

New Zealand Perspectives on Underwater Cultural Heritage

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Introduction

All around the South Pacific there are great places to dive like Espiritu Santo in Vanuatu, the Great Barrier Reef of Australia, the Vava'u Island Group of Tonga, the Solomon Islands and New Zealand itself. Professional and recreational divers now move around these dive sites and what happens in one country has a ripple effect in others. This paper looks at the current issues in Underwater Cultural Heritage in New Zealand and elsewhere in the South Pacific from New Zealand perspectives.

Geographical Background

New Zealand (also known by its Māori name Aotearoa) is a paradox so far as its relationship with the oceans is concerned. On the one hand it is a country with a small population of 4,410,000¹ but it has the tenth longest coastline in the world in excess of 15,000 km. The exact length is debatable because of the difficulties of measuring precisely; 15,134 km is the figure most consistently quoted. New Zealand competes with the UK for having the fifth largest Exclusive Economic Zone (EEZ),² exactly which is fifth appears to depend on which overseas territories of the UK are accepted as applying. New Zealand's EEZ is 15 times its land mass. New Zealand is also extending its area with claims on the adjacent Continental Shelf. Some of these claims have been resolved, for example with Australia, but other claims are still outstanding, for example with Fiji and Tonga.³ New Zealand's entire offshore area currently covers in excess of 5.7 million sq km, comprising the EEZ of 4 million sq km and NZ's Extended Continental Shelf (ECS) area, as recognised by the UN, which covers a further 1.7 million sq km. The entire offshore area amounts to 1% of the earth's surface.⁴

New Zealand also claims the Ross Dependency portion of Antarctica, a

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1 Statistics New Zealand estimate as at 31/06/11.
2 Ministry for the Environment NZ website www.mfe.govt.nz.
3 www.data.govt.nz 08/08/11.
4 Measurements supplied by GNS Science in emails 08/08/11 and 09/09/11.

413,540 km wedge that extends from the South Pole to the Southern Ocean, embracing the Ross Sea and ice shelf, and the Transantarctic Mountains;⁵ this is a claim made before the 1959 Antarctic Treaty put such claims on hold. A copy of the Antarctic Treaty is on the US State Department website.⁶ New Zealand maintains a permanent scientific establishment at Scott Base on Ross Island, McMurdo Sound.

Although 4 out of 5 of the largest cities have a port, there are extensive areas of the coastline that are sparsely inhabited as they are bordered by farm, forests or National Parks.

The Exclusive Economic Zone stretches from around the Kermadec Islands in the sub tropical North to around Campbell Island in the sub-antarctic South. This is shown on the map in Appendix 1.

Initially the EEZ was primarily of value because it enabled New Zealand to profit from the extensive fishing grounds that are included, especially the Chatham Rise and Challenger Plateau, where the seabed rises closer to the surface. Oil and gas deposits in the EEZ were identified and the Maui Gas field has been producing since 1979. Other oil and gas fields are now in production and further oil, gas and mineral deposits have been identified for the future.

NZ was prompt in developing fisheries policies for its EEZ and introducing a quota system for many species of fish. However there is ongoing tension over whether the right balance has been reached between catching and protecting fish species, and whether bottom trawling should be prohibited, and there is no overarching oceans management strategy.⁷ There are also issues over the working conditions and operations of foreign charter vessels fishing in the EEZ which are currently the subject of a Ministerial Inquiry.

New Zealand relies on a small navy to control activities in its waters. The Royal New Zealand Navy (RNZN) has only 4 Inshore and 2 Offshore Patrol Vessels and 2 Frigates, which are designed to operate in Antarctic waters. In addition the Royal New Zealand Air Force maintains a surveillance role using long range Orion aircraft, these are currently designated P-3K and being upgraded to P-3K2.

Historical Background

Because it is comparatively isolated, New Zealand was one of the last countries to be discovered and settled. It was discovered by the Polynesian explorers who started spreading out across the Pacific from Melanesia via Vanuatu, Fiji, Tonga and Samoa in the period 500 – 1000 AD. This great expansion accelerated as Polynesian navigators reached Hawaii in the North, the mainland of New Zealand, and on to the Auckland Islands in the sub-antarctic

⁵ Greg Ansley NZ Herald 13/08/11.

⁶ <http://www.state.gov/t/isn/4700.htm>.

⁷ Karen Scott in 01/07/11 NZLS Talk 18.

South, and at least as far East as Easter Island. It also seems likely that Polynesians reached the coast of South America as the kumara plant which became one of their staples, especially in New Zealand, originated there. Large scale settlement of New Zealand by Polynesian Māori began around about 1250 AD.⁸

Europeans reached New Zealand somewhat later. The Dutch explorer Abel Tasman visited New Zealand briefly in 1642 but this was an isolated occurrence and did not lead to any further European visits until Captain Cook in 1769. Thereafter contact with New Zealand was consistent. New Zealand trees were suitable for the masts and spars of the Royal Navy and British and US ships came chasing whales and seals.

A most unfortunate trade in preserved tattooed Māori heads (toi moko) developed. This led to the sale of muskets to Māori tribes, especially the Northern tribes, which began what is known as the Musket Wars and caused the devastation of populations throughout the North Island and many areas of the South Island.

By a treaty between the British Crown and the leaders of many Māori tribes in 1840 (te Tiriti o Waitangi), New Zealand became part of the British Empire. This led to the population of New Zealand by immigrants initially from the United Kingdom and Europe and subsequently from the Pacific Islands, China, India and throughout the world.

The nature of Underwater Cultural Heritage in New Zealand

No example of the ocean navigating vessels used by the original Polynesian explorers has been found. However, there are examples of Māori canoes (waka), paddles and bailers, at least one submerged fort (pā) and palisade at Lake Okataina, stone fish traps and other Māori cultural items. The total number of shipwrecks on the New Zealand coast is in excess of 2300 and these are chronicled in Ingram's *New Zealand Shipwrecks* (8th Ed.) (2007) revised by Lynton & Edith Diggle and Keith Gordon and its *Companion* (2009) written by Lynton Diggle. The majority of these shipwrecks occurred in the 19th Century, particularly during the 1860s when the gold rushes occurred. The difficulties of sailing vessels caught on the stormy and windswept West Coast of New Zealand with only a limited number of harbours, most of which have treacherous bars at the entrances, meant that a lot of vessels were driven onto the rocks and shoreline. About two-thirds of the New Zealand coastline is rugged with hard rocky shores⁹ and the waters are turbulent, causing a washing machine effect that breaks up and scatters wrecks very quickly. The earliest maritime archaeological artefacts recovered were anchors belonging to the French explorer de Surville lost in 1769 and recovered by Kelly Tarlton just over 200 years later.

⁸ Janet Wilmshurst, Terry Hunt, Carl Lipo & Atholl Anderson "High-precision radiocarbon dating shows recent and rapid initial human colonisation of East Polynesia" www.PNAS.org.

⁹ Te Ara Encyclopaedia of New Zealand www.teara.govt.nz.

The most famous wreck sites include the "Boyd" (1809), the French corvette "L'Alcméne" (1851), the HMS "Orpheus" (1863), the "General Grant" (1866) on the sub-antarctic Auckland Islands, the "Tasmania" (1897), the "Elingamite" (1902), the RMS "Niagara" (1940), the "Wahine" (1968), and the "Mikhail Lermontov" (the pride of the Soviet ocean liners in 1986). Artificial reefs have been created by sinking vessels, such as the "Rainbow Warrior," the Greenpeace vessel initially sunk by French secret service agents in 1985, which was refloated and sunk again at the Cavalli Islands. The "Rainbow Warrior" lies in a sheltered position, but the problems of creating artificial reefs on exposed coasts are shown with the fractured wreck of F69 HMNZS "Wellington" which was split into 3 parts by a storm soon after it was sunk.

Although it is possible that other European, South Asian or Chinese seafarers visited New Zealand between the original discovery by the Māori and Abel Tasman no definite traces of this have been discovered. There are at least two anomalies, a "Spanish" helmet and a "Tamil" bell, which may have come from a South Asian vessel. Expeditions to track down the possible sites of the wrecks of Spanish or Portuguese caravels occur from time to time and there are oral traditions in some Māori tribes that support this.

Other underwater cultural heritage includes the town buildings under Lake Dunstan, the submerged remains of wharves and jetties and several aircraft.

New Zealand's legal regime

New Zealand Law relating to wrecks developed out of the English law and until recently New Zealand followed the same Receiver of Wreck tradition as in England. The problem is that as New Zealand Law developed separately it has had a piecemeal approach with no great coherence. Consequently there are different statutory regimes the strands of which do not connect up.¹⁰

The Maritime Transport Act 1994 deals primarily with salvage and modern wrecks and material coming ashore from the wreck of a vessel, and only applies to vessels within or brought within the territorial waters of New Zealand. It does not apply to wrecks that sank and remain beyond the 12 nautical mile limit. The traditional powers of the Receiver of Wreck were transferred to the Director of Maritime New Zealand and the Police in 1999 by the Maritime Transport Amendment Act 1999. This means that a local police station may be presented with an artefact rescued from the sea and will simply be perplexed about what to do next.

A second strand of legislation includes the Historic Places Act 1993 which covers archaeological sites "in New Zealand" and this can include "the site of the wreck of any vessel where that wreck occurred before 1900" and "is or maybe able through investigation by archaeological methods to provide

¹⁰ Piers Davies & Paul Myburgh, chapter 9, in "The Protection of the Underwater Cultural Heritage" edited by Sarah Dromgoole pages 189-215 Martinus Nijhoff, 2006.

evidence relating to the history of New Zealand."¹¹ This definition includes a number of uncertainties, for example, what does "in New Zealand" mean and what is meant by the "history of New Zealand," some maritime archaeologists interpret this very widely while some divers argue for a narrow exclusionary approach. This legislation is site specific and that is another area of potential debate. Once again this legislation does not apply to wrecks beyond the 12 nautical mile limit. The New Zealand Historic Places Trust (NZHPT) requires that any application to destroy, damage or modify an archaeological site or sites in accordance with sections 11 and 12 of the Historic Places Act 1993 is to be submitted to it. Consistent with the Historic Places Act there is the Protected Objects Act 1975, which is the old Antiquities Act 1975 renamed and expanded so that New Zealand can comply with the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹²

A third strand of legislation is the Resource Management Act 1991 (RMA) which sets out the manner in which heritage sites are to be recorded by the local authority. The Auckland Regional Council had a particularly extensive system of registering maritime cultural heritage sites as part of its Auckland Regional Plan: Coastal. The Auckland Regional Council has now been subsumed into the Auckland Council so this regional coastal plan is currently still in place but there could be significant changes in the future when the new Unitary Plan is finalised.¹³ The RMA also links into the New Zealand Coastal Policy Statement 2010 (NZCPS 2010) which is the only compulsory national policy statement under the RMA.

The fourth strand of legislation involves a number of largely unrelated Acts that can apply, including the Marine Reserves Act 1971 and regulations under the Fisheries Act 1996. The Crown Minerals Act 1991 applies to minerals out to the outer limits of the territorial sea and the Continental Shelf Act 1964 applies to minerals in the seabed or subsoil of the continental shelf.

The Marine and Coastal Area (Takutai Moana) Act 2011 replaces the Foreshore and Seabed Act 2004. The 2004 Act had little or no known effect on Underwater Cultural Heritage (UCH) but the 2011 Act possibly could do so. It is the latest development in the disputes over customary title claims to the foreshore by Māori tribes (iwi) and sub tribes (hapu) that go back to the 19th Century but which became a major issue again after the Court of Appeal decision in the Ngati Apa case.¹⁴ A detailed analysis of the historical background and the provisions of the Act has been made by Richard Boast and Robert Makgill.¹⁵

¹¹ Section 2.

¹² Piers Davies & Paul Myburgh "The Protected Objects Act in New Zealand : Too Little, Too Late?" (2008) International Journal of Cultural Property Volume 15 pages 321-345.

¹³ Kevin Brassey Auckland Council discussion 29/09/11.

¹⁴ [2003] 3 NZLR 643.

¹⁵ The 2011 NZLS CLE Seminar "Marine and Coastal Area Act – demystifying the hype."

The 2011 Act relates to what can be called common marine and common coastal land which comprises the entire territorial sea, estuaries, the foreshore and to some extent the beds of navigable rivers. It is believed that this could be larger than all the lands currently in Māori freehold land tenure.¹⁶ The 2011 Act creates specialised rights which can be claimed by Māori applicants – Protected Customary Rights and Customary Marine Titles. A key question is how realistic are the prospects of Māori applicants establishing their claims. If they are able to do so on a significant scale there is the potentiality of affecting wrecks in the seabed or driven on the foreshore. However some treaty lawyers consider that the bar has been set too high for most claimants.¹⁷

There is some uncertainty as to whether the seabed is effectively included in the 2011 Act or not. If the seabed is not part of the Marine and Coastal Area then regional councils will not exercise jurisdiction over such matters as the occupation of the seabed. This could lead to a lacuna.¹⁸

One unusual and surprising aspect of the 2011 Act is that "structures" that are fixed to or under the Marine and Coastal Area are now to be regarded as personal property and not as land or an interest in land. This applies even if it is a concrete seawall embedded in the foreshore and seabed.¹⁹

Time will be needed for the regime established by this Act to be worked through and it is too early to know what many of the long term implications will be.

Foreign wreck materials brought into New Zealand are subject to import duties and this applies whether it is any part of a ship (or aircraft) and its cargo, machinery and equipment. This is assessed by the Customs Department.

New Zealand is a State Party to the 1982 UN Convention on the Law of the Sea (UNCLOS) including Part XI and the UN Fish Stocks Agreement, and the 1989 International Convention on Salvage but not to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage nor to the 2007 Nairobi Wreck Removal Convention. New Zealand has recently ratified the Convention on the Conservation and Management of High Seas Fishery Resources of the South Pacific Ocean (SPRFMO) which is anticipated to be in force soon.

Scientific information on NZ's EEZ and Continental Shelf

New Zealand has 80% of its biodiversity in the sea, with at least 38 species of dolphin and whale and 84 species of sea bird breeding in New Zealand waters.²⁰

One of the challenges is that there is only a limited amount of scientific and hydrographic information available relating to the EEZ and the Continental

¹⁶ Boast and Makgill page 22.
¹⁷ Te Kani Williams discussions 09/11.
¹⁸ Boast and Makgill pages 34-35.
¹⁹ Boast and Makgill page 24.
²⁰ Gary Taylor NZ Herald 13/04/11.

Shelf. GNS Science estimates that 70% of the seafloor in New Zealand's offshore territory is unexplored and unmapped.²¹ This exploration and mapping will take time.

In August 2011 Land Information New Zealand released a new map series depicting all of New Zealand's offshore islands more accurately than was previously possible by using high resolution satellite imagery captured in the summer of 2009/2010.²²

The Navy has a specific hydrographic vessel the "Resolution" for surveying and charting the waters in and around New Zealand and in the Pacific. It also has an inshore survey motor boat SMB "Adventure" which can be operated as a tender from the "Resolution" or as an independent operation.

In the meantime there are opportunities for greater involvement of science organisations, industry and government in improving the understanding of New Zealand's offshore territory. The discovery and increasing exploration of the seafloor and benthic oceanography is one of the missions of GNS Science, a Crown Research Institute established by the New Zealand Government in 1992 and the successor to the original New Zealand Geological Survey established in 1865.

Oil Gas and Mineral Exploration in EEZ and Continental Shelf and UCH

There are major existing oil and natural gas fields in the EEZ. The Maui natural gas field has been producing since 1979. Exploration was reduced during the last decade up until about 18 months ago when the activity level escalated. The NZ Government has been encouraging this further development of the oil and gas fields while maintaining a target of 90% electricity generation from renewable resources by 2025.²³ The Government has obtained a detailed report valuing the Crown's Royalty streams from the petroleum estate, some of which is on land, some in the Territorial Sea and some in the EEZ. This shows that the Crown Royalty as at 30 June 2010 was NZD\$3,191 million and with increasing value in the future.²⁴ The Government released its New Zealand Energy Strategy and the New Zealand Energy Efficiency and Conservation Strategy on 30 August 2011. Opposition to oil exploration in the Raukumara Basin by Petrobras, the Brazilian oil firm, has resulted in protests and an application to the High Court for judicial review by Te Runanga Te Whanau a Apanui and Greenpeace.

The minerals in the EEZ include phosphate on the Chatham Rise, sulphide deposits on the Kermadec Ridge and iron sands off the Taranaki Coast.²⁵ One of the companies involved in mineral research is Odyssey Marine Exploration

²¹ GNS Science email 08/08/11.

²² Landscan 09/11 page 4.

²³ Statement by the Acting Minister of Energy and Resources 30/08/11.

²⁴ Woodward Partners Report 03/11.

²⁵ Sunday Star Times 25/09/11.

Inc. This company is providing deep ocean contracting services to Neptune Minerals, which focuses on discovering and optimising high value mineral deposits on the ocean floor. Odyssey also has a minority stake in Neptune Minerals. Odyssey is more famous for the various exploration work and recoveries it has obtained on wrecks including the SS "Republic," the HMS "Victory" and the much litigated colonial era wreck (code named the "Black Swan").

Reflecting the lack of an over arching oceans management strategy there is currently a lack of comprehensive joined up legislation covering the oil, gas and mineral exploration and there have been significant gaps in the spectrum. The issues concerned are covered by Paul David in "The Search for Oil in New Zealand Waters : Work to be Done?"²⁶

On 24 August 2011 The New Zealand Government introduced the Exclusive Economic Zone and Continental Shelf (Environment Effects) bill. The purpose of this bill is to set up an environment management regime for the EEZ and the Continental Shelf.

The Bill is intended to fill the "gaps in the environmental management regime in the EEZ; existing laws such as the Fisheries Act 1996 and Maritime Transport Act 1994 will continue to operate largely as at present. Activities covered by the Bill include seabed mining, some aspects of petroleum activities, energy generation, carbon capture and storage, and marine farming. The Bill gives effect to New Zealand's obligation under the United Nations Convention on the Law of the Sea to manage and protect the natural resources of the EEZ."

"The Bill aims to achieve a balance between the protection of the environment and economic development. It also includes a general duty for adverse effects to be avoided, remedied, or mitigated."²⁷ Whether the Bill achieves these aims or not will be the subject of debate as it works its way through the Parliamentary procedures.²⁸

There are a number of countries where the preservation of Underwater Cultural Heritage has been a major consideration in connection with research for oil, gas or minerals including Greece, Norway, Netherlands and Ireland.²⁹ The potentiality exists in New Zealand so that this sort of condition could apply. However enquiries with the Ministry for Culture and Heritage have indicated that they have not been consulted on the applications to date but are fully aware of the implications for the future.³⁰ No doubt the main reason why this has not been an issue to date is that there are a limited number of wrecks in New Zealand EEZ, less than ten.³¹ Such a number is insignificant considering the 4 million sq km of the EEZ.

²⁶ (2011) Australian and New Zealand Law Journal (ANZ Mar LJ) Volume 25, pages 49-68.

²⁷ Both quotes from the General policy statement in the Explanatory note to the Bill.

²⁸ See also Barry Barton "Offshore Petroleum and Minerals [2011] NZLJ 211.

²⁹ Sarah Dromgoole email 15/06/11.

³⁰ Kate MacDonald MCH email 02/06/11.

³¹ Lynton Diggle and Keith Gordon emails and discussions in 12/10.

Diver Attitudes and Artefact Preservation in New Zealand

Diver attitudes in New Zealand run the whole spectrum between those who see themselves as piratical fossickers and treasure hunters to maritime archaeologists. Most divers are closer to the middle of the spectrum. They appreciate the need to preserve wrecks because of the historical knowledge that can be provided, but they also appreciate that a wreck may only be accessible for a very short period of time. For example the sand dunes of the West Coast will reveal a wreck briefly and then cover it up again for another 30 or 40 years. Divers are also aware that if responsible people do not look after the artefacts they find, then these will be taken by the irresponsible. Time is also critical because of the decay inevitable when a wooden or metal artefact is uncovered by sand movement or brought to the surface.

The preservation facilities available in New Zealand are limited. Best known are the laboratory operated by the Maritime Archaeological Association of New Zealand on the veteran heavy lift crane vessel SS "Hikitia" in Wellington Harbour.

Technological Advances in underwater exploration

Up until the invention of the aqualung, underwater diving was restricted by the need to link the explorer to the surface with a direct air current. Consequently the diving bells and diving suits used were cumbersome. Even so, very skilled recoveries did occur, as in the case of the RMS "Niagara" in 1940/1941. The aqualung opened up a whole new era of diving potentialities which has been embraced by both the professional and recreational divers. Further developments in the 1990s in the mixtures of gases breathed, termed "technical diving," has extended the time underwater.

The invention of deep sea submersibles and submarines and sea ROV technology has increased the capabilities of exploration. Up until comparatively recently, large areas of the ocean were not accessible. This has changed dramatically as the exploration of the RMS "Titanic" since 1985 has illustrated. The activities of Odyssey Marine have also indicated the abilities to explore wrecks at very deep levels. The Chinese have now developed a manned submersible designed to reach 7000 metres which would allow it to access 99% of the ocean floor. The test dive for 7000 metres is scheduled for 2012.³² This will bring with it disadvantages as well as advantages. It will open up the possibility of recovering minerals at extreme depths and it will also mean that access to underwater cultural heritage will be even more open to those who see themselves primarily as commercial operators and/or treasure hunters. There are even proposals for deep water submersibles to be built to allow billionaires to explore the ultra deep areas of the oceans.³³

It was these technological developments that triggered the proposals for an

³² NZ Herald 29/07/11 from the Independent.

³³ NZ Herald 13/08/11 from the Observer.

International Convention to protect the Underwater Cultural Heritage.

UNESCO Convention on the Protection of Underwater Cultural Heritage 2001

The UNESCO Convention originated from a draft convention proposed by the Cultural Heritage Law Committee of the International Law Association in 1994. The main principles of the Convention are:

- An obligation on the States Parties to preserve Underwater Cultural Heritage and to take action accordingly.
- The preservation of UCH in its original condition and location is to be considered as the first option. The recovery of objects may be authorised for the purposes of making a significant contribution to the protection of or knowledge about UCH.
- UCH should not be commercially exploited for trade or speculation.
- The Convention encourages training in underwater archaeology and the transfer of technologies and the sharing of information.³⁴

As at 30 September 2011, 40 countries are recorded on the UNESCO website as having ratified or accepted the Convention.³⁵ This includes a number of countries with significant Underwater Cultural Heritage in their waters, like Italy and Mexico. Spain, another State Party, not only has significant Underwater Cultural Heritage in its waters but ownership of historic wrecks elsewhere. None of the 10 countries with the longest coastlines and none of the 10 countries with the largest EEZs have ratified / accepted and those countries that have ratified / accepted are not spread evenly around the World. Instead there is a concentration of countries bordering the Mediterranean and the Black Sea, also in the Caribbean, but only Cambodia in Southeast Asia. Neither Australia nor New Zealand nor any of the South Pacific Islands have ratified / accepted the Convention, but a significant number of Central and South American countries have ratified, including Honduras, Panama, Ecuador, Paraguay and Argentina.

In addition to the countries that have actually ratified or accepted, there are a number of other countries where the Rules in the Annex to the Convention are used as indications of best practice and Governments and/or companies and/or institutions have looked to the Rules in the Annex as the basis for their negotiations and contractual arrangements. The United Kingdom Government has acknowledged this in relation to the wreck of HMS Victory (1744).³⁶ The Commonwealth of Australia, its states and the Northern Territory gave their endorsement to the Rules in November 2010 as outlining international best practice management.³⁷

³⁴ UNESCO website <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-2001-convention/>

³⁵ <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-2001-convention/>.

³⁶ Report on the Public Consultation on options for the Management of the Wreck Site of HMS Victory (1744) by the Ministry of Defence and the Department for Culture, Media & Sport July 2011.

³⁷ Letter from the Australian Government Department of Sustainability, Environment, Water, Population and Communities 18/08/11.

This usage seems likely to increase. Consequently the Rules in the Annex can be looked upon as an international norm outside those countries that have actually committed themselves to the Convention as they set out the internationally accepted standards.

Regular meetings of the States Parties to the Convention are working on the details of how the Convention is to be applied, this includes the recent adoption of the UNESCO Code of Ethics for Diving on Submerged Archaeological Sites which sets out 15 Rules for the estimated 15 million divers world wide.³⁸

2001 UNESCO Convention and the South Pacific

UNESCO has been encouraging countries throughout the Pacific to become involved with the 2001 UNESCO Convention. It has been using a number of techniques, ranging from persuading countries to refuse permits to treasure hunters to operate in their territories to encouraging countries to practice in-situ conservation of wrecks. The UNESCO Asia-Pacific Heritage Award programme set up to encourage a wide range of conservation projects from private residences to palaces and industrial factories was extended in 2009 with the category of heritage site 'in-situ Underwater Cultural Heritage' and the M 24 Midget Submarine Wreck located off the coast of Sydney in Australia was recognised with an Award of Distinction.

UNESCO has also been encouraging a capacity building programme which is funded through the Royal Government of Norway. To date this programme has allowed UNESCO and the Underwater Archaeological Department of the Ministry of Culture Thailand to provide training to 72 practitioners from over 17 countries in Asia and the Pacific and even to one from Kenya, as there are several Chinese shipwrecks on the coast of East Africa.³⁹

The key to what happens in the South Pacific is almost certainly what the Australian Federal and State Governments agree to do. For the last 2 years the Federal and State Governments have been reviewing the existing historic shipwrecks legislation and considering the ratification of the 2011 Convention as part of that process.⁴⁰ This process will take time as amending legislation will be required and it seems to have been slowed down during the last 12 months by more urgent items on the Government agenda, but it is anticipated that the Convention will eventually be ratified.⁴¹

The Ministry for Culture and Heritage in New Zealand (MCH) continues to take an interest in the 2001 Convention and supports the aims and principles outlined in the Convention; the NZHPT goes further and believes the Rules in the Annex should be applied in practice. However, the MCH also says that

³⁸ UNESCO website http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/support_unesco_code_of_ethics_for_diving_on_submerged_archaeological_sites/

³⁹ Asia-Pacific Regional Council on Underwater Cultural Heritage press release of interview with Timothy Curtis, Head of the Culture Unit in UNESCO Bangkok office 08/11.

⁴⁰ Australian Government letter 18/08/11 above.

⁴¹ Mark Staniforth email 10/08/11.

reviewing the existing legislation and ratifying the 2001 Convention is not currently a priority.⁴² This position is likely to remain until the Australian Government makes its final decision. Should the Australian Government decide to ratify, then this will bring pressure on the New Zealand Government to do so as well.

Practical Solutions

In the meantime, the bodies representing the different parties in the UCH area have been negotiating and working out their own common ground. This is being discussed primarily between the NZHPT, the New Zealand Underwater Heritage Group (NZUHG), representing the divers and those who search the seashores for the remains of a wreck, and the Maritime Archaeological Association of New Zealand (MAANZ) which represents a wide range of people interested in the UCH. It is hoped that a Heads of Agreement can be completed in time for the Southern Summer Season (December – March) which is when the flash points occur on the beaches between those looking for wrecks and the representatives of the NZHPT, but as at the date of this paper the drafts are still passing backwards and forwards.

The delay reflects the enormous workload on the NZHPT as a result of the 2010 and 2011 earthquakes in Christchurch; 80 listed central heritage buildings had been demolished as at the end of July 2011 and another 34 heritage buildings, including the iconic Anglican and Roman Catholic Cathedrals, may still have to be demolished.⁴³

2007 Nairobi International Convention on the Removal of Wrecks

This Convention provides a set of uniform international rules aimed at the prompt and effective removal of hazards involved in wrecked ships. Ship owners will be required to take out compulsory liability insurance and strict liability will be imposed on the registered ship owner for the costs of locating, marking and removing a wreck. Affected States will be permitted to take direct action against an owner's liability insurer. This Convention was initiated by the International Maritime Organisation and is designed to apply primarily in the exclusive economic zone but also potentially in the territorial sea. The Convention is supported by the International Salvage Union (ISU).

The Convention will enter into force 12 months following the date on which 10 states have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession. While the Convention is still short of the necessary numbers, its eventual ratification received a significant boost when the UK Government passed the Wreck Removal Convention Act, 2011, which received the Royal Assent on 12 July 2011. It is too early to surmise whether Australia and/or New

⁴² Kate MacDonald MCH discussion 28/09/11.

⁴³ Sunday Star Times 21/08/11.

Zealand will take an interest in reviewing and ratifying the Convention but there are those who advocate strongly for it.⁴⁴

The nature of the relationship between the 2001 UNESCO Convention and the Nairobi Wreck Removal Convention is yet to be fully determined, but there is likely to be an overlap in relation to some World War I and other older wrecks that present navigational or environment risk problems. Eventually the same issue will apply to World War II wrecks as the 100 year time limit in 2001 UNESCO Convention beings to apply. This issue is extensively studied by Sarah Dromgoole and Craig Forrest in "The 2007 Nairobi Wreck Removal Convention and hazardous historic shipwrecks."⁴⁵

Future Developments

The debate over how the oceans, the ocean beds and their resources should be dealt with, is likely to intensify, both within each country and between countries. Often this debate is likely to be emotional. There are those that argue that the recovery of oil, gas and minerals from the seabed is a fundamental economic objective. Others will argue that the fundamental principle on which to base maritime cultural heritage and resource management should be sustainable development.⁴⁶ Some will try and search out a middle way between these viewpoints.

The passage of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) bill through the New Zealand Parliament should help to crystallize the issues of resource control in the EEZ and Continental Shelf.

Aquaculture will become increasingly important. Currently it is estimated to be worth in excess of NZ\$380 million with a target goal of NZD\$1 billion in sales by 2025.⁴⁷ The New Zealand Parliament passed the Aquaculture Legislation Amendment Bill (No 3) 2010 in August 2011, amending the Resource Management Act 1991, the Fisheries Act 1996, the Maori Commercial Claims Settlement Act 2004 and the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004.

This legislation is likely to encourage a significant number of new marine farm applications and has a procedure to compensate commercial fishing quota holders who lose the ability to fish their quota as a result.

Marine energy based on tidal energy and/or wave energy will bring its own complications and conflicts over the uses of resources.⁴⁸

⁴⁴ William Irving "The Nairobi Convention : Reforming Wreck Removal in New Zealand" (2010) 24 ANZ Mar LJ, pages 76-92.

⁴⁵ [2011] LMCLQ 92-122.

⁴⁶ Article by Stefan Claesson "The Value and Valuation of Maritime Cultural Heritage (2011) International Journal of Cultural Property Volume 18, pages 61-80.

⁴⁷ Aquaculture NZ – "New Zealand Aquaculture Farm Facts" 3rd edition June 2010.

⁴⁸ Glen Wright and David Leary "Marine energy" [2011] NZLJ 227 and Glen Wright "A tidal power project" 2011 NZLJ 260.

The greater number and types of usages the greater prospects of conflict in usages and the potential risks to wreck sites.

It is too early to speculate about the long term effects of the 2007 Nairobi Wreck Removal Convention in the South Pacific. However, so far the 2001 UNESCO Convention is concerned, it seems likely that Australia will ratify the 2001 UNESCO Convention eventually and this will apply pressure on NZ and other South Pacific countries. In the meantime it is hoped that practical solutions will be resolved so far as New Zealand is concerned by the NZUHG, MAANZ, NZHPT and MCH.

Piers Davies
30 September 2011

Acknowledgements

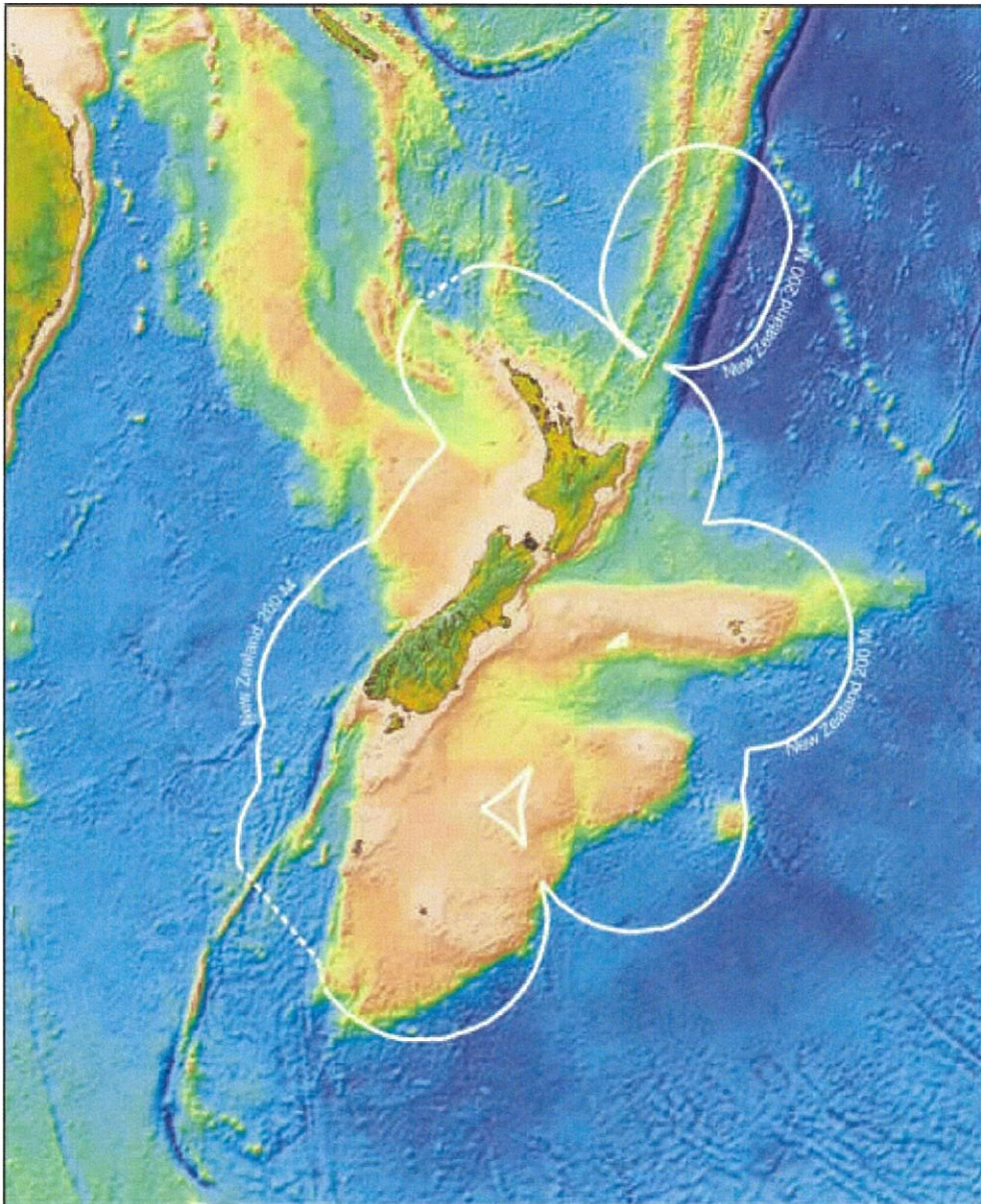
Most of my legal research into underwater cultural heritage issues over the last 10 years has been made in conjunction with Associate Professor Paul Myburgh of the Auckland University Law Faculty to the extent that our research is now inextricably intermingled. My thanks also to Dave Moran, (Dive New Zealand) Lynton Diggle and Keith Gordon (NZUHG), Rick McGovern-Wilson (NZHPT), Mary O'Keeffe, Malcolm McGregor and Ken Scadden (MAANZ), Kate MacDonald (MCH), Te Kani Williams and Wiremu Kaa, John Callan (GNS Science), Kevin Brassey (Auckland Council), Professor Sarah Dromgoole (UK), Dr Craig Forrest, Dr Patrick O'Keefe, Dr Leah McKenzie and Dr Mark Staniforth (Australia).

The usual disclaimer applies

Appendix 1

Map of New Zealand's Exclusive Economic Zone (EEZ)

Courtesy of GNS Science



Appendix 2 Case Study RMS "Niagara"

This is a useful case study as it illustrates a number of the important issues affecting wrecks in New Zealand waters.

The RMS "Niagara", known as the Queen of the Pacific, was built in 1913 and was a liner on the Pacific route for many years in the 1920s and 1930s carrying passengers and the mail between New Zealand the West Coast of America.

In June 1940 the "Orion," a German raider, laid mines around the Mokohinau Islands and in the approaches to the Hauraki Gulf 200 miles North of Auckland. The "Niagara" struck one of these mines shortly after leaving the port of Auckland and sank in 66 fathoms (120.7 metres of water). The passengers were safely evacuated but a large shipment of gold went down with the vessel. This resulted in the salvage operations to recover the gold in 1940-1941. This operation by Captain Williams was highly successful and 555 bars of gold were recovered. This was one of the deepest recoveries at that time and was a great feat in view of the restricted equipment that could be used. The main equipment was the diving bell lowered from the "Claymore", underwater explosives, oxy-hydrogen underwater cutting equipment, a clamshell grab, and the two divers in helmet diving suits.

Further attempts were made to recover the remaining bars of gold. An attempt in 1953 was also successful and recovered a further 30 bars. However there are still 5 gold bars outstanding. Whether these can ever be recovered is hard to tell because of the length of time since the vessel sank. Equipment in more recent expeditions in 1999 and 2003/2004 has been the most modern available and included ROV equipment. For a full account of the history of the "Niagara" and the salvage activities see "Deep Water Gold" by Keith Gordon, SeaROV Technologies Ltd (2005).

When the "Niagara" left the Port of Auckland it was believed to have had at least 4,200 tons of fuel oil onboard. The total bunker capacity was 4324 tons. Signs of leakage have been noted over the years as the fuel has been seen rising to the surface in small spherical balls and transforming into a slick when it reaches the surface. The longest slick observed was 14 kms long from the wreck site in 2003.⁴⁹ However no conclusive investigation has occurred to identify how much oil is still there and in what state.

The official view expressed by Maritime New Zealand in 2005⁵⁰ is that the fuel oil has probably solidified in the cold temperatures on the sea floor and that it does not pose a threat to the environment. However, Keith Gordon, a member of the 2003 expedition and a highly experienced diver and operator of ROV equipment disagrees and believes that the situation is of concern. The vessel has now been on the seafloor for 70 years and the condition of the hull has

⁴⁹ Keith Gordon "Deep Water Gold" page 188.

⁵⁰ NZ Herald 27/09/05.

deteriorated throughout that time, even though the wreck is in a more sheltered area of the New Zealand coastline. Keith Gordon is sceptical about the argument that the oil has solidified as the water temperatures even in winter are not that cold. Keith Gordon believes that a proper investigation of the bunkers is needed before the hull disintegrates, because if the oil has not solidified it would then be a major risk for the marine reserves and waters of the Hauraki Gulf and the suburban beaches of Auckland.

A minor curiosity is that Captain Kurt Weyher, the Commander of the Orion, was a talented water colour painter and he painted his vessel laying mines and the "Niagara" sinking. These paintings are at the Institute for Shipping and Naval Information, Hamburg, Germany.