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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**Great Barrier Reef Marine Park Amendment (Authority Governance and
Other Matters) Bill 2017**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment and Energy,
the Hon Josh Frydenberg MP)

Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017

GENERAL OUTLINE

The Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017 (the Bill) amends the *Great Barrier Reef Marine Park Act 1975* (the GBRMP Act) to change the governance size and structure of the Great Barrier Reef Marine Park Authority (the Authority) and strengthen requirements for appointment and termination of members. The amendments will strengthen the strategic capability and capacity of the Authority to respond to challenges facing the Great Barrier Reef Marine Park (the Marine Park).

The Authority's key functions are to advise and make recommendations to the Minister in relation to the care and development of the Marine Park; develop zoning plans and plans of management; manage the Marine Park collaboratively with the Queensland Government; conduct research; and provide education, advisory and information services.

In 2017, an independent Review of Governance of the Authority was conducted by Dr Wendy Craik AM (the Review). The Review was released on 5 October 2017.

The Review found the current governance arrangements do not allow for sufficient strategic leadership or management commensurate with the requirements of the Authority's functions and responsibilities. The scale and workload of the Chairperson position had become too large for a single person. The legislated size of the Authority and background requirements of the majority of members limited the capacity to provide local, national and international perspectives and diversity of expertise required to address the issues affecting the Great Barrier Reef (the Reef).

The Bill amends the GBRMP Act to implement the governance arrangements recommended by the Review and accepted by the Government. The key provisions of the Bill are:

- Replace the existing full-time Chairperson position with a part-time Chairperson and full-time Chief Executive Officer (the CEO). The CEO will be the 'accountable authority' of the agency for the purposes of the *Public Governance, Performance and Accountability Act 2013*, and the 'agency head' for the purposes of the *Public Service Act 1999*.
- Establish one additional part-time member position, bringing the total membership of the Authority to seven (including the Chairperson and CEO).
- Strengthen requirements for the appointment and termination of members by: specifying the general skills required; limiting the number of consecutive terms served by an individual member; providing for termination of members by the Governor-General for underperformance; and reducing the potential for conflicts of interest.

Additionally the Bill makes a minor technical amendment to the Act to clarify the relationship between the suite of legislation underpinning the functions of the Authority.

FINANCIAL IMPACT STATEMENT

The Bill has no financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS – PART 3 HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011

Statement of Compatibility with Human Rights

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

Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017 amends the *Great Barrier Reef Marine Park Act 1975* (GBRMP Act) to change the size and structure of the Great Barrier Reef Marine Park Authority, and strengthen requirements for appointment and termination of members.

The Bill will separate the existing full-time Chairperson position into a part-time Chairperson and full-time Chief Executive Officer, and establish one additional part-time member position. The Bill will specify the general skills required of members, allow an individual to be appointed for a maximum of 10 consecutive years, provide for termination of a member by the Governor-General for underperformance, and reduce the potential for conflicts of interest in the conduct of the Authority's functions.

Additionally the Bill will make minor technical amendments to clarify the relationship between the suite of legislation underpinning the functions of the Authority. The Bill includes application and transitional provisions with retrospective application to preserve the effect of actions previously taken under Marine Park legislation and confirm the validity of rights and liabilities of persons that have arisen under Marine Park legislation.

The amendments will strengthen the strategic capability and capacity of the Authority to respond to challenges facing the Marine Park.

Human rights implications

The Bill engages the following rights:

- (a) The right to equality and non-discrimination in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- (b) The right to take part in public affairs and elections in Article 25 of the ICCPR
- (c) The right to a fair trial in Article 14 of the ICCPR
- (d) The prohibition on retrospective criminal laws in Article 15 of the ICCPR

The right to equality and non-discrimination

Article 26 of the ICCPR guarantees that all persons are equal before the law and are entitled to the equal protection of the law.

The Bill retains an existing provision in the GBRMP Act that one of the members of the Authority must be an Indigenous person with experience in Indigenous matters relating to the Marine Park. This promotes the representation of Indigenous perspectives in the performance of the Authority's functions. Aboriginal and Torres Strait Islander peoples are the Traditional Owners of the Great Barrier Reef area and have a continuing connection to their land and sea country.

The right to take part in public affairs and elections

Article 25 of the ICCPR ensures that citizens have the right and opportunity to take part in the conduct of public affairs, to vote and to be elected at elections and to have equal access to public service.

The Bill limits eligibility of individuals to serve as a member of the Authority by requiring that an individual not be a member of the governing board of a relevant interest group for the duration of their appointment. This is defined as a group that is directly involved in advocating about the management of the Marine Park, or a group that represents people who use the Marine Park for commercial purposes. However, an individual is eligible for appointment if they are merely a member of a relevant interest group and are not involved in the management of that entity.

The Authority manages the Marine Park, including through issuing permits and developing zoning plans and plans of management which affect what particular individuals or organisations are permitted to do within the Marine Park. It would be inappropriate for a person to be a member of the Authority if that person's work or public occupation involves lobbying or advocating policy or actions to governments that are clearly intended for specific benefits for themselves, or their organisation, which is primarily comprised of commercial interests operating in the Marine Park.

The purpose of this measure is to reduce the potential for conflicts of interest in the conduct of the Authority's functions and promote public confidence in the Authority's independence.

Right to a fair trial

The right to a fair trial is protected in Article 14 of the ICCPR. Article 14 is aimed at ensuring the proper administration of justice, which includes the right to equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The application and transitional provisions in the Bill preserve the effect of actions previously taken under Marine Park legislation, and confirm the validity of rights and liabilities of persons that have arisen under Marine Park legislation. The right to a fair trial will not be prejudiced by these provisions. The Bill promotes legal certainty and addresses

what may have been a technical defect in relevant pre-commencement GBRMPA instruments by ensuring that the rights and liabilities of all persons are maintained.

Prohibition on retrospective criminal laws

The prohibition on retrospective criminal laws is contained in Article 15 of the ICCPR. Article 15 provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

The application and transitional provisions in the Bill do not infringe the prohibition on retrospective criminal laws. The Bill addresses what may have been a technical defect, associated with the prescription of conduct in Marine Park legislation. To the extent that there was any defect, the Bill confirms that the content of the relevant prohibited conduct is exactly that which was on the face of the relevant instruments. That is, there would have been no change to the rules of conduct that users of the Marine Park needed to comply with in the past.

The Bill includes an additional protection, in the form of a ‘historic shipwrecks’ clause, ensuring that any person whose property rights would be acquired contrary to section 51(xxxi) of the Constitution, is entitled to receive compensation on just terms from the Commonwealth.

Conclusion

This Bill is compatible with human rights as it promotes the right to equality and non-discrimination, the right to a fair trial and the extent to which it limits the right to take part in public affairs and elections is reasonable, necessary and proportionate. The Bill does not infringe the prohibition on retrospective criminal laws.

Minister for the Environment and Energy, the Hon Josh Frydenberg MP

NOTES ON CLAUSES

Clause 1 – Short title

1. This clause provides for the Bill, when enacted, to be cited as the *Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Act 2017*.

Clause 2 – Commencement

2. This clause provides for Schedule 1 of the Act to commence on a day to be fixed by Proclamation, up to 12 months after the Act receives the Royal Assent, and for Schedule 2 of the Act to commence the day after the Act receives Royal Assent.
3. The delay in commencement of Schedule 1 of the Act provides time to recruit appropriately qualified individuals for the positions of Chairperson and CEO for appointment by the Governor-General. This process is expected to take approximately six months, however additional time has been allowed in case there are unexpected delays.
4. The current full-time Chairperson position is filled by an acting appointment which will cease when a new Chairperson is appointed. Upon commencement of Schedule 1 of the Act this position will be separated into a part-time Chairperson and full-time CEO. It is therefore important to ensure the current Chairperson can continue to undertake both of these functions until the new appointments are made.
5. Aligning commencement of Schedule 1 of the Act with the appointment of the new Chairperson and CEO would provide continuity for the Authority and support a smooth transition to the new governance arrangements.

Clause 3 – Schedules

6. This clause provides that legislation that is specified in a Schedule to the Act will be amended or repealed as set out in the Schedule, and that any other item in a Schedule to the Act has effect according to its terms.

Schedule 1 – Authority governance

Part 1 – Main amendments

Great Barrier Reef Marine Park Act 1975

Background

7. Under the new governance model, the Authority will consist of seven members:
 - a. an independent part-time Chairperson of integrity, national credibility and standing who would not be perceived as representing a Reef interest group;
 - b. a full-time CEO; and
 - c. five other part-time members including continuation of at least one member who must be an Indigenous person with significant knowledge or experience in Indigenous matters relating to the Marine Park and at least one member who must have significant knowledge or tourism expertise in the Marine Park. One member will also continue to be nominated by the Queensland Government.
8. This governance structure will ensure the Authority has access to skills and expertise commensurate with its functions.
9. The Chairperson will provide strategic direction, guidance and oversight of the Authority and guide engagement with government, industry and other stakeholders on major issues affecting the Reef and its management. The Chairperson will lead meetings of the Authority, consider the performance of the Authority, and act to rectify any deficiencies.
10. The CEO will be responsible for leading and managing the agency, including its human and financial resources, and implementing the Authority's strategy and directions. The CEO will be the 'accountable authority' for the purposes of the *Public Governance, Performance and Accountability Act 2013* and 'agency head' for the purposes of the *Public Service Act 1999*.

Item 1 – Subsection 3(1), and Item 2 – Subsection 3(1) (definition of *part-time member*)

11. These items insert additional defined terms into subsection 3(1) of the GBRMP Act to reflect the measures enacted by the Bill.
 - a. 'CEO' is the Chief Executive Officer of the Authority established by the Bill
 - b. 'member of the governing body of a relevant interest group' has the meaning given by subsection 10(10) (see paragraphs 21 to 23).
 - c. 'paid work' defines the characteristics of paid work for the purposes of sections 15A (which deals with other paid work for part-time members) and 39ZQ (which deals with outside employment for the CEO).

- d. 'part-time member' is amended to mean a member appointed under subsection 10(2) and (2A) (namely, the Chairperson and other members, excluding the CEO) (see paragraph 16).

Item 3 – Paragraph 6(2)(b) and Item 4 – After subparagraph 6(2)(c)(i)

12. These items amend the GBRMP Act to specify that the CEO will be the 'accountable authority' and an official of the Authority for the purposes of the *Public Governance, Performance and Accountability Act 2013*. This aligns with the CEO's responsibility for leading and managing the agency, including its human and financial resources, and for implementing the Authority's strategy and directions, as recommended by the Review.

Item 5 – Subsection 7A(8), Item 6 – Subsection 8(1) (note), Item 7 – Section 8B (heading), Items 8 and 9 – Section 8B

13. These items amend the GBRMP Act to reflect the transfer of responsibilities from the Chairperson to the CEO as the 'accountable authority' for the purposes of the *Public Governance, Performance and Accountability Act 2013* and 'agency head' for the purposes of the *Public Service Act 1999*, and the CEO's responsibility for leading and managing the agency and implementing the Authority's strategy and directions.
14. The sections amended by these items relate to: provision of assistance to other institutions and persons; powers of the Authority; and the CEO not being subject to direction by the Authority on certain matters.

Item 10 – Paragraph 10(1)(b)

15. This item adds the CEO as a member of the Authority and specifies that there will be five other members in addition to the Chairperson and CEO. The total number of members of the Authority shall be seven. This will provide for greater diversity of perspectives and expertise, and enable formation of sub-committees to deal with specific issues.

Item 11 – Subsection 10(2)

16. This item specifies that members of the Authority shall be appointed by the Governor-General, and that all members other than the CEO shall be appointed on a part-time basis. The Review recommended the Authority consist of a part-time Chairperson, a full-time CEO, and five other part-time members, all appointed by the Governor-General.

Item 12 – Subsection 10(3)

17. This item retains the existing provision that one part-time member is to be appointed on the nomination of the Queensland Government, and clarifies that this is a part-time member other than the Chairperson. This item does not prevent the part-time member appointed on the nomination of the Queensland Government from being appointed as the acting Chairperson in accordance with section 15(1).

Item 13 – Subsections 10(6) to (8)

18. The Review found that access to additional perspectives would assist the Authority in making decisions and providing advice to meet the contemporary challenges facing the Reef. The Review also found that having a leadership group comprised of individuals with appropriately diverse and strategic skills would provide constant guiding leadership and direction to an agency dealing with unprecedented situations.
19. This item specifies the general skills required of members of the Authority. To be eligible for appointment a member must have significant knowledge or experience in one or more of the following fields:
 - a. science (including one or more fields related to climate change, marine science, coastal ecology, fisheries, social sciences or engineering);
 - b. natural resource management (which includes parks management);
 - c. Indigenous matters relating to the Marine Park;
 - d. the tourism industry associated with the Marine Park;
 - e. business or industry;
 - f. resource economics;
 - g. public sector governance;
 - h. regulation;
 - i. education or communications (which is communications for the purposes of education and knowledge sharing); and
 - j. strategic management (which includes scenario planning).
20. The amendments to these subsections retain the existing requirements in the GBRMP Act that one member must be an Indigenous person with expertise in Indigenous matters relating to the Marine Park and that at least one member must have expertise in the tourism industry associated with the Marine Park.
21. The new subsections 10(9) and 10(10) provide that a person is not eligible for appointment as a part-time member of the Authority if they are a member of the governing body of a relevant interest group. This is an ongoing eligibility requirement for the whole of the member's term. This requirement will reduce the potential for conflicts of interest in the conduct of the Authority's functions and promote public confidence in the Authority's independence.

22. A relevant interest group is one that is directly involved in advocating views in relation to the management of the Marine Park, or a group that represents people who use the Marine Park for commercial purposes. The Authority manages the Marine Park, including through issuing permits and developing zoning plans and plans of management which affect what particular individuals or organisations are permitted to do within the Marine Park. It would be inappropriate for a person to be a member of the Authority if that person's work or public occupation involves lobbying or advocating policy or actions to governments that are clearly intended for specific benefits for themselves, or their organisation.
23. An individual is eligible for appointment if they are merely a member of a relevant interest group and not involved in the management of that entity.

Item 14 – Sections 11 to 14

24. This item limits the number of consecutive terms served by an individual member by specifying that a person may not hold office as a part-time member for a continuous period exceeding 10 years. The maximum period for a single term of appointment is five years. An appointment would usually be for five years. Any time served as an acting member of the Authority does not count towards the maximum continuous service of 10 years.
25. The purpose of this amendment is to allow for rotation of members with different skill sets and knowledge, which will help to avoid entrenchment of certain views and regulatory capture by affected stakeholders. It will allow the Authority to benefit from a range of perspectives, while maintaining broad stability.
26. This item updates section 12 of the GBRMP Act regarding remuneration of part-time members to reflect current drafting practices. The provisions currently in the GBRMP Act are retained.
27. This item updates section 13 of the GBRMP Act to allow part-time members to be granted a leave of absence. The Minister may grant a leave of absence to the Chairperson. The Chairperson may grant a leave of absence to other part-time members, and must notify the Minister if such a period is greater than 3 months.
28. This item updates section 14 of the GBRMP Act regarding resignation of part-time members to reflect current drafting practices. The provisions currently in the GBRMP Act are retained.

Item 15 – Subsections 15(1) and (3) (notes)

29. This item updates references to sections of the *Acts Interpretation Act 1901* for rules that apply to acting appointments.

Item 16 – After subsection 15(3)

30. This item applies the same eligibility requirements for members in subsection 10(6) and (9) of the GBRMP Act to acting members. Specifically, that the person has significant knowledge or experience in one or more required skills and the requirement to not be a member of the governing body of a relevant interest group.

Item 17 – Subsection 15(5)

31. This item repeals a subsection regarding resignation of an acting appointment which is now addressed by section 33A(1)(d) of the *Acts Interpretation Act 1901*.

Item 18 – After section 15

32. This item reduces the potential for conflicts of interest to arise for part-time members of the Authority and promotes public confidence in the independence of the Authority.
33. This item inserts section 15A which requires any other paid work undertaken by a part-time member to not conflict with the proper performance of their duties as a member of the Authority. For example, if a person received income for undertaking activities which are regulated by the Authority, it would not be appropriate for them to make decisions relating to the regulation of such activities.
34. This item also inserts section 15B which restates the provision in section 10(10) of the GBRMP Act, that a part-time member must not be a member of the governing body of a relevant interest group. This ensures that a member is continually subject to these requirements throughout the period of their appointment.

Item 19 – Section 16

35. This item specifies the grounds on which the Governor-General may terminate the appointment of a part-time member. It updates text to reflect current drafting practices and adds conflicts of interest and consistent underperformance as grounds for termination, at the Governor-General's discretion.

Item 20 – Subsections 16A(1) and (3)

36. This item updates this section relating to disclosure of interests to refer to part-time members only.

Item 21 – After section 16A

37. This item provides that the Minister may determine additional terms and conditions on which a part-time member holds office. This is to enable streamlined administration of the appointment, which is made by the Governor-General. This item does not provide the Minister the power to direct a member in the exercise of their powers or performance of functions or duties.

Item 22 – Subsection 17(3)

38. This item specifies that four members constitute a quorum at the meeting of the Authority. It is appropriate for the majority of members to be present when the Authority is making decisions.

Item 23 – Subsections 17(6) to (10)

39. This item clarifies that decisions of the Authority are to be made by a majority vote of members present and voting, with the presiding member to have a deliberative vote, and a casting vote in the event of an equality of votes. It also requires the Authority to keep minutes of its meetings.

Item 24 – At the end of Part III

40. This item provides that, subject to the requirements of the GBRMP Act, the Authority may regulate its meetings as it considers appropriate.

Item 25 – Before section 40

41. This item inserts a new section 39ZJ into the GBRMP Act which establishes the position of the Chief Executive Officer of the Authority.
42. A new section 39ZK describes the CEO's role. The role of the CEO will be to lead and manage the agency, including its human and financial resources, and be responsible for implementing the Authority's strategy and directions. The CEO will be the 'accountable authority' for the purposes of the *Public Governance, Performance and Accountability Act 2013* and 'agency head' for the purposes of the *Public Service Act 1999*. The Authority will continue to have responsibility for implementation of the GBRMP Act, supported by the CEO and staff of the Authority.
43. The Authority may give written directions to the CEO about the performance of the CEO's responsibilities, but not in relation to the CEO's performance of functions or exercise of powers under the *Public Governance, Performance and Accountability Act 2013* or the *Public Service Act 1999*. The CEO must comply with any such direction. Subsection 39ZK(6) has been included to assist readers to understand that a direction given by the Authority to the CEO under subsection 39ZK(4) is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*.
44. Under the new section 39ZL, the CEO will be appointed by the Governor-General on a full-time basis, for up to five years. An individual may not hold office as CEO for a continuous period exceeding 10 years, excluding any period served as acting CEO.
45. Under the new section 39ZM, the Minister may appoint a person to act as the CEO during a vacancy in the office of CEO, when the CEO is absent from duty or from Australia, or for any reason is unable to perform the duties of the office.
46. Under the new section 39ZN, remuneration for the CEO will be determined by the Remuneration Tribunal. If the Remuneration Tribunal does not make a determination on

remuneration for the CEO, the Minister may prescribe remuneration and allowances by legislative instrument. Recreation leave entitlements for the CEO will be determined by the Remuneration Tribunal. The Minister may grant a leave of absence for the CEO.

47. As for the other members, under the new section 39ZR, the CEO must not be a member of the governing body of a relevant interest group. This is to reduce the potential for conflicts of interest and promote public confidence in the independence of the Authority. The CEO must also not engage in any other paid work without the Minister's approval.
48. Under the new section 39ZT, the CEO may resign by giving the Governor-General a written resignation. This item also sets out the grounds for termination of the CEO by the Governor-General which include consistent underperformance, membership of the governing body of a relevant interest group, and other grounds consistent with similar statutory appointments.
49. Under the new section 39ZU, the Minister may determine additional terms and conditions on which the CEO holds office. This is to provide for streamlined administration of the appointment, which is made by the Governor-General. This item does not provide the Minister the power to direct the CEO in the exercise of his or her powers, or performance of his or her functions or duties.

Item 26 – Paragraphs 40(2)(a) and (b)

50. This item establishes the CEO as the 'agency head' for the purposes of the *Public Service Act 1999*. This aligns with the CEO's responsibility for leading and managing the agency, including its human and financial resources, and for implementing the Authority's strategy and directions, as recommended by the Review.

Item 27 – Before section 46

51. This item creates a new Division to increase readability.

Item 28 – After paragraph 47(1)(a)

52. This item adds the CEO as a person to whom the Authority may delegate any or all of its powers or functions under the GBRMP Act. The provision for the Authority to delegate powers or functions to the Chairperson has been retained to provide flexibility.

Item 29 – Section 48 (heading), Item 30 – Before subsection 48(1), Item 31 – Subsections 48(1) and (2), Item 32 – After subsection 48(3), and Item 33 – Subsections 48(4) and (5)

53. These items amend the GBRMP Act to provide for delegation of the CEO’s powers or functions under the Act, rather than the Chairperson. This reflects the transfer of responsibilities from the Chairperson to the CEO as the ‘accountable authority’ for the purposes of the *Public Governance, Performance and Accountability Act 2013* and ‘agency head’ for the purposes of the *Public Service Act 1999*, and the CEO’s responsibility for leading and managing the agency and implementing the Authority’s strategy and directions.
54. New subsection 48(1AA) provides for the CEO to delegate a power or function to a member of staff of the Authority working in an SES or Executive Level 2 or equivalent position. The purpose of this item is to provide flexibility in the efficient and effective administration of the Authority as a statutory agency. Executive Level 2 or equivalent positions have been included, as limiting such delegation to SES positions would be too restrictive given the size and structure of the organisation.

Item 34 – Sections 53 and 53A, Item 35 – Paragraphs 59F(7)(b) and (c), Item 36 – Section 61AMA, Item 37 – Subsections 61AMB(4) and (5), and Item 38 – Subsections 61AMC(1), (2), (3) and (4)

55. These items amend the GBRMP Act to reflect the transfer of responsibilities from the Chairperson to the CEO as the ‘accountable authority’ for the purposes of the *Public Governance, Performance and Accountability Act 2013* and ‘agency head’ for the purposes of the *Public Service Act 1999*, and the CEO’s responsibility for leading and managing the agency and implementing the Authority’s strategy and directions.
56. The sections amended by these items relate to: preparation of the Authority’s annual report and corporate plan; persons to whom the Minister may delegate the power to exempt the requirement to navigate with a pilot; the power to issue, vary, or revoke an evidentiary certificate; and the evidentiary effect of a certificate.

Part 2 – Consequential amendments

Environment Protection and Biodiversity Conservation Act 1999

Item 39 – Subsection 486E(2) (paragraph (d) of the definition of *official*), Item 40 – Paragraph 515AA(1)(b), Item 41 – Paragraph 515AB(1)(b), Item 42 – Subparagraph 17(3)(c)(i) of Schedule 1, Item 43 – Paragraph 38(3)(b) of Schedule 1 and Item 44 – Subclause 38(4) of Schedule 1

57. These items change references to the Chairperson of the Authority within the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to the CEO of the Authority. This reflects the transfer of responsibilities from the Chairperson to the

CEO as the ‘accountable authority’ for the purposes of the *Public Governance, Performance and Accountability Act 2013* and ‘agency head’ for the purposes of the *Public Service Act 1999*, and the CEO’s responsibility for leading and managing the agency and implementing the Authority’s strategy and directions.

58. The sections amended by these items relate to: notices to produce or attend for investigation or preventing offences under the EPBC Act; delegation of powers by the Minister or Secretary of the Environment Department relating to the Great Barrier Reef Marine Park; and powers in Schedule 1 of the EPBC Act which deals with provisions relating to the detention of suspected foreign offenders.

Part 3 – Application and transitional provisions

Item 45 – Interpretation

59. This item defines terms relevant only to this Part of the Act which deals with application and transitional provisions. In particular, ‘commencement day’ is defined to mean the day on which the Schedule commences.

Item 46 – Period of appointment

60. This item clarifies that the limit of 10 years continuous appointment (excluding acting appointments) applies to existing members of the Authority. This period begins from the date of their appointment, even if they were appointed prior to the commencement day. This aligns with the purpose of the amendment in item 14 which is to allow for rotation of members with different skills sets and knowledge.

Item 47 – Conditions of appointment

61. This item clarifies that the new sections 15A, 15B, 16 and 16B of the GBRMP Act relating to outside employment, membership of a governing body of a relevant interest group, grounds for termination, and determination of other terms and conditions of office by the Minister also apply to existing members of the Authority (see paragraphs 32-37).

Item 48 – References in certain instruments to the Chairperson of Authority

62. This item provides for certain instruments made by the Chairperson prior to the commencement day to continue to have effect after the commencement of the Act. References in those instruments to Chairperson are to be read as references to the CEO. This ensures that those instruments are not invalidated merely by the change to the powers of the Chairperson on commencement of the Act. This only applies to instruments referring to the Chairperson as the ‘accountable authority’ for the purposes of the *Public Governance, Performance and Accountability Act 2013* and ‘agency head’ for the purposes of the *Public Service Act 1999*.

Item 49 – Transitional rules

63. This item allows the Minister for the Environment and Energy to make rules about transitional matters relating to the amendments or repeals made by this Act.

Schedule 2 – Powers of zoning plans and plans of management

Background

64. Schedule 2 makes changes directed at clarifying the relationship between zoning plans, plans of management and regulations made under the GBRMP Act; or other legislative instruments. Schedule 2 also includes application and transitional provisions to provide certainty in relation to existing arrangements. This is achieved by confirming that regulations, zoning plans and plans of management made under the Act can continue to be made in the same style as they currently are, which allows for the continuity of a flexible and consistent regulatory regime within the Marine Park.

Part 1 – Amendments

Great Barrier Reef Marine Park Act 1975

Item 1 – After section 35D

65. This item inserts a new section 35DA into the GBRMP Act. Subsection 35DA(1) provides that a zoning plan may provide in relation to a matter by providing that the regulations, or any other legislative instrument, provide in relation to that matter.
66. Under Division 2 of Part V of the GBRMP Act the Authority may prepare zoning plans for the Marine Park.
67. The primary purpose of the new subsection 35DA(1) is to clarify the relationship between a zoning plan prepared by the Authority under Division 2 of Part V of the GBRMP Act and regulations made by the Governor-General under subsection 66(1) of the GBRMP Act by confirming that regulations may provide matters for the purposes of zoning plans. The new subsection 35DA(1) also clarifies the relationship between zoning plans and other legislative instruments by confirming that other legislative instruments may provide matters for the purposes of zoning plans.
68. Subsection 35DA(2) provides that to avoid doubt, a reference to a zoning plan in Part V of the GBRMP Act (except subsections 32B(2) and 35A(1)) does not include a reference to regulations, or another legislative instrument, covered by subsection 35DA(1). The purpose of the new subsection 35DA(2) is to ensure that the procedural requirements in Part V for zoning plans, such as the requirements relating to preparation, commencement and disallowance of zoning plans, are not interpreted as applying to regulations made under the GBRMP Act, or other legislative instruments, in circumstances where such regulations or other legislative instruments provide matters for the purposes of zoning plans.
69. Subsection 35DA(2) does not apply to subsections 32B(2) and 35A(1) because when subsections 32B(2) and 35A(1) are referring to a zoning plan, they are also referring to any regulations made under the GBRMP Act, or other legislative instruments, to the

extent that the regulations or other instruments provide matters for the purposes of that zoning plan.

Item 2 – After section 39ZF

70. This item inserts a new section 39ZFA into the GBRMP Act. Subsection 39ZFA(1) provides that a plan of management may provide in relation to a matter by providing that the regulations, or any other legislative instrument, provide in relation to that matter.
71. Under Part VB of the GBRMP Act, the Authority may prepare plans of management for the Marine Park.
72. The purpose of the new subsection 39ZFA(1) is to set out the relationship between a plan of management prepared by the Authority and regulations made by the Governor-General under subsection 66(1) of the GBRMP Act by confirming that regulations may provide matters for the purposes of plans of management. The new subsection 39ZFA(1) also clarifies the relationship between a plan of management and other legislative instruments by confirming that other legislative instruments may provide matters for the purposes of plans of management.
73. Subsection 39ZFA(2) provides that to avoid doubt, a reference to a plan of management in Part VB of the GBRMP Act (except section 39W) does not include a reference to regulations, or any other legislative instrument, covered by subsection 39ZFA(1). The purpose of the new subsection 39ZFA(2) is to ensure that the procedural requirements in Part VB, such as the requirements relating to preparation and commencement of plans of management, are not interpreted as applying to regulations made under the Act, or other legislative instruments, in circumstances where such regulations or other legislative instruments provide matters for the purposes of plans of management.
74. Subsection 39ZFA(2) does not apply to subsection 39W because when subsection 39W is referring to a plan of management, it is also referring to any regulations made under the GBRMP Act, or other legislative instruments, to the extent that the regulations or other instruments provide matters for the purposes of that plan of management.

Item 3 – Subsection 66(1)

75. This item amends subsection 66(1) to clarify that ‘zoning plan’ in subsection 66(1) is to be read as disregarding regulations made for the purposes of new subsection 35DA(1). This clarification is necessary to ensure that if regulations are made that provide matters for the purposes of a zoning plan, subsection 66(1) does not prevent subsequent regulations from being made which may be considered to be ‘inconsistent’ with the relevant zoning plan pursuant to subsection 66(1).

Item 4 – At the end of subsection 66(1)

76. This item inserts a note stating that the regulations may provide for a matter that a zoning plan or plan of management may otherwise provide for. The note is inserted into section 66 for information.

77. The note is included as a consequence of the new section 35DA (which sets out the relationship between zoning plans and regulations made under the GBRMP Act, and other legislative instruments) and the new section 39ZFA (which sets out the relationship between plan of managements and regulations made under the GBRMP Act, and other legislative instruments).

Item 5 – After paragraph 66(2)(ba)

78. This item inserts a new paragraph 66(2)(bb) which provides that regulations may be made providing that zoning plans or plans of management may provide in relation to a matter in relation to which the regulations may provide.

79. This item complements the new sections 35DA and 39ZFA by confirming that zoning plans and plans of management may provide matters for the purposes of regulations made under the GBRMP Act.

Part 2 – Application and transitional provisions

80. Part 2 contains application and transitional provisions which have retrospective application. Essentially these provisions preserve the effect of actions previously taken under Marine Park legislation, and confirm the validity of rights and liabilities of persons that have arisen under Marine Park legislation. These provisions will ensure the application of GBRMPA instruments in the past and in the future is the same, so that persons are not disadvantaged by any potential for inconsistent application of the existing framework. The retrospective application of the amendments will not adversely impact on persons due to the inclusion of a ‘historic shipwrecks’ clause at Item 10 (discussed in more detail below).

Item 6 - Definitions

81. This item defines two terms used in Part 2 of Schedule 2, namely ‘affected order’ and ‘pre-commencement GBRMPA instrument.’

- a. ‘affected order’ is defined in paragraph (a) of the definition as an order purportedly made, before the commencement of Part 2, in relation to any pre-commencement GBRMPA instrument, or an order purportedly made, before the commencement of Part 2, on appeal from, or review of, an order referred to in subparagraph (a)(i) of the definition of ‘affected order.’ Paragraph (b) of the definition provides that if, before the commencement of Part 2, a court or Registrar purported to vary, revoke, set aside, revive or suspend an order referred to in paragraph (a) of the definition, then an affected order is defined as an order in the form in which, and to the extent to which, it purports or purported to have effect from time to time. A definition for the term ‘affected order’ is necessary because the term is used in Part 2 in items 9 and 11;
- b. ‘pre-commencement GBRMPA instrument’ is defined as any zoning plan, any plan of management or any regulations as in force under the GBRMP Act at any time before

the commencement of Part 2. A definition for the term is necessary because the term is used in Part 2 in items 8 and 9.

Item 7 – Application of amendments

82. This item is an application provision. The effect of this provision is that the amendments made by Part 1 of Schedule 2 apply in relation to any zoning plan, any plan of management and any regulations made under the GBRMP Act, whether before or after the commencement of Part 2. This item is intended to ensure the amendments made by Part 1 of Schedule 2 apply both retrospectively and prospectively so as to avoid any uncertainty about the ability for GBRMPA instruments to provide for the matters contemplated in Schedule 1.

Item 8 – Instruments made before commencement etc.

83. Subitem (1) provides that a pre-commencement GBRMPA instrument is, and is taken to always have been, as valid as the instrument would have been if the instrument had been made under the GBRMP Act as amended by Part 1 of Schedule 2.

84. Subitem (2) provides that any thing done before the commencement of Part 2 of Schedule 2 under a pre-commencement GBRMPA instrument is, and is taken always to have been, as valid as it would have been if the instrument had been valid.

85. The purpose of subitems (1) and (2) is to eliminate any doubt about the validity of pre-commencement GBRMPA instruments and the validity of things done pursuant to such instruments.

Item 9 – Rights and liabilities of persons

86. The purpose of this item is to eliminate any doubt about the validity of actions taken on the basis of pre-commencement GBRMPA instruments.

87. Subitem (1) provides that the rights and liabilities of all persons are by force of item 9, declared to be, and always to have been, the same as if each pre-commencement GBRMPA instrument had always been valid. Subitem (1) is subject to subitems (3) and (4). This ensures that there is no doubt about rights and liabilities that arose under a pre-commencement GBRMPA instrument.

88. Subitem (2) provides a non-exhaustive list of things people are entitled to do, or to have done, in relation to the rights and liabilities conferred under subitem (1).

89. Paragraph (2)(a) provides that all persons are, by force of item 9, declared to be, and always to have been, entitled to act on the basis that other persons had, and have, the rights and liabilities as declared by subitem (1).

90. Paragraph (2)(b) provides that a right or liability that a person is declared by subitem (1) to have, or to have had, is exercisable or enforceable, and is to be regarded as always having been exercisable or enforceable, as if each pre-commencement GBRMPA instrument had always been valid.

91. Paragraph 2(c) provides that the rights and liabilities that a person is declared by subitem (1) to have, or to have had, include any right the person would have or have had, to appeal, or to seek review of, an affected order, if each pre-commencement GBRMPA instrument had always been valid.
92. Subitem (3) provides that item 9 does not affect rights or liabilities of parties to proceedings for which leave to appeal to the High Court has been given on or before the day this Part commences, to the extent that the fact that a pre-commencement GBRMPA instrument was not valid is in issue in the proceedings. This ensures that the retrospective operation of the amendments will not interfere with High Court proceedings which have already commenced.
93. Subitem (4) makes it clear that nothing in item 9 is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

Item 10 – Compensation for acquisition of property

94. The purpose of this item is to provide that if Part 2 of Schedule 2 would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
95. Subitem (1) provides that if the operation of Part 2 of Schedule 2 would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person. ‘Acquisition of property’ and ‘just terms’ in this subitem have the same meaning as in paragraph 51(xxxi) of the Constitution.
96. Under subitem (2), if the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia, the Federal Circuit Court of Australia, or a court of a State or Territory that has jurisdiction in relation to matters arising under the GBRMP Act, for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Item 11 – Evidence

97. This item provides for the court record, or a copy of the court record, of an affected order to be used as evidence of the existence, nature and extent of an order-based right or liability.
98. This item will ensure that a court is in a position to determine the rights and liabilities of a person under an affected order by reference to the court record and is intended to complement the operation of Section 157 of the *Evidence Act 1995*.

Item 12 – Part does not apply to certain orders

99. This item provides that this Part does not apply to an order specifically declared or held to be invalid, or to have been made without power, by a court before the commencement of this Part.

100. The purpose of this item is to ensure that Part 2 will not interfere with findings by a court made before the commencement of the Part, and any actions or orders consequential to that finding.