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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**GREAT BARRIER REEF MARINE PARK AND OTHER LEGISLATION
AMENDMENT BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment, Heritage and the Arts,
the Honourable Peter Garrett AM MP)

GREAT BARRIER REEF MARINE PARK AND OTHER LEGISLATION AMENDMENT BILL 2008

OVERVIEW

The purpose of the Bill is to establish a modern and robust regulatory framework that provides the capability for the efficient and effective protection and management of the Great Barrier Reef into the future.

The Bill will:

- establish a modern framework for administration of the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) and management of the Great Barrier Reef Marine Park (Marine Park) that is aligned, integrated and not duplicative with the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and other legislation;
- put in place robust and streamlined environmental impact assessment and permitting processes;
- enhance capability for investigation and evidence collection;
- provide a wider range of enforcement options allowing for a more tailored and targeted approach to enforcement;
- enhance deterrence and encourage responsible use of the Marine Park; and
- establish new emergency management powers.

The changes proposed by the Bill address findings of a 2006 review of the GBRMP Act. That review found that the GBRMP Act has served its purpose well over the past 30 years, but needs to be updated and better integrated with other legislation in order to provide an effective framework for protection and management of the Great Barrier Reef into the future.

There has been a significant change in the scale, scope and nature of the challenges in securing the long-term protection of the Great Barrier Reef since the inception of the GBRMP Act in 1975. The focus of the Act was initially on establishing the Marine Park, and developing administrative and institutional arrangements for management. The Marine Park now covers an area of around 344 400 square kilometres and is intensively used for a wide variety of purposes, including tourism, fishing, research, public enjoyment and defence training. The Marine Park and associated zoning plan provide a strong framework for protecting the Great Barrier Reef and ensuring use is ecologically sustainable. A strong, modern regulatory system is required to ensure 'on ground' capability to efficiently and effectively administer and deliver that framework.

The Bill is divided into separate schedules dealing with particular topics, as follows:

- Objects and Applications
- Matters related to the Great Barrier Reef Marine Park Authority
- Proclaiming the Marine Park, Zoning Plans and Plans of Management
- Environmental Impact Assessments
- Investigation and Enforcement
- Offences and Civil Penalties

Each schedule is discussed below, first through a general outline, then by notes on individual clauses.

FINANCIAL IMPACT STATEMENT

The Bill will have no financial impact.

ABBREVIATIONS

The following abbreviations are used in this Explanatory Memorandum:

AAT – Administrative Appeals Tribunal

Authority – the Great Barrier Reef Marine Park Authority

EEZ – Exclusive Economic Zone

EMC – Environmental Management Charge (see GBRMP Act Part VA)

EPBC Act – *Environment Protection and Biodiversity Conservation Act 1999*

GBRMP Act – *Great Barrier Reef Marine Park Act 1975*

GBRMP Regulations – *Great Barrier Reef Marine Park Regulations 1983*

LI Act – *Legislative Instruments Act 2003*

Marine Park – refers to the Great Barrier Reef Marine Park

NES – refers to matters of “National Environmental Significance”, established by the EPBC Act.

PRELIMINARY PROVISIONS

NOTES ON INDIVIDUAL CLAUSES

Clause 1 – Short title

1. This clause provides that the short title by which the Act may be cited is the “*Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008*”.

Clause 2 – Commencement

2. This clause provides that the Act, with the exceptions of schedules 4, 5 and 6 will commence the day after the Act receives the Royal Assent. Schedule 4, 5 and 6 will commence on proclamation, or at the end of 12 months from the day the Act receives the Royal Assent. The period of up to 12 months before commencement is necessary as implementation of the changes requires substantial associated work, including:
 - the development of extensive regulation amendments;
 - the development of administrative arrangements related to the administration of both the GBRMP Act and the EPBC Act;
 - engagement with stakeholders in the context of the regulation amendments and development of administrative arrangements;
 - education and training of those administering and performing functions under the Act, including persons appointed as inspectors; and
 - education of Marine Park users.

Clause 3 – Schedule(s)

3. This clause provides that the amendments set out in the schedules to the Act have effect.

SCHEDULE 1 – OBJECTS AND APPLICATION

GENERAL OUTLINE

Schedule 1 establishes a new objects section in the GBRMP Act. The current objects (section 5) are out of date. They are a product of the time the Act was first drafted, when the focus was on establishing a Marine Park, the Great Barrier Reef had not yet been declared a World Heritage Area and concepts such as ecological sustainability had not yet emerged and been adopted.

The new objects section provides a modern, future-oriented focus to guide administration of the Act and management of the Marine Park. It identifies long-term protection of the environment, biodiversity and heritage values of the Great Barrier Reef as the primary object of the Act, with subsidiary objects including allowing for ecologically sustainable use of the Great Barrier Reef.

The new objects will be central to administration of the Act and management of the Marine Park. The Authority will be required to have regard to, and seek to act consistently with, the Act's new objects, as well as the principles of ecologically sustainable use (as defined by this Schedule) and the protection of the World Heritage values of the Great Barrier Reef.

In terms of application matters, the Schedule removes a redundant provision relating to the constitutional basis for the GBRMP Act and establishes a provision clarifying the geographical application of the GBRMP Act.

NOTES ON INDIVIDUAL CLAUSES

Great Barrier Reef Marine Park Act 1975

Item 1 – New Objects section

4. This item establishes a new section defining the objects of the GBRMP Act. The new section identifies the long-term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region as the primary object of the Act. Subject to that object, the following subsidiary objects apply:
 - allowing for ecologically sustainable use of the Great Barrier Reef Region;
 - encouraging engagement by stakeholders and communities in protection and management of the Great Barrier Reef Region; and
 - assisting in meeting Australia's international responsibilities relating to the environment and the protection of world heritage.
5. The current object of the Act, identified in section 5, is repealed by item 20.
6. The item also inserts a subsection describing how the Act seeks to achieve its objects. This is provided to assist understanding of the Act.

Items 2-18 & 23 – Definitions

7. These items define a number of key terms used in this and other Schedules of the Bill and remove redundant definitions. Where appropriate, terms are defined by reference to, or consistently with the EPBC Act and other relevant legislation.
8. Item 12 defines the “precautionary principle” consistently with its meaning under the EPBC Act.
9. Item 16 defines “Traditional Owner” consistently with the GBRMP Regulations and zoning plan.
10. Item 18 inserts a definition of “ecologically sustainable use”. The term is used in the new objects of the Act and is central to administration of the Act. The term is defined consistently with the EPBC Act, but also recognises the specific context of the GBRMP Act – in particular, that it applies to a particular area (the Great Barrier Reef) where the primary management objective is long term protection, rather than being of general application.
11. Item 18 also inserts a definition of the “principles of ecologically sustainable use”. The principles specified reflect those in the EPBC Act (section 3A). The principles will be a key factor guiding administration of the Act and management of the Marine Park.

Items 19, 20, 23 & 24 – Jurisdictional application of the Act

12. Item 20 repeals current section 5, which sets out the objects of the Act. Item 1 establishes a new objects section. The current section 5 also includes a constitutional “reading down” provision. This was in place given constitutional uncertainties at the time the GBRMP Act was first enacted (1975). Since that time, the constitutional basis for the GBRMP Act has become clearer as case law has developed. The provision is no longer necessary.
13. Item 20 inserts a new section 5 clarifying the jurisdictional application of the GBRMP Act, in particular, that the Act applies to everyone (including foreign nationals), within Australia, its exclusive economic zone (EEZ), continental shelf and external territories, but does not apply to anyone (Australian or foreign) outside Australia, its EEZ, continental shelf and external territories. Existing provisions relating to the same subject (subsections 4(2), 65(1)) are repealed by items 19, 23 and 24 and are consolidated in the new section 5.

Items 21 & 22 – Factors guiding administration of the Act and management of the Marine Park

14. Item 21 provides that, in managing the Marine Park and performing its other functions under the GBRMP Act, the Authority must have regard to, and seek to act in a way that is consistent with:
 - the objects of the Act;
 - the principles of ecologically sustainable use; and
 - the protection of the World Heritage values of the Great Barrier Reef World Heritage Area.

This will make the above matters central to administration of the GBRMP Act and management of the Marine Park.

15. Item 21 also provides that the Authority may prepare and publish plans and policies about the way it intends to manage the Marine Park and perform its functions, as well as its interpretation of the application of the Act, regulations or a zoning plan. Such plans and policies are intended to provide guidance to Marine Park users and other interested persons on how the Authority intends to apply and administer the Act in various circumstances – for example, its planned approach to managing protected species, or administration of permitting requirements. Plans and policies are not legally binding and do not impose obligations on the Authority, Marine Park users or other persons. Accordingly, the item clarifies that the plans and policies are not legislative instruments. This is declaratory of the law and included to assist readers – the plans and policies are not legislative in nature within the meaning of section 5 of the *Legislative Instruments Act 2003* (LI Act).
16. Item 22 repeals section 39Z. That section requires the Authority, in preparing plans of management under Part VB of the Act, to have regard to the precautionary principle and the protection of the World Heritage values of the Marine Park. Item 21 establishes equivalent requirements of general application, making section 39Z redundant.

Item 25 – Application of *Legislative Instruments Act* subsection 14(2)

17. This item provides that, despite subsection 14(2) of the LI Act, regulations made under the GBRMP Act may apply, adopt or incorporate matters contained in other instruments as in force from time to time (rather than only at a particular point in time).
18. Regulations made under the GBRMP Act “call up” various statutory instruments made under Queensland legislation. Most notably, fishing is permitted in certain zones of the Marine Park provided it is done in accordance with Queensland Government fisheries legislation and management plans. Currently, whenever Queensland amends its legislation or management plans, the regulations under the GBRMP Act must also be amended. The change proposed by this item will avoid this need by allowing the GBRMP Regulations to require compliance with Queensland legislation and management plans as in force from time to time. This capacity provides for clearer and more efficient regulation, and reflects jurisdictional responsibilities – in particular, that Queensland is responsible for the management of fisheries and the Commonwealth responsible for managing the Marine Park (and as a part of that, use of the Marine Park).

Great Barrier Reef Marine Park (Environmental Management Charge–Excise) Act 1993

Item 26 – Updating a cross reference

19. This item is a technical change. It repeals and replaces section 3 of the *Great Barrier Reef Marine Park (Environmental Management Charge – Excise) Act 1975* to update a cross-reference to provisions of the GBRMP Act amended by items 19 & 20.

Great Barrier Reef Marine Park (Environmental Management Charge–General) Act 1993

Item 27 – Updating a cross reference

20. This item is a technical change. It repeals and replaces section 3 of the *Great Barrier Reef Marine Park (Environmental Management Charge – General) Act 1975* to update a cross-reference to provisions of the GBRMP Act amended by items 19 & 20.

SCHEDULE 2 – MATTERS RELATING TO THE GREAT BARRIER REEF MARINE PARK AUTHORITY

GENERAL OUTLINE

Schedule 2 makes two changes to the GBRMP Act related to the Great Barrier Reef Marine Park Authority (the Authority).

The first establishes a requirement for one member of the Authority to be an Indigenous person with knowledge of, or experience concerning, Indigenous issues relating to the Marine Park. There are more than 70 Traditional Owner groups along the coast from Bundaberg to the Torres Strait who have a long and continuing relationship with the Great Barrier Reef. The knowledge and perspective of persons with expertise related to traditional use of the Marine Park and indigenous issues more generally is of particular value in achieving ecologically sustainable management of the Great Barrier Reef.

The second change made by the schedule establishes a capacity for the Authority to conduct business outside of formal meetings, subject to an appropriate governance framework. This allows for more efficient and responsive decision-making by the Authority, which has a large number of statutory powers and functions vested in it.

NOTES ON INDIVIDUAL CLAUSES

Great Barrier Reef Marine Park Act 1975

Item 1 – Indigenous expertise on the Authority

21. This item inserts a requirement for one member of the Great Barrier Reef Marine Park Authority to be an Indigenous person with knowledge of, or experience concerning, Indigenous issues relating to the Marine Park. As with current arrangements, all members of the Authority must have qualifications or extensive experience in a field related to the functions of the Authority.

Items 2-4 – Decisions outside of meetings

22. Item 2 inserts a note drawing attention to the *Acts Interpretation Act 1901* section 33B, which allows statutory authorities to hold meetings via telephone, videoconference and other such forms of communication. The note is inserted for information.

23. Item 3 amends subsection 17(8) as a consequence of item 4. Subsection 17(8) currently provides that, if only two Authority members attend a meeting, and a matter is tied, the matter must be deferred until the next meeting at which at least three members are present. Item 3 allows such matters to also be reconsidered outside of a meeting, in accordance with the provisions inserted by item 4.
24. Item 4 inserts a new provision empowering the Authority to make decisions outside of meetings. This capacity is subject to sound governance requirements. Reasonable steps (the exact nature of which must be agreed by the Authority) must be taken to seek the views of all members in considering matters outside of meetings. If not all members are able to express their view, and the matter is tied, the matter cannot be carried. Members with conflicts of interest may not vote.

SCHEDULE 3 – PROCLAIMING THE MARINE PARK, ZONING PLANS AND PLANS OF MANAGEMENT

GENERAL OUTLINE

Schedule 3 makes changes related to establishment of the Marine Park, and the development of zoning plans and plans of management.

In large part, these changes are directed at clarifying and modernising relevant provisions, and do not make substantive changes to existing arrangements. Most notably, provisions relating to the development of zoning plans are restructured to clarify the process that must be followed and requirements that must be met in developing zoning. There are also a number of changes designed to clarify the application of the *Legislative Instruments Act 2003* (LI Act) to proclamations establishing the Marine Park, zoning plans and plans of management – all of which are legislative instruments for the purposes of that Act.

The key substantive changes made by the schedule are as follows:

- The introduction of a requirement for the Authority to publicly consult on a proposal to proclaim an area as a part of the Marine Park, or to remove an area from the Marine Park by way of proclamation. This requirement is designed to enhance stakeholder and community engagement in management of the Great Barrier Reef and provides greater alignment with requirements for the proclamation of Commonwealth Reserves under the EPBC Act.
- The matters that must be considered in developing zoning plans and plans of management are updated, most notably, to build in better integration with relevant Commonwealth and Queensland legislation. The Authority will, for example, be required to consider relevant plans related to protected species prepared under the EPBC Act and Queensland legislation in preparing zoning plans and plans of management. Similarly, the Authority will be required to have regard to the Australian World Heritage Management Principles specified in the EPBC Regulations.
- The objects applying to the development of zoning plans are updated to recognise as objects (in addition to the current objects):
 - protection of the ecosystem of the Great Barrier Reef, its biodiversity and World Heritage values;

- protection of areas that are of high conservation value;
- managing competing usage demands on the Marine Park;
- ensuring use of the Marine Park is ecologically sustainable; and
- providing for ecologically sustainable traditional use of the Great Barrier Reef.

NOTES ON INDIVIDUAL CLAUSES

Part 1 - Amendments to the *Environment Protection and Biodiversity Conservation Act 1999*

Items 1 & 2 – Application of EPBC Act World and National Heritage management planning requirements to the Great Barrier Reef Marine Park

25. These items provide that it is not necessary to prepare and implement:
- a World Heritage Management Plan under section 321 of the EPBC Act in relation to so much of a World Heritage Area that is in the Great Barrier Reef Marine Park; and
 - a National Heritage Management Plan under section 324X of the EPBC Act in relation to so much of a National Heritage Area that is in the Great Barrier Reef Marine Park.
26. The Great Barrier Reef is both a World and National Heritage Area. The areas have identical boundaries and values. The Marine Park covers around 98 per cent of the World and National Heritage Area, the other two per cent being Queensland islands and internal waters. The GBRMP Act establishes the Great Barrier Reef Marine Park Authority to manage and advise government in relation to care and development of the Marine Park. In doing so, the Authority must have regard to, and act consistently with, the protection of World Heritage values (Schedule 1, item 21). Zoning plans are the key mechanism through which the Marine Park is managed. The Authority must, in preparing zoning plans, have regard to the Australian World Heritage Management Principles, National Heritage Management Principles and National Heritage values of the Great Barrier Reef, as specified under and pursuant to, the EPBC Act (see item 17).
27. In light of these comprehensive and robust management arrangements in place for the Great Barrier Reef, an additional requirement for a World Heritage management plan and a National Heritage management plan to be prepared under the EPBC Act is unnecessary and of little value in terms of management outcomes. An analogous approach is taken to Commonwealth reserves constituted over World and National Heritage Areas, such as Kakadu. World and National Heritage management plans are not required for such areas (see subsections 316(6) and s324T of the EPBC Act), as a reserve management plan is prepared, taking account of world and national heritage values and management principles.

Part 2 - Amendments to the *Great Barrier Reef Marine Park Act 1975*

Items 3 & 4 – Updating cross references

28. These items are technical changes that insert and update cross references. Item 3 inserts a cross reference in the interpretation section (section 3) to the definition given in section 39V of “community group having a special interest”. Item 4 updates a cross reference in light of other amendments in this schedule.

Item 5 & 8 – Public Notice requirements

29. This item establishes a definition of “public notice”. In so doing, it establishes requirements for the issuing of a public notice - at a minimum, notices must be published in the Gazette, in a newspaper circulating generally in Queensland and on the Authority’s website. This later publication requirement is additional to existing requirements. Public notice requirements apply to the making of proclamations creating or amending the Marine Park, zoning plans and plans of management.

Item 6 – Definition of zone

30. This item clarifies that a “zone” can include an area that is created or identified by a zoning plan, but is not necessarily called a “zone”. The item is intended to clarify that “areas”, such as “designated areas” identified by the *Great Barrier Reef Marine Park Zoning Plan 2003*, are “zones” for the purposes of the Act.

Items 7 & 9 – Updating cross references

31. These items are technical changes. They amend cross references as a consequence of the creation of a new division within Part V of the Act.

Item 10 – New Division

32. This item establishes a new division of Part V, titled “Great Barrier Reef Marine Park”. The division encompasses the existing section 31 (as amended by the Bill), which deals with the creation, amendment and revocation of the Marine Park.

Items 11 & 13 – Proclaiming the Marine Park: Clarifying application of the LI Act

33. Subsection 31(1) empowers the making of proclamations declaring an area of the Great Barrier Reef Region to be a part of the Great Barrier Reef Marine Park. Subsection 31(3) empowers the making of proclamations revoking or amending a previous proclamation of an area as a part of the Marine Park. Items 11 and 13 insert notes clarifying that such proclamations are legislative instruments for the purposes of the LI Act but are not subject to the disallowance or sunseting requirements of that Act. This is declaratory of the law and is included to assist readers. Subsections 44(2) and 54(2) of the LI Act provide, respectively, exemptions from disallowance and sunseting provisions.

Item 12 & 14 – Proclaiming the Marine Park: Procedural requirements

34. Item 12 provides that the Governor-General must consider a report prepared by the Authority prior to making a proclamation under section 31 (declaring an area to be a part of the Marine Park or excising areas from the Marine Park). Such a requirement is currently only in place in relation to a proclamation declaring an area to be a part of the Marine Park.
35. Item 14 inserts an additional requirement relating to proclamations made under section 31 (declaring an area to be a part of the Marine Park or excising areas from the Marine Park). The item requires the Authority to publicly consult on a proposed proclamation. Comments made in the context of consultation are reported to the Governor-General, who is responsible for making the proclamation.

Items 15-29 – Clarifying and modernising zoning plan provisions

36. These items repeal sections 32 and 33 and amend other provisions related to the making of zoning plans. The amendments establish a new division dealing with the development, amendment and revocation of zoning plans, clearly setting out applicable processes and requirements. The amendments, in large part, simply restructure and separate out the different requirements applying to the development of zoning plans. Actual processes and requirements are unchanged, with the exceptions discussed below.

Objects of zoning (Item 15)

37. Subsection 32(7) currently sets out the objects that must be considered in preparing a zoning plan. The current item updates those objects to provide greater clarity, establish links to the updated objects and focus of the GBRMP Act (Schedule 1, item 1) and recognise key considerations in zoning development, such as ecological sustainability. The item establishes a stand-alone section dealing with the objects of zoning plans, adding to the current objects the following:
 - protection of the ecosystem of the Great Barrier Reef, its biodiversity and World Heritage values;
 - protection of areas that are of high conservation value;
 - managing competing usage demands on the Marine Park;
 - ensuring use of the Marine Park is ecologically sustainable; and
 - providing for ecologically sustainable traditional use of the Great Barrier Reef.

Application of IUCN protected area categories (Items 15 & 17)

38. Items 15 and 17 provide that a zoning plan must designate, for each zone or part of a zone, an IUCN category. In designating an IUCN category, the Authority must have regard to the purposes for which the zone may be entered or used, and the Australian Reserve Management Principles, as set out in the EPBC Regulations.
39. IUCN categories relate to protected areas. They categorise protected areas according to applicable management categories. The approach is established internationally and applied to Commonwealth reserves established under the EPBC Act. The items apply the approach to the Marine Park.

40. As with current arrangements, it will be the zoning plan that defines what activities (legally) may and may not be undertaken in particular zones. Designation of IUCN categories is done as a means of classification and to facilitate reporting. It is not intended to itself affect or determine the permitted uses of particular zones and areas of the Park. It is also not intended that an IUCN category and the associated management principles would in any way qualify or provide a basis for “reading down” the provisions of the zoning plan.

Considerations in developing zoning (Item 17)

41. Item 17 inserts a number of matters that must be considered in the development of zoning. The inserted requirements are designed to improve integration and alignment with the EPBC Act and relevant Queensland legislation. The provisions require the Authority to have regard to relevant plans, principles and values related to protected species and protected areas, for example, recovery plans for threatened species, the Australian World Heritage Management Principles and the national heritage values identified for the Great Barrier Reef National Heritage Area.
42. Item 17 also requires that the Minister, in determining whether to accept a zoning plan developed by the Authority, be satisfied that the plan is consistent with relevant international obligations of Australia. This is designed to ensure Australia’s compliance with international law, for example, the United Nations Convention on the Law of the Sea, which includes provisions relating to the regulation of activities in the territorial sea and exclusive economic zone (parts of which the Marine Park is constituted over).

Clarification of application of the LI Act

43. The items clarify the application of the LI Act to zoning plans. The items provide that zoning plans made under section 32, amended under subsection 37(2) or section 37A or revoked under subsection 37(4) are legislative instruments for the purposes of the LI Act, but are exempt from the sunset and disallowance requirements of that Act. With one exception (discussed below), this is declaratory of the law, included to assist readers. Exemptions are already in place under the LI Act.
44. Zoning plans (and amendments and revocations of zoning plans) are currently exempt from the disallowance provisions of the LI Act by virtue of item 40 of the table in subsection 44(2) of that Act. The exemption is provided on the basis that the GBRMP Act provides for disallowance of zoning plans. Application of LI Act disallowance requirements would therefore be duplicative. It is considered appropriate to retain disallowance provisions in the GBRMP Act, rather than relying on those of the LI Act. The development and amendment of zoning plans attracts significant public interest and involvement. Having the complete process for the development of zoning plans clearly articulated on the face of the GBRMP Act is important in ensuring public understanding of and confidence in the process. This, in turn, is important for the effective management of the Marine Park and engagement of interested persons in the development of zoning.
45. The Bill amends the disallowance provisions of the GBRMP Act to ensure consistency with those of the LI Act, so as to avoid the risk of parliamentarians being mistaken as to

the periods within which notice of a motion to disallow and resolution of such a motion must occur.

46. Zoning Plans, amendments to zoning plans and a revocation of a zoning plan are exempted from the sunset provisions of the LI Act by item 22 of the table in subsection 54(2), with the exception of minor amendments to zoning plans made pursuant to section 37A. Minor amendments are not captured by the exemption as the capacity for such amendments was introduced in July 2007, and consequential amendments to the LI Act were not made at the time. The items therefore establish an exemption.
47. Zoning plans are the primary basis for management of the Marine Park. They are subject to ongoing assessment and evaluation. Section 54 of the GBRMP Act requires the five-yearly preparation of a “Great Barrier Reef Outlook Report”. Reports must include an assessment of measures to protect and manage the Great Barrier Reef, which includes zoning plans. Zoning plans may be revoked (and replaced) or amended only every seven years (at a minimum). This is designed to ensure there is sufficient time for plans to become established, social and biological systems to respond and the effects to be monitored and understood. From the above, there are sufficient measures for ensuring zoning plans are periodically reviewed to ensure they remain necessary and adapted to purpose. Application of LI Act sunset provisions is therefore considered unnecessary.

Item 30 – New division: “Offences etc”

48. This item inserts a new Division in the GBRMP Act titled “Offences etc”. The provision is inserted as Schedules 4, 5 and 6 of the Bill, which deal with offences and related matters, commence on proclamation, whereas the provisions of this Schedule commence the day after the Royal Assent. Insertion of the Division by this Schedule will serve to group sections 38-39 (which deal with offences and related matters) until the amendments contained in Schedules 4, 5 and 6 commence, thereby ensuring offences and related matters are not inappropriately included in a Division dealing with zoning plans.

Items 31, 32, 34-36, 38-41, 44 – Plans of management: public notice requirements

49. These items are a consequence of the inclusion in the GBRMP Act of a definition of “public notice” of general applicability (Schedule 3, item 5). The items update provisions relating to public notices to reflect this change. The items also improve consistency of expression in the Act by aligning the language of provisions requiring consultation on a proposal to prepare a Plan of Management with the language of provisions requiring consultation on a proposal to prepare a zoning plan.

Item 33 – Contents of plans of management

50. This item clarifies that a plan of management may comprise two parts. The first may set out policies and strategies concerning how the Authority intends to manage the matters that are the subject of the plan (e.g. a particular area or species). The second part may set out “enforcement provisions” prohibiting or regulating activities, as currently provided for by subsections 39ZD(5)-(8).

Item 37 – Considerations in preparing plans of management

51. This item establishes a new provision requiring the Authority, in preparing a plan of management, to have regard to any relevant key threatening processes, critical habitat, approved conservation advice, recovery plan, threat abatement plan or wildlife conservation plan, as identified or established under the EPBC Act. The item also requires that a plan of management that relates to a threatened species or ecological community listed under the EPBC Act not be inconsistent with any recovery plan or threat abatement plan in place for the species or community. These measures are designed to improve integration between EPBC Act measures for the protection and recovery of threatened species and ecological communities and management measures under the GBRMP Act.

Items 42, 43, 45 &46 – Plans of management: clarifying application of the LI Act

52. These items clarify the application of the LI Act to plans of management by explicitly recognising, in the GBRMP Act, that plans, amendments to plans and revocations of plans are legislative instruments for the purposes of the LI Act.
53. The items include notes that plans of management (and amendments and revocations of the same) are exempt from the sunseting provisions of the LI Act. This is declaratory of the law, provided for clarity. Such exemptions are already provided by item 22 of the table in subsection 54(2) of the LI Act.
54. Item 42 repeals provisions relating to commencement of plans of management, as the LI Act provides for commencement. Item 43 amends provisions relating to commencement of amendments to plans of management for the same reason.

Item 47 – Plans of management binding on the Authority

55. This item provides that the Authority must perform its functions and exercise its powers consistently with relevant plans of management. This clarifies the intended nature of plans of management, which include documented approaches and strategies for management of the Marine Park (or particular areas within or matters relevant to the Marine Park) by the Authority. The item also repeals section 39ZI, which is a redundant transitional provision.

Part 3 – Amendment of the *Legislative Instruments Act 2003*

Item 48 – Subsection 54(2) (table item 22)

56. This item amends the LI Act to remove the exemption from the sunseting provisions of that Act currently in place in relation to zoning plans made under section 32 and amended or revoked under section 37 of the GBRMP Act. Items 17 and 23 relocate these exemptions into the GBRMP Act.

Part 4 – Transitional, application and saving provisions

Item 49 – Zoning plans under section 32 of the *Great Barrier Reef Marine Park Act 1975*

57. This item provides that zoning plans made under section 32 of the GBRMP Act and in force at the time of commencement continue in force despite the amendments in this Schedule.
58. The item also allows for the IUCN categories to be designated to zones in the existing zoning plan by way of an amendment to the plan. The amendment must be done in accordance with section 37A, which requires Ministerial approval and tabling in Parliament, where it may be subject to a motion of disallowance.

Items 50, 51 and 52 – Plans of management: transitional provisions

59. Item 49 ensures that plans of management in force prior to commencement of the schedule continue to operate unaffected by the amendments of this Schedule.
60. Item 50 provides that, where a plan of management was under preparation at the time of commencement of this Schedule, and a notice had been issued under section 39ZE in relation to the plan, the provisions of Part VB prior to commencement of this Schedule continue to apply in relation to that plan.
61. Item 51 provides that where a plan of management was under preparation at the time of commencement of the schedule, but a notice had not been issued under section 39ZE in relation to the plan, the new provisions relating to the preparation of plans established by this Schedule apply.

SCHEDULE 4 – ENVIRONMENTAL IMPACT ASSESSMENTS

GENERAL OUTLINE

Schedule 4 contains amendments related to environmental impact assessment and approval. The amendments establish the EPBC Act as the primary basis for environmental impact assessment and approval of actions in the Marine Park having a significant impact on the environment. This is done in order to remove currently circuitous and at times duplicative requirements, and apply the best practice environmental impact assessment processes of the EPBC Act more consistently to environmental matters regulated by the Commonwealth.

Key aspects of the Schedule include:

- Establishment of the Great Barrier Reef Marine Park as a “matter of national environmental significance” under the EPBC Act. As a consequence, the environmental impact assessment and approval requirements of the EPBC Act will apply where an action in the Marine Park has, will have or is likely to have a significant impact on the environment; and where an action outside the Marine Park has, will have or is likely to have a significant impact on the environment in the Marine Park.

- Provisions to establish a single, integrated environmental impact assessment process under the EPBC Act, used for the purposes of both approval requirements under the EPBC Act and permission requirements under the GBRMP Act.
- Provisions enabling the Great Barrier Reef Marine Park Authority to provide the “shopfront” for the administration of environmental impact assessment and approval requirements in relation to actions relevant to the Marine Park.
- Transitional provisions to ensure the new assessment and approval requirements do not apply retrospectively and, for actions being assessed at the time the amendments commence, the rules are not changed part way through that assessment.

NOTES ON INDIVIDUAL CLAUSES

Part 1 – Amendments to the *Environment Protection and Biodiversity Conservation Act 1999*

Item 1 – Section 11 (simplified outline)

62. This item is a technical change. It amends the outline of Chapter 2 of the EPBC Act provided by section 11. It is a consequence of amendments to section 43 of the Act (see item 10).

Item 2 – Establishing the Great Barrier Reef Marine Park as a matter of National Environmental Significance

63. This item establishes the Great Barrier Reef Marine Park as a matter of National Environmental Significance (NES). This ensures that EPBC Act assessment and approval requirements apply in appropriate circumstances – namely, in relation to actions (or parts thereof) within the Marine Park that have, will have or are likely to have a significant impact on the environment; and actions outside of the Marine Park that have, will have or are likely to have a significant impact on the environment of the Marine Park.
64. Under current arrangements applying to actions in the Marine Park, the Great Barrier Reef Marine Park Authority must, under the EPBC Act (section 160), seek the advice of the Minister prior to issuing a permission for an action in the Marine Park likely to have a significant impact on the environment. The Minister’s advice is based on an assessment carried out under Part 8 of the EPBC Act.
65. Establishing the Great Barrier Reef as a matter of NES maintains this “threshold” for application of EPBC Act environmental impact assessment requirements to actions in the Marine Park, but calls up those requirements in a more direct manner. In so doing, it clarifies the impacts that must be assessed and approved, and more clearly and completely applies the robust and transparent assessment and approval processes of the EPBC Act – which include opportunities for public input, publication requirements, timelines for decision-making and clearly stated decision-making criteria.

66. As with other matters of NES, civil penalty and offence provisions are established to prohibit actions:
- within the Marine Park having a significant impact on the environment; and
 - outside of the Marine Park having a significant impact on the environment of the Marine Park;
- unless done in accordance with an approval issued under Part 9 of the EPBC Act, having been assessed in accordance with Parts 7 and 8 of the EPBC Act (or unless otherwise exempted).
67. The proposed new offence provisions includes strict liability elements, such that a prosecutor will not have to show (where relevant to the offence in question) that the accused knew or was reckless as to the fact that an action is taken in the Marine Park or that an action is taken outside of the Marine Park but in the Australian jurisdiction. The use of strict liability in this way is proposed having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs. Having regard to these documents, strict liability is established as it:
- ensures the integrity of the regulatory regime applying to the Great Barrier Reef;
 - overcomes problems of proof that would otherwise make the regulatory regime particularly difficult to enforce;
 - overcomes a “knowledge of the law” problem; and
 - goes, in part, to a jurisdictional element of the relevant offences.
68. The existence of a Marine Park is fundamental to and underpins regulation and management of the Great Barrier Reef. Proclaiming an area as a part of the Marine Park provides a framework from which regulatory and management arrangements flow. The boundaries and activities allowed within the Marine Park are widely publicised, for example, through the distribution of maps of the Park and the zones that it comprises. In this context, deeming persons to be aware that they are within a Marine Park is essential to the integrity of the regulatory regime in place to protect the Great Barrier Reef.
69. Proving to a Court that a defendant did not know or was reckless to the fact that an area was a part of the Marine Park is problematic. Such matters are largely within the knowledge of the defendant alone, and proving the contrary beyond a reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
70. The fact that an area is a part of the Marine Park forms a part of the law. Proclamations creating the Marine Park are legislative instruments for the purposes of the LI Act – that is, they determine the content of the law and impose obligations and create rights (see LI Act s7). Allowing people to avoid conviction because they did not know an area was a part of the Marine Park would allow ignorance of the law to be used as an excuse for criminal behaviour.
71. For the offences proposed, the fact that an action takes place within the Marine Park is in some senses jurisdictional. The essence of the proposed offences is a prohibition against actions that have, will have or are likely to have a significant impact on the environment. The fact that such actions or the impacts of an action must be within the

Marine Park reflects the Commonwealth's powers and responsibilities to protect the Great Barrier Reef.

Items 3-5 – Consequential changes to section 25AA

72. These items are a consequence of establishing the Marine Park as a matter of NES (see item 2). Section 25AA provides a defence/exception to the offence and civil penalty provisions of Division 1, Part 3 of the EPBC Act. The defence/exception ensures that a person cannot be tried for impacts caused by the actions of third parties which are consequential to the actions of the first person, but which are not directed or requested by the first person. This does not prevent enforcement action being taken against the third party for taking an action without an approval which has significant impacts on a matter protected by Part 3 of the EPBC Act.
73. The current item ensures that the subsection 25AA defence/exception applies in relation to the new offences and civil penalty provisions that establish the Marine Park as a matter of NES.

Item 8 – Consequential changes to section 34

74. This item is a consequence of establishing the Marine Park as a matter of NES (see item 2). Part 4, Division 2 of the EPBC Act provides for the accreditation of management arrangements and the making of declarations that an action in a class of actions does not require approval under Part 9 for the purposes of a specified provision of Part 3 if the action is taken in accordance with an accredited management arrangement. In accrediting a management arrangement, the Minister must be satisfied that there has been or will be an adequate assessment of the impacts of relevant actions on the “matter protected” by the provision of Part 3 in relation to which it is proposed to make a declaration.
75. The current item amends the table in section 34 to provide that, for the purposes of declarations relating to the new Marine Park matter of NES, the “matter protected” is “the environment” for actions within the Marine Park, and the “environment in the Marine Park” for actions outside the Marine Park.

Items 9 & 10 – Application of the EPBC Act Part 3 to actions in the Marine Park

76. These items amend section 43 so that actions in the Marine Park authorised by a permission, authority, approval or permit issued under the GBRMP Act are no longer exempt from EPBC Act Part 9 approval requirements. As a result, actions in the Marine Park having a significant impact on a matter protected by Part 3 of the EPBC Act must be assessed and approved in accordance with Parts 7, 8 and 9 of the EPBC Act (as appropriate). The exception to this is activities allowed in the Marine Park “as of right” (i.e. without a permission) under a GBRMP Act zoning plan. As with current arrangements, EPBC Act approval requirements will not apply to such actions.
77. Amendments to the GBRMP Act proposed elsewhere (see Schedule 3) establish requirements and considerations applying to the development of zoning plans. These requirements are similar to those applying under Part 4, Divisions 2 and 3 of the EPBC Act, which allows the Minister to make a declaration that actions in a class of action do not require approval on the basis that they are done in accordance with an

accredited management plan or bioregional plan. Furthermore, zoning plans are subject to parliamentary disallowance. These provisions ensure that GBRMP Act zoning plans provide an appropriate basis for an exception from EPBC Act approval requirements for “as of right” activities.

78. Item 9 also amends the title of section 43 to better reflect its content, as amended.

Items 6, 7, 11 and 17 – Bilateral Agreements relating to the Marine Park

79. Item 11 amends section 49 to provide that a bilateral agreement made under Part 5 of the EPBC Act does not apply to actions in the Marine Park unless the agreement specifically provides otherwise. Similar qualifications are in place (see section 49) for actions in Commonwealth areas and specified national parks established under the EPBC Act.
80. The amendment recognises that the Australian and Queensland governments have in place long-standing collaborative approaches to regulation and management of the Great Barrier Reef. These approaches necessarily differ from approaches in place for the regulation of environmental matters in other areas in Queensland (i.e. outside of the Marine Park). The amendment proposed by this item provides scope for bilateral agreements to include both general and Great Barrier Reef-specific arrangements.
81. Items 6, 7 and 17 are technical in nature and are a consequence of item 11.

Item 12 – Requirement to notify the Authority of relevant referrals

82. This item provides that, where an action has been referred to the Minister under the EPBC Act, and the action is wholly or partially within the Marine Park, the Minister must provide the Authority with a copy of the referral.
83. This requirement forms a part of changes to establish, for actions in the Marine Park, a single integrated environmental impact assessment process under the EPBC Act, used for the purposes of both the EPBC Act and the GBRMP Act. Item 41, below, provides that a referral under the EPBC Act to take an action wholly or partially in the Marine Park is deemed to also be an application under the GBRMP Act for any permissions required under that Act. The current item complements that provision, by ensuring that the Authority is made aware of any relevant referrals - and therefore of permission applications deemed to have been made under the GBRMP Act (which the Authority is responsible for assessing).
84. In practice, it is anticipated that the Authority will provide the “regulatory shopfront” for both EPBC Act and GBRMP Act assessment and approval purposes in relation to actions in the Marine Park. Under these arrangements, it is expected that a single application would be made to the Authority (in relation to actions in the Marine Park), initiating assessment processes for both EPBC Act approval and GBRMP Act permission purposes.

Items 13 & 14 – Consequential amendments to section 74

85. These items are a consequence of establishing the Marine Park as a matter of NES (see item 2). They provide that, where an action has been referred to the Minister, and the

Minister believes that the Marine Park matter of NES could be a “controlling provision” because of the impacts of the action on heritage values within the Marine Park, the Minister may invite comments on that aspect of the referred action from the Australian Heritage Council.

86. The amendments are necessary because the matter protected by the Marine Park matter of NES is “the environment”. Under the EPBC Act, “the environment” is defined to include heritage values. The Australian Heritage Council is a key source of advice to government on the protection of heritage values.

Items 15 & 16 – Consequential amendments to sections 75 and 82

87. These items are a consequence of establishing the Marine Park as a matter of NES (see item 2). Under subsection 75(2), in deciding whether an action referred under the Act is a “controlled action”, the Minister must consider the adverse impacts the action has, will have or is likely to have on each matter protected by Part 3 of the EPBC Act. Similarly, section 82 provides that the “relevant impacts” of an action for the purposes of assessment and approval under Parts 8 and 9 of the Act are the impacts the action has, will have or is likely to have on each matter protected by each provision of Part 3 of the EPBC Act that the Minister has decided under section 75 is a “controlling provision”.
88. The items clarify these requirements by providing that, for an action that is (wholly or partially) within the Marine Park, the impacts that must be considered are only the impacts of that part of the action that is taken within the Marine Park. This is consistent with qualifications applying to actions within National Heritage places, the Commonwealth marine environment and Commonwealth land (see subsection 75(2A)). These provisions, and the current item, reflect the powers and role of the Commonwealth in relation to environmental matters.
89. The Marine Park matter of NES will also apply to parts of actions that are outside of the Marine Park, insofar as the action has a significant impact on the environment of the Marine Park.

Items 18-24 – Provisions allowing for a single environmental impact assessment process for EPBC Act and GBRMP Act purposes

90. These items form part of changes to establish, for actions in the Marine Park, a single integrated environmental impact assessment process under the EPBC Act, used for the purposes of both the EPBC Act and the GBRMP Act. Item 41 provides that a referral under the EPBC Act to take an action wholly or partially in the Marine Park is deemed to also be an application under the GBRMP Act for any permissions required under that Act. The current items complement that provision by providing that, where such a deemed application has been made, the guidelines for a Public Environment Report (PER) or Environmental Impact Statement (EIS) being prepared for EPBC Act approval purposes may also require the PER or EIS to include information on matters relevant to consideration of the deemed GBRMP Act permission application. Similarly, the terms of reference for an inquiry being undertaken for EPBC Act approval purposes may require the inquiry to consider matters relevant to the deemed GBRMP Act permission application. These provisions will allow a single environmental impact assessment to be undertaken to inform decision-making under both Acts.

Item 25 – Consequential amendment to subsection 158A(1)

91. This item is a consequence of establishing the Marine Park as a matter of NES (see item 2). Section 158A provides that, where an action has been referred under Part 7, Division 1, and the Minister has made a decision on that referral under section 75, that decision, and any other decision relevant to the assessment and approval process under Parts 7, 8 and 9 of the EPBC Act for that action, is unaffected by a “listing event”. This is designed to ensure that the assessment and approval requirements applying to a particular action are those in place at the time the Minister made a decision on the referral under section 75, and are not affected by subsequent events that could otherwise affect the required scope and nature of the assessment and approval process. This item identifies a change to the boundaries of the Marine Park as a “listing event”.

Items 26-34 – Consequential amendments to cetacean and listed marine species offences

92. These items are a consequence of establishing the Marine Park as a matter of NES (see item 2). The items provide exemptions from certain offences related to cetaceans (see section 231) and listed marine species (see section 255). The exemptions arise where an action:
- is approved under Part 9 of the EPBC Act, and the approval is for the purposes of the Marine Park matter of NES;
 - is done in accordance with a declaration made by the Minister under section 33 that particular actions do not require approval under Part 9 on the basis that they are taken in accordance with a management arrangement accredited under Part 4 of the EPBC Act, and that management arrangement is accredited for the purposes of the Marine Park matter of NES; or
 - is done in accordance with a declaration made by the Minister under section 37A that particular actions do not require approval under Part 9 of the EPBC Act by reference to the fact that they are undertaken in accordance with a Bioregional Plan established under section 176, and the declaration is for the purposes of the Marine Park matter of NES.
93. These exceptions are established as the impacts on cetaceans and listed marine species must be considered in the context of issuing the Part 9 approval for the purposes of the Marine Park matter of NES and in making a declaration under section 33 or 37A. Similar exceptions apply to in relation to the Commonwealth marine environment matter of NES (sections 23 and 24A) for this same reason.

Item 35 – Delegations

94. This item adds new sections allowing the Minister and Secretary to delegate powers and functions under the EPBC Act to the Great Barrier Reef Marine Park Authority, the Chairperson of the Authority or a member of the staff of the Authority. Powers and functions may only be delegated insofar as they relate to the Marine Park. The GBRMP Act subsection 7(1A) provides guidance on what is properly considered to be a matter “relating” to the Marine Park. Powers related to enforcement may only be delegated to Senior Executive Service or Executive Level employees to ensure coercive powers are only exercised at appropriate organisational levels.
95. These delegation provisions will facilitate administration by the Authority of relevant parts of the EPBC Act, insofar as they relate to the Marine Park. Most notably, the

provisions will allow the Authority (or its Chairperson or staff) to be delegated responsibility for the conduct of environmental impact assessment and approvals in relation to actions in the Marine Park. The provisions will also allow the Authority (or its Chairperson or staff) to be responsible for certain statutory decisions associated with the investigation and enforcement, which is of value given the changes of Schedule 5.

96. A capacity to delegate any or all powers and functions under the EPBC Act to the Authority (and not just those related to environmental impact assessment and approval) is proposed in order to allow for a more holistic approach to environmental regulation by the Environment Portfolio, particularly (but not exclusively) in relation to environmental impact assessment under Chapter 4 of the EPBC Act, permitting under Part 13 of the EPBC Act and enforcement activities under Part 17 of the EPBC Act.
97. A capacity to delegate to not only the Authority, but also the Chairperson of the Authority and staff of the Authority, is essential to efficient administration. The giving of delegations and the exercise of delegated powers are the subject of guidelines, fraud control procedures and risk management processes and other protocols. These are designed to ensure delegated decision-making is made at the appropriate level and in a transparent and accountable manner.

Items 36 & 37 – Definitions

98. These items insert definitions of “Great Barrier Reef Marine Park” and “Great Barrier Reef Marine Park Authority” in the EPBC Act to facilitate ease of reference.

Part 2 – Amendments to the *Great Barrier Reef Marine Park Act 1975*

Items 38-40 – Functions of the Authority

99. These items clarify that a function of the Authority is to perform functions relating to the Marine Park under legislation other than the GBRMP Act. It also clarifies what is properly considered a matter “relating to the Marine Park”. It complements item 35, which empowers the Minister and Secretary to delegate functions under the EPBC Act to the Authority.

Item 41 – Relationship between the GBRMP Act and the EPBC Act

100. This item inserts a new Division in Part V of the GBRMP Act dealing with the relationship between the GBRMP Act and the EPBC Act. The Division will pick up existing section 39, which provides that an area of the Great Barrier Reef Region may not be established as a Commonwealth reserve under the EPBC Act. The Division will also include new provisions establishing a single integrated environmental impact assessment process under the EPBC Act, used for the purposes of both the EPBC Act and the GBRMP Act. This is achieved by providing that:
 - where a proposal to take an action in the Marine Park has been referred under the EPBC Act for assessment and approval, the referral is deemed to also be an application for any permissions required under the GBRMP Act in relation to the action; and
 - where an action in the Marine Park is a “controlled action” for the purposes of the EPBC Act (that is, it requires assessment and approval under the EPBC Act), a

permission under the GBRMP Act cannot be issued in relation to that action unless an EPBC Act approval for the action is in place.

101. These provisions allow for two forms of assessment and approval to be carried out through a single, integrated environmental assessment – the two forms being:
- regulation of actions having significant impacts on the environment and other matters of “national environmental significance” – which is the subject of the EPBC Act approval; and
 - regulation of activities in the Marine Park in order to ensure the protection, ecologically sustainable use and orderly management of the Park – which is the subject of GBRMP Act permissions.
102. In situations where an action in the Marine Park does not require assessment and approval under the EPBC Act (i.e. the action is not a “controlled action”), permission requirements under the GBRMP Act will remain, and the action assessed and permissions issued in accordance with that Act alone.

Part 3 – Transitional, application and saving provisions

Items 42-44 – Application of new environmental impact assessment and approval arrangements

103. These items establish transitional provisions for the proposed new environmental impact assessment and approval arrangements established by this Schedule. The items provide that the new arrangements do not apply to:
- actions that have legally been taken or begun at the time the legislative changes commence – whether “as of right” or in accordance with an approval or permission issued under the EPBC Act or GBRMP Act; and
 - actions in relation to which a referral under the EPBC Act or permission application under the GBRMP Act has been made and is “active” (i.e. has not lapsed, been rejected or withdrawn etc since commencement of the changes).
104. These provisions are designed to ensure that the new environmental impact assessment and approval arrangements do not introduce legal requirements retrospectively and, for actions that are being assessed at the time the provisions commence, the ‘rules’ are not changed part way through the assessment process.
105. For actions that are in the process of being assessed at the time the legislative changes commence, the proponent may elect to have the new process and requirements apply. In order to do so, the current application and/or referral would need to be withdrawn and resubmitted. Similarly, where an application/referral to which the transitional provisions applies lapses or is rejected, and subsequently a new application/referral relating to the same action is made, the new process and requirements will apply.

SCHEDULE 5 – INVESTIGATION AND ENFORCEMENT

GENERAL OUTLINE

Schedule 5 makes amendments related to investigation and enforcement of the GBRMP Act with the objectives of facilitating efficient and effective compliance and achieving better consistency with the EPBC Act.

Investigation provisions

The changes to investigations provisions establish a single investigations regime for both GBRMP Act and EPBC Act purposes.

Under current arrangements, the GBRMP Act provides for the appointment of inspectors. Those inspectors may exercise a number of powers under the GBRMP Act for the purposes of investigating compliance with the GBRMP Act. As *ex officio* inspectors under the EPBC Act (section 397), inspectors may also exercise a different set of powers under that Act for the purpose of investigating compliance with the EPBC Act.

The existence of two, slightly different, investigations regimes for the two key environmental laws applying in the Marine Park creates unnecessary complexity and raises risks of non-compliance with legislative requirements for the conduct of investigations. Changes to make the EPBC Act the basis for environmental impact assessment and approval in the Marine Park (Schedule 4) exacerbate these problems, due to increased application of the EPBC Act to activities in the Marine Park.

The changes in this Schedule empower inspectors appointed under the GBRMP Act to use the investigation powers of the EPBC Act for both EPBC Act and GBRMP Act purposes. Relevant investigation powers of the GBRMP Act are repealed, with the exception of powers related to the Environmental Management Charge and Compulsory Pilotage schemes (GBRMP Act Parts VA and VIIA, respectively), which reflect needs specific to those schemes.

The EPBC Act contains provisions generally equivalent to all of the repealed GBRMP Act investigations provisions, with some minor exceptions. Where appropriate, these exceptions have been addressed through inclusion of new provisions in the EPBC Act, and will otherwise be dealt with through regulation amendments. Where relevant, this is indicated in the notes on individual clauses.

The EPBC Act includes some investigation powers not currently in the GBRMP Act. The EPBC Act provisions were reviewed and updated in early 2007 to provide a modern, comprehensive, balanced and practical approach to environmental law enforcement. As discussed in the notes on individual clauses, the availability of these powers for the purposes of the GBRMP Act is, in all cases, necessary and appropriate, having regard to the nature of GBRMP Act investigations activities and the governance arrangements in place for the vesting and exercise of investigation powers.

New enforcement mechanisms

The Schedule amends the GBRMP Act to include a number of new mechanisms for enforcing the Act. This is designed to increase flexibility, so that enforcement action can be better tailored to the nature and circumstances of each particular alleged offence/contravention. Criminal prosecution would always remain an option and the decision in any particular circumstance as to what form of enforcement action is taken will be made

consistently with relevant Australian Government policies and guidelines, and agency enforcement policy.

The new enforcement mechanisms introduced by the schedule are as follows:

- *Enforceable Directions* - the Minister will be empowered to issue a person s/he believes has breached the Act an “Enforceable Direction”. A Direction can include a requirement to take action or to cease taking action for the purposes of ensuring ongoing compliance with the Act and/or to prevent, mitigate and remediate damage to the environment resulting from an alleged breach of the Act. A person issued with a direction has access to appeal rights.
- *A civil penalty regime* – it will be possible to take civil action against an alleged wrongdoer seeking award of a pecuniary penalty. The availability of civil action as an enforcement mechanism is expected to be particularly useful in relation to corporate wrongdoing, where criminal prosecution can be difficult (given the need to provide mental elements) and fail to provide an adequate disincentive.
- *Enforceable undertakings* – The Minister will be empowered to accept an undertaking, enforceable in court, from a person the Minister believes has breached a provision of the GBRMP Act. The undertaking could be to take action, or to pay the Commonwealth money for the cost of taking action, directed at ensuring ongoing compliance with the Act and/or remedying, mitigating and preventing damage to the environment of the Great Barrier Reef Region.
- *Infringement Notices* – The GBRMP Regulations establish an infringement notice regime. The schedule makes changes that will allow infringement notices to be used in relation to certain offences against the GBRMP Act, rather than only offences in the GBRMP Regulations, as is the current situation. The use of infringement notices in any given situation would be at the discretion of those responsible for enforcing the Act.

Encouraging responsible use of the Marine Park

The Schedule contains a number provisions designed to encourage compliance with the GBRMP Act and responsible use of the Marine Park more generally, including through the following changes:

- *Publication of Offences* – the Minister and Authority will be empowered to publicise a contravention of the Act. Courts will be empowered to order a person convicted of an offence or found to have contravened the Act, to take steps to publicise the offence/contravention.
- *Liability of Executive Officers* – executive officers of bodies corporate may be held personally liable for offences and civil penalty contraventions perpetrated by the body corporate if they failed to exercise due diligence and take reasonable steps to prevent the contravention or offence.
- *Liability of permission and licence holders* – permission and licence holders may be held liable for the actions of others they have authorised to carry out activities under the permission or licence if they failed to exercise due diligence in ensuring those other people comply with the GBRMP Act and permission requirements.

- *Remediation orders* – Courts will be empowered to order a person who has engaged in conduct constituting an offence against the Act or contravention of a civil penalty provision to take action to prevent, repair or mitigate environmental damage resulting from their conduct.
- *Environmental Duty* – users of the Marine Park will be required to take reasonable steps to prevent or minimise harm to the environment that might or will be caused by their use of the Park. Guidance is provided as to what constitutes “reasonable steps”. Failing to comply with the duty is not an offence or a civil penalty contravention, but may be enforced through an Enforceable Direction or Enforceable Undertaking (see above).
- *Directions limiting access to the Marine Park* – where a person has contravened the GBRMP Act three or more times within a ten year period, the Minister will be empowered to issue a direction excluding or restricting use of the Marine Park by that person for a period of up to ten years.

Facilitating efficient enforcement action

The Schedule includes provisions allowing for the use of evidentiary certificates so that various technical and confidently asserted matters can be efficiently established in court proceedings to enforce the Act.

Emergency Management

The Schedule addresses a gap in powers to manage the Marine Park by allowing for the issuing of “Emergency Directions”. Where a serious risk to the environment of the Marine Park exists, the Authority will be empowered to make Emergency Directions requiring a person or class of persons to take or not take specified action for the purpose of avoiding, mitigating or eliminating the risk.

NOTES ON INDIVIDUAL CLAUSES

Part 1 – Amendment of the *Environment Protection and Biodiversity Conservation Act 1999*

Items 1-5 – Inspectors

106. The amendments made by this Schedule make the investigation-related provisions of the EPBC Act available for the purposes of investigating compliance with the GBRMP Act. The current items provide that it is only inspectors appointed under the GBRMP Act that may exercise EPBC Act investigation powers for GBRMP Act purposes (as well as members and special members of the Australian Federal Police, who have *ex officio* powers under both the GBRMP Act and EPBC Act). This arrangement ensures that the vesting and exercise of investigation powers for GBRMP Act purposes is subject to a clear governance framework, with responsibility resting with the Authority.

107. In light of these governance arrangements, the items also amend provisions related to identity cards to provide that an identity card issued under the GBRMP Act to an inspector appointed under that Act suffices for EPBC Act purposes. More specifically, a GBRMP Act inspector need not be issued an EPBC Act identity card, and may satisfy EPBC Act provisions requiring the production of an identity card by producing their GBRMP Act identity card.

Items 6-87 – Making EPBC Act investigation provisions available for GBRMP Act purposes

108. These items allow the investigation powers of the EPBC Act to be exercised for the purposes of investigating compliance with the GBRMP Act.

109. EPBC Act investigation powers are currently exercisable in relation to a suspected offence against the EPBC Act or regulations and/or a contravention of a civil penalty provision of the EPBC Act. To establish a single investigations regime for EPBC Act and GBRMP Act purposes, EPBC Act investigation powers will, in future, be exercisable in relation to a suspected offence against “an environmental law” and/or a contravention of “an environmental penalty provision”. The terms “environmental law” and “environmental penalty provision” are defined (items 76 and 77), respectively, as an offence against the EPBC Act or GBRMP Act (and regulations) and a contravention of a civil penalty provision of those Acts (and regulations). Similarly, the definitions of “evidential material” (subsection 406(2)) and “relevant material” (subsection 407A(12)) are amended to ensure such materials include evidence of an offence against, or contravention of a civil penalty provision of, the GBRMP Act and regulations.

110. An exception to the general approach of using EPBC Act investigation powers for GBRMP Act purposes relates to enforcement of the Compulsory Pilotage provisions of the GBRMP Act (Part VIIA). In line with current GBRMP Act provisions, a number of EPBC Act investigation powers will not be available in relation to the Compulsory Pilotage provisions. The exception is in place because the GBRMP Act Part VIIA provides investigation powers specific to the Compulsory Pilotage scheme, reflecting the nature and needs of that scheme.

111. Further information on the particular EPBC Act investigation provisions that are made available for GBRMP Act purposes, and the rationale for doing so, is provided below.

Boarding vessels, aircraft, vehicles, platforms (Items 6, 11-16)

112. Subsection 403(2) provides authorised officers with a power to board a vehicle, vessel, aircraft or platform to search for “evidential materials” (see EPBC Act ss406(2)). The GBRMP Act section 48 contains an equivalent power, which will be repealed (see item 122). The power to board and search a vessel etc without warrant remains necessary and appropriate in investigating compliance with the GBRMP Act given the large area of the Marine Park, the often remote location in which investigations are conducted, and the mobility of vehicles, vessels and aircraft. A requirement to obtain a warrant in such circumstances would unduly hamper efficient and effective investigations.

113. An inspector who has boarded a vehicle, vessel, aircraft or platform may exercise the powers set out in section 406 related to the identification and collection of evidence.

The inspector may also conduct a search of a person on the vessel, platform etc, without warrant, for any eligible seizeable items or evidential material. The search is of essentially the same nature as a “frisk search” (see EPBC Act section 413(3)). This power is necessary to ensure the safety of officers conducting searches and to facilitate the efficient collection of evidence. Obtaining a warrant prior to conducting a search is impractical and inefficient given the large area of the Marine Park, the often remote location in which investigations are conducted and the mobility of vessels. Section 406A imposes requirements on the conduct of searches to ensure a person searched is not subjected to undue indignity.

Bringing vessels and aircraft to port/airport (Items 7 & 8)

114. Subsection 403(3) empowers an authorised officer to themselves bring, or to direct a person in charge of a vessel the officer suspects on reasonable grounds has been used or involved in the commission of an offence to bring, the vessel to the nearest port. Subsection 403(4)(a) empowers an authorised officer to direct a person in charge of an aircraft the officer suspects on reasonable grounds has been involved in the commission of an offence, to bring the aircraft to the nearest airport.
115. The GBRMP Act currently includes a similar provision allowing an inspector to give a notice requiring the delivery of a vessel or aircraft the inspector is authorised to seize to a specified location (section 47B). This provision will be repealed (see item 122). Such a power is necessary and appropriate in investigating compliance with the GBRMP Act given the large area of the Marine Park, the often remote location in which investigations are conducted, and the mobility of vessels. Intercepting vessels, and properly searching for and collecting evidence at the point of interception, can be difficult or impractical and potentially unsafe. Intercepting and inspecting aircraft en route is not possible.

Requiring information from persons in charge of a vehicle, vessel, aircraft or platform (Item 9)

116. Subsection 403(5) empowers an authorised officer who has boarded a vessel, aircraft vehicle or platform to require the person in charge of the vessel etc to provide information concerning the vessel etc, its crew and other persons on the vessel etc. The current item, in addition to making this power available for the purposes of investigating compliance with the GBRMP Act and regulations, clarifies that the person in charge of a vessel may be required to provide information concerning persons operating dories in association with vessel. This recognises the responsibility of vessel operators for others working dories in association with the vessel.

Taking things into possession (Items 17-19)

117. This item inserts a new section 406AA. The new section empowers an authorised officer that has found eligible seizeable items in searching a vehicle, vessel, aircraft or platform (under paragraph 406(1)(a)) or a person (under paragraph 406(1)(ba) or 406A), to take that item into possession and keep it for as long as necessary for the purposes of the EPBC Act and/or GBRMP Act.
118. This provision takes the existing powers in subsections 406A(4), (5) and (6) (repealed by item 17), which relate to eligible seizeable items found during search of a person, and extends the power to include such items found in searching the vessel etc. This capacity

is currently missing from the EPBC Act and is important in ensuring the safety of persons boarding and searching vessels etc under section 403, as it allows items that may present a danger to inspectors or be used to escape lawful custody to be secured until such time as it is safe to return the item.

Division 3, Part 17 - Monitoring of Compliance (Items 20 & 21)

119. Division 3 of Part 17 empowers authorised officers to board/enter, with the consent of the occupier/operator, premises, vehicles, vessels etc for the purpose of finding out whether the provisions of the Act have been, are being or will be complied with. Section 409 provides for entry for the same purpose pursuant to a monitoring warrant issued by a magistrate. These powers are directed at monitoring compliance with legislative requirements, rather searching for evidence of specific offences. The powers provide a mechanism for auditing operations, particularly large and complex activities, to ensure they are being conducted consistently with the full range of applicable legal requirements. Such a power is necessary in the context of the Marine Park, as compliance with legal requirements is often contingent not simply on the fact that an activity is or is not being undertaken, but on the manner in which an activity is done and the environmental outcomes of the activity over time (for example, the level and nature of discharges into the Marine Park)

Division 4, Part 17 - Search Warrants (Items 22-43)

120. Division 4, Part 17 of the EPBC Act provides for the issuing of search warrants by a magistrate. The GBRMP Act does not currently provide for the issuing of search warrants. Instead, where search under warrant is required, *Crimes Act 1914* provisions are available. It is proposed elsewhere (see item 125) that a civil penalty regime be introduced into the GBRMP Act. Consequently, it is necessary to allow search under warrant for the purposes of collecting evidence of both criminal offences and contravention of civil penalty provisions. The EPBC Act search warrant regime allows for this.

121. The Authority has in place an internal governance framework for the vesting and exercise of investigations powers that is consistent with the *Commonwealth Fraud Control Guidelines* and other relevant Australian Government policies and guidelines. Governance arrangements will be further reviewed and updated in light of the changes in the Bill such that, to the extent the search warrant powers of the EPBC Act are used for GBRMP Act purposes, warrants will only be applied for and executed by police officers.

Part 17, Division 6 - Arrest and related matters (Items 44-50)

122. Section 403 allows an authorised officer to arrest a person without warrant if the officer believes on reasonable grounds that the person has or is committing an offence and that proceedings against the person by summons would not be effective. Section 46 of the GBRMP Act contains an equivalent power (which will be repealed). The capacity to arrest without warrant remains necessary and appropriate in enforcing the GBRMP Act given the often remote location in which investigations are conducted, and the fact that alleged offenders may be located on vessels or are otherwise highly mobile. The Authority's internal governance framework for the exercise of arrest powers dictates that the power is only used in exceptional circumstances, almost always by a police officer, and in any case, only by an appropriately qualified person. The EPBC Act

subsection 403(3) requires that a person arrested without warrant must, without unreasonable delay, be brought before a Justice of the Peace or other authority to be dealt with in accordance with the law.

123. Section 431 and 432 empower an authorised officer to conduct a frisk search and ordinary search (respectively) of a person arrested under section 430. Sections 46A and 46B of the GBRMP Act provide identical powers (which are repealed). The power to conduct searches of an arrested person remains necessary and appropriate in enforcing the GBRMP Act, as it helps ensure the safety of authorised officers and others and facilitates the efficient collection of evidence. The required context of an arrest provides assurance that the power will not be used in the absence of reasonable suspicion.
124. Section 433 allows the seizure of evidential material that is in plain view at the premises at which a person is arrested under section 430. This power facilitates the efficient and effective investigation of suspected offences for which a person has been arrested and decreases the risk of evidence being destroyed to avoid seizure. There is no equivalent provision in the GBRMP Act.

Power to ask for a persons' name and address (Item 51)

125. Subsection 444(1) empowers an authorised officer to ask for a person's name and address if they suspect on reasonable grounds that the person has been involved in the commission of an offence. Paragraph 48(2)(b) of the GBRMP Act contains an equivalent provision (which is repealed). The power remains necessary and appropriate to efficient and effective investigation of compliance with the GBRMP Act and is subject to the requirement for reasonable suspicion and the production of relevant identification (e.g. the inspector's identify card).

Seizure (Items 52-56)

126. Section 445 allows the seizure, without warrant, of any thing an authorised officer suspects on reasonable grounds is evidential material. The GBRMP Act subsections 47(2) and (6) provide equivalent powers (which are repealed). The power to seize evidential material without warrant remains necessary and appropriate in investigating compliance with the GBRMP Act given the large area of the Marine Park, the often remote location in which investigations are conducted, and the mobility of vehicles, vessels and aircraft that are the most common subject of investigations. A requirement to obtain a warrant prior to seizing items in such circumstances would unduly hamper efficient and effective investigations and often be impractical. The power is also a corollary of section 403, which allows authorised officers to board and search vehicles, vessels, aircraft etc without warrant. The exercise of seizure powers is subject to protections, notably a requirement that seized items be expeditiously returned as soon as retention of the item is no longer necessary or justified (section 446).

Direction to deliver a seizable item (Item 57)

127. Section 47B of the GBRMP Act empowers an inspector to issue a notice requiring the delivery of a vessel, aircraft, article, plant or animal the inspector is authorised to seize. Item 57 proposes that the EPBC Act be amended to include an equivalent provision, as the relevant GBRMP Act provision is repealed.

128. The power to order the delivery of an item for the purpose of seizure is important to efficient and effective investigation of both the GBRMP Act and the EPBC Act, most notably in circumstances where investigations are carried out in remote locations, as is the case in the Marine Park (and Commonwealth Reserves established under the EPBC Act). Seizure at the location in question may be impractical, unsafe and unnecessarily inconvenient for both the authorised officer (for example, they may not have the capacity to take possession of illegally caught fish or take charge of a vessel), and those who are the subject of the investigation (for example, those aboard a vessel that is to be seized).
129. The power to order delivery of an item for seizure purposes is enforced through a new offence provision carrying a maximum penalty of 12 months imprisonment, 60 penalty units (individual) or both. A custodial sentence is considered appropriate as failing to comply with a direction could amount to obstructing an investigation by a law enforcement officer - a serious offence warranting the potential of imprisonment. The penalty is aligned with analogous offences, for example, subsection 63(2) of the *Sea Installations Act*, which relates to failing to provide information required by an inspector.

Release of a seized item subject to a condition (Items 58 & 59)

130. This item establishes a new offence applying where a seized item is released subject to a condition pursuant to section 449BA and that condition is not complied with. The offence ensures the conditions of release of a seized item are appropriately enforceable. A maximum penalty of 12 months imprisonment, 60 penalty units (individual) or both is specified. A custodial sentence is considered appropriate as failing to comply with a direction could amount to obstructing an investigation by a law enforcement officer - a serious offence warranting the potential of imprisonment. The penalty is aligned with that of an equivalent offence in the GBRMP Act, which is repealed by this Bill.
131. The offence establishes absolute liability in relation to the element that a person has been issued with a direction. Absolute liability is applied as the fact that a seized item has been released subject to a condition is a jurisdictional element of the offence - the essence of the offence is non-compliance with such conditions. Application of absolute liability is proposed having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs.

Forfeiture (Items 60-68)

132. Section 450 empowers a court, upon convicting a person of an offence, to order forfeiture of any thing used or involved in the commission of the offence. Section 450A allows a court, on application, to order the forfeiture of a thing that has been seized if the Court is satisfied that the thing has been used or otherwise involved in the commission of an offence. The GBRMP Act includes an equivalent provision (section 47(1)), which will be repealed. This power remains appropriate, as it provides an important deterrence effect and helps to ensure that persons do not gain economically as a result of illegal activity, for example, that persons convicted of illegal fishing are not able to keep and sell fish caught illegally, the revenue from which may offset any penalty imposed.

Breaking or destroying things to prevent seizure (Item 69)

133. This item ensures that offence of breaking or destroying things to prevent seizure applies to things that are evidence of an offence against the GBRMP Act and regulations (as well as against the EPBC Act). The item also extends the offence to cover evidence of an offence against the EPBC Regulations. This corrects a previous oversight.

Part 17, Division 15A - Notices to Produce and Attend (Items 70-74)

134. Sections 486E-486J empower the Minister to issue “notices to produce” and “notices to attend”, that is, a notice requiring a person to produce information or to appear and answer questions for the purposes of investigating or preventing an offence or contravention of a civil penalty provision. Items 70-74 allow such notices to be issued in relation to contraventions of the GBRMP Act, as well as the EPBC Act (as is currently the case). As part of this, the items expand the range of officials a person may be required to provide information to or appear before to include the Chairperson and staff of the Authority. This allows investigation of compliance with the GBRMP Act through notices to produce/attend to be undertaken by the Authority, reflecting its statutory and administrative responsibilities.
135. The capacity to seek information through notices to produce/attend will greatly assist the efficiency of enforcement and administration of the GBRMP Act, notably where information is most easily accessed, or is only available to, the person to be served with the notice. The capacity to issue a notice is subject to a requirement of reasonable belief (section 486E), and a person issued a notice is protected against self incrimination (section 486J).

Definitions (Items 75-78)

136. These items insert definitions in the EPBC Act of the following terms:

“dory” – this term is defined consistently with the GBRMP Act. The need to define the term is a consequence of item 9, which empowers an authorised officer to request information from the master of a vessel regarding the operators of dories associated with that vessel

“environmental law” – As discussed above, this schedule makes EPBC Act investigation provisions available for GBRMP Act purposes by providing that investigation powers can be exercised in relation to a suspected offence against “an environmental law”. The current item defines “an environmental law” as the EPBC Act, GBRMP Act and regulations made under those Acts.

“environmental penalty provision” - As discussed above, this schedule makes EPBC Act investigation provisions available for GBRMP Act purposes by providing that investigation powers can be exercised in relation to a suspected contravention of an “environmental penalty provision”. The current item defines an “environmental penalty provision” as a civil penalty provision of the EPBC Act, GBRMP Act and regulations made under those Acts.

“*Primary commercial fishing vessel*” - this term is defined as it is used in the definition of “dory” (see above). The term is defined consistently with the GBRMP Act.

Provisions relating to the detention of suspected foreign offenders (Items 79-87)

137. The provisions amended by these items relate to the detention and handling of suspected foreign offenders – persons that are not Australian citizens or residents, and who are apprehended on suspicion of an offence involving a foreign vessel and/or an offence committed in a location within the Australian jurisdiction, but outside the migration zone (see *Migration Act 1958*). Schedule 1 of the EPBC Act allows such suspected offenders to be placed into “environment detention” for a limited period while it is determined whether to charge them with an offence against the EPBC Act or regulations or section 6 of the *Crimes Act 1914*. Schedule 1 includes provisions relating to the screening, identifying and handling of persons in environmental detention and the transfer of such persons from environmental detention to migration detention under the *Migration Act 1958*.
138. The EPBC Act Schedule 1 environmental detention provisions are closely aligned with those for “fisheries detention” under the *Fisheries Management Act 1991* and “migration detention” under the *Migration Act 1958*. This alignment is particularly important as, in practice, persons in environmental, fisheries and immigration detention will often be held at the same facility. Having equivalent powers and processes ensures consistent treatment and minimises risks of non-compliance with legal requirements. Alignment also facilitates the ultimate transfer of persons into migration detention, as it ensures that all persons are subject to the same initial screening and identifying processes, regardless of which regime they are first detained under.
139. The current items make the environmental detention provisions of the EPBC Act available in relation to suspected offences against the GBRMP Act and regulations. These changes are necessary to ensure that persons committing offences in the Marine Park, who are not Australian citizens or residents, can be apprehended and prosecuted for offences against the GBRMP Act and regulations, in addition to being dealt with in accordance with the *Migration Act 1958*.
140. The EPBC Act Schedule 1 provisions were introduced in early 2007 and have yet to be fully implemented. Given the changes in the current Bill, it is proposed that the Schedule 1 provisions be implemented for the purposes of both the EPBC Act and the GBRMP Act through a single or closely integrated approach. Arrangements will be developed in consultation with the Minister responsible for administration of the *Migration Act 1958* to ensure consistency in approach with migration detention arrangements.

Part 2 – Amendment of the *Great Barrier Reef Marine Park Act 1975*

Items 88-107 - Definitions

141. These items insert or amend definitions of the following terms and repeal redundant definitions.
- *Civil penalty provision* – see item 125, which establishes a civil penalty regime.

- *Class vessel monitoring direction* – see item 125, which provides for the making of “class vessel monitoring directions”.
- *Declaration of contravention* – see item 125, which empowers a Court, on application, to make a declaration that a person has contravened the GBRMP Act.
- *Emergency Direction* – see item 125, which provides for the making of “emergency directions”.
- *Enforceable direction* – see item 125, which provides for the issuing of “enforceable directions”.
- *Executive officer* – see item 125, which includes provisions relating to the liability of executive officers of bodies corporate.
- *Federal Court* – this term is inserted to facilitate ease of reference.
- *Individual vessel monitoring direction* - see item 125, which provides for the making of “individual vessel monitoring directions”.
- *Pecuniary penalty order* – see item 125, which empowers a Court to order a pecuniary penalty.
- *Penalty unit* – this term is defined by reference to the *Crimes Act 1914* and is a consequence of the inclusion of a civil penalty regime in the GBRMP Act.
- *Remediation order* – see item 125, which empowers a Court to issue a “remediation order”
- *Reviewable decision* – see item 125, which provides for review of specified “reviewable decisions” by the Administrative Appeals Tribunal.
- *Vessel monitoring direction* – see item 125, which provides for the issuing of “vessel monitoring directions”.
- *Vessel monitoring system* – This term is defined consistently with the *Fisheries Management Act 1991*(Cth) (subsection 167B(4)).
- *Owner of a vessel* – subsection 3(10) is amended to clarify that that, where the owner of a vessel does not operate a vessel, and the vessel is instead operated by another person, a reference to the owner is taken to be a reference to that other person.

Item 108 – Application to the Crown

142. This item is a consequence of inclusion of a civil penalty regime in the GBRMP Act (see item 125). The item provides that the Crown is not liable to be subject to civil proceedings for the contravention of a civil penalty provision of the Act. Such entities are currently exempt from prosecution for an offence against the Act. The Act does, however, bind the Crown and enables the Act to be enforced against the Crown through means such as an injunction.

Item 109 – Section 4A (note 1): updating a cross reference

143. This item is a technical change. It updates a cross-reference as a consequence of the repeal and re-enactment of subsection 64(8) – see item 125.

Item 110 – Environmental Duty

144. This item establishes an “environmental duty”, under which persons entering and using the Marine Park must take reasonable steps to prevent or minimise harm to the environment that might or will be caused by their entry and use of the Marine Park. The steps required to fulfil the duty will depend on circumstances, for example, the significance of any potential impacts and practicality and costs of action. The item

provides guidance on the matters that must be considered in determining whether the duty has been fulfilled in a particular circumstance. Administrative guidelines, codes of practice and other best practice standards will also help indicate what is required. Breach of the duty is not an offence, but triggers the possibility of administrative action, through which reasonable and practical steps towards achieving the outcome of avoiding or minimising environmental harm would be collaboratively identified by the Authority and person/company in question.

145. The environmental duty recognises that “black letter” law often does not provide the most efficient means of achieving desired environmental outcomes. The duty provides a mechanism through which best practice approaches to environmental protection can be flexibly and collaboratively established on, for example, an individual, site, area, sector or industry-specific basis, as appropriate. This recognises that one size does not always fit all, and thereby helps to minimise imposts on business and communities arising from regulation. Analogous requirements exist under state environmental protection legislation.

Items 111 &112 – Appropriation of the Consolidated Revenue Fund for Environmental Management Charge-related receipts and payments

146. These items repeal provisions providing an appropriation in relation to Environmental Management Charge-related payments and receipts. The appropriations are consolidated and re-enacted in item 141.

Items 113-116 – Environmental Management Charge investigation provisions

147. These items update investigation provisions that relate specifically to the Environmental Management Charge (EMC) (see GBRMP Act Part VA).
148. The EMC-specific investigation powers are currently qualified by the general GBRMP Act investigation powers, notably, a requirement for inspectors to produce identification upon request when searching (or proposing to search) an aircraft or vessel under section 39S. As this general provision is being repealed (item 122), item 113 amends the EMC-specific power to include a provision of equivalent effect.
149. Item 114 establishes a new subsection 39T(1A) requiring an inspector seeking to enter and search premises (under existing subsection 39T(1)) to produce identification upon request. Similarly, item 115 inserts a new subsection 39T(2A) requiring an inspector seeking to enter and search premises under warrant (pursuant to existing subsection 39T(2)) to produce identification and a copy of the warrant. These changes update existing provisions to bring them into line with the Australian Government *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. In so doing, they ensure appropriate procedural requirements apply to the exercise of coercive powers.
150. Item 116 is of a technical nature and inserts a definition of “occupier” for the purposes of section 39T. This is done to clarify on whom section 39T imposes liabilities and to guide the proper exercise of investigation powers under the section.

Items 118-121 – Appointment of inspectors

151. These items provide that the Authority must not appoint as an inspector an officer or employee of another Australian Government agency or Queensland Government instrumentality unless there is first an arrangement to do so in place. In the case of the officers and employees of another Australian Government agency, the arrangement must be between the Authority and the other agency. In the case of Queensland Government officers or employees, the arrangement must be between the Minister and the relevant Queensland Government Minister.
152. The capacity to make such arrangements is in place because the Great Barrier Reef is managed collaboratively by a number of Australian and Queensland government agencies. For example, under an intergovernmental agreement, Queensland instrumentalities undertake field management activities in the Marine Park, including investigation and enforcement tasks. Similarly, enforcement and management activities in the Marine Park are undertaken by a wide range of Australian government agencies, including the Australian Federal Police, Australian Customs Service, and Australian Maritime Safety Authority. This provides for more efficient and effective management and enforcement, and allows the Commonwealth's Great Barrier Reef Marine Park and Queensland's marine and island national parks within the Great Barrier Reef World Heritage Area to be managed in an integrated and holistic manner.
153. Arrangements related to the appointment of persons as inspectors may set out matters such as the class and qualifications of persons that may be appointed as inspectors, the powers that may be vested and the purposes they may be vested for. Similarly, in appointing persons as inspectors (either pursuant to an arrangement or otherwise), the Authority may specify the powers that may be exercised under both the GBRMP Act and EPBC Act. These provisions help to ensure there are sound governance arrangements around the vesting and exercise of inspectors' powers. They provide a legislative framework, which is complemented by administrative arrangements, such as protocols on the qualifications required for the vesting and exercise of inspectors' powers. This framework is designed to ensure that compulsive powers are only exercised by appropriately qualified persons and subject to appropriate controls and accountability.
154. Items 119 and 121 insert notes drawing attention to the fact that inspectors appointed under the GBRMP Act have powers under the EPBC Act to enforce the GBRMP Act. This is informational, and a consequence of changes discussed above, that establish the investigation powers of the EPBC Act as the basis for enforcement of the GBRMP Act.

Item 122 – Repeal of GBRMP Act investigation provision (sections 45A to 48A)

155. This item is a key component of changes to make EPBC Act investigation powers the basis for investigating compliance with the GBRMP Act. The item repeals GBRMP Act investigation provisions that are of a general nature. Investigations provisions specific to the Environmental Management Charge scheme (Part VA) and Compulsory Pilotage scheme (Part VIIA) are retained in the GBRMP Act, as those provisions reflect needs specific to those schemes.
156. The EPBC Act (as amended by this Bill) includes provisions generally equivalent to all of the provisions repealed by this item, with the following exceptions:

- The power to give directions for the purpose of ensuring the Act is complied with (section 45A) and to give an order to a person to leave the Marine Park or a zone (paragraph 48(2)(b)). These powers will be replaced through regulation amendments. A similar approach is taken in relation to Commonwealth Reserves established under the EPBC Act (see EPBC Regulations, regulation 12.60)
- The power to require a person to produce a copy of a permission the inspector believes the person requires to carry out an activity in the Marine Park (paragraph 48(2)(c)). This power will be replaced through regulation amendments. A similar approach is taken in relation to Commonwealth Reserves established under the EPBC Act (see EPBC Regulations, regulation 12.59)
- The GBRMP Act subsections 47(3), (8) and (9) currently provide that a person who has suffered loss or damage as a result of wrongful seizure is entitled to reasonable compensation. These provisions are not reproduced elsewhere as common law remedies are available (notably conversion and detinue). Further, the EPBC Act section 517 will operate to ensure that compensation is paid by the Commonwealth on “just terms” where there is an acquisition of property, as required by the Constitution.

Items 117, 122 & 123 - Delegation of powers and functions

157. Item 122 empowers the Minister to delegate to the Authority any or all of the Minister’s powers and functions under the Act, with specified exceptions. The powers and functions that may not be delegated are matters properly vested with the Minister only, such as the approval of a zoning plan prepared by the Authority and arranging for the peer-review of a Great Barrier Reef Outlook Report prepared by the Authority.
158. In exercising powers delegated to it, the Authority must comply with any directions of the Minister. Item 123 requires that any such directions be disclosed in the Authority’s annual report. This requirement ensures an appropriate level of independence for the Authority in management of the Marine Park by providing for transparency and accountability in relation to any Ministerial directions to the Authority. The provision is analogous to existing provisions (see subsection 61A(4)).
159. Item 122 also empowers:
- the Authority to delegate its powers under the GBRMP Act and to sub-delegate powers delegated to it to:
 - the Chairperson of the Authority;
 - an employee of the Authority;
 - an officer or employee of another Australian Public Service Agency;
 - an officer or employee of a Commonwealth authority or company;
 - an officer or employee of the Queensland Government; and
 - the Chairperson of the Authority to sub-delegate powers and functions delegated (but not sub-delegated) to the Chairperson under the GBRMP Act or any other Act, to an employee of the Authority.
160. The Authority and Chairperson may only delegate and sub-delegate enforcement-related powers and functions to SES and Executive Level employees and officers (and state government equivalents). This ensures coercive powers are exercised by people with appropriate experience and expertise, and are at an appropriate level in the organisation.

161. The Authority may not delegate powers and functions to an officer or employee of another Australian Government agency or Queensland Government instrumentality unless there is first an arrangement to do so in place. In the case of the officers and employees of another Australian Government agency, the arrangement must be between the Authority and the other agency. In the case of Queensland Government officers or employees, the arrangement must be between the Minister and the relevant Queensland Government Minister. Such arrangements may set out matters such as the class and qualifications of persons that may be delegated powers and functions. These provisions help to ensure there are sound governance arrangements around the vesting and exercise of delegated powers. They provide a legislative framework, which is complemented by administrative arrangements, such as protocols on who may be delegated powers and for what purpose.
162. The scope of the delegation powers reflects the nature of the Authority’s functions and powers, and the way it does business.
- The Great Barrier Reef is managed collaboratively by a number of Australian and Queensland government agencies. For example, under an intergovernmental agreement, Queensland instrumentalities undertake field management activities in the Marine Park. This requires the delegation of certain powers and functions to Queensland public service employees. Similarly, enforcement and management activities in the Marine Park are undertaken by a wide range of Australian government agencies, including the Australian Federal Police, Australian Customs Service, and the Australian Maritime Safety Authority.
 - The size of the Marine Park is significant and it is in parts remote. Some powers and functions need to be performed by people “on the water” in order to provide for effective management and administration of the Act.
 - The Authority comprises multiple members who meet infrequently. A capacity to delegate day-to-day issues to the Chairperson, Authority staff and others allows for more effective management.

Items 124 & 125 – Enforcement Provisions

New Enforcement Part

163. Item 124 establishes a new Part of the Act dealing with enforcement matters.

Repeal of section 61

164. Item 125 repeals section 61, which relates to delegation powers. Item 122 establishes new delegation provisions.

Vessel Monitoring Directions

165. Item 125 establishes a Subdivision empowering the Authority to issue a “vessel monitoring direction” requiring a person to provide, or cause to be provided (e.g. via another government agency), Vessel Monitoring System (VMS) data in relation to a vessel while it is within the Marine Park. Such a direction may only be made in relation to vessels that are required, under a Commonwealth or State law, to be equipped with a VMS. The provision does not empower the Authority to direct a person to install and use a VMS system. Directions may be issued in relation to an individual vessel (an “individual vessel monitoring direction”) or in relation to a class of vessels (a “class

vessel monitoring direction”), for example, all vessels licensed to operate within a particular fishery.

166. A VMS is an electronic device fitted to a vessel that provides information, generally via satellite or radio frequency, on the location, course and speed of a vessel, and similar such matters. VMS are currently required by law to be fitted on vessels operating in all Commonwealth and some Queensland fisheries. Some non-fishing vessels are also required to be fitted with VMS (although a different name is sometimes used, such as “Automatic Identification System”). Access to VMS data has potential to significantly enhance efficiency in enforcement of the GBRMP Act by providing real-time data on key users of the Marine Park that can be used to initiate on-water investigations and in the context of enforcement action.
167. As VMS data may potentially be commercially sensitive, the item provides that data may not be used or disclosed by the Authority except for the purposes of administering the GBRMP Act, managing the Marine Park, and in the context of court proceedings to enforce the Act or for a review of a decision under the Act (e.g. as evidence). VMS data may also be disclosed for law enforcement purposes, for example, to other government agencies, and otherwise as required by law. Amendments elsewhere (item 125) provide for the making of evidentiary certificates in relation to VMS data, limiting the need to publicly disclose data in the context of enforcement action.
168. The item establishes an offence and civil penalty provision of failing to comply with a vessel monitoring direction. Enforcement of directions may also be achieved through an injunction or other court order.
169. The offence provides for absolute liability in relation to the circumstances that a vessel monitoring direction applies to a vessel and to a person or kind of person. Absolute liability is applied because the matters are jurisdictional – the essence of the offence is that a person has failed to comply with a direction. Further, if the direction relates to a particular vessel, the offence only applies where the person has been given a copy of the direction. Similarly, a direction that applies to a class of person must be published on the Federal Register of Legislative Instruments.
170. Strict liability is applied to the elements of the offence that a person is a “responsible person” and the person has been provided a copy of the direction. As above, these matters are jurisdictional elements of the offence, however, it is appropriate that a defence of honest and reasonable mistake be available.
171. The item specifies that a Vessel Monitoring Direction that applies to a particular vessel (an “individual vessel monitoring direction”) is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003* (LI Act). This is declaratory of the law and included to assist readers – a direction made to an individual is not legislative in nature within the meaning of section 5 of the LI Act. Vessel Monitoring Directions that apply to a class of vessel (“class vessel monitoring directions”) are legislative instruments. Accordingly, such Directions will need to be registered on the Federal Register of Legislative Instruments, and tabled in Parliament where they may be subject to disallowance.

Enforceable undertakings

172. Item 125 establishes a subdivision empowering the Minister to enter into an undertaking with a person the Minister believes has contravened a civil penalty provision of the GBRMP Act or the environmental duty (see item 110). An undertaking may include a commitment to take action to ensure compliance with the Act/environmental duty in the future; to prevent, mitigate or repair damage to the environment; or to pay money to the Commonwealth for the above purposes. The entering into of an enforceable undertaking is voluntary on the part of both parties and may be withdrawn, varied or cancelled at any time by agreement. Undertakings may be enforced by the Federal Court of Australia.
173. Enforceable undertakings provide an administrative mechanism for flexibly dealing with non-compliance with the GBRMP Act, backed up by legal enforceability. Undertakings provide a framework through which persons suspected of contravening a civil penalty provision of the GBRMP Act or the environmental duty can be brought into conformity and/or any detrimental environmental impacts of non-conformity be repaired.
174. The use of undertakings in any given circumstance is a matter of discretion. Criminal prosecution, civil action or another form of legal or administrative enforcement will always remain an option. The decision in any particular case as to what form of enforcement action is taken will depend on circumstances and will be made consistently with relevant Australian Government policies and guidelines and agency enforcement policy.

Emergency Directions

175. Item 125 establishes a subdivision empowering the Authority to make “Emergency Directions” where a serious risk to the environment of the Marine Park exists. Such directions may require a person or class of persons to take or not take specified action for the purpose of avoiding, mitigating or eliminating the risk. The provisions are designed as a measure for responding to incidents such as a ship grounding, oil spill or pontoon breaking loose in a cyclone.
176. Before making a Direction, the Authority must be satisfied that the direction is necessary and appropriate for the purpose of avoiding, mitigating or eliminating the risk to the environment of the Marine Park. Where the emergency relates to a vessel, the Authority must be satisfied that the direction is not inconsistent with Articles III and V of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. This, for example, would require directions to be proportionate to the damage caused or threatened. Directions must be agreed to by the Minister. Directions have a maximum duration of two months. Item 140 provides for reconsideration and review by the Administrative Appeals Tribunal of a decision to make or vary an emergency direction.
177. The power to make Directions is subordinate to the role and powers of the Australian Maritime Safety Authority (AMSA), as provided for by subsection 8(1C) of the *Protection of the Sea (Powers of Intervention) Act 1981*. This recognises the role of AMSA as the agency with primary responsibility for responding to shipping incidents in the Marine Park. It is also not intended that the capacity to issue emergency

directions will in any way interfere with the powers and operations of the Executive Director of Transport Safety Investigation under the *Transport Safety Investigation Act 2003*.

178. The item establishes an offence of failing to comply with an Emergency Direction. Consistent with an equivalent offence under the *Protection of the Sea (Powers of Intervention) Act 1981* (section 19), the following defences are available:
- non-compliance with the direction resulted from a need to save life at sea;
 - compliance with the direction was not possible.
- These matters are specified as defences as they are issues within the knowledge of the defendant and would be particularly difficult for the prosecution to establish. Further, given the context of directions – action to respond to a serious risk to the environment of the Marine Park – it is appropriate that it be incumbent on the defendant to establish valid reasons for non-compliance with a direction.
179. The offence applies absolute liability to the circumstance that an emergency direction applies to a person. This is done as the matter is a jurisdictional element of the offence – the essence of the offence is a failure to comply with a direction. Directions applying to individuals must be communicated to the individuals. Directions of more general application must be publicised on the Authority’s website.
180. The item provides that an Emergency Direction is not a legislative instrument for the purposes of the LI Act. This reflects the nature of the directions and the requirements applying to the making of directions, which provide controls and protections similar to those of the LI Act, but in a way that is adapted to the nature of emergency directions. In particular:
- there are controls around the making of orders, such as the matters that must be considered and the requirement for Ministerial approval;
 - directions applying to an individual must be communicated to that individual;
 - directions applying to a class of person must be communicated through the Authority’s website – a location in which persons affected by the order are more likely to access than the Federal Register of Legislative Instruments;
 - directions are of only a short duration – a maximum of two months; and
 - internal reconsideration and AAT review of directions is available.

Enforceable directions

181. Item 125 establishes a subdivision empowering the Minister to give an “enforceable direction” where s/he is satisfied that:
- a person has engaged, is engaging or is likely to engage in conduct constituting an offence against the GBRMP Act; a contravention of a civil penalty provision of the GBRMP Act; or breach of the environmental duty (see item 110); and
 - it is in the public interest to make a direction for the purpose of ensuring compliance with the Act and/or preventing, mitigating or repairing environmental damage that has been, will be or might be caused by the conduct in question.
182. Directions remain in effect for the period set out in the direction, unless set aside by a Court or revoked by the Minister.
183. A person issued with a direction may request reconsideration by the Minister (this is a non-delegable function of the Minister). The person may also apply to the Federal

Court to have the order set aside on the basis that the person did not engage in the conduct in question, the conduct does not constitute an offence against or contravention of the GBRMP Act or environmental duty, or the requirements of the direction are not reasonable for the purpose of ensuring compliance or preventing, repairing or mitigating environmental damage caused by the conduct in question. External review is by the Federal Court, rather than the AAT in the first instance, as any review will involve questions of law. A court is therefore a more appropriate forum for review.

184. Directions can be enforced by the Federal Court. Non-compliance with a direction may attract a civil penalty of up to 600 penalty units for an individual, 6,000 units for a body corporate.
185. Enforceable directions provide a strong administrative mechanism for ensuring compliance with the GBRMP Act, backed up by legal enforceability and the potential for sanctions. Directions provide a flexible framework through which persons suspected of breaching the GBRMP Act or environmental duty can be brought into conformity and/or any detrimental environmental impacts of non-conformity repaired. It is envisaged that directions will be of particular value in relation to ongoing (rather than one-off) activities, for example, the operation of a tourist resort and associated tourism activities.
186. The issuing of a direction in any given circumstance is a matter of discretion. Criminal prosecution, civil action or another form legal or administrative enforcement will always remain an option. The decision in any particular case as to what form of enforcement action is taken will depend on circumstances and will be made consistently with relevant Australian Government policies and guidelines and agency enforcement policy.
187. The item provides that an enforceable direction is not a legislative instrument for the purposes of the LI Act. This provision is declaratory of the law, not an exemption, and is provided to assist readers. Directions do not fall within the meaning of a “legislative instrument”, as provided by section 5 of the LI Act.

Directions limiting access to the Marine Park

188. Item 125 establishes provisions empowering the Minister to issue a person who has, at least three times in a ten year period, committed an offence against or contravened a civil penalty provision of the GBRMP Act, with a direction prohibiting access to the Marine Park or placing restrictions on that person’s entry and use of the Park. Such directions can have effect for a maximum period of ten years from the date of the most recent offence/contravention. Item 140 provides for internal reconsideration and AAT review of a decision to make or vary a direction limiting access to the Marine Park.
189. This provision is designed to enhance deterrence. The Great Barrier Reef is an area of significant environmental, economic and social value. The GBRMP Act is designed to protect those values. Persons who repeatedly breach the Act jeopardise the protection and ecologically sustainable management of the Great Barrier Reef. The capacity to exclude from or place conditions on use of the Marine Park by repeat offenders is therefore considered appropriate. The requirement for the three “strikes” to be in a ten year period, and the maximum duration of a direction of ten years, is designed to reflect

a similar policy to that of the spent convictions scheme established by the *Crimes Act 1914*.

190. The item provides that a direction limiting access to the Marine Park is not a legislative instrument for the purposes of the LI Act. This provision is declaratory of the law, not an exemption, and is included to assist readers. Directions do not fall within the meaning of a “legislative instrument”, as provided by section 5 of the LI Act.
191. Failure to comply with a direction is an offence carrying a maximum penalty of 500 penalty units (individual). The offence applies absolute liability to the circumstance that the person has been issued a direction. This is done as the fact the person has been issued a direction or order is a jurisdictional element of the offence - the essence of the offence is non-compliance with such a direction. The offence specifies negligence as the fault element in relation to the result that the person failed to comply with a direction. In other words, a person may be found guilty if, given the same circumstances, a “reasonable person” would have complied with the direction. Application of an objective standard of care through the use of negligence as a fault element is considered appropriate given the nature of the direction, notably, that it is issued to a person who has repeatedly breached the GBRMP Act.

Publicising offences and contraventions

192. Item 125 establishes a subdivision empowering the Minister and Authority to publicise the fact that a person has been convicted of an offence or found to have contravened a civil penalty provision and the penalty that was imposed. This additional sanction is intended to enhance deterrence, particularly in relation to commercial Marine Park users whose marketing includes promotion of an environmentally friendly image.

Injunctions

193. Item 125 establishes a subdivision empowering the Federal and Queensland Supreme Court to issue prohibitory and mandatory injunctions for the purpose of securing compliance with the GBRMP Act. The provisions are a re-enactment of section 38N (repealed by Schedule 6, item 24), with the exception that injunctions may now be sought in relation to all offences of the GBRMP Act and regulations (previously this applied only to the offences set out in sections 38-38MC) and in relation to the civil penalty provisions inserted by this Bill. The provisions have also been updated to reflect modern drafting practices.
194. Unlike the existing provisions, the re-enacted subdivision allows injunctions to be sought in the Federal Court and the Queensland Supreme Court, rather than the supreme court of any state or territory. This reflects the fact that injunctions are generally sought within Queensland, as this is where the Great Barrier Reef and the Great Barrier Reef Marine Park Authority are located.
195. Consistent with the current provisions and injunction powers of the EPBC Act, the re-enacted provisions do not require an undertaking as to damages in relation to an interim injunction. The rationale for this provision is that requiring such an undertaking may inappropriately deter the Minister/Authority from acting in the public interest to protect the Great Barrier Reef.

Remediation orders

196. Item 125 establishes a subdivision allowing the Federal Court, on the application of the Minister, to make an order requiring a person that has engaged in conduct constituting an offence or a contravention of a civil penalty provision of the GBRMP Act, to take action to prevent, repair or mitigate environmental damage that has been caused by the conduct. The provisions closely follow equivalent provisions of the EPBC Act (sections 480A – 480C). The provisions will help to ensure that persons contravening the GBRMP Act can be held responsible for addressing the environmental consequences of their non-compliance.

Civil penalty provisions

197. Item 125 includes a subdivision establishing a civil penalty regime in the GBRMP Act. The provisions allow the Authority, on behalf of the Commonwealth, to apply to the Federal Court for a declaration that a person has contravened a civil penalty provision of the GBRMP Act, and an order that the person pay a pecuniary penalty. Amendments elsewhere (notably Schedule 6) establish civil penalty provisions.

198. The provisions establishing the civil penalty regime are generally equivalent to those of the EPBC Act (sections 481-486D) and include protections against multiple civil, or both civil and criminal action being taken against a person, consistent with the legal principle of double jeopardy.

199. The availability of civil penalties adds flexibility in enforcement and is of particular value in relation to corporate wrongdoing, where criminal prosecution may not provide appropriate deterrence and punishment. The taking of civil action in any given circumstance is a matter of discretion. Criminal prosecution or another form of legal or administrative enforcement will always remain an option. The decision in any particular case as to what form of enforcement action is taken will depend on circumstances and will be made consistently with relevant Australian Government policies and guidelines and agency enforcement policy.

Court order to pay an amount equivalent to avoided charge

200. Item 125 includes provisions allowing a Court to order a person found to have operated without the necessary permission in the Marine Park to pay a penalty reflecting the Environmental Management Charge (EMC) that would have been payable, had the person held the necessary permission. In determining the penalty payable, a Court must consider not only the particular instance for which the person has been convicted or ordered to pay a pecuniary penalty, but all instances in which the person engaged in the conduct in question. For example, if a person has operated five tours without the necessary permission, but is only prosecuted in relation to one tour, the penalty under this item should reflect the fact that five tours have been conducted.

201. The provision seeks to enhance deterrence and reduce incentives for illegal activities. It also reflects the “user pays” policy that underlies the EMC – that is, users of the Marine Park should contribute to the cost of managing the Park. The EMC is a levy on use of the Marine Park that contributes to the cost of managing the Marine Park. Certain operators in the Marine Park (notably tourism operators) are required to pay, or collect from visitors and pay, an “Environmental Management Charge”. Liability to pay/collect the EMC is a condition of relevant permissions issued under the

GBRMP Regulations. EMC collected is appropriated to the Authority for the purpose of performance of its functions. Consistent with this, item 141 provides an appropriation in relation to amounts paid under the current provision (discussed in further detail below).

Publicity Order

202. Item 125 includes a provision allowing a Court to order a person it has convicted or who has been found to have contravened a civil penalty provision, to take action to publicise the offence or contravention. This additional sanction is expected to provide enhanced deterrence, particularly in relation to commercial Marine Park users whose marketing includes an environmentally friendly image.

Infringement Notices

203. Item 125 establishes a subdivision allowing for an infringement notice scheme to be established by Regulation. This provision is in part a re-enactment of current subsection 66(n), under which an infringement notice scheme has already been established through the GBRMP Regulations. The new subdivision expands the range of offences in relation to which the infringement notice scheme may relate, to include specified offences in the Act, as well as offences in the regulations – the subject of the current scheme. Infringement notices are only permitted in relation to strict liability offences, with a maximum penalty of 60 units. The maximum infringement notice fine that may be imposed is one-fifth of the maximum penalty for the offence in question.

Evidentiary Matters

204. Item 125 establishes a subdivision dealing with evidentiary matters.

205. The subdivision allows the Chairperson of the Authority to issue evidentiary certificates in relation to a variety of formal, technical and factual matters that can be asserted with a high degree of confidence as to their accuracy. Matters in relation to which a certificate may be issued are as follows:

- that a specified document is a copy of a permission, authority or notice given under the Act;
- that a person was or was not the holder of a permission at a particular time;
- that a person was given a notice, order or direction;
- that a fee or charge is payable by a particular person;
- that a fee or charge that is payable has not been paid;
- that certain conduct took place in a specified location or area;
- that a specified location or area is within the Marine Park or a particular zone;
- that Vessel Monitoring System data shows that a vessel was in a particular location or area at a particular point in time and/or was travelling a specified speed.

206. In any proceedings to enforce the Act, a certificate is *prima facie* evidence of the matters specified in the certificate. The defendant may cross-examine the Chairperson on the content of a certificate. The matters that may be the subject of a certificate are of a nature that do not relate to the fault element of any offence.

207. The availability of evidentiary certificates and the associated evidentiary effect is considered appropriate for the following reasons.

- Paragraphs (a)-(e) of new section 61AMA are matters relating to administration of the GBRMP Act, for example, that a person holds a permission granted under the Act, was issued an order under the Act, owes a fee in connection with an application etc. These are simple factual matters that, for all relevant offences, need to be established as a formality. In many cases, the matter relates to a strict or absolute liability element of an offence and it is unlikely that a defendant would seek to dispute the matters. Proving the matter in court via conventional evidentiary means would likely involve calling the Chairperson of the Authority, who would essentially state the issues that would, using the proposed provision, be set out in a certificate. The provisions therefore allow formalities to be established without the need for a witness to be called. The item allows the defendant to cross-examine the Chairperson regarding the content of the certificate.
- Paragraph (f) of section 61AMA reflects current GBRMP Act section 62 - which allows an averment in relation to location. Paragraphs (g) and (h) are similar provisions that allow a certificate stating that Vessel Monitoring System data shows a vessel to be in a particular location at a particular time. Such provisions are not uncommon - e.g. *Fisheries Management Act 1991* section 166, *Torres Strait Fisheries Act 1984* section 58. Location can be asserted with a high degree of accuracy and confidence given Global Positioning System and Vessel Monitoring System data. Allowing evidentiary certificates avoids the need to establish the accuracy of such data in every trial, which requires expert witnesses and adds significant time and expense to prosecutions (e.g. expert witness costs). It also avoids the need for field officers to travel from the sometime quite remote areas of the Great Barrier Reef to appear as a witness. All relevant information can instead be collected in a certificate and presented to the Court. The defendant may elect to cross-examine the Chairperson regarding the content of the certificate.

208. The subdivision includes a further provision relating to commercial fishing offences. It establishes a presumption that all fish found in the possession of a person at the time they are apprehended are deemed to have been taken in contravention of the Act. The provision is necessary as it is highly difficult, if not impossible, to establish which fish on board a vessel at the time it is found fishing in an area where fishing is not permitted have been taken illegally. Some or all fish could have, for example, been taken outside of the area in question. Knowledge of where fish have been taken from will generally be entirely within the knowledge of the defendant. It is difficult, if not impossible, to prove that particular fish have been taken from an area where fishing is prohibited. It may be the case that some fish have been taken legally and others illegally. This creates two problems:

- *Liability for unlawful seizure* - seizure provisions only allow for the seizure of items involved in the commission of an offence/contravention of a civil penalty provision. As it is near impossible to prove that particular fish have been taken illegally, it is difficult to confidently seize fish, given potential liability if fish are seized without sufficient power. Seizure of fish for evidentiary purposes aids in prosecuting offences and securing appropriate penalties.
- *Inadequate deterrence* - illegal fishing is a significant pressure on the Great Barrier Reef. There are strong incentives to illegally fish given generally higher catch rates in areas closed to fishing. To date, maximum fines ordered for fishing contrary to the GBRMP Act are approximately \$40,000 for trawling and approximately \$35,000 for line fishing. Commercial fishing boats, on a single trip, can and generally do catch product in excess of these amounts, and boats operating illegally

are likely to catch more fish in a shorter space of time than those operating legally. An effective capacity to seek forfeiture of fish (or application of the *Proceeds of Crime Act 2004*) is therefore necessary to ensure appropriate deterrence is provided.

209. The deeming provision would address these issues, as well as providing significant deterrence for illegal behaviour that is a key pressure on the Great Barrier Reef. Such provisions are not uncommon - the *Fisheries Management Act 1991* is an example. State fisheries legislation also generally includes similar provisions.

Conduct of directors, employees and agents

210. Item 125 establishes a new subdivision dealing with corporate criminal and civil liability. The subdivision is a re-enactment of current section 64 of the GBRMP Act, with some minor changes. These changes better align provisions with the EPBC Act (section 498B), with some differences in the factors to which a Court must have regard in determining whether a body corporate took reasonable precautions and exercised due diligence to avoid the conduct in question. The changes will help ensure that courts will find corporations liable in appropriate circumstances and encourage environmental awareness and good environmental management practices by corporations.

211. The subdivision provides an alternative regime for inferring corporate liability to that of the *Criminal Code* Part 2.5. The key difference in approach is the requirement for corporations to exercise reasonable precautions and due diligence. As above, this alternative approach is adopted as it encourages environmental awareness and good environmental management practices by corporations, and for this reason, is a feature of other environmental legislation (e.g. the EPBC Act). Further, the subdivision applies to both criminal and civil liability, whereas the *Criminal Code* provisions apply only to criminal liability.

Liability of executive officers of bodies corporate

212. Item 125 establishes a subdivision providing for the civil and criminal liability of the executive officers of bodies corporate for offences and contraventions perpetrated by the body corporate for which they are responsible. The provisions reflect those of the EPBC Act (sections 493-496). The potential for executives of bodies corporate to be personally liable “lifts the corporate cloak” in appropriate circumstances, thereby providing an important deterrence mechanism and encouraging good environmental management practices by those responsible for managing corporations. Under the subdivision, liability of an executive officer is dependent, firstly, on proof of a principal contravention by the corporation. It must then be shown that the executive officer knew or was reckless (or negligent in the case of a civil penalty provision) as to whether the contravention would occur, was in a position to influence the conduct of the corporation and failed to take reasonable steps to prevent the contravention. The subdivision sets out the factors a court must consider in determining whether an executive officer took reasonable steps – essentially, that the body, under the executive officer’s control, took steps to regularly assess and manage risks. These requirements establish important constraints on accessorial liability of executive officers.

Powers of the Federal Court

213. Item 125 includes a provision clarifying that the powers conferred on the Court by the new enforcement part of the Act are additional to, and do not limit, any other powers of the Court.

Items 126-129 – Restoration of the Environment

214. These items amend section 61A, which empowers the Minister to take action to repair, mitigate and prevent environmental harm arising from an offence against the Act. The items expand the provision to also apply to environmental harm resulting from contravention of a civil penalty provision, update a cross reference and remove provisions made redundant by other changes made by this Bill.

Items 130-138 – Liability for expenses of the Commonwealth and Authority have incurred as a result of a civil penalty contravention

215. These items amend sections 61B and 61C, under which a person convicted of an offence against the GBRMP Act can be found liable for expenses and other liabilities incurred by the Commonwealth and the Authority as a result of the offence. The items expand the provision to also apply to expenses and other liabilities resulting from a civil penalty contravention. The provision complements section 61A, which empowers the Minister to take action to repair, mitigate and prevent environmental harm arising from a breach of the Act. Section 61B allows the Commonwealth and Authority to (among other things) recover the costs of taking such action.

Item 139 – Repeal of Section 62 (averments)

216. This item repeals section 62, which allows for a prosecutor to make an averment in relation to certain matters. Item 125 establishes a capacity to issue evidentiary certificates in relation to the same matters. The capacity to make averments is therefore no longer necessary.

Item 140- Reconsideration and review of decisions

217. This item provides for internal reconsideration and AAT review of certain decisions made by the Minister and Authority under the GBRMP Act. The item specifically identifies emergency directions and directions limiting access to the Marine Park as decisions reviewable under the provision. Regulations may prescribe other decisions as subject to reconsideration and review.

218. Procedures for internal reconsideration and AAT review will be set out in regulations. The GBRMP Regulations provide for reconsideration and AAT review of certain decisions made under the Regulations. The intention is to also apply those procedures to relevant decisions made under the Act, so that common processes apply.

219. The item also establishes a new Part IX – Miscellaneous, and repeals section 64, which relates to corporate liability and the conduct of directors, servants and agents of corporations. The provisions are replaced by item 125, with minor changes.

Item 141 – Appropriation of the Consolidated Revenue Fund in relation to Environmental Management Charge receipts and payments

220. This item provides an appropriation in relation to receipts and payments related to the Environmental Management Charge (EMC) scheme. For the most part, the provision is a consolidation of existing appropriations currently provided by section 39I, subsection 38K(4) and subsection 39PA(3), which are repealed by items 111 and 112. Consolidation within a single appropriation provision is intended to enhance transparency and accountability in relation to standing appropriations provided by the GBRMP Act.
221. The item also establishes a new appropriation. Item 125 establishes a capacity for a court to order a person found to have operated without the necessary permission in the Marine Park to pay a penalty reflecting the EMC that would have been payable had the person held the necessary permission. The current item provides an appropriation such that any amount a Court orders a person to pay will be made available to the Authority for the purpose of performance of the Authority's functions. This approach is consistent with the nature of the EMC scheme. The EMC is a levy on use of the Marine Park, which contributes to the cost of managing the Marine Park. As with the existing standing appropriations discussed above, an appropriation relating to court-ordered penalties to pay an amount in lieu of EMC avoided ensures that such funds are used for park management purposes.

Items 142-146 – Regulation-making powers

222. Item 145 establishes four new matters in relation to which regulations may be made:
- the use of Vessel Monitoring Systems (VMS) on vessels in the Marine Park and the disclosure and use of VMS data;
 - the regulation of fishing in the Marine Park;
 - the regulation of camping and other activities on islands within the Marine Park; and
 - the protection and conservation of protected species within the Marine Park.
223. The capacity to establish regulations in relation to the above issues is necessary and appropriate for carrying out and giving effect to the Act, which has among its objects the long-term protection of the environment and biodiversity values of the Great Barrier Reef Region and the ecologically sustainable use of the Region. It is most likely the case that the current regulation making power of the GBRMP Act (section 66) already provides power in relation to the above matters. The provisions are to make it clear that the capacity exists.
224. Item 143 repeals paragraph 66(2)(n), which allows for establishment of an infringement notice regime through regulations. Item 125 re-enacts this power, with some changes, in a separate subdivision of the Act.
225. Items 142 and 146 are of a technical nature. Item 146 establishes new subsections 66(2A) and 66(2B), which are a re-enactment of subsections 38(3A) and (3B) (repealed by Schedule 6). The provisions provide regulation-making powers in relation to the management of the discharge of sewage from vessels in the Marine Park. The repeal and re-enactment is a part of restructuring and clarifying the Act.

Part 3 – Transitional, application and saving provisions

Item 147 – Section 42 of the *Great Barrier Reef Marine Park Act 1975*

226. This item is a consequence of changes to section 42 of the GBRMP Act. Item 122 replaces that section with a new section of similar, but extended, effect. The section, both now and as amended, allows the Australian Government and the Authority to enter into arrangements with the Queensland Government and Australian Government agencies (respectively), under which persons or classes of persons perform functions and/or exercise powers under the GBRMP Act. The current item ensures that any such arrangements in place prior to the amendments continue to have effect as if they were made under the new section 42.

Item 148 – Section 46D of the *Great Barrier Reef Marine Park Act 1975*

227. This item is a consequence of the repeal of section 46D, which relates to the retention of things seized under section 46A and 46B. The item provides that, despite the repeal of section 46D, the section continues to apply in relation to an item seized prior to commencement.

Item 149 - Section 47 of the *Great Barrier Reef Marine Park Act 1975*

228. This item is a consequence of the repeal of section 47 of the GBRMP Act. That section provides for the seizure, release and forfeiture of items an inspector reasonably believes have been involved in the commission of an offence. The current item provides that the requirements of section 47 continue to apply to items seized prior to commencement of the amendments.

Item 150 - Section 47B of the *Great Barrier Reef Marine Park Act 1975*

229. This item is a consequence of the repeal of section 47B of the GBRMP Act and enactment of an equivalent provision in the EPBC Act. Section 47B allows an inspector to direct a person to deliver an item that may be seized. The current item provides that, where an inspector was empowered to issue such a direction pursuant to section 47B immediately before commencement, such a direction can be made under the new EPBC Act provision. This ensures the amendments do not affect the eligibility for seizure of any items.

Item 151 – Section 48AB of the *Great Barrier Reef Marine Park Act 1975*

230. This item is a consequence of the repeal of section 48AB, which relates to the seizure of weapons or other things capable of causing harm or facilitating escape. The item provides that, despite the repeal of section 48AB, the section continues to apply in relation to an item seized prior to commencement.

Item 152 - Directions limiting access to the Marine Park

231. This item is a consequence of item 125, which empowers the Minister to make a direction limiting access to the Marine Park by persons who have, on three or more occasions, contravened the GBRMP Act. A contravention that is more than ten years old does not count. The current item clarifies that this power to issue directions exists in

relation to offences and contraventions that occurred prior to commencement of the amendments. This provision does not establish liability retrospectively, but does have retroactive application in that it potentially attaches new consequences to past behaviour. This is considered appropriate given the context. The power to issue directions can only be exercised where a person has three or more “strikes” against their name and the Minister considers it appropriate having regard to the nature of the conduct constituting the strikes and the objects of protecting the environment of the Marine Park and preventing future non-compliance. Directions are contemplated as a means of dealing with repeat and recalcitrant offenders. This capacity would be compromised if persons who have already breached the Act are given a “clean slate” at the time of commencement.

Item 153 – Delegations under section 61 of the *Great Barrier Reef Marine Park Act 1975*

232. This item is a consequence of the repeal of section 61 and its replacement by a new delegations provision (see item 122). The item provides that delegations in place under section 61 at the time of commencement continue in force as if it had been made under the new, general delegations power.

Item 154 - Delegations under subsection 61A(3) of the *Great Barrier Reef Marine Park Act 1975*

233. This item is a consequence of the repeal of subsections 61A(3) and (4) and their replacement by a general delegations provision (see item 122). The item provides that delegations in place at the time of commencement under the subsections continues in force as if it had been made under the new, general delegations power.

Item 155 - Averments under section 62 of the *Great Barrier Reef Marine Park Act 1975*

234. This item is a consequence of the repeal of section 62 of the GBRMP Act (item 139). That section allows for the making of averments in relation to particular matters. The current item provides that an averment made prior to commencement continues in effect, despite the repeal of section 62.

Item 156 - Section 64 of the *Great Barrier Reef Marine Park Act 1975*

235. This item is a consequence of the repeal of section 64 of the GBRMP Act. That section relates to corporate liability for the actions of directors, servants and agents of a corporation. An equivalent provision is re-enacted by item 125. The current item provides that section 64 continues to apply in relation to conduct engaged in prior to commencement. This ensures that there are no “gaps” in provisions relating to corporate liability as a result of the amendments.

Item 157 - Regulations in relation to infringement notices

236. This item is a consequence of the repeal of paragraph 66(2)(n) of the GBRMP Act. That paragraph provides for the making of regulations establishing an infringement notice regime. The Bill establishes a new division providing for regulations relating to infringement notices. The current item ensures the validity of the current infringement notice regime established under the regulations is unaffected by the amendments.

SCHEDULE 6 – OFFENCES AND CIVIL PENALTIES

GENERAL OVERVIEW

Schedule 6 makes a number of changes to existing offence provisions of the GBRMP Act and establishes equivalent civil penalty provisions for most of those offences. The changes:

- Distinguish conduct constituting an offence/contravention on the basis of factors such as culpability and the environmental harm caused, and apply differing penalties as appropriate.
- Amend the structure and wording of offences so as to clarify the matters that need to be established in order to prove the offence.
- In appropriate circumstances, apply fault elements that vary from the defaults established by the *Criminal Code 1995*, for example, negligence and strict and absolute liability.
- Adjust penalty levels to ensure maximum possible penalties are neither too lenient nor too harsh.
- Consolidate and rationalise a number of existing offences.

The schedule also extends existing vicarious and collective liability provisions in order to recognise, in appropriate circumstances:

- The responsibility of persons holding a license to carry out or be in charge of commercial fishing for the activities carried out by others pursuant to that license.
- The responsibility of permission holders for the activities carried out by others pursuant to the permission under the authority of the permission holder.

The schedule establishes new offences as follows:

- Operation of a commercial fishing vessel in a zone where fishing is not permitted, except for the purposes of transiting, anchoring, in an emergency or as a result of an accident.
- A false or misleading representation concerning a person's liability to pay a fee, tax, levy or other charge in connection with entry and use of the Marine Park.

NOTES ON INDIVIDUAL CLAUSES

Part 1 – Amendments

Great Barrier Reef Marine Park Act 1975

Items 1-22 – Definitions

237. These items define or amend existing definitions of the following terms:

- *aggravated contravention* – see item 24, which establishes a class of “aggravated contraventions”.

- *aggravated offence* – see item 24, which establishes a class of “aggravated offences”.
- *Australian resident* – this term is defined consistently with the EPBC Act, schedule 1.
- *conduct* – this term is defined by reference to the *Criminal Code 1995*.
- *discharge* – this moves the existing definition given by the GBRMP Act section 38J into the interpretation section.
- *dory* – this term is defined consistently with the GBRMP Regulations.
- *engage in conduct* – this term defined by reference to the *Criminal Code 1995*.
- *fish* – this moves the existing definition given by the GBRMP Act section 38CA into the interpretation section.
- *fishing* – this moves the existing definition given by the GBRMP Act section 38CA into the interpretation section.
- *minerals* – this term is defined consistently with other legislation and is defined to include oil and natural gas.
- *mining operations* - this term is defined consistently with the EPBC Act, with some changes reflecting differences between the context and objectives of the GBRMP Act and that of the EPBC Act. The term is defined to include prospecting and exploring for, as well as recovery of, minerals. It replaces the term “operations for the recovery of minerals”.
- *Owner* – this clarifies that the definition of “owner” relates to the owner of a vessel. The items also provide that the owner of a vessel can include (where applicable) the person registered as the owner under a law of a state or territory (as well as under Commonwealth law or on a foreign register of ships).
- *primary commercial fishing vessel* – this term is defined consistently with the GBRMP Regulations.
- *prohibited* – this term defines conduct that is “prohibited” under a zoning plan for the purposes of relevant offence provisions.
- *protected species* – this term is defined consistently with the *Great Barrier Reef Marine Park Zoning Plan 2003*, and includes species protected under the EPBC Act, relevant Queensland legislation and other species identified by the GBRMP Regulations.
- *reef* – this moves the existing definition given by GBRMP Act section 38CA into the interpretation section.
- *take* – this term is defined consistently with its meaning under the *Great Barrier Reef Marine Park Zoning Plan 2003*.
- *territorial sea* – this term is defined by reference to the *Seas and Submerged Lands Act 1973*.
- *waste* – this moves the existing definition given by GBRMP Act section 38J into the interpretation section. The definition reflects the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

Item 23 – Subsection 3A(10): updating a cross reference

238. This item is of a technical nature. It updates a cross reference as a consequence of other amendments made by the schedule.

Item 24 – Offence and civil penalty provisions

239. This item repeals sections 38A to 39, which mostly establish offences. All the offences repealed are re-enacted by the item, with some consolidation, changes and additions, along with the creation of equivalent civil penalty provisions for many of the offences.

Sections 38N and 39, also repealed by this item, are re-enacted elsewhere (Schedules 5 and 4, respectively).

240. Each offence and civil penalty provision established by the schedule is discussed below, following an explanation of strict liability provisions that apply in common to a number of offences in the schedule.

Strict liability – Deemed awareness of the Marine Park, its zones and the restrictions on use that apply

241. Offences in the schedule apply strict liability to the circumstance that conduct:
- was carried out in the Great Barrier Reef Region (38AA);
 - was carried out in a zone (38BA(1)(b), BD(b));
 - is not permitted in a zone under a zoning plan (38BA(1)(c), 38BD(d));
 - is not permitted under a zoning plan unless notice is first given to a specified body (38BC);
 - was carried out in an unzoned area of the Marine Park (38CA(2)); and
 - occurred or was carried out in the Marine Park (38DA(1)(b); 38DD(1)(b)).
242. These provisions all reflect a common principle that it should be incumbent on users of the Great Barrier Reef to be aware of:
- the existence of the Great Barrier Reef Region, the Marine Park and its zones;
 - their location in relation to those areas; and
 - the restrictions on use that apply as a consequence of an area being a part of the Region, Park or a zone.
243. This approach is taken having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs. Having regard to these documents, strict liability is proposed as it:
- ensures the integrity of the regulatory regime in place to protect the Great Barrier Reef;
 - overcomes problems of proof that would otherwise make the regulatory regime particularly difficult to enforce; and
 - overcomes a “knowledge of the law” problem.
244. The existence of the Great Barrier Reef Region, Marine Park and zoning plan for the Marine Park is fundamental to and underpins regulation and management of the Great Barrier Reef. The fact that an area is part of the Region, Park or a zone is the framework from which regulatory and management arrangements arise. The boundaries and activities allowed within the Region, Park and its zones are widely publicised, for example, through the free distribution of maps and guides to the activities permitted in particular areas, signposting and other educational measures. Zoning is in place for at least seven years and changes are made through processes involving significant public involvement. In this context, making it incumbent on Marine Park users to be aware of the existence of the Region, Park and zones, their location in relation to those areas and the rules that apply is reasonable and essential to the integrity of the regulatory regime in place to protect the Great Barrier Reef.

245. Proving to a Court that a defendant did not know or was reckless to the fact that an area was a part of the Great Barrier Reef Region, Marine Park or a zone, that they were within such an area and/or that that the conduct they have engaged in is not permitted in that area is problematic. Such matters are within the knowledge of the defendant alone, and proving the contrary beyond a reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
246. The fact that an area is part of the Great Barrier Reef Region, Marine Park or a zone of the Marine Park and the restrictions on use that consequently apply forms a part of the law. The Region is defined by the GBRMP Act. The Marine Park is established through proclamations, which are legislative instruments for the purposes of the LI Act – that is, they determine the content of the law and impose obligations and create rights (see LI Act section 7). Similarly, zoning is established by a zoning plan, which is also a legislative instrument. Allowing people to escape conviction because they were unaware of these legal requirements would allow ignorance of the law to be used as an excuse for criminal behaviour.
247. In applying strict liability to the offence elements identified above, it is not intended to provide for the defence of honest and reasonable mistake of fact to be used in a way that allows ignorance of the law to be an excuse for criminal behaviour, for example, a mistake as to the legal delineation of zones and the activities permitted within zones.

Strict liability – conduct authorised by a permission

248. The offences in 38AA, 38BA, 38BD and 38DD apply strict liability to the circumstance that the defendant was authorised to engage in the conduct in question by a permission granted under the GBRMP Regulations. This is proposed having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs. Having regard to these documents, the use of strict liability is considered appropriate as it:
- is necessary to ensure the integrity of the regulatory regime;
 - overcomes problems of proof that would otherwise make the regulatory regime particularly difficult to enforce; and
 - overcomes a “knowledge of the law” problem.
249. The permission system is integral to regulation of the Marine Park and Great Barrier Reef Region. Activities are subject to permission requirements where they have the potential to have impacts of consequence on the environment. The conditions attached to permissions are directed at ensuring that the impacts of the permitted activity are acceptable, for example, by requiring activities to be done in a certain manner. In this context, it is essential to the integrity of the regulatory regime that it is incumbent on users of the Park and Region to be aware of permit requirements and, if they hold a permission, the activities they are authorised to undertake. Further, as the requirement for a permission and the activities authorised by a particular permission are matters of law, the use of strict liability overcomes a “knowledge of law” problem (i.e. it ensures ignorance of law cannot be used as an excuse).
250. Proving to a Court that a defendant did not know or was reckless to the fact that they were not authorised by a permission to engage in conduct is problematic. These matters

are within the knowledge of the defendant alone, and proving the contrary beyond reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.

Mining operations in the Great Barrier Reef Region (38AA & 38AB)

251. The item re-enacts, with some changes, current section 38 and establishes an equivalent civil penalty provision. As with the current section 38, the provisions prohibit mining operations. “Mining operations” is defined to include prospecting or exploring for, as well as recovery of, minerals (see item 11).
252. As with the current section 38, the offence and civil penalty provision do not apply where the defendant is authorised to carry out the operations by a permission granted under the GBRMP Regulations. The Authority may not issue a permission authorising mining operations unless those operations are for the purpose of research or investigations relevant to the conservation of the Marine Park. The intention is that commercial mining and petroleum and gas recovery is prohibited absolutely in the Great Barrier Reef Region.
253. The re-enacted prohibition applies to mining operations within the Great Barrier Reef Region (as defined in the Act). This consolidates the existing section 38, which prohibits mining operations in the Marine Park, and the *Great Barrier Reef Region (Prohibition of Mining) Regulations 1999*, which prohibit mining in areas of the Great Barrier Reef Region that are not a part of the Marine Park. The regulations will be repealed.
254. The maximum penalty for the offence of carrying out mining operations in the Great Barrier Reef Region is increased from 500 penalty units to 1,000 penalty units. There is also provision for an “aggravated offence” carrying a maximum penalty of three years imprisonment, 2,000 penalty units or both. Aggravated offences are discussed in greater detail below (see 38GA). The civil penalty equivalent of the offence carries a maximum penalty of 2,000 penalty units for an individual and 20,000 penalty units for a body corporate. There is also provision for an “aggravated contravention”, carrying a maximum penalty of 5,000 penalty units for an individual and 50,000 penalty units for a body corporate. Aggravated contraventions are discussed in greater detail below (see 38GB).
255. The offence includes a number of strict liability elements. The approach reflects general principles applied to a number of offences in the schedule and is discussed in greater detail above.

Conduct in Marine Park Zones (38BA & 38BB)

256. The item re-enacts, with some changes, sections 38A-38CC and 38M-38MB, and establishes an equivalent civil penalty provision. The provisions prohibit conduct that is not allowed under a zoning plan (see definition of “prohibited”, item 15), or is only allowed with a permission and no such permission is held.
257. The provisions significantly rationalise existing offences. This is done firstly by consolidating currently separate offences relating to conduct that is prohibited absolutely and conduct that is allowed only with a permission and no permission is

held. Secondly, the provisions consolidate currently separate offences relating to fishing, shipping and other forms of conduct through the establishment of “aggravated offences” and “aggravated contraventions”, which are discussed below.

258. The offence includes a number of strict liability elements. The approach reflects general principles applied to a number of offences in the schedule and is discussed in greater detail above.
259. The offence of conduct contrary to a zoning plan does not apply where circumstances prescribed by regulations exist. The circumstances prescribed must relate to conduct engaged in within 120 days of commencement of a zoning plan or a change to a zoning plan, or to conduct after that time where a person has applied for a permission. This regulation-making capacity reflects current subsection 38B(2), and provides a mechanism for transitional arrangements where a new or amended zoning plan imposes a requirement to hold a permission to undertake a particular activities in a particular location, where no such requirement previously existed. Under regulations currently in place for the purposes of the provision, where a person was lawfully carrying out an activity without a permission in a particular location, and a new or amended zoning plan introduces a requirement for a permission for that activity, that person has 120 days to apply for a permission (or cease the activity). The defendant bears the evidential burden in relation to this matter. Reversal of the burden of proof is considered appropriate as the fact that a person, before the introduction or amendment of a zoning plan, undertook particular activities in a particular location is a matter within the knowledge of that person, would be difficult for the prosecution to establish and is unlikely to be of relevance to the majority of offences prosecuted. Framing as a defence has the effect that the defendant will be required to adduce evidence of the matter. If sufficient evidence is presented, the prosecutor would then need to refute the assertion that the defence is made out beyond reasonable doubt (see *Criminal Code* section 13.1).
260. The offence provisions increase maximum penalties for some offences. The maximum “base” penalty is now 1,000 units. For an “aggravated offence”, the maximum penalty is three years imprisonment, 2,000 units, or both. Aggravated offences are discussed in greater detail below (see 38GA). The civil penalty equivalent of the offence carries a maximum penalty of 2,000 penalty units for an individual and 20,000 penalty units for a body corporate. For an “aggravated contravention”, the maximum penalty is 5,000 penalty units for an individual and 50,000 penalty units for a body corporate. Aggravated contraventions are discussed in greater detail below (see 38GB).
261. Consistent with current section 38A, the item re-enacts a strict liability version of the offence prohibiting conduct not allowed under a zoning plan, or allowed only with a permission and no such permission is held. A strict liability offence is proposed having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs. Having regard to these documents, the offence is considered appropriate as:
- There are legitimate grounds for penalising persons lacking fault.
 - It will enhance the effectiveness and efficiency of the overall enforcement regime.
 - The maximum penalty is 60 penalty units for an individual (300 units for a body corporate).

262. The zoning plan is fundamental to and underpins regulation and management of the Great Barrier Reef Marine Park. It is the primary mechanism through which use of the Marine Park is regulated and managed. The development of zoning plans involves significant public consultation, and zoning is widely publicised, for example, through the free distribution of maps showing zones and providing a guide to the activities permitted in each zone. In this context, making it incumbent on Marine Park users to be aware of zoning plan requirements, and guard against contravening behaviour, is reasonable and essential to the integrity of the regulatory regime.
263. The availability of a strict liability offence will enhance the effectiveness and efficiency of the enforcement regime 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. Further, Schedule 5, item 125 allows regulations to make provision for infringement notices to be issued in relation to the strict liability offence. The availability of infringement notices provides yet a further enforcement option that can be used in relation to minor offences, where the immediate imposition of a penalty would enhance deterrence and the efficiency of enforcement.

Conduct without required notice (38BC)

264. The item re-enacts section 38D, providing an offence of failing to comply with a requirement of a zoning plan to notify the Authority (or other specified body) before carrying out a particular activity. The offence is restructured to provide greater clarity as to the elements of the offence. The maximum penalty is unchanged from the current section 38D at 200 penalty units (individual).
265. Strict liability is applied to one element of the offence. The approach reflects general principles applied to a number of offences in the schedule and is discussed in greater detail above.
266. In line with the current section 38D, the re-enacted offence specifies negligence as the fault element for the circumstance that the person failed to give the required notice before carrying out conduct. In other words, a person may be found guilty if, given the same circumstances, a “reasonable person” would have given the required notice. Application of negligence rather than recklessness (the default fault element under the *Criminal Code*) is considered appropriate because recklessness requires awareness of the circumstance, which, for the current offence, would require awareness of the requirement to notify. This would be inconsistent with the application of strict liability (discussed above), which has the effect that a person need not be shown to have known or have been reckless as to the fact that the conduct in question can only be undertaken after giving notice.

Operation of a fishing vessel in a zone where fishing is not permitted (38BD)

267. The item establishes a new offence related to the operation of a primary commercial fishing vessel in a zone where fishing is not permitted. The offence recognises that commercial fishing vessels have a legitimate need to enter zones where fishing is not permitted for the purposes of transiting, anchoring, in an emergency or as a result of an

unavoidable accident. Entry in other circumstances is prohibited by the offence. A maximum penalty of 500 penalty units (for an individual) applies.

268. The offence aims to increase the efficiency and effectiveness of enforcement and adopt a precautionary approach to regulation of the Great Barrier Reef. Illegal commercial fishing is a key pressure on the Great Barrier Reef and has the potential to undermine realisation of the environmental, economic and social benefits of closing areas to fishing through zoning. The approach of allowing entry into zones where fishing is not permitted only for the purposes of transiting, anchoring or in an emergency is consistent with the management of marine protected areas established under the EPBC Act, and in relation to areas closed to fishing in some Commonwealth fisheries managed under the *Fisheries Management Act 1991*.
269. The offence does not apply if the zone was entered for the purpose of transiting through the zone, anchoring, or transiting to and from a position in which the vessel is anchored. In this context, a vessel is only taken to be transiting if it is taking the most direct practicable route through the zone to its destination or to and from a position where the vessel is anchored, travelling at a speed of five knots or more. The defendant bears the evidential burden in relation to the matter of whether the vessel is transiting. Reversal of the burden of proof in this manner is considered appropriate, as the manner in which a vessel is operated, and the intentions of the vessel operator to travel to a particular destination or anchor in a particular area are within the knowledge of the defendant. It would be highly difficult and impractical for the prosecution to obtain and adduce evidence of these matters. Framing as a defence has the effect that the defendant will be required to adduce evidence of the matter. If sufficient evidence is presented, the prosecutor would then need to refute the assertion that the defence is made out beyond reasonable doubt (see *Criminal Code* section 13.1).
270. The offence also does not apply if operation of the vessel in the zone was reasonably necessary for the purpose of dealing with an emergency presenting a serious risk to safety, or a result of an unavoidable accident not caused by reckless or negligent behaviour. The defendant bears the evidential burden in relation to these matters. Reversal of the burden of proof in this manner is considered appropriate as the existence of an emergency or occurrence of an accident, the actions the vessel operator took in response and the rationale for doing so are within the knowledge of the defendant. It would be highly difficult and impractical for the prosecution to obtain and adduce evidence of these matters and doing so would not be of relevance to the large majority of offences prosecuted. Framing as a defence requires the defendant to put forward adequate evidence that the operation of the vessel was a result of an emergency or unavoidable accident. It would then be for the prosecution to refute that evidence beyond reasonable doubt (see *Criminal Code* section 13.1). In order for this defence of emergency or unavoidable accident to be available, the operator of the vessel must have notified the Authority of the matter within 48 hours of it occurring. This provides scope for the incident to be verified, if appropriate.
271. The offence includes strict liability elements. The approach reflects general principles applied to a number of offences in the schedule and is discussed in greater detail above.
272. The offence establishes absolute liability in relation to the elements that the vessel in question is an Australian vessel and is authorised by law to fish using a particular

fishing method or particular fishing apparatus. Absolute liability is applied as the matters are jurisdictional – the essence of the offence is that a fishing vessel to which the provision applies (i.e. an Australian vessel) has entered a zone where fishing of the sort carried out by the vessel (e.g. trawling, line fishing) is not permitted.

Conduct in an unzoned area of the Marine Park (38CA & 38CB)

273. The item re-enacts, with some changes, current section 38F and establishes an equivalent civil penalty provision. The provisions prohibit certain conduct in unzoned areas of the Marine Park. The nature of the conduct that is prohibited is unchanged from current section 38F.
274. The re-enacted offence increases the maximum “base” penalty to 1,000 penalty units. For an “aggravated offence”, the maximum penalty is 3 years imprisonment, 2,000 penalty units, or both. Aggravated offences are discussed in greater detail below (see 38GA). The civil penalty provision equivalent of the offence carries a “base” maximum penalty of 2,000 penalty units for an individual and 20,000 penalty units for a body corporate. For an “aggravated contravention”, the maximum penalty is 5,000 penalty units for an individual and 50,000 penalty units for a body corporate. Aggravated contraventions are discussed in greater detail below (see 38GB).
275. The offence includes strict liability elements. The approach reflects general principles applied to a number of offences in the schedule and which are discussed in greater detail above.

Vessels causing damage to the Marine Park (38DA & 38DB)

276. The item re-enacts current section 38MC and establishes an equivalent civil penalty provision. The provisions prohibit the causing of damage to the environment of the Marine Park through operation of a vessel.
277. The penalty for the offence provision is changed from a maximum of 2,000 penalty units, to a maximum, for an aggravated offence (see 38GA), of three years imprisonment, 2,000 penalty units, or both (for an individual). A non-aggravated offence carries a maximum penalty of 1,000 penalty units (for an individual). The maximum penalty for the new civil penalty provision is 2,000 penalty units for an individual, 5,000 penalty units for a body corporate. For an aggravated contravention (see 38GB), the maximum penalty is 20,000 penalty units for an individual and 50,000 penalty units for a body corporate.
278. As with current section 38MC, the offence requires negligence as to the circumstance that the operation of a vessel results in, or is likely to result in damage to the environment of the Marine Park. This reflects the potential for serious environmental harm to be caused to the sensitive environment of the Great Barrier Reef through operation of a vessel, which may, for example, result in grounding on and destruction of a reef, or an oil spill. Given the potential consequences, negligence is applied so that vessel operators are required to exercise due diligence. More specifically, vessel operators may be liable for the damage they cause to the Marine Park where they were not themselves aware of a risk of causing damage, but should have been, having regard to the “reasonable person” test applied by the fault element of negligence.

279. The offence includes a strict liability element. The approach reflects general principles applied to a number of offences in the schedule and is discussed in greater detail above.

Conduct contravening an Order or Direction (38DC)

280. The item re-enacts and consolidates sections 38E and 38H, providing an offence of failing to comply with an order or direction given by the Authority pursuant to the GBRMP Regulations and/or a zoning plan. The offence is restructured so as to provide greater clarity as to the elements of the offence. The maximum penalty for the offence is 500 penalty units (for an individual).

281. Absolute liability applies to the circumstance that the person has been issued a direction or order and that order or direction is of a kind declared by regulation to be an order or direction to which the offence relates. Absolute liability is applied as these matters are jurisdictional elements of the offence - the essence of the offence is non-compliance with such a direction or order.

282. In line with current section 38E, the re-enacted offence specifies negligence as the fault element for the result that the person failed to comply with a direction. In other words, a person may be found guilty if, given the same circumstances, a “reasonable person” would have complied with the direction. Application of negligence as a fault element is considered appropriate given the nature of the orders and directions to which the offence applies. The orders and directions apply to a limited class of person/activities and are either an order to remove abandoned property, or are a condition of entry into the Marine Park - that is, a person may only enter and use the Marine Park (or a zone within the Marine Park) for a particular purpose if they comply with specified directions. As a part of this, the person issued with the direction is expected to actively comply with and guard against non-compliance with the direction, as would be expected of a “reasonable person”.

Discharging waste in the Marine Park (38DD, 38DE)

283. The item re-enacts current section 38J, which prohibits the discharge of waste in the Marine Park. The offence is re-enacted through two provisions. The first (38DD) deals with discharge of waste in the Marine Park. The second (38EA) deals with the contravention of a condition of a permission authorising (among other things) the discharge of waste in the Marine Park.

284. The penalty for the re-enacted offence of discharging waste in the Marine Park has been amended to provide for an “aggravated offence” with a maximum penalty of three years imprisonment, 2,000 penalty units or both (for an individual). Aggravated offences are discussed in further detail below (see 38GA). The maximum “base” penalty (i.e. not an aggravated offence) is 1,000 penalty units (for an individual).

285. The offence includes strict liability elements. The approach reflects general principles applied to a number of offences in the schedule and is discussed in greater detail above.

286. The offence is subject to a number of defences as follows:

- Circumstances prescribed by regulations for the purpose of the provision apply, being circumstances related to the discharge of sewage from a vessel. These regulations relate to treatment standards for sewage and the locations in which it

may be discharged. These matters are prescribed in regulations rather than the Act, as treatment standards and acceptable discharge locations may vary over time as, for example, treatment technology improves and/or becomes more economical.

- The waste discharged is fresh fish or parts of fresh fish caught in the Marine Park (e.g. trawler by-catch), except where the discharge occurs in a location prescribed by regulations for the purposes of the provision. This provides flexibility for the regulations to identify sensitive locations in which such discharges should not be permitted.
- The discharge was necessary to secure the safety of a vessel, aircraft or platform; was necessary for the purpose of saving life; or was for the purpose of minimising damage from a pollution incident and was approved by a prescribed officer or the Authority.

287. Because these matters are framed as defences it is for the defendant to adduce evidence of a reasonable possibility that the defence in question applies. Reversal of the burden of proof in this manner is considered appropriate as evidence of the matters that are the subject of defences are issues wholly or primarily within the knowledge of the defendant. It would be highly difficult and impractical for the prosecution to obtain and adduce evidence of relevant matters and doing so would not be of relevance to the large majority of offences prosecuted. Framing as a defence has the effect of requiring the defendant to put forward adequate evidence that the waste was sewage treated to the required standard; was fresh fish or fish parts caught within the Marine Park; or that the action was for the purpose of securing safety, saving life or responding to a pollution incident. It would then be for the prosecution to refute that evidence beyond reasonable doubt (see *Criminal Code* section 13.1).

288. As with the current section 38J, the offence requires that the discharge of waste be negligent, rather than intentional or reckless. Discharges of waste such as oil, noxious chemicals and garbage have the potential to cause significant harm to the sensitive environment of the Great Barrier Reef. Given this potential, negligence is applied so that relevant persons (e.g. ship operators) are required to exercise due diligence. More specifically, a person may be liable for a discharge of waste where the discharge was not intentional or they were not themselves aware of a risk of the discharge, but should have been, having regard to the “reasonable person” test applied by the fault element of negligence.

289. In line with current subsection 38J(1B), the item re-enacts a strict liability version of the offence of discharging waste in the Marine Park. Re-enactment of a strict liability offence is proposed having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs. Having regard to these documents, the offence is considered appropriate as:

- It will enhance the effectiveness and efficiency of the overall enforcement regime.
- There are legitimate grounds for penalising persons lacking fault.
- The penalty imposed reflects the serious and immediate threat to the environment posed by the discharge of waste.

290. The *International Convention for the Prevention of Pollution from Ships 1973* (referred to as the MARPOL Convention) includes strong measures to prevent damage to the

marine environment through the discharge from ships of wastes such as oil, noxious chemicals and garbage. The Convention is implemented through uniform national legislation. At a Commonwealth level, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POS(PPS) Act) is the primary Act implementing the Convention. The Convention includes provisions relating specifically to the Great Barrier Reef. The GBRMP Act implements these provisions and otherwise regulates discharges in areas and from vessels not covered by the POS(PPS) Act. The strict liability offence proposed by the current item reflects the Convention and offences established by the POS(PPS) Act and relevant Queensland legislation. This ensures a consistent regulatory environment and enhances the efficiency and effectiveness of enforcement.

291. Discharge of waste has the potential to cause significant harm to the sensitive environment of the Great Barrier Reef. The Great Barrier Reef has been recognised as a “Particularly Sensitive Sea Area” by the International Maritime Organisation, and as mentioned above, is afforded special protection under the MARPOL Convention. Given this status, it is considered appropriate that Marine Park users be on notice to guard against the possibility of a discharge of waste. This, and the maximum penalty of 500 units (for an individual), also ensures appropriate deterrence.
292. The item includes a provision (38DE) empowering the Authority to approve the discharge of waste where it is necessary for the purposes of combating a specific pollution incident or minimising damage from pollution. This reflects an existing provision. Currently, persons employed in particular positions as prescribed by regulation may approve discharges. The schedule replaces this approach by vesting power with the Authority, which may then delegate to appropriate employees and officers. The relevant regulations will be repealed. This addresses a risk of a lack of capacity to respond to pollution incidents due to the regulations being out of date.

Contravention of a permission or authority (38EA & 38EB)

293. The item re-enacts, with some changes, an offence prohibiting conduct contravening the conditions of a permission, and establishes an equivalent civil penalty provision. The provisions consolidate relevant offences established by current sections 38, 38C, 38CC, 38E, 38G, 38J and 38MC.
294. The re-enacted offence increases the maximum “base” penalty to 500 penalty units (for an individual). For an “aggravated offence”, the maximum penalty is 1,000 units (for an individual). Aggravated offences are discussed in greater detail below (see 38GA). The civil penalty provision equivalent of the offence carries a “base” maximum penalty of 1,000 penalty units for an individual and 10,000 penalty units for a body corporate. For an “aggravated contravention”, the maximum penalty is 2,000 penalty units for an individual and 20,000 penalty units for a body corporate. Aggravated contraventions are discussed in greater detail below (see 38GB).
295. A number of defences to the offence of conduct contravening a permission or authority are specified. These defences are re-enacted from current section 38J and are as follows:
- The conduct in question involved a discharge of waste that is fresh fish or parts of fresh fish caught in the Marine Park, except in areas prescribed in regulations for the purposes of the provision.

- The conduct in question involved a discharge of waste that was necessary to secure the safety of a vessel, aircraft or platform; was necessary for the purpose of saving life, or was for the purpose of minimising damage from a pollution incident and was approved by a prescribed officer.

296. Because these matters are framed as defences, the defendant bears the evidential burden – that is, it is for the defendant to adduce evidence that there is a reasonable possibility that the defence in question is made out. Reversal of the burden of proof in this manner is considered appropriate, as evidence of the matters that are the subject of the defence are issues wholly or primarily within the knowledge of the defendant. It would be highly difficult and impractical for the prosecution to obtain and adduce evidence of these matters and doing so would not be of relevance to the large majority of offences prosecuted. Framing as a defence has the effect of requiring the defendant, if relevant, to put forward adequate evidence that the waste was fresh fish caught within the Marine Park; or that the action was for the purpose of securing safety, saving life or responding to a pollution incident. It would then be for the prosecution to refute that the defence is not made out beyond reasonable doubt (see *Criminal Code* section 13.1).

297. The offence includes absolute liability provisions such that a prosecutor will not have to show a person knew or was reckless as to the facts that:

- the person is authorised by a permission or an authority granted under a permission to engage in conduct; and
- the permission or authority is subject to a condition.

Absolute liability is specified as these matters are jurisdictional elements of the offence. The essence of the offence is that a person acting under the authority of a permission has failed to comply with the requirements of that permission.

298. In line with the existing offence provisions, the re-enacted offence specifies negligence as the fault element for the result that the conduct in question contravenes a condition of the permission (or authority), however, the conduct itself must be intentional. Application of negligence is considered appropriate in relation to non-compliance with permission conditions. Permissions authorise a person to enter and use the Marine Park, subject to complying with specified conditions designed to prevent and manage harm to the Marine Park that will or might result from the activity. Permission (and authority) holders are expected to actively seek to comply, and guard against non-compliance, with the conditions of their permission. Applying negligence is consistent with this, as a permission (or authority) holder may be found guilty in situations where they were not aware of a risk of non-compliance, but should have been, had they been exercising the level of care expected of a “reasonable person”.

299. The item establishes a strict liability version of the offence of conduct contravening a condition of a permission. A strict liability offence is proposed having considered the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, as well as the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs. Having regard to these documents, the offence is considered appropriate as:

- There are legitimate grounds for penalising persons lacking fault.
- It will enhance the effectiveness and efficiency of the overall enforcement regime.

- The maximum penalty is 60 penalty units for an individual (300 for a body corporate).
300. The permitting system in place under the zoning plan and GBRMP Act and Regulations is fundamental to regulation and management of the Great Barrier Reef. Activities in the Marine Park are subject to permission requirements where they have the potential to have impacts of consequence on the environment. The conditions attached to permissions are directed at ensuring the impacts of the permitted activity are acceptable, for example, by requiring activities to be done in a certain manner. In this context, making it incumbent on permission holders to actively ensure their activities comply with permission conditions is reasonable and essential to the integrity of the regulatory regime.
301. The availability of a strict liability offence will enhance the effectiveness and efficiency of the enforcement regime by providing a broader spectrum of enforcement options. It will allow minor and “clear cut” contraventions of permission conditions to be dealt with expeditiously, with a penalty more suited to the nature of the contravention. Further, Schedule 5, item 125 allows regulations to make provision for infringement notices to be issued in relation to the strict liability offence. The availability of infringement notices provides yet a further enforcement option that can be used in relation to minor contraventions, where the immediate imposition of a penalty would enhance deterrence and the efficiency of enforcement.

Collective and vicarious liability – persons responsible for vessels, aircraft and platforms used in committing offences (38FA)

302. The item imposes vicarious liability on persons responsible for vessels involved in an offence against specified provisions of the Act. This, in part, re-enacts current sections 38K and 38L.
303. The provisions require “responsible persons” in relation to a vessel to take all reasonable steps and exercise due diligence in ensuring the vessel is not used in the commission of an offence. In determining whether a responsible person has taken all reasonable steps and exercised due diligence, regard must be had to:
- the steps the person took to satisfy themselves that the Act will be complied with; and
 - if the person was or should have been aware of a risk of a contravention, the steps the person took to reduce or remove that risk.
- These requirements suggest that a responsible person should actively seek to satisfy themselves that use of the vessel will be carried out in accordance with relevant provisions of the GBRMP Act, having regard to risks of non-compliance, and take action as appropriate to ensure compliance.
304. The provisions specify as “responsible persons” vessel masters, vessel owners and persons responsible for vessel-based commercial fishing activities, notably the fishing licence holder. Application of vicarious liability to this class of persons recognises that such people have a responsibility and capacity to manage the operations of the vessel. The provisions ensure appropriate incentives are in place to encourage those persons to discharge their responsibilities with due diligence. The provisions apply an appropriate allocation of culpability should the vessel they are responsible for be involved in a contravention of the Act.

305. The vicarious liability of vessel masters and owners is well established in maritime law. A master is, as a matter of law, the person in charge or command of a vessel. A master should not escape liability if, under his or her direction (or lack of direction), the vessel is involved in an offence, but he or she is not “at the wheel” at the time. Vessel owners are responsible for determining how the vessel will be used and in so doing, are responsible for introducing risks associated with vessel operations. They are able to manage such risks through, for example, their control over the master, and their capacity to put in place requirements, systems and procedures relating to the operation of the vessel. They are also the entity that profits from operation of the vessel and should have some degree of culpability should those operations result in a criminal offence.
306. The vicarious liability imposed on commercial fishing licence holders recognises that such persons are responsible in law for commercial fishing activities carried out under the licence. They determine how a boat is used, who the master is and generally appoint and directly manage the crew. In so doing, they create risks associated with the fishing operations, which they are able to manage in a variety of ways, for example, educating crew, putting in place appropriate management systems and taking steps to ensure the probity of their crew. They stand to profit from the operation of the vessel and should have some degree of culpability should those operations result in a criminal contravention.
307. The requirement that reasonable steps and due diligence be exercised ensures that culpability reflects the capacity of a responsible person to influence the operations of the vessel at the relevant time. This provides an important limit on vicarious liability.
308. The provisions relating to commercial fishing licence holders are designed to apply to holders of licences, permits, rights and authorities issued under the Queensland *Fisheries Act 1994* (including a “Commercial Fisher Licence” and a “Commercial Fishing Boat Licence”), the Commonwealth *Fisheries Management Act 1991* (including a fishing permit and statutory fishing right) and the *Torres Strait Fisheries Act 1984* (including a “Torres Strait Fishing Boat Licence”).
309. The offence establishes strict liability in relation to the fact that a person is a “responsible person” and that the vessel, aircraft or platform for which they are responsible was used in committing an offence. Strict liability is specified as these matters are jurisdictional – the essence of the offence is that the person has failed to take reasonable steps and exercise due diligence in ensuring the vessel would not be used in commission of an offence. Application of strict liability also ensures a defence of honest and reasonable mistake is available.

Collective liability –ships involved in an offence (38FB)

310. The item imposes collective liability on the master and owner of a ship involved in the commission of an offence against Part VAA of the Act (i.e. the offences set out in this schedule). This, in part, is a re-enactment of current sections 38M, 38MA and 38MB.
311. The collective liability of vessel masters and owners is well established in shipping law and is reflected in Commonwealth legislation, for example, in the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Navigation Act 1912*. Masters

are, as a matter of law, the person in charge or command of a vessel. A master should not escape liability if, under his or her direction (or lack of direction), the vessel is involved in an offence, but he or she is not “at the wheel” at the time. Vessel owners are responsible for determining how the vessel will be used and in so doing, are responsible for introducing risks associated with vessel operations. They are able to manage such risks through, for example, their selection of and control over the master, and their capacity to put in place requirements, systems and procedures relating to the operation of the vessel. They are also the entity that has introduced a risk to the environment in the pursuit of profit, and should have some degree of culpability should those operations result in a criminal offence.

312. Illegal shipping activities have the potential to cause significant harm to the sensitive environment of the Great Barrier Reef. The Great Barrier Reef has been recognised as a “Particularly Sensitive Sea Area” by the International Maritime Organisation and is afforded special protection under the *International Convention for the Prevention of Pollution from Ships 1973*. The GBRMP Act and zoning plans contain a number of provisions designed to minimise the potential for serious environmental harm to be caused through shipping activities, for example, by designating shipping routes, so as to avoid sensitive and dangerous waters.
313. Vicarious liability arises as a matter of strict liability given proof of the primary offence, which involves the satisfaction of fault standards, as required by the offence provision in question. Application of strict liability recognises that the elements are jurisdictional, while allowing for a defence of honest and reasonable mistake.

Collective liability – vessels causing damage to the Marine Park (38FC)

314. The item imposes liability on the master and owner of a vessel involved in the commission of an offence against 38CA (vessel causing damage to the environment of the Marine Park) and 38CE (discharging waste). This, in part, re-enacts current subsection 38MC(2).
315. The collective liability of vessel masters and owners is well established in maritime law. A master is, as a matter of law, the person in charge or command of a vessel. A master should not escape liability if, under his or her direction (or lack of direction), the vessel is involved in an offence, but he or she is not “at the wheel” at the time. Vessel owners are responsible for determining how the vessel will be used and in so doing, are responsible for introducing risks associated with vessel operations. They are able to manage such risks through, for example, their selection of and control over the master, and their capacity to put in place requirements, systems and procedures relating to the operation of the vessel. They are also the entity that has introduced a risk to the environment in the pursuit of profit, and should have some degree of culpability should those operations result in an offence.
316. The item, in part, reflects and implements the *International Convention for the Prevention of Pollution from Ships 1973* (referred to as the MARPOL Convention). The Convention includes strong measures to prevent damage to the marine environment through the discharge from ships of wastes such as oil, noxious chemicals and garbage. The Convention is implemented through uniform national legislation. At a Commonwealth level, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (POS(PPS) Act) is the primary Act implementing the Convention. The

Convention includes provisions relating specifically to the Great Barrier Reef. The GBRMP Act implements these provisions and otherwise regulates discharges in areas and from vessels not covered by the POS(PPS) Act. The imposition of vicarious liability on vessel masters and owners reflects provisions of the POS(PPS) Act and relevant Queensland legislation. This ensures a consistent regulatory environment and enhances the efficiency and effectiveness of enforcement.

317. Discharge of waste has the potential to cause significant harm to the sensitive environment of the Great Barrier Reef. The Great Barrier Reef has been recognised as a “Particularly Sensitive Sea Area” by the International Maritime Organisation, and as mentioned above, is afforded special protection under the MARPOL Convention.
318. Vicarious liability arises as a matter of strict liability given proof of the primary offence, which involves the satisfaction of fault standards, as required by the offence provision in question. Application of strict liability recognises that the elements are jurisdictional, while allowing for a defence of honest and reasonable mistake.

Vicarious liability – permission holders (38FD)

319. The item imposes vicarious liability on the holder of a permission where another person, acting under an authority issued by the permission holder pursuant to the permission, contravenes a condition of the permission.
320. Under the GBRMP Regulations, a permission holder may, if the conditions of the permission allow, grant an “authority” to another person to undertake the activities authorised by the permission. In undertaking such activities, the authority holder is subject to the conditions of the permission, and commits an offence if they fail to comply with those conditions.
321. The item requires that the permission holder take all reasonable steps and exercise due diligence in ensuring the permission conditions are complied with by a person to whom they have issued an authority. In determining whether a permission holder has taken all reasonable steps and exercised due diligence, regard must be had to:
- the steps the person took to satisfy themselves that the Act would be complied with; and
 - if the person was or should have been aware of a risk of a contravention, the steps the person took to reduce or remove that risk.
- These requirements suggest that a permission holder should actively seek to satisfy themselves that activities authorised by the permission will be carried out in accordance with conditions of the permission, having regard to risks of non-compliance, and take action as appropriate to ensure compliance.
322. Imposition of vicarious liability on the holder of the permission for an offence committed by an authority holder recognises that permission holders have responsibility and a capacity to manage the risks of non-compliance with permission conditions. They determine who to issue authorities to and can influence the conduct of the authority holder, for example, by requiring them to act in accordance with defined procedures or systems. Further, the permission holder generally stands to profit from activities undertaken pursuant to the permission, and so should share some culpability if permission conditions are not complied with.

323. The requirement that reasonable steps and due diligence be exercised ensures that culpability reflects the capacity of a permission holder to influence the actions of an authority holder. This provides an important limit on vicarious liability.

324. The offence establishes strict liability in relation to the following circumstances:

- the permission holder has issued another person with an authority;
- the authority is given in accordance with the permission;
- the permission is subject to a condition or conditions; and
- the authority holder has committed an offence involving contravention of a condition of a permission.

Strict liability is specified as these matters are jurisdictional – the essence of the offence is that a permission holder has failed to take reasonable steps and exercise due diligence in ensuring that a person undertaking actions authorised by the permission on their behalf complies with the conditions of the permission. Application of strict liability also ensures that a defence of honest and reasonable mistake is available.

Aggravated offences and contraventions (38GA, 38GB)

325. The item establishes “aggravated offences” and “aggravated contraventions” as a means of distinguishing conduct constituting an offence or contravention of a civil penalty provision on the basis of the impact, seriousness, culpability, potential for pecuniary benefit and similar such factors. More specifically, the item identifies as an “aggravating” circumstance, conduct that:

- is fishing involving a primary commercial fishing vessel or a dory;
- involves navigation of a ship (within the meaning of the relevant zoning plan);
- results in or had the potential to result in serious harm to the environment of the Marine Park;
- results in the taking of or injury to a member of a protected species; and
- was done for a commercial purpose.

326. Higher maximum penalties apply when these aggravating circumstances exist, so as to ensure adequate deterrence, and reflect the seriousness of the contravention in terms of actual and potential impact and culpability. The maximum penalty for an aggravated offence and contraventions is set out in each offence and civil penalty provision.

327. Where an aggravated offence is alleged, the prosecution must charge and prove the aggravating circumstance. If the trier of fact is not satisfied that the aggravating circumstance has been made out, the person may instead be found guilty of the “base” offence. Similar procedural provisions apply to actions for contravention of a civil penalty provision.

328. In line with the *Criminal Code*, recklessness is the fault element applied to most aggravating circumstances. Strict liability applies to aspects of certain aggravating circumstances, specifically, the fact that a vessel is a “primary commercial fishing vessel”, a “dory” or a “ship” and the fact that an animal or plant is a member of a protected species. Use of strict liability is proposed as it:

- overcomes problems of proof that would otherwise make the regulatory regime particularly difficult to enforce; and
- overcomes a “knowledge of the law” problem.

329. Proving to a Court that a defendant did not know or was reckless to the fact that a vessel is a “primary commercial fishing vessel”, a “dory” or a “ship” or that an animal or plant is a member of a “protected species” is problematic. These matters are largely within the knowledge of the defendant alone, and proving the contrary beyond a reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
330. The fact that a vessel is a “primary commercial fishing vessel”, a “dory” or a “ship” or that an animal or plant is a member of a “protected species” forms a part of the law. The terms are defined by the GBRMP Act, regulations and zoning plan made under the Act. Allowing people to avoid conviction because they were unaware of, or mistaken concerning, legal requirements would allow ignorance of the law to be used as an excuse for criminal behaviour.

Commencement of prosecutions – time limit (38HA)

331. The item provides an extension to the time in which certain prosecutions may be commenced. The *Crimes Act 1914* section 15B provides that a prosecution for an offence carrying a maximum penalty of less than six months’ imprisonment must be commenced within 12 months of the commission of the offence. This is too short for many offences under the GBRMP Act. The Marine Park is a large and in places quite remote area, parts of which are often inaccessible for extended periods, for example, due to the wet season. Investigations for some offences can be quite complex. Because of these factors, it may not be possible to adequately detect, investigate and collect relevant evidence of an offence within 12 months of its commission. The item extends the period in which prosecutions may be commenced from 12 months to two years.
332. Under the *Crimes Act 1914*, a prosecution for an offence punishable by a maximum penalty of more than six months may be commenced at any time. This provision is unaffected by the current item.
333. The item provides that provisions of the GBRMP Act and *Crimes Act 1914* related to the time limit for commencing prosecutions are not affected by sections 38HC-38HF, which provide that, despite the penalty set out for the relevant offence, a sentence of imprisonment is not available in certain circumstances (involving foreign nationals in Australian exclusive economic zone and territorial sea).

Commencement of certain prosecutions – Attorney-General’s Consent (38HB)

334. The item imposes a requirement for the Attorney-General to consent to the commencement of criminal proceedings against a foreign national for a collective or vicarious liability offence (Division 6 of Part VAA, as inserted by this schedule). In consenting to the commencement of proceedings, the Attorney-General is required to consider relevant international rights and obligations. This is designed to ensure any enforcement action against foreign nationals is consistent with Australia’s international rights and obligations.

Conduct in the Exclusive Economic Zone and Territorial Sea (38HC-38HF)

335. The item includes provisions preventing the imposition of a sentence of imprisonment for an offence against specified provisions of the GBRMP Act in certain circumstances. Under international law, notably the United Nations Convention on the Law of the Sea

(UNCLOS), Australia is restricted from imposing a sentence of imprisonment on foreign nationals in relation to fishing and polluting offences that occur in Australia's exclusive economic zone (EEZ) or territorial sea. As the Marine Park takes in areas of Australia's EEZ and territorial sea, the item inserts provisions to ensure Australia abides by these international obligations. It remains possible to order a pecuniary penalty.

Item 26-32 – Civil penalty provision equivalents of environmental management charge offences

336. These items establish civil penalty provision equivalents of existing offences established by section 39FA and 39FB. These offences relate to failure to collect, pay and provide to the Authority the Environmental Management Charge a person is required by law to collect, pay and/or provide.
337. The availability of civil penalties adds flexibility in enforcement and is of particular value in relation to corporate wrongdoing, where criminal prosecution may not provide appropriate deterrence and punishment. The taking of civil action (rather than criminal prosecution or other form of enforcement) in any given circumstance is a matter of discretion.

Item 33 – False or misleading representation in relation to tourism services

338. This item establishes a new offence of making, in the course of providing a tourism-related service, a false or misleading representation concerning a person's liability to pay a fee, tax, levy or other charge in connection with entry and use of the Marine Park. This new offence responds to evidence of persons making false or misleading statements regarding the requirement to pay the Environmental Management Charge (EMC) (see GBRMP Act Part VA), or the amount of EMC that is payable.
339. The representations that are of concern sometimes do not use the term "Environmental Management Charge", but instead, use terms such as "reef tax", "environmental levy" or "park fee". The framing of the offence is intended to pick up any such term that implies there is a government-imposed charge payable.
340. The offence is phrased in a way that the representation must relate to entry or use of the Marine Park. However, the representation need not explicitly identify a relationship with use of or entry into the Marine Park. Rather, the representation should relate to an activity. That activity should involve entry into and/or use of the Marine Park. Similarly, while the offence requires that the representation relate to a tax, fee etc imposed by the 'Commonwealth', it is not necessary to prove that the representation explicitly identified the fee as being imposed by the Commonwealth.
341. The offence carries a maximum penalty of 1,000 penalty units for an individual and 5,000 penalty units for a body corporate.

Item 34 – Penalty for late payment of Environmental Management Charge

342. Current section 39G establishes a late payment penalty for failing to provide Environmental Management Charge to the Authority by the due date. The current penalty is 20 per cent per annum of the amount outstanding. Where only a small

amount is owed, this penalty can fail to provide adequate deterrence. To address this, the item establishes a new penalty of \$250 or 20 per cent per annum of the amount unpaid, whichever is greater.

Part 2 – Application, Saving and Transitional Provisions

Item 35 – Definition

343. This item clarifies that a reference to “Marine Park regulations” in Part 2 of the schedule means regulations made under the GBRMP Act.

Item 36 – Mining or drilling in the Great Barrier Reef Region

344. This item is a consequence of the replacement of the offence established by current section 38 with new offence 38AA and civil penalty provision 38AB. The item provides that, where conduct is authorised by a permission issued for the purposes of existing section 38, that same permission acts to authorise conduct for the purposes of the new offence and civil penalty provision.

Item 37 – Conduct in zone

345. This item is a consequence of the replacement of the offence established by current sections 38B, 38CB and 38MA with new offence 38BA and civil penalty provision 38BB. The item provides that certain conduct is not an offence under 38BA or a contravention under 38BB if it is authorised by a permission that is prescribed for the purposes of current sections 38B, 38CB or 38MA. This ensures that activities that are currently lawfully carried out under a permission can continue to be.

Item 38 – Conduct in unzoned area

346. This item is a consequence of the replacement of the offence established by current section 38F with new offence 38CA and civil penalty provision 38CB. The item provides that certain conduct is not an offence if authorised by a permission granted for the purpose of the section. The current item ensures such permissions apply for the purposes of the new offence and civil penalty provision.

Item 39 – Contravening order or direction

347. This item is a consequence of the replacement of offences established by sections 38E and 38H with new offence 38DC. The provisions relate to contravention of an order or direction. The item provides that, where an order or direction was made pursuant to section 38E or 38H prior to commencement, contravention of the order or direction is an offence under new 38DC.

Item 40 – Discharging waste

348. This item is a consequence of the replacement of the offence established by current section 38J with new offence 38DD. The item provides that certain conduct is not an offence if authorised by a permission granted for the purpose of the section. The item ensures such permissions apply for the purposes of the new offence.

Item 41 – Conduct contravening condition of permission or authority

349. This item is a consequence of the new offence 38EA and civil penalty provision 38EB, both of which relate to contravening conditions of a permission or authority. The item ensures the new offence and civil penalty provisions apply to permissions and authorities issued prior to the commencement of this schedule (as well as permissions and authorities issued after commencement).

Item 42 – Liability of permission holder for conduct contravening permission

350. This item is a consequence of new offence 38FD, which imposes liability on a permission holder for a breach of permission conditions by a person acting under an authority issued by the permission holder. The item ensures the new offence applies in relation to permissions issued prior to commencement.