



Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

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Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

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Portfolio: Environment, Heritage and the Arts

Commencement: Sections 1- 3 commence on Royal Assent, with Schedules 1-3 commence the day after Royal Assent. Schedules 4 - 6 commence on a date to be fixed by proclamation, or failing that, 12 months from the day of Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

This Bill implements the conclusions of a 2006 review of the *Great Barrier Reef Marine Park Act 1975* ('the GBRMP Act'), aimed at ensuring a relevant modern robust regulatory framework that delivers efficient and effective protection and management of the Great Barrier Reef, assisted through amendments which provided for:

- the restoration of Indigenous expertise to the Great Barrier Reef Marine Park Authority
- streamlining of environmental approval and permitting processes and requirements
- enhancement of the investigation, enforcement and offence provisions, providing for a more tailored and targeted approach,
- promotion of more responsible use of the park and the provision of new emergency management powers, and
- improved alignment and integration between the GBRMP Act, the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act)¹ and other Commonwealth and Queensland legislation.

1 The EPBC Act provides a framework to help protect and promote recovery of the Australian environment, including its biodiversity and its natural and culturally significant places. It creates a range of processes designed to protect and promote the recovery of threatened species and ecological communities, and preserve significant places from decline. The Act makes use of Regulations, which provide for the issuing of approvals and permits for a

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Background

According to the Report of the Panel of the 2006 [Review of the Great Barrier Reef Marine Park Act 1975](#):

The Great Barrier Reef has significant environmental, social, economic and cultural values. It is the world's largest coral reef ecosystem, and within Australia the Great Barrier Reef Marine Park is the largest of any Commonwealth or State Marine Protected Area. The Marine Park extends over 2 300 kilometres along the Queensland coastline and covers approximately 344 400 square kilometres. It includes some 2 900 individual reefs, 900 islands and cays and 70 distinct habitat types, called bioregions. These habitats contain great biodiversity including 30 per cent of the world's soft corals, 30 per cent of Australia's sponges, six of the world's seven species of marine turtle and breeding areas for humpback whales and dugong.

The Great Barrier Reef and the surrounding coastal and catchment areas support substantial economic activity.

In addition, there are more than 70 Traditional Owner groups along the Great Barrier Reef coast from Bundaberg to the eastern Torres Strait islands. Their traditional customs, spiritual lore and beliefs continue to be practised today. The sense of custodianship extends to all marine resources, and the sea and islands are collectively considered to be an integral part of their traditional country, known as 'sea country'.²

Professor Don Anton has pointed out that one of the current environmental issues of importance in Australia is the threat to the Great Barrier Reef (the largest coral reef in the world) posed by increased shipping and its popularity as a tourist site.³ It also faces threats from Coral bleaching and land-based sources of elevated nutrient levels.

In 1975, the Fraser Government enacted the GBRMP Act which created the Great Barrier Reef Marine Park Authority ('the Marine Park Authority') and also defined what activities were prohibited on the Great Barrier Reef for the purposes of protecting the Reef against harmful activities. The Great Barrier Reef was selected as a World Heritage Site in 1981 and is the second largest marine protected area in the world. The Marine Park Authority manages the Reef and does so in partnership with the Government of Queensland, to ensure that the Reef's significance is widely appreciated and that activities in the Reef happen in a sustainable manner. Protection and conservation of the Reef occurs through

range of activities on Commonwealth land and land affecting the Commonwealth. A key feature of the Act is the environmental assessment and approval provisions which are aimed at protecting matters of national environmental significance and promoting the conservation of biodiversity.

2 Report of the Panel of the 2006 [Review of the Great Barrier Reef Marine Park Act 1975](#), p. 8.

3 Anton, Donald K. Australian Environmental Law: A Federal Overview (6 June, 2008). Found at SSRN: <http://ssrn.com/abstract=1141711>, accessed 28 August 2008.

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the use of a combination of zoning, natural resource management and land planning, resource and information sharing, permits, education and incentives.

Up until 1999, there were four main zones in the Great Barrier Reef Marine Park, each with its own zoning plan. The *Great Barrier Marine Park Zoning Plan 2003* superseded all previous zoning plans, coming into effect on 1 July 2004 for the entire Marine Park, and is widely regarded as establishing a new international benchmark for the conservation of marine ecosystems.

The main tool used in managing the Great Barrier Reef is zoning. Each marine park zone has specific management objectives, which determine the human activities that may or may not take place in that zone and you must have a permit for certain activities. However, most zones allow a wide range of uses such as fishing and boating (over 95 percent of the Great Barrier Reef Marine Park is zoned for general use). Only in a few zones are certain activities prohibited.⁴

Basis of policy commitment

[2006 Review of the GBRMP Act](#)

As part of its 2004 election platform, the then Howard Government made a firm commitment to review the GBRMP Act ‘to improve the performance of the Great Barrier Reef Marine Park Authority, its office holders and its accountability frameworks’.⁵

On 23 August 2005 the then Minister for the Environment and Heritage, Senator the Hon. Ian Campbell, announced a review of the GBRMP Act with the following terms of reference:

1. The review focuses on:

- the role of office holders
- the functions of the Authority
- accountability frameworks, and
- consultation mechanisms.

2. The review also provides advice, in light of the [Uhrig principles](#), on:

- the appropriateness of current arrangements;
- the efficiency and effectiveness of current consultation mechanisms;

4 http://www.divingcairns.com.au/reef_management.html, accessed on 6 September 2008.

5 The Howard Government Election 2004 Policy: Supporting North Queensland, 2004, Canberra.

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- any changes to improve the corporate governance arrangements of the Authority;
- any adjustment of the function of the Authority;
- improving consistency between the GBRMP Act and the EPBC Act; and
- any legislative amendments required to make such changes.⁶

The Background Paper accompanying the terms of reference for the 2006 Review also mentioned that:

The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) is the Commonwealth's primary legislation for environmental regulation. The review provides an opportunity to ensure the alignment of the GBRMP Act with the EPBC Act.

In response to the stakeholder response to the rezoning of the Great Barrier Reef Marine Park (the Marine Park), the Authority commissioned a report on its consultation mechanisms, the "Futureye" report.

In 2006, following this review of the GBRMP Act, a range of measures were proposed to enhance the regulatory and policy frameworks relating to management and long-term protection and sustainability of the Marine Park. Further information on the review and its outcomes can be found in the report titled [Review of the Great Barrier Reef Marine Park Act 1975](#). Public submissions to the review can be found here: [Public submissions](#).

The amendments provided for in this Bill address the key outstanding recommendations of the review dealing with the regulatory framework.

Committee consideration

The Bill was referred to the Senate Standing Committee on Environment, Communications and the Arts for inquiry which reported on 15 September 2008.

Details of the inquiry can be found here:

http://www.aph.gov.au/Senate/committee/eca_ctte/gbrmpa2008/index.htm

Financial implications

The Explanatory Memorandum states that there is no financial impact.

⁶ <http://www.environment.gov.au/coasts/mpa/publications/pubs/terms-of-reference.pdf> accessed on 13 August 2008.

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Main provisions

Schedule 1—Objects and Applications

Item 1 – New Objects Section

A proposed revised **‘Objects’ section(2A)** incorporates mainstream and core fundamental environmental concepts and goals reinforced by an explicit future oriented focus to guide the administration and management of the GBRMP Act. Currently, the ‘objects’ section is to be found in section 5 of the GBRMP Act.

The proposed primary object of the GBRMP Act is “the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region”.

The following subsidiary objects also apply, but only where they remain consistent with the achievement of the primary object:

- allowing ecologically sustainable use of the Great Barrier Reef for public enjoyment, education, economic and research activities.
- encouraging engagement by communities (interested persons and groups) and stakeholders in the protection and management of the Great Barrier Reef Region.
- assisting in meeting Australia’s responsibilities in relation to the environment and protection of world heritage.

Proposed subsection 2A(3) articulates the principal mechanisms by which it is envisaged that these objects are to be achieved. The description of the mechanisms represent good drafting practice in that they provide for a framework understanding of the operation of the GBRMP Act.

Items 2-18 & 23 – Definitions

These proposed amendments update the key definitions used in this and other schedules in the Bill, and repeal redundant definitions. Where relevant, it is proposed that certain terms be defined by reference to, or consistent with the EPBC Act and other relevant legislation. Of note, for example, is **item 12** which contains

proposed subsection 3(1). This defines the term **‘precautionary principle’** consistently with its meaning under the EPBC Act. Precautionary principle means ‘the principle that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage’.

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Senator Barnaby Joyce has expressed concern with the inclusion and potential breadth and uncertainty of operation of the precautionary principle in the Act.⁷

The precautionary principle is not a new concept. It has been used in international agreements and various national strategies and policies, for over two decades.⁸ It is a well appreciated and instructional principle within Australian government resource management strategies, at the Commonwealth, State and Territory, and local government levels.⁹ However until 2006, the case law in Australia did not seem to provide consistency or clarity about its practical operation and implications. The case of *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133, heard in the NSW Land and Environment Court, seems to provide a useful and instructive consideration of the precautionary principle in Australian case law. The case concerned itself with the precautionary principle as expressed in the NSW *Protection of the Environment Administration Act 1991* (below). This is very similar to that proposed by this Bill.

If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the principle... decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- (ii) an assessment of risk-weighted consequence of various options.

Deacons Foreign Legal Counsel, Rebecca Mohr, provided the following summary of the salient points of the case.

- The principle and accompanying need to take precautionary measures is "triggered" when two prior conditions exist: a threat of serious or irreversible damage, and scientific uncertainty as to the extent (likelihood and severity) of possible damage.
- Once both are satisfied, "a proportionate precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate."
- The threat of serious or irreversible damage should invoke consideration of five factors: the scale of threat (local, regional etc); the perceived value of the threatened environment; whether the possible impacts are manageable; the level of public concern, and whether there is a rational or scientific basis for the concern.

7 Senator Barnaby Joyce, 'Second reading speech: Great Barrier Reef Marine Park And Other Legislation Amendment Bill 2008', Senate, *Debates*, 28 August 2008.

8 See Dovers, S. 2002, 'Precaution, prediction, proof, and policy assessment', *New Solutions*, vol. 12, no. 3, pp. 281–96.

9 The principle is already being used in the GBRMP Act, for example, in the context of development of Plans of Management, and is also a consideration in making permit decisions.

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- The consideration of the level of scientific uncertainty should involve factors which may include: what would constitute sufficient evidence; the level and kind of uncertainty; and the potential to reduce uncertainty.
- The principle shifts the burden of proof. If the principle applies, the burden shifts: "a decision maker must assume the threat of serious or irreversible environmental damage is... a reality [and] the burden of showing this threat... is negligible reverts to the proponent..."
- The precautionary principle invokes preventative action: "the principle permits the taking of preventative measures without having to wait until the reality and seriousness of the threat become fully known".
- "The principle should not be used to try to avoid all risks."
- The precautionary measures appropriate will depend on the combined effect of "the degree of seriousness and irreversibility of the threat and the degree of uncertainty... the more significant and uncertain the threat, the greater...the precaution required". "...measures should be adopted... proportionate to the potential threats".¹⁰

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

Given developments in Australian case law which have further articulated and strengthened the constitutional basis for the GBRMP Act, **item 20** inserts a **new section 5** which clarifies the jurisdictional application of the GBRMP Act, confirming its application to everyone within Australia, its exclusive economic zone, continental shelf and external territories.

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

In addition to reaffirming that the Marine Park Authority must perform its functions consistent with the objects of the GBRMP Act, **item 21** inserts **new subsections 7(3)** and **(4)** which provide that the Marine Park Authority may publish plans and policies about the way it intends to manage the Park or perform its other functions, and the way in which it considers that the GBRMP Act, regulations, or a zoning plan applies. These plans and policies are intended to have educative and guidance value for Marine park users and other interested persons. However, such plans and policies are not intended to be legally binding or to impose obligations on the Marine Park Authority. To avoid doubt, **new subsection 7(5)** makes it clear that such plans and policies are not legislative instruments.

10 Mohr, R (2006) '[Guidelines on the precautionary principle and development](#)', *Deacons Legal Update*, April 2006, pp. 2–3.

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

Proposed subsection 66(13) provides that regulations made under the GBRMP Act may apply, adopt or incorporate any matter contained in other instruments as in force or existing from time to time, notwithstanding **subsection 14(2)** of the *Legislative Instruments Act*.¹¹ This addresses the close interaction in practice between the GBRMP Act and the Queensland legislation.

Schedule 2—Matters related to the Great Barrier Reef Marine Park Authority

Item 1– Indigenous expertise on the Authority

Proposed subsection 10(6A) requires that at least one member of the Marine Park Authority be an indigenous person and explicitly states that they must have knowledge of, or experience concerning indigenous issues relating to the Marine Park.

According to the Explanatory Memorandum, this requirement was inspired by the recognition of the long and continuous relationship with the Great Barrier Reef had by more than 70 Traditional Owner groups living along the coast from Bundaberg to Torres Strait, has obviously generated invaluable knowledge about the traditional use of the Marine Park and indigenous issues more generally. Access to such expertise is considered especially valuable in terms of sustainable management of the Great Barrier Reef.¹²

This partly reverses the change made by the *Great Barrier Reef Marine Park Amendment Act 2007* which deleted of the requirement that one member of the Authority represent the interests of indigenous communities adjacent to the Park. Note however, the change proposed by this Bill does not require the person in question to ‘represent’ indigenous interests.

Item 2 – The holding of meetings

Item 2 proposes that a note be inserted at the end of the current **subsection 17(1)** making reference to section 33B of the *Acts Interpretation Act*, which deals with the ability of statutory authorities to hold meetings via electronic means such as telephone and videoconferencing.

Item 4 – Decisions outside of meetings

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- 11 Section 14(2) of the *Legislative Instruments Act* states that: unless the contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.
- 12 Explanatory Memorandum, p. 7.

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Proposed section 18 enables the Marine Park Authority to conduct its business outside of formal meetings as long as it is done so under a proper governance framework. The purpose of this is to provide for more timely and efficient decision-making by the Authority, given the large number of statutory powers and functions that it must perform.

Specifically, **proposed section 18** provides that the Marine Park authority may make a decision outside a formal meeting if:

- the majority of members who would be entitled to vote on that issues in a formal meeting, indicate their agreement with the proposed decision, in a manner consistent with the method determined by the Marine Park Authority;
- that the Marine Park Authority has the power to make such decisions without a meeting; and
- that all were informed of the proposed decision, or reasonable efforts were made to inform all the members of the proposed decision.

Schedule 3—Proclaiming the Marine Park, Zoning Plans and Plans of Management

Part 2 - Amendments to the GBRMP Act

Items 5 & 8 – The requirements of ‘public notice’

Proposed subsection 18(1) defines ‘public notice’ thus laying down the requirements for the issuing of public notice. The notice must be published in the gazette, a newspaper circulating generally in Queensland, on the website of the Marine Park Authority, and any such other manner (if any) that the Marine Park Authority considers appropriate.

Item 6 – Clarifying the definition of ‘zone’

According to the Explanatory Memorandum, the amendment to the **current subsection 3(1)** is intended to clarify that the term zone can and does include an area that is created or identified by a zoning plan, even though it may not formally be called a ‘zone’. Thus, areas such as ‘designated areas’ identified by the *Great Barrier Reef Park Zoning Plan 2003*, are ‘zones’ for the purposes of the GBRMP Act.¹³

Items 12 & 14 – Proclaiming the Marine Park: Procedural Requirements

Item 12 places a requirement on the Governor-General to consider a report prepared by the Marine Park Authority prior to making a proclamation under **section 31**, declaring an area to be part of the Marine Park, or excising areas from the Marine Park. Presently, the

13 Explanatory Memorandum, p. 10.

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Governor General only needs to consider a report prepared by the Marine Park authority when declaring an area to be part of the Marine Park.

Item 14 proposes an amendment to **current section 31** dealing with the requirements for proclamations. It imposes an obligation on the Marine Park Authority to provide public notice and details of a proposed proclamation and to invite public consultation. Any comments received in this regard are to be included in the report to the Governor-General, who is responsible for making the proclamation.

Items 15 to 29 – Clarification and modernisation of zoning plan provisions

These items propose to tidy up provisions relating to development or zoning plans.

The two substantive amendments are **items 15 and 17**. Significantly, they provide for greater synergy with relevant Commonwealth and Queensland legislation.

Items 15 & 17 – the assignment of IUCN protected management areas

To ensure consistency in defining and managing marine protected areas, Australia has adopted the World Conservation Union's (IUCN) internationally recognised set of [seven management categories](#). As such, proclamations declaring Commonwealth marine protected areas must assign the reserves, and any zones within them, to one of the seven IUCN Protected Area Management Categories.

Proposed **section 32B** and **subsection 35A(2)** make it a requirement that a zoning plan must designate, for each zone or part of a zone, an IUCN category. Also, in designating an IUCN category, the Marine Park authority must have regard to the purposes for which the zone may be used or entered, and the Australian IUCN Reserve Management Principles for that category, as set out in the EPBC Act.

According to the Explanatory Memorandum, the designation of an IUCN category is not meant to affect or determine the permitted uses of particular zones and areas of the Marine Park. As per current practice, it will be the zoning plan that defines the activities that may be legally undertaken in particular zones. Designation of IUCN categories is done for classification purposes and to assist with reporting. To be clear, the designation of the IUCN categories does not provide a basis for “reading down” the provision of the zoning plan.¹⁴

Item 15 – Considerations in developing a zoning plan

Proposed section 32 updates the list of objects that must be considered in developing zoning. Specifically, it adds the following objects:

14 Explanatory Memorandum, p. 12.

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- regulation of the Marine Park so as to protect the ecosystem within the Great Barrier Reef Region and so as to ensure its ecologically sustainable use, including ecologically sustainable traditional use
- management of the competing demands of the Marine Park
- protection of areas of high conservation value, and
- protection of the world heritage values of the Great Barrier Reef World Heritage Area.

Item 17

Considerations in developing a zoning plan

Proposed subsection 325 lists the matters that the Marine Park Authority must have regard to when preparing zoning plans. The intent is to enhance synergy and consistency with the EPBC Act and relevant Queensland legislation. Amongst other matters, these include:

any approved conservation advice, bioregional recovery plan, recovery plan threat abatement or wildlife conservation plan that is relevant

any habitat that is specified in the zoning plan as critical habitat, and

various matters contained in the EPBC Act or Queensland *Marine Parks Act 2004* or *Nature Conservation Act 1992* which are relevant.

The Minister's consideration of a submitted zoning plan

Proposed subsection 35C(8) provides that in deciding whether to accept a zoning plan under **section 35C**, the Minister must have regard to the obligations of Australia under international law, including obligations under any agreement or arrangement between Australia and another country or countries.

Item 37 – Considerations in preparing plans of management

In developing a plan of management, **proposed subsection 39ZD(2)** imposes a requirement the Marine Park Authority to have regard to any key threatening process, critical habitat, any approved conservation advice, recovery plan, threat abatement or wildlife conservation plan as identified or established under the EPBC Act, any plan made under relevant Queensland legislation.

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Schedule 4—Environmental Impact Assessments

Part 1 - Amendments to the EPBC Act

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

One of the three main areas covered by the EPBC Act is environmental impact assessments. One of the areas of assessment and approval is that of activities that are listed as having a significant impact on matters of NES.

The EPBC Act identifies seven matters of national environmental significance:

- World Heritage properties
- National heritage places
- Wetlands of international importance (Ramsar wetlands)
- Nationally listed threatened species and ecological communities
- Listed migratory species
- Commonwealth marine areas
- Nuclear actions

Establishing the Great Barrier Reef Marine Park as a matter of NES will make it subject to the EPBC Act assessment and approval requirements in relevant circumstances – that is, in relation to actions within or outside the Marine Park which have or are likely to have a significant impact on the environment.

The Explanatory Memorandum points out that this amendment does away with the current less direct and inefficient process for seeking an assessment and permission for certain action in the Marine Park that is likely to have a significant impact on the environment. The amendment also results in greater clarity about impacts that must be assessed and approved, promoting greater consistency and transparency.

Requirement for approval of activities in the Great Barrier Reef Marine Park

Proposed subsection 24B provides for civil penalty and offence provisions designed to prohibit and punish action taken in or outside the Marine Park that have or will have a significant impact on the environment in the Marine Park, or is likely to do so. The civil penalty for an individual is 5,000 penalty units¹⁵ and for a body corporate, it is 50,000

15 Section 4AA of the *Crimes Act 1914* provides that a penalty unit equates to \$110.

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penalty units. Approval issued under Part 9¹⁶ of the EPBC Act is one of the exceptions to the prohibition.

Offences relating to the Great Barrier Reef Marine Park – the imposition of strict liability elements

In order for an offence to be committed, it is often the case that several discrete physical elements must occur or exist. To take an example from the Bill, proposed subsection 24C(1) requires that:

- a person takes an action; and
- the action is taken in the Great Barrier Reef Marine Park; and
- the action results or will result in a significant impact on the environment.

All three of these must occur or exist in order for the offence to have been committed. However, for each of these physical elements, the law also generally requires that a ‘fault’ element must be present – either intention, knowledge, recklessness or negligence.

However, on occasions, legislation may be drafted so that strict liability applies to some or all of these physical elements. This means that the prosecution does not have to prove any fault element in relation to the relevant physical element, although the defence of reasonable mistake is available. If strict liability applies to one or more physical elements of an offence, the evidentiary burden on the prosecution is significantly less, making it easier to gain a conviction.

According to the Explanatory Memorandum, effective regulation and management is essential to the long term ecological sustainability of the Great Barrier Reef. The Great Barrier Reef is widely known for its significance in general, if not more specific terms. Moreover, the activities and boundaries allowed within the Marine Park are widely publicised. Proving to a court, beyond reasonable doubt, that a defendant was ignorant or reckless to the fact that a particular area was part of the Marine Park, can be quite problematic from an evidentiary point of view. Making a prosecutor prove this would reduce the number of convictions, weakening the deterrent effect of the offence provisions, thus frustrating the objects of the GBRMP Act. The government’s intention is that the imposition of strict liability will promote greater efficacy and integrity in the supervision of the regulatory scheme.

Much has been written by various members of the legal profession, human rights advocates, about the imposition of strict liability operating very unfairly in individual cases. The Explanatory Memorandum indicates that the drafters are cognisant of such concerns, but consider that the imperatives of the environmental context meet the criteria warranting the imposition of strict liability having considered the Senate Scrutiny of Bills Committee [*Sixth Report of 2002: Application of Absolute and Strict Liability Offences in*](#)

16 Part 9 of the EPBC Act deals with the approval of actions in the Marine Park.

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[Commonwealth Legislation](#), as well as the [Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers](#).¹⁷ Consistent with the views of many legal writers, human rights advocates and so forth, the aforementioned publications embrace an understanding that the stigma and public punishment associated with the finding of guilt for a criminal offence, have traditionally made the element of fault a central tenet of criminal law.¹⁸ That being said, there has been a significant growth in the application of strict liability - especially in regard to regulatory offences - as a relatively cheap, efficient and effective way of deterring, controlling and regulating particular conduct (i.e. for administrative convenience). In order to displace the requirement for fault and create a strict liability offence for certain conduct, the aforementioned publications proposed that certain considerations should be applied to the particular circumstance in question.

Strict liability is thought to be inappropriate where the regulator is readily able to assess the truth of the matter. Such cases would include those where the capacity to comply with the law is relatively straightforward and one over which a person has control. The abovementioned report of the Senate Scrutiny of Bills Committee opines that strict liability should only be introduced after thorough consideration of all available options, and it should not be driven by some predetermined formula or for mere administrative convenience. Furthermore, where strict liability is used, the general defence of mistake of fact with its lower evidentiary burden acts as a necessary safeguard and that the Criminal Code should continue to expressly provide for this. The Criminal Code should also continue to make it clear that strict liability should not make any other defence unavailable. Finally, strict liability should only be applied where there appears to be general public support and acceptance for that measure, and where that penalty does not include imprisonment.¹⁹

Proposed subsection 24C prohibits the taking of an action in or outside the Marine Park that has or will, or is likely to result in significant impact on the environment, unless the action is approved under Part 9 of the Act, or one of the 'exceptions' listed in the section apply. The strict liability elements are those that relate to the place where the action occurred and / or where the effect of the action will occur. Thus the prosecution will not have to prove that a person knew, or were reckless or negligent about, whether they were in the Park when they took the relevant action.²⁰ However, the prosecution will have to prove that they were reckless about the fact the action would, is likely to, have a significant impact on the environment. The prescribed maximum penalty is imprisonment for 7 years or 420 penalty units, or both. Certain limited defences are provided for.

17 Explanatory Memorandum, p. 17.

18 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law*, 2nd Ed., Pyrmont, Law Book Co, 2005, pp. 187–191.

19 Senate Scrutiny of Bills Committee [Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation](#), p. 283.

20. Although the defence of reasonable mistake is available.

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

Part 3 of the EPBC Act deals with ‘matters of national environmental significance’ (NES)

As a logical consequence of amendments made under **item 2** of **schedule 4**, actions in the Marine Park which are currently capable of authorisation under the GBRMP Act are no longer exempt from EPBC Act Part 9 approval requirements. Such actions in the Marine Park, having a significant impact on a matter protected by Part 3 of the EPBC Act would need to be assessed and approved in accordance with Parts 7, 8 and 9 of the EPBC Act (as appropriate).

The exception to this are activities permitted in the Marine Park ‘as of right’ (i.e. without permission) under a GBRMP zoning plan.

Item 11 – Bilateral Agreements relating to the Marine Park

Under the *EPBC Act*, a bilateral agreement is a written agreement between the Commonwealth and a State or Territory which relates to almost any matter connected with the environment.

A key function of bilateral agreements is to reduce duplication of environmental assessment and regulation between the Commonwealth and states/territories. Bilateral agreements allow the Commonwealth to 'accredit' particular state/territory assessment processes and, in some cases, state/territory approval decisions.

In effect, bilateral agreements allow the Commonwealth to delegate to the states/territories the responsibility for conducting environmental assessments under the EPBC Act and, in certain circumstances, the responsibility for granting environmental approvals under the EPBC Act.

To be accredited, a state/territory process will need to meet 'best practice' criteria.

If a proposed action is covered by an assessment bilateral, then that action is assessed under the accredited state/territory process. After assessment, the proposed action still requires approval from the Minister under the EPBC Act.

If a proposed action is covered by an approval bilateral, then it will be assessed and approved by the state/territory in accordance with an agreed management plan. No further approval is required from the Minister under the EPBC Act.²¹

Part 5 of the EPBC Act deals with bilateral agreements. **Section 49** of the EPBC Act more specifically addresses the express provision needed to affect Commonwealth areas or actions using bilateral agreements.

21 Found at <http://www.environment.gov.au/epbc/assessments/bilateral/index.html>, accessed on 7 August 2008.

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Item 11 amends **section 49** of the EPBC Act with the effect that a bilateral agreement made under Part 5 of the EPBC Act will not apply to actions in the Marine Park unless there is express provision for it in the agreement, in which case there is then scope to include both general and Great Barrier Reef-specific arrangements.

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

According to the Explanatory Memorandum, these items provide for amendments that ‘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’.²² This is done by providing that ‘a referral under the EPBC Act to take an action wholly or part in the Marine Park is deemed also to be an application under the GBRMP Act for any permission required under that Act’.²³

Part 2 - Amendments to the GBRMP Act

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

Proposed new Division 4 in Part V of the GBRMP Act deals the relationship between the GBRMP Act and the EPBC Act, and establishes a single integrated environmental impact assessment process under the EPBC Act, to be used both for the EPBC Act and the GBRMP Act. **New section 37AB** would provide that:

- if a proposal to take an action in the Marine Park is referred to the Minister for assessment and approval, then that referral is taken to also be an application made in accordance with the GBRMP Act regulations for that permission.
- if the action in the Marine Park is a ‘controlled action’ (requiring assessment and approval under the EPBC Act), then permission under the GBRMP Act cannot be validly given under the regulations unless an EPBC Act approval for the action is in place.

Schedule 5—Investigation and Enforcement

The amendments made under this schedule bring the GBRMP Act into line with the provisions relating to investigation and enforcement under the EPBC Act.

Part 1 - Amendments to the EPBC Act

Investigation provisions

22 Explanatory Memorandum, p. 20.

23 *ibid.*

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At present the EPBC Act and the GBRMP Act operate under two somewhat different regimes for the purposes of investigating compliance with the two key laws that apply in the Marine Park. This can create uncertainty and the potential for non-compliance with legislative requirements for investigations.

Items 1-5 – Inspectors

The amendments proposed by these items are designed to make the investigation-related provisions of the EPBC Act available for the purposes of investigating compliance with the GBRMP Act. However, it is only inspectors authorised under the GBRMP Act (as well as members of the Australian Federal Police, who have *ex officio* powers under both the GBRMP Act and EPBC Act) that may exercise EPBC Act investigation powers for GBRMP Act. This arrangement avoids confusions by ensuring that responsibility for investigations continues to rest with the Marine Park Authority.

Items 6, 11-16 – Boarding vessels, aircraft, vehicles, platforms

For the purposes of searching for ‘evidential materials’,²⁴ **subsection 403(2)** of the EPBC Act gives authorised officers the power to board:

- (a) any Australian vessel or Australian aircraft, whether or not it is in the Australian jurisdiction; or
- (b) any other vessel or aircraft, or any vehicle or platform, that is in the Australian jurisdiction.

According to the Explanatory Memorandum, **section 48** of the GBRMP Act has a roughly equivalent power which will be repealed. A closer examination of the content of the relevant provisions in the two Acts relating to investigation powers per se, and the boarding of vessels etc and access to premises, reveals that the more robust provision seems to be that provided by the EPBC Act.

The Explanatory Memorandum makes special mention of and provides justification for the need for authorised officers to be able to search a vessel etc without the need for a warrant.²⁵ Furthermore, where an inspector has boarded a vehicle, vessel, aircraft or platform, they are able to exercise the powers provided by **section 406** of the EPBC Act relating to the identification and collection of evidence. The inspector may also conduct a ‘frisk search’ of a person without a warrant. The need to guard the safety of the officers and the impracticality of obtaining a warrant under in some circumstances (the Marine Park is a very large area and incidents often occur in remote areas), justifies the grant of this power.

24 See EPBC Act subsection 406(2)

25 Explanatory Memorandum, p. 28.

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

Under the EPBC Act, an authorised officer has the power to themselves bring, or to direct a person in charge of a vessel (subsection **403(3)**) or an aircraft (**paragraph 403(4)(a)**) that the officer suspects on reasonable grounds has been used for or involved in the commission of an offence, to bring that vessel or aircraft to the nearest port or airport respectively.

The GBRMP Act has a similar provision (section 47B) which will be repealed.

This power is considered necessary because it is not always practical to engage in a proper and safe search of a vessel or aircraft at the point of interception.

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

Subsection 403(5) of the EPBC Act provides that an authorised officer may require the person in charge of a vehicle, vessel, aircraft or platform to give information concerning the vehicle, vessel, aircraft or platform and its crew and any other person on board the vehicle, vessel, aircraft or platform. This power is made available for the purposes of investigating compliance with the GBRMP Act.

Item 18 – Taking things into possession

The **new section (406AA)** proposed by **item 18** allows an authorised officer who has found eligible seizeable items in their search of a vehicle, vessel, aircraft or platform, or a person, to take that item into possession and keep it for as long as required for the purposes of the EPBC Act and/or GBRMP Act.

Chapter 6, Part 17, Division 3 – Items 20 & 21 – Monitoring of Compliance

Section 409 of the EPBC Act deals with authorised officers boarding/entering the premises, vehicles, vessels etc, with the consent of the occupier/operator, for the purposes of monitoring compliance of the Act and its regulations. The Explanatory Memorandum points out that compliance is significantly about ensuring that the manner in which activities are normally carried out are compliant with the object and purpose of the GBRMP Act over time.²⁶

Chapter 6, Part 17, Division 6 – Items 44 & 50 – Arrest and related matters

Section 430 of the EPBC Act provides an authorised officer to arrest a person without a warrant if the officer ‘believes on reasonable grounds that the person is committing or has committed an offence against this Act or the regulations; and proceedings against the person by summons would not be effective’. The equivalent power contained in the GBRMP Act will be repealed. The contextual circumstances of the investigation in terms

26 Explanatory Memorandum, p. 29.

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of the location of the investigation and the possibility that the offender is highly mobile are used to justify the existence of this power, which is meant to be used only in exceptional circumstances.²⁷ And it is mandatory for the person arrested without a warrant to be without unreasonable delay, brought before a Justice of the Peace or other authority to be dealt with in accordance with the law.

Other investigative powers under the EPBC Act

Items 51-74 provide amendments designed to make the investigation-related provisions of the EPBC Act available for the purposes of investigating offences under the GBRMP Act and its regulations include:

- the power to ask for a person’s name and address
- the power to seize without a warrant any thing that an authorised officer suspects on reasonable grounds is evidential material
- a direction to deliver a seizable item
- the establishment of an offence for a person who has a seized item released to them subject to a condition and they breach that condition
- the power of a court, upon convicting a person of an offence, to order forfeiture of any thing used or involved in the commission of that offence
- the power of the Minister to issue “notices to produce” information and “notices to attend” and answer questions relating to an investigation or for the purposes of preventing an offence or contravention of a civil penalty provision

Part 2 - Amendments to the GBRMP Act

Item 110 – Establishment of an ‘environmental duty’

Proposed **section 37AA** establishes an **environmental duty** under which a person who enters the Marine Park must take all reasonable steps to prevent or minimise harm to the environment in the Marine Park that might or will be caused by the person’s use or entry.

The Explanatory Memorandum states that administrative guidelines, codes of practice and other best practice standards will also help to indicate what is required. While breach of this duty is not an offence as such, it may still trigger 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 the person/company in question’.²⁸ The Explanatory Memorandum envisages that ‘this duty is a mechanism through which best practice approaches to environmental protection

27 *ibid*, p.30.

28 Explanatory Memorandum, p. 35.

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can be flexibly and collaboratively established ... as appropriate'.²⁹ It is stated that analogous requirements exist under state environmental protection legislation, but unhelpfully, no examples are provided.

Items 122 & 123 – Delegation of powers and functions

Proposed section 46 allows the Minister to delegate to the Marine Park Authority any or all of the Minister's powers or functions under the GBRMP Act (except for powers relating to matters properly vested with the Minister only such as the approval of a zoning plan).

Items 124 & 125 – Enforcement provisions

Vessel monitoring direction

Proposed section 61AAA applies in relation to a vessel that is required under a Commonwealth, State or Territory law to be equipped with a vessel monitoring system.³⁰ The Authority may, in writing, make a direction requiring one of the persons responsible for a particular vessel to provide the Authority, or cause the Authority to be provided, with the information specified for the vessel in the direction (which must be information of a kind provided by the vessel monitoring system in relation to the operation of the vessel in the Marine Park). The information obtained by the Authority may not be used or disclosed except for the purposes of administering the GBRMP Act.

Enforceable undertakings

Proposed section 61ABA allows the Minister to enter into a written undertaking with a person the Minister believes has contravened a civil penalty provision of the GBRMPA Act or the 'environmental duty'. That undertaking may involve the person doing any or all of the following:

- (a) take specified actions to prevent, repair or mitigate harm of a specified kind in the Great Barrier Reef Region;
- (b) take specified actions to ensure that the person does not engage, or is unlikely to engage, in conduct that contravenes the duty in section 37AA or a civil penalty provision;
- (c) pay a specified amount to the Commonwealth, to be used for the purpose of taking actions referred to in paragraph (a) or (b).

29 *ibid.*

30 A vessel monitoring system provides information on the location, course and speed of a vessel. The proposed provision does not give the Marine Park Authority the power to direct a person to install a vessel monitoring system.

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- (3) The undertaking must be expressed to be an undertaking under this section.
- (4) The person may withdraw or vary the undertaking at any time, but only with the consent of the Minister.
- (5) The Minister may, by notice in writing given to the person, cancel the undertaking.
- (6) The undertaking may be published on either or both of the following:
 - (a) the website of the Authority;
 - (b) the website of the Department.

The rationale underpinning the use of enforceable undertakings

The Explanatory Memorandum explains that this is meant to operate as an administrative mechanism for flexibly dealing with non-compliance of the GBRMP Act, albeit legally enforceable. The use of such undertakings will exist as a matter of discretion, as part of the panoply of options available which include criminal prosecution, civil action or other administrative enforcement. While flexibility and tailoring of penalties is a worthwhile endeavour, it remains of somewhat problematic comfort for the potential (accidental) offender that the Explanatory Memorandum states that:

the decision in any particular case as to what form of enforcement action it taken will depend on circumstances and will be made consistently with relevant Australian Government policies and guidelines and agency enforcement policy.³¹

Emergency directions

Proposed section 61ACA provides that where the Marine Park Authority is satisfied that circumstances exist amounting to an emergency that poses a serious risk to the environment in the Marine Park, the Authority may make an emergency direction requiring a particular person or class or persons to take or not to take specified action for the purposes of avoiding, mitigating or eliminating that risk. This measure is designed to respond to incidents such as an oil spill or ship grounding. Given the nature of the events that are being addressed, the emergency direction is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Failure to comply with an emergency direction would be an offence under **proposed section 61ACB**, attracting 500 penalty units.

Enforceable directions

Proposed section 61ADA provides that where the Minister is satisfied that a person has, is, or is likely to engage in conduct that does or would constitute an offence against or

31 Explanatory Memorandum, p. 40.

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would contravene a civil penalty provision against the GBRMP Act, and that it would be in the public interest to make a direction to ensure the person's future compliance with the Act and, or to prevent, repair or mitigate harm to the environment, then Minister may make a direction requiring a person to take or not to take specified action.

Directions limiting access to the Marine Park

Proposed section 61AEA provides that where a person has been convicted of an offence under the GBRMP Act or contravened a civil penalty at least 3 times in the past 10 years, then the Minister has the power to issue that person with a direction either prohibiting their access to the Marine Park or placing restrictions on it.

Publicising offences and contraventions

Proposed 61AFA provides that the Minister or Authority may publicise in any way that the Minister or Authority thinks appropriate the fact that a person has been convicted of an offence or found to have contravened a civil penalty provision and that a penalty was imposed on that person. While this sanction is intended to enhance deterrence, it seems potentially too excessive in terms of the breadth of its scope. Specifically the phrasing "may publicise in *any way*". Also and rather problematically, the terms of that section do not prevent anyone else from publicising an offence against or contravention of the Act.

Remediation orders

Proposed 61AHA provides that where a person is engaging or has engaged in conduct that constitutes an offence against the GBRMP Act, then on application by the Minister, the Federal Court can make an order requiring that person to take action to prevent, repair or mitigate harm to the environment in the Marine Park that has been, might be or will be caused by the conduct. **Sections 480A-480C** in the EPBC Act contain similar provisions.

Publicity Order

Proposed section 61AKA provides that where a court convicts a person of an offence against the GBRMP Act or finds that they have contravened a civil penalty provision, then they may make an order that the person take action to publicise either the offence or contravention and or any penalty imposed.

This provision is designed to enhance deterrence, particularly in relation to commercial Marine Park users. It is similar to the kinds of orders that can be made by the Australian Competition and Consumer Commission in certain circumstances. However, in those cases, they applied to commercial dealings. In light of the potentially significant penalties that an individual may suffer under the GBRMP Act, it seems somewhat excessive that this might also be applied to individuals. In view of the philosophical rights-based writings on punishment, it is suggested that publicity orders should be confined in their use to commercial entities.

Liability of executive officers of bodies corporate

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Proposed section 61AOA establishes civil and criminal liability of the executive officers of bodies corporate for offences and contraventions of the GBRMP Act done by the body corporate for which they are responsible. **Sections 493-496** of the EPBC Act contain similar provisions.

Schedule 6—Offences and Penalties

Schedule 6 proposes a variety of changes relating offences and penalties. These include:

- updating of a range of definitions, and or also making certain definitions consistent with other relevant legislation, or consistent as between the GBRMP Act and the EPBC Act
- improving the drafting and structure of certain offences so as to make clearer the matters that need to be established in order to prove that offence.
- the establishment of equivalent civil penalties for most offences
- tailoring the penalties according to factors such as culpability and the environmental damage that has been caused. Associated with this are amendments to meaningfully vary the fault elements (e.g, negligence and strict and absolute liability) accordingly rather than simply adopt the defaults established by the *Criminal Code 1995*. It should be pointed out however, that the Criminal Code establishes a preferred model of offences and variation from that model requires strong justification
- an extension of the existing vicarious liability³² and collective liability provisions to recognise, in appropriate circumstances:
 - the responsibility of a **permission holder** for another person’s conduct, where the authority for the conduct was given by the permission holder in accordance with the permission, but where that other person breaches a condition of the permission.
 - the responsibility of **persons holding a licence** to engage in or be in charge of commercial fishing activities carried out others pursuant to that licence.
- the establishment of new offences for
 - - the **operation of a fishing vessel** which is prohibited or done without permission in a zone (except for the purposes of transiting, anchoring, or reasonably necessary to deal with in an emergency, or is due to an unavoidable accident) (**38BD**)
 - - a **false, misleading or reckless representation** in relation to tourism services, concerning a person’s liability to pay a fee, tax or other levy or charge imposed by the Commonwealth for the purposes connected with the use or entry to the Marine Park.

32 In simple terms, vicarious liability refers to the responsibility and therefore liability of a third party who had the right, ability or duty to control the activities of wrongdoer.

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Opposition concerns relating to Schedule 6

Senators Boswell, Fielding, Joyce, McDonald, Scullion and Xenophon have raised strong concerns about the amendments relating to the breadth and thus operation of offences proposed by **Schedule 6**. Basically, the concern is that the Bill has not struck a reasonable balance between the need to effectively deal with offenders and protect the Marine Park, while avoiding the potentially harsh and unfair practical operation of the proposed provisions. In particular, there is a concern about the operation of strict liability offences and a corresponding call to ensure that the legislation is clearly written and information regarding the rights and obligations of users is readily available and user-friendly. These concerns resulted in the Bill's referral to the Senate Standing Committee on Environment, Communications and the Arts.

In its [report](#), the Senate committee responded to issues raised by opposition senators and provided clarification via departmental submissions containing a relevant information and evidence relating to the concerns raised by the senators. An issue that was not the subject of the Bill - the idea of pardoning of 116 persons who were convicted of recreational fishing offences between 1 July 2004 to December 2006 - remains an outstanding concern for a few of the opposition senators.

Part 1 - Amendments

Item 9 – Definition of fishing

Item 9 does not propose a new definition of 'fishing'. Paragraphs (a) to (f) are identical to the definition found in current **subsection 38CA(2)**. 'Fishing' means any of the following:

- (a) searching for, or taking, fish;
- (b) attempting to search for, or take, fish;
- (c) engaging in any other activities that can reasonably be expected to result in the locating of, or taking of, fish;
- (d) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons;
- (e) any operations at sea directly in support of, or in preparation for, any activity described in this definition;
- (f) aircraft use relating to any activity described in this definition except flights in emergencies involving the health or safety of crew members or the safety of a launch, vessel or floating craft of any description.

This definition, which has simply been moved to into the interpretation section, has nonetheless been criticised by Senators Boswell, Scullion and Joyce for being too broad in terms of its capture and thus potentially draconian in its operation because of its

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insufficiently considered practical consequences.³³ The example provided by Senator Boswell is that of someone entering a green zone with an echo sounder³⁴ or fish finder turned on. There is concern that in such a case, given that an echo finder also performs non-fishing functions, a person may be found guilty of an offence.

The Senate Standing Committee responded to this concern by clarifying that this is not the definition of fishing in the GBRMP Act that actually generates the prosecution process.

To be charged for fishing in a prohibited area in the Marine Park, a breach of the *Great Barrier Reef Marine Park Zoning Plan 2003* (Zoning Plan) must be established in the first instance. The Zoning Plan defines ‘fishing and collecting’ as ‘taking a plant, animal or marine product’. An offence will have been committed if:

- a person engages in conduct that is ‘fishing’ (within the meaning of the Zoning Plan), in a zone where it is prohibited; or
- a person attempts (as provided for by Part 2.4 of the Criminal Code) to engage in ‘fishing’ (within the meaning of the Zoning Plan) in zones closed to fishing.³⁵

The committee explained that the definition of ‘fishing’ stated in **item 9** is what is applied in order to classify an offence as ‘aggravated’ only once a breach of the Zoning Plan has already been established. The definition of ‘fishing’ in the Act does not therefore operate so as to modify or qualify the definition of “fishing” for the purposes of determining whether a person has engaged in, or attempted to engage in, conduct that is prohibited under the Zoning Plan. Only the definition in the Zoning Plan and application of the *Criminal Code* are relevant in this context.

If that is the case, then placement of this definition in interpretation section without clarification seems to be less than optimal drafting.

33 Senator Ronald Boswell, ‘Second reading speech: Great Barrier Reef Marine Park And Other Legislation Amendment Bill 2008’, Senate, *Debates*, 1 September 2008. Senator Nigel Scullion, ‘Second reading speech: Great Barrier Reef Marine Park And Other Legislation Amendment Bill 2008’, Senate, *Debates*, 1 September 2008.

34 An echo sounder may be used for the following purposes: “locating where schools of fish are hiding around a structure and their depths. Locating shipwrecks, reefs, pinnacles, sunken trees and other objects between the hull of the vessel and the bottom. Determining bottom contours and composition to recognize soft mud, gravel, sand and rock. Determining the water depth and locating hazards for navigation purposes.”
<http://www.alcommarine.com/fishfindfaq.htm>, accessed on 5 September 2008.

35 Senate Standing Committee on Environment, Communications and the Arts, Inquiry into the provisions of the Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 – additional information. Submission by Department of Environment, Water, Heritage and the Arts, p. 1.

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Item 24 – Offence and civil penalty provisions

This item repeals **sections 38A to 39**, which deal with items such as conditions attached to permission requirements, permit or authority; activities allowed/prohibited in zoned areas; the establishment of offences relating to the aforementioned items, including offences relating to the removal of property, discharge of waste and damage to the marine park. **Item 24** re-enacts all of these offences with some consolidation, adjustments and additions. Significantly, civil penalty equivalents have been created for many of the offences.

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

Strict liability is applied in the circumstance where that conduct:

- was carried out in the Great Barrier Reef Region (38AA – Mining or Drilling)
- was carried out in a zone (38BA(1)(b), 38BD(b))
- is not permitted in a zone under a zoning plan (38BA(1)(c), 38B(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)).

According to the Explanatory Memorandum, the policy rationale underlying these offence provisions is an explicit onus being placed on the user to take steps to make themselves aware of:

- the Marine Park and its zones;
- their location in relation to those areas; and
- any restrictions on their activities and use of those areas that might apply.³⁶

Strict liability – conduct authorised by permission

The offences in **proposed 38AA (Mining and Drilling in the Great Barrier Reef Region: offence)**, **proposed 38AB (Mining and Drilling in the Great Barrier Reef Region: civil penalty)**, **proposed 38BD (Operation of fishing vessel in zone: offence)** and **proposed 38DD (Discharging of waste: offence)** apply strict liability to the circumstance that the defendant was authorised to engage in the conduct by virtue of a permission granted under the GBRMP Regulations.

36 Explanatory Memorandum, p. 54.

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According to the Explanatory Memorandum, the permission system underpins the regulation of the Marine Park and the Great Barrier Reef Region. Permission requirements exist where there is a potential for activities to have implications for the environment. The permission requirements attach certain conditions to the way in which activities are performed and are designed to ensure that activities undertaken are acceptable ones that are consistent with maintaining the integrity of the environment.³⁷ It is therefore reasonable, logical and expected that the holder of a permit will make themselves aware of their rights and duties pursuant to that permission. Making this a strict liability element not only overcomes the problem of disproving ignorance of the law by the prosecution, but is consistent with the terms upon which the permission was given—that the holder would adhere to the conditions, which means making themselves aware of those conditions.

Part VAA – Offences and penalties in relation to Great Barrier Reef Marine Park and Region

Division 1— Conduct in the Great Barrier Reef Region

Mining operations in the Great Barrier Reef Region

Proposed section 38AA increases the maximum penalty for the offence of carrying out mining operations in the Great Barrier Reef Region from 500 penalty units to 1,000 penalty units. A provision for an aggravated offence has also been included and this carries a maximum penalty of three years imprisonment, 2,000 penalty points or both.

The concept of aggravated offences is discussed later in this Digest.

An equivalent civil penalty offence is established for this provision and it carries a maximum penalty of 2,000 units for an individual and 20,000 penalty units for a body corporate. An aggravated contravention attracts a maximum civil penalty of 5000 penalty units, or 50,000 units for a body corporate.

However, the offence and civil penalty provisions do not apply if the defendant has authorisation to carry out the conduct by permission under the regulations. The Marine Park Authority must not grant a person permission to engage in such conduct unless the Authority is satisfied that the conduct is for the purpose of research or investigations relevant to the conservation of the Marine Park.

Division 2— Conduct in Marine Park Zones (38BA and 38BB)

The proposed amendments rationalise and consolidate various the offences relating to provisions that prohibit conduct not allowed under a zoning plan or is only allowed with a permission and no such permission is held. The offence once again adopts strict liability elements, consistent with the rationale underpinning their adoption elsewhere in the schedule.

37 *ibid*, p. 55.

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The maximum base penalty for has been increased to 1,000 units. The maximum penalty for an ‘aggravated offence’ is three years imprisonment, 2,000 units, or both. 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.

Division 3— Conduct in an unzoned area of the Marine Park (38CA and 38CB)

This item increases the base penalty to 1,000 penalty units. For an ‘aggravated offence’, the maximum penalty is 3 years imprisonment, 2,000 penalty units, or both. The civil penalty provision equivalent of the offence provides for 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.

Division 4—Conduct in the Marine Park generally

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

This item basically re-enacts 38MC and also creates an equivalent civil penalty provision.

It is proposed that the penalty for an aggravated offence be increased to three years imprisonment, 2,000 penalty units or both (for an individual). The new civil penalty provision carries a maximum penalty of 2,000 penalty units for an individual and 5,000 penalty units for a body corporate. In the case of an ‘aggravated contravention’, the maximum penalty is 20,000 penalty units for an individual and 50,000 penalty unit points for a body corporate.

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

This item basically re-enacts an existing section which prohibits the same conduct of discharging waste in the Marine Park. However, the amendment provides for an ‘aggravated offence’ attracting a maximum penalty of three years imprisonment, 2,000 penalty units or both (for an individual). The maximum base penalty for an individual is 1,000 penalty units. These offences, as elsewhere, include strict liability elements and also contain a number tempering of defences.

Division 5—Conduct contravening conditions

Contravention of a permission authority (38EA and 38 EB)

Coupled with some changes (including the establishment of an equivalent civil penalty provision), this item re-enacts the offence prohibiting conduct which contravenes conditions of the permission. The defences associated with the current provision have also been re-enacted.

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The maximum ‘base’ penalty has been increased to 500 penalty units (for an individual). For an ‘aggravated offence’, the maximum penalty is 1,000 units (for an individual). 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.

Division 6—Collective and vicarious liability

Liability for vessels, aircraft and platforms used in committing offences (38FA)

This item re-enacts **current sections 38K and 38L** of the Act, imposing vicarious liability on persons responsible for vessels involved in an offence against specified provisions of the Act.

‘Responsible persons’ are identified as vessel masters, vessel owners and persons responsible for vessel-based commercial fishing activities, notably the fishing licence holder. Making these persons vicariously liable recognises that they are in a prime position to be able to affect and monitor compliance with any conditions which attach to their licences and to activities in the Great Barrier Reef.

A check is placed on the culpability of vicarious liability to prevent unjust consequences being visited on ‘responsible persons’. This is done by excusing the responsible person from liability if they took all *reasonable* steps and exercised *due diligence* in ensuring that the vessel is not used in the commission of an offence.

Collective liability – ships and vessels causing damage to the Marine Park (38FB)

This item imposes liability on the master and owner of a vessel involved in the commission of an offence under **Part VAA** of the Act. The maximum penalty is 500 penalty units. Collective liability is not controversial or new, it is well established in maritime law, including Commonwealth maritime pollution law.

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

This item in part re-enacts the **current subsection 38MC(2)** imposing liability on the master and owner of a vessel involved in the commission of an offence under **proposed subsection 38CA** (causing damage to the environment of the Marine Park). The maximum penalty is 500 penalty units.

Vicarious liability – permission holders (38FD)

This item proposes to impose responsibility on the holder of a permission for the activities of another person, where they grant ‘authority’ to that other person to undertake the activities authorised by the permission. This has the effect of requiring the original

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permission holder to take all reasonable steps and exercise due diligence in ensuring that the permission conditions are met by the person to whom they have issued authority.

Vicarious liability is not a new concept and is widely used in analogous contexts based on the logic that there are a bundle of obvious obligations and responsibilities associated with rights and potential gains of holding such a permission, and the most fundamental one is to take reasonable steps to appreciate, foresee and manage the risks of non-compliance.

Division 7—Aggravated offences and contraventions (38GA, 38 GB)

According to the Explanatory Memorandum, the categories of ‘aggravated offences’ and ‘aggravated contraventions’ are established by this item as a means of distinguishing between 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.³⁸

Conduct which is specifically identified as an ‘aggravating circumstance’ and therefore necessarily attracting a higher penalty in order to have a deterrent effect is:

- fishing that involves a primary commercial fishing vessel or a dory; or
- navigating a vessel that is a ship within the meaning of the zoning plan for the zone in which the vessel was being navigated; or
- conduct resulting in the taking of or injury to an animal or plant that is a member of a protected species; or
- conduct resulting in serious harm to the environment in the Marine Park; or
- conduct which has the potential to result in serious harm to the environment in the Marine Park ; or
- conduct done for a commercial purpose.

The prosecution bears the onus of proving the existence of the ‘aggravating circumstance’. If they are unable to do so, then the person may still be found guilty of an ‘ordinary’ offence against that provision.

Division 8— Miscellaneous

Commencement of prosecution times – extension of time limit (38HA)

Under section 15B of the *Crimes Act 1914*, prosecution for an offence carrying a maximum penalty of six months imprisonment must be commenced within 12 months of the commission of an offence. The Explanatory Memorandum states that this is considered too short a period of time for many offences under the GBRMP Act. This is because the

38 *ibid*, p. 69.

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Marine Park is a large and in places rather remote area, with parts not always readily accessible due to seasonal factors. Furthermore the complexity of an investigation in terms of accessing the area and obtaining relevant evidence of the offence, may not always be possible within the current 12 month period. This amendment therefore proposes to extend the period in which prosecutions may be commenced from 12 months to two years.

This proposal to double the length of time is arguably too generous and may result in unjust consequences for the accused. The statute of limitations on commencing prosecution exists because of the understanding that with the passage of time, evidence can become stale, lost, obscured or defective with possibly unfair consequences for the accused. Should the proposed amendment be adopted, it will therefore be important that prosecutions are still commenced as soon as possible, rather than taking advantage of the extended time limit unless this is unavoidable in the circumstances of the particular case.

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

Background: the EMC and its application

- The Environmental Management Charge or EMC is a charge payable by most commercial operators granted permits by the Great Barrier Reef Marine Park Authority (GBRMPA). This includes operators conducting tourist programmes and non-tourist commercial charters plus those operating facilities in the Great Barrier Reef Marine Park
- There is no Goods and Services Tax liability on the EMC
- Visitors to the reef participating in a tourist activity are currently liable to pay the charge to the permit holder. The role of the operator in relation to the charge is to collect and remit the charge to the GBRMPA
- All funds received as EMC payments are applied directly to management of the Great Barrier Reef Marine Park including education, research, ranger patrols and policy development.

The EMC applies to chargeable permissions. This includes a permission for any of the following kinds of activities:

- Operation of tourist programme
- installation and operation of tourist facilities (for example pontoons, marinas, floating hotels, underwater observatories)
- Resorts on Commonwealth islands for example Lady Elliot Island
- Non-tourist commercial operations (for example, vessels chartered for research, filming or other non-tourist activities)
- Mariculture

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- Land-based sewage outfalls into the Great Barrier Reef Marine Park
- Sale of goods or services from a vessel.³⁹

Existing section 39FA of the GBRMP Act makes it a requirement that a chargeable permission holder must collect the charge payable by visitors. Existing **section 39FB** of the GBRMP Act makes it a requirement that chargeable permission holders must remit (pay) collected amounts to the Marine Park Authority on time. Each of the sections provide that a failure to comply is an offence under the GBRMP Act.

Items 26-32 propose amendments that establish civil penalty provisions for the existing offences under **section 39FA** and **section 39 FB**. The proposed civil penalty for a failure to collect under **section 39FA** is 100 penalty unit points for an individual and 500 penalty unit points for a body corporate. The proposed civil penalty for a failure to timely remit the collected EMC under **section 39FB** is 20 penalty unit points for an individual and 100 penalty unit points for a body corporate.

Item 33 – False, misleading or reckless misrepresentation in relation to tourism services

Proposed subsection 39FF makes it a new offence to make a **false, misleading or reckless representation** in relation to tourism services, concerning a person's liability to pay a tax, charge or fee (however described) imposed by the Commonwealth for the purposes connected with the use or entry to the Marine Park. It is not necessary to prove that the representation expressly refers to the Marine Park or to an imposition of a liability by the Commonwealth.

Item 34 – Penalty for late payment of Environmental Management Charge (EMC)

At present, the late penalty for failing to provide EMC to the Marine Park Authority is 20 per cent per annum of the outstanding amount. However, the Explanatory Memorandum argues that where only a small amount is owed this is not considered as providing a sufficient deterrent.⁴⁰ Hence the amendments proposed **item 41** imposes a new penalty of \$250 or 20 per cent per annum of the amount unpaid, whichever is the greater.

39 Found at http://www.gbrmpa.gov.au/corp_site/permits/emc, accessed 16 August 2008

40 Explanatory Memorandum, p. 71.

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