

EXPLANATORY STATEMENT

Select Legislative Instrument No. 244, 2013

Issued by the Authority of the Minister for Environment

Great Barrier Reef Marine Park Act 1975

*Great Barrier Reef Marine Park Amendment (Public Moorings and Infrastructure)
Regulation 2013*

Subsection 66(1) of the *Great Barrier Reef Marine Park Act 1975* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act or with a zoning plan, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act establishes the Great Barrier Reef Marine Park Authority (the Authority) and makes provision for and in relation to the establishment, control, care and development of a Marine Park in the Great Barrier Reef Region.

The Regulation amends the *Great Barrier Reef Marine Park Regulations 1983* (the Principal Regulations) to prevent the removal of, misuse of and damage to public moorings and infrastructure in the Great Barrier Reef Marine Park (the Marine Park).

Issues

Public moorings are available to all vessel operators and have been installed by (or for) the Authority and the Queensland Parks and Wildlife Service at popular locations in the Marine Park. Buoys attached to the moorings are blue in colour with a label explaining the class (vessel length), time limits and maximum wind strength limits that apply to the mooring. This and other information is also displayed on tags that are attached to moorings.

Under regulation 102 of the Principal Regulations, a person commits a strict liability offence if they remove, misuse or damage a mooring installed in the Marine Park by the Authority (Authority moorings). In that regulation it is unclear whether the offence applies to moorings installed on behalf of the Authority, as distinct from moorings installed by the Authority, and the regulation does not specify the types of acts and omissions which constitute misuse.

In addition to moorings, the Authority often installs other types of infrastructure in the Marine Park, such as reef protection markers, buoys, signs and boundary marking ropes. There is no protection equivalent to that afforded under regulation 102 for these other types of public infrastructure.

The Regulation will:

- clarify the types of moorings that regulation 102 of the Principal Regulations applies to (public moorings rather than Authority moorings);
- clarify the types of acts and omissions that constitute misuse; and
- expand the application of the regulation to other types of public infrastructure.

These changes will increase the Authority's ability to take enforcement action against users of the Marine Park who remove, misuse or damage public moorings and other public infrastructure. The changes will also act as a deterrent to prevent future acts and omissions of this type in the Marine Park.

The penalty for contravening regulation 102 of the Principal Regulations is 50 penalty units. Pursuant to the Principal Regulations an offence under regulation 102 may, as an alternative to having the matter dealt with in a court, be dealt with as an infringement notice offence. The infringement notice penalty for such an offence is currently five penalty units. The Regulation will reduce the infringement notice penalty applicable to an offence committed under regulation 102 from five penalty units to three penalty units. This will bring the infringement notice penalty in line with other similar types of offences.

Consultation

Consultation on the issues addressed by the Regulation occurred in April 2009, May 2013 and June 2013 with the Queensland Parks and Wildlife Service, who jointly manage and deliver the Field Management Program for the Great Barrier Reef World Heritage Area with the Authority. In April 2009 the Authority also raised the idea of making the Regulation with the Authority's Tourism and Recreation Reef Advisory Committee, which is a committee of Marine Park stakeholders such as tourist operators, recreational users and Traditional Owners, established to provide advice to the Authority on operational issues. Both the Queensland Parks and Wildlife Service and the Tourism and Recreation Reef Advisory Committee have been supportive of the making of the Regulation.

The Regulation has been prepared in consultation with the Criminal Justice Division of the Department of Justice and Attorney-General and the Commonwealth Director of Public Prosecutions. From a prosecution and enforcement perspective, those organisations took no issue with the Regulation.

The Authority undertook preliminary regulatory assessment. Advice was received from the Office of Best Practice Regulation confirming that a regulation impact statement was not required (reference no. 11912)

The Regulation is outlined in more detail in [Attachment A](#).

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

ATTACHMENT A

Details of the *Great Barrier Reef Marine Park Amendment (Public Moorings and Infrastructure) Regulation 2013*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Great Barrier Reef Marine Park Amendment (Public Moorings and Infrastructure) Regulation 2013*.

Section 2 – Commencement

This section provides for the Regulation to commence on the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Great Barrier Reef Marine Park Act 1975*.

Section 4 – Schedule(s)

This section provides that the *Great Barrier Reef Marine Park Regulations 1983* are amended as set out in Schedule 1.

Schedule 1 – Amendments

Item [1] Subregulation 3(1) (definition of *permitted mooring*)

Item 1 makes consequential amendments to the definition of ‘permitted mooring’, required due to the new definition of ‘public mooring’ that is inserted by Item 2.

Item [2] Subregulation 3(1)

Item 2 inserts definitions for the terms ‘public infrastructure’ and ‘public mooring’. Those terms are referred to in regulation 102 as a consequence of Item 3.

It is intended that the meaning of public infrastructure and public mooring not just be restricted to infrastructure and moorings installed ‘by’ the Authority. Instead, the definitions for these terms capture infrastructure and moorings installed ‘by’ or ‘for’ the Authority (i.e. by the Authority or on behalf of the Authority).

The majority of infrastructure and moorings in the Marine Park are installed by or on behalf of the Queensland Parks and Wildlife Service. To avoid any doubt, the definitions inserted by Item 2 specifically apply to such infrastructure and moorings. However, instead of referring specifically to the Queensland Parks and Wildlife Service, the definitions inserted by Item 2 refer to ‘the agency in which the *Marine Parks Act 2004 (Qld)* is administered’ in case the relevant agency changes in the future.

For the definition of public infrastructure, paragraph (a)(ii) makes it clear that the relevant infrastructure must relate to the use of the Marine Park by the public in order to fall within the definition. By using this wording, it is intended that the definition

captures both infrastructure that is installed for the public to use and infrastructure that is otherwise related to the use of the Marine Park by the public.

Most public moorings are labelled as such except in cases of public moorings for tender vessels. While the Authority intends to endeavour to label most public moorings, it is acknowledged that this will not be possible in every case. Accordingly, for the definition of public mooring, paragraph (a)(ii) makes it an element of the definition for the mooring to either be labelled or, where a mooring is not labelled, be 'otherwise intended for public use' (such as tender vessel moorings).

Item [3] Regulation 102

Item 3 repeals the previous wording of regulation 102 of the Principal Regulations, and substitutes it with new criminal offence provisions. The defence of reasonable excuse is not substituted, as the Authority considers that the only reasonable excuses for committing an offence under regulation 102 are already defences of general application pursuant to the *Criminal Code Act 1995* (the Code). For example, duress (under section 10.2 of the Code) and sudden or extraordinary emergency (under section 10.3 of the Code) are examples of what the Authority would consider to be defences of reasonable excuse that are already covered under the Code.

Regulation 102 contains offence provisions relating to removal of, misuse of or damage to public moorings and public infrastructure. For both public moorings and public infrastructure, there are separate offence provisions for a 'person' and a 'person responsible for a vessel'.

Where a person (whether they are on a vessel or otherwise) engages in conduct and the conduct results in the removal of, misuse of or damage to either a public mooring or public infrastructure, that person commits an offence of strict liability under subregulation 102(1) (if in relation to a public mooring) or subregulation 102(3) (if in relation to public infrastructure).

Additionally, where a person on a vessel engages in conduct and the conduct results in the removal of, misuse of or damage to either a public mooring or public infrastructure, a responsible person for the vessel will have also committed an offence of strict liability pursuant to either subregulation 102(2) (if in relation to a public mooring) or subregulation 102(4) (if in relation to public infrastructure). 'Responsible person' is defined in subregulation 102(5) as including the master of the vessel and the person in charge of the vessel.

The meaning of 'misuse of a public mooring' is clarified in subregulation 102(5), which does not contain an exhaustive definition of 'misuse of a public mooring' but provides examples of the types of acts and omissions constituting misuse.

The methods of attaching vessels to public moorings listed in paragraphs (a) to (d) of the definition of misuse of a public mooring constitute misuse because those methods place additional strain on moorings and can result in damage to moorings and vessels. Those methods are also unsafe.

Paragraphs (c) and (d) of the definition of misuse of a public mooring are intended to prevent a situation where one vessel is attached to a public mooring and one or more other vessels are linked to that vessel in a chain. The only time this type of linking of vessels would be considered appropriate would be where a vessel is attached to a public mooring and a tender vessel is attached to that vessel. This is allowed pursuant to paragraph (c). However, it would not be appropriate for a third vessel to then be attached to either the main vessel or the tender vessel and this type of linking of vessels is prevented by paragraph (d). Paragraph (d) also prevents long chains of vessels being attached to a public mooring.

Tags, known as pick-up tags, are attached to public moorings. Most pick-up tags attached to public moorings specify that a certain time limit applies. Paragraph (e) of the definition of misuse of a public mooring requires a vessel that has been attached for the maximum time limit to detach from the mooring for at least one hour. This will allow other vessels an opportunity to use the mooring and will help to ensure all vessels share the use of public moorings in the Marine Park. Although mooring buoy labels generally do not specify the time limits, paragraph (e) provides that the time limit may be specified on a pick-up tag or buoy because the Authority may decide to do either or both in the future.

The intention to ensure all vessels share the use of public moorings in the Marine Park is also reflected in paragraph (f) of the definition of misuse of a public mooring, which prevents persons from falsely claiming to own a public mooring or to have a preferential right to use a public mooring.

Paragraphs (g) to (j) of the definition of misuse of a public mooring prevent activities that would damage public moorings and could jeopardize the safety of persons in the Marine Park. Most public mooring pick-up tags contain instructions which apply to users of public moorings in the Marine Park. These instructions specifically state not to take the actions mentioned in paragraphs (h) and (i). Such tags are therefore covered by paragraph (j). However, paragraphs (h) and (i) are still necessary because not all pick-up tags are consistent and it is possible for mooring tags to become removed from the mooring rope.

Paragraph (j) of the definition of misuse of a public mooring requires users of public moorings to comply with any instructions specified on the pick-up tag or buoy. Most mooring pick-up tags and buoys currently have instructions that are consistent with the examples that are provided at the end of the subregulation.

Subregulation 102(5) contains a non-exhaustive definition for 'misuse of public infrastructure', which is referred to in subregulations 102(3) and (4). That definition clarifies that attaching a vessel to public infrastructure that is not intended to be used to attach vessels constitutes misuse. For example, attaching a vessel to a reef protection marker, a buoy not attached to a public mooring, a sign or a boundary marking rope constitutes misuse of public infrastructure.

Subregulation 102(5) contains a non-exhaustive definition for ‘responsible person’ for a vessel, which is mentioned in subregulations 102(2) and (4). This definition confirms that masters of vessels and persons in charge of vessels are responsible persons.

If instructions are placed on a public mooring pick-up tag or buoy by a person other than the Authority or the Queensland Parks and Wildlife Service (and this is not done for the Authority or for the Queensland Parks and Wildlife Service), subregulation 102(6) ensures that paragraph (j) of the definition of misuse of a public mooring in subregulation 102(5) does not have the effect of requiring users of public moorings to comply with such instructions. The placing of such instructions on a public mooring pick-up tag or buoy constitutes misuse of a public mooring pursuant to paragraph (j) of the definition of misuse of a public mooring in subregulation 102(5). It is not the Authority’s intention that Marine Park users be required to follow such instructions.

Item [4] Regulation 189 (table item 4)

Item 4 causes the infringement notice penalty applicable to the offences under subregulation 102 to be reduced from five penalty units to three penalty units. This will bring the penalty in line with other similar types of infringement notice offences.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Great Barrier Reef Marine Park Amendment (Public Moorings and Infrastructure) Regulation 2013

The Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulation

Under regulation 102 of the Principal Regulations, a person commits a strict liability offence if they remove, misuse or damage a mooring installed in the Great Barrier Reef Marine Park by the Authority. However, it is unclear whether the offence applies to moorings installed for the Authority by other organisations and the regulation does not specify the types of acts and omissions which constitute misuse. The Authority often installs other types of infrastructure in the Marine Park, including reef protection markers, buoys, signs and boundary marking ropes and there is currently no equivalent protection for these other types of public infrastructure.

This Regulation repeals and substitutes the existing offence provisions contained in regulation 102. The substituted provisions will expand the application of the prohibition on removal, misuse and damage to all public moorings and other public infrastructure installed in the Marine Park. The Regulation will also remove the defence of reasonable excuse which applied to the existing provisions (because any excuse that would be considered to be reasonable would also fall within the defences of general application under the *Criminal Code Act 1995*), clarify the types of action that will constitute misuse of a public mooring and will lower the infringement notice penalty payable where an offence is committed.

The amendments effectively expand the nature of the existing offence provisions. They do this by broadening the common law interpretation of what constitutes misuse of a public mooring, incorporating a range of conduct which may not have constituted misuse previously and expanding the application of the existing provisions to all public moorings and other public infrastructure in the Marine Park.

The purpose of the Regulation is to increase the Authority's ability to take enforcement action against users of the Marine Park who remove, misuse or damage public moorings and other public infrastructure, and to act as a deterrent to prevent future acts and omissions of this type in the Marine Park.

The penalty for contravening regulation 102 of the Principal Regulations is 50 penalty units. Pursuant to regulations 188 and 189 of the Principal Regulations an offence under regulation 102 may, as an alternative to having the matter dealt with in a court, be dealt with as an infringement notice offence. The infringement notice penalty for

such an offence is 5 penalty units. The Regulation will also reduce the infringement notice penalty applicable to an offence committed from 5 penalty units to 3 penalty units, which will bring the infringement notice penalty in proportion with other similar types of offences.

The Regulation commences the day after it is registered and will not have any retrospective application.

Human rights implications

The Regulation engages the presumption of innocence in Article 14(2) of the International Covenant on Civil and Political Rights, which provides that a person charged with a criminal offence is to be presumed innocent until proven guilty. The United Nations Human Rights Committee has stated in General Comment 32 that this imposes the burden of proving the charge on the prosecution.

By expanding the application of strict liability offence provisions in regulation 102 of the Principal Regulations to include the removal of, misuse of and damage to all public moorings and other public infrastructure installed in the Marine Park, the Regulation allows for the further imposition of criminal liability without the need to prove fault.

Strict liability offences are commonly used in regulatory legislation protecting the environment, such as the Principal Regulations. It is justifiable to expect individuals who voluntarily participate in regulated activity in the Marine Park to be deemed to have accepted certain conditions and to demonstrate why they are not at fault for infringements. This is particularly important in cases such as those dealt with in the Regulation, where the activities in question carry public safety risks.

The removal of the defence of reasonable excuse does not engage the presumption of innocence because any excuse that would be considered to be reasonable would also fall within the defences of general application under the *Criminal Code Act 1995* (the Code). For example, duress (under section 10.2 of the Code) and sudden or extraordinary emergency (under section 10.3 of the Code) are examples of defences of reasonable excuse that are already covered under the Code.

Despite the imposition of the strict liability offence provisions, the right of a defendant to a defence will be preserved. It will not be impossible or impracticable for the defendant to make out a valid defence based on facts within the defendant's own knowledge or to which they have ready access. For example, if there was a genuine need for a vessel to attach to a public mooring or public infrastructure in a manner that constitutes misuse due to a sudden life threatening situation, a defendant would presumably be able to produce evidence of this to establish the defence of sudden or extraordinary emergency under section 10.3 of the Code.

Contravention of the provisions is punishable by a fine of only 50 penalty units if dealt with by way of prosecution rather than an infringement notice.

The punishment of conduct without the need to prove fault, such as the conduct covered by the Regulation, is likely to significantly enhance the effectiveness of the Authority's enforcement regime by deterring removal of, misuse of and damage to public moorings and public infrastructure in the Marine Park.

Conclusion

The Regulation is compatible with human rights to the extent that it engages human rights because those limitations are reasonable, necessary and proportionate.