

## **EXPLANATORY STATEMENT**

Issued by the Minister for the Environment and Water

*Great Barrier Reef Marine Park Act 1975*

*Great Barrier Reef Marine Park Amendment (No-anchoring Areas) Regulations 2024*

### **Legislative Authority**

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

Subsection 66(1) of 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.

### **Background**

The Great Barrier Reef Marine Park (Marine Park) is home to the largest natural coral reef system in the world. The Marine Park is characterised by its unique biodiversity and sensitive ecosystem.

The act of dropping an anchor from a vessel can take seconds but anchoring over sensitive habitats in the Great Barrier Reef has consequences for years to come. No-anchoring areas throughout the Marine Park are designed to protect sensitive habitats such as coral communities from anchor damage.

To minimise instances of anchor-related damage to coral and the sea floor, the Reef Authority communicates responsible reef practices, delivers protection infrastructure (such as public moorings), and applies regulatory approaches including those relating to no-anchoring areas.

Generally, vessels may enter a no-anchoring area, but an anchor must not be dropped in the area. The *Great Barrier Reef Marine Park Regulations 2019* (Principal Regulations) contain strict liability offence provisions and infringement notice provisions which apply where a person drops an anchor for a vessel in a no-anchoring area.

Prior to the Amendment Regulations being made, the definition of a 'no-anchoring area' in the Principal Regulations provided that the Reef Authority may, by notifiable instrument, describe a no-anchoring area in a declaration. In accordance with the Principal Regulations, the boundaries of all no-anchoring areas were declared by the Reef Authority in the *Great Barrier Reef Marine Park (Declaration of No-Anchoring Areas - Townsville/Whitsunday Management Area) Notifiable Instrument 2021* (2021 Declaration). However, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) have raised a scrutiny concern in that no-anchoring areas should be described in a legislative instrument (such as the Principal Regulations), and it is not appropriate to describe no-anchoring areas in a notifiable instrument (such as the 2021 Declaration).

The Committee assesses delegated legislation against a set of scrutiny principles that focus on compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight. Describing no-anchoring areas in a notifiable instrument means that the descriptions are not subject to tabling, disallowance, sunset, or scrutiny by the Committee or other parliamentary processes. This is of concern to the Committee because it means there is no form of parliamentary oversight in the making of no-anchoring areas.

## **Purpose**

The primary objective of the *Great Barrier Reef Marine Park Amendment (No-anchoring Areas) Regulations 2024* (Amendment Regulations) is to address the Committee's concern by:

1. providing that the descriptions of new no-anchoring areas are contained only in a disallowable legislative instrument, and consequentially removing the power of the Reef Authority to describe such areas in a notifiable instrument; and
2. providing for the descriptions of certain existing no-anchoring areas, previously contained in the 2021 Declaration, to instead be contained in a disallowable legislative instrument.

These objectives ensure that when no-anchoring areas are created in a disallowable legislative instrument, they receive an appropriate level of parliamentary scrutiny, including scrutiny by the Committee. Once tabled, a disallowable legislative instrument is subject to a disallowance period of 15 sitting days. During that period, a member of Parliament may put forward a motion to disallow the instrument, in whole or in part. If the motion is agreed to, the instrument is disallowed and ceases to have effect.

The Amendment Regulations achieve these objectives by amending the Principal Regulations so that the definition of a 'no-anchoring area' refers only to areas shown in a new Schedule 3 of the Principal Regulations. Additionally, certain existing no-anchoring areas have been included in the new Schedule 3. The effect of these changes is that any new no-anchoring areas will be established through amending the Principal Regulations (as a disallowable legislative instrument).

## **Regulatory Impact**

The Office of Impact Analysis was consulted in the preparation of the Amendment Regulations and advised that a policy impact analysis is not required (reference number OIA23-05610).

## **Consultation**

The Amendment Regulations have been prepared in consultation with the Commonwealth Director of Public Prosecutions and the Queensland Parks and Wildlife Services and Partnerships. Both agencies are generally supportive of the Amendment Regulations.

Because the Amendment Regulations are minor and machinery in nature and were required urgently to address scrutiny concerns raised by the Committee, no additional consultation was considered to be appropriate or reasonably practicable.

## **Details and Operation**

Details of the Amendment Regulations including commencement details are set out in Attachment A.

The Amendment Regulations are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act). The Amendment Regulations are a disallowable instrument under section 43 of the Legislation Act.

**Details of the Great Barrier Reef Marine Park Amendment (No-anchoring Areas) Regulations 2024**

**Section 1 – Name**

1. This section provides that the name of the Amendment Regulations is the *Great Barrier Reef Marine Park Amendment (No-anchoring Areas) Regulations 2024*.

**Section 2 – Commencement**

2. This section provides that the whole of the instrument commences on the day after the instrument is registered.

**Section 3 – Authority**

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

**Section 4 – Schedules**

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

**SCHEDULE 1 – AMENDMENTS**

***Great Barrier Reef Marine Park Regulations 2019***

**Items [1] and [2] Subsection 5(1) (definition of *no-anchoring area*) and Paragraph 5(2)(b)**

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 declaration under paragraph (2)(b) of this section, as in force from time to time*”; and
- paragraph 5(2)(b) of the Principal Regulations provided that the Reef Authority may, by notifiable instrument, declare an area described in the declaration to be a no-anchoring area for the purposes of the definition of ‘no-anchoring area’ in subsection 5(1).

The Amendment Regulations repeal the definition of ‘no-anchoring area’ in subsection 5(1), and paragraph 5(2)(b), and substitute the definition with:

***“no-anchoring area means an area of the Marine Park that is located, inshore of, or is enclosed by, a no-anchoring boundary line shown on a map in Schedule 3.”***

The purpose of this change is to address the scrutiny concern raised by the Committee, by ensuring that no-anchoring areas can only be described in Schedule 3 of the Principal Regulations, rather than in notifiable instruments such as the 2021 Declaration.

It is intended that the 2021 Declaration will no longer be of any effect, since the definition of ‘no-anchoring area’ in the Principal Regulations no longer refers to declarations such as the 2021 Declaration. Given that the power to make the 2021 Declaration in paragraph 5(2)(b) of the Principal Regulations is repealed pursuant to Item 2 of the Amendment Regulations, it is intended that the 2021 Declaration is impliedly repealed as a consequence.

For clarity, the definition of ‘no-anchoring area’ refers specifically to “*an area of the Marine Park...*”. This is to make it clear that any areas outside of the Marine Park which are located inshore of, or enclosed by, a no-anchoring boundary line shown on a map in Schedule 3, are not unintentionally captured in the definition of no-anchoring area. For example, onshore areas above the low water mark, and outside of the Marine Park, are not intended to be no-anchoring areas.

### **Item [3] Schedule 3-No-anchoring areas**

As explained above in relation to Items 1 and 2, the change to the definition of ‘no-anchoring area’ ensures that no-anchoring areas can only be described in Schedule 3 of the Principal Regulations. It is therefore necessary to retain certain existing no anchoring areas, previously described in the 2021 Declaration, by describing these areas in Schedule 3. Item 3 is intended to achieve this by describing the existing no-anchoring areas in the maps inserted in Schedule 3.

The following 14 existing no-anchoring areas have been inserted into Schedule 3:

1. Magnetic Island-Arthur Bay
2. Orpheus Island-Yanks Jetty
3. Bowen-Horseshoe Bay
4. Bait Reef
5. Black Island
6. Daydream Island-Sunlover’s Bay
7. Dumbell Island
8. Haslewood Island-Chalkies Beach
9. Hayman Island-Blue Pearl Bay
10. Hook Island-Caves Cove
11. Hook Island-Luncheon Bay and Manta Ray Bay
12. Langford Island
13. South Molle Island-Sandy Bay
14. Whitsunday Island-Cairn Beach

The boundaries of these no-anchoring areas remain generally unchanged. Aside from changes to rectify minor discrepancies (such as typographical errors and symbols missing in some of the map legends), and minor updates to reflect slight variances in the physical locations of

reef protection markers which have occurred over time, they are identical to the equivalent no-anchoring areas that were previously contained in the 2021 Declaration. As a result, the insertion of these no-anchoring areas into Schedule 3 is not intended to create any new rules in the Marine Park.

One minor change has been made in the map describing the boundary of the no-anchoring area for Hook Island-Luncheon Bay and Manta Ray Bay, in that a boundary line which previously ran from coordinate 1 to the coast has been removed. This line made the area appear to be two separate no-anchoring areas, which is not intended.

Other no-anchoring areas that were contained in the 2021 Declaration have not been inserted into Schedule 3. It is intended these areas will instead be managed by the State of Queensland. It is anticipated that Queensland will implement measures to restrict anchoring in these areas, equivalent to those which applied pursuant to the 2021 Declaration.

**STATEMENT OF COMPATIBILITY FOR A DISALLOWABLE LEGISLATIVE INSTRUMENT THAT RAISES HUMAN RIGHTS ISSUES**

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

***Great Barrier Reef Marine Park Amendment (No-anchoring Areas) Regulations 2024***

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

The Great Barrier Reef Marine Park (Marine Park) is home to the largest natural coral reef system in the world. The Marine Park is characterised by its unique biodiversity and sensitive ecosystem. The Marine Park is accessible to the public providing recreational and commercial utility to its visitors.

To preserve the sensitive habitats of coral communities in the Marine Park, it is necessary to regulate the anchoring of vessels in particular areas. Vessel anchors can cause significant damage to coral reefs when dropped in sensitive locations. To prevent damage to coral reefs caused by vessel anchors, the *Great Barrier Reef Marine Park Regulations 2019* (Principal Regulations) have previously established no-anchoring areas at particularly sensitive coral reef areas within the Marine Park, by delegating power to the Reef Authority to declare these areas through notifiable instruments.

For the purpose of this Statement of Compatibility with Human Rights, “vessel anchors” also includes aircraft anchors and anchors of any other facility.

Generally, vessels may enter a no-anchoring area provided that no anchor is dropped. Dropping anchor in a no-anchoring area attracts strict liability offence and infringement notice provisions under the Principal Regulations.

The *Great Barrier Reef Marine Park Amendment (No-anchoring Areas) Regulations 2024* (Amendment Regulations) recognise that because the establishment of no-anchoring areas may impact public use in areas of the Marine Park, there is a need for parliamentary oversight to ensure an appropriate balance is maintained between protecting the environmental integrity of the Marine Park with the public’s right to use it. In this regard, the Amendment Regulations restore the requirement for the establishment of no-anchoring areas to be subject to tabling, disallowance, sunseting, scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) and other parliamentary processes.

The primary objective of the Amendment Regulations is to address a concern raised by the Committee by:

1. providing that the descriptions of new no-anchoring areas are contained only in a disallowable legislative instrument, and consequentially removing the power of the Reef Authority to describe such areas in a notifiable instrument; and
2. providing for the descriptions of certain existing no-anchoring areas, previously contained in the *Great Barrier Reef Marine Park (Declaration of No-Anchoring*

*Areas - Townsville/Whitsunday Management Area) Notifiable Instrument 2021 (2021 Declaration), to be contained in a disallowable legislative instrument.*

These objectives would address the Committee's concerns by ensuring that when no-anchoring areas are created in a disallowable legislative instrument, they receive an appropriate level of parliamentary scrutiny, including scrutiny by the Committee. Once tabled, a disallowable legislative instrument is subject to a disallowance period of 15 sitting days. During that period, a member of Parliament may put forward a motion to disallow the instrument, in whole or in part. If the motion is agreed to, the instrument is disallowed and ceases to have effect.

The provisions of the Amendment Regulations achieve these objectives by amending Principal Regulations so that the definition of 'no-anchoring area' refers only to areas shown in a new Schedule 3 of the Principal Regulations. Additionally, certain existing no-anchoring areas have been included in the new Schedule 3. The effect of these changes is that any new no-anchoring areas will be established through amending the Principal Regulations (as a disallowable legislative instrument).

As all of the no-anchoring areas which the Amendment Regulations insert into Schedule 3 of the Principle Regulations already exist at law, this Statement of Compatibility has been prepared noting that there is no additional impact on human rights – rather, a continuation of an existing impact.

#### Human rights implications

The Amendment Regulations engage the following rights:

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

#### Right to health

The Amendment Regulations continue an existing positive impact on the 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 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 Authority Act 1975* (the Act). Subsection 2A(1) of the Act provides that "*the main object of [the] Act is to provide for the long term protection and conservation of the environment, biodiversity and heritage values of*



*the Great Barrier Reef Region.*” The Amendment Regulations support the main object of the Act by continuing to limit damage caused by vessel anchors on vulnerable coral reefs.

Protecting the environmental and ecological health of the Marine Park from avoidable damage will assist in ensuring the long-term preservation of coral reefs in the Marine Park. A preserved Marine Park will allow individuals to continue to use the Marine Park for recreational purposes that contribute to positive physical and mental health of Marine Park visitors.

### Right to freedom of movement

The Amendment Regulations continue an existing impact on the right to freedom of movement in a manner considered reasonable, necessary, and proportionate in order to protect the environment.

Article 12(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that everyone lawfully within the territory of a State shall have the right to liberty of movement within that territory. Article 12(3) of the ICCPR provides that this right may be restricted under domestic law on grounds of protecting public health. As outlined above, the United Nations Committee on Economic, Social and Cultural Rights has stated that the right to health includes factors that promote conditions in which people can lead a healthy life, including a healthy environment.

The Amendment Regulations do not impose any new restrictions on freedom of movement. Rather, they retain existing restrictions, with the only change being that certain existing descriptions of no-anchoring areas are being moved into a disallowable legislative instrument. The existing restrictions place a minor restriction on the freedom of movement by restricting users of the Marine Park from dropping an anchor in certain parts of the Marine Park. The number and size of the no-anchoring areas is limited to only those areas where it is considered necessary for the protection of sensitive habitats, such as reef communities, from anchor damage. Whilst restricting the use of anchors in these areas, additional public moorings have also been installed, providing an alternative option for Marine Park users as well as encouraging the mooring of vessels away from the sensitive habitats.

The existing no-anchoring areas retained through the Amendment Regulations have been identified as areas where sensitive habitats must be protected. These no-anchoring areas are not arbitrary locations where freedom of movement has been unnecessarily restricted. As mentioned above, generally, vessels will still be able to enter no-anchoring areas without limitation. Only the act of anchoring a vessel in a no-anchoring area is restricted. The right to movement over the water surface of no-anchoring areas is left undisturbed.

This minor restriction on freedom of movement is considered reasonable given the need to protect the environmental integrity of particular locations within the Marine Park. The restriction is necessary and proportionate as the least intrusive means of achieving protection because they still allow for persons 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

The Amendment Regulations continue an existing impact on the right to the presumption of innocence, as anchoring in a no-anchoring area remains a strict liability offence. The Amendment Regulations preserve the permissible impact that this strict liability offence has on the right to the presumption of innocence.

Article 14(2) of the ICCPR provides that “*everyone charged with a criminal offence shall have 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 do not impact the current strict liability offences applicable to no-anchoring areas as pursuant to the Principal Regulations. These existing offences were drafted with consideration of the Attorney-General’s Department’s guidelines as set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at the time the offences came into force. The offences do not carry a penalty of imprisonment and are limited to a maximum penalty of 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 are commonly used in regulatory legislation protecting the environment. 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 Amendment Regulations do not disturb the elements of the strict liability offences and maintain their rational connection to the legitimate objective of the main 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 Reef Authority continues to provide factsheets, maps and other resources to educate industry and the broader public on the regulatory context in which Marine Park users must operate and act. This includes providing education and resources informing Marine Park users about the existence of no-anchoring areas.

Despite the imposition of the existing strict liability offence provisions, the right of a defendant to a defence remains 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 Amendment Regulations do not alter current strict liability offences under the Principal Regulations which are reasonable, necessary and proportionate to the aim of protecting the Marine Park, and therefore remain compatible with the right to the presumption of innocence as expressed 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 Amendment Regulations continue to promote the right to a fair trial and fair hearing as established by Article 14(1) of the ICCPR. The Amendment Regulations do not affect the current infringement notice scheme as provided by the Principal Regulations. Anchoring in a no-anchoring area remains an offence subject to the infringement notice scheme.

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” pursuant to Part 16, Division 3 of the Principal Regulations. Most 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 Reef Authority requesting a period longer than the required 28 days for the payment of the penalty. The Reef Authority has the power to withdraw infringement notices under the Principal Regulations, and the person may also make written representations to the Reef Authority seeking the withdrawal of a notice. An infringement notice gives the person to whom the notice is issued an 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 the infringement notice.

The Amendment Regulations do not alter the above infringement notice scheme in any way.

The Principal Regulations continue to 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 served on a person, the person may make submissions to the Reef Authority about any facts or matters the person believes ought to be taken into account in relation to the alleged offence, and the Reef 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 existing infringement notice scheme established by the Principal Regulations. The Amendment Regulations do not interfere with the infringement notice scheme described above and as such continue to promote the rights to a fair and public hearing.

### 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.