

## **EXPLANATORY STATEMENT**

*Select Legislative Instrument No. 68, 2015*

Issued by the Authority of the Minister for the Environment

*Great Barrier Reef Marine Park Act 1975*

*Great Barrier Reef Marine Park Amendment (Special Management Areas) Regulation  
2015*

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.

### **Issues**

The Regulation will amend the *Great Barrier Reef Marine Park Regulations 1983* (the Principal Regulations) to add a new type of Special Management Area, the Maritime Cultural Heritage Protection Special Management Area (the MCHP SMA) and declare two areas in the Great Barrier Reef Marine Park (the Marine Park) to be MCHP SMAs.

The purpose of the Regulation is to protect cultural heritage in general, and in particular, the heritage value of two Royal Australian Air Force (RAAF) Catalina aircraft wrecks (RAAF Catalina A24-24 and RAAF Catalina A24-25) located in two different areas of the Marine Park.

RAAF Catalina A24-24 crashed off Bowen on 17 August 1943 with the loss of 14 Australian personnel. This site lies at a depth of 38 metres located in the General Use Zone of the Marine Park.

RAAF Catalina A24-25 crashed near Flora Reef south of Cairns on 28 February 1943 with the loss of 11 personnel. This site lies at a depth of 36 metres located just 160 metres inside the Northern Boundary of the Marine National Park Zone of the Marine Park.

The *Great Barrier Reef Marine Park Zoning Plan 2003* (the Zoning Plan) is the primary planning instrument for the conservation and management of the Marine Park. The Zoning Plan divides the Marine Park into zones and regulates the purposes for which each zone may be used or entered.

The General Use Zone in which the Catalina A24-24 is located currently provides no protection against damage to the wreck, as most types of fishing are allowed in that zone. Recent surveys of the wreck by the Authority show substantial damage from anchoring, fishing and trawling.

The Marine National Park Zone in which the Catalina A24-25 is located also currently provides inadequate protection because it allows anchoring. In addition,

people have been suspected of fishing illegally at the site of the wreck. Recent surveys of the wreck by the Authority and other interested third parties revealed substantial damage to the wreck from anchoring, fishing and trawling. The Authority has experienced difficulties in obtaining appropriate evidence to prosecute suspected illegal fishers at the site of the wreck because fishers commonly stow fishing equipment when they see a government compliance vessel approaching and claim to only be anchored at the site.

The Regulation will protect the 2 Catalina aircraft wrecks by declaring two MCHP SMAs over the sites where the aircraft wrecks are located in order to protect the human remains and archaeological fabric of the two wrecks. Each MCHP SMA covers 100 hectares of the Marine Park. The Regulation includes specific management provisions for the MCHP SMAs regulating entering and approaching the wrecks, operating vessels, anchoring vessels, fishing and collecting.

### **Consultation**

The Authority consulted with commercial trawler fishers, recreational fishers, dive operators, holiday accommodation owners, Fisheries Queensland, descendants and relatives of those lost in the plane wreckages, the RAAF, wreck finders, recreational divers, members of the public, the RSL District President, the Australian Hydrographic Service, community advisory bodies, a World War 2 historian and the Queensland Seafood Industry Association on the proposed amendment. Feedback was received indicating that those consulted were generally in support of the amendments being progressed.

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. 16073).

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.

**Authority:** Subsection 66(1) of the  
*Great Barrier Reef Marine  
Park Act 1975*

**Details of the proposed Great Barrier Reef Marine Park Amendment (Special Management Areas) Regulation 2015**

**Regulation 1 – Name**

This regulation provides that the title of the Regulation is the *Great Barrier Reef Marine Park Amendment (Special Management Areas) Regulation 2015*.

**Regulation 2 – Commencement**

This regulation sets out the timetable for the commencement of the provisions of the Regulation. The Regulation commences on the day after it is registered on the Federal Register of Legal Instruments.

**Regulation 3 – Authority**

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

**Regulation 4 – Schedules**

This regulation provides that each instrument specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms.

**Schedule 1 – Amendments**

**Item [1] at the end of regulation 45**

Item 1 includes a new class of SMA in the list in regulation 45 of the Principal Regulations, being the Maritime Cultural Heritage Protection SMA (MCHP SMA).

**Item [2] after regulation 65B**

***66 Maritime Cultural Heritage Protection SMA—declaration***

Item 2 inserts regulation 66 into the Principal Regulations, declaring two areas of the Great Barrier Reef Marine Park (the Marine Park) to be MCHP SMAs. The geographical coordinates describing the two areas is contained in a table (table 66) in regulation 66. The declared MCHP SMAs comprise two 100 hectare sites in separate areas of the Marine Park, with each site containing the wreck of a Royal Australian Air Force (RAAF) Catalina aircraft (RAAF Catalina A24-24 and RAAF Catalina A24-25).

***66A Maritime Cultural Heritage Protection SMAs—special management provisions***

Item 2 inserts regulation 66A into the Principal Regulations, which sets out the special management provisions that are to apply to the MCHP SMAs.

Subregulation 66A(1) provides definitions for terms which are used in subregulations 66A(2) – (5)).

Subregulations 66A(2) – (5) prohibit certain conduct in MCHP SMAs. These prohibitions are subject to the exceptions in Part 5 of the Zoning Plan, which allow zones in the Marine Park to be used or entered in certain circumstances.

Under subregulation 66A(2), persons are prohibited from entering a wreck or approaching within 100 metres of a wreck in an MCHP SMA without the written

permission of the Authority. The reason for this prohibition is to protect any human remains contained in the wrecks and prevent damage to the archaeological fabric of the wrecks.

An exception to the prohibition in subregulation 66A(2) is where a non-submersible vessel or aircraft is transiting through an MCHP SMA. In such a situation, the non-submersible vessel or aircraft can approach within 100 metres of a wreck, so as to allow it to transit through the area along the surface of the water or in the airspace above the water. However, non-submersible vessels must comply with the requirements of subregulation 66A(3) (discussed below) at all times while transiting through the area.

Under subregulation 66A(3), a person must not operate a vessel in an MCHP SMA without the permission of the Authority other than for the purpose of transiting through the area to a place outside the area. This requirement will have the effect of prohibiting vessels from stopping in the area. This is intended to prevent illegal fishers from avoiding prosecution by simply stowing fishing equipment when they see a vessel approaching and claiming to only be stopped in the area.

Where a vessel is transiting through an MCHP SMA, a person operating the vessel will be required to travel by the most direct and reasonable route pursuant to paragraph 66A(3)(a). This is intended to prevent potential illegal fishers from having the ability to claim they are merely transiting through an MCHP SMA when they are clearly spending an unnecessary amount of time in the area.

A person operating a vessel that is transiting through an MCHP SMA will be required to keep the vessel underway at all times pursuant to paragraph 66A(3)(b). This is intended to prevent potential illegal fishers who stop their vessels in an MCHP SMA from claiming that they are transiting through the area.

Subregulation 66A(4) prohibits a person from anchoring (or attempting to anchor) a vessel, or deploying a vessel's anchoring equipment, in an MCHP SMA without the permission of the Authority. This prohibition is intended to prevent damage to wrecks caused by anchoring.

A 'written permission' of the Authority referred to in proposed subregulations 66A(2), (2), (3) and (4) is a permission to which Part 2A of the Principal Regulations applies (see paragraph 88(1)(b) of the Principal Regulations). It is intended that the granting of a permission for the actions referred to in those subregulations would only be warranted in very limited circumstances, which are set out in Item 3.

Under subregulation 66A(5), persons are prevented from undertaking fishing or collecting. The definition of 'fishing or collecting' in proposed subregulation 66A(1) adopts the meaning given by the Zoning Plan. The definition of 'fishing or collecting' in the Zoning Plan is broad and includes activities such as trawling and trolling. Prohibiting these activities in MCHP SMAs is necessary to protect any human remains contained in the wrecks and prevent damage to the archaeological fabric of the wrecks.

Where a person engages in conduct that contravenes subregulations 66A(2), (3), (4) or (5), the offence and civil penalty provisions under sections 38BA and 38BB of the

*Great Barrier Reef Marine Park Act 1975* apply. Subregulation 66A contains a note that alerts readers to these offence and civil penalty provisions.

**Item [3] after regulation 88V**

Item 3 inserts regulation 88VA into the Principal Regulations, which is intended to clarify the circumstances in which the Authority may grant a permission to use or enter an MCHP SMA.

Subregulation 88VA(2) prohibits the Authority from granting a permission to use or enter an MCHP SMA other than for cultural heritage purposes. Subregulation 88VA(1) provides definitions for terms which are used in subregulation 88VA(2), including a definition for 'cultural heritage purposes'. This definition clarifies that 'cultural heritage purposes' means carrying out cultural heritage research or monitoring; works to stabilise the wrecks; photography, filming or sound recording to improve public education and understanding of cultural heritage; ceremonial activities or any other activity incidental to the activities listed. Incidental activities to those listed will be, for example, anchoring a vessel near the wrecks and diving in the wrecks in order to carry out one of the listed activities, such as cultural heritage research.

**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 (Special Management Areas) Regulation 2015***

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 amends the *Great Barrier Reef Marine Park Regulations 1983* (the Principal Regulations) to add a new type of Special Management Area, the Maritime Cultural Heritage Protection Special Management Area (the MCHP SMA) and declare two 100 hectare areas in the Great Barrier Reef Marine Park (the Marine Park) to be MCHP SMAs. The Regulation includes specific management provisions for the MCHP SMAs regulating approaching and entering the wrecks, operating vessels, anchoring vessels, fishing and collecting.

The purpose of the Regulation is to protect cultural heritage in general, and in particular, the heritage value of two Royal Australian Air Force Catalina aircraft wrecks (RAAF Catalina A24-24 and RAAF Catalina A24-25) which together contain the remains of 25 deceased military personnel. The human remains and archaeological fabric of the wrecks are currently being exposed to damage caused by anchoring, fishing and trawling. It is intended that the Regulation will prevent further damage by prohibiting persons from undertaking the following activities in the MCHP SMAs:

- Entering a wreck without the permission of the Authority;
- Approaching within 100 metres of a wreck without the permission of the Authority (except where passing over a wreck in a non-submersible vessel or aircraft);
- Operating a vessel without the permission of the Authority other than for the purpose of transiting through the area;
- Anchoring or attempting to anchor a vessel, or deploying the vessel's anchoring equipment, without the written permission of the Authority; or
- Undertaking fishing or collecting.

Permissions to use or enter MCHP SMAs will only be able to be granted by the Authority for cultural heritage purposes, which includes cultural heritage research and monitoring activities, filming or sound recording to improve public education and understanding of cultural heritage and ceremonial activities,

Where a person engages in conduct that contravenes the Regulation, the criminal offence and civil penalty provisions under sections 38BA and 38BB of the *Great*

*Barrier Reef Marine Park Act 1975* (the Act) apply. The amendments effectively extend the scope of these criminal offence and civil penalty provisions by creating new circumstances in which they apply.

Under subsection 38BA(1) of the Act a person commits an offence if they engage in conduct in a zone of the Marine Park, the conduct is prohibited under the zoning plan or requires permission, and no such permission is held. The fault element applicable to the conduct is intention. Strict liability attaches to the jurisdictional elements of the offence. The penalty for an aggravated offence is imprisonment for 3 years or 2,000 penalty units (or both) or where there are no circumstances of aggravation the penalty is 1,000 penalty units (circumstances of aggravation are set out in section 38GA of the Act).

Where intention cannot be established in relation to the conduct the strict liability offence in subsection 38BA(3) of the Act can be relied on. This offence provision is identical to the offence provision in subsection 38BA(1) except that strict liability attaches to both the conduct and the jurisdictional elements of the offence. The penalty for the offence is 60 penalty units.

Under section 38BB of the Act, a person must not engage in conduct in a zone of the Marine Park that is prohibited under a zoning plan, or requires permission and no such permission is held. The civil penalty for a contravention of section 38BB is 5,000 penalty units for an aggravated contravention by an individual, 2,000 penalty units for a contravention by an individual in any other case, 50,000 for an aggravated contravention by a body corporate or 20,000 penalty units for a contravention by a body corporate in any other case. Circumstances of aggravation are set out in section 38GB.

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

### **Human rights implications**

The following rights are engaged by the Regulation:

- The right to take part in cultural life (International Covenant on Economic, Social and Cultural Rights ('ICESCR'), article 15(1)(a));
- The presumption of innocence (International Covenant on Civil and Political Rights ('ICCPR'), article 14(2));
- Criminal process rights (ICCPR, article 14); and
- The right to freedom of movement (ICCPR, article 12).

#### *The Right to Take Part in Cultural Life*

The Regulation engages and promotes the right to take part in cultural life. Article 15(1)(a) of the ICESCR recognises this right, and article 15(2) provides that the steps to be taken to achieve the full realisation of this right include '*those necessary for the conservation, the development and the diffusion of science and culture*'. Through

conserving the human remains and archaeological fabric of two Royal Australian Air Force Catalina aircraft wrecks, the Regulation promotes this right.

### *The Presumption of Innocence*

The Regulation engages the presumption of innocence in Article 14 of the ICCPR. Article 14(2) provides that *'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'*. The United Nations Human Rights Committee has stated in General Comment 32 that this imposes the burden of proving the charge on the prosecution. The imposition of strict liability in section 38BA engages the right to be presumed innocent in that it allows for the imposition of criminal liability without the need to prove fault.

Strict liability offences will not be inconsistent with the presumption of innocence provided that they pursue a legitimate aim and are reasonable, necessary and proportionate to that aim. The restriction the Regulation places on the presumption of innocence is necessary, reasonable and proportionate in the circumstances for the reasons set out below.

### Necessity

For the jurisdictional elements in both subsections 38BA (1) and (3), strict liability is necessary because it will be difficult to prove that a person knew (or was reckless as to the fact that) they were in a zone, that under the zoning plan for the zone the conduct is prohibited or requires permission, and no such permission is held.

The application of strict liability to the conduct element in subsection 38BA(3) is necessary because it will often be impossible for the prosecution to satisfy subsection 38BA(1) by proving beyond reasonable doubt that a person intended to engage in conduct. In particular, it would be difficult to establish that a person intended to approach within 100 metres of a wreck or intended not to travel through an area by the most direct and reasonable route.

For subsection 38BA(3), the punishment of conduct that contravenes the Regulation without the need to prove fault is likely to significantly enhance the effectiveness and efficiency of the Authority's enforcement regime by deterring that type of conduct in the MCHP SMAs and by providing a broader spectrum of enforcement options. It will allow minor and 'clear cut' contraventions to be dealt with expeditiously, with a penalty more suited to the nature of the contravention.

### Reasonableness

It is intended that announcements will be made and information placed on the Authority's website to notify Marine Park users of the new requirements. It is reasonable to expect persons who voluntarily enter an area such as the Marine Park accept that their conduct will be subject to regulation and be required to demonstrate why they are not at fault where their conduct contravenes such regulations.

Despite the imposition of the strict liability offence provision, an accused person's right to a defence is maintained. In the event of an emergency situation where it is necessary to engage in conduct contrary to the Regulation, a person would have a



defence under section 5.1 of the *Great Barrier Reef Marine Park Zoning Plan 2003* (Zoning Plan). Section 5.1 allows for a zone in the Marine Park to be used or entered without permission in an emergency for certain purposes. In addition, a person would have access to the defence under the *Criminal Code Act 1995* of mistake or ignorance of fact. 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.

### Proportionality

Although the penalty for an aggravated offence under subsection 38BA(1) is quite severe (imprisonment for 3 years or 2,000 penalty units or both) this is proportionate in light of the serious nature of the applicable circumstances of aggravation set out in section 38GA. Where there are no circumstances of aggravation, the penalty under subsection 38BA(1) is 1,000 penalty units, which is appropriate given the potential damage to wrecks that could occur where an offence is committed. In addition, the application of strict liability to the jurisdictional elements does not go to the essence of the criminality being addressed.

Contravention of the strict liability offence provision in section 38BA(3) of the Act is only punishable by a fine of 60 penalty units, which is proportionate with the restriction on the presumption of innocence because it is significantly lower than the penalty that would apply where the element of intention is established by the prosecution in relation to the conduct.

### *Criminal Process Rights*

By extending the application of the civil penalty provisions in section 38BB of the Act, the Regulation may potentially engage the criminal process rights under article 14 of the ICCPR if the civil penalty provisions could be classified as 'criminal' under human rights law. Although the civil penalty provisions are labelled as 'non-criminal' under domestic law, this is not determinative and the nature and severity of the provisions must be assessed.

### Nature or Purpose of the Penalty

Under section 38BB proceedings are instituted by a public authority (being the Authority) with statutory powers of enforcement and a finding of culpability precedes the imposition of a penalty. This might make the penalties appear 'criminal' however, these factors are unlikely to be decisive.

Although the penalties under section 38BB are deterrent in nature and appear on their face to apply to the general public, in practice they only apply to a specific group (being persons who undertake activities in the Marine Park) in a regulatory capacity. In light of these factors it appears that the penalties are not criminal in nature or purpose.

### Severity of the Penalty

On the face of it, the pecuniary penalty that can be imposed for a contravention of section 39BB appears to be quite high. For individuals, the pecuniary penalty that may be imposed is 5,000 penalty units for an aggravated contravention or 2,000

penalty units in any other case. The pecuniary penalty is higher than the pecuniary penalty that may be imposed for a corresponding criminal offence, which is only 2,000 penalty units for an aggravated contravention or 1,000 penalty units in any other case.

Despite this, the pecuniary penalty is justified taking into account the fact that the Marine Park requires significant regulation to protect matters such as the preservation of cultural heritage. The penalty is proportionate to the potential damage to wrecks that could occur due to a contravention of the Regulation and it does not carry a sanction of imprisonment for non-payment. These factors make the penalty less likely to be criminal.

### Assessment of the Provisions

The provisions are not classified in Australian law as criminal, they have a purpose which is not criminal, and although the penalties are relatively high, they are justified in the circumstances and do not carry a sanction of imprisonment for non-payment. Accordingly, the provisions should not be classed a criminal under human rights law.

### *The Right to Freedom of Movement*

The Regulation engages the right to freedom of movement in article 12 of the ICCPR. Article 12(1) of the Covenant relevantly provides that '*everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement...*'. This right is restricted in a minor way by the Regulation because persons are prohibited from entering and approaching wrecks and operating vessels for non-transiting purposes in certain areas of the Marine Park without the permission of the Authority.

The restrictions in the Regulation on the right to freedom of movement are necessary to protect public order in the sense that they will help to preserve Australian cultural heritage and will prevent interference with war graves. Given the historic significance of the Catalina aircraft wrecks and the damage that will continue to occur without the Regulation, the restrictions imposed are proportionate to the need for protection. The restrictions are the least intrusive means of achieving protection because they still allow for persons to enter the MCHP SMAs and only prohibit conduct that would be likely to cause damage to the wrecks.

### **Conclusion**

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