

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the Environment

Great Barrier Reef Marine Park Act 1975

Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021

Legislative Authority

The *Great Barrier Reef Marine Park Act 1975* (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).

Under subsection 66(1) of the Act, 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.

Background

No-anchoring areas throughout the Marine Park are designed to protect sensitive habitats such as coral communities from anchor damage. Generally vessels may enter a no-anchoring area, but an anchor must not be dropped in the area.

Presently there are no-anchoring areas located in the Marine Park in the Cairns Planning Area, the Hinchinbrook Planning Area and the Whitsunday Planning Area (the Planning Areas). The rules applicable to these no-anchoring areas are contained in the *Cairns Area Plan of Management 1998*, *Hinchinbrook Plan of Management 2004* and *Whitsundays Plan of Management 1998*.

Contravention of a plan of management is a strict liability offence pursuant to section 234 of the *Great Barrier Reef Marine Park Regulations 2019* (the Principal Regulations). Accordingly, if there is a contravention of the rules applicable to the no-anchoring areas located in the Planning Areas, the strict liability offence under section 234 of the Principal Regulations applies. This offence does not apply to areas of the Marine Park outside of the Planning Areas.

Pursuant to paragraph 5(2)(b) of the Principal Regulations the Authority may, by notifiable instrument, declare an area described in the declaration to be a no-anchoring area. On 21 May 2021 the Authority made the *Great Barrier Reef Marine Park (Declaration of No-Anchoring Areas –Townsville/Whitsunday Management Area) Notifiable Instrument 2021* (the 2021 Declaration) which, inter alia, declares no-anchoring areas in other areas of the Marine Park outside of the Planning Areas. The 2021 Declaration takes effect on the date of commencement of the *Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021* (the Amendment Regulations). The matters declared in the 2021 Declaration are therefore contingent upon the commencement of the Amendment Regulations. The notifiable instrument is registered on the Federal Register of Legislation and may be accessed at no cost at www.legislation.gov.au.

Purpose

The primary objective of the Amendment Regulations is to ensure that there are enforceable rules capable of applying to no-anchoring areas declared under paragraph 5(2)(b) of the Principal Regulations in all areas of the Marine Park, as the existing offence provision under section 234 of the Principal Regulations is only capable of applying in the Planning Areas.

The provisions of the Amendment Regulations achieve this objective by amending the Principal Regulations so that new strict liability offence and infringement notice offence provisions are created for anchoring in a declared no-anchoring area.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Amendment Regulations and the notes on clauses are set out at **Attachment A**.

Commencement

The Amendment Regulations will commence on the day after registration.

Consultation

Prior to the 2021 Declaration being made, reef protection markers were installed throughout the Marine Park to delineate the boundaries of the no-anchoring areas that are now reflected in the 2021 Declaration. Local stakeholders were consulted prior to the installation of these markers with the understanding that the marked areas are sensitive habitats, and therefore anchoring is not a desirable activity due to the high likelihood of damage to coral from dropping an anchor.

The Amendment Regulations have been prepared in consultation with the Commonwealth Director of Public Prosecutions (CDPP). Comments made by staff of CDPP relating to prosecution and enforcement were taken into account in the development of the Amendment Regulations.

Regulatory Assessment

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 number 42471).

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in **Attachment B**.

Details of the *Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021*

Section 1 – Name

This section provides that the title of the Amendment Regulations is the *Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021*.

Section 2 – Commencement

This section sets out the timetable for the commencement of the provisions of the Amendment Regulations. The Amendment Regulations commence on the day after registration.

Section 3 – Authority

This section provides that the Amendment Regulations are made under the Act.

Section 4 – Schedules

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

Schedule 1 – Amendments

Item [1] Subsection 5(1) (definition of no anchoring area)

Prior to the Amendment Regulations being made, the definition contained in subsection 5(1) of the Principal Regulations provided that a no-anchoring area:

'means an area described in:

(a) Schedule 3; or

(b) without limiting paragraph (a), if a declaration is in force under paragraph (2)(b) of this section—the declaration, as in force from time to time.'

Pursuant to paragraph 5(2)(b) of the Principal Regulations the Authority may, by notifiable instrument, declare an area described in the declaration to be a no-anchoring area.

The 2021 Declaration declares no-anchoring areas in accordance with paragraph 5(2)(b) of the Principal Regulations. For ease of reference, the no-anchoring areas described in Schedule 3 of the Principal Regulations (which are all located in the Whitsunday Planning Area) are now described in the 2021 Declaration, along with other additional no-anchoring areas (which are located outside of the Whitsunday Planning Area).

It is no longer necessary to describe no-anchoring areas in Schedule 3 of the Principal Regulations, as the descriptions for these no-anchoring areas have all been consolidated

with the descriptions for other no-anchoring areas in a single instrument (the 2021 Declaration). Item 1 therefore repeals and substitutes the definition of no-anchoring area to remove the reference to Schedule 3 (Schedule 3 is also repealed –see explanation of Item 6 below).

Under the new definition, a no-anchoring area:

‘means an area described in a declaration under paragraph (2)(b) of this section, as in force from time to time.’

The reference to a declaration ‘as in force from time to time’ is allowed by subsection 66(13) of the Act, which authorises the Principal Regulations to make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

Any declarations made under paragraph 5(2)(b) of the Principal Regulations are registered as notifiable instruments on the Federal Register of Legislation. These declarations may be accessed at no cost and used by members of the public from the Federal Register of Legislation website www.legislation.gov.au. As at the date of commencement of the Amendment Regulations, there is only one declaration in force, being the 2021 Declaration.

Item [2] Section 166

Section 166 of the Principal Regulations contains a simplified outline of Part 6 (Removal of property and various offences). In light of the new strict liability offence provisions being inserted into Part 6 (see explanation of Item 3 below), Item 2 amends the simplified outline of Part 6 to acknowledge this.

Item [3] At the end of Part 6

Two new strict liability offence provisions are inserted by Item 3 at the end of Part 6 of the Principal Regulations, as subsections 171A(1) and (2).

The new provision in subsection 171A(1) provides that a person commits an offence of strict liability if the person drops an anchor for a vessel, an aircraft or any other facility in a no-anchoring area (other than a no-anchoring area that is in the Whitsunday Planning Area). The penalty for a contravention of the offence in subsection 171A(1) is 50 penalty units.

In addition to describing the no-anchoring areas previously contained in Schedule 3 of the Principal Regulations (which are all located within the Whitsunday Planning Area), the 2021 Declaration also describes no-anchoring areas in other areas of the Marine Park. Subsection 171A(1) creates a new strict liability offence provision applicable to anchoring in no-anchoring areas outside of the Whitsunday Planning Area, which complements the 2021 Declaration (and any future declarations) to the extent that such declarations declare no-anchoring areas outside of the Whitsunday Planning Area. The new offence provision does not apply to no-anchoring areas in the Whitsunday Planning Area because there is already a strict liability offence in section 234 of the Principal Regulations which, when read in conjunction with subclause 2.12(3) of the *Whitsundays Plan of Management 1998*, is applicable to the contravention of no-anchoring rules that apply in the Whitsunday Planning Area.

The new provision in subsection 171A(2) provides that the master of a vessel commits an offence of strict liability if any person on board the vessel drops an anchor for the vessel in a no-anchoring area. The penalty for a contravention of the offence in subsection 171A(2) is 50 penalty units. This additional offence has been included due to the important role that the master of a vessel has in ensuring the vessel is not operated in a way that causes damage to the marine environment, including by ensuring persons on board the vessel do not drop an anchor in a no-anchoring area.

The references to 'dropping an anchor' in both subsections 171A(1) and (2) are intended to ensure that where vessels or other facilities are equipped with dynamic positioning systems, a person will not be in contravention of the offences when using these systems at a no-anchoring area. This is because dynamic positioning systems can allow a vessel to remain stationary in an area without the need to physically drop an anchor, and as a result, no anchor damage to sensitive habitats is caused.

The Authority is aware that some operators (and, in particular, tourism operators) of vessels, aircraft and other facilities attempt to avoid causing anchor damage to sensitive habitats by swimming down to the ocean floor with an anchor and placing the anchor in a location where it is less likely to cause damage. Whilst the Authority acknowledges this responsible reef practice, it should be noted that this manner of anchoring is not allowed in a no-anchoring area, and would constitute a contravention of the no-anchoring rules that apply in the Marine Park.

Regarding the reference to 'facility' in the new subsection 171A(1), this phrase is defined in subsection 5(1) of the Principal Regulations as having the same meaning as it has in subsection 3A(9) of the Act. As at the date of commencement of the Amendment Regulations, that definition provided that a facility '*includes a building, a structure, a vessel, goods, equipment or services.*' Whilst it is acknowledged that not all types of facilities are capable of dropping an anchor in a no-anchoring area, by using the phrase 'facility' in section 171A, it is intended that the offence provision will be capable of having a broad interpretation and will apply to any facility that drops an anchor. Use of this phrase will also achieve consistency with the equivalent no-anchoring provision in section 2.12 of the *Whitsundays Plan of Management 1998*.

The offence provisions are drafted to be consistent with *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The offences are appropriately strict liability offences as they support the integrity of the regulatory scheme for the environment. It is also important for the offences to be strict liability offences so that it is appropriate to bring them within the existing infringement notice scheme in accordance with Item 5 of the Amendment Regulations. It is reasonable for persons who use or enter the Marine Park to expect there will be rules that apply and that they need to be familiar with the rules when accessing and undertaking activities in the Marine Park. Marine Park users can therefore be considered to be placed on notice to guard against the possibility of a contravention. The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.

Item [4] Subsection 243(1) (table item 9)

The table in subsection 243(1) of the Principal Regulations sets out the infringement notice offences for the Principal Regulations and the corresponding infringement notice penalties. Subsection 243(1) provides that an offence against a provision of the Principal Regulations mentioned in column 1 of an item in the table set out in the subsection is an infringement notice offence. The penalty (being the infringement notice penalty) for the offence is the penalty mentioned in column 2 of the item.

Item 4 is intended to correct a minor typographical matter that was identified during the drafting of the Amendment Regulations, in that the reference in table item 9, which lists the four offences in section 171, should be separated by the phrase 'or' (rather than the phrase 'and') so that there is no doubt that any of those offences constitute an infringement notice offence. Item 4 therefore substitutes the phrase 'and' with the phrase 'or', which is more consistent with the manner in which other items in the table have been drafted.

Item [5] Subsection 243(1) (after table item 9)

Item 5 inserts a new item into the table in section 243(1) of the Principal Regulations, so that an offence against either subsection 171A(1), or subsection 171A(2), is an infringement notice offence. The infringement notice penalty for such an offence is 3 penalty units. This penalty aligns with the infringement notice penalties imposed under the Principal Regulations for similar offences (e.g. the infringement notice offence in table item 23 for a contravention of a plan of management) and is considered by the Authority to be at a level appropriate for environmental regulation.

Item [6] Schedule 3

As explained above in relation to Item 1, it is no longer necessary to describe no-anchoring areas in Schedule 3 of the Principal Regulations, as the descriptions for these no-anchoring areas have all been consolidated with the descriptions for other no-anchoring areas in a single instrument (the 2021 Declaration). Item 6 therefore repeals Schedule 3 (and the definition of no-anchoring area has been updated as a consequence, to remove the reference to Schedule 3 (see explanation of Item 1 above).

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 (No-Anchoring Areas) Regulations 2021

This disallowable legislative instrument 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 disallowable legislative instrument

No-anchoring areas throughout the Marine Park are designed to protect sensitive habitats such as coral communities from anchor damage. Generally vessels may enter a no-anchoring area, but an anchor must not be dropped in the area.

The primary objective of the *Great Barrier Reef Marine Park (No-Anchoring Areas) Regulations 2021* (the Amendment Regulations) is to ensure there are enforceable rules capable of applying to no-anchoring areas declared under paragraph 5(2)(b) of the *Great Barrier Reef Marine Park Regulations 2019* (the Principal Regulations) in all areas of the Marine Park.

The provisions of the Amendment Regulations achieve this objective by amending the Principal Regulations so that new strict liability offence and infringement notice offence provisions are created for anchoring in a declared no-anchoring area.

Human rights implications

The Amendment Regulations engage the following rights:

- The right to health (Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR));
- The right to freedom of movement (Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR));
- The right to the presumption of innocence (Article 14(2) of the ICCPR); and
- The right to a fair trial and fair hearing rights (Article 14(1) of the ICCPR).

The right to health

Article 12(1) of the ICESCR provides for the right to the enjoyment of the highest attainable standard of physical and mental health. The United Nations Committee on Economic, Social and Cultural Rights 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 Amendment Regulations promote the right to a healthy environment by supporting the key objectives of the *Great Barrier Reef Marine Park Act 1975* (the Act). The main object of the Act set out in subsection 2A(1) “to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier

Reef” is promoted by the Amendment Regulations through the protection of sensitive habitats from anchor damage. Additionally, the Amendment Regulations promote other objects of the Act, such as allowing ecologically sustainable use of the Great Barrier Reef Region for purposes including public enjoyment and appreciation; and recreational, economic and cultural activities (subparagraphs 2A(2)(a)(i) and (iii) of the Act).

The right to freedom of movement

Article 12(3) of the ICCPR provides that the right to freedom of movement can be restricted under domestic law on grounds of (among other things) protecting public health. Laws restricting access to areas of environmental significance may be necessary to protect public health by promoting a healthy environment. In order for such a restriction to be permissible it must be reasonable, necessary and proportionate to the protection and be the least intrusive means of producing the desired result.

The Amendment Regulations place a minor restriction on freedom of movement by restricting people from anchoring vessels, aircraft and other facilities in certain parts of the Marine Park that have been declared to be no-anchoring areas. These areas have been declared only where it is considered necessary for the protection of sensitive habitats such as coral communities from anchor damage.

The restriction on freedom of movement is considered reasonable given the need to protect the environment. The restriction is necessary and proportionate as the least intrusive means of achieving protection because they still allow for persons to access the area without deploying an anchor and to anchor in other areas of the Marine Park outside of no-anchoring areas, subject to reasonable conditions to facilitate orderly and ecologically sustainable use of public resources.

Right to the presumption of innocence

Article 14(2) of the ICCPR provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. The presumption of innocence imposes on the prosecution the burden of proving the charge beyond reasonable doubt.

Strict liability offences engage and limit the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault.

The Amendment Regulations apply strict liability to the new offence provisions found in section 171A. Application of strict liability to these offences has been set with consideration to the guidelines of the Attorney-General’s Department as set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide). The penalties for the offences do not include imprisonment, and do not exceed 50 penalty units, which is consistent with the requirement in subsection 66(11) of the Act. Further, it is important for the offences to be strict liability offences so that it is appropriate to bring them within the infringement notice scheme contained in the Principal Regulations.

Strict liability offences will not be inconsistent with the right to the presumption of innocence provided that they pursue a legitimate aim and are reasonable, necessary and proportionate to that aim.

Strict liability offences are commonly used in regulatory legislation protecting the environment, such as the Principal Regulations (for example, the Principal Regulations apply strict liability to the majority of the offence provisions in Division 2.5 (Additional purposes for use or entry), Division 2.6 (Fishing and related offences), Division 3.9 (Offence provisions for permissions), Part 5 (Discharge of sewage), Part 6 (Removal of property and various offences), Part 9 (Interacting with cetaceans), Part 11 (Bareboat operations), Division 4 of Part 13 (Record-keeping and returns etc.) and Part 14 (Plan of Management enforcement provisions). The strict liability offences are for the legitimate objective of regulating conduct for the protection of the Marine Park environment. While the strict liability offences in the Amendment Regulations relate to relatively minor offences within the context of the regulatory scheme, the existence of these offences are crucial as a deterrence against potentially environmentally harmful and damaging conduct in the Marine Park. The strict liability offences also provide for more efficient and effective punitive measures and enforcement options compared to other offence provisions that may be available under the Act, especially considering that such offences attach to the Principal Regulation's infringement notice scheme. Further, the conduct that the strict liability offences apply to is such that fault – i.e. a person's intention, knowledge, recklessness or negligence – would be difficult to prove (that is, it will be difficult to prove the person intended or knew, etc. that they were in a no-anchoring area). The strict liability offence provisions are rationally connected to the legitimate objective of the primary object of the Act being to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef.

The use of strict liability is reasonable as 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. The regulated community include: tourist operators and commercial operators that are aware, or ought to be aware, of the obligations placed on them when entering or using the Marine Park; and members of the general public. The Authority regularly provides factsheets, maps and other resources to educate those industries, and the wider public, on the regulatory context in which Marine Park users must operate and act.

Despite the imposition of the strict liability offence provisions, the right of a defendant to a defence will be preserved. The existence of strict liability does not make other defences under the *Criminal Code Act 1995* (the Criminal Code) unavailable to a defendant. 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 person to anchor a vessel in a no-anchoring area 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 Criminal Code. Moreover, in the event there is a genuine misunderstanding, the defence of honest and reasonable mistake of fact is still available to a defendant under the Criminal Code.

The use of strict liability is proportionate to achieving the stated objective because the penalties are within reasonable limits and relatively small. Consequently, individuals will

not be subject to unreasonable or unduly harsh penalties taking into account the objectives of the Act.

The strict liability offences are therefore reasonable, necessary and proportionate to the aim of the Authority to protect the Marine Park, and are therefore compatible with the right to the presumption of innocence in Article 14(2) of the ICCPR.

Right to a fair trial and fair hearing rights

Article 14(1) of the ICCPR relevantly provides that “in determination of ...[a person’s] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”.

The Principal Regulations establish an infringement notice scheme whereby an infringement notice may be issued by an inspector, either in person or through the post, setting out the particulars of an alleged contravention of an offence. The infringement notice gives the person to whom the notice is issued the option to pay the fine specified in the notice in full, as an alternative to having the offence heard by a court. An infringement notice is a notice of pecuniary penalty imposed on a person. The Principal Regulations take a graduated approach to compliance and enforcement by using infringement notices to administer a proportional approach to protecting and regulating the Marine Park.

The infringement notice scheme provides that an inspector may give a person an infringement notice if they believe on reasonable grounds that the person has committed an “infringement notice offence” (Division 3 of Part 16). The majority of offences under the Principal Regulations are deemed to be an “infringement notice offence” under the Principal Regulations.

The infringement notice must be given within 12 months after the day the contravention is alleged to have taken place. The person to whom an infringement notice has been given may apply in writing to the Authority requesting a period longer than the required 28 days for the payment of the penalty. The Authority has the power to withdraw infringement notices under the Principal Regulations, and the person may also make written representations to the Authority seeking the withdrawal of a notice. An infringement notice gives the person to whom the notice is issued the option of paying the penalty set out in the notice, or electing to have the matter dealt by a court. If the person does not pay the amount in the notice, they may be prosecuted if the notice relates to an offence provision. Further, the affected person is given the opportunity to dispute an infringement notice.

The Amendment Regulations widen the scope of the existing infringement notice regime under the Principal Regulations by adding two new infringement notice offences to that regime, for anchoring in a declared no-anchoring area. The Amendment Regulations do not otherwise change the manner in which the existing infringement notice regime operates under the Principal Regulations.

The Principal Regulations promote fair trial and fair hearing rights, to the extent that aspects of the criminal trial procedure are regulated for infringement notice offences. The Principal Regulations do this by providing that:

- Within 28 days of an infringement notice being serviced on a person, the person may make submissions to the Authority about any facts or matters the person believes ought to be taken into account in relation to the alleged offence, and the Authority must take any such submissions into account;
- Evidence of an admission made by a person in such a submission is inadmissible in a proceeding against the person for the alleged offence; and
- If a person who is served with an infringement notice chooses not to pay the infringement notice penalty and is convicted of the offence, the court must not take into account the fact that the person chose not to pay the infringement notice penalty in determining the penalty to be imposed.

As a result, the rights to a fair and public hearing under Article 14(1) of the ICCPR in criminal matters are not limited by the infringement notice scheme created by the Principal Regulations. To the extent that the Amendment Regulations widen the scope of the existing infringement notice scheme, the rights to a fair trial and a public hearing remain unaffected.

Conclusion

The Amendment Regulations are compatible with human rights. To the extent that human rights are limited by the Amendment Regulations, this is done so in a way that is necessary, reasonable and proportionate.