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## **The Marine Provisions of the Heritage Bill 2008**

***Mike Williams***<sup>1</sup>

### **Abstract**

This article examines the provision of the Heritage Bill 2008 relating to the protection of the United Kingdom's underwater cultural heritage. Currently such protection is principally afforded by the Protection of Wrecks Act 1973, a temporary and very limited measure, widely acknowledged as being urgently in need of replacement by a more extensive regulatory regime. In the event the underwater cultural heritage provisions of the Bill were a deep disappointment to the marine archaeological community. The article outlines these provisions and critically assesses their likely efficacy.

**Keyword:** underwater cultural heritage, Protection of Wrecks Act 1973, Heritage Bill 2008

### **Introduction**

Due to its geographical position, as an island, rich in resources, sitting astride natural maritime routes to and from the European continent, the United Kingdom has an extremely rich and varied underwater cultural heritage (UCH). In English waters the latest estimate from English Heritage's Maritime Record is that there are 36,000 wreck sites (ships and aircraft), 5,200 known wreck positions and 27,400 wrecks recorded but whose positions have not been located. There are also 7,400 located fishermen's 'fastenings,' which may indicate further wrecks. There are also concentrations of wrecks in certain areas, for instance the Goodwin Sands, Scarweather Sands and the Thames Estuary. The current best estimate of total shipping loss in UK waters is a few hundred thousand for England,<sup>2</sup> 9,000 for Scotland, 3,000 for Northern Ireland and 4,000 for Wales.<sup>3</sup> Possibly the oldest known shipwreck in the world, provisionally dated to 3,500BC and revealing trading links with Sicily, is being investigated at the entrance to Salcombe harbour,<sup>4</sup> while in the nearby Erme estuary a shipwreck dated to 500BC has provided the first physical evidence of the United Kingdom's fabled tin trade with Mediterranean societies<sup>5</sup>. Going even further back, there is very good and varied evidence of submerged

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<sup>2</sup> Reflecting the huge amount of cross-channel trade into Northern Europe over the centuries.

<sup>3</sup> The author is grateful to Steve Waring for assistance in compiling these figures.

<sup>4</sup> The site is being investigated by the South West Maritime Archaeological Group, with the support of Oxford Maritime Trust. Intermixed with the wreck are the remains of a 17<sup>th</sup> century trading vessel returning from North Africa.

<sup>5</sup> See further <http://historic-scotland.gov.uk/histproc-shipwrecks.pdf>

landscapes from particular coastal and maritime environments. Palaeolithic remains exist in marine aggregates as much as terrestrial. There are Mesolithic sites (10-5,000BC) on the Dogger Bank and off Bouldnor Cliff (Solent); recent finds include worked flints off Tynemouth; drowned Bronze Age fields off the Scilly Isles; prehistoric traces of humans and animals in Morecambe Bay and submerged forests in the Severn estuary<sup>6</sup>.

Unfortunately, the extent and richness of this UCH is not reflected in the adequacies of the statutory framework for managing and protecting it. The protection of this heritage has been extremely limited in both scope and extent and essentially reactive, focusing upon what are termed 'spot designations,' typically arising in the context of visible remains protruding from seabed. Consequently, only some 61 wrecks have been afforded protection under the Protection of Wrecks Act 1973 (the 1973 Act), only two groups of wrecks are scheduled under the Ancient Monuments and Archaeological Areas Act 1979<sup>7</sup> and 1,100 aircraft and 58 vessels protected under the Protection of Military Remains Act 1986.<sup>8</sup> With the publication of the Heritage Bill attention moved to proactive protection, concentrating upon the more vexing question of how to best manage and protect this vast array of significant UCH, while at the same time remedying the acknowledged shortcomings of the principal statutory mechanism, the 1973 Act. This change had been occasioned by greater awareness of the UCH potential, due to quantum advances in archaeological remote sensing capabilities, and by concern over the threat posed to that UCH in the face of intensifying use and development of the marine space. Offshore renewable energy generation, aggregate dredging, port expansion, aquaculture have all intensified marine and seabed development pressures. The focus is shifting towards a more proactive approach to conserve the UK's UCH, rather than the current reality which places it as a matter on the fringes of State regulation. Thus, it was to be firmly part of the mainstream sustainable maritime agenda. The primary mechanism to deliver this aspiration was to be found in the marine provisions of the Heritage Bill.

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<sup>6</sup> An example of the potential for finding submerged settlements in the North Sea is that Dutch fishermen land about 20 tonnes of prehistoric mammal bones and 2,000 mammoth teeth per year from the North Sea, some of which are worked artefacts. It is probable that UK fishermen are finding similar numbers but not reporting them. Another indicator of potential for UK waters is that there are 2,300 submerged pre-historic sites located around Denmark.

<sup>7</sup> See further, Nedham, S., and Giardino, C., 'From Sicily to Salcombe: a Mediterranean Bronze Age object from British coastal waters,' (2008) 82 *Antiquity* pp.60-72.

<sup>8</sup> This latter provision is designed to reflect the 'war grave' status of such remains and not for use as a heritage management tool. Not all the vessels protected are within territorial waters.

## 1 The Protection of Wrecks Act 1973<sup>9</sup>

This Act was passed as a direct consequence of the looting of wrecks of historical interest. Designation and licensing are the chosen mechanisms of control. The Secretary of State is authorised to designate<sup>10</sup> as a restricted area the site of a vessel of *historical, archaeological or artistic importance*<sup>11</sup> lying wrecked in or on the seabed.<sup>12</sup> There is no further definition of these criteria in the Act but non-statutory guidance has been issued<sup>13</sup> and the criteria therein reflect those used for scheduling monuments under the Ancient Monuments and Archaeological Areas Act 1979. The objective is to protect the restricted area itself from unauthorised interference and not merely the vessel or its contents. It is an offence, within a restricted area, to tamper with, damage or remove any object or part of the vessel or to carry out any diving or salvage operation.<sup>14</sup> Further operations within the area are then controlled by the issuing of licences, authorising only certain specified activities.

The Secretary of State may grant a licence, subject to conditions or restrictions, to persons considered to be competent and properly equipped, for the carrying out of salvage operations in a manner appropriate to the importance of the wreck or associated objects.<sup>15</sup> In determining whether to designate a vessel and/or grant a licence authorising diving or salvage operations<sup>16</sup> the Secretary of State will receive advice from the Advisory Committee on Historic Wreck Sites (ACHWS)<sup>17</sup> and the relevant heritage agency.<sup>18</sup> Where a licence is granted, it will be subject to conditions or restrictions, appropriate to each individual site and may be varied or revoked by the Secretary of State at any time upon not less than one week's

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<sup>9</sup> For a detailed account of the Act see Dromgoole, S. (ed.) *Legal Protection of the Underwater Cultural Heritage*, (1999, Kluwer Law International) ch.12.

<sup>10</sup> For the purposes of the 1973 Act the term 'Secretary of State' now denotes, in England, the Secretary of State for Culture, Media and Sports, in Scotland the Scottish Ministers and in Wales the Welsh Assembly respectively.

<sup>11</sup> s.1(1)(b).

<sup>12</sup> s.1(1). The Act has, as its title suggests, no application to submerged landscapes. In determining whether to designate a vessel and/or grant a licence authorising diving or salvage operations the Secretary of State will receive advice from the Advisory Committee on Historic Wreck Sites and CADW (in Wales), English Heritage, Historic Scotland and the Environment and Heritage Service (Northern Ireland), as applicable.

<sup>13</sup> See further Advisory Committee on Historic Wreck Sites, Report for years 1999 and 2000 Department for Culture, Media and Sport March 2002 Annexe E pp.40-41.

<sup>14</sup> s.1(3).

<sup>15</sup> s.1(5).

<sup>16</sup> The licence does not necessarily authorise activities which are intended to lead to a salvage award.

<sup>17</sup> A non-statutory advisory committee.

<sup>18</sup> CADW (in Wales), English Heritage, Historic Scotland and the Environment and Heritage Service (Northern Ireland), as applicable.

notice.<sup>19</sup> Where authorised recoveries of wreck are made, a salvage award can be claimed and disposal of the wreck (archaeological) material is made in accordance with the Receiver of Wreck's policy for historic wreck under the terms of the Merchant Shipping Act 1995.<sup>20</sup>

### **Shortcomings**

The 1973 Act has enjoyed some measure of success. However, it suffers from a number of fundamental shortcomings. These predominantly stem from its origin as a Private Member's Bill, intended as a temporary expedient, and not as a mainstay for protecting the underwater cultural heritage for 36 years. It is also true that the 1973 Act reflects the limited understanding of the UCH resource in northern temperate waters 36 years ago. Criticism of the Act has centred upon:

- i. The 1973 Act is potentially restricted in its application due to the use of the term 'vessel'. The term is not defined in the Act but the Merchant Shipping Act 1995 defines the term as '*... including any ship or boat or any other description of vessel used in navigation.*'<sup>21</sup> Clearly, this would encompass log boats and rafts but it is uncertain if flying boats or amphibious vehicles would be included. The remains of historic aircraft would undoubtedly be outside the definition, which is a significant omission.<sup>22</sup>
- ii. The 1973 Act lacks any capacity for 'area' designations to protect locations of high archaeological potential,<sup>23</sup> relying as it does on upon a 'spot' designation of an individual vessel.

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<sup>19</sup> s.1(5)(b). Such revocation would presumably be subject to the constraints imposed by Administrative Law in that, e.g. the revocation should be reasonable, taking into account only material considerations and after the licensee has been consulted and been afforded an opportunity to make representations.

<sup>20</sup> The Receiver will attempt to ensure that historic wreck is placed in a suitable, publicly accessible depository, subject to a salvage award being paid, though finders often waive this award. There is no statutory definition of 'historic wreck' but administratively the view is taken that any wreck over 100 years old from the date of sinking is historic, while at the same time recognising that wreck from a lesser period may be historic e.g. wreck from the Second World War.

<sup>21</sup> s.255(1).

<sup>22</sup> Aircraft do come within the meaning of 'wreck' for the purposes of the Merchant Shipping Act 1995 by virtue of the Aircraft (Wreck and Salvage) Order 1938 (S.R.&O 1938 No.136) and s.51 Civil Aviation Act 1949.

<sup>23</sup> e.g. the Goodwin Sands.

iii. The 1973 Act fails to take account of the proprietary and possessory rights which can exist in historic wrecks. Their importance usually only becomes apparent over a period of time as investigation proceeds. Such investigation can confer possessory rights upon the divers involved as salvors in possession. Consequently, any subsequent designation of the site is potentially draconian, in that any further acts of possession become unlawful, including any diving operations for mere exploration, unless authorised by the Secretary of State. Therefore, designation can result in immediate and complete loss of possession and beneficial use of the wreck.<sup>24</sup> Since the 1973 Act has no mechanism for compensation, designation, unless followed by the grant of a licence, will infringe the possessory rights of a salvor.<sup>25</sup> Similar constraints will operate where a person has a proprietary interest in a wreck which is designated. This point was brought dramatically home when the wreck of the postal packet *Hanover*<sup>26</sup> was designated in August 1997. The designation forced the salvor in possession, who had just commenced salvage operations utilising a jack up rig as a diving platform, to cease operations and quit possession of the site. The salvor subsequently obtained an injunction restraining the Secretary of State from giving effect to the designation order. The injunction was obtained upon the administrative law ground of inadequate prior consultation with the salvor and the matter was subsequently resolved by a negotiated settlement.<sup>27</sup> The salvor reputedly recovered all his legal costs, damages and the costs of agreed archaeological services from the Secretary of State.<sup>28</sup> The case harshly illustrated that the 1973 Act lacks provisions to secure compliance with the norms of administrative law, such as mechanisms for consultation, appeals against determinations and compensation for loss of possessory

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<sup>24</sup> Which may cause these provisions to conflict with the duty under the Human Rights Act 1998 to give effect to the European Convention on Human Rights? In particular in this connection see Article 6 – the right to a fair determination of a person’s rights and liabilities; and Article 1 of the First Protocol which concerns a person’s (qualified) right to enjoy property free from state interference.

<sup>25</sup> See further Fletcher-Tomenius, P. and Williams, M., ‘The Protection of Wrecks Act 1973: A Breach of Human Rights?’ (1998) 13(4) *International Journal of Marine and Coastal Law* pp.623-641.

<sup>26</sup> Sunk in 1765, it is the only known site of a Falmouth postal packet—a lightly armed postal delivery ship.

<sup>27</sup> The salvor being granted an excavation licence under the 1973 Act so salvage could recommence.

<sup>28</sup> See further Fletcher-Tomenius, P. and Williams, M., *Postal Packet Hanover: A Legal History*. (2009 English Heritage) <http://www.english-heritage.org.uk/server/show/conWebDoc.6588> .

or proprietary rights.<sup>29</sup> The impact the litigation had upon the Department of Culture, Media and Sport (DCMS) was profound and it would be no understatement to say that, in relation to the marine component of the Bill, the case informed the majority of the provisions.<sup>30</sup>

- iv. The drafting of the Act was deficient in that it failed to reflect the advances in underwater technology, notably in that it failed to define what constituted a 'diving or salvage operation', thereby leaving open the possibility designated wrecks could be accessed by Remotely Operated Vehicles (ROV),<sup>31</sup> or to prohibit surveying by modern electronic or acoustic methods.

## 2 Reforming the System

The Government's proposals for reform were set in March 2007.<sup>32</sup> In terms of the marine historic environment these proposals encompassed a broadening of the range of '*marine assets*' that could be protected by designation, the provision of statutory criteria for designations, the introduction of interim protection pending determination of applications to designate and the creation of statutory duty on the Receiver of Wreck to inform the relevant authority of the recovery of cultural material. Not expressly stated was the intention to introduce a comprehensive system of provisions relating to applications to designate, consultations thereon, provisions for appeal against designation and for the protection of possessory and proprietary rights. All of these latter provisions were undoubtedly designed to remedy the lacunae highlighted by the *Hanover* litigation and create a comparable system to that on land for the listing of buildings and designation of Conservation Areas. The scars of the *Hanover* litigation undoubtedly ran deep.

### The Draft Heritage Protection Bill

The principal component of protection for underwater cultural heritage under the Bill is the designation of '*marine heritage sites*.' These sites consist of '*marine assets*' of

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<sup>29</sup> See footnote 24.

<sup>30</sup> Indeed, so evident was this connection that many in the nautical archaeology community ironically took to terming the Bill the 'Hanover Protection Bill'.

<sup>31</sup> See further Fletcher-Tomenius, P. and Williams, M., 'A Diving or Salvage Operation? ROV's and the Protection of Wrecks Act 1973,' (1999) 6(10) *International Maritime Law* pp.270-273.

<sup>32</sup> *Heritage Protection for the 21<sup>st</sup> Century*, Department of Culture, Media and Sport 2007 Cm. 7057.

'special historical, archaeological, architectural or artistic interest' and designation is achieved by inclusion of such sites on the 'heritage register.'

As noted above, one of the principal failings of the 1973 Act was its limitation to shipwrecks or their cargoes only. Other significant components of underwater heritage assets underwater cannot be afforded any protection. The Bill sets out to remedy this by listing an extremely wide range of 'marine assets' that could be designated.<sup>33</sup> These include a vessel or its remains or a 'registerable structure'; the latter comprising a building or structure, an earthwork, fieldwork system or other work or any part thereof; a cave or excavation or the site of remains thereof or the site or remains of a vehicle, aircraft or vessel any object in or formerly in these. Finally, lest anything should not fall within these categories, the site of evidence of any previous human activity can be designated.<sup>34</sup> It is difficult to see what item, if any, of archaeological nature could fall outside this provision.

Having defined this broad range of *marine assets*, the Bill goes on to stipulate that a 'marine heritage site' comprises a *marine asset* of 'special historical, archaeological, architectural or artistic interest,' lying within the territorial waters of England or Wales,<sup>35</sup> which the relevant 'Marine Registration Authority'<sup>36</sup> considers is appropriate to include on the heritage register for England or Wales respectively. Once included on the relevant register the site becomes a 'Registered Marine Heritage Site.' No statutory guidance as to the grounds for determining what constitutes special interest are published and the matter will be dealt with in secondary legislation. However, to achieve maximum flexibility it is specifically provided that the criteria as to what constitutes special interest may differ in relation to the different kinds of marine asset and in relation to the different interests.<sup>37</sup> The criteria for determining whether a *marine asset* is of such special interest are likely to be far more comprehensive than the existing non-statutory criteria<sup>38</sup> but is hoped that they will not be so rigidly defined

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<sup>33</sup> cl.46.

<sup>34</sup> This phraseology is strongly reminiscent of the reference in Article 1 *European Convention on the Protection of the Archaeological Heritage (Revised)* ETS 143 to '... any other traces of mankind from past epochs ....'

<sup>35</sup> i.e. within 12 nautical miles of the UK's internationally coastal baselines. A nautical mile is slightly longer than a terrestrial mile, being expressed as 2,000 yards or one minute of Latitude.

<sup>36</sup> i.e. in England Secretary of State for Culture, Media and Sport or the Welsh Ministers.

<sup>37</sup> i.e. historical, archaeological, architectural or artistic.

<sup>38</sup> The existing criteria are Period (this reflects all periods), Rarity, Documentation (inc. contemporary records) Group Value (e.g. from within a historic battle or port), the condition of surviving remains, Fragility and Vulnerability, Diversity of forms and the Potential to provide information; see further See further Advisory Committee on Historic Wreck Sites, Report for



so as to cause restriction in terms of what may be designated. Hopefully any proposed criteria will be put out widely for public consultation, at least within the nautical archaeology community. All in all this aspect of the Bill has been broadly welcomed as a considerable improvement by the nautical archaeological community.

Once a site is a registered *Marine Heritage Site*, it is an offence, termed a '*Prohibited Marine Activity*,' to tamper with, damage, remove any part of a marine asset in a marine registered site or to carry out in site or sea above diving or salvage operations directed to the exploration of or the removing of objects from marine asset or seabed, or to deposit, so as to fall and lie abandoned on the seabed anything that could obliterate, obstruct access to or damage wreck.<sup>39</sup> While the list of prohibited activities appears extremely comprehensive, there is evidence that these matters have been given relatively little thought, having been simply 'carried over' from the 1973 Act. The expression 'diving or salvage operations' remains undefined. Given that the provision is designed to prohibit unauthorised public access to *Marine Heritage Sites*, this is unfortunate. The advent of remotely operated vehicles since 1973 means that for relatively little outlay a site could be accessed using such vehicles and it remains unclear whether such an operation would amount in law to a diving operation.<sup>40</sup>

Similarly, in terms of foreshore sites, while unauthorised access by diving would constitute an offence, no offence would be committed were a person to simply wait for the tide to ebb. One could then walk out to a *Marine Heritage Sites* to access it, provided one did not damage or tamper with it. Nor do the ambiguities stop there. The range of marine assets is commendably broad but a 'salvage operation' only applies to certain material. While there is no exhaustive list of legitimate subjects of salvage, it is generally accepted that it has to comprise what may be termed maritime property. Consequently, it is highly unlikely that one can 'salvage' an earthwork, fieldwork system or other work or a cave or excavation or evidence of any previous human activity. While the handling and examination of, say, a bronze or gold object from a flooded landscape may perhaps be caught by the offences of damaging, tampering or removing part of a marine asset the impression given overall is that the

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years 1999 and 2000 Department for Culture, Media and Sport March 2002 Annexe E pp.40-41.

<sup>39</sup> cls.187 and 189. Unless authorised by licence or done to deal with an emergency, in exercise of statutory functions or out of necessity due to stress of weather or navigational hazard (cl.191).

<sup>40</sup> See further Fletcher-Tomenius and Williams, 'A Diving or Salvage Operation?' pp. 270-272. The damaging or disturbance of a site or the recovery of objects would clearly constitute an offence.

drafting of prohibited marine activities has been blindly carried over from the 1973 Act without due thought and, as such, is unnecessarily complex and perhaps ineffective in some circumstances. This impression that the prohibited marine activities are the 'Cinderella' of the Bill is heightened by the clumsy prohibition on the use equipment in marine registered site or in sea above for purpose of, inter alia, of 'surveying the seabed'. It is extremely difficult to see how this provision can be enforced. Virtually all marine craft, even small recreational vessels, are commonly fitted with sonar equipment. This equipment is designed for safety of navigation and displays a detailed image of the seabed. Thousands of craft transit above historic wreck sites every year with such equipment routinely switched on, as a requirement of navigational safety, and consequently enforcement of this provision would be difficult, to say the least. Perhaps the provision is aimed at the use of specialised equipment solely designed to locate metal objects, such as a Magnetic Anomaly Detector. If so, it would have been better for the drafting to reflect this, as it does in respect of metal detectors on terrestrial sites.

Unlike the *marine prohibited activities*, much greater consideration appears to have been given to the comprehensive provisions relating to the procedures for inclusion of *marine heritage sites* on the register, interim protection, public consultation, the application for licences and appeals against licence determinations. The procedures closely mirror terrestrial systems in respect of land use planning and listed building consents and clearly reveal a departmental resolve that the litigation surrounding the designation of the postal packet *Hanover* is never repeated. If it is considered by a '*marine registration authority*'<sup>41</sup> that a *marine heritage site* contains or may contain a *marine asset* of special interest<sup>42</sup> then registration of the site may be deemed appropriate.<sup>43</sup> Once a decision to register is reached a formal procedure for inclusion on the register is invoked and registration cannot be completed unless this procedure is complied with.<sup>44</sup> This will involve inviting written representations from a wide range of specified persons or institutions,<sup>45</sup> including government agencies, persons with proprietary or possessory interests in the site and persons with appropriate

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<sup>41</sup> i.e. in English waters the Secretary of State for Culture, Media and Sport and in Welsh waters the Welsh Ministers. Any person may make a request in writing for a site to be included in or removed from the register or its entry amended (cl.67). The form and content of such requests are likely to be prescribed by regulation.

<sup>42</sup> i.e. of special historical, archaeological, architectural or artistic interest.

<sup>43</sup> Registration is thus discretionary, not mandatory but this discretion will be constrained by certain principles of administrative law, e.g. natural justice, irrationality etc.

<sup>44</sup> cl.50.

<sup>45</sup> Specified in Schedules 1 for English waters and Schedule 2 for Welsh waters.

knowledge of or interest in the site.<sup>46</sup> In addition a notice must also be published inviting written representations about the proposed inclusion of the site on the heritage register.<sup>47</sup> The contrast with the 'closed,' almost secretive, departmental process for designation under the 1973 Act could not be starker.<sup>48</sup>

Two further innovations are included in the Bill. The first is that of 'interim protection.'<sup>49</sup> Clearly, once consultations are invited as to the inclusion of a site on the register, that site becomes vulnerable to interference from diving or salvage operations. This vulnerability is enhanced by the fact that the exact coordinates of the site must be published in the consultation and that such interference would be lawful.<sup>50</sup> In effect, as one marine archaeologist termed it, '...putting a signpost in the sea ... here are souvenirs.'<sup>51</sup> To forestall such interference, once a decision is made to consult, the site must be *provisionally* included on the register as a *registered marine heritage site*. That provisional registration will then continue until such time as the consultation is concluded and a decision is made to permanently register the site or remove it from the register.<sup>52</sup>

The second innovation is that of Certificates of No Intention to Register (CNIR). Obviously borrowed from Listed Building provisions, the mechanism is clearly designed to avoid the situation, as per the *Hanover*, where a salvor commences commercial scale operations only to be forced to suspend them due to designation. The CNIR would provide assurance to any intending salvor by requiring consideration be given to registration of the site prior to commencement of salvage operations, with an attendant outlay of costs. The procedure closely mirrors that of registration of marine assets, in that any person may apply in writing for a CNIR. Consultations<sup>53</sup> and an invitation for written representations must occur. The relevant

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<sup>46</sup> This last and wide category could include archaeologists, historians and interested persons from the local community.

<sup>47</sup> cls.50, 53 and 54. The manner and form of publication will be prescribed by regulations.

<sup>48</sup> Comparable procedures are specified for amendment or deletion of entries on the register.

<sup>49</sup> cls. 55 and 56.

<sup>50</sup> Since salvage can be, and often is, voluntary and non contractual in nature. See further *The Five Steel Barges* (1890) 15 PD 142 at 146 per Sir James Hannen P.

<sup>51</sup> Personal communication. In practice this may not always be such a problem, at least where a wreck, such as a wooden vessel, has broken up and dispersed. Sites are prescribed as a circle of a given diameter around a single coordinate of Longitude and Latitude. As the author from personal experience can attest that is a significant area of seabed to search for fragmented remains. However, in the case of metal hulled vessels, which tend to remain relatively intact, it would be far more problematic.

<sup>52</sup> All consultees must be informed of the determination reached as to permanent inclusion on the register (cl.70). Interim protection is also afforded where it is proposed to amend the registration, e.g. by extending the site.

<sup>53</sup> As per Schedules 1 or 2.

authority<sup>54</sup> will then determine whether to issue a CNIR.<sup>55</sup> If issued the site cannot subsequently be entered on the register for a period of five years from the date of the CNIR. If not issued there is no obligation to register the site in question. This may seem a curious omission, but it is often the case with maritime archaeological sites that it takes some time to establish whether they are potentially significant, let alone actually significant. The relevant authorities are much more likely to be advised that the site *may* be significant, rather than whether it is or is not. Consequently, it will be thought prudent to keep all options open by not issuing a CNIR, yet at the same time not registering it immediately.<sup>56</sup> It will then be for the salvor to decide whether or not to proceed without a CNIR.

In terms of the licensing to authorise the doing of anything which would otherwise be a *prohibited marine activity* on a *Registered Marine Heritage Sites*, predictably, there is relatively little substantive, as opposed to procedural, change. A more formal procedure will be set out for written applications to the '*appropriate national authority*,<sup>57</sup> which somewhat confusingly then becomes the '*licensing authority*.<sup>58</sup> Regulations may be made to prescribe required form and content, publicity, the invitation of written representations from prescribed persons, notification of decisions and relevant time periods. These represent a marked formalisation of the present system, where an application is simply made in writing to the relevant heritage agency, especially in terms of publicity and the recognition of the need to involve a variety of stakeholders, not least the public. This requirement in itself is likely to result in enhanced responses from local interest groups, especially those concerned with exploitative marine commercial activities and recreational sea user groups. In many ways this is advantageous, as it is likely to raise awareness of both the existence and rich variety of our UCH. It will also render decision making by the *licensing authority* considerably more involved and to a degree contentious, in a similar manner to the tensions generated by regulatory decisions in land use planning. As under the present system licences may be granted subject to conditions or refused. In practice

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<sup>54</sup> i.e. in English waters the Secretary of State for Culture, Media and Sport and in Welsh waters the Welsh Ministers.

<sup>55</sup> There is one significant restriction on the issuing of Certificates. If any application is made for inclusion of a site on the register then no CNIR can be issued until that application is determined.

<sup>56</sup> In practice it is likely that the relevant heritage agency (English Heritage or CADW) will request that the archaeological diving contractor (currently Wessex Archaeology) will be asked to visit the site and provide an initial assessment, which will then inform a decision to whether or not the site should subsequently be registered.

<sup>57</sup> In English waters English Heritage and in Welsh waters the Welsh Ministers (cl.192) but for English waters the Secretary of State may reserve certain applications (cl.194).

<sup>58</sup> cl.196.

conditions are always imposed and such conditions will be informed by the Annex to UNESCO's Convention the Protection of the Underwater Cultural Heritage 2001 (the Convention).<sup>59</sup> The UK has declined to ratify the Convention<sup>60</sup> but has undertaken to abide by the principles set out in the Annex to the Convention,<sup>61</sup> which in effect now provides a policy framework for the UK.

A further innovation is the provision of a statutory right of appeal,<sup>62</sup> there being no appeal mechanism at present, which presumably drove the salvors of the *Hanover* to seek redress by judicial review. Appeals may be lodged within 28 days against refusal to grant a licence, the imposition of any condition or a failure to determine an application for a licence within a (yet to be) prescribed period.<sup>63</sup> There is no appeal against the granting of a licence, so the only recourse open to a dissatisfied third party is judicial review.<sup>64</sup> However, not all the innovations relating to licensing and appeals are simply mechanistic. A very radical and very welcome initiative means that not all diving operations on a *Registered Marine Heritage Site* will necessitate a licence. If a registered site has been expressly designated as a site suitable for unintrusive diving operations, the diving is unintrusive and the consent of the 'relevant persons' has been obtained, then no licence is required.<sup>65</sup> In terms of public accessibility to important UCH it is hard to understate the value of this reform. One of the most strident criticisms from the diving and marine archaeological communities of the present system of designation under the 1973 Act is that it excludes the diving public from the UCH. There is anecdotal evidence that this has led to persons not reporting heritage discoveries for fear that diving within the area may be prohibited.

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<sup>59</sup> For an account of the Convention see O'Keefe. P., *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, (Institute of Art and Law, Leicester 2002).

<sup>60</sup> See further "UNESCO Convention on the Protection of Underwater Cultural Heritage: The UK's Standpoint" in 'Taking the UNESCO Convention Forward' Proceedings of Conference, Royal Society of Antiquaries, London October 2005 Nautical Archaeology Society, (2006) Portsmouth pp. 2-10.

<sup>61</sup> For the potential difficulties in so doing see Fletcher-Tomenius. P. and Williams. M., 'The Draft UNESCO/DOALOS Convention on the Protection of Underwater Cultural Heritage and Conflict with the European Convention on Human Rights,' (1999) 28(2) *International Journal of Nautical Archaeology* pp.145-153.

<sup>62</sup> cls.200–208.

<sup>63</sup> cls.200 and 204. Appeals relating to English waters will be from English Heritage to the Secretary of State for Culture, media and Sport, while those relating to Welsh waters will be from the Welsh Ministers to a person appointed to review the decision. In both instances regulations may be made prescribing the form, content and timing of such appeals (cls.201 and 205).

<sup>64</sup> The grounds for judicial review of decisions relating to the refusal or granting of licences are restricted to an allegation that the decision is not within the powers of the Act or that an applicable requirement either under any secondary legislation or under the Tribunals and Inquiries Act 1992 has not been met.

<sup>65</sup> cl.198.

To some extent this criticism has been countered by the granting of 'Visitor' licences, but it still requires a person to make an application, which acts as a deterrent to those individuals who are merely curious to view the UCH, without getting actively involved in its investigation. This reform is in principle to be commended. However, concern has been expressed as to the requirement that such diving can only occur with the consent of the 'relevant persons,' who must also be consulted prior to the designation of the suitability of a site. These 'relevant persons' are defined as '*each owner of, or of any part of, the registered marine heritage site and (if any) the salvor in possession of the marine asset.*'<sup>66</sup> It is an inevitable consequence of the law of Salvor in Possession that consent should be required of such a person. The very status of possession, akin to that of adverse possession on land, inherently confers the right to exclude others, even an owner, from a wreck site. More disturbing is that the consent of '*...each owner of or of any part of ...*' the site must be obtained. The objections to this are both technical and practical. In the context of shipwrecks, especially mercantile, there are likely to be multiple and unidentifiable owners, such as owners of the hull, cargo, personal effects of passenger and crew, insurers etc. To obtain the consent of each would be administratively impossible except for only the most recent of wrecks. Moreover, while it remains undecided in law, there is no authority for the proposition that simply swimming through the marine water column without disturbing either the seabed or the wreck itself requires the consent of an owner of the surface or underlying strata of the seabed or of a wreck lying thereon. While the dearth of case law is perhaps explained by the fact that commercial diving dates only from the 1830s and recreational diving from the 1950s, it appears to have been assumed hitherto that such diving is analogous to a development that falls within and is a function of the right of public navigation in tidal waters. There is certainly no case law to suggest that it is otherwise<sup>67</sup> and were an owner able to prohibit innocent passage through the marine water column, whether on or below the surface, the necessity for legislation restricting unintrusive diving access, such as the Protection of Military Remains Act 1986 would not exist. One is left with the feeling that the Bill comes perilously close to extending ownership rights beyond their present remit and such an extension is both impracticable and unwelcome in concept.

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<sup>66</sup> cl.198(5).

<sup>67</sup> There is authority to the effect that no public right exists to bathe upon the foreshore or the shore or to pass or repass over the foreshore for that purpose (*Blunderall v Catteral* (1821) 5 B & Add 268; 106 ER 1190). However the decision predates the advent of compressed gas diving technology or SCUBA and it is submitted that it cannot be taken as authority for the proposition that diving under the surface, using compressed gases, at depth in the marine tidal column is a trespass.

## Conclusion

The desirability, indeed some would argue the urgent necessity, of reform to the regime for the protection of UCH is well established.<sup>68</sup> The Bill's extension of the types of UCH that can be protected was most welcome but beyond that many in the nautical archaeology community expressed disappointment with the Bill. While the formalisation of licensing and appeals relating thereto is, of itself, worthy it was felt by many that this was the main thrust of the Bill, occupying a disproportionate amount of the provisions. This may perhaps be taken as an indication of departmental priority in respect of protection of underwater cultural heritage.<sup>69</sup> The Government's motivation seemed largely restricted to removing any possibility of a repetition of the undoubtedly embarrassing litigation over the designation of the *Hanover*. The influence of the litigation surrounding the postal packet *Hanover* is plain to see and must be taken as an indication as to how deeply this has affected departmental consciousness. Consequently the Bill appeared to this community to suffer a paucity of vision and be a missed opportunity. As events have transpired no opportunity at all has been missed. Since the writing of this paper it has become known that the Heritage Bill will not form part of the legislative programme for 2009-10 and that the Bill's team's within DCMS has been disbanded. Clearly there is no prospect of new legislation in the foreseeable future, perhaps for as long as five to ten years. That 'temporary' solution of 36 years will have to soldier on and English Heritage's attention has now switched to what can be achieved by use of other regulatory mechanisms, notably the licensing provisions in the recent Marine and Coastal Access Act 2009.<sup>70</sup> While such parallel legislation will have some role to play in heritage protection it will never be as effective as bespoke legislation. Legislative reform for the protection of maritime UCH is desperately needed and the current situation remains deeply unsatisfactory.

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<sup>68</sup> See for example *Heritage Law at Sea* JNAPC 2000 and *An Interim Report on the Valletta Convention & Heritage Law at Sea* JNAPC 2003 <http://www.jnapc.org.uk/publications.htm>; *Marine Archaeology Legislation Project* English Heritage 2004 <http://www.cadw.wales.gov.uk/upload/resourcepool/Marine%20Environment%20complete7069.pdf>

<sup>69</sup> As well as, perhaps, an indication that the current system may have some holes which need plugging within a human rights context.

<sup>70</sup> For a discussion of the licensing regime in a heritage context see e.g. Lowther, J, and Williams, M., 'Reform of Licensing for Marine Works: Improvement and Clarification under the Marine and Coastal Access Bill 2008,' *Liverpool Law Review* (2009), 30(2) pp.115-130.