

Transport Infrastructure (Public Marine Facilities) Regulation 2023

Explanatory notes for SL 2023 No. 110

made under the

Coastal Protection and Management Act 1995

State Penalties Enforcement Act 1999

Transport Infrastructure Act 1994

General Outline

Short title

Transport Infrastructure (Public Marine Facilities) Regulation 2023

Authorising laws

Section 167 of the *Coastal Protection and Management Act 1995*

Section 165 of the *State Penalties Enforcement Act 1999*

Section 490 of the *Transport Infrastructure Act 1994*

Policy objectives and the reasons for them

In accordance with Part 7 of the *Statutory Instruments Act 1992*, the *Transport Infrastructure (Public Marine Facilities) Regulation 2011* (the 2011 Regulation) will automatically expire on 31 August 2023. The *Transport Infrastructure (Public Marine Facilities) Regulation 2023* (the proposed Regulation) replaces the 2011 Regulation and continues the regulation of public marine facilities.

The policy objective of the proposed Regulation is to ensure the ongoing safe and efficient operation of public marine facilities in Queensland. A public marine facility is State-owned or State-controlled transport infrastructure relating to Queensland waters, other than port or miscellaneous transport infrastructure. A public marine facility includes transport infrastructure such as jetties, boat ramps, floating walkways, landings and boat harbours.

Consistent with the 2011 Regulation, the proposed Regulation includes provisions about the following matters:

- The management and use of, and safety at, public marine facilities.
- The control of access to and use of boat ramps and landings.

- The control of activities and conduct in a State-managed boat harbour.
- The approval of moorings, fish receival services, fuelling services and transport services to be undertaken in a State managed boat harbour.
- The appointment and powers of authorised officers for the proposed Regulation.

Achievement of policy objectives

The proposed Regulation will achieve the policy objective listed above by continuing to regulate the matters currently regulated under the 2011 Regulation.

The proposed Regulation also incorporates a number of minor changes to clarify existing policy and to reflect current drafting practices.

An outline of the proposed Regulation is provided below, including a description of changes that simplify and enhance the operation of the 2011 Regulation.

Part 1: Preliminary

Part 1 sets out preliminary matters for the proposed Regulation.

Part 2: Management of public marine facilities

Under section 459 of the *Transport Infrastructure Act 1994* (the TI Act), the Governor in Council may, by regulation, appoint a person (the manager) to manage a public marine facility.

Section 5 of the proposed Regulation provides that a person mentioned in schedule 1 is appointed as the manager of the public marine facility stated opposite the person in the schedule.

Section 7 provides the conditions of the appointment of a manager of a public marine facility. These include that the manager must allow the facility to be used by the public, at all times and free of charge, for genuinely private or recreational boating. The proposed Regulation also clarifies that a public marine facility may be used for the purpose of investigating and responding to a current emergency, such as to save a human life or to locate or secure the safety of a vessel.

The proposed Regulation also allows the public marine facility to be used for another purpose, such as a commercial purpose, provided the manager's written approval is obtained together with the written consent of the chief executive. The proposed Regulation incorporates examples of what these other purposes might be, such as leaving a ship unattended at a public marine facility for the purpose of responding to potential emergencies and disembarking passengers from a charter boat.

Section 9 sets out the responsibility of a manager for maintaining a public marine facility in good condition to an appropriate standard.

Part 3: Matters relating to boat ramps and landings

Division 1 provides for the control of access to, and the use of, boat ramps and landings where the chief executive is the manager.

This may be done by the manager using a regulatory notice (section 11), such as erecting a sign controlling activities at the boat ramp or landing. A regulatory notice may also be a document given to a person or be in the form of an official traffic sign (See also part 8 of the proposed Regulation which deals with Regulatory notices).

Failure to comply with a regulatory notice is an offence with a maximum penalty of 30 penalty units.

Section 12 provides that an authorised officer may give a direction to a person at the ramp or landing. This may be given if the officer reasonably believes it is necessary to ensure the safety and security of the ramp or landing, of users of the ramp or landing, or of employees of the Department of Transport and Main Roads (TMR). Failure to comply with such a direction is an offence with a maximum penalty of 30 penalty units.

Division 2 contains other offence provisions relating to using boat ramps and landings. These provisions include those that are aimed at ensuring the efficient use of boat ramps and landings and have a maximum penalty of 20 penalty units. For example, section 15 requires that a person launching or retrieving a ship at a boat ramp must do so as quickly as is reasonably possible. Similarly, section 16 prevents the obstruction of another person's use of a boat ramp or landing.

The division also contains provisions aimed at preventing damage to boat ramps and landings. For example, section 20(1) is aimed at preventing a person driving or parking a vehicle on a boat ramp if the mass of the vehicle and its load is more than the mass indicated in the section. Section 20(4) provides that a person must not drive or park a vehicle on a boat ramp or landing unless the vehicle is fitted with pneumatic or rubber tyres. There is a maximum penalty of 20 penalty units for these offences.

Part 4: Control of State managed boat harbours

Part 4 provides for the control of activities or conduct in a State managed boat harbour other than to the extent that the boat harbour includes land over which a person other than the chief executive has tenure.

This may be done by the chief executive using a regulatory notice to control activities or conduct in the harbour. To do this, the chief executive must reasonably believe that giving the regulatory notice is necessary in light of the matters listed in section 22. Those matters include that the chief executive reasonably believes giving the notice is necessary to maintain or improve the safe, secure or efficient operation of the harbour.

Failure to comply with a regulatory notice under section 22 is an offence with a maximum penalty of 30 penalty units.

The part also provides that an authorised officer may give a direction to a person in a State managed boat harbour. To do this, the authorised officer must reasonably believe that giving the direction is necessary to ensure the safety and security of the harbour, of users of the harbour, or of employees of TMR (section 23).

Failure to comply with such a direction is an offence with a maximum penalty of 30 penalty units.

Part 5: Boat harbour approvals

Division 1 describes the four types of approvals that authorise activities in State managed boat harbours (boat harbour approvals).

A *fish receival service approval* authorises the operation of a service to receive fish into a fixed or mobile facility.

A *fuelling service approval* authorises the operation of a service to dispense fuel to a ship.

A *mooring approval* authorises the mooring of a ship.

A *transport service approval* authorises the provision of a transport service in the course of carrying on a business.

Division 2 sets out the administrative process for making an application for a boat harbour approval.

Section 28 provides for the matters that the chief executive may have regard to when deciding whether a person is suitable to hold a boat harbour approval. These matters were not expressly set out in the 2011 Regulation.

Division 3 allows the chief executive to make a minor amendment to a boat harbour approval (for example, for a formal or clerical reason).

Division 4 sets out the administrative process for the holder of a boat harbour approval to apply to amend the approval.

Division 5 sets out the administrative process for the chief executive to amend, suspend or cancel a boat harbour approval. The division sets out the grounds on which the chief executive may take this action, including where the holder of the approval has not complied with a condition of the approval, or is no longer a suitable person to hold the approval. The proposed Regulation ensures that the approval holder is given an opportunity to show cause why the proposed action should not be taken. If the chief executive ultimately decides to take action against the approval, the person will be given a notice setting out their rights to have that decision reviewed or appealed against.

Division 6 provides that the holder of a boat harbour approval may surrender the boat harbour approval.

Part 6: Dealing with property in State managed boat harbours

Division 1 contains provisions about moving contravening property. Contravening property is a ship, a vehicle or goods that an authorised officer reasonably believes has been moored, parked or left in a State managed boat harbour in contravention of a regulatory notice or a direction given by an authorised officer.

Division 2 contains provisions about property that has been abandoned in a State managed boat harbour. It contains requirements about endeavouring to locate the owner of the property, how the property can be claimed, selling the property in the event it is not claimed, and distribution of the proceeds of sale.

Part 7: Investigation and enforcement

As envisaged by section 490 and item 20 of schedule 1 of the TI Act, the proposed Regulation continues to provide for the appointment and exercise of powers by authorised officers in relation to the matters contained in the proposed Regulation.

Division 1 contains general provisions about authorised officers including provisions about:

- The officer's appointment conditions and limits on their powers.
- When the officer's appointment ends.
- Identity cards to be issued to the officers.
- The requirement for an officer to produce or display an identity card in certain circumstances.
- The requirement for an officer to return their identity card when their office ends.

Division 2 contains provisions about entry of places by authorised officers.

Section 63 in subdivision 1 allows entry to a place if—

- an occupier consents under subdivision 2 to the entry and section 66 has been complied with for the occupier; or
- the place is a public place and the entry is made when the place is open to the public; or
- the place is a place of business stated in a fuelling service approval or a transport service approval.

Section 63 better identifies the relevant places of business that may be entered when compared with the corresponding provision in the 2011 Regulation. However, the section retains the qualification in the 2011 Regulation that a place of business does not include a part of a place where a person resides.

Subdivision 2 contains provisions that were not in the 2011 Regulation about entry by consent. Section 66 provides that before asking for consent, an authorised officer must explain to the occupier the purpose of the entry, including the powers intended to be exercised. The authorised officer must also tell the occupier that the occupier is not required to consent, and that the consent may be given subject to conditions and may be withdrawn at any time.

Subdivision 3 contains a provision that was not in the 2011 Regulation about entry to a place of business under section 63. This section provides that the authorised officer must, before entering the place, make a reasonable attempt to locate an occupier of the place and to obtain the occupier's consent to entry.

Division 3 contains the general powers of authorised officers after entering places.

Section 70 retains the power from the 2011 Regulation for an authorised officer to inspect any part of the place. It also provides that the authorised officer may examine or film any part of the place, take a sample of, or from a thing at the place and take to, into or onto the place and use any person, equipment and materials the authorised officer requires for exercising the officer's powers under this part.

Division 4 contains other information-obtaining powers of authorised officers including the following powers:

- Power to require the name and address of a person who may have committed an offence against the proposed Regulation. Section 72 provides that failure to provide this information is an offence with a maximum penalty of 40 penalty units.
- Power to require the production of a document required to be kept by a person under a boat harbour approval. Section 74 provides that failure to comply with the requirement is an offence with a maximum penalty of 20 penalty units unless the person has a reasonable excuse. This is different to the corresponding provision in the 2011 Regulation in that it provides that it is a reasonable excuse for a person to fail to comply if complying might tend to incriminate the person or expose the person to a penalty.
- Power to require a person to certify a copy of a document that has been produced. Section 75 provides that failure to comply with the requirement is an offence with a maximum penalty of 20 penalty units unless the person has a reasonable excuse. This section is different to the corresponding provision in the 2011 Regulation in that it provides that it is a reasonable excuse for a person to fail to comply if complying might tend to incriminate the person or expose the person to a penalty.

Division 5 contains provisions about damage that may occur when an authorised officer is exercising a power. This includes a provision requiring that the authorised officer must take all reasonable steps to cause as little inconvenience and do as little damage as possible.

Division 6 sets out when compensation may be claimed by a person for loss incurred because of the exercise of a power by an authorised officer.

Division 7 contains offences about providing false or misleading statements or documents to an authorised officer and for obstructing an authorised officer.

Part 8: Regulatory notices

Part 8 sets out matters related to regulatory notices including requirements for those notices and for the display of them.

A regulatory notice may be:

- Erected or displayed at or near an entrance commonly used by a person to gain access to the public marine facility to which the notice relates, or on or near the public marine facility to which notice relates.
- A document given to a person.
- In the form of an official traffic sign.

Part 9: Other Offences

This part contains the following offences related to behaviours regulated in the proposed Regulation:

- Anchoring a ship in a State managed boat harbour (maximum penalty – 20 penalty units)
- Operating a service for receiving fish at a place in a State managed boat harbour without a fish receival service approval (maximum penalty – 20 penalty units).
- Unloading fish from a fishing ship at a place in a State managed boat harbour unless the person receiving the fish holds a fish receival service approval for the place (maximum penalty – 20 penalty units).

- Operating a service to dispense fuel to a ship in a State managed boat harbour without a fuelling service approval (maximum penalty – 40 penalty units).
- Mooring a ship in a State managed boat harbour without an approval (maximum penalty – 30 penalty units).
- Mooring a ship in a State managed boat harbour where the ship is not securely fastened at the mooring or is secured with inadequate mooring lines (maximum penalty – 30 penalty units).
- Inadequate securing of a moored ship in a State managed boat harbour to a pile or buoy mooring (maximum penalty – 40 penalty units).
- Operating a commercial ship in a State managed boat harbour to provide a transport service in the course of carrying on a business without a transport service approval (maximum penalty – 30 penalty units).
- Failing to comply with the conditions of a boat harbour approval without reasonable excuse
 - for failing to comply with the conditions of a
 - fish receipt service approval (maximum penalty – 20 penalty units)
 - fuelling service approval (maximum penalty – 40 penalty units)
 - mooring approval (maximum penalty – 30 penalty units)
 - transport service approval (maximum penalty – 30 penalty units).

Where an infringement notice amount has been prescribed in the *State Penalties Enforcement Regulation 2014* (see part 13), it has been set at 10 per cent of the maximum penalty.

Part 10: Review of decisions

This part contains a provision that allows a person whose interests are affected by a decision to ask the decision to be reviewed internally by the chief executive. It also allows the person to apply for an external review of the chief executive's reviewed decision if it is not the decision sought by the applicant for the review.

This provision covers, for example, a decision to refuse to grant a boat harbour approval. The provision also applies to a decision to grant a boat harbour approval subject to any condition. The 2011 Regulation limited the review power to a boat harbour approval granted on conditions that were not standard conditions.

Part 11: Fees

This part contains various provisions relating to fees.

Part 12: Transitional provisions

This part contains various transitional provisions necessary for the transition to the proposed Regulation.

Part 13: Amendment of legislation

This part makes consequential amendments to other regulations as a result of the proposed Regulation.

Schedule 1

Schedule 1 sets out the managers for each of the public marine facilities described in the schedule.

Schedule 2

Schedule 2 sets out the fees that apply in relation to mooring in a non-State managed boat harbour.

Schedule 3

Schedule 3 sets out the fees that apply in relation to a State managed boat harbour.

Mooring approvals are provided for varying periods and charged as per the period and the physical length of the mooring. Fees also differ between boat harbours.

Transport service approvals are charged for varying periods, operations (such as a ferry service or a goods carrying service), and the number of people carried.

Fish receipt service approvals are charged for each kilogram of different catches (prawns, fish, shucked scallops, unshucked scallops).

Fuelling service approvals are charged for each service for a period of 1 year and differ between boat harbours.

Schedule 4

Schedule 4 contains the Dictionary of defined terms for the proposed Regulation.

Consistency with policy objectives of authorising law

The proposed Regulation is consistent with the policy objectives of the TI Act, specifically to establish a regime under which public marine facilities are effectively and efficiently managed.

Inconsistency with policy objectives of other legislation

The proposed Regulation is not inconsistent with the policy objectives of other legislation.

Benefits and costs of implementation

The benefits of implementation of the proposed Regulation will primarily be the continued operational safety and effective management of public marine facilities in Queensland. This is through the retention of provisions that, for example:

- Impose responsibility for the management and maintenance of public marine facilities.
- Allow for equitable access and use of the facilities.

The proposed Regulation also incorporates up-to-date drafting protocols, which aid in readability and interpretation.

The cost of remaking the proposed Regulation will be minimal and will be met from existing resources.

Fees set out in Schedules 2 and 3 of the proposed Regulation reflect the administrative and running costs of approvals, and the cost of providing safe, secure and well-maintained boat ramps, landings and moorings. The fee levels are the same as in the 2011 Regulation.

Schedule 2 contains the fees for moorings provided in non-State managed boat harbours. Those in Schedule 3 include fees relating to approvals for fish receipt, fuelling, mooring and transport services in State managed boat harbours. These are set out for each State managed boat harbour and differ by harbour and approval type.

For TMR to continue to administer and maintain these approvals, and ensure safe, secure and well-maintained infrastructure, the fees associated with them are required to be retained.

Consistency with fundamental legislative principles

The fundamental legislative principles under the *Legislative Standards Act 1992* (LSA) that may arise as a result of the proposed Regulation are discussed below.

Legislation should have sufficient regard to the rights and liberties of individuals (LSA, section 4(2)(a))

LSA section 4(3)(a) – rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review

Section 28 of the proposed Regulation provides that the chief executive may refuse an application to grant a boat harbour approval or approve the application on conditions. Section 28 provides that the chief executive may approve the application only if satisfied the applicant is a suitable person to hold a boat harbour approval.

This may raise the fundamental legislative principle of whether the legislation makes the rights and liberties dependent on administrative power that is sufficiently defined and subject to appropriate review.

The purpose of the approval framework is to ensure that only suitable persons are entitled to carry out regulated operations within State managed boat harbours. When determining whether an applicant is a suitable person to hold a boat harbour approval, the chief executive may have regard to whether the person has been convicted of certain offences listed in section 28(3). These include more serious criminal offences and offences against maritime legislation. The holders of boat harbour approvals are trusted to deal with the public, and they are involved in activities that could raise safety issues, so it is essential that they are of good character.

The ability for the chief executive to impose conditions on approvals allows for appropriate flexibility in the process and ensures that safety requirements can be specifically tailored to individual boat harbour approvals. Imposing conditions ensures the safe and efficient management of the harbour, having regard to other users.

Importantly, the decision to refuse an application, or to approve the application on conditions, is subject to appropriate review (section 94). A person is entitled to apply for internal review of the decision by the chief executive and, if dissatisfied with the outcome of that internal review, can apply to Queensland Civil and Administrative Tribunal for an external review of the internal review decision.

To the extent that the proposed Regulation infringes on the fundamental legislative principles, it is considered justified to ensure the chief executive can take into account relevant considerations when determining whether to approve an application for a boat harbour approval with or without conditions. The provision of internal and external review avenues for those whose applications are refused or approved with conditions ensures that appropriate protections are also in place for applicants.

LSA section 4(d) – reversal of onus of proof

The proposed Regulation contains a range of powers for authorised officers including, for example, the power to require a person to state their name and address (see section 71) or to produce or certify certain documents (see section 73). A person must comply with these requirements unless they have a reasonable excuse (see sections 72, 74 and 75). The regulation also contains an offence for a person who obstructs an authorised officer exercising a power in the proposed Regulation or obstructs someone helping an authorised officer exercising a power, unless the person has a reasonable excuse (see section 80).

While these provisions impose an evidentiary onus on a person to establish that they have a reasonable excuse for failing to comply with requirements in the proposed Regulation, these provisions are considered appropriate. This is because they ensure the evidence can be produced by the party best able to satisfy the requirements of the statutory protection. The basis for establishing a reasonable excuse is particularly within the defendant's knowledge and would be more difficult for the State to establish than it would be for the defendant to establish.

LSA section 4(3)(e) – Legislation should confer powers to enter premises and search for or seize documents or other property only with a warrant issued by a judge or other judicial officer

Part 7, divisions 2 and 3 allow authorised officers to enter premises and exercise powers such as inspecting any part of the place. As this may be done without consent or a warrant, this raises the fundamental legislative principle consideration about entry without warrant.

However, it should be noted that section 63 of the proposed Regulation restricts the places to which an authorised officer may gain entry without warrant or consent. The authorised officer can only enter:

- A public place at a time when the place is open to the public.
- A place of business stated in a fuelling service approval, or a transport service approval at a time when the business is open for carrying on the business, otherwise open for entry, or required to be open for inspection under the approval.

Section 63 also makes it clear that the allowable entry to a place of business does not include entry to a part of a place where a person resides.

The power to enter a place and exercise a power such as inspecting any part of the place is required to support compliance with the proposed Regulation and the provision of safe services at public marine facilities. For example, there are situations when an authorised officer may need to enter a place to ensure compliance with a condition of approval such as a limit on the number of passengers able to be carried under a transport approval.

The proposed Regulation also contains the following safeguards:

- Authorised officers must be qualified for appointment (section 54).
- Authorised officers must have an identity card and, when exercising a power, must display or produce the card (section 59).
- The privilege against self-incrimination applies to a person who is:
 - asked to produce for inspection by an authorised officer a document requirement to be kept by a person under a boat harbour approval (section 74(2)); and
 - asked to certify a copy of a document (section 75(2)).

For these reasons, it is believed that the proposed Regulation adequately takes into account fundamental legislative principle considerations as regards the exercise of entry, search and related powers by authorised officers without a warrant.

Further, if entry is by consent, the power is subject to any conditions of the consent and ceases if the consent is withdrawn (see sections 63 and 66). Section 66 sets out additional protections for those who consent to entry including, for example, that the authorised officer must explain the purpose of the entry and that the person is not required to provide consent and that consent may be withdrawn at any time.

Appropriateness of penalties

Following a review of all penalties, a number of the penalties in the proposed Regulation have been set at a different level to equivalent penalties in the 2011 Regulation. This is to ensure that each penalty level continues to reflect the severity of the relevant offence. The changes also provide greater consistency between offences of similar severity and ensure compliance with best practice guidelines for infringement notice amounts. Penalties have been settled based on whether the behaviour sought to be regulated has been classified as lower risk, medium risk or higher risk. Examples of offences in the proposed Regulation that have been classified according to these three tiers are set out below.

Lower risk (maximum penalty—20 penalty units, infringement notice penalty where prescribed - 2 penalty units)

- Driving or parking a vehicle on a boat ramp without using it to launch or retrieve a ship.
- Obstructing another person's use of a boat ramp or landing.
- Carrying out maintenance or repairs to a ship on a boat ramp.
- Failure of an authorised officer to return an identity card within 21 days after they cease in the office, without reasonable excuse.
- Anchoring a ship in a State managed boat harbour.
- Failure by the holder of a fish receipt service to comply with the conditions of the approval.

Medium risk (maximum penalty—30 penalty units, infringement notice penalty where prescribed - 3 penalty units)

- Noncompliance with a regulatory notice or authorised officer direction in relation to a boat ramp, landing or State managed boat harbour.
- Driving a vehicle onto a boat ramp where the mass of the vehicle is more than 5 tonne, or a greater mass approved by the chief executive.
- Mooring in a State managed boat harbour without an approval.
- Operating a commercial ship in a State managed boat harbour to provide a transport service in the course of carrying on a business without an approval.
- Failure by the holder of a mooring approval or transport service approval to comply with the conditions of the approval.

Higher risk (maximum penalty—40 penalty units, infringement notice penalty where prescribed - 4 penalty units)

- Operating a service to dispense fuel to a ship in a State managed boat harbour without an approval.
- Failure by the holder of a fuelling service approval to comply with the conditions of the approval.
- Mooring a ship to a pile or buoy mooring in a State managed boat harbour if the ship is not moored head and stern.

Consultation

Consultation was undertaken with boat harbour managers, public marine facility managers lease holders at State managed boat harbours, boat harbour approval holders, boat harbour tenants, local government authorities, Gold Coast Waterways Authority, Volunteer Marine Rescue Queensland, the Boating Industry Association, Queensland Recreational Boating Council, and Far North Queensland Fishing.

All stakeholders continue to support the need to regulate the matters in the proposed Regulation.

The Office of Best Practice Regulation (OBPR) was consulted on the proposed Regulation and noted that TMR had conducted a sunset review of the 2011 Regulation. OBPR advised that it considered there was a continued need for regulation and the proposed Regulation's effectiveness had been demonstrated. No further regulatory impact analysis was required under the *Queensland Government Guide to Better Regulation*.