

EXPLANATORY STATEMENT

Select Legislative Instrument No. 264, 2013

Issued by the Authority of the Minister for Environment

Great Barrier Reef Marine Park Act 1975

*Great Barrier Reef Marine Park Amendment (Outlook Report and Other Measures)
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 Region).

The Regulation amends the *Great Barrier Reef Marine Park Regulations 1983* (the Principal Regulations) to:

- prescribe that an assessment of heritage values must be contained in the Great Barrier Reef Marine Park Outlook Report (the Outlook Report); and
- rectify typographical errors and other minor issues in the Principal Regulations.

Issues

Section 54 of the Act requires the Authority to prepare and give to the Minister a report, known as the Outlook Report, every five years. The first Outlook Report was required to be given to the Minister by 30 June 2009. The next report is due to be given to the Minister by 30 June 2014.

The Outlook Report must contain the matters set out in subsection 54(3) of the Act. In summary, the Outlook Report must provide an assessment of: the state of biodiversity and use in the Region, risks to the ecosystem, measures to protect the ecosystem, factors influencing the environmental, economic and social values of the Region, and the long-term outlook for the ecosystem.

The provisions in the Act about the Outlook Report were drafted in 2006. In 2008 the objects of the Act were amended to take into account the need for protection and conservation of heritage values, as well meeting Australia's international responsibilities relating to world heritage.

‘Heritage value’ and ‘world heritage values’ are defined in the Act as having the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Heritage value of a place includes the place’s natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians. The world heritage values of a property are the natural heritage and cultural heritage contained in the property. Natural heritage and cultural heritage are types of heritage which have ‘outstanding universal value’, which is determined based on criteria and processes established under the *World Heritage Committee Operation Guidelines for the Implementation of the World Heritage Convention 2012*.

There is currently no legislative requirement (or discretion) for the Authority to provide as part of the Outlook Report an assessment of heritage values or world heritage values in the Region, including the cultural heritage and natural heritage in the Great Barrier Reef World Heritage Area that is of outstanding universal value.

In June 2012 the United Nations Organization for Education, Science and Culture (UNESCO) World Heritage Committee urged the Australian Government to include an explicit assessment of outstanding universal value of the Great Barrier Reef within future Outlook Reports.

In response to the 2008 amendment to the objects of the Act and to the UNESCO World Heritage Committee recommendations, the Regulation will amend the Principal Regulations to include a new provision requiring the Outlook Report to contain an assessment of heritage values (which includes cultural heritage and natural heritage that is of outstanding universal value) in the Region. An assessment of heritage values may, for example, include examination of the condition and trend of indigenous and historic heritage components such as sacred sites, indigenous structures (e.g. fish traps), cultural practices, light stations and shipwrecks.

In addition, the Regulation will rectify typographical errors and minor issues in the Principal Regulations.

Consultation

The Authority consulted with the Wildlife, Heritage and Marine Division of the former Department of Sustainability, Environment, Water, Population and Communities, and the Authority’s Reef Advisory Committees and Local Marine Advisory Committees on amending the Principal Regulations to include the new provision relating to the Outlook Report. All comments received were considered by the Authority and there were no objections to the proposal.

The provisions of the Regulation relating to enforcement powers and criminal and civil penalty provisions have 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 for the Outlook Report proposal (reference no. 14855). The Authority does not consider regulatory assessment is required for the minor and typographical amendments as they will not impact on the business or not-for profit sectors.

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 (Outlook Report and Other Measures) Regulation 2013*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Great Barrier Reef Marine Park Amendment (Outlook Report and Other Measures) 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)

Item 1 inserts definitions for ‘Commonwealth Heritage value’, ‘indigenous heritage value’ and ‘National Heritage value’. Definitions are required for those terms as a consequence of Item 4, which inserts provisions referring to those terms. It is not necessary to insert definitions for other terms referred to in the provisions inserted by Item 4, such as ‘heritage values’ and ‘world heritage values’, as these terms are already defined in the Act.

Item [2] Regulation 73

Item 2 amends regulation 73 of the Principal Regulations so that the existing provision in regulation 73 will become subregulation (1). This amendment is necessary as a consequence of Item 3, which will insert subregulation (2) into that provision.

Item [3]

Item 2 rectifies a drafting error in regulation 73 of the Principal Regulations by clarifying that that an offence against regulation 73 is an offence of strict liability.

Regulation 73 of the Principal Regulations provides that a person must not carry on a business on Low Island (which is an island located in the Marine Park approximately 25 kilometres north-east of Port Douglas) except in the circumstances set out in that

regulation. As an alternative to pursuing a court prosecution for an offence committed under regulation 73, regulations 188 and 189 of the Principal Regulations provide that a person may instead dispose of the matter by paying a monetary penalty (an ‘infringement notice penalty’) specified in a notice (an ‘infringement notice’).

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* published by the Attorney-General’s Department states that an infringement notice scheme should generally only apply to strict or absolute liability offences. As an offence under regulation 73 is an infringement notice offence it should be a strict liability offence.

Item [4]

Item 4 inserts Part 4B into the Principal Regulations. This new part will prescribe that the Outlook Report must contain an assessment of heritage values. Subregulation 116A(2) will provide a non-exhaustive definition of what an ‘assessment of heritage values’ must include. Subregulation 116A(3) will provide a non-exhaustive definition of ‘heritage values’. Heritage values will include ‘Commonwealth Heritage values’, ‘indigenous heritage values’ and ‘National Heritage values’ (which will have the same meaning as in the EPBC Act), as well as ‘heritage values’ and ‘world heritage values’ (which currently have the same meaning as in the EPBC Act pursuant to the definitions contained in the Act).

‘Heritage value’ of a place is defined in section 528 of the EPBC Act as including the place’s natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.

The definition of world heritage values includes natural heritage and cultural heritage in accordance with sections 12 and 528 of the EPBC Act. Pursuant to subsection 12(4) of the EPBC Act, ‘natural heritage’ and ‘cultural heritage’ have the meaning given by the *Convention for the Protection of the World Cultural and Natural Heritage 1972*. An essential component of the definitions of natural heritage and cultural heritage is ‘outstanding universal value’. The description and concept of outstanding universal value is based on criteria and processes established under the *World Heritage Committee Operation Guidelines for the Implementation of the World Heritage Convention 2012*.

Item [5] Subregulation 166(2)

Item 5 corrects a typographical error in subregulation 166(2) of the Principal Regulations by substituting the reference to ‘regulation 144’ in that provision with a reference to ‘regulation 143’.

Subregulation 166(2) of the Principal Regulations provides that the holder of a chargeable permission must keep a receipt or ticket used to obtain an exemption under regulation 144 for two years after the date on the receipt or ticket. Regulation 144 is an offence provision relating to altering a date or adding a date to a ticket. It is likely the reference in subregulation 166(2) should be to regulation 143 instead of regulation

144. Regulation 143 provides for an exemption from paying a charge in certain circumstances.

Item [6]

Item 6 rectifies a drafting error in regulation 167 of the Principal Regulations by clarifying that that an offence against regulation 167 is an offence of strict liability.

Regulation 167 of the Principal Regulations contains offence provisions which apply in circumstances where the holder of a chargeable permission does not comply with the requirements set out in that regulation for submitting charge returns, copies of logbook extracts and other information. As an alternative to pursuing a court prosecution for an offence committed under regulation 167, regulations 188 and 189 of the Principal Regulations provide that a person may instead dispose of the matter by paying a monetary penalty (an ‘infringement notice penalty’) specified in a notice (an ‘infringement notice’).

As discussed above for Item [3], infringement notice offences such as those contained in regulation 167 should be strict liability 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 (Outlook Report and Other Measures) 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

The Regulation inserts a provision into the Principal Regulations that will prescribe that an assessment of heritage values of the Region must be contained in the Outlook Report.

Additionally, the Regulation will:

1. Clarify that offences under regulations 73 and 167 of the Principal Regulations are strict liability offences; and
2. Correct a typographical error in subregulation 166(2) by substituting the reference in that provision to ‘regulation 144’ of the Principal Regulations with a reference to ‘regulation 143’ of the Principal Regulations.

Regulation 73 of the Principal Regulations provides that a person must not carry on a business on Low Island except in the circumstances set out in that regulation. Regulation 167 contains offence provisions which apply in circumstances where the holder of a chargeable permission does not comply with the requirements set out in that regulation for submitting charge returns, copies of logbook extracts and other information. Offences committed under regulations 73 and 167 of the Principal Regulations may be dealt with by way of infringement notices as opposed to court prosecutions pursuant to regulations 188 and 189 of the Principal Regulations. Infringement notice offences should be strict liability offences in accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* published by the Attorney-General’s Department

Subregulation 166(2) provides that the holder of a chargeable permission must keep a receipt or ticket used to obtain an exemption under regulation 144 for 2 years after the date on the receipt or ticket.

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

Human rights implications

The prescribing of a matter to be contained in the Outlook Report and the correcting of a typographical error in subregulation 166(2) does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

To the extent that the Regulation clarifies that offences under regulations 73 and 167 of the Principal Regulations are strict liability offences, 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 human right imposes the burden of proving the charge on the prosecution.

By clarifying that regulations 73 and 167 of the Principal Regulations are strict liability offences, 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.

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 mistake of fact leading to an offence under regulations 73 or 167 of the Principal Regulations, a defendant would presumably be able to produce evidence of this to establish the defence of mistake of fact under section 9.2 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 persons from carrying on a business on Low Island (except in the circumstances set out in regulation 73 of the Principal Regulations) and from failing to submit charge returns and other documents in accordance with regulation 167 of the Principal Regulations.

Conclusion

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