

## **EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for the Environment, Heritage and the Arts

*Heard Island and McDonald Islands Act 1953*

*Environment Protection and Management Amendment Ordinance 2009 (No. 1)(HIMI)*

Subsection 10(1) of the *Heard Island and McDonald Islands Act 1953* ('the Act') provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. The *Environment Protection and Management Amendment Ordinance 2009 (No. 1)* ('Amendment Ordinance') is made pursuant to subsection 10(1) of the Act.

### **Background**

The Heard Island and McDonald Islands (HIMI) Marine Reserve was declared by proclamation in 2002 pursuant to the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act'). As a result of the declaration the *Heard Island and McDonald Islands Marine Reserve Management Plan 2005* was made under the EPBC Act. The HIMI Marine Reserve Management Plan provides a comprehensive management regime for the protection of conservation values of the HIMI Marine Reserve. A management plan made in 1995 under the *Environment Protection and Management Ordinance 1987* (EPMO) for the HIMI Territory (which is located wholly within the broader Marine Reserve) became obsolete following the 2005 Marine Reserve Management Plan and was allowed to lapse in 2007. This situation was foreshadowed at the time of making the management plan under the EPBC Act, which noted that the intention was to allow the management plan under the EPMO to lapse and make necessary amendments to the EPMO. The HIMI Marine Reserve Management Plan is premised on the continued existence of the EPMO and its application to the Territory and provides that EPMO permits to be the primary mechanism for regulating access to and activities in the HIMI Territory part of the Reserve.

### **Outline**

The main purposes of the Amendment Ordinance are to remove reference to the management plan made under the EPMO and references to zones of special status, and to make EPMO consistent with the EPBC Act. Other amendments include:

- adding a definition of 'environment';
- specifying information that must be included on a permit;
- providing for third persons to be authorised by the person(s) named in the permit to undertake activities pursuant to any conditions specified on the permit.

- replacing the requirement to gazette permits issued and instead require the information to be published on the relevant government website for Heard Island and McDonald Islands;
- allowing the minister to delegate powers to SES employees or APS employees at the Executive Level 2 or equivalent in the Australian Antarctic Division of the Department;
- recognising members of the Australian Federal Police or police force of a territory as inspectors with enforcement powers for the purposes of the Ordinance;
- replacing the penalty of \$1000 for offences against a provisions of the regulations with a penalty of 10 penalty units for consistency with the rest of the Ordinance which has the result of increasing the penalty by \$100; and
- minor amendments to rectify previous drafting errors and to reflect modern drafting practices.

The Ordinance is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and commenced on the day after it was registered on the Federal Register of Legislative Instruments. In accordance with subsection 10(2) of the Act a notice of the making of an Ordinance was published in the *Gazette*.

The details of the Ordinance are included in the **Attachment**.

**Details of the Environment Protection and Management Amendment Ordinance 2009 (No. 1)**

Section 1 – Name of Ordinance

This section provides that the Ordinance be cited as the *Environment Protection and Management Amendment Ordinance 2009 (No. 1)*.

Section 2 – Commencement

This section provides that the Ordinance will commence the day after registration on the Federal Register of Legislative Instruments.

Section 3 – Amendment of *Environment Protection and Management Ordinance 1987*

This section provides that the *Environment Protection and Management Ordinance 1987* is amended by Schedule 1 of this Ordinance.

Section 4 – Saving

This section provides that permits issued prior to the commencement of these amendments are not affected by these amendments.

Schedule 1

Amendment Item [1] – Definition of Environment

This item will insert a new definition of *environment* in the Ordinance.

This definition is almost identical to the definition of environment in the *Environment Protection and Biodiversity Conservation Act 1999*. Previously environment was only used in a very general sense (for example in the long title and the purpose provision) without any obligations connected to it. The term environment is used more substantively in the Amendment Ordinance.

The inclusion of the definition of environment clarifies the existing objective of protecting not only the natural environment but also the social, economic and cultural aspects of the natural environment as well as heritage values of the Territory.

This definition of *environment* is not exhaustive but is a list of examples.

#### Amendment Item [2] – Definition of inspector

This section provides that an inspector may be one appointed under subsection 20(1) or one mentioned in 20(5).

#### Amendment Item [3] – Definition of Plan of Management

This section repeals the definition of *plan of management*.

This definition is no longer required as the Minister's power to make Management Plans under the Ordinance has been repealed. In 2005 a comprehensive management plan was made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) for the Heard Island and McDonald Islands marine reserve, a Commonwealth reserve incorporating the HIMI Territory. The power to make management plans under the Ordinance is now redundant as the same requirement exists in the EPBC Act for Commonwealth reserves.

#### Amendment Item [4] – Definition of zone of special status

This section repeals the definition of *zone of special status*.

This definition is no longer required as the Minister's power to declare zones of special status has been repealed.

#### Amendment Item [5] – Repeal of sections 7, 8, 9, 10 and 11

##### *Section 7*

This repeals the Minister's power to declare zones of special status. It removes any inconsistency between the *Environment Protection and Management Ordinance 1987* and the EPBC Act. Protection is given to the marine reserve through the IUCN classification system as required under the EPBC Act and the management plan made under that act.

##### *Sections 8*

This repeals the Minister's power to make a plan of management. The power to make plans of management under EPMO is redundant as the same power exists under the EPBC Act for the marine reserve, which wholly contains the area of application of the EMPO.

### *Section 9*

This repeals the obligation on the Minister to cause a plan of management made under the EPMO to be laid before both Houses of the Parliament. These obligations have become redundant.

### *Section 10*

This repeals the obligation on the Minister to comply with plans of management in force under the EPMO. This obligation under EPMO has become redundant. The EPBC Act requires the Commonwealth and Commonwealth agencies to comply with management plans for Commonwealth reserves.

### *Section 11*

This repeals the Minister's power to amend and or revoke plans of management made under EPMO. This power under EPMO has become redundant. The EPBC Act gives the Minister power to amend or revoke management plans for Commonwealth reserves.

### Amendment Item [6] – Section 14 Heading

This section omits 'acts' and replaces it with 'activities' to achieve consistency throughout the Ordinance.

### Amendment Item [7] – Reference to act

This section omits 'act' and replaces it with 'activity' to achieve consistency throughout the Ordinance.

### Amendment Item [8] – Section 15

#### *15A Applications for Permits*

To be consistent with modern drafting practices and the EPBC Act, the old provision that dealt with permits has been redrafted into two sections, this section on application and section 15 on grating permits.

This section entitles a person to apply to the Minister for a permit to be issued under section 15. An application must be made in a form approved by the Minister and must also specify names of persons making the application. This section also repeals the reference to zones of special status which has become redundant.

#### *15 Granting of permits*

The Minister may issue a permit to a person to enter the Territory and carry on activity that otherwise would be prohibited under subsection 14(1). As in the old provision the Minister must consider the need to protect the environment of the Territory and the safety

of persons, aircraft, vehicles and vessels in the Territory when deciding whether to grant a permit and when imposing conditions.

As in the old provision the Minister may decide that a permit is subject to conditions. The Minister may also decide that a permit may include a condition that the person who is granted the permit may authorise another person to enter the Territory and carry out an activity in accordance with the permit. This allows some flexibility where additional persons may be required to carry on the activity or assist with the activity authorised in a permit.

The following information must be included in the permit:

- activity or activities to be carried out under the permit;
- where the activity or activities will be carried out;
- conditions;
- name of the person to whom the permit is granted;
- period of validity of the permit; and
- any other information the Minister decides should be set out.

The EBPC Act requires similar information be included on a permit.

Permits may be expressed to apply to an individual of an expedition or all the members of an expedition. Regulations may prescribe fees not exceeding \$50 for granting a permit.

#### *16A Authorities under permits*

This new clause empowers a permit holder to authorise, in writing, another person to carry out on behalf of the permit holder any activity authorised by the permit. This is possible only if the permit conditions allow an authority to be given, and if done in accordance with those conditions.

The permit holder who gives an authority is not prevented from operating under that permit. The permit holder must notify the Minister in writing within 14 days of giving an authority.

#### Amendment Item [9] – Paragraph 16(1)(a)

This item inserts the word ‘and’ at the end of subparagraph 16(1)(a) and makes it clear that all the paragraphs are relevant and that the Minister must be satisfied of all the requirements under subparagraph 16(1).

#### Amendment Item [10] – Sub-section 16(3)

This repeals subsection 16(3) on permits to enter a zone of special status, which has become redundant.

#### Amendment Item [11] – Section 17

This section repeals section 17 – *Matters published in Gazette*. Gazettal requirements have been replaced with a requirement that the Minister must establish a register of permits as soon as practicable after the commencement of this section.

The Minister must establish a register of permits that includes a copy of the permit, name of any person authorised under s16A to enter the Territory and carry on activity under a permit and any other information the Minister decides should be included.

The Minister may decide not to include some or all the information on a permit on the register if the disclosure of the information:

- could adversely affect the commercial interests of a person who has been granted a permit under this Ordinance;
- could result in a risk to the environment of the Territory;
- would not be in the national interest.

Without limiting what is in the national interest, the Minister may consider the need to keep details about surveillance and enforcement activities in the Southern Ocean confidential.

The Minister must ensure that the register is updated as soon as practicable after a permit is issued or varied and must ensure that the register is accessible to the public through the internet. The Minister must retain expired permits on the register and update the register as soon as practicable after a permit expires to indicate that a permit is no longer in force.

The Minister must also ensure that the register includes a statement to the effect that an application may be made to the Administrative Appeals Tribunal subject to the Administrative Appeals Tribunal Act 1975 by or on behalf of a person whose interests are affected by the decision

#### Amendment Item [12] – Section 18

This section has been amended to include persons authorised pursuant to section 16A as well as persons named in a permit as having committed an offence if they contravene a condition of the permit.

#### Amendment Item [13] – Paragraph 19(a)

This item inserts the word ‘or’ at the end of subparagraph 19(a) and makes it clear that paragraphs are alternatives and that only the requirements in one paragraph need to be satisfied by the Minister.

#### Amendment Item [14] – Section 19A

This clause empowers the Minister to delegate his or her powers under the Ordinance except the power to make regulations to:

- the Director of the Australian Antarctic Division (AAD) of the Department of the Environment, Water, Heritage and the Arts;
- an SES employee or acting SES employee in the AAD; and
- an APS employee who holds, or is acting in, an Executive Level 2 or equivalent position in the AAD.

#### Amendment Item [15] – Section 20, heading

This amends the heading to more correctly reflect the purpose of the section which is to appoint inspectors and issue identity cards.

#### Amendment Item [16] – Subsection 20(3)

This provides for the appointment of inspectors and issuing of identity cards. The requirement that the Minister sign the identity cards has been repealed. The amendments make this provision consistent with other Antarctic legislation and the EPBC Act.

The identity card must be in a form approved by the Minister, bear a photograph of the person and have a statement to the effect that the person is an inspector for the purposes of the Ordinance.

Members of the Australian Federal Police and members of a police force of a Territory are inspectors for the purposes of the Ordinance. They are not required to be issued with an identity card.

#### Amendment Item [17] – Section 24

This clause omits reference to subsection 15(2)(b) and has been replaced with subsection 15(3)(b) taking into account amendments to section 15.

#### Amendment Item [18] – Paragraph 26(2)(a)

This item inserts the word 'and' at the end of subparagraph 26(2)(a) and makes it clear that all the paragraphs are relevant and that without limiting the generality of subsection 26(1) the Minister may make regulations with respect to all matters prescribed in 26(2).



Amendment Item [19] – Paragraph 26(2)(b)

This section makes a minor amendment to express the penalty in penalty units rather than as a monetary sum. This amendment achieves consistency throughout the Ordinance where all penalties are expressed as penalty units now.

The indirect effect of this amendment has been to increase the penalty by \$100.

Amendment Item [20] – Paragraph 26(2)(c)

This paragraph omitted as Ministers power to declare zones of special status has been repealed.

Amendment Item [21] – Further Amendments

References to *issued* has been replaced with *granted* and one reference to *issuing* has been replaced with *granting*.