

EXPLANATORY STATEMENT

Select Legislative Instrument No. 71, 2015

Issued by the Authority of the Minister for the Environment

Great Barrier Reef Marine Park Act 1975

*Great Barrier Reef Marine Park Amendment (Capital Dredge Spoil Dumping) 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:

- prohibit the Authority from granting permissions for the dumping of more than 15,000 cubic metres of capital dredge spoil material in the Great Barrier Reef Marine Park (Marine Park); and
- revoke an existing permission granted by the Authority that, if not revoked, would allow in future the uncontained disposal of 3,000,000 cubic metres of capital dredge spoil material in the Marine Park.

One identified risk to the Great Barrier Reef is the disposal and re-suspension of dredge spoil material, which can potentially impact water quality, hydrodynamics and benthic fauna and flora.

The purpose of the Regulation is to:

- improve water quality in the Marine Park;
- increase protection and conservation of the plants and animals of the Marine Park, including protected species; and therefore,
- improve the Great Barrier Reef's overall World Heritage values

by decreasing the potential impacts of dumping of capital dredge spoil material.

Consultation

From 2013 to 2015 the issue of disposal of dredge material was the subject of significant public consultation and advice to the Authority. This included a 13 week formal public consultation period for the *Great Barrier Reef Region Strategic Assessment*, a 6 week formal public consultation period on the draft *Reef 2050 Long Term Sustainability Plan* and the

provision of advice to the Authority by members of reef and marine advisory committees. Through these processes the Authority received submissions and advice relating to the management of the impacts of dredge spoil disposal, which informed the development of the Regulation.

Prior to the finalisation of the Regulation, the Authority carried out more detailed consultation on the specifics of the Regulation. This involved a formal public consultation period from 16 March 2015 to 27 March 2015. A description of the draft policy and an invitation to provide submissions during the consultation period was given through the following channels:

- the Authority's website;
- media releases issued by the Authority and the Minister for the Environment;
- the sending of targeted consultation letters and emails to key stakeholders such as members of the tourism industry, recreational boating clubs, Traditional Owners, government agencies, ports and resources sectors, scientists, conservation groups and members of Reef and local marine advisory committees.

A total of 7,725 submissions were received in response to the March 2015 public consultation (96 individual submissions and 7,629 submissions in response to three types of campaigns run by the World Wildlife Fund, Fight for the Reef and Greenpeace).

The submissions are publicly available on the Authority's website (apart from 1 submission which cannot be released for privacy reasons). Common themes raised in the submissions included concerns that the limitation on dumping should extend beyond the Marine Park, should apply to more types of dredge spoil material, should not contain an exception for the dumping of amounts of capital dredge spoil material less than 15,000 cubic metres and should apply to the activity of dredging. On the other end of the scale, some submissions raised concerns that limiting dumping in the Marine Park could result in worse environmental outcomes caused by increased dumping in coastal areas, that there should be an exception for dumping of volumes of capital dredge spoil material larger than 15,000 cubic metres and that dumping should not be limited where the impacts can be appropriately managed and are supported by the best available science.

No significant changes were made to the Regulation following the formal public consultation. A more detailed description of the consultation that was carried out and the outcomes of the consultation are contained in the Regulation Impact Statement.

Regulatory Assessment

The Authority carried out a comprehensive regulatory impact assessment. A copy of the Regulation Impact Statement is included as supporting documentation to this Explanatory Statement.

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 Great Barrier Reef Marine Park Amendment (Capital Dredge Spoil Dumping) Regulation 2015

Regulation 1 – Name

This regulation provides that the title of the Regulation is the *Great Barrier Reef Marine Park Amendment (Capital Dredge Spoil Dumping) 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] after regulation 88R

Item 1 inserts regulation 88RA into the Principal Regulations, which limits the Authority's ability to grant a permission for the dumping of capital dredge spoil material in the Marine Park in certain circumstances.

Subregulation 88RA(1) provides that the Authority must not grant a permission for an activity if it is satisfied that the activity would constitute or involve prohibited dumping.

Pursuant to subregulation 88RA(2), the Authority will be prevented from granting a new permission for prohibited dumping regardless of whether the application for the permission was received prior to or after the commencement of the Regulation.

Prohibited dumping is defined in subregulation 88RA(3). Prohibited dumping means dumping an amount of capital dredge spoil material in the Marine Park that prior to its excavation was, in situ, more than 15,000 cubic metres in volume. 'In situ' is a well-known term used in the dredging industry which means 'in place' or 'on site'. Accordingly, for the purposes of the definition of 'prohibited dumping', the volume of the capital dredge spoil material proposed to be dumped in the Marine Park is to be determined as it lies on the sea floor prior to it being excavated.

Subregulation 88RA(4) clarifies that prohibited dumping does not include burying a pipe, cable or tube with capital dredge spoil material if the material had been excavated to create the trench in which the pipe, cable or tube is laid. This is intended to cover things such as critical infrastructure, including pipes and cables for (but not limited to) water, telecommunications and electricity.

Capital dredge spoil material is defined in subregulation 88RA(5). The definition is intended to capture material that is dredged as a result of activities to create new areas or enlarge existing areas as opposed to simply maintaining an existing area. The definition captures (among other things) materials dredged for the purposes of developing new or existing port facilities, barge ramps and marinas.

Paragraph 88RA(6)(a) clarifies that material dredged for maintaining existing areas in a usable state does not fall within the definition of capital dredge spoil material. This is intended to capture material from what is commonly referred to in the dredging industry as 'maintenance dredging'. It is also intended to capture relocated material (for example, material relocated as a result of a storm or cyclone) that is dredged in order to maintain a waterway in a navigable state.

Paragraph 88RA(6)(b) excludes material dredged for protecting human life or property from the definition of capital dredge spoil material. This is intended to allow for dumping to be permitted in emergency situations, such as following a severe storm or cyclone where it may be necessary to replace eroded material in order to protect coastal properties and infrastructure.

Item [2] at the end of Division 2A.8

Item 2 inserts regulation 88ZVA into the Principal Regulations, which revokes the permission granted by the Authority on 31 January 2014 to North Queensland Bulk Ports Corporation Limited. Where permissions have been granted by the Authority for prohibited dumping prior to the commencement of the Regulation and the dumping has not yet been carried out, it is intended the Regulation will revoke these permissions except where the proposed dumping will be a contained disposal (a disposal within an engineered structure designed to provide for the required storage volume). The permission that is revoked by the Regulation is the only existing permission for uncontained prohibited dumping of capital dredge spoil material where the proposed dumping has not yet occurred.

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 (Capital Dredge Spoil Dumping) 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:

- prohibit the Authority from granting permissions for the dumping of capital dredge spoil material in the Marine Park in certain circumstances; and
- revoke existing an permission that, if not revoked, would allow in future the uncontained disposal of 3,000,000 cubic metres of capital dredge spoil material in the Marine Park.

The purpose of the Regulation is to:

- improve water quality in the Marine Park;
- increase protection and conservation of the plants and animals of the Marine Park, including protected species; and therefore,
- improve the Great Barrier Reef’s overall World Heritage values

by decreasing the potential impacts of dumping of dredge spoil material.

Where a person carries out works in the Marine Park, such as dumping of dredge spoil material, without the permission of the Authority, 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 do not extend the scope of these criminal offence and civil penalty provisions because they do not create any new circumstances in which they apply. However, the amendments may indirectly increase the potential for more offences to be committed in the Marine Park by limiting the circumstances in which a permission for dumping may be granted.

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 a 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 the 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

Right to Health

Article 12(1) of the International Covenant on Economic, Social and Cultural Rights provides for the right to the enjoyment of the highest attainable standard of physical and mental health. The United Nations Human Rights Committee has stated in General Comment 14 that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, including a healthy environment. The Regulation promotes the right to a healthy environment by increasing the protection and conservation of the Marine Park.

Presumption of Innocence

The Regulation may indirectly engage the presumption of innocence recognised by the International Covenant on Civil and Political Rights ('ICCPR'), article 14(2). 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 of the Act 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.

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 prohibited dumping in the Marine Park 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 prohibition on the granting of permissions. 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. 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 the Marine Park that could occur where prohibited dumping of capital dredge spoil material occurs. 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 dredge spoil dumping 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 389BB appears to be quite high. For individuals, the pecuniary penalty that may be imposed on an individual 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 it from damage caused by unpermitted dumping. The penalty is proportionate to the potential damage to the Marine Park that could occur due to unpermitted dumping and it does not carry a sanction of imprisonment for non-payment. In addition, persons who engage in the activity of dredge spoil dumping should know what they are and are not able to do in the Marine Park as part of engaging in the dredging industry. 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.

Conclusion

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