the finder's part.

72. See Palmer, op. cit., p.182 who calls the requirements for the hiding of the property and the intention to subsequently recover, "a wholly anachronistic impediment". Clearly it is very difficult to prove that, for example, artefacts from the fifth century, were hidden with the intention of subsequent recovery: see, for example, Att. Gen. of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd. [1982] 2 WLR 397 and Att. Gen. v. Trustees of the British Museum [1903] 2 Ch. 598. This leads to much delay and uncertainty before entitlement can be established. The Netherlands has recently revised its treasure trove rules to overcome such limitations: the new Dutch Civil Code of 1992, discussed by C. Forder in "New Treasure Trove Law in the Netherlands" (1992) 1 IJCP 396.

73. She was held entitled to the treasures, as finder and landowner. (As to whether it is the finder or the landowner who is generally entitled to a find that is not treasure trove, see Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.306 et seq. and Palmer, op. cit.) The reason artefacts of gold and silver which were part of the Sutton Hoo treasure were not considered to be treasure trove appears to be that - as a burial - there was no intention of subsequent recovery.

74. This is the conclusion of a number of commentators: Prott and O'Keefe Law and the Cultural Heritage, Vol. 1, op. cit., p.315; Palmer, op. cit., p.178; Hammond, op. cit., p.60; C. Sparrow, "Treasure Trove: a lawyer's view" (1982) 56 Antiquity 199, at p.199.

75. E.g. the Brodrick Committee Report, Death Certification and Coroners, Cmnd. 4810 (1971); the Law Commission, Treasure Trove Law Reform Issues (1987). See also, Treasure Trove Law Reform Issues, op. cit., paras. 1-5.

76. DOE, Consultation Paper on Portable Antiquities (1988), pp.4-5.

77. This was the decision of the Irish Supreme Court in Webb v. Ireland [1988] IR 353. This appears to cover material found on the bed of inland waters and in the territorial sea: The Times, 24 November 1990.

78. See National Monuments Act 1930 s.23 (Ireland) and National Monuments (Amendment) Act 1987 s.3(6) (Ireland) in relation to underwater finds.

79. And the Welsh Office.

80. In 1982 an Antiquities Bill passed through all its stages and failed only because it ran out of time. Apparently, the objection which the government raised to the Bill was that it would interfere with landowners' rights: Viscount Hanworth, H.L. Debate on Museums and Galleries, Vol.513 Col.1343 (1989-90). The 1988 Consultation Paper (p.2) provided that: [t]he review is not intended to call into question fundamental rights of the individual, including rights of private property".

81. Lord Hesketh, House of Lords Debates, Vol.513 Col.1358 (1989-90).

82. With underwater finds, there have clearly been problems in this respect, see Chapter Six, A.5., above.

83. See further, Chapter Six, A.4(c) above.

84. Lord Hesketh, H.L. Debates, Vol.513 Col.1359 (1989-90).

85. DOE, Consultation Paper on Proposed Amendments to Ancient Monuments Legislation (1991).

86. During a debate on Museums and Galleries, H.L. Debates, Vol.513 Col.1358-1359 (1989-90).

87. An analogy can be drawn between the problems caused at sea by hobby divers, which many feel can be controlled by education, and the problems caused by professional treasure salvors, which need other measures.

88. This objection to interference with private rights mirrors that made by the government to the 1982 Antiquities Bill. See above.

89. On 21 September 1992, in a personal communication with the DNH, it confirmed that it had been pursuing the possibility of dealing with stray archaeological finds from unscheduled sites by means of a code of practice and that this was still under consideration.

90. It seems that the matter has been on a "back-burner" and the DNH has not been in a hurry to see it resolved. English Heritage has been trying to revive the process: personal communication with Michael Brainsby, Head of Legal Services, English Heritage, 4 November 1992.

91. See Chapter Six, A.5., above, for discussion of the need for rewards. Cf. the European Convention on the Protection of the Archaeological Heritage (revised) 1992 (see Chapter Four, E., above). Art.2 of the Convention makes provision for the mandatory reporting to competent authorities by a finder of chance discoveries, but the Explanatory Report to the Convention states that "[a] State...may only require mandatory reporting of finds of precious materials or on already listed sites". This appears to suggest that, if the UK government ratifies the Convention, it would need to make few changes to conform with its provisions in this respect. For further discussion of the Convention, see Chapter Four, E., above. For the writer's specific reform proposals, see Chapter Eight, B.1(j) below.

92. Of course, there are a number of cases where a land site comprises a movable, for example, because of geophysical change, a ship may be found inland, e.g. the ancient wreck recently found in Dover: The Independent, 17 October 1992.

93. See generally, Chapter Two, above.

94. See Chapter Six, B.1., above.

95. See Chapter Three, D., above.
96. See further, C.2., below.
97. See C., below regarding the planning regime on land and the regulatory regime at sea. There is no fundamental reason why the regulatory regime at sea could not take into account archaeological considerations.
98. See generally, Chapter One, above.
99. See C., D., and E., below.
100. See Chapter Six, A.3., above.
101. Considerable emphasis is placed on this factor by English Heritage, see Exploring Our Past, op. cit. See further, B., below.
102. See further, A.1(a) above.
103. See the National Monuments (Amendment) Act 1987, s.3.
104. Personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.
105. See generally, Chapter Six, above.
106. See thesis Introduction.
107. 1991.
108. G. Wainwright, English Heritage, Archaeology Policy Statements (1991).
109. English Heritage, Exploring Our Past, op. cit., p.4. In 1988 a report by management consultants for the DOE recommended that many of the functions of English Heritage, including responsibility for scheduling ancient monuments, should be taken over by the RCHME: The Sunday Times, 11 September 1988. These recommendations were not taken up by the Department.
110. Certain areas will also require extra posts of SMR Assistants to be created and English Heritage believes that there should be established posts for Conservation Archaeologists in every area with significant historic remains.
111. See further, Chapter Six, A.4(c) above.
112. Darvill, et al., op. cit. One of the co-authors, A. Saunders, is the present Chief Inspector of Ancient Monuments.
113. Ibid. at p.395.
114. Ibid. at pp.393-408.
115. For the methods to be used in undertaking the evaluation, see ibid.
116. English Heritage, Exploring Our Past, op. cit., p.47.
117. PPG 16: Archaeology and Planning (1990).
118. See further, Chapter Six, A.4(b) above.
119. One such area recently identified in Ireland is a 2,700 year old town surrounded by three miles of defensive walls, 30 miles south west

of Dublin. Within an area of six square miles there are a total of five separate fortified settlements: The Independent, 3 November 1992.

120. There are signs that English Heritage is showing an increasing interest in the marine zone, see further, B.5., below.

121. The DOE's 1990 White Paper, This Common Inheritance, recommended that English Heritage, and its equivalents, compile a register of historic landscapes which would be informative, without having direct legal effect. It was envisaged that the register would alert local planning authorities and others to the significance of these sites when considering development plans and applications for planning permission.

122. Cf. the two-tiered concept of the Marine Protected Areas proposal, see D., below.

123. See A.1(a) above for details.

124. See C.1., below.

125. See further, Chapter Six, B.2., above.

126. See further, D., below.

127. See Wildlife and Countryside Act 1981 s.48, Water Act 1989 s.8, Land Drainage Act 1991 s.12, Water Resources Act 1991 s.16 and Water Industry Act 1991 s.3.

128. National Rivers Authority, English Heritage, The Water Environment: Our Cultural Heritage, *op. cit.* The National Rivers Authority is taking steps to train staff to recognise archaeological finds and to deal with them and has adopted a code of practice giving an explicit set of instructions as to how the water heritage should be identified and safeguarded.

129. English Heritage, Exploring Our Past, *op. cit.*, p.30.

130. "Law and the underwater heritage", *op. cit.*, p.180.

131. See D., below.

132. See further, C.2., below and Chapter Eight.

133. See further, Chapter Six, D., above.

134. English Heritage, Exploring Our Past, *op. cit.*, p.12. By 1991, developer funding was providing 50% of funding for archaeology in Britain: RESCUE, "Archaeological Funding and Legislation: A manifesto for the 1990s" (1991) 54 Rescue News 4, at p.5. For further details of funding by developers, see C.1., below.

135. PPG 16, Archaeology and Planning (1990) and English Heritage, Management of Archaeological Projects (1991).

136. English Heritage's Corporate Plan, as cited in Exploring Our Past, *op. cit.*, p.32. This includes funding for rescue projects on scheduled and non-scheduled sites.

137. For further discussion, see C.2., below.

138. When discussing English Heritage's liability to pay compensation in certain instances under the AMA 1979: S. Jenkins, "Between pit and pendulum", The Times, 12 May 1989.

139. Discovered during road construction work. Approximately two-thirds of the 40ft to 50ft long wooden ship will be lifted and will go on display at the Dover Museum: The Independent, 12 October 1992.
140. Personal communication with D. Abercromby, Records Manager, English Heritage, 20 October 1992.
141. H.C. Debates, Vol.965 Col.1363 (1978-79).
142. When the ADU inspected the site in order to consider it for designation, material was apparently "wafting past" them: C. Martin, Scottish Institute of Maritime Studies, in a presentation to the Advisory Committee on Historic Wreck Sites' meeting with licensees, 25 November 1992.
143. Personal communication with C. Dawes, Heritage Sponsorship Division, DNH, 25 November 1992.
144. For details, see Chapter Three, C.2., above.
145. See further, Chapter Five, C.3(b) above.
146. English Heritage, Exploring Our Past, op. cit., p.34.
147. See further, Chapter Six, A.4(a) above.
148. See Chapter Six, E., above.
149. Furthermore, there are a number of ways in which the government could reduce its overall financial commitment: see Chapter Six, E., above.
150. See Chapter Five, C.5(a) above.
151. This issue is explored at C., below.
152. See A.3., above.
153. Confirmed by the Court of Appeal in Hoveringham Gravels Ltd. v. Sec. of St. for the Environment [1975] QB 754 and PPG 16, Archaeology and Planning (1990).
154. The planning system and its impact on archaeology are considered in some detail in M. Redman, "Archaeology and Development" [1990] JPEL 87 and M. Redman, "Cultural Heritage Law: Planning and Archaeology" [1991] 3 Land Management and Environmental Law Report 44.
155. PPG 16, Archaeology and Planning (1990). The Secretary of State expects local planning authorities to have regard to the guidance set out in Planning Policy Guidance Notes in the exercise of their planning functions: PPG 16. Prior to PPG 16, the various Guidance Notes on archaeology and planning were "generalised, ambiguous and difficult to apply": RESCUE, op. cit., p.5. For some comments on the impact of PPG 16, see J. Mellor, "PPG 16: One Year On" (1992) 56 Rescue News 1 and Editor's Note, "Archaeology and Planning: Guidance Note Review" [1992] JPL 726.
156. PPG 16, Archaeology and Planning (1990), para.8. This may, however, mean development over buried remains with the consequent possibility of destruction and disruption by foundations and piling: RESCUE, op. cit., p.5.
157. It is interesting to note that at a Marine Conservation Society workshop on 11 November 1992, M. Coupe, an official representing English Heritage, stated that English Heritage was interested in extending the

principles of PPG 16 to territorial waters and underwater archaeology.

158. The Town and Country Planning General Development Order 1988 (SI 1988, No.1813) defines "site of archaeological interest" as scheduled sites, Areas of Archaeological Importance, or land "which is within a site registered in any record kept by a county council and known as the County Sites and Monuments Register". (This appears to be the only statutory recognition given to county SMRs.)

159. Listed in the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, Schedules 1 and 2 (SI 1988, No.1199, putting into effect EC Directive 85/337).

160. Specified in Schedule 3 of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No.1199).

161. Where a development requiring environmental assessment affects the site of a scheduled monument, English Heritage must be consulted on the submitted environmental statement and may provide information to assist in the preparation of such a statement. Guidance on environmental assessments is provided in DOE Circular 15/88.

162. This Liaison Group is a permanent body initiated by the British Property Federation and the Standing Conference of Archaeological Unit Managers. Its aim is to foster voluntary co-operation between developers and archaeologists.

163. The continuing success of this voluntary method is fragile however: a representative of the British Property Federation apparently admitted in an article in The Observer newspaper dated 21 May 1989, that the liaison could be upset by problems on a single site: RESCUE, op. cit., p.5.

164. British Archaeologists and Developers Liaison Group, Code of Practice, Background and Objectives.

165. In exchange for adherence to this code, mineral operators were granted exemption from having their areas designated as Areas of Archaeological Importance under the AMA 1979: Redman, "Cultural Heritage Law: Planning and Archaeology", op. cit.

166. As to the acceptability of such negatively phrased conditions, see Scrase, op. cit., at p.1106. A further method is for the local planning authority to require the developer to enter into a section 106 agreement: Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991 s.12).

167. AMA 1979, s.7.

168. See further, B.5., above.

169. See Marston, op. cit., Chaps. XII and XIII. The ownership of river estuaries may be more contentious: a 150 year old dispute between the Crown and the Earls of Devon over ownership of the bed of the Exe estuary has only just been resolved: The Times, 11 November 1992.

170. See Chapter Six, A.4(a) above.

171. The majority of licences granted are for sand and gravel dredging but licences have also been granted to dredge for tin, or waste coal, or calcified seaweed: DOE, News Release No. 265, 8 May 1989.

172. The licensing procedure was reviewed in 1990: see Crown Estate Commissioners, Report for the year ended 31 March 1990, and DOE

Memorandum, The Crown Estate Licensing System (1990).

173. The Government View procedure was instituted following a case in 1968 in which the Crown Estate Commissioners received conflicting advice from different government departments: DOE, Offshore Dredging for Sand, Gravel and Other Minerals: Government Policy (1989) (attached to DOE, News Release No. 265, 8 May 1989).

174. DOE, News Release No. 265, 8 May 1989, Appendix.

175. Minerals and Land Reclamation Division. In Welsh waters, the "Government View" is formulated by the Welsh Office.

176. House of Commons Environment Committee, Second Report, Coastal Zone Protection and Planning, H.C. Paper 17, March 1992, Vol. I, p.xxxiii. "[T]he broader ecological effects of marine aggregate extraction are never considered": ibid.

177. DOE, Offshore Dredging for Sand, Gravel and Other Minerals: Government Policy (1989) (attached to DOE, News Release No. 265, 8 May 1989).

178. A coast protection authority may be set up under s.2 of the Coast Protection Act, "for the protection of land". It is unclear whether the reason for making an order under s.18 should also be "for the protection of land" and not, for example, for the protection of underwater archaeology.

179. House of Commons Environment Committee, Second Report, Coastal Zone Protection and Planning, H.C. Paper 17, March 1992, Vol. I, p.xxx.

180. South Wight Borough Council appears to have been concerned to protect the archaeological resource off its coast and has undertaken extensive discussions with the County Archaeological Officer to determine how this could best be done using their present powers.

181. The following examples are not an exhaustive list, but illustrate the nature and number of consenting bodies. See Nature Conservancy Council, Legislative Responsibilities in the Marine Environment: A Review (1989), which summarises the responsibilities of government departments and agencies in the marine environment.

182. It should also be noted that it may be possible, under such local Acts or regulations issued thereunder, for harbour authorities to control diving activities on wrecks within their jurisdictional boundaries. For example, the Scapa Flow Dockyard and Port Regulations were amended in 1973 to ban unauthorised diving on HMS Royal Oak which was at that time being looted by amateur divers: H.C. Debates, Vol.90, Col.1232 (1985-86). (The ban is now applied by an Orkney Council bylaw.)

183. Land Drainage Act 1976, s.29(1), as amended by the Water Act 1989.

184. See (c) below. The National Rivers Authority may take some account of archaeology in issuing consents as a result of the duty imposed upon it by the Water Act 1989 s.8, see further B.4., above.

185. See further, C.2(c) below.

186. Crown Estate Commissioners Report for year ended 31 March 1990.

187. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", op. cit.

188. See (c) below.



189. Land Drainage Improvement Works (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No.1217); Environmental Assessment (Salmon Farming in Marine Waters) Regulations 1988 (SI 1988, No.1218); Harbour Works (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No.1336); Harbour Works (Assessment of Environmental Effects) (No.2) Regulations 1989 (SI 1989, No.424); Harbour Works (Assessment of Environmental Effects) Regulations 1992 (SI 1992, No.1421). Developments undertaken under Parliamentary Bill procedures or the new Order procedures set out in the Transport and Works Act 1992 are also subject to formal environmental assessment. It appears that there is no statutory instrument governing environmental assessment in the case of marine dredging for aggregates, but the Crown Estate Commissioners will request assessment, where dredging is likely to have significant environmental effects, in accordance with criteria set out in the appendix to DOE, Procedure for Determining Applications for Production Licences (1989).

190. House of Commons Environment Committee, Second Report, Coastal Zone Protection and Planning, H.C. Paper 17, March 1992, Vol. I, p.xxxvii.

191. See further, Chapter Six, A.1(c) above.

192. And this may only be the case after full surveys have taken place. The reason for this is that the National Archaeological Record and the SMR, in relation to marine sites, rely in the main on information from documentary sources rather than from survey. For this reason they are a record of the perceived, rather than the real surviving resource: A. Gale, "The Marine SMR" (1990) 64 Antiquity 400. Until underwater surveys are undertaken, the records cannot be regarded as an accurate reflection of the resource: ibid.

193. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", op. cit.

194. Personal communication with Alison Gale, SMR Officer, Isle of Wight County Council, 27 December 1989. This example again demonstrates the commitment of South Wight Borough Council, the local planning authority, to the protection of the marine resource. See further, C.2(a) above.

195. November 1992, see Appendix 15.

196. See para.2.1, Appendix 15.

197. See para.2.5, Appendix 15.

198. See para.2.8, Appendix 15.

199. See further, Chapter Six, A.4(c) above.

200. For proposals as to a structure for such a regime, see Gale, "In Search of a Wider Perspective", op. cit. It should be noted, however, that the planning regime on land relies heavily - in its management of the archaeological resource - on the information available in the SMRs. It would take some time, and the availability of resources, to enhance the SMRs sufficiently in respect of the marine zone to fulfil a similar function.

201. Ibid. There are already examples of local planning authorities coming together in order to address specific types of offshore development, for example the Standing Conference on Problems Affecting the Coastline (which was formed to consider the implications of coastal erosion) and the Standing Conference on Oil and Gas (which considers the implications of hydrocarbon exploration).

202. This would provide a basis for the UK to conform, in relation to its marine heritage, with the 1968 UNESCO Recommendation concerning the preservation of cultural property endangered by public or private works. For details of the coastal waters planning regime in Sweden, see Cederlund, op. cit.

203. See further, E., below.

204. Hampshire County Council, Maritime Archaeology in Hampshire: A report prepared by the County Archaeologist, March 1990. The County organised a one-day Maritime Archaeology Conference which took place in April 1991.

205. National Parks and Access to the Countryside Act 1949 s.5 and the Wildlife and Countryside Act 1981 ss.42-46.

206. National Parks and Access to the Countryside Act 1949 s.87.

207. Wildlife and Countryside Act 1981 s.28, as amended by the Wildlife and Countryside (Amendment) Act 1985 s.2.

208. Wildlife and Countryside Act 1981 s.35.

209. Agriculture Act 1986 s.18. See further, B.4., above.

210. See further, B.4., above.

211. In fact, the eligibility of an area for designation as an Area of Outstanding Natural Beauty may well arise indirectly from significant archaeological components in the landscape. The reason for this is that landscape beauty in the UK is "almost exclusively the product of past human use of the land": National Rivers Authority, English Heritage, op. cit., p.18.

212. See further, E., below.

213. Wildlife and Countryside Act 1981 s.36, which was left unamended by the Territorial Sea Act 1987 (see Sched.1, para.6 of the 1987 Act). The Nature Conservation and Amenity Lands (Northern Ireland) Order 1985 makes similar provision for Northern Ireland.

214. Wildlife and Countryside Act 1981 s.36(1).

215. Wildlife and Countryside Act 1981 s.37(2).

216. In Northern Ireland, there was just one site, Strangford Lough, on the list of proposed Marine Nature Reserves. It is interesting to note that the House of Commons Select Committee on the Environment, in its consideration of coastal zone protection and planning (see further E., below), heard evidence that large areas of Strangford Lough had been turned into "a moonscape by the 'hoovering-up' of scallops along the seabed by trawlers": HC Paper 17 I (1991-92) p.xlviii. This clearly has implications for underwater archaeology as well as wildlife and landscape.

217. Warren, op. cit., p.159.

218. S. Gubbay and L. Warren, Marine Protected Areas (1991).

219. Gubbay and Warren, op. cit., p.2.

220. Recognised by the House of Commons Environment Committee which, in 1985, recommended "as a matter of urgency" that the DOE and MAFF take action to break the deadlock: House of Commons Environment Committee,

Operation and Effectiveness of Part II of the Wildlife and Countryside Act, HC Paper 6-I (1984-85).

221. House of Commons Agriculture Committee, Fourth Report, Fish Farming in the UK, HC Paper 141-II p.91.

222. And the Welsh Office. Scotland already operates a similar system.

223. The DOE's 1990 White Paper This Common Inheritance announced that the government would be reviewing existing legislation relevant to marine conservation and this was confirmed in the DOE's 1991 White Paper This Common Inheritance - The First Year Report (Cmnd. 1655, para. 5.28) which announced that a consultation paper would be published.

224. The effectiveness of the system would be monitored annually.

225. Varying from 11 sq. km. to 770 sq. km.

226. A charity formed in 1983 devoted solely to protecting the marine environment: Marine Conservation Society, Seas Fit for Life Appeal leaflet.

227. Gubbay and Warren, *op. cit.* The term "marine protected area" has been defined as "an area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment": Resolution by the Fourth World Wilderness Congress, Colorado, USA, September 1987. This definition has been adopted by the Marine Conservation Society.

228. In particular, under the Ramsar Convention on Wetlands of International Importance 1971 (which requires Contracting States to submit a list of the most important wetlands in their territory which they would undertake to protect); the EC Birds Directive (79/409/EEC) and the EC Habitats Directive (92/43/EC). The integrated approach of Marine Protected Areas was supported by the House of Commons Environment Committee in its Second Report on Coastal Zone Protection and Planning (see further E., below).

229. E.g. to cover the 200 mile British fishing limit, or the continental shelf.

230. This principle was endorsed by the Second International Conference on the Protection of the North Sea, held in London in 1987.

231. See B.3., above.

232. Because of the strict control over these areas that would be necessary, it is proposed that they would be restricted to territorial waters. An analogy may be drawn between Type 1 areas and National Nature Reserves on land, except that the controls within the latter rely to a large degree on the private ownership of land, which is not available at sea.

233. This has been called a "lived-in" approach: J. Carter, The Benefits of Marine Protected Areas to Underwater Archaeology (1992). In this respect, Type 2 areas are analogous to National Parks on land.

234. Detailed provisions relating to a co-ordinating body and the consultative procedure are laid down in the proposals: Gubbay and Warren, *op. cit.*

235. Town and Country Planning General Development Order 1988 (SI 1988, No.1813), Art.18(1)(t).

236. J. Carter, op. cit.
237. An interesting example of how the two tier system could apply to wrecks in the Poole Bay area is given in Table 1 of the paper.
238. See further Chapter Six, A.1(c) and B.2., above.
239. Statement of aims by Emily Hay (Secretary of Inter Departmental Group set up to look at regulation below the low-water mark, see further E., below) and Hilary Neal (Habitats Division), both of the DOE, at the Marine Conservation Society workshop on Marine Protected Areas, held on 11 November 1992.
240. Apparently some fishermen specialise in wreck fishing: see H.C. Debates, Vol.90, Col.1229 (1985-86).
241. It appears that trawling in the Irish and North Seas is changing the nature of the benthic communities to the extent that they are not necessarily less valuable, but "they are certainly losing diversity": Evidence given by English Nature to the House of Commons Environment Committee, HC Paper 17-I, p.xlviii. It is interesting to note that English Nature proposed a policy of zoning areas: highly sensitive areas could be set aside either as fishing exclusion zones or as low intensity fishing zones, while in areas of "middle importance" less damaging fishing methods could be used.
242. S. Gubbay, "Coastal and Sea Use Management in the UK", Marine Forum for Environmental Issues, North Sea Report (1990), p.153.
243. Gale, "In Search of a Wider Perspective: Thoughts for Discussion", op. cit.
244. House of Commons Environment Committee, Second Report, op. cit., p.1.
245. In co-operation with the Countryside Commission.
246. Hampshire County Council, A Strategy for Hampshire's Coast (1991).
247. Hampshire County Council, 1987.
248. In fact, in 1991 John Major, the Prime Minister, announced the setting up of a new Environmental Protection Agency, one of the responsibilities of which would have been to have introduced a national coastal strategy: The Independent, 9 July 1991. This proposal has not been implemented.
249. Sessional Papers HC 17-I and II.
250. Sessional Paper Cm 2011.
251. Cm 2011, para.15.
252. Cm 2011, para.118.
253. By the House of Commons Agriculture Committee in the 1989-90 Session, op. cit.
254. Under the Transport and Works Act 1992, Schedule 3, para.6. See further, Chapter Eight, B.3., below.
255. Cm 2011, para.65.
256. Cm 2011, para.38.

257. Cm 2011, para.38.
258. Cm 2011, para.42.
259. Organised by the Marine Conservation Society.
260. Notably C. Dawes, Heritage Sponsorship Division, DNH and member of the Inter Departmental Group.
261. PPG 20, Coastal Planning (1992), para.2.8.
262. Ibid., at para.1.8.
263. Ibid., at para.4.17.
264. E.g. at C.2., above.
265. See further, Chapter Six, A.4(c) above.
266. The River Hamble Local Plan already specifies such policies for historic wrecks underwater and on the shoreline and is possibly the first local plan to do so: Hampshire County Council, Maritime Archaeology in Hampshire: A report prepared by the County Archaeologist, op. cit.
267. For further proposals, see Chapter Eight below.
268. See further, Chapter Six, D., above.
269. For further argument on this point, see A.3., above.
270. See further, B.4., above.

## CHAPTER EIGHT: SPECIFIC PROPOSALS FOR REFORM

### INTRODUCTION

This chapter will outline two sets of proposals for reform, to be called respectively Package A and Package B. Package A comprises some suggestions for fine-tuning the current legislation, together with some policy and administrative changes. It would require little legislative amendment, extra public funding or government commitment, and yet would result in quite considerable improvements upon the present system. However, it is not the ideal option and should only be proposed if it became clear that the government was determined not to institute comprehensive reform in the foreseeable future.

The writer believes that the time is ripe for a much more radical overhaul of the legislation. The JNAPC's campaign<sup>1</sup> has resulted in some government recognition for underwater archaeology, illustrated by the transfer of responsibility for the PWA 1973, first to the DOE and then to the DNH. Now, through the efforts of the JNAPC, the government has the operation of the MSA 1894 and PWA 1973 under review and the opportunity should therefore be grasped to persuade the government of the need for comprehensive reform. It has been very nearly 20 years since the PWA 1973 was enacted. If the government were to undertake minor amendments now, a further period of similar length might well elapse before it was willing to consider the matter again. Comprehensive reform should not have to wait so long. The second set of proposals - Package B - therefore comprises an extensive review of the current legislation and represents the writer's preferred option.

## A. PACKAGE A: MODEST REFORM

This package of proposals will have as its basis the JNAPC's statement of principle in Heritage at Sea that "archaeological sites of national importance underwater should receive no less protection than those on land", although the principle will be amended slightly to include sites of international importance as well.<sup>2</sup> The writer does not necessarily agree that this should be the underlying principle of reform,<sup>3</sup> but will accept it for this set of proposals.

There are primarily two pieces of legislation which need to be taken into consideration: the PWA 1973 and the MSA 1894. In Package A some minor legislative amendments will be proposed, but - more importantly - there will be proposals for administrative changes which would refine the operation of the legislation in the interests of cultural property.

### 1. Protection of Wrecks Act 1973

Within its own narrow confines, the PWA 1973 is a well-drafted piece of legislation which provides a good framework for the protection of certain sites of particular importance, leaving the details to departmental practice. This means that many improvements can be made without legislative change.

#### (a) Legislative amendments

Four small amendments to the PWA 1973 are proposed:-<sup>4</sup>

(i) Criterion for designation - The current criterion in s.1(1)(b) for designation of a site, i.e. "on account of the historical, archaeological

or artistic importance" of the vessel etc., should be replaced with the criterion of "national or international importance". This would bring the PWA 1973 in line with the AMA 1979 scheduling criterion<sup>5</sup> and would meet the statement of principle in Heritage at Sea. However, it would also provide for the difficulty of calling a wreck of "national importance" when it had no connection with the UK.<sup>6</sup> Furthermore, "national" should be interpreted widely, so as to include wrecks which may be of "national" importance to a state other than the UK, although not having the wider importance imported by the word "international".

(ii) Areas of high archaeological potential - There should be provision for designation of areas of high archaeological potential. The following wording,<sup>7</sup> which could be inserted as a new subsection (2A) to section 1 may be appropriate:-

"If the Secretary of State is satisfied with respect to any area in United Kingdom waters that-

- (a) it is an area where a number of vessels are or may be lying wrecked in or on the seabed, and
- (b) on account of the quantity of material of historical, archaeological or artistic importance which is or may be lying in or on the seabed in that area, the area ought to be protected from unauthorised interference,

he may by order designate the area as a restricted area."

This wording reflects the nature of areas of high archaeological potential as having potential, rather than necessarily actual, importance.

(iii) Offences on designated sites - The offence in s.1(3)(b) should be amended in order to facilitate the collection of evidence to bring prosecutions.<sup>8</sup> The present wording of this subsection is:-

"[A] person commits an offence if, in a restricted area...

(b) he carries out diving or salvage operations directed to the exploration of any wreck or to removing objects from it or from the seabed, or uses equipment constructed or adapted for any purpose of diving or salvage operations".



With the present phrasing, it may be very difficult to prove intent, i.e. the intent that the diving or salvage operations were directed to the exploration of any wreck, etc. It is also unclear from the present wording whether this intent is required when someone uses "equipment constructed or adapted for any purpose of diving or salvage operations." The following, simplified wording, is therefore proposed:-

"[A] person commits an offence if, in a restricted area...

(b) he carries out diving or salvage operations, or uses equipment constructed or adapted for any purpose of diving or salvage operations".

This wording would avoid the problem of proving intent and would also bring the offence in line with the popular belief that diving for any purpose in a restricted area is an offence. In making this proposal, the ease of enforcing designations has been weighed against the legitimate interest of amateur divers in having access to "visit" designated sites. The conclusion reached was that the problems of policing designated sites have been so great<sup>9</sup> that in this instance enforcement should take precedence.

(iv) Offences in designated areas - It is proposed that a new subsection (3A) to section 1 be inserted, in order to provide for offences in designated areas of high archaeological potential. This should provide for the same offences as for designated sites with the exception of subsection (3)(b). Subsection (3A)(b) should provide as follows:-

"[A] person commits an offence if, in a restricted area...

(b) he carries out diving, survey or salvage operations directed to the detection, location, or exploration of any wreck or to removing objects from it or from the seabed; or

(c) he uses equipment constructed or adapted for any purpose of diving, survey or salvage operations directed to the detection, location, or exploration of any wreck or to removing objects from it or from the seabed".<sup>10</sup>

It would probably be necessary to have such a distinction between the offence in relation to a designated site, and that in relation to a designated area, in order that diving and salvage activities were not unduly restricted in the wider areas subject to restrictions in the latter case. Dividing the provision in two helps to clarify the wording of the subsection.

(b) Administrative changes

There are a number of changes to the administrative practice in respect of the PWA 1973 that could be made which would result in quite significant improvements over the current system:-

(i) Number of designations - When the PWA 1973 was enacted, the number of designated sites was envisaged to exceed no more than 24<sup>11</sup> and keeping to around this number appears to have been the policy of the Advisory Committee until quite recently. However, in the last three years the number of designated sites has increased to 37 as a result of the ADU bringing sites to the attention of the Advisory Committee. If the proposed non-statutory criteria for selecting sites for designation in Heritage at Sea were adopted (in line with the non-statutory criteria used for the selection of sites for scheduling under the AMA 1979),<sup>12</sup> "probably less than 100 known sites" would be eligible for protection.<sup>13</sup> This estimate may therefore reflect the number of sites which the legislation's administrators should be aiming to designate in order to afford protection to all known sites of importance. It is therefore proposed that the non-statutory criteria in Heritage at Sea be adopted and that an effort be made to increase the number of sites designated.

The number of areas designated under the new subsection (2A) to section 1 would probably be no more than one or two initially, but would

rise as the records of the RCHME and its equivalents<sup>14</sup> become able to identify areas of high archaeological potential.

(ii) Licences for designated sites - Two types of licence are currently available under the PWA 1973: licences to survey and licences to excavate.<sup>15</sup> The practice of the Advisory Committee, both in the past and to a great extent now, has been to issue excavation licences to most designated sites after licensees have shown a certain level of competence under a survey licence. This policy of "exploitation" must stop; it is out of line with current archaeological thinking<sup>16</sup> and with the policy adopted by English Heritage for land sites.<sup>17</sup> The argument that a licensee can police the designated site is fundamentally flawed because the licensee's own activities may - in reality - be as destructive as those of non-licensees. Instead, enforcement of designation orders must be afforded by the gradual education of the diving fraternity and by a properly motivated system of prosecution. Designated sites should only be excavated where necessary for rescue purposes or, in very exceptional circumstances, for research purposes. Such a restriction would mean that those excavations that did take place could be undertaken by a reputable archaeological body using state-of-the-art techniques and facilities, and there would be adequate conservation and storage facilities for the material raised. Also, if less material was being raised, it would alleviate the pressure on museums with limited acquisition budgets to acquire material from historic wrecks.

Licences to survey should be available more freely than excavation licences. Nonetheless, they should be granted again only to reputable archaeological bodies, since the very activity of surveying a site may cause destabilisation and should be undertaken with expert supervision. Encouragement should be given to these bodies to employ the assistance of local diving enthusiasts in the survey work, perhaps through contact

with the local sub aqua club. Such involvement would be a means whereby amateur divers could be trained in archaeological techniques and could be "educated" to respect the cultural heritage.<sup>18</sup>

(iii) Conditions on licences - At present there is a conflict between the provisions of the PWA 1973 which were designed to protect historic wrecks, and the salvage and wreck provisions in the MSA 1894 which apply to all wreck raised, even from designated sites. Where a licence under the PWA 1973 allows the raising of finds from a designated site, such items - once brought ashore - become subject to the MSA 1894's reporting, handling and disposal system. The result of this conflict was vividly illustrated in the case of HMS Invincible.<sup>19</sup> Effectively the site receives protection, but not the items raised from it. It appears that the Advisory Committee on Historic Wreck Sites has not been in the practice of making conditions about disposal of finds from designated sites because it understood that it was not legally entitled to do so. This seems to have resulted from a fundamental misunderstanding and there actually appears to be no legal reason why such conditions cannot be imposed.<sup>20</sup> It is therefore proposed that there should be a practice of imposing conditions on licences regarding disposal.

Conditions should also be placed on licences regarding the treatment of any human remains found on the site, to ensure that such remains are treated with care and sensitivity. This would help to align the PWA 1973 with the PMRA 1986.<sup>21</sup>

(iv) Radius of restricted area - In order to assist the prosecution procedure, the radius of designated sites should be extended from the 50-300 metres currently adopted.<sup>22</sup> Such an extension would make it easier to tell that someone was operating in the restricted area. This, together with the amendment proposed above<sup>23</sup> to the offences available, should facilitate the bringing of prosecutions. Once one or two

successful prosecutions had been brought, this would probably act as a deterrent to others against breach of the restrictions.

(v) Consultation regarding consents - The DNH should ensure that it is a consultee in any departmental consultation process undertaken prior to consent being given to seabed operations. When such consultation takes place, for example, concerning licences to dredge for aggregates under the Government View procedure, the DNH should make it a policy not to consent to dredging or other operations in designated areas of high archaeological potential before an archaeological assessment of the seabed had taken place. This policy would probably have the same effect as a negative condition on planning permission in that the developer would pay for the assessment in order to avoid consent being refused. Where material of archaeological significance was discovered as a result of the assessment, the developer should be encouraged to comply with the voluntary code of conduct (which is currently being developed)<sup>24</sup> in order to allow time for recording and study to take place. Where a developer was not prepared to comply with the code of conduct, consent should be refused. No consent should be given for operations to take place within the restricted area around a designated site, nor for operations outside the restricted area which are likely to have an impact on the site. The procedures for the issue of other consents to activities in the marine zone, which do not have a departmental consultation process, should be tightened so that designated sites and areas are taken fully into account.

(vi) The Advisory Committee on Historic Wreck Sites - The composition of the Advisory Committee should be revised to ensure that it represents the main historical and archaeological bodies with an interest in underwater archaeology. In particular, it should include a representative from the RCHME and its equivalents, and from the Association of County Archaeologists, since these bodies will play an

increasing role in the protective regime for underwater archaeology.<sup>25</sup> Membership should be representative, rather than ad hominen, and should be reviewed on an annual or biennial basis. In order to avoid any allegations of secrecy, the Advisory Committee should publish an annual report on its work which includes a report on the work that has been undertaken on each licensed site.

## 2. Merchant Shipping Act 1894

Amendment of the MSA 1894 is likely to be a much more difficult task than amendment of the PWA 1973. This is because of the interference that would take place with private and, in particular, commercial rights and interests.<sup>26</sup> Nonetheless, in the DTp's 1984 Consultative Document certain amendments were proposed<sup>27</sup> and they presumably reflect the type of changes that the government may be prepared to accept. Two, comparatively small, amendments along the lines proposed in the 1984 Consultative Document are therefore advocated here. Again, as with the PWA 1973, there appears to be plenty of room for administrative reform and this is the area in which changes are primarily proposed.

### (a) Legislative amendments

Only two legislative changes would be necessary to the MSA 1894 to implement Package A:-

(i) Ownership claim period - the current one year period may well dissuade divers from reporting finds because it will lead to months of uncertainty about whether they will be able to keep them. Also it does not encourage museums and conserving bodies to care for such material because its future is uncertain. It is therefore proposed that the

claim period be reduced from one year to three months.<sup>28</sup> It is clear that, in practice, very few ownership claims are made and, therefore, the interests of museums and finders seem to outweigh those of owners in this regard. In its 1984 Consultative Document, the government proposed a reduction of the period to two months and this suggests that such a proposal is not something it would necessarily be adverse to implementing. Some of the respondents to the 1984 Consultative Document did apparently object that the two month period was too short so, in this light, three months would seem to be a reasonable compromise.

(ii) Conservation costs - provision should be made that the costs of any temporary conservation and cleaning of artefacts should be reimbursed by the person or body who ultimately becomes entitled to the artefacts.

(b) Administrative changes

The following changes in the administration of the MSA 1894 Part IX are proposed:-

(i) Administrative department - It is unfortunate that the MSA 1894 provisions relating to wreck remain under the auspices of the DTp.<sup>29</sup> Moreover, it seems unnecessary in light of the fact that the 1894 reporting system is largely defunct in relation to modern wreck, which is the only legitimate DTp interest. It is unclear whether or not it would be possible to transfer the administration of Part IX of the MSA 1894 to the DNH. This may be vetoed by the government which may not wish to see the split administration of particular statutes. Nonetheless, there already appears to be a precedent for such a split in that the DNH administers the PWA 1973 ss.1 and 3 and the DTp retains administration of the PWA 1973 s.2, relating to dangerous wrecks. It is

therefore proposed that, if possible, the administration of Part IX of the MSA 1894 should be transferred to the DNH. There is little doubt that the transfer of these provisions would lead to their better administration in the interests of historic wreck.<sup>30</sup>

(ii) Reporting points - Some provision should be made for archaeological expertise in the reporting procedure. Furthermore, a local, as opposed to central, reporting point would be most satisfactory.<sup>31</sup> However, it appears that no reliance can be placed on HM Customs to provide this service, because of plans to regionalise Customs Offices.<sup>32</sup> Since the only purpose for reporting now appears to be to assess the archaeological significance of finds, it is proposed that the County Archaeological Units should become reporting points. This seems to be the most logical solution to the problem, since such Units would be able to determine the nature and archaeological significance of finds and would also be able to record finds in the county SMRs. The paperwork and administrative duties involved in receivership, including the advertising of finds and settlement of claims could be undertaken by the responsible government department, be it the DTp or DNH.<sup>33</sup> In its recent review of the receivership service, the DTp did consider replacing the local Customs offices with a network of reporting points based either on SMRs or on local museums, but concluded that such an arrangement would be too costly. It is unclear why such an arrangement would be costly and it is likely that this conclusion resulted from the decision, which appears to have been taken in the DTp, to wind-down the receivership service.

Reports could initially be made by post. Forms (perhaps simply a revised WRE 5<sup>34</sup>) should be freely available. If the County Archaeological Unit decided that a find was of potential archaeological interest, arrangements could be made for it to be examined, and if necessary, recorded in the SMR. All reports should be passed on to the



department concerned, in order that entitlement issues could be dealt with.

A certificate acknowledging that a report had been made should be developed which would be given to divers who report their finds. If the artefact was eventually awarded to the finder, the certificate would provide evidence that it had been properly reported. Such evidence could then be requested by a prospective purchaser and this might deter non-reporting.

(iii) Crown rights to unclaimed wreck - The Crown should exercise its rights in respect of unclaimed wreck responsibly. The current practice whereby items of unclaimed historic wreck are usually returned to the finder in lieu of a salvage reward<sup>35</sup> should be ended. Instead, where material is of interest to a museum, the Crown should relinquish its title in favour of the museum, without charge. In the case of material from designated sites, title should be relinquished in favour of the licensee.<sup>36</sup> The 1984 Consultative Document made similar proposals.<sup>37</sup> The problem of salvage payments to finders remains in the case of isolated finds, or material raised from undesignated sites. It is proposed that the salvage reward should be payable by the museum acquiring the object. This arrangement would at least give museums a first option as to whether to acquire artefacts and would alert them to the availability of such artefacts.<sup>38</sup> The 1984 Consultative Document provided that there should be a two month period after the ownership claim period in which a museum could make a claim, followed by a one year period in which to raise funds to pay for salvage. In fact, there seems no reason why museums could not register their interest in an artefact during the ownership claim period in case no one with ownership rights made a claim. This would save some delay. A one year period, as proposed in the Consultative Document, should be allowed in which a

museum could raise funds for salvage. It should be possible to allow this period without requiring legislative amendment, especially in view of the fact that, at present, many claims are actually left unsettled for years.<sup>39</sup>

Where there are finds of no interest to museums, they should be returned to the finder in lieu of salvage.

(iv) Enforcement and prosecutions - Whichever department administers the MSA 1894 provisions, there should be a commitment to enforce the reporting duty and to prosecute for infringement. Such commitment does not exist at present and there is virtually a complete breakdown of the reporting system.<sup>40</sup> There should be an education campaign whereby it is publicised that a new regime has come into force under which there will be a tough policing of the reporting duty. At the same time, there should be some kind of amnesty arrangement whereby material that has been found before a certain date could be declared without fear of prosecution, in order that details could be registered in the SMR.<sup>41</sup>

(v) Official charges - There no longer appears to be a problem regarding receivers' fees and expenses. The receiver's fee has been waived<sup>42</sup> and, according to the DTp, receivers do not usually incur expenses. Where such expenses are incurred, or VAT, excise duty etc.<sup>43</sup> are chargeable on material, such charges should not be payable by museums. Furthermore, the proposal in the DTp's 1984 Consultative Document that a fee should be payable by museums for the transfer of Crown title should not be implemented.

### 3. Other Legislation: Administrative changes

(a) Activation of the AMA 1979 s.53 - In order to ensure that non-wreck marine archaeological sites are afforded legal protection, the operation of s.53 of the AMA 1979 should be activated in order to protect "nationally important" non-wreck sites. Now that the AMA 1979 and PWA 1973 are both administered by the same department, there should be less concern about jurisdictional conflict.<sup>44</sup> A recently discovered example of a site which may well be considered of national importance, and is therefore evidence that such sites do exist, is the massive complex of wooden fish-traps dating from the seventh to tenth centuries found half a mile out to sea near Colchester.<sup>45</sup>

(b) Activation of the PMRA 1986 - The designation procedure under the PMRA 1986 should be activated since this would provide some measure of protection - indirectly - for late nineteenth century and twentieth century military wrecks of historical significance. There should be close liaison in this respect between the MOD and the DNH to ensure that no wreck is designated under both the PMRA 1986 and the PWA 1973 and that a wreck is designated under the most appropriate legislation. Where a vessel designated under the PMRA 1986 has some historical significance, then this should be taken fully into account when licences are issued, and salvage contracts made. For example, perhaps licences could be issued only to those with a genuine research interest and, where a salvage contract is made with the MOD, this could provide for a representative sample of material raised to be donated to an appropriate museum. Equally, as mentioned earlier, licences issued under the PWA 1973 should include conditions regarding the treatment of human remains, possibly based on a code of practice drawn up by the MOD in consultation with the DNH.<sup>46</sup>

#### 4. Summary of Package A

##### Protection of Wrecks Act 1973

###### Legislative amendment

- \*Designation of sites on account of their "national or international" importance
- \*Provision for designation of areas of high archaeological potential
- \*Fine-tuning of offences relating to interference with designated sites
- \*Provision for offences in areas of high archaeological potential

###### Administrative changes

- \*Number of designated sites increased and use of non-statutory criteria for designation of sites laid out in Heritage at Sea
- \*Excavation licences issued only in exceptional circumstances
- \*Survey licences issued to reputable archaeological bodies which should encourage local diver involvement
- \*Conditions on licences regulating disposal and treatment of human remains
- \*Radius of restricted areas widened
- \*The DNH should ensure that it is a consultee in any departmental consultation process undertaken prior to seabed consents  
Procedures for other consents should be tightened
- \*Advisory Committee membership revised and annual report published

##### Merchant Shipping Act 1894

###### Legislative amendments

- \*Ownership claim period reduced to three months
- \*Reimbursement of costs of temporary conservation by person or body who ultimately becomes entitled to the artefact.

###### Administrative changes

- \*Transfer of administration of Part IX from DTp to DNH
- \*County Archaeological Units to become reporting point with departmental administrative support
- \*Development of "certificate of reporting"
- \*Crown rights to unclaimed wreck to be relinquished to museums and licensees; other finds to be returned to the finder in lieu of a salvage reward
- \*Vigorous enforcement policy (coupled with amnesty)
- \*Abolition of all official charges on material going to museums.

##### Other Legislation

###### Administrative changes

- \*AMA 1979 s.53 activated to protect non-wreck marine sites.
- \*PMRA 1986 activated to protect late nineteenth century and twentieth century vessels. Close liaison between administrators of the PWA 1973 and the PMRA 1986.

## 5. Drawbacks of Package A

While the vast bulk of underwater archaeological remains is subject to its own separate regime in the PWA 1973, it is unlikely that it will be afforded equal treatment to the land-based heritage.<sup>47</sup> In particular, English Heritage will probably continue to consider that underwater archaeology is not part of its remit and this will prevent proper management and education policies being established.<sup>48</sup> Furthermore, the PWA 1973 does not cover non-wreck marine archaeological remains. Although such remains are covered by the AMA 1979 s.53, which could be activated (as suggested above) to provide protection for them, it seems much more logical for all types of marine archaeological remains to be covered by the same legislative provisions.<sup>49</sup> Moreover, the PWA 1973 was a Private Member's Bill and, therefore, its provisions could not commit significant government funding. Whether amendments to the Act could do so is unclear,<sup>50</sup> but this issue could foreseeably result in a lack of adequate funding for marine archaeology.

The provisions of the MSA 1894 Part IX were not designed to deal with historic wreck and are no longer required for what they were designed for, i.e. recent wreck.<sup>51</sup> The application of salvage law to cultural property is completely inappropriate and out of line with much current thinking.<sup>52</sup> Apart from the archaic nature of the provisions, and their inappropriateness to deal with material of potential archaeological significance, it may well be the case that the government would not allow the transfer of responsibility for Part IX to pass from the DTp to the DNH (as suggested in Package A), because the Merchant Shipping Acts are the province of the DTp. While under the auspices of the DTp, it is very doubtful that effort will be put into the enforcement of the reporting duty or that much enthusiasm will be mustered for the subject.<sup>53</sup> Furthermore, it is illogical that the

reporting, handling and disposal of historic wreck is treated completely separately from the protective provisions in the PWA 1973. These issues should not be severed from the protective regime.

A clear, workable division needs to be drawn between the operation of the PWA 1973 and the PMRA 1986 but, without some reform of the PMRA 1986,<sup>54</sup> such a division will rely on the goodwill of officials in both administering departments.

A system such as Package A, which relies on amendment of the existing legislation, can only result in piecemeal reforms, cobbled together. It should therefore be seen as a last resort measure only.

#### B. PACKAGE B: MORE EXTENSIVE REFORM

The information gathered during the course of this study has led the writer to believe that reform is required on a more extensive scale than Package A. There is no valid distinction, in terms of archaeological value and significance, between archaeological remains on land and those at sea. If the government is willing to exercise a sophisticated and well-funded management system for land-based remains, then it must be persuaded of the need for a similar system for underwater remains. If carefully implemented, so as to utilise as many of the existing frameworks as possible, such a system would probably not require a vast amount of extra funding, or significant new administrative structures.

Considerable thought has been given as to whether there should be a separate "Underwater Heritage Act" or whether provisions in relation to underwater remains should be included in the AMA 1979. It has been

concluded that the latter would be the best way forward.<sup>55</sup> One of the principal advantages of such integration would be that English Heritage would no longer be able to argue that underwater archaeology was not part of its remit. As will be seen, the requirement for English Heritage to take over responsibility for underwater archaeology is the linchpin of Package B.

It is the writer's view that the fundamental principle set out in Heritage at Sea that "archaeological sites of national importance underwater should receive no less protection than those on land"<sup>56</sup> has too narrow an approach. It refers only to archaeological sites of national importance, thereby restricting its remit to a very small percentage of the existing underwater archaeological resource. On land, it is not just sites of national importance that receive some form of protection: all known archaeological remains and areas of high archaeological potential receive a certain degree of protection through the planning system. Also, English Heritage is examining the possibility of providing wider protective mechanisms than scheduling for land-based remains - so as to encompass all archaeological remains on land within a management strategy and to develop techniques to protect areas of high archaeological potential and historic landscapes.<sup>57</sup> It is therefore submitted that a wider perspective needs to be taken than simply aiming to protect sites of "national importance". The basis of Package B is that the protective regime for the underwater heritage should mirror, as far as possible, that for the land heritage and, as far as possible, the two should be integrated. The main objective of English Heritage<sup>58</sup> in respect of land-based archaeological remains is to secure their preservation in situ wherever possible and, where this is not possible, to make provision for preservation by record. This should also be the objective of any regime for the protection of underwater archaeological remains and will therefore be the basis for the following proposals.

## 1. Legislative Changes

### (a) Subject matter

Section 53 of the AMA 1979 should be repealed and replaced by a new part. This part should be headed "Underwater cultural property". "Underwater cultural property" should be defined as "all remains, objects and any other traces of human existence"<sup>59</sup> that have been submerged for more than 100 years in UK waters. An approach whereby protection is afforded to wreck and non-wreck remains under the same legislative regime is in line with the various European and international initiatives in this field<sup>60</sup> and the 100 year cut-off point is in line with the Council of Europe's Recommendation 848 (1978) and the 1985 draft European Convention.<sup>61</sup>

There should be the ability to include, and exclude, property from the protective regime. UK waters would be defined to cover all tidal waters,<sup>62</sup> but the definition of "underwater cultural property" would include material partly below, and partly above, high-water mark.<sup>63</sup> Material in inland and non-tidal waters would continue to be dealt with under the scheduling procedure. This division is in line with the Council of Europe's Recommendation 848 (1978) which provides that the definition of "underwater heritage" should extend up to what is covered by land antiquities legislation, so that there are no gaps in what is protected. This divide also seems to be the most logical in the UK: non-tidal waters are subject to ordinary planning regulations, are generally easier to police, and salvage and wreck laws do not apply to them.<sup>64</sup>

### (b) Salvage and wreck laws

"Underwater cultural property" should be expressly excluded from the operation of the MSA 1894 wreck and salvage provisions. The UK



should accordingly make a reservation under the 1989 International Convention on Salvage, Article 30.<sup>65</sup>

(c) Ownership

It is proposed that ownership of all "underwater cultural property", as defined in (a) above, should vest in the Crown where no owner is known.<sup>66</sup> There should be a statutory presumption regarding abandonment and it is suggested that there should be a provision deeming ownership to have been abandoned where no efforts have been made to exercise rights of ownership in respect of the property during a 100 year period.<sup>67</sup> "Particular interests"<sup>68</sup> of other states in wrecks with which they have an historical connection should be statutorily recognised and these interests catered for by the use of co-operation agreements.<sup>69</sup>

The general practice should be for the Crown to relinquish its title to "underwater cultural property" in favour of a publicly accessible museum in the UK, where such a museum would like to acquire the material. Any remains under excavation could be transferred to a reputable archaeological body under a deed of trust, similar to that for certain MOD vessels, e.g. the Anne.<sup>70</sup> An acquisitions policy would need to be agreed between the government agencies responsible for the underwater heritage<sup>71</sup> and the Museums Service so that assemblages were kept together and logically housed.<sup>72</sup> Title to material not acquired by a museum should be relinquished to the finder.

In relation to FCO and MOD owned wrecks<sup>73</sup> which fall into the category of "underwater cultural property",<sup>74</sup> a proper management policy - based on historical and archaeological considerations - should be established in full consultation with the government agencies responsible for nautical archaeology.

(d) Designated sites

The PWA 1973 provisions relating to historic wrecks should be repealed and provision for designation of sites should be included in the AMA 1979. Designation should be undertaken by a reconstituted Advisory Committee,<sup>75</sup> with the advice of the ADU. Sites could be designated for a variety of reasons and there could be a system of categorisation, different types of activity being permitted - through a system of general licensing - in each category. There is much room for imagination and innovation in the categorisation of sites, but it is here suggested that there could be three categories of site:-

(i) "Category A" sites - These sites would receive the highest degree of protection and all unauthorised interference with them would be prohibited. The criteria for such designation should be flexible, so as to include all sites in need of such a high level of protection, for whatever reason. Some sites could be placed in Category A because of their particular archaeological importance; others awaiting rescue archaeology or in the process of rescue measures. The category should also include sites chosen for protection in situ for the benefit of future generations.<sup>76</sup>

(ii) "Category B" sites - This second category would allow for the visiting of sites on a "look but don't touch" basis. Again, the reasons for giving sites Category B status should be flexible, but the category would include, for example, sites being preserved in situ as part of an underwater heritage or conservation park.<sup>77</sup>

(iii) "Category C" sites - On such sites divers would be free to explore and tamper with the remains without restriction. This category would provide "training sites" and "play areas" for amateur divers.

The legal mechanism by which such categories could be created would be through a system of general "class consent" licences<sup>78</sup> for Category B and Category C sites, which would lift some of the statutory restrictions which would otherwise apply on designated sites. It should be possible for such licences to be revoked or amended easily if the need arose and for sites to move between categories in certain circumstances. For example, a site could be designated a Category A site while subject to survey activities to assess its importance, and might later move to a Category B or C designation if the survey showed it to be of only minor archaeological importance.<sup>79</sup> Such flexibility would allow for the management of the underwater archaeological resource.

If the Marine Conservation Society's concept of Marine Protected Areas<sup>80</sup> is adopted by government, it should be possible to overlap the two-tier system of site protection proposed as the basis for such Areas, with the system of categorisation. For example, "Category A" sites could be analogous with Type 1 Marine Protected Areas, and "Category B" sites could be analogous with Type 2 Marine Protected Areas.

(e) Designated areas

It should be possible to designate areas of high archaeological potential.<sup>81</sup> In such areas, all dredging and other commercial activities should be permitted only after full surveys of the underwater archaeological resource have been undertaken and assessed by independent analysts. Where archaeological remains are found, the remains should be a "material consideration" in the decision whether or not to grant consent. The establishment of restricted areas in the marine zone is very problematic<sup>82</sup> and a careful balance would have to be drawn between commercial and archaeological interests. Depending on

the outcome of the Marine Protected Areas proposal,<sup>83</sup> there should be liaison with conservation groups about the possibility of joint conservation areas, in which an environmental assessment would always be required before "development" activities took place, in order to evaluate the potential impact of the proposed operation on various environmental, as well as archaeological, factors.

(f) Protective regime

There should be offences for interference with all "underwater cultural property" and heavy penalties for infringement. There need to be offences which apply to "underwater cultural property" in general, and offences which apply to designated sites and areas. It is proposed that the offences take the following, or similar, form:-

(i) In relation to all "underwater cultural property":-

"Subject to the statutory defences laid out in [],<sup>84</sup> a person commits an offence if, without the authority of a licence, he knowingly tampers with, damages or removes underwater cultural property".

The insertion of the word "knowingly" would exempt fishermen and dredging companies, etc., from infringing the provisions where they inadvertently damage or raise material.<sup>85</sup>

(ii) In relation to designated sites:-

"Subject to the statutory defences laid out in [], a person commits an offence if, within the area of a designated site and without the authority of a licence, he-

(a) tampers with, damages or removes underwater cultural property;

(b) carries out diving or salvage operations, or uses equipment constructed or adapted for any purpose of diving or salvage operations; or

(c) deposits, so as to fall and lie abandoned on the seabed, anything which, if it were to fall on an underwater cultural site<sup>86</sup> (whether it so falls or not) would wholly or partly

obliterate the site or obstruct access to it, or damage any part of it".

In particular, it should be noted that - under this proposal - all diving and salvage activities would be prohibited on a designated site. Also, the offence in (a) is based on strict liability and therefore any commercial operations (other than those undertaken in exercise of a statutory function) which tampered with underwater cultural property on a designated site would be in breach. Position-fixing difficulties would be alleviated if the restricted areas were enlarged from those currently used.

(iii) In relation to designated areas:-

"Subject to the statutory defences laid out in [], a person commits an offence if, within a designated area and without the authority of a licence, he-

(a) tampers with damages or removes any underwater cultural property;

(b) carries out diving, survey or salvage operations directed to the detection, location or exploration of underwater cultural property or to recovering it from, or from under, the seabed;

(c) uses equipment constructed or adapted for any purpose of diving, survey or salvage operations, directed to the detection, location or exploration of underwater cultural property or to recovering it from, or from under, the seabed; or

(d) deposits, so as to fall and lie abandoned on the seabed, anything which, if it were to fall on an underwater cultural site (whether it so falls or not) would wholly or partly obliterate the site or obstruct access to it, or damage any part of it".

It should be noted that not all diving and salvage operations in designated areas would be prohibited, but only those directed towards the detection, location, exploration or recovery of, underwater cultural property.<sup>87</sup> Again, the prohibition in (a) is based on strict liability and therefore any commercial operations which interfered with underwater cultural property would be in breach.

The offences in relation to designated sites and areas would not

take place if undertaken with the authority of a licence.<sup>88</sup> Such licences would allow for the varying restrictions imposed on the different categories of site.<sup>89</sup> Penalties for all offences should consist of a heavy fine and, in some cases, imprisonment, and it must be made clear that prosecutions will be vigorously enforced.

(g) Licences

It is proposed that there should be three forms of licence:-

(i) Licences to excavate - Such licences would be issued, in the main, only where excavation was justified because of threats to the site through natural processes or commercial exploitation. Very exceptionally, such licences may be awarded for genuine research purposes, but only where the use of scarce excavation resources was fully justified. Excavation licences should only be issued to bona fide archaeological organisations and should contain conditions regarding disposal and treatment of human remains.<sup>90</sup> Funds for excavation should be provided by English Heritage,<sup>91</sup> developers<sup>92</sup> and commercial sponsorship.<sup>93</sup>

(ii) Licences to survey - This type of licence would be available more freely than an excavation licence and would be issued to appropriate bodies with archaeological expertise. Such licensees would be encouraged to recruit local diving enthusiasts to assist with the survey work.<sup>94</sup> Licences should contain conditions regarding disposal of any material that needs to be raised during the survey work, and conditions regarding treatment of human remains.

(iii) General "class consent" licences<sup>95</sup> - This type of licence would be issued for Category B and Category C sites in order to avoid infringement of the statutory provisions prohibiting diving, etc. There

could be a "class consent" licence for Category B sites and a "class consent" licence for Category C sites, giving en bloc authorisation for certain activities.

(h) Duty to report

There should be a duty to report all finds of "underwater cultural property" and this should be to a local reporting point.<sup>96</sup> In most cases the report will consist of information that a site or material has been found on the seabed, rather than a report that material has been raised. This is because, in general, the raising of "underwater cultural property" will be prohibited. However, it is the case that some material would be raised, either inadvertently by fishermen, dredging companies, etc., or as a result of survey work.<sup>97</sup> To overcome problems of identification of "underwater cultural property", divers and other sea users should be encouraged to report all finds of human origin.<sup>98</sup> Reports should be made within a certain time limit, e.g. four days.<sup>99</sup>

As in the case of Package A, the natural reporting point would appear to be the County Archaeological Unit.<sup>100</sup> The reporting procedure could be very similar to that advocated in Package A, with a written report being made first and the handing in of the object later, if it was considered to have potential archaeological significance.<sup>101</sup> In the case of finds returned to the finder, conservation and cleaning costs would be payable by them. Where the find was to go to a museum, then the museum should pay these costs. As in Package A, a certificate of reporting should be issued.

(i) Rewards

The writer has come to the conclusion that there should be no provision for monetary rewards for finders of "underwater cultural

property".<sup>102</sup> Provision for rewards would require significant government funding and may be enough to dissuade the government from initiating reform proposals. If there are strong and effective enforcement and prosecution measures,<sup>103</sup> coupled with a concerted long-term education campaign<sup>104</sup> and strict export controls,<sup>105</sup> that may be all that is necessary to prevent widespread abuse of the system. Furthermore, there are a number of imaginative ways in which finders could be rewarded in a non-monetary fashion and these should be explored and utilised.<sup>106</sup> The aim of non-monetary rewards should be to make the finder feel recognised and well treated.

(j) Abolition of treasure trove law

Proposals for the reform of treasure trove law<sup>107</sup> are really beyond the remit of this thesis, but some tentative suggestions are made here which would help to equalise the treatment afforded to all types of archaeological find in the UK.

In order to align the protection afforded to "underwater cultural property" with other types of cultural property found in inland waters and on land, the law of treasure trove should be abolished and replaced with statutory provisions in the AMA 1979 providing that all remains of human origin over 100 years old should belong to the Crown where no owner is known.<sup>108</sup> The same statutory presumption regarding abandonment suggested for marine remains<sup>109</sup> should be applicable here also. There should be a duty to report all such finds to the nearest County Archaeological Unit. To assuage the government, which may well be unhappy about such sweeping proposals, there should be no reward payable. As with "underwater cultural property", a certificate of reporting should be issued. Also, museums would have first refusal on such material but, where an item was not required by a museum, the Crown should relinquish its rights to the finder.



## (k) Enforcement measures

It seems inevitable that little money will be available for the policing of the protective regime outlined above and, therefore, it is not proposed that there should be a special task force of enforcement officers. Nonetheless, those official bodies that already operate on the coast, such as the ADU, harbour masters, Coastguards, etc., should be given statutory powers similar to those in the PMRA 1986<sup>110</sup> to enable them to enforce the protective regime and collect evidence of its infringement. For example, where they have "reasonable grounds for believing" it necessary to do so, they could be given power to board and search vessels, seize material, etc. There should also be the power to seize equipment and a court should be able to order the forfeiture of equipment so seized.<sup>111</sup>

As far as enforcement of the duty to report is concerned, the police and also possibly officers of the county archaeological units, should be given the power to search places where underwater cultural property may be secreted and seize material found there.<sup>112</sup>

## 2. Administrative Changes

### (a) Agency

It is proposed that English Heritage takes over responsibility for underwater archaeology in England, as its counterparts have already done in Scotland and Wales.<sup>113</sup> Its budget should be increased accordingly. Only a national agency such as English Heritage could exercise a proper management policy for the underwater cultural heritage,<sup>114</sup> together with an ongoing scheme of public education,<sup>115</sup> both of which are essential to any effective protective regime. It is

extremely unlikely that the government would establish a separate underwater heritage agency and, in any event, this would probably be unnecessary if the resources of English Heritage and the structures already in place could be utilised. Furthermore, the basic principle of Package B is to integrate the treatment of land-based and marine archaeology as far as possible.

English Heritage would administer a management strategy for underwater archaeology similar to that for land archaeology outlined in Chapter Seven.<sup>116</sup> This strategy should be based on a "management cycle" analogous to that identified by English Heritage in relation to the management of the land-based resource.<sup>117</sup> National and county records of the archaeological resource would provide the key management tool. Documentary records of the marine archaeological resource are already being established in the SMRs and National Archaeological Record, but funds would be required for a comprehensive survey of the seabed in order to identify areas of high archaeological potential.

A major function of English Heritage would be to administer a campaign of education, defined in the broadest terms.<sup>118</sup> This would enable the protective regime for "underwater cultural property" outlined above to be observed and respected without too much reliance on policing measures and would help to justify public money being spent on underwater archaeology.

Once the government had provided pump-priming funds to establish the new regime, much could be done through sponsorship, voluntary assistance and so on to reduce the commitment of public funds.<sup>119</sup> If English Heritage goes ahead with its recently announced plans to hive off the management of many of the monuments currently under its guardianship to charities, trusts and local authorities,<sup>120</sup> there is no reason why particular underwater archaeological sites could not be

managed on a local basis in the same way.<sup>121</sup>

(b) Other administrative structures

The Advisory Committee on Historic Wreck Sites, in its present form, should be disbanded. Its practices are ingrained, it has too many vested interests and its remit requires a fresh approach. A new representative committee should be formed, to parallel the Ancient Monuments Advisory Committee. The new committee should be available to advise English Heritage.<sup>122</sup>

The ADU should be retained and its duties and funding expanded, in line with the Central Excavation Unit's newly defined role.<sup>123</sup> The services of the Ancient Monuments Laboratory should be made available for underwater, as well as land-based, archaeology.<sup>124</sup>

3. Other Changes Required

(a) Planning/regulation in the marine zone

On land, the planning regime provides a significant degree of protection for the archaeological resource<sup>125</sup> and this protection should be mirrored as far as possible in the marine zone. At present it is unclear whether or not the government will extend planning jurisdiction into coastal waters. It is therefore necessary to consider the position if it does extend such jurisdiction, and also the position if it does not.

(i) Extension of the planning authority regime

If the planning regime is extended into territorial waters, this would allow for the archaeological resource to be treated as a material

consideration in all cases where developments are proposed. The policies set out in PPG 16 relating to land archaeology<sup>126</sup> should be extended into the marine sphere. For example, there should be a presumption in favour of the preservation in situ of important archaeological remains and development plans should be established for the marine zone which should include policies for the "protection, enhancement and preservation" of sites of archaeological interest.<sup>127</sup> The marine archaeological resource should be dealt with in the same way as on land - through the advice of the County Archaeological Officer and reference to the SMR. In the initial stages, while the SMR marine records were being compiled, it would be necessary to require developers who propose a development which affects the seabed to undertake an archaeological survey and assessment.<sup>128</sup> Later, when it becomes possible to identify areas of high archaeological potential, developers should be required to undertake surveys and assessments prior to planning permission only in these areas.

As on land, where planning authorities decide that preservation in situ is not justified in the circumstances, and that development resulting in the destruction of archaeological remains should proceed, provision should be made for rescue archaeology. A voluntary agreement should be encouraged wherever possible (perhaps based on the code of conduct currently being drafted by the JNAPC),<sup>129</sup> or a condition should be imposed on planning permission in order to ensure that rescue archaeology takes place.

There should be the imposition of a statutory duty on all statutory undertakers and marine operators to "have regard for" the underwater archaeological resource. The Transport and Works Act 1992, Schedule 3,<sup>130</sup> already imposes a duty on harbour authorities to have regard to the conservation of the natural beauty of the countryside and of flora and fauna in formulating or considering any proposals

relating to their statutory functions. There appears to be no reason why this provision could not be amended to include a duty to have regard to the underwater archaeological resource. The Sea Fisheries (Wildlife Conservation) Act 1992 s.1 requires appropriate Ministers and local fisheries committees to have regard to the conservation of marine flora and fauna and endeavour to achieve a reasonable balance between conservation and "any other considerations to which he is or they are required to have regard" in the discharge of their functions under the Sea Fisheries Acts. Again, this provision could easily be amended to include archaeology in the list of conservation interests to which regard should be paid. Similar statutory duties could be imposed on other bodies who operate, or give consents to operate, in the marine zone. In particular, the Crown Estate Act 1961 should be amended in this regard. There should also be a statutory duty on seabed operators to report finds which may be of archaeological interest.<sup>131</sup>

(ii) No extension of the planning authority regime

If there is no extension of planning authority jurisdiction and the regulatory regime remains very much in its current form, the Government View procedure used in the case of applications to dredge for marine aggregates should be adapted and extended to apply to all consents in the marine zone and consultation should take place with English Heritage and the local County Archaeological Unit. A statutory duty to "have regard for" the underwater archaeological resource should be imposed on marine operators and consenting bodies and there should also be a statutory duty to report archaeological finds. If it is not feasible to impose statutory duties in this regard, voluntary agreement to undertake these duties should be sought.

In general, the aim should be to ensure that operations and activities in the marine zone do not proceed without taking into account

their potential impact on the archaeological resource.

(b) Protection of Military Remains Act 1986

There needs to be as clear a distinction as possible between the jurisdiction of the proposed regime for "underwater cultural property" and the PMRA 1986. It is therefore proposed that the PMRA 1986 be amended as follows:-

(i) Designated vessels - The provision in the PMRA 1986 s.1(3)(a) that a designated vessel should only be one that appears to the Secretary of State to have sunk or stranded on or after 4th August 1914, should be amended so that it is only possible to designate vessels which sank or stranded less than 100 years ago. The original provision was clearly designed to include World War I vessels and obviously its replacement with a moving date system will mean that from 2014 some World War I vessels will no longer be able to receive protection under the Act. However, 100 years is a period within living memory and it is arguable that it is a more logical cut-off point than that in the PMRA 1986.

(ii) Controlled sites - The provision in the PMRA 1986 s.1(4)(a) that controlled sites should only be designated where it appears to the Secretary of State that less than 200 years have elapsed since the crash, sinking or stranding, should be amended to state: "less than 100 years". It is unclear why a 200 year period was chosen for the designation of controlled sites as it appears completely arbitrary, and it is also unclear why it was felt necessary to have a different time period in relation to controlled sites and designated vessels. The amendments proposed here would therefore remove these apparent anomalies in the Act.

(iii) Aircraft - The provision in the PMRA 1986 s.1(1) which states that the Act applies to any aircraft which has crashed while in military service should be amended so that it only applies to aircraft which have crashed "less than 100 years ago" while in military service.

(iv) Exclusion - A provision should be inserted in the AMA 1979 (as amended) to the effect that no remains could be designated under the AMA 1979 which were already designated under the PMRA 1986. Such a provision would be necessary since there would be the ability under the AMA 1979 (as amended) to designate sites of remains which were less than 100 years old.<sup>132</sup> If the exclusion was inserted in the AMA 1979 (as amended), rather than the PMRA 1986, this would give precedence to designations under the PMRA 1986. Since the general cut-off point between the two legislative frameworks would be 100 years, such precedence would seem logical.

These amendments would provide a clear cut-off point between the jurisdiction of the PMRA 1986 and the AMA 1979 (as amended). Human remains on sites designated under the AMA 1979 (as amended) would still receive protection through conditions on licences regarding the treatment of such remains.<sup>133</sup> Equally, if the system of designation under the PMRA 1986 was activated - and this is advocated - military remains less than 100 years old which were of historical significance could receive some measure of protection through the PMRA 1986. Operation of the two statutes should be co-ordinated in order to ensure the protection of cultural interests and the sanctity of human remains.

#### 4. Summary of Package B

(a) The AMA 1979 should be amended to insert a new part. This should make provision for the following:-

- \*"Underwater cultural property" should be defined as "all remains, objects and any other traces of human existence" that have been submerged for more than 100 years in UK waters. (UK waters should have the same definition as in the PWA 1973, i.e. to include all tidal waters.)
- \*"Underwater cultural property" should be expressly excluded from the operation of the MSA 1894 wreck and salvage provisions.
- \*Ownership of all "underwater cultural property" should vest in the Crown where no owner is known. There should be a statutory presumption regarding abandonment. "Particular interests" of other states should be statutorily recognised and catered for by co-operation agreements.
- \*There should be provision for designation of sites. Such designations should be divided into categories which have different purposes.
- \*There should be provision for designation of areas of high archaeological potential.
- \*There should be offences for interfering with underwater cultural property.
- \*There should be three types of licence: licences to excavate (awarded only for rescue purposes and exceptionally for research purposes), licences to survey and general "class consent" licences.
- \*All licences should include conditions regarding the treatment of human remains.
- \*There should be a duty to report all finds to the County Archaeological Unit within a certain time period.
- \*There should be no provision for monetary rewards.
- \*Consideration should be given to the abolition of treasure trove law and its replacement by a statutory system for reporting and Crown ownership of land-based finds. This would align the treatment afforded to land-based and marine finds.
- \*Official bodies should be given powers of search, seizure, etc.

(b) Administrative changes should be as follows:-

- \*English Heritage should take over responsibility for underwater cultural property in English waters.
- \*The Advisory Committee on Historic Wreck Sites should be disbanded and a new committee formed to parallel the Ancient Monuments Advisory Committee.
- \*The ADU should be retained and expanded, in line with the Central Excavation Unit, and the services of the Ancient Monuments



Laboratory should be available for underwater archaeology.

(c) Other changes would be required as follows:-

\*Underwater archaeology should be a "material consideration" in any application for planning permission, or application for consent, in the marine zone.

\*The PMRA 1986 should be amended so that in general it does not apply to "underwater cultural property".

CONCLUSION

The government should be urged to implement a radical reform package and should seriously consider the reforms outlined in Package B. This package is very much in line with the Council of Europe's minimum requirements in Recommendation 848 (1978). It only departs from these requirements in two respects. First, in view of the current economic climate, Package B makes no provision for monetary rewards, and secondly, it extends only to cover the territorial sea.<sup>134</sup> In respect of the ownership and salvage issues, it goes further than the 1985 draft European Convention on the Protection of the Underwater Cultural Heritage, but in other ways it accords with the draft Convention.

As pointed out earlier,<sup>135</sup> the regime set out in the 1992 ILA draft Convention would not apply directly to the territorial waters of Contracting States, but States Parties would be "encouraged" to apply the provisions to activities within their territorial waters. This draft Convention provides for the blanket protection of underwater cultural property at least 50 years old and in this respect Package B differs in that it provides protection for underwater cultural property over 100 years old. In the UK a 50 year period would almost certainly be unacceptable to commercial interests and 100 years seems to provide a reasonable compromise. How far Package B would accord with the controls upon activities envisaged by the 1992 draft Convention will

remain unknown until the criteria to be set out in the Appendix to the Convention have been drafted.

Package B accords well with both the letter and spirit of the European Convention on the Protection of the Archaeological Heritage (revised) 1992, which the UK may ratify in the near future. In particular, it provides for the "integrated conservation"<sup>136</sup> of underwater archaeology by providing mechanisms to reconcile the interests of archaeology and development.

Furthermore, Package B would clearly comply with Article 303 of the 1982 Law of the Sea Convention in that it would fulfil the duty of states to protect objects of an archaeological and historical nature found in their territorial waters. Moreover, in recognising the "particular interests" of other states and encouraging co-operation agreements, it would also fulfil the duty to "co-operate" for the purpose of protecting objects of an archaeological and historical nature found in territorial waters.

In order to provide a measure of support for a reformed system, such as that proposed in Package B, the government is urged to ratify the 1970 UNESCO Convention on Illicit Trade in Cultural Material.<sup>137</sup> It is essential that there should be a strengthening of controls over the export of cultural property in order to make it less worthwhile for individuals to evade the protective regime.

If the government was determined not to institute comprehensive reform in the foreseeable future, implementation of the reforms proposed in Package A - although not ideal - would result in considerable improvements over the present system.

## NOTES

1. See Chapter Five, C., above.
2. See 1(a) below.
3. See B., below.
4. The writer offers some suggestions for the statutory wording, but obviously these would need to be submitted for consideration by Parliamentary Counsel.
5. See further, Chapter Six, A.1(a) above.
6. See further, Chapter Six, A.1(c) above.
7. This wording was originally proposed by Margaret Lynd-Smith of the Treasury Solicitor's Department in August 1990, in a paper circulated internally within the JNAPC.
8. See further, Chapter Three, C.6., above.
9. See Chapter Six, A.3., above.
10. This wording is based on the Irish National Monuments (Amendment) Act 1987 s.3(3), see further Chapter Six, A.2(b) above. The underlining emphasises the differences between the provision in relation to designated sites and that in relation to designated areas.
11. See Chapter Three, C.3., above.
12. See Chapter Seven, A.1(a) above.
13. JNAPC, Heritage at Sea, *op. cit.*, p.18.
14. See further, Chapter Six, A.4(c) above.
15. See further, Chapter Three, C.5., above.
16. See further, Chapter Six, B.1., above.
17. See Chapter Seven, A.1(a) above.
18. Such a policy appears to have worked well in Ireland: see Chapter Six, B.2., above.
19. See Chapter Three, D., above.
20. See further, Chapter Three, C.5., above.
21. For details of the PMRA 1986, see Chapter Three, E., above. It may be possible for relevant government departments, including the DNH and MOD, to draw up a code of practice for the treatment of human remains, which would have to be observed by licensees under both the PWA 1973 and the PMRA 1986. For proposals for reform of the PMRA 1986, see A.3(b) below.
22. See Chapter Three, C.3., and C.6., above. See also Chapter Six, A.3., above.
23. See A.1(a)(iii) above.

24. See Chapter Five, C.5(a) and Chapter Seven, C.2(d) above.
25. In 1988, the Association of County Archaeological Officers offered to send a representative to meetings of the Advisory Committee, arguing that it was not possible to assess the importance of sites without having knowledge of the available resource, but this offer was rejected by the DTP: see further, Chapter Three, C.1., above.
26. See generally, Chapter One, above.
27. See further, Chapter Five, B., above.
28. In fact, this was the original claim period laid down by Henry III in 1236: see Chapter One, B.1., above.
29. For the drawbacks, see Chapter Two, C.5., above.
30. See further, Chapter Two, C.5., above.
31. See further, Chapter Six, A.5., above.
32. A transfer of the receivership duties away from HM Customs appears inevitable: see Chapter Two, B., above.
33. Current proposals are that the DTP Marine Directorate takes over the duties of the receivership service, so there should be no objection to this responsibility. See further, Chapter Two, B., above.
34. See Appendix 4.
35. See Chapter Two, A.4., above.
36. Under the proposals in A.1(b)(ii) above, licences would only be issued to reputable archaeological bodies and conditions would be placed on disposal.
37. Except that the Secretary of State was empowered to require payment of a fee to cover the cost of transferring Crown title. See A.2(b)(v) below.
38. Under the current system, museums are probably not aware of the existence of most archaeological finds, and usually only become so aware if the find is put up for sale at public auction.
39. See Chapter Two, C.2., above.
40. See further, Chapter Two, A.5., and A.6., above.
41. Such an amnesty has achieved benefits in Western Australia, see Chapter Six, A.4(c) above.
42. See further, Chapter Two, A.3., above.
43. See further, Chapter Five, C.4., above.
44. See further, Chapter Seven, A.1(a) above.
45. See thesis Introduction.
46. Such a code of practice could operate in respect of licences issued under both the PWA 1973 and the PMRA 1986. The assurance provided by the government that licences under the PMRA 1986 would be issued to reputable British salvage companies in respect of British military wrecks in international waters (see Chapter Three, E.1(c) above) was on

the condition that they operated under a code of practice.

47. For further argument, see Chapter Seven, A.3., above.

48. See further, B., below.

49. See further, Chapter Six, A.1(a) above.

50. See further, Chapter Three, D., above.

51. See further, Chapter Two, A.6., above.

52. See further, Chapter Six, A.5., above.

53. See further, Chapter Two, C.5., above.

54. See proposals in Package B, B.3(b) below.

55. See further, Chapter Seven, A.3., above.

56. See further, Chapter Five, C.3(a) above.

57. See further, Chapter Seven, B., above.

58. See Chapter Seven, A.1(a) and B., above.

59. This definition derives from the ILA's draft text in its Queensland Report, op. cit. See further, Chapter Four, D.1., above.

60. See further, Chapter Six, A.1(a) above.

61. See Chapter Four, A.1., and B.2(a) above. The 50 year cut-off point proposed in the latest ILA draft (see Chapter Four, D.2., above) would probably be too recent to be acceptable to the UK's strong commercial interests. As to these commercial interests, see generally, Chapter One, above.

62. The definition of UK waters should be the same as that currently used in the PWA 1973 s.3(1).

63. So providing protection for sites which straddle the land/sea divide: see further, Chapter Six, A.1(b) above.

64. See, e.g., The Goring [1988] 1 All ER 641 (HL). In contrast, Ireland has included inland waters in its special provisions for underwater sites and finds, but other factors seem to be applicable there: see Chapter Six, A.1(b) above.

65. See further, Chapter Four, B.2(c) above.

66. For justification of this somewhat radical proposal, see Chapter Six, C.1., above. Amendment of treasure trove law should seriously be considered in order to bring into line material found on land-based sites, see further B.1(j) below.

67. See further, Chapter One, A.2., above, and Chapter Six, C.1., above.

68. A concept used in the 1985 draft European Convention, see Chapter Four, B.2(j) above.

69. Such agreements can be extremely successful: see further, Chapter Six, C.1., and C.2., above.

70. See further, Chapter One, A.1(c) above.

71. See B.2(a) below.

72. Similar principles to those employed in the Australia/Netherlands Agreement could be usefully adopted: see further, Chapter Six, C.2., above.

73. See further, Chapter One, A.1(c) above. See also, Chapter Five, C.4., above.

74. As will be seen at B.3(b) below, the PMRA 1986 would apply only to wrecks which do not fall into this category.

75. See B.2(b) below.

76. See further, Chapter Six, B.1., above.

77. See further, Chapter Six, B.1., above.

78. See B.1(g) below.

79. This flexible approach to designation would remove any need for temporary designation orders: see further, Chapter Six, A.1(c) above.

80. See further, Chapter Seven, D., above.

81. The protection of such areas on land is already being considered: see Chapter Seven, B.2., and B.3., above.

82. See further, Chapter Seven, D., above.

83. See Chapter Seven, D., above.

84. The statutory defences would be the same as, or similar to, those currently laid down in the PWA 1973 s.3(3). See Chapter Three, B., above.

85. See thesis Introduction for examples of such interference.

86. An "underwater cultural site" could be defined as "a site comprising remains or objects of human origin which have been submerged for more than 100 years".

87. See A.1(a)(iv) above.

88. See B.1(g) below.

89. See B.1(d) above.

90. For amendment of the PMRA 1986, see B.3(b) below.

91. See further, Chapter Seven, B.5., above.

92. See further, Chapter Seven, B.5., and C.1., above.

93. See further, Chapter Six, E., above.

94. See further, Chapter Six, B.2., above.

95. Cf. the general licences that can be granted under the PMRA 1986, see Chapter Three, E.1(c) above; and the "class consents" orders under the AMA 1979, see Chapter Seven, A.1(a) above.

96. The duty should be imposed on the finder and any person who becomes aware of the find: see Chapter Six, A.5., above.

97. In the case of material raised as a result of excavation work, there would be no need for it to be reported because ownership issues, co-operation agreements, etc. would have been sorted out prior to the issue of a licence. Obviously, the excavators would keep a full record of recoveries which would form part of their published results.

98. Since it is notoriously difficult for non-experts to distinguish archaeologically valuable material from other material. See Chapter Six, A.5., above.

99. This would be in line with the Irish National Monuments (Amendment) Act 1987 s.3(6).

100. See further, A.2(b)(ii) above. If the County Archaeological Unit became the reporting point for marine finds, it might foreseeably lead to a system of reporting of finds from land sites to the Unit too. This would then comply with the Council of Europe's minimum requirement in Recommendation 848 (1978) that "a single authority should be given primary responsibility for dealing with both land and underwater finds and determining their significance".

101. Some provision should be made for any expenses incurred by the finder in getting the object to the County Archaeological Unit.

102. For arguments for, and against, rewards, see Chapter Six, A.7., above.

103. See further, Chapter Six, A.3., above. See also B.1(k) below.

104. See further, Chapter Six, D., above. See also B.2(a) below.

105. See Conclusion to this chapter.

106. See further, Chapter Six, A.7., above.

107. For details of the current law, see Chapter Seven, A.1(b) above.

108. Such a change would also help to bring the position in England more in line with that in Scotland and the Republic of Ireland, see Chapter Seven, A.1(b) above.

109. See B.1(c) above.

110. See further, Chapter Three, E.1(d) above. For proposed amendments to the PMRA 1986, see B.3(b) below.

111. Powers of seizure and forfeiture of equipment are available under the Australian Commonwealth Historic Shipwrecks Act 1976: see Chapter Six, A.3., above.

112. Such a power could be along the lines of the power available to receivers under s.537 of the MSA 1894: see further, Chapter Two, A.5., above.

113. See Chapter Three, C., above and Chapter Five, C.4., above.

114. In line with that for the land-based heritage, see Chapter Seven, B., above.

115. See further, Chapter Six, E., above.

116. See Chapter Seven, B., above.

117. See further, Chapter Seven, B.7., above.

118. See further, Chapter Six, D., above.

119. See further, Chapter Seven, E., above.

120. The Independent, 26 October 1992. These plans have caused much controversy (see "English Heritage disposal plans spark serious rift", The Independent, 29 October 1992; "Prehistorians attack 'flawed' heritage plan", The Independent, 29 October 1992) and it may be that the opposition to them will be sufficient to result in a moderating of the proposals.

121. In fact, the gifting of particular remains to charitable trusts, proposed above, would fulfil the same function.

122. And its equivalents in Scotland and Wales. The committee should also advise the DOE (Northern Ireland).

123. See further, Chapter Seven, B.6., above.

124. See further, Chapter Seven, B.6., above.

125. See Chapter Seven, C.1., above.

126. See Chapter Seven, C.1., above.

127. PPG 16: see Chapter Seven, C.1., above.

128. According to Dr. Tim Champion of the Archaeology Department, University of Southampton (in a presentation on archaeology and planning law at a conference on Archaeology and Law held in Southampton in November 1992), on land it would be "utterly unreasonable" to request assessment where there is no evidence of archaeological remains. However, the position in the marine zone is different because inventories have not yet been developed to a stage where they can identify areas of high archaeological potential.

129. See Chapter Seven, C.2(d) above.

130. Para.6, amending the Harbours Act 1964 s.48.

131. This has already been done in Norway in relation to petroleum exploration and exploitation: see further, Chapter Six, A.5., above.

132. See B.1(a) above.

133. See B.1(g) above.

134. The territorial scope of application of the laws relating to the underwater cultural heritage will be considered in the thesis Conclusion.

135. See Chapter Four, D.3., above.

136. See further, Chapter Four, E.5., above.

137. See further, Chapter Four, B.2(k) above.



## FINAL CONCLUSIONS

### A. THE UK POSITION

These are interesting times for those concerned for the underwater cultural heritage of the UK. In the last three years there have been significant developments which improve, or promise to improve, the position of underwater archaeology. Of particular note are the transfer in 1991 of administrative responsibility for the PWA 1973 from the DTp to a department which has responsibility for other heritage matters, and the creation in 1990 and 1991 of national and county records of marine sites. The Heritage at Sea initiative in 1989 focussed government attention on the plight of underwater archaeology and this has led to a review of the operation of the PWA 1973 and the MSA 1894. These and other developments which have taken place are to be warmly welcomed.

Unfortunately, the government has not yet been persuaded of the need for legislative reform. Without such reform many serious difficulties will remain. In particular, salvage law will continue to apply to historic wreck, the duty to report wreck may well continue to be openly flouted, adequate funding will not be made available to nautical archaeology and, perhaps most importantly, English Heritage will probably remain unwilling to take over responsibility for this aspect of the national heritage. While these factors remain unresolved, it will not be possible to create a proper management policy for underwater archaeology and it will continue to be treated as a poor relation of its counterpart on land.

The government - in this as in many other matters - requires evidence of destruction or problems being caused by the present legislation, before it is prepared to act. Unfortunately, evidence will tend to be anecdotal since it is virtually impossible to draw up statistics to illustrate the amount of material recovered but unreported, the amount of material dredged or trawled up but thrown back into the sea, and so on. However, the fact that such statistics cannot be collated does not mean that there is not a problem.

Until now, as in other areas of law, "efforts to protect wrecks have evolved not so much as systematic policy, but more in response to various crises."<sup>1</sup> In the years preceding the enactment of the PWA 1973 much damage and destruction was wrought on historic wrecks of enormous significance such as the Association, the Romney, the Amsterdam, the de Liefde, the Hollandia and the Mary.<sup>2</sup> The artefacts and information lost at this time can never be replaced. With the ever increasing pressure on coastal resources; the building of marinas and other recreational facilities on the shoreline; increasing coastal defence work, dredging activities, oil and gas exploration and exploitation, fish-farming enterprises, etc., there is an increasing likelihood that important wrecks or other underwater cultural remains will be seriously damaged or destroyed before their existence even becomes apparent or their significance recognised. The government should therefore consider a pro-active, rather than reactive, approach in this respect in order to anticipate problems before a further crisis develops.

Twenty years ago, when the PWA 1973 was enacted, underwater archaeology was a "nascent discipline".<sup>3</sup> Now, that discipline has "come of age", it is recognised to be an equal counterpart to archaeology on land and it deserves to receive equal treatment. The following words of the government, written with land-based remains in mind, are equally applicable to underwater archaeological remains:-

"Archaeological remains should be seen as a finite, and non-renewable resource, in many cases highly fragile and vulnerable to damage and destruction. Appropriate management is therefore essential to ensure that they survive in good condition. In particular, care must be taken to ensure that archaeological remains are not needlessly or thoughtlessly destroyed. They can contain irreplaceable information about our past and the potential for an increase in future knowledge. They are...valuable both for their own sake and for their role in education, leisure and tourism."<sup>4</sup>

It is for these reasons that the government should be urged to implement comprehensive reforms along the lines of the proposals outlined in Package B.<sup>5</sup>

## B. BEYOND THE UK

In the course of preparing this thesis, it became increasingly apparent that future international attention will be focussed on waters beyond the traditional territorial limits. The 1982 Law of the Sea Convention directed its attention to this issue, which is also the particular remit of the ILA initiative. Even the European Convention on the Protection of the Archaeological Heritage (revised) 1992 recognises that there may be legitimate claims by coastal states to exercise control over cultural property beyond the traditional limits. The purpose of this thesis was to examine the position of archaeological remains in UK territorial waters and suggestions for reform have been made in this regard. However, when the government is considering these suggestions, it should also consider following the example of countries such as France, Denmark, Norway, Ireland and Australia, by extending its controls over the underwater cultural heritage beyond the 12 mile territorial limit.

In the last few years there have been significant technological developments which have enabled salvage missions previously

uncontemplatable, for example, the recovery of artefacts from the Titanic lying at a depth of 12,000 feet. Undoubtedly the deeper waters beyond coastal state control will be seen increasingly as "rich pickings" by treasure seekers and commercial treasure salvage companies. The more states that act unilaterally in this respect, the greater the likelihood that control over the contiguous zone, continental shelf or a 200-mile zone, in respect of underwater archaeology, will be seen to be an unassailable part of customary international law. The government might argue in this respect that wrecks further out to sea are less likely to relate to this nation's heritage, since the vessel may not have been British, or calling at a British port.<sup>6</sup> This view is insular in the extreme and, in any event, contemporary statistics show that during the eighteenth and nineteenth centuries, about half the sailing ships operating in the British Isles were eventually lost at sea and that approximately 25% of these sank in deep water.<sup>7</sup> In the 1860s alone, 2,537 British ships sank far out to sea.<sup>8</sup> The remains of many of these vessels, undoubtedly part of the national heritage, will be lying, well preserved but unprotected, along the traditional sea routes.

The 1985 draft European Convention on the Protection of the Underwater Cultural Heritage acknowledges "the importance of the underwater cultural heritage as an integral part of the cultural heritage of mankind and a significant element in the history of peoples and their mutual relations".<sup>9</sup> It recognises that "moral responsibility" for protecting the underwater cultural heritage rests primarily with the State directly concerned<sup>10</sup> and it is submitted that there is a moral duty upon the current custodians of the cultural heritage to carefully preserve it in the interests of future generations.

## NOTES

1. C. Jones, "Marine Archaeology in the UK: A pattern of development" [1978] Marine Policy 321.
2. See further, Chapter Three, A., above.
3. Its inception has been identified with publication of the results of excavation of the Cape Gelidonya Bronze Age wreck off Turkey in the early 1960s: J.A. Gifford et al., op. cit.
4. DOE, PPG 16, op. cit., para.6.
5. See Chapter Eight, above.
6. Cf. Robinson v. Western Australia Museum (1977) 51 ALJR 806 and the opposing judgments of Barwick C.J. at pp.811-812 and Gibbs J. at p.815 on this point. See also Chapter Six, A.1(c) above.
7. P. Throckmorton (ed.), History from the Sea (1987).
8. Ibid.
9. 1985 draft European Convention on the Protection of the Underwater Cultural Heritage, Preamble.
10. Ibid.

## **Appendix 1**

## Merchant Shipping Act 1894

## PART IX.

## WRECK AND SALVAGE.

*Vessels in Distress.*

510. In this Part of this Act, unless the context otherwise requires—

- (1.) The expression "wreck" includes jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water:
- (2.) The expression "salvage" includes all expenses, properly incurred by the salvor in the performance of the salvage services.

511.—(1.) Where a British or foreign vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, the receiver of wreck for the district in which that place is situate shall, upon being made acquainted with the circumstance, forthwith proceed there, and upon his arrival shall take the command of all persons present, and shall assign such duties and give such directions to each person as he thinks fit for the preservation of the vessel and of the lives of the persons belonging to the vessel (in this Part of this Act referred to as shipwrecked persons) and of the cargo and apparel of the vessel.

(2.) If any person wilfully disobeys the direction of the receiver, he shall for each offence be liable to a fine not exceeding fifty pounds; but the receiver shall not interfere between the master and the crew of the vessel in reference to the management thereof, unless he is requested to do so by the master.

512.—(1.) The receiver may, with a view to such preservation as aforesaid of shipwrecked persons or of the vessel, cargo, or apparel—

- (a) require such persons as he thinks necessary to assist him:
- (b) require the master, or other person having the charge, of any vessel near at hand to give such aid with his men, or vessel, as may be in his power:
- (c) demand the use of any waggon, cart, or horses that may be near at hand.

(2.) If any person refuses without reasonable cause to comply with any such requisition or demand, that person shall, for each refusal, be liable to a fine not exceeding one hundred pounds; but a person shall not be liable to pay any duty in respect of any such waggon, cart, or horses, by reason only of the use of the same under this section.

513.—(1.) Whenever a vessel is wrecked, stranded, or in distress as aforesaid, all persons may, for the purpose of rendering assistance to the vessel, or of saving the lives of the shipwrecked persons, or of saving the cargo or apparel of the vessel, unless there is some public road equally convenient, pass and repass, either with or without carriages or horses, over any adjoining lands without being subject to interruption by the owner or occupier, so that they do as little damage as possible, and may also, on the like condition, deposit on those lands any cargo or other article recovered from the vessel.

(2.) Any damage sustained by an owner or occupier in consequence of the exercise of the rights given by this section shall be a charge on the vessel, cargo, or articles in respect of or by which the damage is occasioned, and the amount payable in respect of the damage shall, in case of dispute, be determined and shall, in default of payment, be recoverable in the same manner as the amount of salvage is under this Part of this Act determined or recoverable.

(3.) If the owner or occupier of any land—

- (a) impedes or hinders any person in the exercise of the rights given by this section by locking his gates, or refusing, upon request, to open the same, or otherwise; or
- (b) impedes or hinders the deposit of any cargo or other article recovered from the vessel as aforesaid on the land; or
- (c) prevents or endeavours to prevent any such cargo or other article from remaining deposited on the land for a reasonable time until it can be removed to a safe place of public deposit; he shall for each offence be liable to a fine not exceeding one hundred pounds.

514.—(1.) Whenever a vessel is wrecked, stranded, or in distress as aforesaid, and any person plunders, creates disorder, or obstructs the preservation of the vessel or of the shipwrecked persons or of the cargo or apparel of the vessel, the receiver may cause that person to be apprehended.

(2.) The receiver may use force for the suppression of any such plundering, disorder, or obstruction, and may command all Her Majesty's subjects to assist him in so using force.

(3.) If any person is killed, maimed, or hurt by reason of his resisting the receiver or any person acting under the orders of the receiver in the execution of the duties by this Part of this Act committed to the receiver, neither the receiver nor the person acting under his orders shall be liable to any punishment, or to pay any damages by reason of the person being so killed, maimed, or hurt.

515. Where a vessel is wrecked, stranded, or in distress as aforesaid, and the vessel or any part of the cargo and apparel thereof, is plundered, damaged, or destroyed by any persons riotously and tumultuously assembled together, whether on shore or afloat, compensation shall be made to the owner of the vessel, cargo, or apparel...

516.—(1.) Where a receiver is not present, the following officers or persons in succession (each in the absence of the other, in the order in which they are named), namely, any chief officer of customs, principal officer of the coastguard, officer of inland revenue, sheriff, justice of the peace, commissioned officer on full pay in the naval service of Her Majesty, or commissioned officer on full pay in the military service of Her Majesty, may do anything by this Part of this Act authorised to be done by the receiver.

(2.) An officer acting under this section for a receiver shall, with respect to any goods or articles belonging to a vessel the delivery of which to the receiver is required by this Act, be considered as the agent of the receiver, and shall place the same in the custody of the receiver; but he shall not be entitled to any fees payable to receivers, or be deprived by reason of his so acting of any right to salvage to which he would otherwise be entitled.

517.—(1.) Where any ship, British or foreign, is or has been in distress on the coasts of the United Kingdom, a receiver of wreck, or at the request of the Board of Trade a wreck commissioner or deputy approved by the Board, or, in the absence of the persons aforesaid, a justice of the peace, shall, as soon as conveniently may be, examine on oath (and they are hereby respectively empowered to administer the oath) any person belonging to the ship, or any other person who may be able to give any account thereof or of the cargo or stores thereof, as to the following matters; (that is to say,)



- (a.) The name and description of the ship ;
- (b.) The name of the master and of the owners ;
- (c.) The names of the owners of the cargo ;
- (d.) The ports from and to which the ship was bound ;
- (e.) The occasion of the distress of the ship ;
- (f.) The services rendered ; and
- (g.) Such other matters or circumstances relating to the ship, or to the cargo on board the same, as the person holding the examination thinks necessary.

(2.) The person holding the examination shall take the same down in writing, and shall send one copy thereof to the Board of Trade, and another to the secretary of Lloyd's in London, and the secretary shall place it in some conspicuous situation for inspection.

(3.) The person holding the examination shall, for the purposes thereof, have all the powers of a Board of Trade inspector under this Act.

#### *Dealing with Wreck.*

**518.** Where any person finds or takes possession of any wreck within the limits of the United Kingdom he shall,—

(a) if he is the owner thereof, give notice to the receiver of the district stating that he has found or taken possession of the same, and describing the marks by which the same may be recognised ;

(b) if he is not the owner thereof, as soon as possible deliver the same to the receiver of the district :

and if any person fails, without reasonable cause, to comply with this section, he shall, for each offence, be liable to a fine not exceeding one hundred pounds, and shall in addition, if he is not the owner, forfeit any claim to salvage, and shall be liable to pay to the owner of the wreck if it is claimed, or, if it is unclaimed to the person entitled to the same, double the value thereof, to be recovered in the same way as a fine of a like amount under this Act.

**519.**—(1.) Where a vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, any cargo or other articles belonging to or separated from the vessel, which may be washed on shore or otherwise lost or taken from the vessel shall be delivered to the receiver.

(2.) If any person, whether the owner or not, secretes or keeps possession of any such cargo or article, or refuses to deliver the same to the receiver or any person authorised by him to demand the same, that person shall for each offence be liable to a fine not exceeding one hundred pounds.

(3.) The receiver or any person authorised as aforesaid may take any such cargo or article by force from the person so refusing to deliver the same.

**520.** Where a receiver takes possession of any wreck he shall within forty-eight hours—

(a) cause to be posted in the custom house nearest to the place where the wreck was found or was seized by him a description thereof and of any marks by which it is distinguished ; and

(b) if in his opinion the value of the wreck exceeds twenty pounds, also transmit a similar description to the secretary of Lloyd's in London, and the secretary shall post it in some conspicuous position for inspection.

**521.**—(1.) The owner of any wreck in the possession of the receiver, upon establishing his claim to the same to the satisfaction of the receiver within one year from the time at which the wreck came into the possession of the receiver, shall, upon paying the salvage, fees, and expenses due, be entitled to have the wreck or the proceeds thereof delivered up to him.

(2.) Where any articles belonging to or forming part of a foreign ship, which has been wrecked on or near the coasts of the United Kingdom, or belonging to and forming part of the cargo, are found on or near those coasts, or are brought into any port in the United Kingdom, the consul-general of the country to which the ship or in the case of cargo to which the owners of the cargo may have belonged, or any consular officer of that country authorised in that behalf by any treaty or arrangement with that country, shall, in the absence of the owner and of the master or other agent of the owner, be deemed to be the agent of the owner, so far as relates to the custody and disposal of the articles.

522. A receiver may at any time sell any wreck in his custody if in his opinion—

- (a) it is under the value of five pounds, or
  - (b) it is so much damaged or of so perishable a nature that it cannot with advantage be kept, or
  - (c) it is not of sufficient value to pay for warehousing,
- and the proceeds of the sale shall, after defraying the expenses thereof, be held by the receiver for the same purposes and subject to the same claims, rights, and liabilities as if the wreck had remained unsold.

#### *Unclaimed Wreck.*

523. Her Majesty and Her Royal successors are entitled to all unclaimed wreck found in any part of Her Majesty's dominions, except in places where Her Majesty or any of Her Royal predecessors has granted to any other person the right to that wreck.

524.—(1.) Where any admiral, vice-admiral, lord of the manor, heritable proprietor duly infeft, or other person is entitled for his own use to unclaimed wreck found on any place within the district of a receiver, he shall deliver to the receiver a statement containing the particulars of his title, and an address to which notices may be sent.

(2.) When a statement has been so delivered and the title proved to the satisfaction of the receiver, the receiver shall, on taking possession of any wreck found at a place to which the statement refers, within forty-eight hours send to the address delivered a description of the wreck and of any marks by which it is distinguished.

525. Where no owner establishes a claim to any wreck, found in the United Kingdom and in the possession of a receiver, within one year after it came into his possession, the wreck shall be dealt with as follows; (that is to say,)

- (1.) If the wreck is claimed by any admiral, vice-admiral, lord of a manor, heritable proprietor, or other person who has delivered such a statement to the receiver as herein-before provided, and has proved to the satisfaction of the receiver his title to receive unclaimed wreck found at the place where that wreck was found, the wreck after payment of all expenses, costs, fees, and salvage due in respect thereof, shall be delivered to him;
- (2.) If the wreck is not claimed by any admiral, vice-admiral, lord of a manor, heritable proprietor, or other person as afore-said, the receiver shall sell the same and shall pay the proceeds of the sale (after deducting therefrom the expenses of the sale, and any other expenses incurred by him, and his fees, and paying thereout to the salvors such amount of salvage as the Board of Trade may in each case, or by any general rule, determine) for the benefit of the Crown, as follows; (that is to say,)
  - (a.) If the wreck is claimed in right of Her Majesty's duchy of Lancaster, to the receiver-general of that duchy or his deputies as part of the revenues of that duchy;

- (b.) If the wreck is claimed in right of the duchy of Cornwall, to the receiver-general of that duchy or his deputies as part of the revenues of that duchy; and
- (c.) If the wreck is not so claimed, the receiver shall pay the proceeds of sale to the Mercantile Marine Fund during the life of Her present Majesty, and after the decease of Her present Majesty to her heirs and successors.

**526.**—(1.) Where any dispute arises between any such admiral, vice-admiral, lord of a manor, heritable proprietor, or other person as aforesaid and the receiver respecting title to wreck found at any place, or, where more persons than one claim title to that wreck and a dispute arises between them as to that title, that dispute may be referred and determined in the same manner as if it were a dispute as to salvage to be determined summarily under this Part of this Act.

(2.) If any party to the dispute is unwilling to have the same so referred and determined, or is dissatisfied with the decision on that determination, he may within three months after the expiration of a year from the time when the wreck has come into the receiver's hands, or from the date of the decision, as the case may be, take proceedings in any court having jurisdiction in the matter for establishing his title.

**527.** Upon delivery of wreck or payment of the proceeds of sale of wreck by a receiver, in pursuance of the provisions of this Part of this Act, the receiver shall be discharged from all liability in respect thereof, but the delivery thereof shall not prejudice or affect any question which may be raised by third parties concerning the right or title to the wreck, or concerning the title to the soil of the place on which the wreck was found.

**528.**—(1.) The Board of Trade may, with the consent of the Treasury, out of the revenue arising under this Part of this Act, purchase for and on behalf of Her Majesty any rights to wreck possessed by any person other than Her Majesty. . .

#### *Offences in respect of Wreck.*

**535.** If any person takes into any foreign port any vessel, stranded, derelict, or otherwise in distress, found on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck found within those limits, and there sells the same, that person shall be guilty of felony, and on conviction thereof shall be liable to be kept in penal servitude for a term not less than three years and not exceeding five years.

**536.**—(1.) A person shall not without the leave of the master board or endeavour to board any vessel which is wrecked, stranded, or in distress, unless that person is, or acts by command of, the receiver or a person lawfully acting as such, and if any person acts in contravention of this enactment, he shall for each offence be liable to a fine not exceeding fifty pounds, and the master of the vessel may repel him by force.

(2.) A person shall not—

- (a) impede or hinder, or endeavour in any way to impede or hinder, the saving of any vessel stranded or in danger of being stranded, or otherwise in distress on or near any coast or tidal water, or of any part of the cargo or apparel thereof, or of any wreck;
- (b) secrete any wreck, or deface or obliterate any marks thereon; or
- (c) wrongfully carry away or remove any part of a vessel stranded or in danger of being stranded, or otherwise in distress, on or near any coast or tidal water, or any part of the cargo or apparel thereof, or any wreck,

and if any person acts in contravention of this enactment, he shall be liable for each offence to a fine not exceeding fifty pounds, and that fine may be inflicted in addition to any punishment to which he may be liable by law under this Act or otherwise.

537.—(1.) Where a receiver suspects or receives information that any wreck is secreted or in the possession of some person, who is not the owner thereof or that any wreck is otherwise improperly dealt with he may apply to any justice of the peace for a search warrant and that justice shall have power to grant such a warrant, and the receiver, by virtue thereof, may enter any house, or other place, wherever situate, and also any vessel, and search for, seize, and detain any such wreck there found.

(2.) If any such seizure of wreck is made in consequence of information given by any person to the receiver, on a warrant being issued under this section, the informer shall be entitled, by way of salvage, to such sum not exceeding in any case five pounds as the receiver may allow.

...

#### *Salvage.*

...

546. Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel, or wreck, a reasonable amount of salvage to be determined in case of dispute in manner herein-after mentioned.

#### *Procedure in Salvage.*

547.—(1.) Disputes as to the amount of salvage whether of life or property, and whether rendered within or without the United Kingdom arising between the salvor and the owners of any vessel, cargo, apparel, or wreck, shall, if not settled by agreement, arbitration, or otherwise, be determined summarily in manner provided by this Act, in the following cases; namely,—

(a.) In any case where the parties to the dispute consent :

(b.) In any case where the value of the property saved does not exceed one thousand pounds :

(c.) In any case where the amount claimed does not exceed in Great Britain three hundred pounds, and in Ireland two hundred pounds.

(2.) Subject as aforesaid, disputes as to salvage shall be determined by the High Court in England or Ireland, or in Scotland the Court of Session, but if the claimant does not recover in any such court in Great Britain more than three hundred pounds; and in any such court in Ireland more than two hundred pounds, he shall not be entitled to recover any costs, charges, or expenses incurred by him in the prosecution of his claim, unless the court before which the case is tried certify that the case is a fit one to be tried otherwise than summarily in manner provided by this Act.

(3.) Disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved, or of their respective agents.

(4.) Where a dispute as to salvage is to be determined summarily under this section it shall be referred and determined as follows :—

- (a.) In England it shall be referred to and determined by a county court having Admiralty jurisdiction by virtue of the County Courts Admiralty Jurisdiction Act, 1868, or any Act amending the same:
  - (b.) In Scotland it shall be referred to and determined by the sheriff's court:
  - (c.) In Ireland it shall be referred to the arbitration of and determined by two justices of the peace, or a stipendiary magistrate, or the recorder of any borough having a recorder, or the chairman of quarter sessions in any county, and any such justices, stipendiary magistrate, recorder, or chairman are herein-after included in the expression "arbitrators."
- (5.) Nothing in this Act relating to the procedure in salvage cases shall affect the jurisdiction or procedure in salvage cases of a county court having Admiralty jurisdiction by virtue of the County Courts Admiralty Jurisdiction Act, 1868, or the Court of Admiralty (Ireland) Act, 1867, or any Act amending either of those Acts.

**548.**—(1.) Disputes as to salvage which are to be determined summarily in manner provided by this Act shall—

- (a) where the dispute relates to the salvage of wreck be referred to a court or arbitrators having jurisdiction at or near the place where the wreck is found:
- (b) where the dispute relates to salvage in the case of services rendered to any vessel or to the cargo or apparel thereof or in saving life therefrom be referred to a court or arbitrators having jurisdiction at or near the place where the vessel is lying, or at or near the port in the United Kingdom into which the vessel is first brought after the occurrence by reason whereof the claim of salvage arises.

(2.) Any court or arbitrators to whom a dispute as to salvage is referred for summary determination may, for the purpose of determining any such dispute, call in to their assistance any person conversant with maritime affairs as assessor, and there shall be paid as part of the costs of the proceedings to every such assessor in respect of his services such sum not exceeding five pounds as the Board of Trade may direct.

**549.**—(1.) Where a dispute relating to salvage has been determined summarily in manner provided by this Act, any party aggrieved by the decision may appeal therefrom—

- (a) in Great Britain, in like manner as in the case of any other judgment in an Admiralty or maritime cause of the county court or sheriff's court, as the case may be; and
- (b) in Ireland, to the High Court, but only if the sum in dispute exceeds fifty pounds, and the appellant within ten days after the date of the award gives notice to the arbitrators of his intention to appeal and, within twenty days after the date of the award, takes such proceedings as, according to the practice of the High Court, are necessary for the institution of an appeal.

(2.) In the case of an appeal from arbitrators in Ireland the arbitrators shall transmit to the proper officer of the court of appeal a copy on unstamped paper certified under their hands to be a true copy of the proceedings had before them or their umpire (if any) and of the award so made by them or him, accompanied with their or his certificate in writing of the gross value of the article respecting which salvage is claimed; and such copy and certificate shall be admitted in the court of appeal as evidence in the case.

...

**551.**—(1.) Where any dispute as to salvage arises, the receiver of the district where the property is in respect of which the salvage claim is made, may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties.

(2.) Any copy of the valuation purporting to be signed by the valuer, and to be certified as a true copy by the receiver, shall be admissible as evidence in any subsequent proceeding.

(3.) There shall be paid in respect of the valuation by the person applying for the same such fee as the Board of Trade may direct.

**552.—**(1.) Where salvage is due to any person under this Act, the receiver shall—

(a) if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel and cargo or apparel; and

(b) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Act, detain the wreck.

(2.) Subject as herein-after mentioned, the receiver shall detain the vessel and the cargo and apparel, or the wreck (herein-after referred to as detained property) until payment is made for salvage, or process is issued for the arrest or detention thereof by some competent court.

(3.) A receiver may release any detained property if security is given to his satisfaction or, if the claim for salvage exceeds two hundred pounds, and any question is raised as to the sufficiency of the security, to the satisfaction in England or Ireland of the High Court, and in Scotland of the Court of Session, including any division of that court, or the Lord Ordinary officiating on the bills during vacation.

(4.) Any security given for salvage in pursuance of this section to an amount exceeding two hundred pounds may be enforced by such court as aforesaid in the same manner as if bail had been given in that court.

**553.—**(1.) The receiver may sell any detained property if the persons liable to pay the salvage in respect of which the property is detained are aware of the detention, in the following cases; namely,—

(a.) Where the amount is not disputed, and payment of the amount due is not made within twenty days after the amount is due, or,

(b.) Where the amount is disputed, but no appeal lies from the first court to which the dispute is referred, and payment is not made within twenty days after the decision of the first court, or

(c.) Where the amount is disputed and an appeal lies from the decision of the first court to some other court, and within twenty days of the decision of the first court neither payment of the sum due is made nor proceedings are commenced for the purpose of appeal.

(2.) The proceeds of sale of detained property shall, after payment of the expenses of the sale, be applied by the receiver in payment of the expenses, fees, and salvage, and, so far as not required for that purpose, shall be paid to the owners of the property, or any other persons entitled to receive the same.

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#### *Jurisdiction of High Court in Salvage.*

**565.** Subject to the provisions of this Act, the High Court, and in Scotland the Court of Session, shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the body of any county, or partly on the high seas and partly within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land.

### *Appointment of Receivers of Wreck.*

566. The Board of Trade shall have the general superintendence throughout the United Kingdom of all matters relating to wreck, and may, with the consent of the Treasury, appoint any officer of customs or of the coastguard, or any officer of inland revenue, or, where it appears to such Board to be more convenient, any other person, to be a receiver of wreck (in this Part of this Act referred to as a receiver), in any district, and to perform the duties of receiver under this Part of this Act, and shall give due notice of the appointment.

### *Fees of Receivers of Wreck.*

567.—(1.) There shall be paid to every receiver the expenses properly incurred by him in the performance of his duties, and also, in respect of the several matters specified in the Twentieth Schedule to this Act, such fees not exceeding the amounts therein mentioned as may be directed by the Board of Trade, but a receiver shall not be entitled to any remuneration other than those payments.

(2.) The receiver shall, in addition to all other rights and remedies for the recovery of those expenses or fees, have the same rights and remedies in respect thereof as a salvor has in respect of salvage due to him.

(3.) Whenever any dispute arises in any part of the United Kingdom as to the amount payable to any receiver in respect of expenses or fees, that dispute shall be determined by the Board of Trade, and the decision of that Board shall be final.

(4.) All fees received by a receiver in respect of any services performed by him as receiver shall be carried to and form part of the Mercantile Marine Fund, but a separate account shall be kept of those fees, and the moneys arising from them shall be applied in defraying any expenses duly incurred in carrying into effect this Act in such manner as the Board of Trade direct.

568.—(1.) Where services are rendered by any officers or men of the coastguard service in watching or protecting shipwrecked property, then, unless it can be shown that those services have been declined by the owner of the property or his agent at the time they were tendered, or that salvage has been claimed and awarded for those services, the owner of the property shall pay in respect of those services remuneration according to a scale to be fixed by the Board of Trade; and that remuneration shall be recoverable by the same means, and shall be paid to the same persons, and accounted for and applied in the same manner as fees received by receivers under the provisions of this Part of this Act.

(2.) The scale fixed by the Board of Trade shall not exceed the scale by which remuneration to officers and men of the coastguard for extra duties in the ordinary service of the Commissioners of Customs is for the time being regulated.

### *Duties on Wreck.*

569.—(1.) All wreck, being foreign goods brought or coming into the United Kingdom or Isle of Man, shall be subject to the same duties as if the same was imported into the United Kingdom or Isle of Man respectively, and if any question arises as to the origin of the goods, they shall be deemed to be the produce of such country as the Commissioners of Customs may on investigation determine.

(2.) The Commissioners of Customs and Inland Revenue shall permit all goods, wares, and merchandise saved from any ship stranded or wrecked on her homeward voyage to be forwarded to the port of her original destination, and all goods, wares, and merchandise saved from any ship stranded or wrecked on her outward voyage to be returned to the port at which the same were shipped; but those Commissioners shall take security for the due protection of the revenue in respect of those goods.

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## **Appendix 2**



# Protection of Wrecks Act 1973

## 1973 CHAPTER 33

An Act to secure the protection of wrecks in territorial waters and the sites of such wrecks, from interference by unauthorised persons; and for connected purposes.

[18th July 1973]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) If the Secretary of State is satisfied with respect to any site in United Kingdom waters that—

- (a) it is, or may prove to be, the site of a vessel lying wrecked on or in the sea bed; and
- (b) on account of the historical, archaeological or artistic importance of the vessel, or of any objects contained or formerly contained in it which may be lying on the sea bed in or near the wreck, the site ought to be protected from unauthorised interference,

he may by order designate an area round the site as a restricted area.

(2) An order under this section shall identify the site where the vessel lies or formerly lay, or is supposed to lie or have lain, and—

- (a) the restricted area shall be all within such distance of the site (so identified) as is specified in the order, but excluding any area above high water mark of ordinary spring tides; and
- (b) the distance specified for the purposes of paragraph (a) above shall be whatever the Secretary of State thinks appropriate to ensure protection for the wreck.

(3) Subject to section 3(3) below, a person commits an offence if, in a restricted area, he does any of the following things otherwise than under the authority of a licence granted by the Secretary of State—

- (a) he tampers with, damages or removes any part of a vessel lying wrecked on or in the sea bed, or any object formerly contained in such a vessel; or
- (b) he carries out diving or salvage operations directed to the exploration of any wreck or to removing objects from it or from the sea bed, or uses equipment constructed or adapted for any purpose of diving or salvage operations; or
- (c) he deposits, so as to fall and lie abandoned on the sea bed, anything which, if it were to fall on the site of a wreck (whether it so falls or not), would wholly or partly obliterate the site or obstruct access to it, or damage any part of the wreck;

and also commits an offence if he causes or permits any of those things to be done by others in a restricted area, otherwise than under the authority of such a licence.

(4) Before making an order under this section, the Secretary of State shall consult with such persons as he considers appropriate having regard to the purposes of the order; but this consultation may be dispensed with if he is satisfied that the case is one in which an order should be made as a matter of immediate urgency.

(5) A licence granted by the Secretary of State for the purposes of subsection (3) above shall be in writing and—

(a) the Secretary of State shall in respect of a restricted area grant licences only to persons who appear to him either—

(i) to be competent, and properly equipped, to carry out salvage operations in a manner appropriate to the historical, archaeological or artistic importance of any wreck which may be lying in the area and of any objects contained or formerly contained in a wreck, or

(ii) to have any other legitimate reason for doing in the area that which can only be done under the authority of a licence;

(b) a licence may be granted subject to conditions or restrictions, and may be varied or revoked by the Secretary of State at any time after giving not less than one week's notice to the licensee; and

(c) anything done contrary to any condition or restriction of a licence shall be treated for purposes of subsection (3) above as done otherwise than under the authority of the licence.

(6) Where a person is authorised, by a licence of the Secretary of State granted under this section, to carry out diving or salvage operations, it is an offence for any other person to obstruct him, or cause or permit him to be obstructed, in doing anything which is authorised by the licence, subject however to section 3(3) below.

2.—(1) If the Secretary of State is satisfied with respect to a vessel lying wrecked in United Kingdom waters that—

(a) because of anything contained in it, the vessel is in a condition which makes it a potential danger to life or property; and

(b) on that account it ought to be protected from unauthorised interference,

he may by order designate an area round the vessel as a prohibited area.

(2) An order under this section shall identify the vessel and the place where it is lying and—

(a) the prohibited area shall be all within such distance of the vessel as is specified by the order, excluding any area above high water mark of ordinary spring tides; and

(b) the distance specified for the purposes of paragraph (a) above shall be whatever the Secretary of State thinks appropriate to ensure that unauthorised persons are kept away from the vessel.

(3) Subject to section 3(3) below, a person commits an offence if, without authority in writing granted by the Secretary of State, he enters a prohibited area, whether on the surface or under water.

3.—(1) In this Act—

“United Kingdom waters” means any part of the sea within the seaward limits of United Kingdom territorial waters and includes any part of a river within the ebb and flow of ordinary spring tides;

“the sea” includes any estuary or arm of the sea; and references to the sea bed include any area submerged at high water of ordinary spring tides.

(2) An order under section 1 or section 2 above shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and may be varied or revoked by a subsequent order under the section; and the Secretary of State shall revoke any such order if—

(a) in the case of an order under section 1 designating a restricted area, he is of opinion that there is not, or is no longer, any wreck in the area which requires protection under this Act;

(b) in the case of an order under section 2 designating a prohibited area, he is satisfied that the vessel is no longer in a condition which makes it a potential danger to life or property.

(3) Nothing is to be regarded as constituting an offence under this Act where it is done by a person—

(a) in the course of any action taken by him for the sole purpose of dealing with an emergency of any description; or

(b) in exercising, or seeing to the exercise of, functions conferred by or under an enactment (local or other) on him or a body for which he acts; or

(c) out of necessity due to stress of weather or navigational hazards.

(4) A person guilty of an offence under section 1 or section 2 above shall be liable on summary conviction to a fine of not more than £400, or on conviction on indictment to a fine; and proceedings for such an offence may be taken, and the offence may for all incidental purposes be treated as having been committed, at any place in the United Kingdom where he is for the time being.

4. This Act may be cited as the Protection of Wrecks Act 1973.

## PROTECTION OF MILITARY REMAINS ACT 1986

(1986 c.35)

## ARRANGEMENT OF SECTIONS

## SECT.

1. Application of Act.
2. Offences in relation to remains and prohibited operations.
3. Extraterritorial jurisdiction.
4. Licences to carry out prohibited works, operations etc.
5. Supplemental provision with respect to licence applications.
6. Powers of boarding by authorised persons.
7. Supplemental provisions with respect to offences.
8. Administrative expenses.
9. Interpretation.
10. Short title, commencement and extent.

An Act to secure the protection from unauthorised interference of the remains of military aircraft and vessels that have crashed, sunk or been stranded and of associated human remains; and for connected purposes.

[8th July 1986]

## PARLIAMENTARY DEBATES

*Hansard*: H.C. Vol. 90, col. 1227; Vol. 91, col. 611; Vol. 100, col. 1283; H.L. Vol. 471, col. 73; Vol. 473, col. 811; Vol. 475, col. 768; Vol. 476, col. 1156; Vol. 477, col. 589.

## Application of Act

1.—(1) This Act applies to any aircraft which has crashed (whether before or after the passing of this Act) while in military service.

(2) Subject to the following provisions of this section, the Secretary of State may by order made by statutory instrument—

- (a) designate as a vessel to which this Act applies any vessel which appears to him to have sunk or been stranded (whether before or after the passing of this Act) while in military service;
- (b) designate as a controlled site any area (whether in the United Kingdom, in United Kingdom waters or in international waters) which appears to him to contain a place comprising the remains of, or of a substantial part of, an aircraft to which this Act applies or a vessel which has so sunk or been stranded;

and the power of the Secretary of State to designate a vessel as a vessel to which this Act applies shall be exercisable irrespective of whether the situation of the remains of the vessel is known.

(3) The Secretary of State shall not designate a vessel as a vessel to which this Act applies unless it appears to him—

- (a) that the vessel sank or was stranded on or after 4th August 1914; and
- (b) in the case of a vessel which sank or was stranded while in service with, or while being used for the purposes of, any of the armed forces of a country or territory outside the United Kingdom, that remains of the vessel are in United Kingdom waters.

(4) The Secretary of State shall not designate any area as a controlled site in respect of any remains of an aircraft or vessel which has crashed, sunk or been stranded unless it appears to him—

- (a) that less than two hundred years have elapsed since the crash, sinking or stranding;
- (b) that the owners and occupiers of such land in the United Kingdom as is to be designated as, or as part of, that site do not object to the terms of the designating order which affect them; and
- (c) where the aircraft or vessel crashed, sank or was stranded while in service with, or while being used for the purposes of, any of the armed forces of a country or territory outside the United Kingdom, that the remains are in the United Kingdom or in United Kingdom waters.

(5) An area designated as a controlled site shall not extend further around any place appearing to the Secretary of State to comprise remains of an aircraft or vessel which has crashed, sunk or been stranded while in military service than appears to him appropriate for the purpose of protecting or preserving those remains or on account of the difficulty of identifying that place; and no controlled site shall have a boundary in international waters any two points on which are more than two nautical miles apart.

(6) For the purposes of this Act a place (whether in the United Kingdom, in United Kingdom waters or in international waters) is a protected place if—

- (a) it comprises the remains of, or of a substantial part of, an aircraft, or vessel to which this Act applies; and
- (b) it is on or in the sea bed or is the place, or in the immediate vicinity of the place, where the remains were left by the crash, sinking or stranding of that aircraft or vessel;

but no place in international waters shall be a protected place by virtue of its comprising remains of an aircraft or vessel which has crashed, sunk or been stranded while in service with, or while being used for the purposes of, any of the armed forces of a country or territory outside the United Kingdom.

(7) The power to designate any land as, or as part of, a controlled site shall be exercisable in relation to Crown land as it is exercisable in relation to other land.

(8) The Secretary of State may by order made by statutory instrument substitute references to a later date for the reference in subsection (3)(a) above to 4th August 1914 or for any reference to a date which is inserted by an order under this subsection; and a statutory instrument containing an order under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

#### **Offences in relation to remains and prohibited operations**

2.—(1) Subject to the following provisions of this section and to section 3 below, a person shall be guilty of an offence—

- (a) if he contravenes subsection (2) below in relation to any remains of an aircraft or vessel which are comprised in a place which is part of a controlled site;
- (b) if, believing or having reasonable grounds for suspecting that any place comprises any remains of an aircraft or vessel which has crashed, sunk or been stranded while in military service, he contravenes that subsection in relation to any remains by virtue of which that place is a protected place;
- (c) if he knowingly takes part in, or causes or permits any other person to take part in, the carrying out of any excavation or diving or salvage operation which is prohibited by subsection (3) below; or
- (d) if he knowingly uses, or causes or permits any other person to use, any equipment in connection with the carrying out of any such excavation or operation.

(2) A person contravenes this subsection in relation to any remains—

- (a) if he tampers with, damages, moves, removes or unearths the remains;
- (b) if he enters any hatch or other opening in any of the remains which enclose any part of the interior of an aircraft or vessel; or
- (c) if he causes or permits any other person to do anything falling within paragraph (a) or (b) above.

(3) An excavation or diving or salvage operation is prohibited by this subsection—

- (a) if it is carried out at a controlled site for the purpose of investigating or recording details of any remains of an aircraft or vessel which are comprised in a place which is part of that site; or
- (b) if it is carried out for the purpose of doing something that constitutes, or is likely to involve, a contravention of subsection (2) above in relation to any remains of an aircraft or vessel which are comprised in a protected place or in a place which is part of such a site; or
- (c) in the case of an excavation, if it is carried out for the purpose of discovering whether any place in the United Kingdom or United Kingdom waters comprises any remains of an aircraft or vessel which has crashed, sunk or been stranded while in military service.

(4) In proceedings against any person for an offence under this section, it shall be a defence for that person to show that what he did or, as the case may be, what he caused or permitted to be done was done under and in accordance with a licence under section 4 below.

(5) In proceedings against any person for an offence under this section in respect of anything done at or in relation to a place which is not part of a controlled site it shall be a defence for that person to show that he believed on reasonable grounds that the circumstances were such that (if those had been the circumstances) the place would not have been a protected place.

(6) In proceedings against any person for an offence under this section it shall be a defence for that person to show that what he did or, as the case may be, what he caused or permitted to be done was urgently necessary in the interests of safety or health or to prevent or avoid serious damage to property.

(7) A person who is guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to a fine.

(8) Nothing in this section shall be construed as restricting any power to carry out works which is conferred by or under any enactment.

(9) References in this section to any remains which are comprised in a protected place or to any remains which are comprised in a place which is part of a controlled site include references to remains other than those by virtue of which that place is a protected place or, as the case may be, to remains other than those in respect of which that site was or could have been designated.

### Extraterritorial jurisdiction

3.—(1) Where a contravention of subsection (2) of section 2 above occurs in international waters or an excavation or operation prohibited by subsection (3) of that section is carried out in international waters, a person shall be guilty of an offence under that section in respect of that contravention, excavation or operation only—

(a) if the acts or omissions which constitute the offence are committed in the United Kingdom, in United Kingdom waters or on board a British-controlled ship; or

(b) in a case where those acts or omissions are committed in international waters but not on board a British-controlled ship, if that person is—

(i) a British citizen, a British Dependent Territories citizen or a British Overseas citizen; or

(ii) a person who under the British Nationality Act 1981 is a British subject; or

(iii) a British protected person (within the meaning of that Act); or

(iv) a company within the meaning of the Companies Act 1985 or the Companies Act (Northern Ireland) 1960.

(2) Subject to subsection (1) above, an offence under section 2 above shall, for the purpose only of conferring jurisdiction on any court, be deemed to have been committed in any place where the offender may for the time being be.

(3) Where subsection (1) above applies in relation to any contravention, excavation or operation, no proceedings for an offence under section 2 above in respect of that contravention, excavation or operation shall be instituted—

(a) in England and Wales, except by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by or with the consent of the Director of Public Prosecutions for Northern Ireland.

### Licences to carry out prohibited works, operations etc.

4.—(1) The Secretary of State shall have power to grant licences authorising the doing of such things as are described (whether generally or specifically) in the licences for the purpose of enabling those things to be done without the commission of any offence under section 2 above.

(2) A licence under this section shall be capable of being granted to a particular person, to persons of a particular description or to persons generally; and such a licence may be contained in an order designating a controlled site.

(3) The Secretary of State in granting a licence under this section may impose such conditions with respect to the doing of anything authorised by the licence as he may specify in the licence for any purpose connected with protecting or preserving any remains to which the licence relates.

(4) A licence under this section shall continue in force, subject to any amendments made from time to time by the Secretary of State, until the expiration of such period as is specified in the licence or until revoked, whichever is the earlier.

(5) Where a licence (other than a licence contained in an order designating a controlled site) is granted, amended or revoked under this section, the Secretary of State shall, as he thinks fit, either—

(a) send a copy of the licence, amendment or revocation to the licensee; or

(b) publish such a copy in such manner as he considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the licence, amendment or revocation.

(6) The grant of a licence under this section is without prejudice to the rights of any person (including the Crown)—

(a) as the owner of an interest in any land where any remains of an aircraft or vessel are, or are thought to be, situated; or

(b) as the owner of, or the person entitled (whether under any enactment or rule of law or otherwise) to claim, an interest in any such remains.

#### **Supplemental provision with respect to licence applications**

5.—(1) A person shall be guilty of an offence if, for the purpose of obtaining a licence under section 4 above (whether for himself or another or for persons of any description), he—

(a) makes a statement, or furnishes a document or information, which he knows to be false in a material particular; or

(b) recklessly makes a statement or representation, or furnishes a document or information, which is false in a material particular.

(2) A person who is guilty of an offence under subsection (1) above shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to a fine.

(3) The Secretary of State may by order made by statutory instrument require an application made to him for a licence under section 4 above to be accompanied, in such circumstances as may be specified in the order, by a fee of an amount so specified.

(4) A statutory instrument containing an order under subsection (3) above shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Any fees received by the Secretary of State by virtue of an order under subsection (3) above shall be paid into the Consolidated Fund.

#### **Powers of boarding by authorised persons**

6.—(1) Subject to the following provisions of this section, an authorised person shall be entitled for the purpose of determining whether an offence under this Act is being, has been or is to be committed to board and search—

(a) any vessel which is in United Kingdom waters; or

(b) any vessel which is in international waters and is a British-controlled ship.

(2) An authorised person shall not board a vessel under this section unless at the time he made his first request to board the vessel he had reasonable grounds for believing—

(a) in the case of a vessel other than a British-controlled ship, that an offence under this Act was being committed on board the vessel; or

(b) in the case of a British-controlled ship, that such an offence was being, had been or was to be so committed.

(3) An authorised person who has boarded a vessel under this section may seize anything which is on board the vessel if he has reasonable grounds for believing—

(a) that it is evidence of an offence under this Act or has been obtained in consequence of the commission of such an offence; and

(b) that it is necessary to seize it to prevent its being concealed, lost, altered or destroyed.

(4) An authorised person may use such force as is reasonably necessary for the purpose of exercising any power conferred on him by this section and may do anything else reasonably necessary for that purpose, including ordering a vessel to stop.

(5) A person on whom a power is conferred by this section shall, if required to do so by the master of the vessel, produce his authority before exercising the power.

(6) Any person who intentionally obstructs a person who is exercising any power conferred by this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(7) For the purpose only of conferring jurisdiction on any court, an offence under subsection (6) above shall be deemed to have been committed in any place where the offender may for the time being be.

(8) In this section "authorised person" means a person authorised in writing by the Secretary of State to exercise the powers conferred by this section (whether in all cases or only in cases specified or described in the authority) or a person of a description of persons so authorised.

#### **Supplemental provisions with respect to offences**

7.—(1) Section 43 of the Powers of Criminal Courts Act 1973 and Article 7 of the Criminal Justice (Northern Ireland) Order 1980 (power to deprive offenders of property used, or intended for use, for purposes of crime) shall have effect in England and Wales and in Northern Ireland respectively as if an offence under section 2 above were an offence punishable on indictment with imprisonment for a term of two years or more.

(2) Where a body corporate is guilty of an offence under this Act and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where the affairs of a body corporate are managed by its members, subsection (2) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

#### **Administrative expenses**

8. There shall be paid out of money provided by Parliament any administrative expenses incurred by the Secretary of State in consequence of the provisions of this Act.

#### **Interpretation**

9.—(1) In this Act, except in so far as the context otherwise requires—

"aircraft" includes a hovercraft, glider or balloon;

"British-controlled ship" means a ship registered in the United Kingdom or a ship exempted from such registration under the Merchant Shipping Act 1894;

"controlled site" means any area which is designated as such a site under section 1 above;

"Crown land" has the same meaning as in section 50 of the Ancient Monuments and Archaeological Areas Act 1979;

"international waters" means any part of the sea outside the seaward limits of the territorial waters adjacent to any country or territory;

"military service" shall be construed in accordance with subsection (2) below;

"nautical miles" means international nautical miles of 1,852 metres;

"protected place" shall be construed in accordance with section 1(6) above;

"remains", in relation to, or to part of, an aircraft or vessel which has crashed, sunk or been stranded, includes any cargo, munitions, apparel or personal effects which were on board the aircraft or vessel during its final flight or voyage (including, in the case of a vessel, any aircraft which were on board) and any human remains associated with the aircraft or vessel;

"sea" includes the sea bed and, so far as the tide flows at mean high water springs, any estuary or arm of the sea and the waters of any channel, creek, bay or river;

"sea bed" includes any area submerged at mean high water springs;

"United Kingdom waters" means any part of the sea within the seaward limits of the territorial waters adjacent to the United Kingdom.



(2) For the purposes of this Act an aircraft or vessel shall be regarded as having been in military service at a particular time if at that time it was—

- (a) in service with, or being used for the purposes of, any of the armed forces of the United Kingdom or any other country or territory; or
- (b) in the case of an aircraft, being taken from one place to another for delivery into service with any of the armed forces of the United Kingdom.

(3) Where a place comprising the remains of, or of a substantial part of, an aircraft or vessel which has crashed, sunk or been stranded while in military service is situated only partly in United Kingdom waters, that place shall be treated for the purposes of this Act as if the part which is situated in United Kingdom waters and the part which is situated in the United Kingdom or in international waters were separate places each of which comprised the remains of a substantial part of the aircraft or vessel.

**Short title, commencement and extent**

10.—(1) This Act may be cited as the Protection of Military Remains Act 1986.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) This Act extends to Northern Ireland.

(4) Her Majesty may by Order in Council make provision for extending the provisions of this Act, with such exceptions, adaptations and modifications as may be specified in the Order, to any of the Channel Islands or any colony.

## **Appendix 3**

# Ancient Monuments and Archaeological Areas Act 1979

53.—(1) A monument situated in, on or under the sea bed within the seaward limits of United Kingdom territorial waters adjacent to the coast of Great Britain (referred to below in this section as a monument in territorial waters) may be included in the Schedule under section 1(3) of this Act, and the remaining provisions of this Act shall extend accordingly to any such monument which is a scheduled monument (but not otherwise).

(2) The entry in the Schedule relating to any monument in territorial waters shall describe the monument as lying off the coast of England, or of Scotland, or of Wales ; and any such monument shall be treated for the purposes of this Act as situated in the country specified for the purposes of this subsection in the entry relating to the monument in the Schedule.

(3) In relation to any monument in territorial waters which is under the ownership or guardianship of the Secretary of State or any local authority by virtue of this Act, references in this Act to land associated with the monument (or to associated land) include references to any part of the sea bed occupied by the Secretary of State or by a local authority for any such purpose relating to the monument as is mentioned in section 15(1) of this Act.

(4) Without prejudice to any jurisdiction exercisable apart from this subsection, proceedings for any offence under this Act committed in United Kingdom territorial waters adjacent to the coast of Great Britain may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in Great Britain.

(5) It is hereby declared that, notwithstanding that by virtue of this section this Act may affect individuals or bodies corporate outside the United Kingdom, it applies to any individual whether or not he is a British subject, and to any body corporate whether or not incorporated under the law of any part of the United Kingdom.

(6) A constable shall on any monument in territorial waters have all the powers, protection and privileges which he has in the area for which he acts as constable.

(7) References in this section to the sea bed do not include the seashore or any other land which, though covered (intermittently or permanently) by the sea, is within Great Britain.

## **Appendix 4**

WRE 5



# REPORT OF WRECK or other ARTICLES

Found and delivered to a Receiver of Wreck, in pursuance of the  
Merchant Shipping Acts, 1894 & 1906

*To be filled in by the Receiver*

DROIT NUMBER ..... 19 ...../19.....

DISTRICT OF .....

SUB-DISTRICT OF .....

If claimed by a Lord of the Manor,  
state his name and the Manor .....

## A

For completion by Receivers who are not Customs Officers.

The property described overleaf has been taken into my possession and has been entered in my Wreck Report Book.

*Dated this* ..... *day of* ..... 19

*Signature of Officer* .....

*Post and Title* .....

*Receiver of Wreck,*  
.....

## B

The property described overleaf has been taken into my possession and has been entered in my Wreck Report Book, a form WRE 8 posted and \* copy sent to Lloyds in London.

*\*delete if value does not exceed £20*

*Dated this* ..... *day of* ..... 19

..... Receiver

**Salvor's Report of Wreck or other Articles found and delivered to a Receiver of Wreck in pursuance of the Merchant Shipping Acts, 1894 & 1906**

[illegible]

(If necessary continue on plain paper)

**DECLARATION BY SALVOR IN CHARGE OF OPERATIONS**

I hereby declare that the particulars in this report are correct and true and that the property described is all that has been recovered according to my knowledge.

\* I wish to claim salvage for the recovery of the property described.

+ I authorise .....

of ..... to receive anything due in this respect

Signature of Salvor .....

We agree with the above declaration

Signature of other salvors

Signature of Witnesses to Salvors Signatures

.....  
.....  
.....  
.....

.....  
.....  
.....  
.....

\* delete if you do not wish to claim salvage

+ delete if not applicable

## **Appendix 5**



| <u>SITE<br/>NUMBER</u> | <u>DATE OF<br/>DESIGNATION</u> | <u>ORDER<br/>NUMBER</u>   | <u>STATUTORY<br/>INSTRUMENT</u> | <u>NAME OF WRECK SITE</u> | <u>LOCATION</u>         | <u>DATE OF LOSS</u> | <u>TYPE OF VESSEL<br/>(Where known)</u> |
|------------------------|--------------------------------|---------------------------|---------------------------------|---------------------------|-------------------------|---------------------|-----------------------------------------|
| 1                      | 05.09.73                       | 1973 No 1 <sup>(1)</sup>  | 1973/1531                       | CATTEWATER WRECK          | CATTEWATER, PLYMOUTH    | 1520                | UNKNOWN                                 |
| 2                      | 05.02.74                       | 1974 No 1                 | 1974/55                         | MARY ROSE                 | SPITHEAD, PLYMOUTH      | 1545                | FOUR MASTED CARRACK                     |
| 3                      | 05.02.74                       | 1974 No 2                 | 1974/56                         | GRACE DIEU                | HAMBLE RIVER            | 1439                | NAVAL VESSEL                            |
| 4                      | 05.02.74                       | 1974 No 3                 | 1974/57                         | AMSTERDAM                 | HASTINGS                | 1749                | DUTCH EAST INDIAMAN                     |
| 5                      | 05.02.74                       | 1974 No 4                 | 1974/58                         | MARY                      | SKERRIES, ANGLESEY      | 1675                | ROYAL YACHT                             |
| 6                      | 11.04.74                       | 1974 No 5                 | 1974/457                        | ASSURANCE                 | NEEDLES, ISLE OF WIGHT  | 1738                | 44 GUN 5TH RATE NAVAL                   |
| 7                      | 25.06.92                       | 1992 No 2 <sup>(1)</sup>  | 1992/1229                       | DARTMOUTH                 | SOUND OF MULL, ARGYLL   | 1690                | 36 GUN 5TH RATE NAVAL                   |
| 8                      | 23.03.92                       | 1992 No 1 <sup>(II)</sup> | 1992/347                        | HMS ANNE                  | RYE, SUSSEX             | 1690                | 70 GUN NAVAL VESSEL                     |
| 9                      | 13.05.75                       | 1975 No 1                 | 1975/174                        | HMS ROMNEY                | TEARING LEDGE, SCILLIES | 1707                | NAVAL VESSEL                            |
| 10                     | 12.05.75                       | 1975 No 2 <sup>(R)</sup>  | 1975/726                        | HMS COLOSSUS              | SCILLIES                | 1798                | 74 GUN 3RD RATE NAVAL                   |
| 11                     | 15.03.76                       | 1976 No 1                 | 1976/203                        | RILL COVE WRECK           | KYNANCE CLIFF, LIZARD   | C16TH/C17TH         | UNKNOWN                                 |
| 12                     | 01.06.76                       | 1976 No 2 <sup>(R)</sup>  | 1976/720                        | RHINNS OF ISLAY WRECK     | ISLE OF ISLAY, ARGYLL   | C18TH/C19TH         | UNKNOWN                                 |
| 13                     | 27.05.77                       | 1977 No 1                 | 1977/764                        | SOUTH EDINBURGH CHANNEL   | THAMES ESTUARY          | C18TH/C19TH         | UNKNOWN                                 |
| 14                     | 12.08.77                       | 1977 No 2                 | 1977/1357                       | CHURCH ROCKS WRECK        | TEIGNMOUTH, DEVON       | C16TH/C17TH         | UNKNOWN                                 |

| <u>WRECK<br/>NUMBER</u> | <u>DATE OF<br/>DESIGNATION</u> | <u>ORDER<br/>NUMBER</u>    | <u>STATUTORY<br/>INSTRUMENT</u> | <u>NAME OF WRECK SITE</u> | <u>LOCATION</u>          | <u>DATE OF LOSS</u> | <u>TYPE OF VESSEL<br/>(Where known)</u> |
|-------------------------|--------------------------------|----------------------------|---------------------------------|---------------------------|--------------------------|---------------------|-----------------------------------------|
| 15                      | 08.03.78                       | 1978 No 1                  | 1978/199                        | PHLL FANOG WRECK          | MENAI STRAITS, N WALES   | C16TH               | SLATE CARGO SHIP                        |
| 16                      | 08.03.78                       | 1978 No 1 <sup>(2)</sup>   | 1978/199                        | MOOR SANDS WRECK          | SALCOMBE, DEVON          | BRONZE AGE          | UNKNOWN                                 |
| 17                      | 31.03.78                       | 1978 No 2                  | 1978/321                        | CORONATION (NO 1)         | RAME HEAD, PLYMOUTH      | C17TH               | 82 GUN 2ND RATE NAVAL                   |
| 18                      | 01.06.78                       | 1978 No 3                  | 1978/664                        | KENNERMERLAND             | OUTER SKERRIES, SHETLAND | C17TH               | DUTCH EAST INDIAMAN                     |
| 19                      | 26.05.78                       | 1978 No 4 <sup>(3)</sup>   | 1978/764                        | LANGDON BAY WRECK         | LANGDON BAY, DOVER       | BRONZE AGE          | UNKNOWN                                 |
| 20                      | 09.02.79                       | 1979 No 1 <sup>(4)</sup>   | 1979/31                         | TAL-Y-BONT WRECK          | CARDIGAN BAY, GWYNEDD    | C17TH               | UNKNOWN                                 |
| 21                      | 06.06.80                       | 1980 No 1 <sup>(5)</sup>   | 1980/645                        | STIRLING CASTLE           | GOODWIN SANDS            | 1703                | 70 GUN NAVAL                            |
| 22                      | 30.09.80                       | 1980 No 2                  | 1980/1307                       | INVINCIBLE                | EAST SOLENT, SOUTHAMPTON | 1753                | 74 GUN 3RD RATE NAVAL                   |
| 23                      | 03.10.80                       | 1980 No 4 <sup>(6)</sup>   | 1980/1456                       | BARTHOLOMEW LEDGES        | SCILLIES                 | 1597                | POSSIBLE SPANISH VESSEL                 |
| 24                      | 08.12.89                       | 1989 No 1 <sup>(III)</sup> | 1989/2089                       | NORTHUMBERLAND            | GOODWIN SANDS            | 1703                | 70 GUN NAVAL                            |
| 25                      | 08.12.89                       | 1989 No 1 <sup>(IV)</sup>  | 1989/2089                       | RESTORATION               | GOODWIN SANDS            | 1703                | 70 GUN NAVAL                            |
| 26                      | 15.02.82                       | 1982 No 1                  | 1982/47                         | ST ANTHONY                | GUNWALLOE COVE, CORNWALL | 1527                | PORTUGUESE CARRACK                      |
| 27                      | 15.02.82                       | 1982 No 1                  | 1982/47                         | SCHEIDAM                  | GUNWALLOE COVE, CORNWALL | 1684                | DUTCH FLY-BOAT                          |
| 28                      | 18.10.83                       | 1983 No 1                  | 1983/1400                       | BRIGHTON MARINA           | BRIGHTON                 | C15TH/C16TH         | POSSIBLY CYPRIOT                        |

|    |          |                 |           |                      |                     |             |                         |
|----|----------|-----------------|-----------|----------------------|---------------------|-------------|-------------------------|
| 29 | 01.02.85 | 1984 No 3 (V)   | 1984/1963 | YARMOUTH ROADS WRECK | ISLE OF WIGHT       | C17TH?      | POSSIBLY ENGLISH ORIGIN |
| 30 | 27.11.84 | 1984 No 2 (7)   | 1984/1658 | STUDLAND BAY         | POOLE, DORSET       | C15TH/C16TH | POSS. SPANISH MERCHANT  |
| 31 | 03.01.90 | 1989 No 3 (VI)  | 1989/2295 | ADMIRAL GARDENER     | GOODWIN SANDS       | 1809        | ENGLISH VESSEL          |
| 32 | 22.09.86 | 1986 No 1 (8)   | 1986/1441 | HMS HAZARDOUS        | BRACKLESHAM BAY     | 1706        | NAVAL VESSEL            |
| 33 | 03.01.89 | 1988 No 1       | 1988/2138 | CORONATION (NO 2)    | RAME HEAD, PLYMOUTH | N/K         | UNKNOWN                 |
| 34 | 03.01.90 | 1989 No 2       | 1989/2294 | IONA II              | LUNDY, NORTH DEVON  | 1864        | PASSENGER FERRY         |
| 35 | 14.03.90 | 1990 No 1       | 1990/234  | GULL ROCK WRECK      | LUNDY, NORTH DEVON  | C15TH?      | POSS. NAVAL VESSEL      |
| 36 | 10.01.90 | 1990 No 3 (VII) | 1990/2573 | WRANGELS PALAIS      | SHETLAND ISLES      | N/K         | UNKNOWN                 |
| 37 | 03.05.91 | 1991 No 1       | 1991/1110 | ERME ESTUARY         | DEVON               | C16TH?      | POSSIBLY SPANISH        |
| 38 | 07.12.91 | 1991 No 2       | 1991/2746 | SMALLS WRECK         | DYFED               | C8TH/C9TH?  | POSSIBLY VIKING         |
| 39 | 15.05.92 | 1992 No 3       | 1992/1151 | DUART POINT          | ISLE OF MULL        | N/K         | UNKNOWN                 |

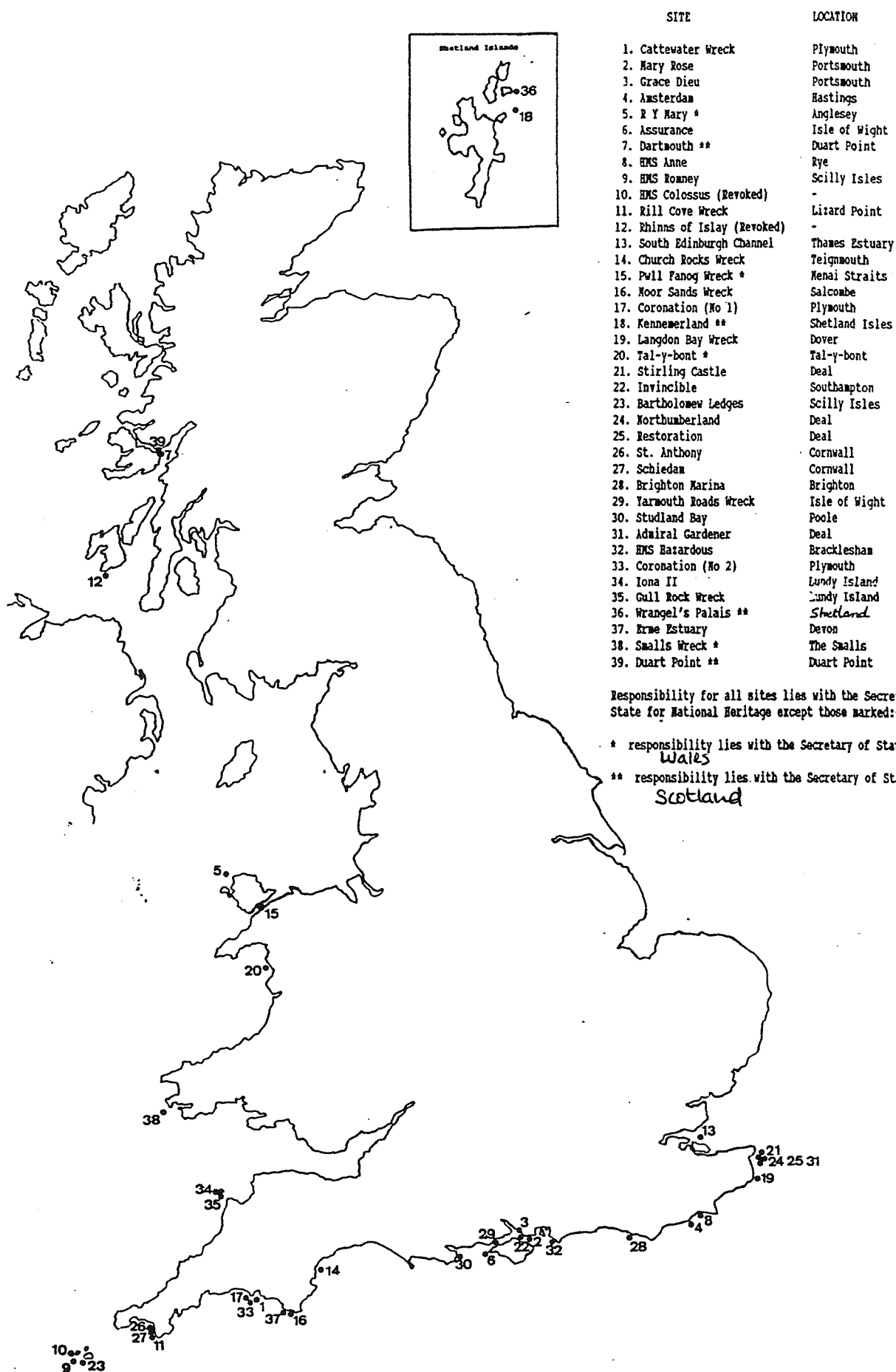
## NOTES

- (1) Amendment Order SI 1975/262
- (2) Amendment Order SI 1979/56
- (3) Amendment Order SI 1979/56
- (4) Amendment Order SI 1989/1766
- (5) Amendment Order SI 1980/1306
- (6) Amendment Order SI 1983/128
- (7) Amendment Order SI 1988/2137
- (8) Amendment Order SI 1988/287

- (I) Original Designation Order (No. 6) SI 1974/458; Revoked on 31.01.79 by SI 1979/6. Redesignated as listed due to new information.
- (II) Original Designation Order (No. 7) SI 1974/910; Revoked and redesignated as listed to correct position.
- (III) Original Designation Order (No. 1) SI 1981/827; Revoked and redesignated as listed to correct position.
- (IV) Original Designation Order (No. 1) SI 1981/827; Revoked and redesignated as listed to correct position.
- (V) Original Designation Order (No. 1) SI 1984/521; Revoked and redesignated as listed to correct position.
- (VI) Original Designation Order (No. 1) SI 1985/699; Revoked on 18.07.86 by SI 1986/1020. Redesignated as listed.
- (VII) Original Designation Order (No. 2) SI 1990/2573; Revoked and redesignated as listed to correct position.

(R) Indicates Designation Order has been revoked.

## **Appendix 6**



## **Appendix 7**

1974 No. 910

## PROTECTION OF WRECKS

## The Protection of Wrecks (Designation No. 7) Order 1974

|                               |       |                |
|-------------------------------|-------|----------------|
| <i>Made</i>                   | - - - | 23rd May 1974  |
| <i>Laid before Parliament</i> |       | 30th May 1974  |
| <i>Coming into Operation</i>  |       | 20th June 1974 |

The Secretary of State, being satisfied that the site identified in article 2 of this Order is the site of a vessel lying wrecked on the sea bed and that on account of the historical and archaeological importance of the vessel the site ought to be protected from unauthorised interference, after consulting with the persons referred to in section 1(4) of the Protection of Wrecks Act 1973(a), in exercise of the powers conferred on him by section 1(1), (2) and (4) of that Act and of all other powers enabling him in that behalf hereby orders as follows:

1.—(1) This Order may be cited as the Protection of Wrecks (Designation No. 7) Order 1974 and shall come into operation on 20th June 1974.

(2) The Interpretation Act 1889(b) shall apply to the interpretation of this Order as it applies to the interpretation of an Act of Parliament.

2. The site in respect of which this Order is made is hereby identified as the site where the vessel HMS "Anne" lies wrecked on the sea bed at Latitude 50° 53' 22" North, Longitude 00° 41' 46" East.

3. The area within a distance of 75 metres of Latitude 50° 53' 22" North, Longitude 00° 41' 46" East shall be a restricted area for the purposes of the Protection of Wrecks Act 1973.

23rd May 1974.

*S. C. Davis,*  
Parliamentary Under Secretary of State  
for Companies, Aviation and Shipping,  
Department of Trade.

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(a) 1973 c. 33.

(b) 1889 c. 63.

## **Appendix 8**



DATED 10 June 1983

THE SECRETARY OF STATE FOR  
DEFENCE

- to -

THE NAUTICAL MUSEUMS TRUST  
LIMITED

DEED OF TRANSFER

T H I S   D E E D is made the 10<sup>th</sup> day of June  
One thousand nine hundred and eighty three  
B E T W E E N THE SECRETARY OF STATE FOR DEFENCE (hereinafter called  
"the Secretary of State") of the one part and the NAUTICAL MUSEUMS  
TRUST LIMITED (hereinafter called "the Trust") of the other part

W H E R E A S:

(a) The Warship ANNE (hereinafter called "the said vessel") is known to have sunk in One thousand six hundred and ninety off Pett Level near Rye East Sussex Latitude 50 53.22N Longitude 00 41.46E.

(b) Excavation work has been carried out in and around the said vessel since about 1974 and artifacts connected with her have been recovered from the said location

(c) It is believed that pieces of the said vessel and other artifacts connected with her are lying at the said location

(d) The Trust is a company limited by guarantee and is a registered charity whose object is to advance the education of the public in nautical history and archaeology by the provision of a museum or museums as is considered necessary

(e) The said vessel and all that was or is in about or connected with her (other than personal effects) belong to the Crown

(f) To enable the Trust to further its said object the Secretary of State is desirous that the said vessel and the equipment found with her should be held by the Trust upon charitable trust

N O W   T H I S   D E E D   W I T N E S S E T H:-

1. THE Secretary of State hereby transfers to the Trust (save in so far as it consists of personal effects not belonging to the Crown):

(a) every part of the said vessel;

(b) all that was connected with her which has since 1974 been raised from her or from the immediate vicinity of where she is lying;

(c) all that was connected with her which is now situate in the immediate vicinity of where she is lying

upon trust to raise in whole or in part (so far as the Trust may in its absolute discretion determine) to preserve and to display same for all time in a museum or museums for the education and benefit of the public

2. (1) Save as permitted by this clause the Trust shall not have power and hereby covenants not to sell charge lease give lend or otherwise dispose of anything hereby transferred

(2) The Trust shall have power to dispose of such things in manner aforesaid with the consent of the Secretary of State and in accordance with any conditions attached thereto

(3) The Trust shall have power to lend such things for any period not exceeding five years

3. IN the event of anything hereby transferred being sold charged leased or otherwise disposed of the proceeds shall be paid to and become the property of the Trust to be applied in furtherance of its objects
4. THE Trust shall within Twelve months (or such further time as may be agreed) provide the Secretary of State a full description of all objects recovered from or near the said vessel with the date and place of recovery
5. IT is hereby declared that nothing in this deed shall affect the statutory obligations of the Trust under Part IX of the Merchant Shipping Act 1894 and Section 518 thereof in particular and under Section 72 of the Merchant Shipping Act 1906
6. THE name of the trust hereby created shall be the Warship Anne Trust

I N W I T N E S S whereof the parties hereto have caused their Official Seal and Common Seal respectively to be hereunto affixed the day and year first above written

THE OFFICIAL SEAL of THE SECRETARY)  
OF STATE FOR DEFENCE was hereunto )  
affixed: )  
)



Authorised by the Secretary  
of State for Defence

THE COMMON SEAL of the NAUTICAL )  
MUSEUMS TRUST LIMITED was here- )  
unto affixed in the presence of:- )  
)

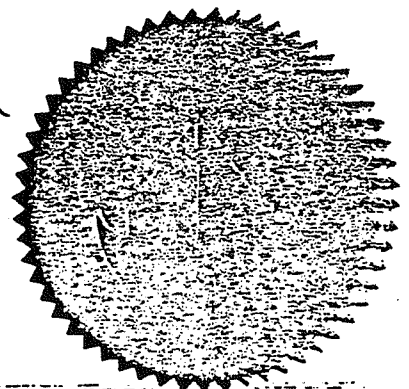
*D A J West*  
D A J WEST  
Assistant Under-Secretary  
(Naval Personnel)

Trustee

*D B Bntson*

Secretary

*P. Marsden*



## **Appendix 9**



Treaty Series No. 3 (1990)

## Exchange of Notes

between the Government of the  
United Kingdom of Great Britain and Northern Ireland  
and the Government of the Republic of South Africa

concerning the regulation of the terms of settlement  
of the salvaging of the wreck of  
*HMS Birkenhead*

Pretoria, 22 September 1989

[The Agreement entered into force on 22 September 1989]

*Presented to Parliament  
by the Secretary of State for Foreign and Commonwealth Affairs  
by Command of Her Majesty  
January 1990*

EXCHANGE OF NOTES  
BETWEEN THE GOVERNMENT OF THE  
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND  
AND THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA  
CONCERNING THE REGULATION OF THE TERMS OF SETTLEMENT OF  
THE SALVAGING OF THE WRECK OF HMS *BIRKENHEAD*

No. 1

*Her Majesty's Ambassador at Pretoria to the Minister of Foreign Affairs  
of the Republic of South Africa*

*Pretoria  
22 September 1989*

Your Excellency

I have the honour to refer to recent discussions between our two Governments about the question of the wreck of the *Birkenhead* and to propose a settlement of all outstanding issues in the following terms:

The wreck of the *Birkenhead* shall, as a military grave, continue to be treated at all stages with respect. In particular, the South African Government shall seek to ensure that the salvors treat reverently and refrain from disturbing or bringing to the surface any human remains which may be discovered at the site of the wreck or in its vicinity. British military historians shall have temporary access for research purposes to salvaged artefacts designated for South African museums.

The South African Government shall as far as possible ensure that representative examples of salvaged artefacts identifiable with a particular British regiment or institution are offered without charge to that regiment (or its successor) or to such institution.

The British Government shall not enter into any salvage contract in respect of the *Birkenhead* and shall not object to the South African Government maintaining its existing salvage arrangements in regard to the wreck under the applicable South African legislation.

If any gold coin (apart from the coins considered to have been in private ownership) were to be recovered, such coin (after deduction of the share due to the salvors in accordance with the existing salvage arrangements) would be shared equally between our two Governments.

In order to facilitate the implementation of these arrangements, consultations shall be held as necessary between representatives of our two Governments, the salvors and other South African institutions concerned.

This settlement is without prejudice to the respective legal positions of our two Governments.

If the above is acceptable to the Government of the Republic of South Africa, I have the honour to propose that this letter and Your Excellency's reply to that effect shall constitute an agreement between our two Governments in this matter which shall enter into force on the date of Your Excellency's reply.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

ROBIN RENWICK

No. 2

*The Minister of Foreign Affairs of the Republic of South Africa to  
Her Majesty's Ambassador at Pretoria*

*Pretoria  
22 September 1989*

Your Excellency

I have the honour to acknowledge receipt of Your Excellency's letter of 22 September 1989 which reads as follows:

[As in No. 1]

In reply, I wish to confirm that these proposals are acceptable to the Government of the Republic of South Africa who therefore agree that Your Excellency's letter and this reply shall constitute an agreement between our two Governments, which shall enter into force on the date of this letter.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

R F BOTHA

## **Appendix 10**



## Heritage at Sea

## SUMMARY OF RECOMMENDATIONS

The principle underlying these proposals is that archaeological sites of national importance underwater should receive no less protection than those on land.

R1. New legislation, specifically drafted for the protection of underwater archaeological sites and the artefacts associated with them, and covering all aspects of the underwater cultural heritage, should be enacted as soon as possible.

R2. An inventory of underwater sites within territorial waters should be compiled and maintained at a national and local level. A set of criteria for assessing the importance of sites should be established and the sites should be graded accordingly.

R3. The payments, required by the Merchant Shipping Act 1894, of fees and VAT, based on the market value of items raised from the seabed, should be waived in the case of items which are to be kept in publicly accessible collections. This should include all finds from sites which are statutorily protected.

R4. Commercial seabed operators and statutory undertakers active on the seabed should be encouraged to carry out archaeological implication surveys before the seabed is disturbed and co-operate with archaeologists during potentially destructive work. They should be encouraged to contribute to the costs of rescue excavation of threatened sites.

R5. The Ministry of Defence, who have responsibility for historic naval wrecks, and the Foreign and Commonwealth Office, who are responsible for East India Company property in wrecks, should acknowledge and fulfil their responsibilities. They should enter into proper consultation with archaeological bodies before disposing of property from underwater. In the long term they should consider transferring the administration of these cultural resources to the maritime heritage protection agency proposed in recommendation six.

R6. The new legislation should provide for the establishment of a maritime heritage protection agency which should carry out and co-ordinate the survey work necessary for the inventory; assess the importance of sites; arrange for the protection of sites by buoying and burial; process applications for licences to carry out work on sites and co-ordinate archaeological diver training and public education.

R7. In the short term, better use should be made of existing legislation to protect underwater sites and effective arrangements should be made for the reporting of artefacts recovered from the seabed.

## **Appendix 11**

## JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE

## WORKING PARTY ON LEGISLATION

## PROPOSALS FOR LEGISLATIVE REFORM

INTRODUCTORY NOTES

1. These proposals for reform are based on the assumption that responsibility for the underwater heritage will pass to the Department of Environment.
2. New legislation is envisaged that would provide for the following:-
  - (a) Protection of all categories of underwater site, not just wreck;
  - (b) protection of all sites of "national importance";
  - (c) protection of designated sites and provision for the handling and disposal of individual "unprotected" finds (presently regulated by two separate pieces of legislation - the 1973 Act and the 1894 Act);
  - (d) the establishment of a maritime heritage protection agency.
3. The handling and disposal of historic wreck should be taken out of the 1894 Merchant Shipping Act scheme. (The Merchant Shipping Acts deal in the main with the operation of the UK's merchant marine. A Merchant Shipping Act is therefore not an appropriate statute for provisions relating to historic wreck. Such provisions should be divorced from provisions relating to modern wreck as the considerations regarding each are very different.)
4. The provisions of the 1973 Protection of Wrecks Act probably provide a good basis for the development of a comprehensive scheme. A lot of the problems which have arisen appear to have done so, not because of defects in the legislative provisions themselves, but rather because of the policies adopted in their execution. For example, the 1973 Act does not require that designated sites be exploited, but in the past this tended to be the policy adopted by the Advisory Committee. The Act does not preclude the prioritisation of sites and resource allocation, nor a policy that sites should not be disturbed except for research or threat reasons.
5. If the 1973 provisions were adopted as a basis for the new legislation, there would be a need to divorce s.2 (relating to dangerous wrecks) from ss. 1 and 3 (relating to historic wreck).
6. Changes in the law itself will be ineffective unless there are changes in the following:-
  - (a) Funding
  - (b) Seabed survey and inventory
  - (c) Training and education - of amateur divers; archaeologists; museums; "developers", e.g. dredging companies; the Ministry of Defence; the Foreign and Commonwealth Office; the public.
7. The "maritime heritage protection agency" could reflect the

structure of English Heritage and could be set up very much along the same lines - i.e. by statute, with powers conferred by statute. It could have similar objectives and terms of reference. The National Heritage Act 1983 establishes English Heritage, and could be used as an example of the type of provisions that could be made. (Under the 1983 Act the functions of English Heritage are, inter alia, to promote the preservation of ancient monuments and historic buildings and to promote the public's enjoyment, and advance their knowledge, of such monuments and buildings. English Heritage may provide educational facilities, advice and information and contribute towards the cost of research. It may form companies for the object of publication of informative material, the production and sale of literature and souvenirs and the provision of public facilities.)

The present Advisory Committee on Historic Wreck Sites could be reconstituted to form an advisory committee to oversee the Agency.

The functions of the Agency are set out later.

8. Under the 1973 Act only wrecks in tidal waters may be designated for protection. Although it is possible for wrecks in other waters, for example, lakes and inland waterways, to be scheduled under the Ancient Monuments & Archaeological Areas Act 1979, it could be argued that this legislation cannot afford them appropriate protection. New legislative measures should therefore be extended to include non-tidal waters.

9. In recommending changes in the law, account should be taken of the Council of Europe's 1978 Recommendation which sets out certain minimum requirements which should be fulfilled by member states.

10. These proposals have been prepared taking into account the Department of Transport's 1984 Consultative Document, which presumably reflects the type of changes that the government may be prepared to accept.

## LEGAL FRAMEWORK

Two legal schemes are proposed, the first for individual finds and the second for protected sites.

### A. SCHEME FOR INDIVIDUAL FINDS

This is broken down into two parts:-

- (i) Reporting process
- (ii) Physical movement/custody of find.

#### (i) Reporting process

1. There would continue to be a legal duty for all finds to be reported. (At present this duty is imposed by the 1894 Act.)
2. The finder could report either to a Customs office or to a local archaeological reporting point. After hours, reporting could perhaps be done by post or through the Customs declaration box. Forms (perhaps simply a revised WRE 5) should be freely available. Finders must be encouraged to declare as early as possible. Nonetheless, finders may report to any Customs office or archaeological reporting point in the country.
3. If the find is reported to Customs they must report to the local archaeological reporting point, and vice versa. The purpose of reporting to Customs would be twofold: in order for a preliminary sorting of ancient and modern wreck to be undertaken, and to provide a mechanism for the establishment of any ownership claims. A three month claim period is proposed (cf. the two month period in the 1984 Consultative Document).

The 1984 Consultative Document proposed that the Customs Service would still be responsible for handling and disposal of historic wreck, despite the nominal abolition of the Receiver Service and, for this reason, there would appear to be no problem with retaining the services of Customs.

It is important that, from the Customs Service's point of view, the system should be made as clear and simple as possible.

4. The Working Party proposes, in line with the 1984 Consultative Document, the relinquishment of Crown title to unclaimed wreck to museums or finders (with the apparent implication that wreck would not be sold to them).
5. Administrative fees, expenses and Customs duty should not be payable on items to be kept in publicly accessible collections.
6. The local archaeological reporting point would be: the local County Sites and Monuments Officer, a local museum or a local specialist. In any event, there would be a need for liaison between such parties.
7. The local archaeological reporting point would undertake the

following functions:

- (i) Assessment - it would decide whether the item was:
  - of no archaeological importance;
  - of sufficient importance to record but not to keep in public care;
  - of sufficient importance to record and keep.
- (ii) Recording - in local SMR/museum (finder may be able to assist).
- (iii) Temporary conservation and cleaning.
- (iv) Liaison with central Executive Agency (item may not have been found locally).

8. The local archaeological reporting point would notify: the central Executive Agency and the National Sites and Monuments Record.

9. Where the actual point at which a find is reported is not in the vicinity of the find spot, then the Executive Agency should co-ordinate liaison.

10. The central Executive Agency's functions would be:

- (i) To co-ordinate individual reports with the intention of identifying sites, some of which may be of "national importance".
- (ii) To investigate sites.
- (iii) To propose sites for designation or scheduling.
- (iv) To provide advice as to identification of items, conservation etc.
- (v) To channel resources to the local archaeological reporting points for preservation and recording.
- (vi) To handle legal problems and to assist Customs in ownership disputes.
- (vii) To co-ordinate education and training.
- (viii) To ensure that the archaeological archive is suitably preserved and accessible for research.

11. The RCAHM would include underwater sites in its National Sites and Monuments Record.

(ii) Physical movement/custody of find

1. The finder would deposit the artefact with the nearest reporting point, be that Customs or a local archaeological reporting point. If to Customs, they would pass the item on to the archaeological point.
2. The local archaeological reporting point would if necessary clean the item and conserve it sufficiently to stabilise its condition during a temporary period.
3. If an ownership claim is made and upheld, the item would pass to the owner.
4. If not, a decision would be made as to whether the item should be kept in public care.
5. If the item is not to be kept in public care, it would be returned

to the finder. In practice it is likely that the great majority of finds would be returned to finders and this should encourage divers to report finds.

6. Consideration should be given to whether or not a reward should be given for the reporting of finds that have not come from protected sites. The general feeling of the Working Party was that there should be no reward system (either in the form of salvage or a finder's reward). If this was the case, there would need to be some clear cut-off point for the operation of general salvage law (e.g. all items over 100 years to be excluded from salvage law).

If there is no reward for finders of individual items, would there be sufficient incentive for divers to report them? Individual items will still be found by amateur divers and others. Already there is a duty to report, but people do not comply with it. The Council of Europe recommends the establishment of a system of finder's reward, payable by the government. This solution has been adopted by Denmark, Finland and Norway. The Council recommends a standard system of fixed finder's monetary reward, related to each identification of an object or site and not necessarily linked to the commercial value of the find. It recommends that the reward should differentiate between an individual object and a site, and be heavily weighed in favour of the latter.

In any event, finders could be given a documentary record of their find. The record could incorporate a description of the find, photographs or a replica. The finder could also be notified of the eventual home for the find. Such moves could provide sufficient incentive, along with the knowledge that the majority of finds would be returned to the finder anyway.

Better education and peer pressure should have a role to play in increasing the effectiveness of the reporting system.

7. In any event, an official certificate of reporting should be issued. If the item was returned to the finder, the certificate would prove that the item had been properly reported and recorded. This would help prevent sales of unreported finds.

## B. SCHEME FOR PROTECTED SITES

1. Sites of "national importance" should receive protection (in line with land heritage).

2. It is proposed that the Executive Agency would recommend sites for designation to the Advisory Committee. These proposals would be considered by the Committee, who would make recommendations to the Secretary of State for Environment who would make the decision.

3. The following criteria for selection are put forward as guidelines. (As the inventory of underwater sites is built up it will be possible to refine the criteria.)

a) All wreck sites (ship structure, groups of associated artefacts or both) earlier in date than 1650 A.D.

b) Other wreck sites up to 1850 which retain a substantial and

coherent element of ship structure and vessels of special historic importance, or sites where there are groups of artefacts which make a major contribution to knowledge of the period.

c) Certain vessels of later date which demonstrate a significant advance in ship technology or have special historical importance.

d) Selection of submerged non-wreck sites for designation would be based on the criteria used for selecting land sites.

(From current knowledge there are probably less than 100 known sites which would be eligible for statutory protection if these criteria were used.)

4. Enforcement of the protective measures would need to be more effective than at present. There are no prosecutions now because, at least partly, there is a problem of evidence. In order to get prosecutions in future, statutory offences must be framed in such a way that it is easier to carry out effective prosecutions. Position-fixing difficulties may be alleviated if the protected area were enlarged. Alternatively, the offences could be framed such that they relate to interference with an identified site (rather than a particular area - see s.1(3) PWA 1973).

5. As far as the policing of sites is concerned, the Executive Agency could collect evidence of infringement, but it is not proposed that the Agency should have policing powers. Instead, the Agency should be able to call on customs, police, coastguard or port authorities, who would have certain powers (e.g. stop and search, seizure). (Australian Commonwealth legislation provides for the appointment of inspectors who are given wide powers. For the purpose of ascertaining whether an offence has been or is being committed, or to obtain evidence in relation to an offence, an inspector may board and search a ship and require a person to answer questions. An inspector may also, without warrant, arrest a person who it is believed has committed certain offences. There are also powers of seizure and forfeiture of vessels and equipment.)

6. The Working Party felt that protected sites should be subject to the same reporting system as that for individual finds outlined above. So there would continue to be a legal duty for all finds from protected sites to be reported (although not usually deposited, see below).

7. Finds from protected sites would need to be reported to Customs as well as the local archaeological reporting point so that any ownership claims can be established. Again, a three month claim period is proposed.

8. In the case of protected sites, the licensee could report on a periodic basis items that have been recovered.

9. A condition of the licence would be that the licensee has adequate facilities for temporary storage and conservation. Therefore, in the case of protected sites, items would usually remain with the licensee during the three month claim period.

10. All historic wreck property currently under the administration of the Ministry of Defence and Foreign and Commonwealth Office would be



transferred to the Department of Environment for administration. They would be "sub-administered" by the Executive Agency. (It seems unlikely that the MoD would be willing to use the provisions of the Protection of Military Remains Act 1986 to protect historic wreck. The Act was passed to protect the feelings of relatives of those who had died in the wrecks and also, presumably, to protect the interests of national security.)

11. Claims by foreign governments could be settled by agreement, on similar lines to the 1972 Agreement Between the Netherlands and Australia Concerning Old Dutch Shipwrecks. By this agreement the Netherlands transferred all its right, title and interest in Dutch East India vessels lying off the coast of Western Australia, to Australia. In return, Australia agreed to allow the Netherlands to hold representative samples of items recovered.

12. As with individual finds, the Crown would relinquish its title to unclaimed wreck to museums or finders.

13. Where no ownership claim is established, a decision would have to be made regarding the permanent care and display of the items recovered. It is envisaged that consent to excavate and retrieve material from protected sites would be conditional on satisfactory arrangements having been made by the licensee for the conservation and curation in public care of anything brought ashore.

14. Salvage rewards should be abolished for sites with protected status. A finder's reward would not be appropriate either.

15. No fees or expenses should be charged in respect of protected items.

16. All protected wreck should be excluded from Customs duty. (At the moment duty apparently has to be paid on wines and spirits from wreck over 100 years old, though not on other items from such wreck).

17. Some consideration should be given to the question of access to protected sites. On land some public access to protected sites is allowed. Should it be possible for divers to visit underwater sites in certain circumstances? On land it is obviously easier to regulate such visits. The Working Party has not yet discussed this particular issue but it may be of some importance in helping to maintain a good relationship with amateur divers.

18. The disposal of human remains from underwater sites should be considered.

#### RELATED MATTERS

##### 1. Developmental interests

Control of dredging and other marine development, e.g. the construction of yacht marinas, may well be the most difficult area to tackle if legal controls are required. The Coast Protection Act does not appear to be an appropriate mechanism for protecting the cultural heritage.

Control of development in coastal waters is a very complicated area as many bodies - the Department of Transport, harbour and dock authorities,

water companies - have overlapping powers.

Non-legal methods, i.e. encouragement and a voluntary code of practice (as on land), may prove to be the best way forward.

In order to undertake dredging activities, licences may be required from the following: the Crown Estate (as landowner); the coast protection authority, who may be a local council (Coast Protection Act 1949, s.18); the Department of Transport (Coast Protection Act 1949, s.34) and port authorities (where dredging is to be undertaken within port limits). Some kind of statutory or voluntary liaison between the Executive Agency and the licence-issuing bodies may be appropriate. Also, the dredging companies are under a duty to report finds and they must be persuaded to do so.

## 2. The Role of County Archaeological Officers

The present proposals parallel the activities of a Maritime Heritage Protection Agency with those of English Heritage in managing the archaeological resource in respect of "nationally important" sites. On land, County Archaeological Officers provide a second tier of management for the archaeological resource. Acting at a local level, they provide the raw data from which "nationally important" sites can be identified. By contributing to County and Local Plans they can ensure that consideration is given to preserving sites which are not of "national importance" but are of value within the locality. Moreover, County Archaeological Officers are the front line in responding to threats to both scheduled sites and areas of high archaeological potential. Through the planning process and particularly the requirements for Environmental Impact Assessments stipulated in the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. No.1190), County Archaeological Officers can mitigate threats by ensuring that activities do not proceed prior to a thorough assessment of their impact on the archaeological resource. This can mean developers providing for survey in areas of high, but unknown, archaeological potential.

A comparable management tier could be provided for the underwater archaeological resource.

(a) County boundaries should be extended beyond low-water mark, with a corresponding extension in the responsibilities of County Archaeological Officers for gathering raw data, in order to provide and maintain a marine dimension for the existing County Sites and Monuments Records. A mechanism is already available by which this could be done. The Local Government Act 1972, s.71 gives the Local Government Boundaries Commission express power to review existing county boundaries, so as to extend them to include any area of the sea.

(b) The role of County Archaeological Officers in recording and reporting underwater finds and sites should be confirmed as a statutory responsibility. This will ensure that funding can actually be obtained from local councils so that the SMRs will provide a base for the national record. In addition, it will enable County Archaeological Officers to be involved with local management initiatives, possibly co-operating with local dive clubs for the purposes of surveying sites and regulating the degree of diver activity in sensitive areas. At present

many County Archaeological Officers recognise the importance of considering the marine zone, but their priorities are dictated by economic considerations and the definition of their role within the planning procedure.

(c) The role of County Archaeological Officers should be confirmed with regard to monitoring and controlling threats posed by "development" activities in the marine zone, such as dredging and yacht marinas. The agencies authorising such activities should be obliged to make provision for the heritage in their consultative procedures. While consultation may be channelled through the Maritime Heritage Protection Agency, it should ultimately be directed to the local County Archaeological Officer. It should be recognised that if a County Archaeological Officer or the Maritime Heritage Protection Agency consider an area to be of high, but as yet unknown, archaeological potential, then the appropriate authorising agency (e.g. the Crown Estate Commissioners) should request an Environmental Impact Assessment in order to facilitate informed consideration of the expediency of authorising any proposed activity.

Edited by S. Dromgoole  
5 March 1990

## **Appendix 12**

# THE MERCHANT SHIPPING ACT 1894: ITS DETRIMENTAL EFFECTS ON MATERIAL FROM UNDERWATER AND THE SITES WHERE IT IS FOUND

Commentary paper from the Joint Nautical Archaeology Policy Committee

In its response to *Heritage at Sea* the Government recognises that the provisions of the Merchant Shipping Act 1894 belong to "an earlier age". It remains unconvinced, however, that serious damage is being done, or that important material is being lost "simply as a result of the requirements of salvage law".

The purpose of this paper is to correct this fundamental misunderstanding by explaining and giving examples of the detrimental effects of the Merchant Shipping Act. Although there is no co-ordinated system of monitoring activity on underwater sites, it is possible to provide some examples of incidents of poor archaeological practice which have resulted from the application of the 1894 Act. The examples given below are well documented and particularly alarming because most of them concern wrecks which are of sufficient artistic, historical or archaeological importance to have been designated under the 1973 Protection of Wrecks Act.

The difficulties of reconciling a commercial law with the protection of the archaeological heritage will be felt more acutely following the transfer of administrative responsibility for historic wrecks from the Department of Transport to the Department of the Environment. This transfer is welcomed because it brings the protection of archaeological sites on land and underwater under the same Department. However, DOE cannot have fully effective control of the seabed heritage while Part IX of the Merchant Shipping Act works against the objectives of heritage protection.

The application of the Merchant Shipping Act has the following detrimental effects:

## 1 It encourages the removal of objects from underwater sites.

Dread of losing possession of a newly discovered site prompts divers to act in haste to raise objects to establish a salvage claim. Although the act of delivering wreck to a Receiver (MSA section 518) does not of itself establish a salvage claim, unless this has been done the courts are unlikely to accept that possession has been established (See Muckelroy 1981, *Discovering a Historic Wreck*, p 3-4).

Removal of objects in these circumstances is bad for three reasons. Firstly because it results in the loss of information about the location and stratigraphical context of the finds, as there will not have been time to survey the site to an adequate standard. Secondly, removing objects causes disturbance of the seabed sediments and may upset the biochemical stability of the site and expose it to agents of erosion. Thirdly, the haste to raise finds may mean that inadequate preparation has been made for their conservation when they are removed from the sea.

#### Example

Wrangels Palais (sank 1687) Danish warship. Emergency designation in 1990.  
The finder of this site raised two bronze guns in order to make a salvage claim. They were removed from site without adequate recording and the seabed was disturbed in the process. Conservation provisions were inadequate.

### 2 It undermines the management of sites designated under the Protection of Wrecks Act

Under the Common Law deriving from the Merchant Shipping Act the ~~finder of a wreck has salvage rights to the entire contents of the site.~~ This can mean that the licensee carrying out archaeological excavation of a site, under the conditions of the Protection of Wrecks Act, has no control over the fate of material from the site once it is raised. He may find that the time and money he has spent on the excavation and care of artefacts is all wasted or goes to line the pockets of the salvor in possession.

So far this has not caused serious problems, since on the only site where this situation has arisen (Langdon Bay) there has been co-operation between the finders and the archaeologists, but the potential exists for a serious conflict of interests.

#### Example

Langdon Bay (Bronze Age) artefact scatter. Designated site no. 19.

The local diving club discovered the site and has salvage rights. Work on the site and recovery of objects was carried out by the British Museum and the National Maritime Museum but the British Museum had to purchase all the finds, including those found by museum staff, from the Receiver in order to take them into its care. This money, less the Receiver's commission and expenses, was passed to the local diving club as a salvage award.

### 3 It leads to the neglect of objects while ownership is established.

Section 518 requires finders to deliver wreck to the Receiver and leave it in his custody for up to a year to allow time for ownership claims. Although it has become accepted in recent years that items may be held to the order of the Receiver by a museum, laboratory or similar institution offering secure storage and appropriate treatment, uncertainty about eventual ownership does deter such institutions from expending resources on their care. Uninformed or irresponsible finders may not bother to provide adequate storage.

#### Example

Admiral Gardner (1809) English East Indiaman. Designated site no. 31.

Objects raised from the site were put into inadequate storage in old oil drums in a Receiver's shed. Coins developed "bronze disease", pewter syringes deteriorated and the decoration and glaze of delftware was destroyed by crystalising salt.

4 It promotes the dispersal by sale of assemblages from underwater sites.

Section 525 states that "if the wreck is not claimed ... the Receiver shall sell the same". This procedure means that collections of items which were found in association with each other will be dispersed, so the additional significance and archaeological value of their inter-relationships will be lost.

Because fees and VAT are calculated as percentages of the total commercial value of the finds, this can encourage a sale to take place as a method of determining the commercial value of the finds. Attempts to comply with the Merchant Shipping Act and put a commercial value on archaeological material can be inappropriate and administratively wasteful.

**Examples**

Invincible (sank 1758) English warship. Designated site no. 22)

Finds from this site have been sold at auction and by private sale. There is no record of who now owns the objects and many of them have been taken abroad.

Rye rudders (13th and 15th centuries)

The Department of Transport required a valuation of these massive medieval rudders. They suggested an auction, but the museum where they are housed was averse to it taking place on their premises and the DTp were unwilling to meet the cost of transport. The DTp then suggested that the rudders should be valued as oak timber which could be sold for reuse. This futile exercise was dropped when the DTp was assured that the timber was so split as to have no monetary value.

5 It compels some excavators to sell material in order to pay Receiver's fees, tax and ~~commission~~

The requirement to pay the various charges may mean that underfunded excavators resort to selling finds to raise the money.

**Examples**

St Anthony (sank 1527) Portuguese Carrack. Designated site no. 26.

Some of the finds from this site were sold at auction and can be considered as lost.

Mary Rose (sank 1545) English warship. Designated site no. 2.

The Ministry of Defence transferred its title to this ship to the Mary Rose Trust. However, since MOD ownership does not extend to personal possessions, such as coins and the barber surgeon's equipment, the Trust is liable to pay the Receiver of Wreck's fees on this unclaimed property at 7½% of value and at 25% of value for the gold coins. To comply with the Merchant Shipping Act, if no payment is made the objects must be sold (and dispersed) by the Receiver.

6 It encourages the attitude that historic material from the seabed should be exploited for its monetary value.

Having a law on the statute book which is geared to the recovery and sale of artefacts from the seabed makes it difficult for more enlightened ideas about heritage protection to gain acceptance. Pre-occupation with commercial value results in a failure to appreciate cultural significance or the potential benefit to a wider public.

## **Waste of potential benefits of the Merchant Shipping Act**

### **1 Crown ownership of unclaimed wreck**

According to section 523 "Her Majesty and Her Royal Successors are entitled to all unclaimed wreck...". However, section 525 requires that "if the wreck is not claimed...the receiver shall sell the same". This means that although the Crown will gain ownership of most archaeological material from the sea, it must dispose of it. Crown ownership, properly administered, could ensure proper care for remains. Sale of wreck means that this opportunity is wasted.

#### **Example**

##### Isle of Wight Astrolabe

An astrolabe was discovered off the Isle of Wight and reported to the Receiver of Wreck. As unclaimed wreck the astrolabe became Crown property. The astrolabe passed into the ownership of the finder in lieu of salvage and he put it in his private museum. Several years later it attracted the attention of a curator from Germany who offered to buy it for £12,500. The local museum service could not match this price, so it is likely that the astrolabe will leave the UK.

### **2 Obligation on finders to report wreck**

The Merchant Shipping Act obliges all finders of wreck to report it to the Receiver. This might be expected to produce substantial information suitable for inclusion in the central record of historic wrecks which the Government has asked the Royal Commission on Historical Monuments to create. This potential benefit is wasted, and the chance to record material is lost, because the law is ignored by divers, dredgers and fishermen. They prefer to disregard the law and the very slender risks of prosecution because of the bureaucracy and delays to be faced.

## **Conclusions**

The examples given above demonstrate that application of the provisions of the Merchant Shipping Act results in damage to underwater sites and brings about the deterioration and dispersal of seabed finds. The potential benefits to heritage protection which the Act could provide are not exploited. Even in the best light, the Merchant Shipping Act can only be regarded as unhelpful. Most of the time it must be treated as one of the most immediate and dangerous threats to archaeology underwater.



## **Appendix 13**

JNAPC OBJECTIVES: SEPTEMBER 1991

To continue lobbying for improved protection of UK underwater heritage:

1. LEGISLATION

- a) Co-operate with DOE/DTP to produce explanatory statement about the current legislation and its implementation and ensure it is widely publicised
- b) Evaluate the operation of the current legislation and propose short-term modification and development
- c) Define what is required of new legislation
- d) Summarise the underwater legislation of other countries and comment on its effectiveness

2. REPORTING AND RECORDING OF FINDS

- a) Summarise benefits of reporting finds from underwater and estimate likely volume
- b) Define preferred local and national reporting procedures for finds
- c) Co-operate with DOE/DTP to put in place a nationwide nautical archaeological reporting structure

3. INVENTORY

- a) Assist RCHM where possible in compilation of the inventory and promote the organisation of survey and validation of inventory, including the use of divers
- b) Develop recommendations for future methods of heritage management

4. SEABED OPERATORS

- a) Agree and disseminate draft of Code of Practice and develop relations with seabed operators
- b) Seek sponsorship for the publication of Code of Conduct
- c) See operator/government funding for an investigation/rescue team

5. CROWN TITLE

Develop with DOE an appropriate consultation procedure for MOD and FCO wrecks

6. TRAINING AND PUBLIC EDUCATION

- a) Report on first year of NAS training post
- b) Develop a Code of Practice for sports divers
- c) Travelling exhibition opens

7. CONSERVATION

Reconvene Conservation Working Group to review current situation.

## **Appendix 14**

## DRAFT

## A NOTE ON WRECK LAWS

There are various laws relating to wreck and wrecks, some of which are quite old and can be confusing. On occasion, misunderstandings can land divers in hot water and they can also increase unnecessary risks to historical artefacts found underwater. In this note Andrew Burr of the Department of Transport and Christopher Dawes of the Department of National Heritage (DNH), and Secretary of the Advisory Committee on Historic Wreck Sites, explain the key points in the two principal UK Acts.

As usual, the detail of the law is complicated and any explanation in plain terms cannot be definitive, but we hope that the explanation below will provide helpful guidance.

The two main Acts which deal with wreck and wrecks are: the Merchant Shipping Act 1894, Part IX of which deals with wreck, salvage and the Receiver of Wreck system; and the Protection of Wrecks Act 1973, which provides for the protection of important or dangerous wrecks and wreck sites. The Protection of Military Remains Act 1986 protects military or naval aircraft or vessels and associated human remains, but it is the 1894 and 1973 Acts which have caused the most confusion.

The expression "wreck" means, loosely, the remains of a ship, her cargo, tackle, furniture and armament. As used in the 1894 act, it includes "jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water". It is not limited to "shipwrecks" or remains found at wreck sites: it may cover anything thrown, washed or dropped overboard as well as abandoned property. But material is not regarded as "wreck" if it did not come from a ship; or if it was merely washed out to sea from the shore or from non-tidal waters.

The objects of the Receiver of Wreck system are to:

stop items of wreck being appropriated by people to whom they do not belong;

find any owners of recovered items of wreck, if possible, and return their property to them;

ensure that law-abiding finders of such property receive an appropriate payment under the law - whether the owner is found or not.

If wreck is found or taken possession of it should be reported to the Receiver. This applies to wreck found in UK waters (ie within the present 12-mile limit) or landed in the UK from outside UK waters. It should also be noted that material may be dutiable, controlled or prohibited (for example, alcoholic drinks) and if so needs to be declared to a Customs officer for that reason.

Finding an object does not make it your property, even if it found outside UK waters. Although some finds may appear to have little monetary value, this is for the Receiver to decide, and such finds should still be reported. Finds ought to be reported as soon as possible; finders who conceal items of wreck are liable to prosecution.

The rights to items of wreck lie firstly with the owner. Finds will be advertised locally so that any owner can come forward. The Receiver will ask local archaeological experts about the identity, age and importance of historic finds. If no owner is found within a year, the Crown becomes the owner: this allows the item to be disposed of legally.

The Receiver has a duty to ensure that finders who report as required receive an appropriate salvage payment. This is payable by the owner, or by the Crown if the item is unclaimed. In either case, the finder may be allowed to keep the item instead of receiving a salvage payment.

The Receiver no longer charges a fee, but he will expect any costs he incurs (for example on storage) to be paid by the person claiming the property (the owner, a salvor, or anybody else).

The Receiver does not settle salvage disputes. If there is a salvage dispute with the owner, or between competing salvors, it must go to Court. But the Receiver will detain any finds until a dispute is settled - that is only fair all round. The Receiver does not award salvage rights to material remaining on wreck sites.

Divers should not assume that a wreck has no owner; they should check carefully. The owner may have negotiated salvage rights with somebody else. They may wish their property to be left alone. Material at any site may have more than one owner - personal effects may not have belonged to the ship owner.

The term "salvor in possession" does not come from the 1894 Act. It has been evolved through case law to help resolve disputes between salvors. Contrary to popular belief, raising the odd item will not, of itself, confer any salvage rights. If the owner of a wreck is known, the first step should simply be to tell them that their property has been found.

#### HISTORIC WRECKS

Divers who find a possible historic site should be very careful not to damage it by making unnecessary recoveries straight away. If the site appears to be important and may need protecting from interference, the finder should leave everything as it is, report their discovery (in confidence) to the appropriate authority and suggest a designation under the Protection of Wrecks Act 1973. An order can be made quickly and will stop people interfering with the site. An immediate report is therefore important.

Important sites can be designated under the 1973 Act which imposes special controls. Designations are decided by the DNH (or by its counterparts in Scotland, Wales or Northern Ireland for sites off their shores). The effect of a designation is to control all activities at the site - whether by the owner, a salvor, or others who have no rights there at all.

A designated site may be visited, whether for diving or salvage purposes, and items may be recovered only if a licence for that purpose has been granted. Anybody (including owners or salvors) who interferes with a designated site without a licence - or any licensee who does not obey the terms of the licence - is guilty of an offence. The DNH (or its counterparts) will always consider granting the finder a licence to investigate the site. They will be granted on strict conditions.

A licence for excavating a designated site, or recovering artefacts from it, will not normally be granted until the licensee has completed a satisfactory pre-disturbance survey of the site, under the supervision of a suitable archaeologist.

Recoveries from designated sites will not normally be allowed unless conservation facilities are known to be available and DNH (or its counterparts) are content with where the objects will eventually find a home. It may defeat the purpose of designation if recoveries are simply to be dispersed by sale.

Recoveries from a designated site must still be reported under the 1894 Act. This is one way of ensuring that the terms of a licence are being observed.

Sites in English waters should be reported to the DNH at the address below. Historic Scotland is responsible for sites off Scotland, CADW for those off Wales and the Department of the Environment (NI) for those off Northern Ireland. If in doubt, the Secretary of the Advisory Committee on Historic Wreck Sites should be the first contact.

Addresses:

Christopher Dawes  
Secretary of the Advisory  
Committee on Historic Wreck Sites  
Room C9/10a  
2 Marsham Street  
London SW1P 3EB  
(phone: 071-276 4725/4739)

Ron Dalziel  
Historic Scotland  
20 Brandon Street  
Edinburgh  
EH3 5RA

Alison Minto  
CADW  
Brunel House  
2 Fitzalan Road  
Cardiff  
CF2 1UY

Michael Acheson  
DoE(NI)  
5-33 Hill Street  
Belfast  
BT1 2LA

November 1992

## **Appendix 15**

DRAFT DOCUMENT  
MARITIME ARCHAEOLOGY  
CODE OF PRACTICE FOR SEA-BED DEVELOPERS

This Code issued by the Joint Nautical Archaeology Policy Committee sets out recommended procedures for consultation and co-operation between sea-bed developers and archaeologists.

The Code has been prepared in consultation with interested parties. The organisations in Appendix 1 are being consulted and their endorsement is being sought.

1.0 INTRODUCTION

- 1.1 This Code is concerned with the underwater archaeological and historical resource. The purpose of the Code is to provide a framework within which concerns for the maritime archaeological heritage and the interest of other sea users can be reconciled. It is proper to acknowledge the help already given by sea-bed developers towards the physical preservation or investigation of threatened underwater archaeological sites.
- 1.2 The recent Planning Policy Guidance Note No.16 "Archaeology and Planning" stated the Government's policies on archaeology. "Archaeological remains should be seen as a finite, and non-renewable resource, in many cases highly fragile and vulnerable to damage and destruction. In particular, care must be taken to ensure that archaeological remains are not needlessly or thoughtlessly destroyed. They can contain irreplaceable information about our past and the potential for an increase in future knowledge. They are part of our sense of national identity and are valuable both for their own sake and for their role in education, leisure and tourism".



- 1.3 The Articles within the revised Draft European Convention on the Protection of the Archaeological Heritage, which have been signed by the UK Government, also echo similar policies and define the archaeological heritage as including "...sites and structures whether situated on land or under water" (Article 1.3).
- 1.4 Maritime archaeological sites are equally - "valuable for their own sake and for education, leisure and for tourism". There has been a growing awareness in recent years of underwater archaeological sites and discoveries. Wrecks include 3000 year old boats and the Tudor warship "Mary Rose". Drowned prehistoric, Roman and medieval settlements and harbours can also be found on the sea-bed.
- 1.5 The sea and sea-bed have been used by man for thousands of years and today they support a multitude of commercial and leisure uses. However, the diverse uses of the sea and sea-bed do not always work in the interest of conservation. If we are to ensure that the greatest national benefit is derived from the marine environment, there must be the responsible regulation of activities which aims to resolve potential conflicts between different users. Coherent management policies for the coastal zone and territorial waters can help to balance commercial, archaeological and other environment needs.
- 1.6 The Code recommends ways that would ensure the future preservation of the maritime archaeological heritage through co-operation and consultation between sea-bed developers and archaeologists. Voluntary co-operation can provide more flexibility and greater opportunity of achieving these aims than a system imposed by legislation. A balance must be struck in each case to reflect the archaeological significance of underwater sites compared to their economic need. For example, it might be that the existence of a particular archaeological site would potentially sterilise an important mineral reserve.

If the physical preservation of a site is not feasible then an archaeological investigation for the purposes of "preservation by record" may be an acceptable alternative. However, from the maritime archaeological point of view this should be regarded as a second best option since the "in situ" physical preservation of important maritime archaeological remains is nearly always to be preferred.

- 1.7 The Code's objective is to encourage commercial sea-bed developers to seek advice on the possible maritime archaeological potential of their proposed development at the earliest opportunity. Suitable organisations having appropriate experience in maritime aspects of archaeology ("archaeologists"), will be able to offer advice on the implications of the archaeological remains to the developer's programme of work. Moreover such organisations will have access to information on maritime archaeological sites in the area in question.
- 1.8 The involvement of archaeologists during the planning stages of the development will allow the archaeological implications to be considered in line with the overall assessment of the development's environmental impact. For example, the results of sea-bed survey planned for other purposes might also be scanned for potential archaeological sites or wrecks.
- 1.9 Finally, the Code can assist in the tailoring of specific agreements to suit individual situations. Its adoption should open up a non-statutory channel of communication between sea-bed developers and maritime archaeologists. Early understanding of the maritime archaeological resource will be beneficial to all parties. It will provide the option of planning the development to avoid disturbing archaeological remains. Alternatively, where economic, environmental or social needs outweigh the need to preserve physically archaeological remains, it gives maximum opportunity for archaeological survey and investigation before the development commences.

## 2.0 THE CODE OF PRACTICE

- 2.1 At the earliest opportunity the developer should consult archaeologists to establish whether potential development programmes would be likely to affect a site of archaeological interest. The directory of suitable archaeological organisations is kept by the Secretariat of the Joint Nautical Archaeology Policy Committee - see Appendix 2.
- 2.2 The archaeologists will make available to the developer such information as they possess relating to a proposed development site, and will draw attention to sites of maritime archaeological interest so that consideration may be given to their physical preservation in line with the Government's archaeological policies. In those cases where economic, environmental or social needs must take precedence over the physical preservation of archaeological remains, archaeological survey and investigation may be an acceptable alternative.
- 2.3 After consulting <sup>developers</sup> archaeologists regarding a proposed development programme, the ~~archaeologists~~ will, where possible, carry out an underwater survey of the site in order to ascertain the maritime archaeological potential before development commences, and what action, if any, should be taken to preserve important maritime archaeological remains.
- 2.4 At the earliest opportunity the archaeologists and the developer should agree a specification and timetable for a survey and investigation programme to be undertaken before the development commences.
-

- 2.5 The practice of developers offering financial or practical assistance to archaeological survey and investigation is supported on land by the Government, the CBI and local authorities. The decision to make such contributions, however, is a matter for the developer in each case. It is therefore anticipated that sea-bed developers will give careful consideration to making financial and practical resources available for any necessary maritime archaeological survey and investigation programmes resulting from their development proposals. Such programmes will include the establishment of a site archive and the publication of the results of the investigation and survey according to the requirements of "The Management of Archaeological Projects" published in 1991 by English Heritage.
- 2.6 Sea-bed developers and archaeologists will recognise the legal position of the site in relation to the 1973 Protection of Wrecks Act, and the issues of ownership of finds under the 1894 Merchant Shipping Act.
- 2.7 In co-operation with the Receiver of Wreck, sea-bed developers will ensure that archaeologists may retain artefacts and records for a reasonable time and will recognise the desirability of depositing all artefacts and records in an appropriate museum as a complete long-term archive for future study. Copies of all site records should be sent to the relevant county Sites and Monuments Record and the National Monuments Record.
- 2.8 The archaeologists will be conscious of the potential public relations benefits to developers of publicising their work, and that in any publicity, financial or other support from the developer, should be recognised in a manner agreed with by the developer.

## **Appendix 16**

## LAND SITE SCHEDULING CRITERIA (NON STATUTORY)

- i) Period: all types of monuments that characterise a category or period should be considered for preservation.
- ii) Rarity: there are some monument categories which in certain periods are so scarce that all surviving examples which still retain some archaeological potential, should be preserved. In general, however, a selection must be made which portrays the typical and commonplace as well as the rare. This process should take account of all aspects of the distribution of a particular class of monument, both in a national and a regional context.
- iii) Documentation: the significance of a monument may be enhanced by the existence of records of previous investigation or, in the case of more recent monuments, by the supporting evidence of contemporary written records.
- iv) Group value: the value of a single monument (such as a field system) may be greatly enhanced by its association with related contemporary monuments (such as a settlement and cemetery) or with monuments of different periods. In some cases, it is preferable to protect the complete group of monuments, including associated and adjacent land, rather than to protect isolated monuments within the group.
- v) Survival/condition: the survival of a monument's archaeological potential both above and below ground is a particularly important consideration and should be reassessed in relation to its present condition and surviving features.
- vi) Fragility/vulnerability: highly important archaeological evidence from some field monuments can be destroyed by a single ploughing or unsympathetic treatment; vulnerable monuments of this nature would particularly benefit from the statutory protection which scheduling confers. There are also standing structures of particular form or complexity whose value can again be severely reduced by neglect or careless treatment and which are similarly well suited to protection by scheduled monument legislation, even if these structures are already listed historic buildings.
- vii) Diversity: some monuments may be selected for scheduling because they possess a combination of high quality features, others because of a single important attribute.
- viii) Potential: on occasion, the nature of the evidence cannot be specified precisely, but it may still be possible to document reasons anticipating its existence and importance and so to demonstrate the justification for scheduling. This is usually confined to sites rather than upstanding monuments.

## **Appendix 17**

PARLIAMENTARY ASSEMBLY  
OF THE  
COUNCIL OF EUROPE

THIRTIETH ORDINARY SESSION

RECOMMENDATION 848 (1978)  
*on the underwater cultural heritage*

*The Assembly.*

1. Welcoming the report on the underwater cultural heritage, presented by its Committee on Culture and Education (Doc. 4200) ;
2. Recognising the historical and cultural significance of this heritage, but aware that positive action is urgently needed on both national and European levels in order to ensure its proper protection ;
3. Noting with satisfaction the growing public interest in the underwater heritage, and anxious that this interest be channelled into a better realisation of the potential value of the heritage rather than lead rapidly to its unauthorised destruction ;
4. Stressing the essential unity of land and underwater archaeology, and its contribution to a greater understanding of the history and culture of the peoples of Europe ;
5. Particularly concerned by the lack of professional experts competent in the field of underwater archaeology, by the small scale of government funding, and by the inadequacies of existing legislation and administrative practice in most member states,
6. Recommends that the Committee of Ministers :

*Action at European level*

- a. draw up a European convention on the underwater cultural heritage, open to all member states of the Council of Europe and also to all non-member states bordering on seas in the European area ;
- b. negotiate agreement between member states on the declaration of national cultural protection zones up to the 200-mile limit, wherever that limit is in keeping with geographical realities, as a basis for the implementation of the proposed convention ;
- c. encourage, in co-operation with UNESCO and ICOM, the administration of the application of the convention at regional level, by agreement between states bordering on the same sea or part-sea ;
- d. express its support for the setting up of a European Group for Underwater Archaeology, which, among other things, could prepare and keep up to date a series of European manuals (supplemented where appropriate with visual material) on :
  - i. existing legislation and administrative regulations concerning the underwater heritage ;
  - ii. underwater archaeological techniques ;
  - iii. basic procedures to be followed on locating finds ;

e. bring the report of the Committee on Culture and Education (Doc. 4200) to the attention of interested expert committees in the Council of Europe, with the following proposals for further action at European level :

i. in the field of culture and education, for encouraging training of technicians and archaeologists in underwater questions, for scientific research, and for responsible public education (both inside and outside educational institutions) in the significance of the underwater cultural heritage ;

ii. in the field of environmental protection, for co-ordination of action being taken in favour of the natural and cultural underwater heritage ;

iii. for inclusion of protection of the underwater cultural heritage where appropriate in any future Council of Europe conventions or agreements ;

iv. to the European Youth Centre and European Youth Foundation, for encouraging seminars of young people interested in this field ;

*Action at national level*

f. urge member governments, on the basis of proposals set out in the Annex to this recommendation :

i. to revise where necessary existing legislation ;

ii. to take further action for the underwater cultural heritage, if possible in concertation amongst themselves, in the areas calling for priority attention.



## ANNEX

### *Minimum legal requirements*

- i. There should be no loopholes in the system of protection. The definition of underwater objects and sites should extend up to what is covered by land antiquities legislation.
- ii. Protection should cover all objects that have been beneath the water for more than 100 years, but with the possibility of discretionary exclusion of less important objects (or of less important antiquities) once they have been properly studied and recorded, and the inclusion of historically or artistically significant objects of more recent date.
- iii. Individual, and apparently isolated, underwater objects should be protected to the same extent as wrecks or sites.
- iv. National jurisdiction should be extended up to the full 200-mile limit, with an international agreement providing for reciprocal treatment of cultural finds landed in countries other than those in whose cultural zones they were found.
- v. Existing salvage and wreck law should not apply to any items protected under ii and iv above.
- vi. Reporting of finds to the appropriate authorities should be compulsory.
- vii. A single authority should be given primary responsibility for dealing with both land and underwater finds, and determining their significance.
- viii. A standard system of fixed finder's monetary rewards should be established, related to each identification of an object or site and not necessarily linked to the commercial value of the find. It should differentiate between an individual object and a site, and be heavily weighted in favour of the latter.

- ix. Provision should be made for appropriate enforcement measures.

### *Priority areas for further action at national level*

- i. The establishment of stocks of equipment for underwater research, including mobile laboratories and support vessels.
- ii. The training of more technicians and underwater archaeologists and the improvement of career possibilities for those working in this field.
- iii. The setting up of centres for the analysis and treatment of underwater material, for research and for training.
- iv. The systematic preparation of inventories of underwater sites.
- v. The more effective protection and policing of known underwater sites.
- vi. Increased financial support for rescue excavations and for the careful scientific excavation of really significant sites.
- vii. Encouragement of the responsible presentation of the underwater heritage to the public (in particular by television, by publishers and by museums).
- viii. Assistance to the efforts made by local authorities for the display of underwater finds of cultural importance.

## **Appendix 18**

DIR/JUR (84) 1

DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL  
HERITAGE

PREAMBLE

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose, in particular, of safeguarding and realising the ideals and principles which are their common heritage;

Having regard to the European Cultural Convention, signed at Paris on 19 December 1954, particularly to Article 5 thereof;

Having regard to the European Convention on the Protection of the Archaeological Heritage, signed at London on 6 May 1969;

Having regard to Recommendation 848 (1978) of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage;

Having regard to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted at Paris on 14 November 1970, and to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, adopted at Paris on 19 November 1972;

Acknowledging the importance of the underwater cultural heritage as an integral part of the cultural heritage of mankind and a significant element in the history of peoples and their mutual relations;

Noting the growing public interest in the underwater cultural heritage;

Considering that the threats to the underwater cultural heritage are accentuated by the increasing construction activity and exploitation of the marine resources;

Considering that the underwater cultural heritage is threatened by damaging activities by irresponsible amateur divers, but that at the same time the authorities' co-operation with responsible amateur divers and their organisations is essential for the protection of the underwater cultural heritage;

Considering that the investigation and protection of that heritage necessitate the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of (highly qualified) professional specialisation;

Recognising that moral responsibility for protecting the underwater cultural heritage rests with the State directly concerned but that, as this heritage is common to mankind as a whole, such protection is also the concern of all States;

Bearing in mind the need for more stringent supervision to prevent any clandestine excavation which, by destroying the heritage's environment, would cause the irremediable loss of its historical significance;

Convinced, however, that only through information and education will the public come to appreciate the value of the heritage and the need to preserve it as a component of the history of mankind,

Have agreed as follows:

#### Article 1

1. For the purposes of this Convention all remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or in tidal or other periodically flooded areas, or recovered from any such environment, or washed ashore, shall be considered as being part of the underwater cultural heritage, and are hereinafter referred to as "underwater cultural property".

2. Underwater cultural property being at least 100 years old shall enjoy the protection provided by this Convention. However, any Contracting State may provide that such property which is less than 100 years old shall enjoy the same protection.

#### Article 2

1. Contracting States undertake to protect underwater cultural property in accordance with this Convention.

2. Outside its territorial sea, within a maritime zone which does not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured, each Contracting State may exercise the control necessary to prevent and punish infringement within its territory or territorial sea of its laws and regulations relating to the protection of underwater cultural property.

3. Each Contracting State may, in applying paragraph 2, presume that removal of underwater cultural property from the seabed in the zone referred to in that paragraph without its approval would result in an infringement within its territory or territorial sea of its laws and regulations.

4. For the purposes of this Convention the "area" of a Contracting State means its territory and territorial sea. It also includes, in respect of a Contracting State, any zone in which that State exercises control [in accordance with paragraph 2].

5. Each Contracting State, in the exercise of its jurisdiction over the exploration for and exploitation of the natural resources of its continental shelf, shall take appropriate measures for the protection of underwater cultural property in accordance with the objectives of this Convention.

6. Paragraphs 2 and 3 do not affect the right of a Contracting State to apply, in conformity with international law, its laws and regulations relating to the protection of underwater cultural property within an area beyond its territorial sea.

7. Nothing in this Convention affects the rights of identifiable owners, the law of salvage or other rules of maritime law, or laws and practices with respect to cultural exchanges.

8. This Convention is without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural property.

### Article 3

1. Contracting States shall ensure as far as possible that all appropriate measures are taken to protect underwater cultural property in situ.

2. Contracting States shall ensure that all appropriate measures are taken to protect and conserve recovered underwater cultural property, and that its recovery is carried out under such conditions that a full recording of the find is ensured.

### Article 4

Contracting States shall take measures to further underwater research by providing instruction in underwater archaeological investigation and excavation methods as well as in techniques for the conservation of underwater cultural property, and/or by encouraging the appropriate bodies or organisations to do so.

### Article 5

1. Contracting States may provide that authorisations to carry out survey, excavation or recovery operations may be granted to private persons or concerned bodies. .

2. Such authorisations may be granted only on the basis of scientific considerations, and may, taking into account special characteristics of certain sites and the facilities and economic resources available to the applicants, specify and require that the applicants possess adequate qualifications and equipment or forbid the use of specific techniques or equipment.

### Article 6

1. Contracting States shall require that all discoveries of underwater cultural property be reported without delay to their competent authorities, whether the property has been removed from its place of discovery or not.

2. Contracting States shall require that discoverers of underwater cultural property leave this property, as a principle, where it is situated. In the case of accidental recovery, Contracting States shall require that discoverers limit themselves to taking the necessary measures for temporary protection.

## Article 7

1. Contracting States shall provide for official registration of underwater cultural property discovered or otherwise known to be located in their area [as referred to in Article 2]. The State may decide whether or not to open the registered information or a part thereof to public consultation. In all cases appropriate measures shall be taken in order to avoid possible harmful effects of premature publicity.

2. Contracting States shall, where possible, encourage the co-operation of diving associations, qualified archaeologists and cultural bodies in order to register complete information about underwater cultural property.

## Article 8

Without prejudice to Article 7, paragraph 1, Contracting States shall take all practicable measures to ensure that full scientific information concerning any survey, excavation, recovery, conservation and related work regarding underwater cultural property is made available as early as possible in appropriate publications.

## Article 9

Contracting States shall co-operate in the protection of the underwater cultural heritage under this Convention. In pursuance of this principle, Contracting States shall, especially where underwater cultural property is of particular interest to another Contracting State, consider providing information about the discovery of such property, as well as collaborating in the excavation, conservation, study and cultural promotion of the said property to the extent permitted by their domestic legislation.

## Article 10

1. While respecting the right to publication as well as the archaeological principle of association of finds, each Contracting State shall, to the extent permitted by its domestic legislation, take all appropriate measures in order that recovered underwater cultural property is conserved under conditions facilitating its study by qualified researchers, and that a suitable selection is displayed to the public.

2. Contracting States shall take appropriate measures to promote the appreciation of the underwater cultural heritage and the awareness of the need to protect it. In order to develop this public appreciation, they may in particular encourage collaboration among diving associations, qualified archaeologists and cultural bodies.

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## Article 11

In order to facilitate the control of traffic in underwater cultural property, each Contracting State shall take all measures it deems appropriate to make available evidence on any lawful export of such property.

## Article 12

1. If underwater cultural property is illegally recovered in, or illegally exported from, the area of a Contracting State [as referred to in Article 2], this State shall notify the other Contracting States to which such property has been transferred or is suspected of having been transferred of the fact that the property has been recovered or exported illegally, and give all relevant information concerning such property. Contracting States shall co-operate with a view to discovering where such property is located and to securing it.

2. If underwater cultural property, notification of which has been made under paragraph 1 above, is found, or presumed to be located, within the area of a Contracting State [as referred to in Article 2], this State shall immediately inform the notifying Contracting State, and supply all relevant information concerning such property.

3. If underwater cultural property is found within the area of a Contracting State [as referred to in Article 2] and this State has reasonable grounds to presume that it has been illegally recovered in, or illegally exported from, another Contracting State, it shall immediately notify the Contracting State which it presumes is concerned, of the identity of such property as well as of the circumstances in which it was found.

## Article 13

Each Contracting State shall take all practicable measures towards the restitution of underwater cultural property located within its area [as referred to in Article 2] which has been illegally recovered in the area [as referred to in Article 2] of another Contracting State or illegally exported from such a State.

## Article 14

Where damage has been caused to underwater cultural property in the area of a Contracting State [as referred to in Article 2], Contracting States shall, if so requested, co-operate with that State with a view to discovering the identity of the authors of such damage.

## Article 15

A Contracting State may require its nationals to report to its competent authorities any discovery of underwater cultural property outside the jurisdiction of any State.

## Article 16

1. For the purposes of this Convention, a Standing Committee shall be set up.

2. Any Contracting State may be represented on the Standing Committee by one or more delegates. Each delegation shall have one vote.

3. Any member State of the Council of Europe which is not a Contracting State to the Convention may be represented on the Committee as an observer.

The Standing Committee may, by unanimous decision, invite any non-member State of the Council of Europe which is not a Contracting State to the Convention to be represented by an observer at one of its meetings.

Any body or agency technically qualified in the field of the underwater cultural heritage and belonging to one of the following categories:

- a. international agencies or bodies, either governmental or non-governmental, and national governmental agencies or bodies;
- b. national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located,

may inform the Secretary General of the Council of Europe, at least three months before the meeting of the Committee, of its wish to be represented at that meeting by observers. They shall be admitted unless, at least one month before the meeting, one-third of the Contracting States have informed the Secretary General of their objection.

4. The Standing Committee shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within one year of the date of the entry into force of the Convention. It shall subsequently meet at least every three years and whenever a majority of the Contracting States so request.

5. A majority of the Contracting States shall constitute a quorum for holding a meeting of the Standing Committee.

6. Subject to the provisions of this Convention, the Standing Committee shall draw up its own Rules of Procedure.

#### Article 17

1. The Standing Committee :

- shall keep under review the implementation of the provisions of this Convention;
- may make recommendations concerning the protection of the underwater cultural heritage, the development of particular aspects of this Convention or the improvement of its effectiveness;
- shall carry out exchanges of views and of information on all matters regarding the underwater cultural heritage;
- shall consider any projects for international co-operation in the survey, excavation and conservation of underwater cultural property;
- may submit to the Committee of Ministers reports on the situation of the discipline of underwater archaeology in the higher educational institutions in the Contracting States;
- may make Recommendations to the Committee of Ministers concerning non-member States of the Council of Europe to be invited to accede to this Convention.

2. In order to discharge its functions, the Standing Committee may, on its own initiative, arrange for meetings of groups of experts.

3. After each meeting, the Standing Committee shall submit to the Committee of Ministers of the Council of Europe a report on its work and on the functioning of the Convention.



## **Appendix 19**

# INTERNATIONAL LAW ASSOCIATION

## DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

### PREAMBLE

States party to the present Convention,

*Acknowledging* the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage;

*Noting* growing public interest in the underwater cultural heritage;

*Perceiving* that growing threats to the underwater cultural heritage include increasing construction activity, advanced technology that enhances identification of and access to wreck, exploitation of marine resources, and commercialization of efforts to recover underwater cultural heritage;

*Determining* that the underwater cultural heritage may be threatened by irresponsible activity and that therefore cooperation among states, individual salvors, divers, their organizations, marine archaeologists, museums and other scientific institutions is essential for the protection of the underwater cultural heritage;

*Considering* that exploration, excavation, and protection of the underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicates a need for uniform governing criteria;

*Recognizing* that the underwater cultural heritage is common to humanity, and that therefore responsibility for protecting it rests not only with the State or States most directly concerned with a particular activity affecting the heritage but with all States and other subjects of international law;

*Bearing in mind* the need for more stringent supervision to prevent any clandestine excavation which, by destroying the environment surrounding underwater cultural heritage, would cause the irremediable loss of its historical or scientific significance;

*Convinced* that information and education about the underwater cultural heritage, serious threats to it, and the need for responsible diving and other activity affecting the underwater cultural heritage, will enable the public to appreciate the importance of the underwater cultural heritage to humanity and the need to preserve it as a component of the history of humanity; and

*Committed* to protecting the underwater cultural heritage;

*Have agreed* as follows:

### Article 1

#### 1. Definitions:

For the purposes of this Convention:

- (a) "Underwater cultural heritage" means wreck, and any part of the cargo and other contents thereof, including human remains, as well as underwater sites, structures (including wharfs and bridges), buildings, artifacts, implements, and related objects, together with their contexts.
  - (b) "Wreck" means a vessel, ship or aircraft or any part thereof that has been lost or abandoned.
2. To the extent that a state is entitled to sovereign immunity under international law, such immunity shall continue to apply in the municipal legal systems of Parties notwithstanding the Convention.

3. This Convention shall apply to all activity that could affect the underwater cultural heritage beyond the territorial sea of States Parties, as defined by international law.
4. The provisions of this Convention shall apply to all underwater cultural heritage at least 50 years old. Any Party may extend the provisions, however, to underwater heritage which is less than 50 years old.
5. Parties are encouraged to apply these provisions and the criteria set forth in the Appendix to activity within their internal and territorial waters.
6. Parties are encouraged to prescribe by law that heritage covered by this Convention shall not be subject to salvage laws.

#### Article 2

Each Party shall undertake to establish a "cultural heritage zone" coextensive with its contiguous zone, continental shelf, 200-mile exclusive economic zone, a special 200-mile protection zone, or any combination of these. Within the cultural heritage zone, the Party may regulate all activities affecting the underwater cultural heritage in accordance with the criteria set forth in the Appendix, subject to internationally recognized principles of innocent passage, transit passage, and freedom of navigation.

#### Article 3

1. Beyond its territorial waters and cultural heritage zone, each Party shall prohibit its nationals from interfering with or excavating underwater cultural heritage except in accordance with the criteria set forth in the Appendix.
2. On the request of any Party or on its own initiative, each Party undertakes to seize underwater cultural heritage brought within its territory after having been excavated either within or beyond its territorial waters and cultural heritage zone in a manner not conforming with the criteria set forth in the Appendix. If the underwater cultural heritage in question is or was within the cultural heritage zone of another Party, it is to be returned to that Party in accordance with applicable rules of private and public international law.
3. A Party may impose criminal sanctions for violation of these provisions. Each Party shall cooperate with other Parties in bringing to justice persons subject to such provisions in the municipal law of another Party on the request of the latter state. Each Party will either render over persons subject to such sanctions or prosecute them under its own laws.

#### Article 4

1. Each Party undertakes to share information with other Parties concerning underwater cultural heritage such as, but not limited to, illegally excavated or transferred heritage, location of heritage, pertinent scientific methodology and technology, and legal developments relating to heritage.
2. Whenever feasible, each Party shall use appropriate international data bases to disseminate information about illegally excavated or transferred heritage.
3. Each Party shall endeavour by educational means to create and develop in the public mind a realization of the value of the underwater culture and the threat to the cultural heritage created by violations of this Convention and non-compliance with the criteria in the Appendix.
4. Each Party undertakes to protect underwater cultural heritage it has seized under this Convention and, whenever feasible, to keep underwater cultural heritage on display or otherwise maintain it for the benefit of the public.

#### Article 5

Any dispute between two or more Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by a request in conformity with the Statute of the Court.

#### Article 6

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

#### Article 7

1. The present Convention shall be open for signature by all States until \_\_\_\_\_ at United Nations Headquarters in New York.
2. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### Article 8

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the objects and purposes of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

#### Article 9

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

#### Article 10

A Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

#### Article 11

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

## **Appendix 20**

# European Convention on the Protection of the Archaeological Heritage (revised)

**Valletta - La Valette, 16.I.1992**

## Preamble

The member States of the Council of Europe and the other States party to the European Cultural Convention signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose, in particular, of safeguarding and realising the ideals and principles which are their common heritage;

Having regard to the European Cultural Convention signed in Paris on 19 December 1954, in particular Articles 1 and 5 thereof;

Having regard to the Convention for the Protection of the Architectural Heritage of Europe signed in Granada on 3 October 1985;

Having regard to the European Convention on Offences relating to Cultural Property signed in Delphi on 23 June 1985;

Having regard to the recommendations of the Parliamentary Assembly relating to archaeology and in particular Recommendations 848 (1978), 921 (1981) and 1072 (1988);

Having regard to Recommendation No. R (89) 5 concerning the protection and enhancement of the archaeological heritage in the context of town and country planning operations;

Recalling that the archaeological heritage is essential to a knowledge of the history of mankind;

Acknowledging that the European archaeological heritage, which provides evidence of ancient history, is seriously threatened with deterioration because of the increasing number of major planning schemes, natural risks, clandestine or unscientific excavations and insufficient public awareness;

Affirming that it is important to institute, where they do not yet exist, appropriate administrative and scientific supervision procedures, and that the need to protect the archaeological heritage should be reflected in town and country planning and cultural development policies;

Stressing that responsibility for the protection of the archaeological heritage should rest not only with the State directly concerned but with all European countries, the aim being to reduce the risk of deterioration and promote conservation by encouraging exchanges of experts and the comparison of experiences;

Noting the necessity to complete the principles set forth in the European Convention for the Protection of the Archaeological Heritage signed in London on 6 May 1969, as a result of evolution of planning policies in European countries,

Have agreed as follows:

## **Definition of the archaeological heritage**

### **Article 1**

- 1 The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.
- 2 To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:
  - i the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
  - ii for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and
  - iii which are located in any area within the jurisdiction of the Parties.
- 3 The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water.

## **Identification of the heritage and measures for protection**

### **Article 2**

Each Party undertakes to institute, by means appropriate to the State in question, a legal system for the protection of the archaeological heritage, making provision for:

- i the maintenance of an inventory of its archaeological heritage and the designation of protected monuments and areas;
- ii the creation of archaeological reserves, even where there are no visible remains on the ground or under water, for the preservation of material evidence to be studied by later generations;
- iii the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and making them available for examination.

### **Article 3**

To preserve the archaeological heritage and guarantee the scientific significance of archaeological research work, each Party undertakes:

- i to apply procedures for the authorisation and supervision of excavation and other archaeological activities in such a way as:
  - a to prevent any illicit excavation or removal of elements of the archaeological heritage;
  - b to ensure that archaeological excavations and prospecting are undertaken in a scientific manner and provided that:
    - non-destructive methods of investigation are applied wherever possible;

- the elements of the archaeological heritage are not uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management;
- ii to ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons;
- iii to subject to specific prior authorisation, whenever foreseen by the domestic law of the State, the use of metal detectors and any other detection equipment or process for archaeological investigation.

#### **Article 4**

Each Party undertakes to implement measures for the physical protection of the archaeological heritage, making provision, as circumstances demand:

- i for the acquisition or protection by other appropriate means by the public authorities of areas intended to constitute archaeological reserves;
- ii for the conservation and maintenance of the archaeological heritage, preferably *in situ*;
- iii for appropriate storage places for archaeological remains which have been removed from their original location.

### **Integrated conservation of the archaeological heritage**

#### **Article 5**

Each Party undertakes:

- i to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate:
  - a in planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest;
  - b in the various stages of development schemes;
- ii to ensure that archaeologists, town and regional planners systematically consult one another in order to permit:
  - a the modification of development plans likely to have adverse effects on the archaeological heritage;
  - b the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published;
- iii to ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their settings;
- iv to make provision, when elements of the archaeological heritage have been found during development work, for their conservation *in situ* when feasible;
- v to ensure that the opening of archaeological sites to the public, especially any structural arrangements necessary for the reception of large numbers of visitors, does not adversely affect the archaeological and scientific character of such sites and their surroundings.



## **The financing of archaeological research and conservation**

### **Article 6**

Each Party undertakes:

- i to arrange for public financial support for archaeological research from national, regional and local authorities in accordance with their respective competence;
- ii to increase the material resources for rescue archaeology:
  - a by taking suitable measures to ensure that provision is made in major public or private development schemes for covering, from public sector or private sector resources, as appropriate, the total costs of any necessary related archaeological operations;
  - b by making provision in the budget relating to these schemes in the same way as for the impact studies necessitated by environmental and regional planning precautions, for preliminary archaeological study and prospection, for a scientific summary record as well as for the full publication and recording of the findings.

## **Collection and dissemination of scientific information**

### **Article 7**

For the purpose of facilitating the study of, and dissemination of knowledge about, archaeological discoveries, each Party undertakes:

- i to make or bring up to date surveys, inventories and maps of archaeological sites in the areas within its jurisdiction;
- ii to take all practical measures to ensure the drafting, following archaeological operations, of a publishable scientific summary record before the necessary comprehensive publication of specialised studies.

### **Article 8**

Each Party undertakes:

- i to facilitate the national and international exchange of elements of the archaeological heritage for professional scientific purposes, while taking appropriate steps to ensure that such circulation in no way prejudices the cultural and scientific value of those elements;
- ii to promote the pooling of information on archaeological research and excavations in progress and to contribute to the organisation of international research programmes.

## **Promotion of public awareness**

### **Article 9**

Each Party undertakes:

- i to conduct educational actions with a view to rousing and developing an awareness in public opinion of the value of the archaeological heritage for understanding the past and of the threats to this heritage;

- ii to promote public access to important elements of its archaeological heritage, especially sites, and encourage the display to the public of suitable selections of archaeological objects.

## **Prevention of the illicit circulation of elements of the archaeological heritage**

### **Article 10**

Each Party undertakes:

- i to arrange for the relevant public authorities and for scientific institutions to pool information on any illicit excavations identified;
- ii to inform the competent authorities in the State of origin which is a Party to this Convention of any offer suspected of coming either from illicit excavations or unlawfully from official excavations, and to provide the necessary details thereof;
- iii to take such steps as are necessary to ensure that museums and similar institutions whose acquisition policy is under State control do not acquire elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations;
- iv as regards museums and similar institutions located in the territory of a Party but the acquisition policy of which is not under State control:
  - a to convey to them the text of this (revised) Convention;
  - b to spare no effort to ensure respect by the said museums and institutions for the principles set out in paragraph 3 above;
- v to restrict, as far as possible, by education, information, vigilance and co-operation, the transfer of elements of the archaeological heritage obtained from uncontrolled finds or illicit excavations or unlawfully from official excavations.

### **Article 11**

Nothing in this (revised) Convention shall affect existing or future bilateral or multilateral treaties between Parties concerning the illicit circulation of elements of the archaeological heritage or their restitution to the rightful owner.

## **Mutual technical and scientific assistance**

### **Article 12**

The Parties undertake:

- i to afford mutual technical and scientific assistance through the pooling of experience and exchanges of experts in matters concerning the archaeological heritage;
- ii to encourage, under the relevant national legislation or international agreements binding them, exchanges of specialists in the preservation of the archaeological heritage, including those responsible for further training.

## **Control of the application of the (revised) Convention**

### **Article 13**

For the purposes of this (revised) Convention, a committee of experts, set up by the Committee of Ministers of the Council of Europe pursuant to Article 17 of the Statute of the Council of Europe, shall monitor the application of the (revised) Convention and in particular:

- i report periodically to the Committee of Ministers of the Council of Europe on the situation of archaeological heritage protection policies in the States Parties to the (revised) Convention and on the implementation of the principles embodied in the (revised) Convention;
- ii propose measures to the Committee of Ministers of the Council of Europe for the implementation of the (revised) Convention's provisions, including multilateral activities, revision or amendment of the (revised) Convention and informing public opinion about the purpose of the (revised) Convention;
- iii make recommendations to the Committee of Ministers of the Council of Europe regarding invitations to States which are not members of the Council of Europe to accede to the (revised) Convention.

## **Appendix 21**

**The Wreck and Salvage (Vessels and  
Aircraft) (Bailiwick of Guernsey) Law,  
1986**

**PART 3**

**HISTORIC WRECK**

15. In this Law "historic wreck" means anything in local waters which is or may prove to be--

- (a) a vessel which has lain wrecked for not less than 50 years or since any date prior to 1946, whichever period is shorter;
- (b) any cargo of such a vessel; or
- (c) any cargo or other object lost or abandoned for either of the periods mentioned in paragraph (a);

but does not include anything--

- (i) proved to the satisfaction of the Committee to have been found outside local waters; or
- (ii) declared by the Committee not to be historic wreck.

16. (1) The ownership of historic wreck shall vest in the States.

(2) If the Receiver recovers or takes charge under section 5(3) of any historic wreck, he shall as soon as possible inform the Committee of the fact and, if so directed by the Committee, place it in the Committee's custody.

(3) The States shall not be liable to pay compensation to any person for any loss suffered by virtue of this section.

17. No person shall except under and in accordance with the conditions of a licence granted by the Committee tamper with, damage or remove any historic wreck not within a restricted area which he knows or reasonably ought to know to be historic wreck.

18. (1) If in the opinion of the Committee a site in local waters is or may prove to be the site of any vessel, cargo or other object on or in the sea bed and, because of the historical, archaeological or artistic importance of the vessel, cargo or other object, the site ought to be protected from unauthorised interference, the Committee may by order designate an area round the site as a restricted area.

(2) An order under this section shall identify the site where the vessel, cargo or other object lies or is supposed to lie, and the restricted area shall be any area within such distance of the site, specified in the order, as the Committee thinks fit to ensure the protection of the site.

(3) The Committee shall revoke an order under this section if in its opinion there is not or is no longer any site in the area which requires protection under this section.

(4) No person shall in a restricted area except under and in accordance with the conditions of a licence granted by the Committee—

- (a) tamper with, damage or remove any vessel, cargo or other object on or in the sea bed;
- (b) carry out any diving or salvage operation or use equipment constructed or adapted for diving or salvage operations; or
- (c) deposit anything which, if it were to fall on the site of any vessel, cargo or other object, might wholly or partly obliterate the site, obstruct access to it or damage any part of the vessel, cargo or other object.

(5) In this section references to the sea bed include any area submerged at high water of ordinary spring tides.

(6) The Committee may take such steps as it thinks fit by the use of signs, buoys, lights or otherwise to alert any person to the fact that they are in the vicinity of a restricted area.

19. (1) A licence under section 17 or 18(4) shall be in writing and may be granted subject to such conditions and on payment of such fee as the Committee thinks fit.

(2) The licence and any conditions subject to which it was granted may be varied or revoked by the Committee at any time after giving not less than 7 days' notice to the licensee.

(3) The licence may contain such terms, if any, as to salvage payments as the Committee thinks fit.

(4) The licence shall only be granted to a person who in the opinion of the Committee—

- (a) is competent and properly equipped to perform exploratory or salvage operations in a manner appropriate to the historical, archaeological or artistic importance of the vessel, cargo or other object; or
- (b) in the case of a licence under section 18(4), has any other legitimate reason for doing in a restricted area what can only be done under such a licence.

(5) The States shall incur no liability by reason of the suffering by any party of any loss, damage or disturbance resulting from the acts or defaults of any person to whom the Committee has issued a licence under section 17 or 18(4) occurring while that person is engaged in any activity to which the licence relates.

(6) Subject to subsection (8), if without reasonable cause any person contravenes section 17 or 18(4), he shall be guilty of an offence and liable, on conviction, to a fine not exceeding £1,000; and if the offence is one under section 17 or 18(4)(a), he shall as an alternative to or in addition to the fine be liable to imprisonment for a term not exceeding two years.

(7) Subject to subsection (8), if without reasonable cause any person obstructs any other person in doing anything which that other person is authorised to do by a licence under section 17 or 18(4), he shall be guilty of an offence and liable, on conviction, to a fine not exceeding £1,000.

(8) Nothing shall constitute an offence under section 17, 18(4) or subsection (7) if it is done by a person—

- (a) for the sole purpose of dealing with an emergency;
- (b) in exercising or seeing to the exercise of functions conferred on him or a body for which he acts by or under any enactment; or
- (c) out of necessity due to stress of weather or navigational hazards.

## **Appendix 22**



## NATIONAL MONUMENTS (AMENDMENT) ACT, 1987

AN ACT TO MAKE FURTHER PROVISION FOR THE PROTECTION AND PRESERVATION OF NATIONAL MONUMENTS AND ARCHAEOLOGICAL OBJECTS, INCLUDING PROVISION FOR THE REGULATION OF THE USE AND POSSESSION OF DETECTION DEVICES, TO MAKE PROVISION FOR THE PROTECTION AND PRESERVATION OF HISTORIC WRECKS, TO AMEND AND EXTEND THE NATIONAL MONUMENTS ACTS, 1930 AND 1954, AND TO PROVIDE FOR CONNECTED MATTERS. [22nd July, 1987]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—(1) In this Act—

“the Acts” means the National Monuments Acts, 1930 and 1954;

“archaeological area” means an area which the Commissioners consider to be of archaeological importance but does not include the area of a historic monument standing entered in the Register;

“historic monument” includes a prehistoric monument and any monument associated with the commercial, cultural, economic, industrial, military, religious or social history of the place where it is situated or of the country and also includes all monuments in existence before 1700 A.D. or such later date as the Minister may appoint by regulations;

“underwater heritage order” means an order under *section 3* of this Act;

“the Principal Act” means the National Monuments Act, 1930;

“the Register” means the Register of Historic Monuments established under *section 5* of this Act;

“restricted area” means an area standing designated in an underwater heritage order;

“sea” includes any area submerged at high water of ordinary spring tides, an estuary or an arm of the sea and the tidal waters of any channel, creek, bay or river, and “sea bed” shall be construed accordingly;

“territorial waters of the State” means the territorial seas of the State for the purposes of the Maritime Jurisdiction Act, 1959, and the internal waters of the State for the purposes of that Act;

“wreck” means a vessel, or part of a vessel, lying wrecked on, in or under the sea bed or on or in land covered by water, and any objects contained in or on the vessel and any objects that were formerly contained in or on a vessel and are lying on, in or under the sea bed or on or in land covered by water.

(2) References in *sections 2* and *3* of this Act to the prescribed fee are references to the fee prescribed under *section 24* of this Act.

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3.—(1) Where the Commissioners are satisfied in respect of any place on, in or under the sea bed of the territorial waters of the State or on, in or under the sea bed to which section 2 (1) of the Continental Shelf Act, 1968 applies or on or in ~~land covered by water that~~

(a) it is or may prove to be the site where a wreck or an archaeological object lies or formerly lay, and

(b) on account of the historical, archaeological or artistic importance of the wreck or the object, the site ought to be protected.

they may by order (in this section referred to as "an underwater heritage order") designate an area of the sea bed, or land covered by water, around and including the site as a restricted area.

(2) The following provisions shall apply in relation to an underwater heritage order (and *paragraphs (c) and (d)* of this subsection shall apply in relation to an order revoking such an order):

(a) the restricted area shall be specified in the order and shall be of such size as the Commissioners think necessary for the protection of the site concerned.

(b) the order shall come into operation on the day specified in that behalf therein, or, if no such day is specified, on the seventh day after the day on which it is made.

(c) the order shall, as soon as may be after it is made, be published in *Iris Oifigiúil* and in one or more newspapers circulating in the district in which the restricted area aforesaid is situated or, in case the restricted area concerned is an area of the sea bed, which is nearest to the restricted area concerned.

(d) a copy of the order shall, as soon as may be after it is made, be deposited—

(i) with the county registrar for any county or county borough in which the restricted area aforesaid, or any part of it, is situated or, in case the said restricted area is an area of the sea bed, with the county registrar for the county or county borough which is nearest to the said restricted area.

(ii) with the District Court Clerk of any District Court district within which the restricted area aforesaid, or any part of it, is situated or, in case the said restricted area is an area of the sea bed, which is nearest to the said restricted area, and

(iii) in every Garda Síochána station situated in the District Court district aforesaid.

and a copy so deposited shall be made available for inspection, and may be inspected by members of the public during ordinary office hours.

(e) the Commissioners may by order revoke the order.

(3) Subject to the provisions of this section, a person shall not, in a restricted area, do any of the following, that is to say:

- (a) tamper with, damage or remove any part of a wreck or any archaeological object,
- (b) carry out diving, survey or salvage operations directed to the detection, location or exploration of a wreck or archaeological object or to recovering it or a part of it from, or from under, the sea bed or from land covered by water, as the case may be, or use equipment constructed or adapted for any purpose of diving, survey or salvage operations, or
- (c) deposit, so as to fall and lie abandoned on the sea bed or land covered by water, as the case may be, anything which, if it were to fall on the site of a wreck or archaeological object (whether it so falls or not), would wholly or partly obliterate the site or obstruct access to it, or damage any part of the wreck or object.

(4) Subject to the provisions of this section, a person shall not, at the site of a wreck (being a wreck which is more than 100 years old), or of another object (being an archaeological object), that is lying on, in or under the sea bed or on or in land covered by water—

- (a) tamper with, damage or remove any part of the wreck or archaeological object,
- (b) carry out diving, survey or salvage operations, directed to the exploration of the wreck or archaeological object or to recovering it or a part of it from, or from under, the sea bed or from land covered by water, as the case may be, or use equipment constructed or adapted for any purpose of diving, survey or salvage operations, or
- (c) deposit, so as to fall and lie abandoned on the sea bed or land covered by water, as the case may be, anything which, if it were to fall on the site (whether it so falls or not) would wholly or partly obliterate the site or obstruct access to it, or damage any part of the wreck or object.

(5) (a) Upon application therefor to the Commissioners by any person and upon being furnished by him with such information in relation to the application as they may reasonably require and upon payment to them by the person of the prescribed fee (if any), the Commissioners may, at their discretion, after consultation with (in the case of an application relating to the sea bed) the Minister for the Marine and with such other (if any) persons having a special knowledge of or interest in the matter as they consider ought to be consulted, grant or refuse to grant a licence in writing to a person authorising the doing by (as may be specified in the licence) that person or that person and his servants and agents, subject to such conditions as the Commissioners may think fit and specify in the licence—

- (i) in a specified restricted area or a specified part of such an area of the acts specified in *paragraphs (a), (b) and (c) of subsection (3) of this section* or of such of them as may be specified, or
- (ii) at a specified site to which *subsection (4) of this section* applies or at a specified part of such a site of the acts specified in *paragraphs (a), (b) and (c) of subsection (4) of this section* or of such of them as may be specified.

(b) A licence under this subsection shall remain in force for such period as may be specified in the licence.

(c) A licence under this subsection may—

(i) be made subject to such conditions (if any) as the Commissioners think fit and specify in the licence, and

(ii) may be revoked at any time by the Commissioners and the revocation shall take effect at the time when the person named in the licence is notified of the revocation or at such later time as may be specified in the revocation.

(d) Where an application is made to the Commissioners for a licence under this subsection—

(i) they shall, within three months of the receipt by them of the application—

(I) either grant or refuse to grant the application, and

(II) notify in writing the person who made the application of their decision,

and

(ii) if the person who made the application is not notified as aforesaid of their decision, the Commissioners shall be deemed to have granted the licence, without conditions.

(e) An application to the Commissioners for a licence under this subsection shall be sent to the Commissioners by registered post or delivered by hand to an officer of the Commissioners at the head office of the Commissioners.

(6) A person who finds a wreck (being a wreck which is more than 100 years old) or other object (being an archaeological object) that is lying on, in or under the sea bed or on or in land covered by water, shall, within 4 days after such finding, make a report of the finding to a member of the Garda Síochána or to the Commissioners and shall, when making the report, give to the member or to the Commissioners his name and address, state the nature of the wreck or other object and the time and place at which and the circumstances in which it was found by him and shall also (and whether he has or has not made such report as aforesaid and irrespective of the person to whom he has made such report (if any)) give to any member of the Garda Síochána or to an officer of the Commissioners on request any information within his knowledge in relation to the wreck, or other object.

(7) A person who contravenes *subsection (3), (4) or (6)* of this section or a condition of a licence under *subsection (5)* of this section, shall be guilty of an offence.

(8) It shall be a defence for a person charged with an offence under this section to show that the act constituting the offence was the subject of a licence under this section granted to him, or to a person in relation to whom he was acting as servant or agent at the time of the commission of the act, and in force at that time.

(9) It shall be a defence for a person charged with an offence under this section to show that the act constituting the offence was done by him—

(a) in the course of any action taken by him for the sole purpose of dealing with an emergency of any description, or

(b) out of necessity due to stress of weather or navigational hazards.

(10) If wreck that is an archaeological object and was removed from a restricted area is in the possession of the receiver of wreck for any district and no person establishes a claim under the Merchant Shipping Act, 1894, to the ownership of the wreck within one year after it came into the possession of the said receiver, the said receiver shall, as the Director of the National Museum may request, either—

(a) deliver the wreck to the Director of the National Museum who, as soon as may be after such delivery, shall—

(i) retain it on behalf of the State, and

(ii) pay—

(I) to the said receiver, any expenses incurred by him, and his fees, in relation to the wreck, and

(II) to any salvors of the wreck, such amount of salvage as appears to the Director of the National Museum to be reasonable in all the circumstances,

or

(b) sell the wreck and pay the proceeds of the sale (after deducting therefrom the expenses of the sale and any other expenses incurred by him, and his fees, in relation to the wreck and paying to any salvors of the wreck such amount of salvage as appears to the Director of the National Museum to be reasonable in all the circumstances) to the Minister for Finance.

(11) (a) Proceedings for an offence under this section committed in an area consisting of part of the sea bed may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State.

(b) Proceedings for an offence under this section committed in an area consisting of land that is covered by water and is situated in two or more District Court districts, may be taken, and the offence may for all incidental purposes be treated as having been committed, in any one of those districts.

(12) *Section 2 (1) of this Act and subsections (3) and (4) of this section shall not apply to a member of the Garda Síochána, or a member of the Defence Forces, on duty, or to a person while acting on the instructions of the Commissioners.*

4.—(1) The Minister shall establish by order a council which shall be known as “the Historic Monuments Council” and is in this section referred to as “the Council”.

(2) It shall be the function of the Council to advise and assist the Commissioners in relation to any matter respecting the carrying into execution of the provisions of the *National Monuments Acts, 1930 to 1987*, or any other matter affecting historic monuments or other archaeological areas or wrecks, and their protection and preservation and the Council shall, if requested by the Commissioners to do so, advise them in relation to any specified such matter as aforesaid.

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## **Appendix 23**

# ABANDONED SHIPWRECK ACT OF 1987

## An Act

To establish the title of States in certain abandoned shipwrecks, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the "Abandoned Shipwreck Act of 1987".

### SEC. 2. FINDINGS.

The Congress finds that—

- (a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and
- (b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

### SEC. 3. DEFINITIONS.

For purposes of this Act—

- (a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;
- (b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 101 of the National Historic Preservation Act (16 U.S.C. 470a);
- (c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470ll);
- (d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;
- (e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and
- (f) the term "submerged lands" means the lands—
  - (1) that are "lands beneath navigable waters," as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301);
  - (2) of Puerto Rico, as described in section 8 of the Act of March 2, 1917, as amended (48 U.S.C. 749);
  - (3) of Guam, the Virgin Islands and American Samoa, as described in section 1 of Public Law 93-435 (48 U.S.C. 1705); and
  - (4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

### SEC. 4. RIGHTS OF ACCESS.

(a) ACCESS RIGHTS.—In order to—

- (1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and
- (2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 6 of this Act,

it is the declared policy of the Congress that States carry out their responsibilities under this Act to develop appropriate and consistent policies so as to—

- (A) protect natural resources and habitat areas;
- (B) guarantee recreational exploration of shipwreck sites; and
- (C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) **PARKS AND PROTECTED AREAS.**—In managing the resources subject to the provisions of this Act, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act, for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

#### **SEC. 5. PREPARATION OF GUIDELINES.**

(a) In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after the date of enactment of this Act prepare and publish guidelines in the Federal Register which shall seek to:

- (1) maximize the enhancement of cultural resources;
- (2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;
- (3) facilitate access and utilization by recreational interests;
- (4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this Act.

#### **SEC. 6. RIGHTS OF OWNERSHIP.**

(a) **UNITED STATES TITLE.**—The United States asserts title to any abandoned shipwreck that is—

- (1) embedded in submerged lands of a State;
- (2) embedded in coralline formations protected by a State on submerged lands of a State; or
- (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) **TRANSFER OF TITLE TO STATES.**—The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) **EXCEPTION.**—Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) **RESERVATION OF RIGHTS.**—This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

- (1) section 3, 5, or 6 of the Submerged Lands Act (43 U.S.C. 1311, 1313, and 1314); or
- (2) section 19 or 20 of the Act of March 3, 1899 (33 U.S.C. 414 and 415).

#### **SEC. 7. RELATIONSHIP TO OTHER LAWS.**

(a) **LAW OF SALVAGE AND THE LAW OF FINDS.**—The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act applies.

(b) **LAWS OF THE UNITED STATES.**—This Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies.

(c) **EFFECTIVE DATE.**—This Act shall not affect any legal proceeding brought prior to the date of enactment of this Act.

Approved April 28, 1988.



## **Appendix 24**

## HISTORIC SHIPWRECKS ACT 1976

### PART II—PROTECTION OF HISTORIC SHIPWRECKS AND RELICS

5. (1) Where the Minister is of the opinion that the remains of a ship that are situated in Australian waters or in waters above the continental shelf of Australia are of historic significance, he may, by notice published in the *Gazette*, declare those remains to be a historic shipwreck.

(2) Where the Minister is of the opinion that a particular article that was, or particular articles that were, associated with a ship, or all articles that were associated with a particular ship, being an article that is, or articles that are, situated in Australian waters or in waters above the continental shelf of Australia, is or are of historic significance, he may, by notice published in the *Gazette*, declare the article or articles to be a historic relic or historic relics.

(3) The Minister may make a declaration under sub-section (1) or (2) in relation to any part of the remains of a ship that has, or in relation to any article or articles that has or have, been removed from Australian waters or from waters above the continental shelf of Australia in like manner as he may make a declaration under that sub-section in relation to the remains of a ship, or in relation to an article or articles, situated in those waters.

(4) Where—

- (a) a declaration has been made under this section in relation to the remains of a ship or an article that were or was situated in any waters; and
- (b) after the making of the declaration any part of those remains or that article is removed from those waters,

the declaration continues to apply, subject to any amendment or revocation of the declaration, in relation to that part of those remains or in relation to that article notwithstanding its removal from those waters.

6. (1) Where it appears to the Minister that an article or articles appearing to be the remains of a ship that is or are situated in Australian waters or in waters above the continental shelf of Australia may be of historic significance, he may, by notice published in the *Gazette*, provisionally declare the article or articles to be a historic shipwreck.

(2) Where it appears to the Minister that a particular article that is, or particular articles that are, situated in Australian waters or in waters above the continental shelf of Australia—

- (a) may have been associated with a ship; and
- (b) may be of historic significance,

he may, by notice published in the *Gazette*, provisionally declare the article or articles to be a historic relic or historic relics.

(3) The Minister may make a declaration under sub-section (1) or (2) in relation to any article that has, or articles that have, been removed from Australian waters or from waters above the continental shelf of Australia in like manner as he may make a declaration under that sub-section in relation to an article or articles situated in those waters.

(4) Where—

- (a) a declaration has been made under this section in relation to an article that was situated in any waters; and
- (b) after the making of the declaration that article is removed from those waters,

the declaration continues to apply in relation to that article notwithstanding its removal from those waters.

(5) A notice under this section remains in force, unless sooner revoked, until the expiration of 12 months from the date of publication of the notice in the *Gazette*, but the revocation or expiration of a notice under this section does not prevent the publication in the *Gazette* of a further notice under this section in relation to an article or articles to which the revoked or expired notice applied.

7. (1) The Minister may, by notice published in the *Gazette*, declare an area (not exceeding 100 hectares) consisting of sea or partly of sea and partly of land (not including sea or land within the limits of a State) within which a historic shipwreck is, or a historic relic is or historic relics are, situated to be a protected zone.

(2) Where the Minister is of the opinion that it is necessary to do so for the purposes of protecting a historic shipwreck, a historic relic or historic relics, he may, by notice published in the *Gazette*, extend an area comprising a protected zone under sub-section (1) to include a further area consisting of sea or partly of sea and partly of land (being sea or land within the limits of a State) but so that the total area does not exceed 100 hectares and, where an area is so extended to include a further area, the protected zone includes that further area.

(3) Where a notice declaring an area to be, or to be included in, a protected zone is in force under sub-section (1) or (2), the protected zone shall be taken to include the airspace above that area and, to the extent to which that area consists of the surface of any sea, to include the waters beneath that area, the sea-bed beneath those waters and the sub-soil of that sea-bed.

(4) Where a notice under section 5 or 6 in relation to the remains of a ship or in relation to an article or articles is revoked or otherwise ceases to be in force, any notice under this section in relation to the remains or in relation to the article or articles ceases to be in force but this sub-section does not prevent the publication in the *Gazette* of a further notice under this section in relation to the remains or in relation to the article or articles if a further notice is published in the *Gazette* under section 5 or 6 in relation to the remains or in relation to the article or articles.

8. Where a notice under section 5, 6 or 7 is published in the *Gazette*, the Minister may cause a copy of the notice to be published in such newspapers, periodicals or other publications as he thinks appropriate.

9. (1) Where—

- (a) a person has possession, custody or control of an article; and
- (b) a notice applying in respect of the article is published in the *Gazette* under section 5 or 6,

the person shall, within 30 days after the date of publication of the notice in the *Gazette*, give the prescribed notice to the Minister in relation to the article.

(2) Where an article in respect of which a notice published in the *Gazette* under section 5 or 6 applies comes into the possession, custody or control of a person, the person shall, within 30 days after the day on which the article comes into his possession, custody or control, give the prescribed notice to the Minister in relation to the article.

(3) Where, at the commencement of this Act, a person has possession, custody or control of an article that is, or is a part of, a Dutch shipwreck or is a Dutch relic, the person shall, within 30 days after the commencement of this Act, give the prescribed notice to the Minister in relation to the article.

(4) Where, after the commencement of this Act, an article that is, or is part of, a Dutch shipwreck or is a Dutch relic comes into the possession, custody or control of a person, the person shall, within 30 days after the day on which the article comes into his possession, custody or control, give the prescribed notice to the Minister in relation to the article.

(5) It is a defence to a prosecution of a person for an offence against a provision of this section in relation to an article if the person proves—

- (a) in the case of an offence against sub-section (1) or (2) in relation to an article in respect of which a notice was published in the *Gazette* under section 5 or 6—that the person did not know, and had no reasonable grounds for believing, that the article was an article to which the notice related; or
- (b) in the case of an offence against sub-section (3) or (4)—that the person did not know, and had no reasonable grounds for believing, that the article was a Dutch relic or a part of a Dutch shipwreck.

(6) For the purposes of this section, the prescribed notice in relation to an article means a notice in writing describing the article and stating where the article is situated.

Penalty: \$1,000.

10. (1) Where it appears to the Minister that—

- (a) a person may have, or may have had, possession, custody or control of an article; and
- (b) the article is or may be, or is or may be a part of, a historic shipwreck or is or may be a historic relic,

the Minister may, by notice in writing to the person, require the person, within the time specified in the notice—

- (c) to inform the Minister whether the person has, or has had, possession, custody or control of the article;
- (d) if the person has ceased to have possession, custody or control of the article, to give the Minister particulars of the circumstances in which the person ceased to have possession, custody or control of the article; and
- (e) if the person has transferred possession, custody or control of the article to another person, to give the Minister the name and address of the person to whom possession, custody or control of the article was transferred.

(2) A person to whom a notice is given by the Minister under sub-section (1) shall not—

- (a) refuse or fail to comply with the notice to the extent that the person is capable of complying with it; or
- (b) in purported compliance with the notice, knowingly furnish information that is false or misleading.

Penalty: \$1,000.

(3) A person is not excused from furnishing information in pursuance of this section on the ground that the information may tend to incriminate the person but evidence of the furnishing of the information is not admissible in evidence against the person except in proceedings for an offence against this section.

11. (1) Where a person has possession, custody or control of an article, being, or being a part of, a historic shipwreck or being a historic relic, the Minister may, for the purpose of—

- (a) the preservation of the article; or
- (b) the exhibition of, or the provision of access to, the article,

by notice in writing, require the person to take such action in relation to the article as is specified in the notice.

(2) The action that a person may be required to take in relation to an article by a notice under sub-section (1) includes but is not limited to—

- (a) keeping the article in a particular manner or place;
- (b) removing the article to a particular place within a particular time;
- (c) doing a particular act in relation to the article within a particular time, being an act designed to assist in the preservation of the article; and
- (d) delivering the article into the custody of a particular person within a particular time.

(3) Where the Minister gives a notice to a person under sub-section (1) requiring the person to take action in relation to an article other than action referred to in paragraph (2) (d), he shall in the notice inform the person that the person may, in lieu of taking that action, deliver the article within a specified time into the custody of a person specified in the notice.

(4) A person to whom a notice is given by the Minister under sub-section (1) shall comply with the notice.

Penalty: \$2,000 or imprisonment for 2 years, or both.

(5) A civil action does not lie against a person in respect of any action taken by him in pursuance of a notice given to him by the Minister under sub-section (1).

12. (1) The Minister shall cause to be kept a register to be known as the Register of Historic Shipwrecks.

(2) The Minister shall cause to be entered in the Register particulars of notices in force under section 5, 6 or 7 and particulars of known Dutch shipwrecks and Dutch relics.

(3) A person may inspect the Register and, on payment of the prescribed fee, is entitled to be furnished with a copy of, or of any part of, the Register.

13. (1) Except in accordance with a permit, a person shall not—

- (a) damage or destroy a historic shipwreck or a historic relic;
- (b) interfere with a historic shipwreck or a historic relic;
- (c) dispose of a historic shipwreck or a historic relic; or
- (d) remove a historic shipwreck or a historic relic from Australia, from Australian waters or from waters above the continental shelf of Australia.

(2) A reference in sub-section (1) to the removal of a historic shipwreck or a historic relic from Australian waters or from waters above the continental shelf of Australia includes a reference to the removal of a historic shipwreck or a historic relic from the sea-bed, or from the sub-soil of the sea-bed, beneath those waters or from a reef in those waters.

(3) A person who contravenes this section is guilty of an offence and is punishable, on conviction, by a fine not exceeding \$5,000, or imprisonment for a period not exceeding 5 years, or both.

(4) In this section, "historic shipwreck" includes a part of a historic shipwreck.

14. (1) The regulations may make provision—

(a) for and in relation to prohibiting or restricting—

(i) the bringing into a protected zone of equipment constructed or adapted for the purpose of diving, salvage or recovery operations, or of any explosives, instruments or tools the use of which would be likely to damage or interfere with a historic shipwreck or a historic relic situated within that protected zone;

(ii) the use within a protected zone of any such equipment, explosives, instruments or tools;

(iii) causing a ship carrying any such equipment, explosives, instruments or tools to enter, or remain within, a protected zone;

(iv) trawling, or diving or other underwater activity, within a protected zone; or

(v) the mooring or use of ships within a protected zone; and

(b) prescribing penalties, not exceeding a fine of \$1,000 or imprisonment for 1 year, or both, for any contravention of a provision of any regulations made for the purposes of paragraph (a).

(2) The provision that may be made by regulations made for the purposes of this section for or in relation to restricting the doing of an act includes a provision prohibiting the doing of that act except in accordance with a permit.

(3) Regulations made for the purposes of paragraph (1) (a) may be of general application or may make different provision in relation to different protected zones.

(4) In this section, "ship" includes a hovercraft and any similar craft.

15. (1) The Minister may, in his discretion, upon application by a person, grant a permit to that person authorizing that person and any other persons named or described in the permit to do an act or thing specified in the permit the doing of which would otherwise be prohibited by section 13 or by regulations made for the purposes of section 14.

(2) The Minister may, when granting a permit or at any time while a permit is in force, impose conditions in respect of the permit and may at any time revoke or vary any conditions so imposed.

(3) The conditions that may be imposed under sub-section (2) in respect of a permit authorizing the doing of an act or thing include but are not limited to—

(a) a condition requiring the act or thing to be done in a specified manner;

(b) a condition requiring the act or thing to be done only in accordance with the directions of a person named or described in the permit as a person empowered to give such directions; and

(c) a condition requiring any articles obtained by the doing of an act that is authorized by the permit to be done to be held in such custody or dealt with in such manner as is specified in the permit or as is specified in directions given by a person named or described in the permit as a person empowered to give such directions.

(4) A condition imposed in respect of a permit (other than a condition contained in a permit) or a revocation or variation of a condition so imposed takes effect when notice of the condition or of the revocation or variation is served on the person to whom the permit was granted.

(5) A person shall not contravene a condition imposed in respect of a permit that has been granted to him or is otherwise applicable to him.

Penalty: \$2,000 or imprisonment for 2 years, or both.

(6) The Minister may, at any time, by notice in writing to the person to whom a permit has been granted—

- (a) revoke the permit;
- (b) suspend the permit; or
- (c) cancel the suspension of the permit.

(7) A suspension of a permit may be of indefinite duration or for a specified period.

16. It is a defence to a prosecution of a person for an offence against section 13, for an offence against a regulation made for the purposes of section 14, or for an offence against sub-section 15 (5), if the act that constituted the offence was done for the purpose of—

- (a) saving human life;
- (b) securing the safety of a ship (including a hovercraft or any similar craft) where the ship was endangered by stress of weather or by navigational hazards; or
- (c) dealing with an emergency involving a serious threat to the environment.

17. (1) A person who finds, in a fixed position in Australian waters or waters above the continental shelf of Australia, the remains of a ship or of a part of a ship, or an article associated with a ship, shall, as soon as practicable, give to the Minister a notice setting out a description of the remains or of the article and a description of the place where the remains are, or the article is, situated, being a description of that place that is sufficient to enable the remains or article to be located.

(2) It is a defence to a prosecution of a person for an offence against sub-section (1) if the person proves, or proves that he had reasonable grounds for believing, that a notice setting out a description of the place where the remains are or the article is situated, being a description that is sufficient to enable the remains or article to be located, was given to the Minister by another person before it was practicable for the first-mentioned person to give such a notice.

(3) A person shall not in a notice purporting to be given to the minister under sub-section (1) make a statement that to his knowledge is false or misleading in a material particular.

Penalty: \$1,000.

18. (1) The Minister may—

- (a) pay a reward not exceeding the prescribed amount to the person who first notifies the Minister in accordance with section 17 of the location of any remains or article—
  - (i) a description of the location of which, being a description sufficient to enable the remains or article to be located, had not previously been published in Australia; and
  - (ii) in respect of which a declaration has, since the notification was made, been made under section 5 or which is a Dutch shipwreck or a Dutch relic;
- (b) offer and pay a reward not exceeding the prescribed amount to the person who first furnishes to the Minister a description of the location of a historic shipwreck, or of a historic relic or historic relics, specified in the offer, being a description sufficient to enable the historic shipwreck or historic relic or historic relics to be located; and
- (c) pay a reward not exceeding the prescribed amount to any person who furnishes information leading to the conviction of a person for an offence against this Act.

(2) Payments under sub-section (1) shall be made out of moneys appropriated by the Parliament for the purpose.



## **Appendix 25**

**AGREEMENT BETWEEN THE NETHERLANDS AND AUSTRALIA  
CONCERNING OLD DUTCH SHIPWRECKS**

**THE UNDERSIGNED:**

1. MR WIM BLOKZIJL, resident of The Hague, Head of the Inspection Division of the State Property Directorate of the Ministry of Finance, acting on behalf of the State of the Netherlands, hereinafter referred to as "the Netherlands".

2. DR LLOYD DOUGLAS THOMSON, M.V.O., Australian Ambassador to the Netherlands, acting on behalf of the Government of the Commonwealth of Australia, hereinafter referred to as "Australia".

**HAVING REGARD TO THE FACT:**

A. That vessels that belonged to the Dutch "VEREENIGDE OOSTINDISCHE COMPAGNIE" known as the V.O.C., hereinafter referred to as "the V.O.C.", were wrecked on or off the coast of Western Australia;

B. That the Netherlands, by virtue of article 247 of the 1798 Constitution of the Batavian Republic, is the present legal successor to the V.O.C. :

**AGREE AS FOLLOWS:**

*Article 1:* The Netherlands, as successor to the property and assets of the V.O.C., transfers all its right, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia which shall accept such right, title and interest.

*Article 2:* For the purpose of this Agreement, the expression "articles" means any part of vessels as referred to in article 1, that have become or have been detached or removed therefrom, as well as the fittings, goods and other property, wherever situated, that were installed or carried on those vessels.

*Article 3:* Australia shall make no claim on the Netherlands for reimbursement of any costs incurred in searching for any of the vessels referred to in article 1 of this Agreement or in recovering any articles from those vessels.

*Article 4:* Australia recognises that the Netherlands has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in article 1 of this Agreement.

Accordingly Australia shall set up a Committee to determine the disposition and subsequent ownership of the recovered articles between the Netherlands, Australia and the State of Western Australia.

*Article 5:* The Committee referred to in article 4 of this Agreement shall be set up within 90 days after the entry into force of the Agreement and shall comprise two persons nominated by the Netherlands and two persons nominated by Australia. These persons shall have the scientific and cultural expertise appropriate for the discharge of their functions.

*Article 6:* The Committee shall determine the disposition of the recovered articles in accordance with the principles which have been agreed upon by Australia and the Netherlands and are set out in the Arrangement signed by Australia and the Netherlands and attached to this document.

*Article 7:* Expenditure incurred by the Committee in the performance of its work shall be shared between the two Parties represented on the Committee, the share to be borne by the Netherlands being one third and that by Australia two thirds provided that—

- (I) each Party shall bear the costs of travel by the Committee members nominated by it,
- (II) the costs of communications by a Party to the Committee shall be borne by the despatching Party, and
- (III) the expenses of transportation of articles distributed in accordance with determinations of the Committee shall be borne by the recipients of the articles.

*Article 8:* If the members of the Committee referred to in article 4 of this Agreement cannot come to an agreement on the disposition of particular articles, Australia and the Netherlands shall appoint an independent consultant to report on the matter in issue and the report shall be referred to the Committee for re-consideration of the matter. The cost of the report shall be shared between the two Parties represented on the Committee, the share to be borne by the Netherlands being one third and that by Australia two thirds.

*Article 9:* If, on considering the consultant's report on a matter, the members of the Committee cannot come to an agreement on the disposition of the recovered articles, the matter will be referred to the Government of the Kingdom of the Netherlands and the Government of the Commonwealth of Australia, which will settle the matter by negotiation.

*Article 10:* This Agreement shall enter into force on the date of the signatures of both Parties.

DONE at The Hague this sixth day of November in the year One thousand nine hundred and seventy-two in two originals in the English language.

ARRANGEMENT SETTING OUT THE GUIDING PRINCIPLES FOR THE  
COMMITTEE TO DETERMINE THE DISPOSITION OF MATERIAL FROM  
THE SHIPWRECKS OF DUTCH EAST INDIA COMPANY VESSELS OFF THE  
COAST OF WESTERN AUSTRALIA

THE COMMITTEE

The Committee's responsibility will embrace all material recovered from the wrecks—whether recovered before or after the coming into operation of the Western Australian Museum Act in December 1964 which contains provisions for vesting in the Museum title to the wrecks of the Batavia, the Gilt Dragon, the Zuytdorp and Zeewyk.

The Committee is small enough to meet if occasion demands but most of its work could be done by correspondence.

*General Principles*

The cost of recovery (including treatment) is likely to exceed by far the intrinsic or antiquarian sale-value of material recovered. The Government of Western Australia is spending considerable sums on this work (\$92,000 in the last financial year) and estimates that the total cost will be \$2,000,000 or more. Although a division would not be warranted by consideration of cash value alone, the historic, educational, scientific and international considerations are such as to make the deposition of representative collections in the museums of the Netherlands and Australia most desirable. The remainder of the material would be held in the Western Australian Museum.

In modern archaeological practice sites are no longer regarded merely as a source of important individual items, but rather as a body of material whose collective value far outweighs the importance of the individual pieces and in which the relationship of the individual objects within the sample are a major part of its historical value. Accordingly, the sharing of material from an archaeological site is best regarded as the accommodation in several localities of a corporate entity rather than its division into parts.

If the decision is made that the contents of an archaeological site are to be apportioned between two or more institutions, the first principle to be observed is that the total assemblage should be capable of reassembly to allow further statistical and scholarly analysis. It follows, therefore, that unnecessary splitting of a sample of closely similar objects capable of statistical treatment should be avoided and, where samples are accommodated in more than one institution, those institutions should contract not to disperse them further and, moreover, to agree to allow samples to be brought together for analysis and study as required. The second principle is that where unique or rare objects, themselves, form a meaningful assemblage within the whole, this assemblage should not be split or, if split, perfect replicas be made to complete the assemblage. As in the case of the division of statistical samples an agreement should be made between the recipients to reconstitute the original assemblage if it is required for scholarly research.

The contents of the ancient shipwrecks of the Dutch East India Company include abundant statistical samples such as coin, bricks, objects of pottery, elephant tusks, and so on. There are also many articles which are less abundant but which are duplicated many times over. Many of these are ship fittings such as cannon, anchors, cannon balls, etc. There are also other articles which are relatively rare, or even unique, in the deposits (e.g. articles possessed by crew members, or passengers, such as barber's instruments, navigational instruments, ornaments, etc.). Most articles are fragmentary and in need of immediate chemical conservation and stabilization in the laboratory as soon as they are recovered. This treatment cannot await distribution.

*Operating Principles*

The Committee will operate by reviewing proposals for distribution made, from time to time, by the Director of the Western Australian Museum; it could decide that the proposed samples be increased or decreased in content in the light of the total material collected and other factors.

In its deliberations the Committee will have, as its general aim, the purpose of ensuring that representative series of statistical samples and sufficient examples of the rarer objects will be deposited in the museums of the Netherlands and Australia to convey the variety and contents of each wreck to both the public and to scholars while, at the same time, ensuring that major projects of scholarly research will not be impeded by overfragmentation of the collection. Dispersal in this way, among separate repositories will also help to ensure the permanent safety of representative material in the event of the destruction of any one repository.

Most material so far recovered from the vessels are samples capable of statistical treatment.

A representative collection of the contents of each statistical sample should be made available to a museum of the Netherlands Government and a museum of the Commonwealth Government. Thus, in the case of coin, for example, both the Netherlands and Commonwealth Governments would receive as complete a series as possible representing the mintings and values contained within each of the wrecks. These will provide their museums with ample material of this class of objects for display purposes and sufficient to enable a scholar to make the initial qualitative studies which would possibly lead him to a more detailed statistical treatment of the bulk sample retained in the Western Australian Museum.

In order to ensure that both the Netherlands and Commonwealth Governments acquire, in due course, representative collections of the less common and even unique objects, the following procedure will be adopted. Since the relationships of such objects to the whole sample cannot be known until excavation is complete, the distribution of specimens of this nature cannot be considered during the continuing process of recovery. However, at reasonable intervals (of say two or three years) it should be possible to assemble a representative sample with fair certainty that all duplicates of any rare object present in a particular excavation should have been recovered and their nature taken into consideration during the deliberations of the Committee.

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