

FULL STEAM AHEAD: RECENT DEVELOPMENTS CONCERNING AUSTRALIA'S NEW LEGAL REGIME FOR REGULATING UNDERWATER CULTURAL HERITAGE

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1 Introduction

Australia's new legislation for the protection of its underwater cultural heritage ('UCH'), the *Underwater Cultural Heritage Act 2018* (Cth) ('UCH Act'), received assent on 24 August 2018.¹ The UCH Act was subject to analysis in an article previously published in this journal, written by the first author of this article ('Earlier Article').² Since the Earlier Article was published, the implementation of the new legal regime has occurred with much pace. There have been two key developments:

- a. the UCH Act commenced operation on 1 July 2019, replacing the previous legislative framework created by the *Historic Shipwrecks Act 1976* (Cth) ('HS Act'); and
- b. the *Underwater Cultural Heritage Rules 2018* (Cth) ('UCH Rules'), the subordinate legislation underlying the UCH Act, also commenced operation on 1 July 2019.

The UCH Rules were not considered in the Earlier Article as they were not publicly available at the time the Earlier Article was written. As such, it is timely to provide an overview of, and some commentary on, the UCH Rules now that they have commenced. To that end, this article will consider the following aspects of the UCH Rules:

1. the criteria which the Minister must have regard to when assessing whether the Minister is satisfied that an article is of heritage significance;
2. the mandatory relevant matters which the Minister must have regard to when deciding whether to grant or refuse to grant a permit to engage in conduct relating to UCH protected under the UCH Act;
3. the mandatory relevant matters which the Minister must have regard to when deciding whether to vary an existing permit to engage in conduct relating to UCH protected under the UCH Act;
4. the matters which must be specified in permits to engage in conduct relating to UCH protected under the UCH Act; and
5. noteworthy omissions from the UCH Rules, having regard to the analysis contained in the Earlier Article.

2 The Heritage Significance Criteria

As explained in the Earlier Article, the new legal framework created by the UCH Act has, subject to the operation of the provisions contained in Part 2 of the UCH Act regarding revocation of a Ministerial declaration as to UCH, both a permanent and provisional aspect to it.³

The permanent protection aspect of the UCH Act involves UCH being afforded permanent legal protection through two pathways:⁴

1. automatic protection under s 16(1) of the UCH Act; and

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¹ The *Underwater Cultural Heritage (Consequential and Transitional Provisions) Act 2018* (Cth) also received assent on 24 August 2018.

² See Guy J Dwyer, 'Ship Shape or All at Sea? A Preliminary Assessment of Australia's Recent Legislative Reforms Concerning Underwater Cultural Heritage' (2018) 32 *Australian and New Zealand Maritime Law Journal* 71.

³ *Ibid* 91.

⁴ *Ibid*.

2. protection by way of a Ministerial declaration made under either ss 17 or 18 of the UCH Act, in circumstances where the Minister is satisfied that the particular UCH in question *is* of heritage significance before making a declaration of protection.⁵

Only UCH articles which:

- a. are of a specific character — ie, articles which constitute:
 - i. the remains of vessels in Australian waters (including their associated articles), or
 - ii. the remains of aircraft in Commonwealth waters (including their associated articles); and
- b. have been located underwater for a specific period of time (i.e. at least 75 years),

may receive automatic protection under s 16(1) of the UCH Act.

The only way by which UCH articles which do not possess either of these specific characters, or have not been located underwater for a period of at least 75 years (or both), may be protected under the UCH Act is by way of a Ministerial declaration made under ss 17(1), 18(1) or 19(1).

In respect of the provisional protection aspect of the UCH Act, any UCH articles that are not already protected under the UCH Act can be afforded temporary legal protection by way of a provisional declaration made by the Minister pursuant to s 19 of the UCH Act.⁶ Importantly, unlike a declaration of permanent protection under either ss 17 or 18 of the UCH Act (which requires the Minister to be satisfied that the particular UCH in question *is* of heritage significance), to make a declaration of provisional protection under s 19 of the UCH Act, the Minister need only be satisfied that the particular UCH in question *may be* of heritage significance. The provisional declaration may remain in force for a period of up to five years after it is made.⁷

The Earlier Article observed that one key inadequacy of the HS Act was its failure to contain statutory criteria to which regard should be had (or must be had) when determining whether or not particular UCH has heritage significance and is therefore worthy of protection by way of a Ministerial declaration being made, in the event that the UCH is not otherwise automatically protected. The Earlier Article further observed:⁸

In principle, the UCH Act has addressed this deficiency of the HS Act by requiring the Minister to consider, pursuant to s 22 of the UCH Act, heritage significance criteria before making a Ministerial declaration for protection under ss 17(1), 18(1) and 19(1) of the UCH Act. However, it is too early to assess whether s 22 of the UCH Act is effective. That section is to be underpinned by the UCH Rules made under the UCH Act, and it will be the UCH Rules that set out the actual heritage significance criteria. However, the UCH Act's reference in s 22 to heritage significance criteria is, in and of itself, a promising start.

Rule 5(2) of the UCH Rules sets out, for the purposes of s 22 of the UCH Act, the heritage significance criteria that the Minister must have regard to when assessing whether a particular article of UCH *is* (in the case of ss 17 or 18) or *may be* (in the case of s 19) of heritage significance. Rule 5(2) provides:

- (1) This section is made for the purposes of subsection 22(1) of the Act.

Note: In making a declaration under subsection 17(1), 18(1) or 19(1) of the Act, the Minister must have regard to the criteria in this section when assessing whether the Minister is satisfied that an article is of heritage significance (see subsection 22(2) of the Act).

- (2) The criteria are as follows:
 - (a) the significance of the article in the course, evolution or pattern of history;
 - (b) the significance of the article in relation to its potential to yield information contributing to an understanding of history, technological accomplishments or social developments;
 - (c) the significance of the article in its potential to yield information about the composition and history of cultural remains and associated natural phenomena through examination of physical, chemical or biological processes;
 - (d) the significance of the article in representing or contributing to technical or creative accomplishments during a particular period;

⁵ *Underwater Cultural Heritage Act 2018* (Cth) ss 17(1), 18(1).

⁶ Dwyer (n 2) 91.

⁷ *Underwater Cultural Heritage Act 2018* (Cth) s 19(3)(b).

⁸ Dwyer (n 2) 114.

- (e) the significance of the article through its association with a community in contemporary Australia for social, cultural or spiritual reasons;
- (f) the significance of the article for its potential to contribute to public education;
- (g) the significance of the article in possessing rare, endangered or uncommon aspects of history;
- (h) the significance of the article in demonstrating the characteristics of a class of cultural articles.

There are numerous points that should be made in respect of the heritage significance criteria listed in r 5(2) of the UCH Rules.

First, although perhaps a trite point, the criteria in r 5(2) should not be read in the abstract to apply to all ‘articles’ (which is not a defined term in either the UCH Act or the UCH Rules) at large. The criteria in r 5(2) must be read in their statutory context, having regard to the purposes of the UCH Rules and the UCH Act. It follows that the criteria in r 5(2) are, of course, directed to ‘articles’ that must, as a prerequisite, enliven the meaning of ‘UCH’ in s 15 of the UCH Act.⁹

Secondly, it is apparent that the heritage significance criteria in r 5(2) were formulated having regard to:¹⁰

- a. the heritage significance criteria for listing and protection of (mainly terrene) heritage items contained in other federal and state heritage legislation;¹¹ and
- b. the *Australia ICOMOS Charter for Places of Cultural Significance, The Burra Charter, 2013* (‘Burra Charter’).¹²

There are numerous criteria in r 5(2) of the UCH Rules which have clearly been informed by other federal and state heritage legislation. It suffices, for present purposes, to point to a few examples. For instance:

- s 16(1)(a) of the *Heritage Places Act 1993* (SA) (‘Heritage Places Act’) identifies, as a criterion of heritage significance, that the place ‘demonstrates important aspects of the evolution or pattern of the State’s history’. This criterion of heritage significance is similar to the criterion contained in r 5(2)(a) of the UCH Rules, being that the UCH article has significance ‘in the course, evolution or pattern of history’;
- s 16(1)(b) of the *Heritage Places Act* identifies, as a criterion of heritage significance, that the place ‘has rare, uncommon or endangered qualities that are of cultural significance’. This criterion of heritage significance is similar to the criterion contained in r 5(2)(g) of the UCH Rules, being that the UCH article is significant in possessing ‘rare, endangered or uncommon aspects of history’;
- s 11(f) of the *Heritage Act 2011* (NT) identifies, as a criterion of heritage significance, that the place or object ‘is important in demonstrating a high degree of creative or technical achievement during a particular period’. This criterion of heritage significance is similar to the criterion contained in r 5(2)(d) of the UCH Rules, being that the UCH article is significant in ‘representing or contributing to technical or creative accomplishments during a particular period’; and
- s 10(g) of the *Heritage Act 2004* (ACT) identifies, as a criterion of heritage significance, that the place or object ‘has a strong or special association with the ACT community, or a cultural group in the ACT for social, cultural or spiritual reasons’. This criterion of heritage significance is similar to the criterion contained in r 5(2)(e) of the UCH Rules, being that the UCH article is significant ‘through its association with a community in contemporary Australia for social, cultural or spiritual reasons’.

Given that the UCH Rules only commenced operation on 1 July 2019, it is unsurprising to find that, at the time of writing, the criteria in r 5(2) have not been judicially considered. It is likely that the provisions in the UCH Act

⁹ *Underwater Cultural Heritage Act 2018* (Cth) s 15 (UCH means ‘any trace of human existence that ... is located under water’. UCH is deemed to be ‘under water’ for the purposes of the UCH Act whether partially or totally under water, and whether under water periodically or continuously).

¹⁰ Explanatory Statement, *Underwater Cultural Heritage Rules 2018* (Cth), accessible at: <https://www.legislation.gov.au/Details/F2019L00096/Explanatory%20Statement/Text>.

¹¹ See, eg, *Queensland Heritage Act 1992* (Qld) s 35(1); *Heritage Places Act 1993* (SA) s 16(1); *Heritage Act 2011* (NT) s 11; *Heritage Act 2004* (ACT) s 10 and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) cll 10.01A, 10.03A.

¹² The Burra Charter may be accessed at: <https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>. The Burra Charter was prepared by the Australian branch of the International Council on Monuments and Sites, and aims to provide a standard of practice for those persons who provide advice, make decisions about or undertake works to places of cultural significance.

and the UCH Rules will not be judicially considered for some time. Until then, one might reasonably suggest that, in attempting to divine the meaning and ambit of the criteria contained in r 5(2) of the UCH Rules, assistance may be obtained from the case law that has emerged in different Australian jurisdictions on the very similar criteria for assessing heritage significance that is set out in other federal and state heritage legislation. However, we observe that our case law research has not revealed any cases that provide materially relevant consideration of particular heritage significance criteria that can readily be applied to r 5(2) of the UCH Rules. In any event, we consider that the heritage significance criteria contained in r 5(2) of the UCH Rules are ‘fit for purpose’, in that they have been formulated, with appropriate refinements, by reference to contemporary and accepted heritage significance criteria contained in heritage legislation in other Australian jurisdictions.

Thirdly, it is also apparent that the criteria in r 5(2) may, when applied appropriately by the Minister, give effect to the objectives and provisions of the *Convention on the Protection of the Underwater Cultural Heritage* (‘UNESCO Convention’).¹³ For example, one heritage significance criterion contained in r 5(2) of the UCH Rules is the significance of the article ‘for its potential to contribute to public education’. In this respect, if the Minister sought to make a declaration of protection for a particular UCH article on the basis that the article had significant potential to contribute to public education about UCH, the making of such a declaration would give effect to Article 20 of the UNESCO Convention, which obliges State Parties to the convention to ‘take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it’. The making of such a declaration would also serve to facilitate the objects in s 3 of the UCH Act, including the promotion of, amongst other things, public awareness and understanding of Australia’s UCH.

In short, it is considered that the heritage significance criteria contained in r 5(2) of the UCH Act have been appropriately formulated by reference to contemporary and accepted heritage significance criteria found in heritage legislation located in various Australian jurisdictions. The criteria are likely to provide an effective set of parameters to guide the informed exercise of the Minister’s power to make declarations of protection for UCH articles under the UCH Act.

3 Mandatory Relevant Considerations in Determining whether to Grant or Refuse to Grant a Permit under the UCH Act

Once UCH attains the status of being protected under the UCH Act, it is subject to the regulatory provisions contained in Part 3 of the UCH Act.¹⁴ Importantly, the provisions in Part 3 of the UCH Act make it an offence to engage in conduct that harms UCH protected by the UCH Act without a permit issued under s 23 of the UCH Act.¹⁵

Section 23 of the UCH Act enables the Minister to grant, upon application, a permit to a person to engage in specific conduct relating to particular UCH that is protected under the UCH Act. In deciding whether or not to grant the permit, the Minister is obliged, pursuant to s 23(4) of the UCH Act, to consider any relevant matters specified in the UCH Rules.

Rule 6 of the UCH Rules specifies the mandatory relevant considerations to which the Minister must have regard when determining whether to grant or refuse to grant a permit. The content of r 6 is somewhat densely expressed, but one can derive the following important features of r 6.

First, in determining any application made for a permit under the UCH Act, the Minister must consider, pursuant to r 6(2), whether:

- a. the person applying for the permit is a ‘fit and proper person’ (‘First FPP Factor’); and
- b. each person who will participate in, or otherwise be involved in, the conduct proposed to be authorised by the permit is a ‘fit and proper person’ (‘Second FPP Factor’).

The phrase ‘fit and proper person’, as used in the First and Second FPP Factors, is not defined by the UCH Rules. It is also not defined by the UCH Act. However, r 6(3) of the UCH Rules does outline a set of non-exhaustive

¹³ *Convention on the Protection of Underwater Cultural Heritage*, opened for signature 11 February 2001, 41 ILM 40 (entered into force 2 January 2009) (‘UNESCO Convention’).

¹⁴ Dwyer (n 2) 106.

¹⁵ See, eg, *Underwater Cultural Heritage Act 2018* (Cth) ss 29, 30, 31, 35. See also Dwyer (n 2) 109–10 for discussion of the penalty provisions contained in the Act.

matters that the Minister must have regard to when considering whether the person who is subject to either the First FPP Factor or the Second FPP Factor is, in fact, a ‘fit and proper person’. In short, the matters outlined in r 6(3) are concerned with whether the relevant person who is the subject of either the First FPP Factor or the Second FPP Factor:

- a. has been convicted of an offence under UCH laws in Australian jurisdictions or a foreign State;
- b. has been convicted of an offence or ordered to pay a pecuniary penalty under the UCH Act, the repealed HS Act, the *Protection of Moveable Cultural Heritage Act 1986* (Cth), the *Customs Act 1901* (Cth), and the *Criminal Code* and *Crimes Act 1914* (Cth) (to the extent that it relates to the earlier mentioned statutes in this paragraph); and
- c. is suspected on reasonable grounds of engaging in the supply of UCH that has been unlawfully obtained.

It is apparent that, if the relevant person who is subject to the First FPP Factor or the Second FPP Factor has done or is suspected of doing (as the case may be) one of the things just mentioned, there is a material risk that the Minister may not regard that person as being a ‘fit and proper person’ for the purpose of holding the permit, or participating in or otherwise being involved in the conduct that is proposed to be authorised by the permit.¹⁶ Indeed, each of the things just mentioned would obviously be regarded as a factor that tends against a conclusion that a person is a ‘fit and proper person’, rather than a thing whose presence would support an affirmative conclusion that the person is a ‘fit and proper person’.

Importantly, the matters listed in r 6(3) of the UCH Rules do not constitute an exhaustive statement of the factors that the Minister may have regard to in determining whether the relevant person is, in fact, a ‘fit and proper person’. As a result, while the text, context and purpose of the UCH Act and UCH Rules would be of paramount importance in deriving the meaning of a ‘fit and proper person’¹⁷ and much turns on the particular circumstances attending a given person,¹⁸ it is arguably the case that the meaning of a ‘fit and proper person’ in that context may be assisted by reference to common law principles developed for the purpose of ascertaining the meaning of a ‘fit and proper person’ in other statutory contexts (eg, corporations or trade practices law). In this regard, it is submitted that the following observations made by Toohey and Gaudron JJ in *Australian Broadcasting Tribunal v Bond* are of relevance to deriving the meaning of a ‘fit and proper person’, and applying that concept, in the context of the UCH Act:¹⁹

The expression ‘fit and proper person’, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of ‘fit and proper person’ cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not a fit and proper person to undertake the activities in question.

Whether the fitness or propriety of a licensee to hold a commercial licence are sufficiently ascertained by reference to its character or reputation, or must be ascertained by reference to the conduct of its affairs and activities, is a question the answer to which must be found by implication from the provisions of the Broadcasting Act dealing with the grant, renewal and revocation or suspension of a commercial licence and from the activities to be undertaken pursuant to the licence.

When reflecting on the observations made by Toohey and Gaudron JJ in *Bond*, it is evident that their Honours make a distinction between ‘character’ and ‘reputation’ when determining whether a person is ‘fit and proper’ to

¹⁶ So much is apparent from the opening words of r 6(3) of the *Underwater Cultural Heritage Rules 2018* (Cth) (ie, ‘Without limiting paragraph (2)(a) or (b), the Minister’).

¹⁷ See generally *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 388–90 [23]–[26] (French CJ and Hayne J) and, more specifically, *Maritime Union of Australia v Fair Work Commission* (2015) 230 FCR 15, 21 [17] (North, Flick and Bromberg JJ).

¹⁸ See *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 152 (Dixon CJ, McTiernan and Webb JJ).

¹⁹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 380 (‘*Bond*’). While their Honours were in the minority on the result in this case, the first paragraph we have extracted above from Toohey and Gaudron JJ’s judgment has been cited with approval in other appellate court authorities: see, eg, *Maritime Union of Australia v Fair Work Commission* (2015) 230 FCR 15, 21 [17] (North, Flick and Bromberg JJ) and *Creaser v Savannah Associates Ltd* [2003] ACTCA 26, [10] (Crispin P, Connolly and Wilcox JJ). We also consider that, if the first paragraph we have extracted above from Toohey and Gaudron JJ’s judgment is accepted, the second paragraph we have extracted should also be accepted as a corollary.

hold a licence or permit under statute. Their Honours briefly describe that distinction as being that ‘character’ provides an indication of likely future conduct while ‘reputation’ provides an indication of public perception as to likely future conduct. In *Melbourne v R*, McHugh J sought to draw a similar distinction between ‘character’ and ‘reputation’.²⁰

character refers to the inherent moral qualities of a person or what the New Zealand Law Commission has called ‘disposition — which is something more intrinsic to the individual in question’. It is to be contrasted with reputation, which refers to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person.

In our opinion, the above cases only consider the meaning of ‘character’ and ‘reputation’ at a very high level. The cases do not identify precisely which aspects of a person’s ‘character’ and ‘reputation’ are relevant to whether that person is ‘fit and proper’ to hold a licence or permit under statute. It may be argued that, where a person’s ‘character’ is of relevance, then it should only be the aspects of that person’s character which may be regarded as relating to the conduct which is to be authorised by the licence or permit. Similarly, it may be argued that where a person’s ‘reputation’ is of relevance, then it should only be the aspects of that person’s reputation which may be reasonably regarded as relating to the conduct which is to be authorised by the licence or permit, as perceived by people in the relevant sphere in which the authorised conduct will be undertaken.

Bearing in mind these remarks, and the fact that r 6(3) is expressed not to limit r 6(2)(a) or (b), we suggest that, when considering whether a person who is subject to either the First FPP Factor in r 6(2)(a) or the Second FPP Factor in s 6(2)(b) is, in fact, a ‘fit and proper person’, the Minister would, in addition to the factors listed in r 6(3) of the UCH Rules, be permitted to have regard to the:

- a. character of the person, to the extent that there are aspects of the person’s character that may be reasonably regarded as relating to the conduct that is to be authorised by the UCH permit — eg, whether the person has a prior record of enforcement action being taken against them in respect of heritage protected items, whether underwater or terrene, under any particular law (noting that this consideration would not be limited to convictions or penalties, but also extend to action in the form of warning letters, enforceable undertakings and the like); and
- b. reputation of the person, to the extent that there are aspects of the person’s reputation that may be reasonably regarded as relating to the conduct that is to be authorised by the UCH permit — eg, whether the person is well-respected in the underwater and terrene heritage protection community, and whether the person has a long history of positive involvement in activities directed at heritage protected items.

Before moving on to consider the balance of r 6, there is one further point that should be made about the ‘fit and proper person’ considerations set out in r 6(2) and (3) of the UCH Rules. It is evident that the First FPP Factor identified above focuses on whether the applicant for the permit is a ‘fit and proper person’²¹ whereas the Second FPP Factor identified above focuses on whether ‘each person who will participate in, or otherwise be involved in, the conduct proposed to be authorised by the permit’ is a ‘fit and proper person’.²² It is apparent that the obligation imposed on the Minister to consider the Second FPP Factor — and, by reasonable inference, the obligation for the applicant to provide the necessary information to the Minister to consider the Second FPP Factor — is considerably more onerous than the equivalent obligations created by the First FPP Factor. The primary reason for this is that a far greater number of persons’ ‘fit and proper person’ status will need to be evaluated in respect of the Second FPP Factor. Such persons will likely include, at the very least, the persons who will be funding, designing, physically undertaking and managing the conduct proposed to be authorised by the permit. It is worth noting here that, as a matter of practicality, however, it may not be known, either at the time the application for the permit is made or determined, precisely who will ‘participate in, or otherwise be involved in’ the conduct proposed to be authorised by the permit. To overcome this issue, it may be the case that permit applicants will need to ensure that their projects have been precisely scoped before submitting their permit applications. This issue is compounded by the fact that, in our opinion, the phrase ‘otherwise be involved in’ is far too broad. For example, read conservatively, the provision could be understood to embrace the person/s who will sell, or have already sold, diving or maritime archaeology equipment to the permit applicant or his or her associates.

As a result, it can be contended, with some degree of force that the Second FPP Factor overreaches in the persons whose ‘fit and proper person’ status must be evaluated. The potential for the Second FPP Factor to operate in this

²⁰ (1999) 198 CLR 1, 15.

²¹ *Underwater Cultural Heritage Rules 2018* (Cth) r 6(2)(a).

²² *Ibid* r 6(2)(b).

unduly burdensome way could be alleviated, to some extent, by inserting the word ‘directly’ into r 6(2)(b) so that it reads as follows (our underlining):

whether each person who will directly participate in, or otherwise be directly involved in, the conduct proposed to be authorised by the permit is a fit and proper person.

The use of the word ‘directly’, in our view, is likely to create additional certainty for permit applicants, by emphasising the need for a sufficiently proximate connection to the activities proposed to be undertaken pursuant to the permit. The use of the word ‘directly’ could serve to eliminate, from the scope of inquiry, consideration of persons who participate in or are otherwise involved in the relevant activities in some remote way. In our opinion, however, it would be unwise to provide a list of categories of persons which would be eliminated from the scope of inquiry as a result of the use of the word ‘directly’ in r 6(2)(b), as proposed. Each case must, of course, depend upon its own circumstances.

Secondly, in addition to the ‘fit and proper person’ considerations set out in r 6(2) and (3) of the UCH Rules, we have identified, in Table 1 below, the mandatory relevant considerations identified by the balance of r 6 of the UCH Rules as applying to determining particular permit applications under the UCH Act:

Table 1: Mandatory relevant considerations for particular types of permit applications under the UCH Act (excluding ‘fit and proper person’ considerations)

Type of application	Application for permit where the conduct to be authorised by the permit will have or is likely to have an adverse impact on protected UCH	Application for permit where the conduct to be authorised by the permit will take place in a protected zone	Application for permit where the conduct to be authorised by the permit relates to the import or export of protected UCH or foreign UCH	Application for permit where the conduct to be authorised by the permit is the possession, custody or control of protected UCH
Obligated to consider whether the conduct is consistent with the objects of the UCH Act?	Yes	Yes	Yes	Yes
Obligated to consider relevant government guidelines?	Yes (guidelines relating to protection or management of Australia’s UCH)	Yes (guidelines relating to protection or management of Australia’s UCH)	Yes (guidelines relating to importation or exportation of protected UCH)	Yes (guidelines relating to possession or supply of protected UCH)
Obligated to consider whether the manner in which the conduct will be undertaken is consistent with the relevant requirements of the Annex to the UNESCO Convention?	Yes	No	Yes	Yes
Obligated to consider whether appropriate consultation has been undertaken with relevant stakeholders relating to: (a) shared heritage interests; (b) issues of ownership or sovereignty; and (c) obligations under any relevant international instruments?	Yes	Yes	Yes	Yes
Obligated to consider whether the conduct will affect any of the matters referred to in s 20(3) of the UCH Act?	No	Yes	No	No

Reflecting on the mandatory relevant considerations set out above in Table 1, several observations should be made.

First, when determining whether to grant a permit, the Minister will always be obliged (irrespective of what particular conduct is sought to be authorised by the permit) to have regard to whether the conduct proposed to be authorised is consistent with the objects of the UCH Act and, other than decisions about permits relating to conduct in a protected zone, will be obliged to consider whether the conduct proposed to be authorised is consistent with the rules contained in the Annex to the UNESCO Convention. Importantly, these obligations are pitched at the level of *considering* whether the conduct proposed to be authorised is consistent with the objects of the UCH Act and the rules contained in the Annex to the UNESCO Convention. The obligations are not pitched at the level of imposing, as conditions precedent or jurisdictional facts, obligations on the Minister to be satisfied that, if she authorises the conduct proposed to be carried out pursuant to the permit, the carrying out of the conduct will, in fact, be consistent with the objects of the UCH Act and the rules contained in the Annex to the UNESCO Convention. In our view, it is appropriate for these obligations to be pitched at a level of considering the matter, rather than being satisfied of the matters as jurisdictional facts or conditions precedent to the grant of a permit. This is because it is conceivable that inconsistency or conflict would arise between a decision to grant a permit and the objects of the UCH Act (or the rules in the Annex to the UNESCO Convention).

For example, consider the object in s 3(a) of the UCH Act — ie, ‘to provide for the identification, protection and conservation of Australia’s underwater cultural heritage’. The substantive provisions of the UCH Act have been drafted in a manner to give effect to this objective, in that:

1. identification of UCH is addressed by s 40 (obligation to notify of the discovery of UCH) and s 48 (which establishes the UCH register); and
2. protection and conservation of UCH are addressed by Part 2 of the UCH Act.

However, s 30 of the UCH Act provides, in effect, that a person commits an offence if he or she engages in conduct that has, will have, or is likely to have an adverse impact on protected UCH *without having first* obtained a permit which authorises that conduct. In at least some circumstances, the very act of granting a permit will allow some level of harm to be occasioned to protected UCH. Arguably, in such circumstances, the act of granting the permit will be inconsistent with the object in s 3(a) of the UCH Act to protect and conserve UCH. This example serves to illustrate two propositions:

1. the object to protect and conserve UCH must be read in the wider context of the UCH Act, particularly those provisions in the UCH Act which contemplate that permits may be granted to people to engage in conduct that might not serve to protect and conserve UCH in a particular respect;²³ and
2. in order to ensure the balanced and flexible operation of the regime created by the UCH Act, it would be unworkable for an obligation to be imposed on the Minister to be satisfied, as a matter of jurisdictional fact or condition precedent, that the grant of a permit would be consistent with the objects of the UCH Act.

It is also conceivable that potential inconsistency or conflict may also arise between a decision to grant a permit and the object in s 3(b) of the UCH Act — ie, ‘to enable the cooperative implementation of national and international maritime heritage responsibilities’.²⁴

Pursuant to r 6, the Minister is obliged to consider whether the grant of a permit will be consistent with the objective of cooperative implementation of Australia’s national and international maritime heritage responsibilities. Having regard to the text, context and purpose of the UCH Act and UCH Rules, it is apparent that the UNESCO Convention is clearly intended to serve as a relevant source of Australia’s international maritime heritage responsibilities. This is so notwithstanding the fact that Australia is not, at the current time of writing, a party to the UNESCO Convention.

Accepting that the Australian Parliament, through the introduction of the UCH Act and UCH Rules, intends for the provisions of the UNESCO Convention to be generally observed by Australia in the context of decision-making under the UCH Act and UCH Rules, the question arises as to what ‘responsibilities’ may be said to be imposed on Australia by that convention. While many international conventions and agreements are expressed in such indeterminate language that their provisions are more aptly described as goals to be achieved rather than

²³ Observations to this effect have been made in respect of similar regulatory contexts where use of permit systems are employed by the statute in question: see, eg, *Country Energy v Williams* (2005) 141 LGERA 426, 45–8 [62]–[70] (Basten JA).

²⁴ *Underwater Cultural Heritage Act 2018* (Cth) s 3(b). In this respect, this object should be understood as referring to *Australia’s* national and international maritime responsibilities.

rules to be obeyed,²⁵ it is evident that many of the provisions in the UNESCO Convention (including the rules in the Annex to the convention) are expressed in a manner that clearly intends to impose obligations on a State party, and are not completely hortatory. For instance, r 1 of the Annex to the UNESCO Convention states (our underlining):

The protection of [UCH] through in situ preservation shall be considered as the first option. Accordingly, activities directed at [UCH] shall be authorised in a manner consistent with the protection of that heritage, and subject to that requirement may be authorised for the purpose of making a significant contribution to protection or knowledge or enhancement of [UCH].

As discussed above, it is apparent that the Minister has power to grant a permit under the UCH Act which authorises conduct to be undertaken that has an adverse impact on the protected UCH. This would seem at odds with r 1 of the Annex to the UNESCO Convention, which in turn would seem at least partly inconsistent with the object in s 3(b) of the UCH Act. This example again reinforces the aptness of pitching the relevant obligations as obligations to consider, rather than as conditions precedent or jurisdictional facts in respect of which the Minister must satisfy herself.

Secondly, at the time of writing, as far as the authors are aware, guidelines relating to the protection or management of Australia's UCH have not been developed. It will be interesting to see, in due course, how these guidelines are developed and how they will be used and applied in decision-making concerning permits under the UCH Act.

Thirdly, the obligation imposed on the Minister by r 6 of the UCH Rules to consider whether 'appropriate consultation' has been undertaken with 'relevant stakeholders' relating to:

- a. shared heritage interests;
- b. issues of ownership or sovereignty; and
- c. obligations under relevant international instruments,

suffers from significant ambiguity.

Numerous questions arise with respect to this obligation. What does 'appropriate consultation' mean? Who are the 'relevant stakeholders'? How does one determine 'shared heritage interests'? How should consultation be discharged with 'relevant stakeholders' regarding issues of ownership or sovereignty, or obligations under international instruments? It is unfortunate that the UCH Rules (or the UCH Act) do not provide any assistance in relation to these matters. In the absence of the UCH Rules (or the UCH Act) providing such assistance, it is hoped that the guidelines relating to the protection and management of Australia's UCH referred to above will provide some insight in relation to these matters.

4 Mandatory Relevant Considerations in Determining whether an Existing Permit Granted under the UCH Act Should be Varied

As explained in the Earlier Article, s 25(1) of the UCH Act prescribes that the Minister may vary a permit at any time, either on application or on the Minister's own initiative. In deciding whether to exercise his or her power to vary a permit on application or unilaterally under s 25(1), s 25(3) prescribes that the Minister must have regard to the matters specified in the UCH Rules. Rule 8(2) in the UCH Rules prescribes the following matters:

(2) ...

- (a) whether the conduct that would be authorised by the permit, as varied:
 - (i) would be consistent with the objects of the Act; and
 - (ii) would be consistent with the relevant requirements of the Annex to the Underwater Cultural Heritage Convention; and
- (b) relevant government guidelines relating to the protection or management of Australia's underwater cultural heritage, as in force from time to time; and
- (c) whether appropriate consultation has been undertaken with relevant stakeholders relating to:
 - (i) shared heritage interests; and
 - (ii) issues of ownership or sovereignty; and
 - (iii) obligations under any relevant international conventions, agreements or treaties, as in force from time to time.

²⁵ See, eg, *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 391–2 (McHugh, Gummow, Kirby and Hayne JJ) and *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308, 355 [189] (Griffiths J).

Two points should be made in respect of r 8(2).

First, it is immediately apparent that the matters prescribed in r 8(2), which the Minister must have regard to when deciding to vary a permit, have been generally replicated from the matters prescribed in r 6. It follows, therefore, that the general commentary in respect of those matters in section 3 of this article also applies in respect of the matters prescribed in r 8(2).

Second, the First FPP Factor and Second FPP Factor in r 6(2), which the Minister must have regard to when deciding whether to grant a permit, have been omitted from r 8(2). It follows that whether a permit holder has remained a 'fit and proper person' is not a mandatory relevant consideration under r 8(2). In our view, however, this is not problematic. The reason for this is that the Minister is empowered under s 26(1)(b) to suspend or revoke a permit if the Minister is satisfied that it is 'necessary' to do so in order to conserve and protect UCH. It is, of course, essential to note the import of the word 'necessary' in s 26(1)(b), which suggests that the power to suspend or revoke a permit should not be lightly exercised. However, in our view, s 26(1)(b) does afford the Minister some scope to suspend or revoke a permit in circumstances where either:

- a. the permit holder; or,
- b. any person who is participating in, or otherwise involved in, the conduct authorised by the permit;

has not remained a 'fit and proper person'.

5 Noteworthy Omissions from the UCH Rules?

There are two noteworthy omissions from the UCH Rules.

First, it was observed in the Earlier Article that it is likely that commentators will criticise the automatic protection regime created by s 16(1) of the UCH Act on the basis that:

- a. the UCH Act has adopted an arbitrary quantitative criterion of 75 years for automatic protection of UCH; and
- b. this serves to falsely equate age with heritage significance.²⁶

While such criticism is not without some merit, the Earlier Article observed that (citations omitted):²⁷

the description of the automatic protection in s 16(1) of the UCH Act as affording *permanent* protection might be somewhat of a misnomer. This is because s 16(4) of the UCH Act states, in effect, that the UCH Rules may remove the status of automatic protection for specified UCH referred to in s 16(1) and (3) of the UCH Act. It is uncertain how this provision will operate in practice, as the UCH Rules have not yet been finalised and no draft of those rules has been publicly released, as far as the author is aware. Potentially, it may be the case that s 16(4) of the UCH Act operates as a 'safety valve' to ensure that any article of UCH that:

1. is automatically protected by s 16(1) of the UCH Act; and
2. cannot be regarded as having heritage significance (eg, the examples of lobster traps or pieces of a splintered surfboard suggested by Bederman, or a lump of coal from tonnes of coal in a wreck as suggested by White),

may have its status as automatically protected UCH removed, with the consequence that the article may be retrieved and placed back into the stream of maritime commerce.

It is not far-fetched to envisage situations where a particular UCH article that is automatically protected by s 16(1) of the UCH Act has no heritage significance at all, but is simply an old article of maritime property. Arguably, the Australian legislature was aware of the potential for s 16(1) of the UCH Act to operate to protect old articles of maritime property that have no heritage significance, and it was for this reason that s 16(4) was included in the UCH Act. It is hoped that this was the intended effect of s 16(4) of the UCH Act. If it was, it is suggested that the Australian Parliament has insulated itself well from any criticism that s 16(1) of the UCH Act falsely equates age with heritage significance.

²⁶ Dwyer (n 2) 92.

²⁷ Ibid 93.

The UCH Rules do not contain a provision made for the purpose of s 16(4). In our view, this leaves the automatic protection regime created by s 16(1) of the UCH Act open to the criticism that it falsely equates age with heritage significance.

Given this, in our opinion, the UCH Rules should be amended to incorporate a rule made for the purposes of s 16(4) of the UCH Act which provides that UCH articles with no actual heritage significance may have their automatic protection under s 16(1) and (3) of the UCH Act removed. To that end, the relevant rule could potentially take the following form:

Removal of automatic protection of specified articles of underwater cultural heritage

(1) This section is made for the purposes of subsection 16(4) of the Act.

(2) Subsection 16(1) or 16(3) of the Act does not apply to a specific article of underwater cultural heritage if the Minister:

(a) considers the specific article of underwater cultural heritage that is automatically protected by subsection 16(1) or 16(3) of the Act against the heritage significance criteria made by these Rules for the purposes of s 22(1) of the Act; and

(b) is satisfied, following consideration of the heritage significance criteria, that the specific article should no longer be afforded automatic protection by subsection 16(1) or 16(3) of the Act because the specific article does not have heritage significance.

Of course, the rule could potentially be drafted in terms to similar effect. Alternatively, it could be argued by some that such a rule should be located in the UCH Act rather than the UCH Rules. It could also be argued that such a rule is repugnant to the UCH Act itself.²⁸ For our own part, we do not consider that such a rule would be repugnant to the UCH Act. After all, s 16(4) of the UCH Act expressly contemplates that particular articles of UCH automatically protected by s 16(1) and (3) of the UCH Act may be stripped of that protection. In our view, any argument on repugnancy grounds would be rendered academic if a rule to the effect of that we have drafted above was incorporated into the UCH Act itself.

Secondly, it was observed in the Earlier Article that there is potential for tension to arise between the application of the salvage provisions contained in the *Navigation Act 2012* (Cth) ('Navigation Act') and the permitting provisions contained in the UCH Act.²⁹ The point was concisely expressed in the Earlier Article as follows, in considering a hypothetical example where a salvor wishes to salvage the remains of an Australian vessel that are located on the seabed within Australian waters and automatically protected under s 16(1) of the UCH Act:³⁰

[I]t seems that s 23 [of the UCH Act] enables a person to, in effect, engage in salvage activity in respect of particular UCH that is protected under law where the person has obtained a permit to engage in that activity. This appears to be so despite the apparent objective of s 240(3)(c) of the Navigation Act to render salvage operations non-applicable to certain UCH (such as the Australian vessel considered in this example) ... [I]t is quite odd that the UCH law (ie the UCH Act) would appear to have such a result in circumstances where a maritime law — ie the Navigation Act — is expressly attempting to prohibit salvage of maritime property that is located on the seabed and has prehistoric, archaeological or historic interest.

Nevertheless, the position in respect of UCH considered in this first hypothetical example appears to be as follows: whilst s 240(3)(c) of the Navigation Act operates to prevent salvage operations being conducted in respect of that UCH, the Minister would have power, under s 23 of the UCH Act, to grant a permit which authorises salvage operations to be conducted in respect of that UCH. Of course, the UCH Rules may, in due course, include provisions that dictate the reaching of a contrary conclusion, but it is unhelpful to speculate further on that point in the absence of any draft of those UCH Rules being available.

The UCH Rules, as currently drafted, have not provided any clarification of the apparent potential for tension between s 240(3)(c) of the Navigation Act and s 23 of the UCH Act. Having said that, it should be acknowledged that some of the matters that are identified in r 6 of the UCH Rules as mandatory relevant considerations that the Minister must have regard to in determining whether to authorise particular forms of conduct pursuant to a permit under s 23 of the UCH Act would require the Minister to confront this apparent tension in making decisions. For example, r 6(4) of the UCH Rules relevantly provides that:

²⁸ See generally *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 41–2 [54] (French CJ) and 77 [174] (Hayne J) for an explanation of the common law principles concerning repugnancy of delegated legislation.

²⁹ Dwyer (n 2) 100–3.

³⁰ *Ibid* 101–2.

(4) If the conduct proposed to be authorised by the permit will have or is likely to have an adverse impact on protected underwater cultural heritage, the Minister must ... have regard to the following matters:

(a) whether the conduct is consistent with the objects of the Act;

...

(c) whether the manner in which the conduct will be undertaken is consistent with the relevant requirements of the Annex to the Underwater Cultural Heritage Convention ...

When reflecting on the relevant content of this rule, it is evident that the Minister would be obliged to consider whether the particular conduct proposed to be carried out (ie, salvage operations) would be undertaken in a manner that is consistent with the objects of the UCH Act. One of the objects in s 3(b) of the UCH Act is to 'enable the cooperative implementation of national and international maritime heritage responsibilities'. This object was considered in s 2 of this article. Without question, one of the 'international maritime heritage responsibilities' Australia currently has is the reservation it has made under art 30(1)(d) of the *International Convention on Salvage 1989*³¹ ('1989 Salvage Convention') to the effect that Australia will not apply the 1989 Salvage Convention to the specific forms of UCH mentioned in art 30(1)(d). In this regard, it may be suggested that the Minister could reasonably form the view that authorisation of conduct involving salvage of UCH, pursuant to a permit granted under s 23 of the UCH Act, would undermine the purpose of Australia's reservation under art 30(1)(d) of the 1989 Salvage Convention and, as a result, the object contained in s 3(b) of the UCH Act.

Further, it is evident that, pursuant to r 6(4) of the UCH Rules, that the Minister would be obliged to consider whether the particular conduct proposed to be carried out (ie, salvage operations) would be undertaken in a manner that is consistent with the relevant requirements of the Annex to the UNESCO Convention, which includes the somewhat ambiguous r 2 which states:³²

The commercial exploitation of [UCH] for trade ... or its irretrievable disposal is fundamentally incompatible with the protection and proper management of [UCH]. [UCH] shall not be traded, sold, bought or bartered as commercial goods.

It is suggested that the Minister could reasonably form the view that authorisation of conduct involving salvage of UCH, pursuant to a permit granted under s 23 of the UCH Act, would be inconsistent with this particular rule from the Annex to the UNESCO Convention.

Ultimately, in the final analysis, it is submitted that the UCH Rules have not resolved the apparent potential for tension between s 240(3)(c) of the Navigation Act and s 23 of the UCH Act, with the consequence that the suggested 'fixes' outlined in the Earlier Article remain apposite.³³

6 Conclusion

In a similar vein to its efforts in devising the UCH Act, the Australian Parliament is to be commended for devising what are, on the whole, an appropriately drafted set of rules in the UCH Rules. However, there are certain aspects of the rules that could use some further work. They include:

1. the potentially unduly burdensome operation of the Second FPP Factor in r 6(2)(b) of the UCH Rules;
2. the ambiguity associated with the 'appropriate consultation' that is to be undertaken with 'relevant stakeholders' in making decisions about whether or not to grant a permit under the UCH Act;
3. the absence of a 'safety valve' provision in the UCH Rules made for the purposes of s 16(4) of the UCH Act to remove the status of automatic protection from particular UCH that does not have heritage significance; and

³¹ *International Convention on Salvage*, opened for signature 28 April 1989, 1953 UNTS 194 (entered into force 14 July 1996).

³² The rule has been criticised by numerous commentators for its ambiguity: see generally Sarah Dromgoole, '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2003) 18 *International Journal of Marine and Coastal Law* 59, 69–72 and Craig J S Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (2003) 34 *Journal of Maritime Law and Commerce* 309, 340–9.

³³ Dwyer (n 2) 102–3.

4. the potential for tension to arise between s 240(3)(c) of the Navigation Act and s 23 of the UCH Act regarding the grant of permits (although appreciating that this matter is probably better dealt with in the respective Acts rather than in the UCH Rules).

If these deficiencies in the UCH Rules were to be appropriately addressed, it is considered that the UCH Rules, like the UCH Act, would constitute an exemplar for the development of domestic laws to address the protection and management of UCH.