



Department of  
Primary Industries

# Regulatory Impact Statement

Proposed  
Marine Estate Management Regulation 2017



12 June 2017

Submissions accepted until 11:59 pm 9 July 2017.

Submissions can be submitted:

- using the submission form at [www.marine.nsw.gov.au](http://www.marine.nsw.gov.au)

OR

- by mail to:  
Marine Estate Management Regulation Submission  
NSW Department of Primary Industries, Fisheries  
Locked Bag 1  
Nelson Bay NSW 2315

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Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (August 2017). However, because of advances in knowledge, users are reminded of the need to ensure that information upon which they rely is up to date and to check currency of the information with the appropriate officer of the Department of Primary Industries or the user's independent adviser.

Front cover pictures courtesy of Brett Vercoe *DPI* – (North Solitary), Nicola Johnstone - *DPI Marine Strategy* (South Solitary Island lighthouse & Corindi River and Red Rock) and David Harasti - *DPI, Fisheries NSW* (Blue Devil Fish).

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## Summary

The Marine Estate Management Regulation 2009 (the MEM Regulation) is due for staged repeal on 1 September 2017. Remaking this rule requires the preparation of a Regulatory Impact Statement (RIS) and a period of public consultation.

The MEM Regulation is one of two regulations that support the *Marine Estate Management Act 2014* (the MEM Act). The MEM Act is the primary legislative rule that sets the foundation for strategic and coordinated management of the marine estate and provides for the management of marine parks and aquatic reserves.

The NSW marine estate extends up to three nautical miles offshore from the coastline and includes approximately:

- one million hectares of estuary and ocean (including 1,500 km of ocean coastline)
- 6,500 km of estuarine and coastal lakes foreshores
- 755 beaches and 184 estuaries and coastal lakes.

The NSW marine estate is shared by multiple users and generates benefits from a range of different activities. Approximately 6 million people (or 85 per cent of the NSW population) live within 50 kilometres of the NSW coastline. The marine estate is used by Aboriginal Australians, private businesses, the community and tourists. It provides ecosystem functions, such as the replenishment of fish stocks, habitats and biodiversity.

The annual benefit of recreational activities conducted in the NSW marine estate include recreational fishing (\$5 billion in 2012), cruise shipping (\$1 to 1.1 billion in 2012-13), and recreational boating (\$3.38 billion in 2012). The NSW fishing industry generated approximately \$147.7 million in 2014-15, with \$87 million from wild fishing and \$60.7 million from aquaculture (NSW DPI 2016).

The Marine Estate Management Authority's (MEMA) vision for the NSW marine estate is to have a **healthy coast and sea, managed for the greatest well-being of the community, now and into the future (MEMA 2013)**. The NSW marine estate is considered an *open access* resource – a resource that can be accessed by anyone at any time. Without government intervention there would be no strong incentives to use the marine estate in a sustainable manner.

This RIS assesses two options against a 'base case' (i.e. to remake the existing regulation) referred to as Option 1. The two options are:

- Option 2: Make the proposed Marine Estate Management Regulation
- Option 3: Allow the MEM Regulation to lapse.

Under the base case, the MEM Regulation would be remade with no amendments on 1 September 2017.

Making the proposed Regulation (Option 2) under the MEM Act is the preferred option, as it generates the greatest net benefits to the community, environment, businesses and government. Option 2 provides increased protection to biodiversity in marine protected areas relative to the base case (Option 1). The lapse of the MEM Regulation (Option 3) would reduce powers that protect biodiversity in marine protected areas, which are provided for by options 1 and 2.

## 1. About this Regulatory Impact Statement

### 1.1. Why is the Marine Estate Management Regulation 2009 being remade?

The Marine Estate Management Regulation 2009 (the MEM Regulation) is due for staged repeal on 1 September 2017 and the remake of this rule requires the preparation of a Regulatory Impact Statement (RIS) and public consultation. A regulation that is due for staged repeal may be:

- allowed to lapse
- maintained and the staged repeal process postponed
- remade with or without amendments.

The staged repeal of the MEM Regulation has been postponed on three occasions to allow for the development and implementation of the new *Marine Estate Management Act 2014* (the MEM Act), prioritisation of other marine estate projects, and to prepare amendments to the MEM Regulation.

### 1.2. Why has this RIS been prepared?

Section 5 of the *Subordinate Legislation Act 1989* (the SL Act) provides that before a regulation is made, a RIS should be prepared in connection with the substantive matters to be dealt with by the regulation.

### 1.3. What will this RIS consider?

Schedule 2 of the SL Act prescribes that a RIS must contain:

- a statement of the objectives sought to be achieved and the reasons for them
- an identification of the alternative options by which those objectives can be achieved (whether wholly or substantially)
- an assessment of the costs and benefits of the proposed statutory rule, including the costs and benefits relating to resource allocation, administration and compliance
- an assessment of the costs and benefits of each alternative option to the making of the statutory rule (including the option of not proceeding with any action), including the costs and benefits relating to resource allocation, administration and compliance
- an assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community
- a statement of the consultation program to be undertaken.

It is also a matter of practice that the NSW Government's seven principles of Better Regulation are applied when designing and developing a regulatory proposal. A description of these principles and their application may be found in the Guide to Better Regulation (see <https://www.finance.nsw.gov.au/better-regulation>).

### 1.4. Will the public have a say on the proposed Marine Estate Management Regulation and RIS?

Yes. The proposed Regulation and RIS will be publicly exhibited for a period of 28 days until 9 July 2017.

**The proposed Regulation and RIS are accessible on the [marine estate website](http://www.marine.nsw.gov.au)  
[www.marine.nsw.gov.au/key-initiatives/marine-legislation](http://www.marine.nsw.gov.au/key-initiatives/marine-legislation)**

If you would like to have your say on the proposed changes to the MEM Regulation and/or the RIS, please submit your feedback via the [submission form](#) on the marine estate website.

Alternatively, submissions can be posted to:

Marine Estate Management Regulation Submission  
 NSW Department of Primary Industries, Fisheries  
 Locked Bag 1  
 Nelson Bay NSW 2315

Answers to [frequently asked questions](#) are also available on the marine estate website.

**The closing date for submissions is 9 July 2017 at 11:59pm.**

### 1.5. What will the government do with your submission?

The Department of Primary Industries (DPI), in consultation with the Office of Environment and Heritage (OEH), will review all submissions that are received by the closing date and consider the issues raised.

The Minister for Primary Industries and the Minister for the Environment are required to consider submissions and actions arising from the submissions. DPI will also provide a copy of all submissions to the Legislation Review Committee of the NSW Parliament with the final version of the Regulation. The Committee will also be provided with a report on the outcomes of consultation detailing the issues raised in submissions and how these have been addressed.

The proposed Regulation may be amended following consideration of any issues or comments made in the submissions.

### 1.6. Will it be possible to make a confidential submission?

DPI generally places submissions, or summaries of submissions received, on its website. Please advise us if you do not want your submission published or if you want part of it to be kept confidential (e.g. your name). DPI will respect your request, unless required by law to disclose this information, for example under the provisions of the *NSW Government Information (Public Access) Act 2009*.

### 1.7. Who else will be consulted on the proposed Marine Estate Management Regulation and RIS?

DPI is seeking input from the community, stakeholder groups and government agencies, including Marine Park Advisory Committees, conservation groups, recreational and commercial peak groups, local councils and Aboriginal groups.

### 1.8. How has the proposed Marine Estate Management Regulation and RIS been advertised?

A notice of the proposed Regulation and RIS has been published in the NSW Government Gazette<sup>1</sup> and in the following NSW newspapers:

- The Sydney Morning Herald
- The Daily Telegraph
- The Koori Mail.

A notice has also been placed on the following websites:

- [‘Have your say’ website](#)<sup>2</sup>
- [marine estate website](#)<sup>3</sup>.

<sup>1</sup> <http://www.legislation.nsw.gov.au/#/gazettes>

<sup>2</sup> <https://www.nsw.gov.au/improving-nsw/have-your-say/>

<sup>3</sup> <http://www.marine.nsw.gov.au/key-initiatives/marine-legislation>

## 2. Key terms and definitions

Term	Definition
<b>Authorised officer</b>	The <i>Marine Estate Management Act 2014</i> (the MEM Act) defines an authorised officer as a police officer, fisheries officer or any person specifically appointed as an authorised officer.
<b>Aquatic reserve</b>	<p>The purposes of aquatic reserves are defined in the MEM Act:</p> <ol style="list-style-type: none"> <li>1. The primary purpose of an aquatic reserve is to conserve biological diversity, or particular components of biological diversity (such as specific ecosystems, communities or species), in a specified area of the marine estate.</li> <li>2. The secondary purposes of an aquatic reserve are, where consistent with the primary purpose: <ol style="list-style-type: none"> <li>a. to provide for the management and use of resources in the aquatic reserve in a manner that is consistent with the principles of ecologically sustainable development</li> <li>b. to enable the aquatic reserve to be used for scientific research and education</li> <li>c. to provide opportunities for public appreciation and enjoyment of the aquatic reserve</li> <li>d. to support Aboriginal cultural uses of the aquatic reserve.</li> </ol> </li> </ol>
<b>Marine estate</b>	<p>Marine estate – as defined in the MEM Act means:</p> <ul style="list-style-type: none"> <li>• the coastal waters of New South Wales within the meaning of Part 10 of the Interpretation Act 1987</li> <li>• estuaries (being any part of a river whose level is periodically or intermittently affected by coastal tides) up to the highest astronomical tide</li> <li>• lakes, lagoons and other partially enclosed bodies of water that are permanently, periodically or intermittently open to the sea</li> <li>• coastal wetlands (including saltmarsh, mangroves and seagrass)</li> <li>• lands immediately adjacent to, or in the immediate proximity of, the coastal waters of New South Wales that are subject to oceanic processes (including beaches, dunes, headlands and rock platforms)</li> <li>• any other place or thing declared by the regulations to be the marine estate.</li> </ul> <p>The marine estate does not include any place or thing declared by the regulations not to be the marine estate.</p>
<b>Marine Estate Management Authority (MEMA)</b>	<p>MEMA is an advisory committee established under the MEM Act.</p> <p>MEMA consists of an independent Chair, the heads of the Department of Primary Industries, Office of Environment and Heritage, Department of Planning and Environment and Transport for NSW, and the Chair of the Marine Estate Expert Knowledge Panel.</p> <p>MEMA oversees the management of the entire NSW marine estate and is responsible to the Minister for Primary Industries and the Minister for the Environment.</p>
<b>Marine park</b>	<p>The purposes of marine parks are defined in the MEM Act:</p> <ol style="list-style-type: none"> <li>1. The primary purpose of a marine park is to conserve the biological diversity, and maintain ecosystem integrity and ecosystem function, of bioregions in the marine estate.</li> <li>2. The secondary purposes of a marine park are, where consistent with the primary purpose to: <ol style="list-style-type: none"> <li>a. provide for the management and use of resources in the marine park in a manner that is consistent with the principles of ecologically sustainable development</li> <li>b. enable the marine park to be used for scientific research and education</li> <li>c. provide opportunities for public appreciation and enjoyment of the marine park</li> <li>d. support Aboriginal cultural uses of the marine park.</li> </ol> </li> </ol>
<b>Provision</b>	A provision is a component of a regulation or Act. Provisions may provide powers to persons or require a person to undertake a specific activity.

### 3. The case for government intervention

#### 3.1. About the NSW marine estate

The NSW marine estate extends up to three nautical miles offshore from the coastline and includes approximately:

- one million hectares of estuary and ocean (including 1500 km of ocean coastline)
- 6,500 km of estuarine and coastal lakes foreshores
- 755 beaches and 184 estuaries and coastal lakes (NSW Government 2015).

Marine protected areas within the marine estate were first established in Australia over 50 years ago. Their primary aim is to conserve marine biodiversity.

Approximately six million people (or 85 per cent of the NSW population) live within 50 kilometres of the marine estate. These populations are concentrated in three major cities — Sydney, Newcastle and Wollongong (MEMA 2013).

#### Uses and benefits of the marine estate

The NSW marine estate is shared by multiple users and generates benefits from a range of different activities. This includes:

- private businesses operating shipping, commercial fishing and charter fishing operations, and commercial tourism activities
- Australian and international tourists engaged in recreation and lifestyle activities
- research and educational activities that are conducted on the marine estate
- Aboriginal cultural and traditional use benefits which are obtained from the marine estate.

The marine estate also provides ecosystem functions, such as the replenishment of fish stocks, habitats and biodiversity, and the breakdown of waste (MEMA 2013; Madden 2004).

The 2014 Marine Estate Community Survey has identified a wide range of social, economic and environmental benefits that are provided by the marine estate. Participants identified the following:

environmental benefits:

- healthy, diverse and abundant marine life
- natural beauty – an unpolluted environment

economic benefits:

- contribution to local and state economies (e.g. tourism, fishing and the seafood industry)
- facilities and services that encourage use of the marine estate (e.g. marinas)
- a gateway to Australia – the marine estate provides a transport links for visitors and access to markets for trade

social benefits

- ability to offer a range of activities and uses that are available to all
- natural environment which provides a place to escape, engage with environment and de-stress/relax with family and friends
- cultural value to Aboriginal people and connection to country
- iconic part of Australia's identity (MEMA 2014).

The value of marine recreational activities to the NSW economy includes:

- Nature-based tourists (wildlife watching) — who spent \$14.6 billion<sup>4</sup> in NSW in the year ending September 2014
- Recreational fishing — contributing around \$1.5 billion per annum in direct expenditure and \$3.5 billion to the NSW economy in 2012
- Cruise shipping — generating approximately \$1 billion annually in 2012-13 (0.2 per cent of NSW's gross domestic product and mostly from the Newcastle-Sydney-Wollongong region)
- Recreational boating — generating a direct revenue of \$2 billion and an indirect travel and tourism related spend of \$1.38 billion in 2012.

The benefits of the recreational fishing, cruise shipping and boating activities are more likely to occur in the NSW marine estate, as compared with the \$14.6 billion for nature based tourism and wildlife watching that could be generated in any part of NSW. Hence, a relative comparison of these values is unsuitable.

Other recreational activities have generated the following revenue:

- dive industry – \$300 million
- beach visits – \$480 million for Sydney beaches and \$485 million in surfing related expenditures (2005-06 dollars)
- charter vessels (excluding fishing) – in 2007, the NSW Government received over \$1.5 million from the three largest charter operators on Sydney Harbour for access to King Street Wharf (Vanderkooi 2015).

Commercial uses of the marine estate include:

- Ports in NSW. These contribute around \$6.5 billion to the NSW economy or 1.3% of NSW gross domestic product, including annual profit of around \$85 million (Vanderkooi 2015).
- Pilot boats, tugboats and barges that provide navigation, loading/unloading and other support services to larger trading vessels.
- The approximately 9000 commercial vessels registered in NSW, including passenger boats, houseboats, party boats, oyster punts, work boats, fishing boats and tourist boats. Roads and Maritime Services administers moorings for commercial vessels at more than 4500 sites throughout the state and manages 68 wharves on Sydney Harbour.
- The NSW fishing industry. This generated a total value of production<sup>5</sup> of \$147.7 million in 2014-15, which comprised \$87 million from the wild fishing sector and \$60.7 million from NSW aquaculture. Significant contributors to the value of the wild caught product in 2014-15 include prawns, lobster, abalone and mud crab (NSW DPI 2016).

## 3.2. Identification of the problem

### The need for government intervention

The NSW marine estate is considered an *open access* resource — a resource that can be accessed by anyone at any time.

Without government intervention there would be no strong incentives to use the marine estate in a sustainable manner. Intervention could include regulations and management

<sup>4</sup> A more recent estimate of the value of nature based tourism and wildlife watching in NSW is \$18.3 billion in the year ending September 2016 (Destination NSW 2016).

<sup>5</sup> Gross Value of Production (GVP) is the value in dollar terms of goods and services produced in an industry or price multiplied by the quantity produced.

programs that prescribe or influence the manner in which a person or business can use or operate within the marine estate.

Without careful and effective management, the impact of unconstrained access to the marine estate could differ from the outcomes desired by the broader community. For example, individuals or businesses using the marine estate may not fully bear the social cost of their activities, leading to parts of the marine estate being damaged by activities, such as foreshore development, pollution and over-fishing (MEMA 2013).

In the absence of government intervention, it is more likely that individuals and businesses would underinvest in activities that enhance the benefits of the marine estate. For example:

- research to better understand factors influencing marine ecosystems
- coastal infrastructure to improve users access to beaches, estuaries and the ocean.

Individuals and businesses are likely to underinvest in these ventures as they cannot capture a sufficient value from these investments (MEMA 2013).

### 3.3. Objective of government action

In 2012, the report of the *Independent Scientific Audit of Marine Parks in New South Wales* was completed to assess NSW marine parks. The report stated **the NSW marine estate is owned by all people and has to be managed for all people (Beeton et. al. 2012).**

The NSW Government accepted the intent of the audit report and established the Marine Estate Management Authority (MEMA). MEMA's vision for the NSW marine estate is to have a **healthy coast and sea, managed for the greatest well-being of the community, now and into the future (MEMA 2013).**

The overarching objectives of remaking the MEM Regulation are to:

- help achieve MEMA's vision
- support the management of marine parks and aquatic reserves
- assist with the management of risks to the marine estate.

## 4. Legislative framework

This chapter outlines the role of the MEM Regulation within the existing legislative framework. Information on the proposed Regulation is provided in Chapter 5.

The *Marine Estate Management Act 2014* (the MEM Act) is the primary legislation that sets the foundation for strategic and coordinated management of the NSW marine estate and provides for the management of marine parks and aquatic reserves. The Act is supported by two regulations, namely the:

- Marine Estate Management Regulation 2009 (the MEM Regulation)
- Marine Estate Management (Management Rules) Regulation 1999 (the MEMMR Regulation).

Other key pieces of legislation that also apply to the marine estate are the:

- *Biodiversity Conservation Act 2016 (to be commenced)*
- *Biosecurity Act 2015 (to be commenced)*
- *Crown Lands Act 1989*
- *Environmental Planning and Assessment Act 1979*
- *Fisheries Management Act 1994 (FM Act)*
- *Local Government Act 1993*
- *National Parks and Wildlife Act 1975*
- *Protection of the Environment Operations Act 1997*
- *Threatened Species Conservation Act 1995*<sup>6</sup>

and Commonwealth legislation:

- *Environment Protection and Biodiversity Conservation Act 1999.*

### 4.1. Marine Estate Management Act 2014

The MEM Act commenced on 19 December 2014 and provides the legal foundation for the NSW Government to deliver a healthy coast and sea in NSW for the greatest well-being of the community today and in the future.

The MEM Act objectives include:

- providing for the management of the marine estate consistent with the principles of ecologically sustainable development
- establishing two advisory committees, MEMA and the Marine Estate Expert Knowledge Panel
- requiring the development of a Marine Estate Management Strategy to address priority threats identified through threat and risk assessment
- facilitating the maintenance of ecological integrity, and economic, social, cultural and scientific opportunities
- promoting the coordination of government programs
- providing for a comprehensive system of marine parks and aquatic reserves (NSW Government 2015).

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<sup>6</sup> This Act is to be repealed on the commencement of Schedule 10 to the *Biodiversity Conservation Act 2016*.

## 4.2. Marine Estate Management Regulation 2009

The MEM Regulation assists with implementation of the MEM Act and the MEMMR Regulation by supporting the management of marine parks and aquatic reserves. A summary of the functions of provisions in the MEM Regulation is provided in Figure 1.

Figure 1 Summary of provisions under the MEM Regulation



## 4.3. Marine Estate Management (Management Rules) Regulation 1999

The MEMMR Regulation supports the management of marine parks and contains:

- objects of the types of zones used in marine parks
- management rules for each marine park
- regulations for activities permitted in zones and other areas of marine parks, including activities that require consent
- miscellaneous provisions.

The MEMMR Regulation is exempt from staged repeal.

## 5. The proposed Marine Estate Management Regulation 2017

The proposed Regulation has been drafted by Parliamentary Counsel's Office and informed by a review of the MEM Regulation undertaken by DPI, in consultation with OEH.

The review found that all but one of the existing regulatory provisions would be required for continued management of marine parks and aquatic reserves and that no new provisions were required. It also identified improvements that could be made by amending a small number of existing provisions.

A summary of provisions in the existing MEM Regulation and the proposed amendments is provided in Table 1

. The table also states whether a regulatory provision represents the:

- transition of an existing regulatory arrangement, or
- transition of an existing regulatory arrangement with amendments, or
- new regulatory arrangement.

Table 1 Overview of regulatory provisions for the proposed MEM Regulation 2017

Provision	Regulatory provisions of the MEM Regulation 2009	Transition of existing regulatory provisions to the proposed Regulation 2017		
		As is	With amendment	Deleted
Consent procedures	<p><b>Part 2</b></p> <p>A person or business wanting to conduct an activity in a marine park or aquatic reserve that requires consent under the MEM Regulation, MEMMR Regulation or the MEM Act, must obtain a permit in accordance with the procedures of this part.</p> <p>Part 2 also contains provisions that allow the NSW Government to manage assigned permits (such as the cancellation, suspension and variation of permits).</p>	<p>✓</p> <p><b>All provisions except:</b></p> <ul style="list-style-type: none"> <li>• <b>Assessment criteria c19(h)</b> [c19(j) in the proposed Regulation]</li> <li>• <b>Condition where consent must be refused c10(2)</b></li> <li>• <b>Condition where consent may be refused c11(d).</b></li> </ul>		
	<p><b>Part 2, c19(h)</b></p> <p><b>Assessment criteria (h)</b> – for deciding whether consent may be provided to conduct an activity in a marine park or aquatic reserve, specifically:</p> <ul style="list-style-type: none"> <li>• the requirement for ‘making good’ (correcting) any damage to a marine park or aquatic reserve.</li> </ul>		<p>✓</p> <p>This assessment criteria will be expanded to include the prevention and mitigation of any damage to marine parks and aquatic reserves, in addition to the ‘making good’ of any damage that may arise from a proposed activity <b>c19(j)</b>.</p>	
	<p><b>Part 2, c10(2)</b></p> <p><b>Condition where consent must be refused</b> – the Minister can only provide consent to the carrying out of any activity in a zone of a marine park that is inconsistent with the management objectives of the zone in emergency situations.</p>			✓
	<p><b>Part 2, c11(1)(d)</b></p> <p><b>Condition where consent may be refused</b> – if the applicant has been issued with two or more penalty notices for offences under the MEM Act or the MEM Regulation in the 12 months before the application was made and penalty notices were not later dismissed by the court.</p>		<p>✓</p> <p>Consent may be refused if an applicant has been issued with two or more penalty notice offences in the 12 months before their application was made (and the penalty notices have not been withdrawn and the charges have not been dismissed). This amendment will not change the effect of the existing provision <b>c11(1)(d)</b>.</p>	
Functions of authorised officers including the delegation of	<p><b>Part 3, c121 to c124:</b></p> <p>1. <b>CL21 to c123</b> provides powers for authorised officers (i.e. government officer) to <b>remove a</b></p>		<p>✓</p> <ul style="list-style-type: none"> <li>• Powers in <b>c121 to c124</b> will be extended to aquatic reserves.</li> <li>• Powers for the</li> </ul>	

Provision	Regulatory provisions of the MEM Regulation 2009	Transition of existing regulatory provisions to the proposed Regulation 2017		
		As is	With amendment	Deleted
Ministerial functions	<p><b>person, property and heavily fouled hulls</b> from marine parks.</p> <p>2. <b>CL24</b> provides powers for the Ministers to <b>collect information on commercial fishing and aquaculture</b> activities in marine parks.</p>		<p><b>removal of property</b> from a marine park or aquatic reserve are:</p> <ul style="list-style-type: none"> <li>o amended to ‘has caused or is likely to cause’ a significant impact on species or habitats <b>cl22(1)(c)</b>.</li> <li>o amended to ‘has created or is likely to create’ an environmental hazard <b>cl22(1)(d)</b>.</li> </ul>	
	<p><b>Part 3, cl25</b></p> <p>Authorised officers and persons under the direction of the relevant Ministers or an authorised officer are afforded <b>protections from conviction</b> for offences under the MEM Regulation or the MEMMR Regulation. The provision protects these people when they are carrying out actions that would normally amount to an offence under the MEM Regulation.</p>	✓		
	<p><b>Part 3, cl26</b></p> <p><b>Delegation of Ministers’ functions</b> to select persons.</p>		✓	
Miscellaneous provisions	<p><b>Part 4, cl27 to cl33</b></p> <p>Conditions for the:</p> <ul style="list-style-type: none"> <li>• <b>Seizure of things</b> in marine parks and aquatic reserves (<b>cl29</b>)</li> <li>• <b>Penalty notice offences (cl30)</b></li> <li>• <b>Double jeopardy (cl31)</b></li> <li>• Exemption for <b>Australian Defence Force</b> activities (<b>cl32</b>)</li> <li>• <b>Saving (cl33)</b></li> </ul>	✓	✓	
	<p><b>Part 4, cl32A</b></p> <p><b>Transitional provision</b> — A person that holds a permit under Section 37 of the FM</p>		✓	
			<p>The categories of persons that may be authorised will change to including a <b>public service employee</b> instead of a <b>public servant</b>. This amendment will not change the effect of the existing provision <b>cl26</b>.</p>	
		<p>This includes:</p> <ul style="list-style-type: none"> <li>• <b>Penalty notice offences (cl28)</b> [cl28 in proposed Regulation]</li> <li>• <b>Double jeopardy (cl31)</b> [cl29 in proposed Regulation]</li> <li>• Exemption for <b>Australian Defence Force activities (cl32)</b> [cl30 in proposed Regulation]</li> <li>• <b>Saving (cl33)</b> [cl31 in proposed Regulation].</li> </ul>	<p><b>Seizure of things in marine parks and aquatic reserves cl29 [cl27 in proposed Regulation] —</b> provisions declare the specific offences that are to be forfeiture offences. The amended regulation will not change the effect of the provision, only the manner in which it is legislated.</p>	
			<p>These powers are transferred to and maintained in the</p>	

Provision	Regulatory provisions of the MEM Regulation 2009	Transition of existing regulatory provisions to the proposed Regulation 2017		
		As is	With amendment	Deleted
	Act (issued before 19 December 2014) may use it in their defence, when prosecuted for an offence under Section 62 of the MEM Act.		saving provision of the proposed Regulation <b>cl32A</b> [ <b>cl31</b> in the proposed Regulation].	
<b>Penalties</b>	<b>Schedule 1</b> Specification of the <b>penalty amounts</b> for penalty notice offences as prescribed under the MEM Act, the MEM Regulation and the MEMMR Regulation.	✓		

## 6. Economic method

The economic assessment for this RIS comprises two components, the:

1. identification of impacts for each option relative to the base case
2. assessment of costs and benefits for each option relative to the base case.

In accordance with the SL Act and the Guide to Better Regulation, this assessment:

- considers a range of viable options
- identifies and assesses the impacts of government action for each option relative to a base case
- considers the costs and benefits of each option relative to the base case
- identifies a preferred option that provides the greatest benefit to stakeholders and the community.

### 6.1. Identification of options

The MEM Regulation 2009 contains the current regulatory provisions and under the base case (Option 1) these regulatory provisions would be remade with no change.

Two other options will be assessed against the base case:

- Option 2: Make the proposed Regulation
- Option 3: Allow the MEM Regulation to lapse.

These two options are considered the only feasible options for this staged repeal review.

The details of the proposed Regulation (Option 2) which would be made under the MEM Act are provided in Chapter 5. This regulation would replace existing measures on 1 September 2017.

If no further actions are taken by the government, the MEM Regulation would lapse on 1 September 2017 and no new regulation would be made in its place (Option 3).

### 6.2. Identifying impacts

An assessment of the positive and negative impacts for each of the two options has been undertaken relative to the base case (Option 1) in Chapter 7. The direct and indirect impacts of each option have also been considered. Direct impacts are those immediate impacts on stakeholders, whereas indirect impacts are those that affect a third party.

The costs and benefits relating to resource allocation and competition impacts have not been assessed as they are not impacted by the MEM Regulation.

### 6.3. Machinery clauses

The proposed Regulation would make a number of regulatory provisions of a machinery nature. Generally speaking, machinery clauses are those which could broadly be described as relating to 'process' rather than a substantive policy matter.

Machinery clauses in the proposed Regulation include:

- Clause 1 – Name of the Regulation
- Clause 2 – Commencement date of the Regulation
- Clause 3 – Definitions
- Clause 4 – Regulations applies subject to other legislation.

Matters of a machinery nature do not require a RIS. This RIS does not consider these provisions in detail however comment on these provisions may be included in submissions and will be considered.

## 7. Assessment of impacts

### 7.1. Base Case (Option 1): Remake the Marine Estate Management Regulation 2009 without amendments

#### 7.1.1. Overview of the base case

Under the base case the existing regulatory provisions under the MEM Regulation would be remade, as is, with no amendments, on 1 September 2017. A summary of these provisions is as follows:

1. **Consent procedures** — provide procedures for activities that require consent under the MEM Regulation, the MEMMR Regulation or the MEM Act.
2. **Functions of authorised officers and relevant Ministers** —
  - a. allow authorised officers (e.g. marine park officers) to direct the removal of people, property and heavily fouled vessels from a marine park
  - b. allow relevant Ministers to request information from commercial fishing and aquaculture operators in a marine park
  - c. protect authorised officers or persons acting under the direction of a relevant Minister or authorised officer from prosecution against offences committed under the MEM Regulation and/or the MEMMR Regulation
  - d. allow the delegation of Ministers' functions.
3. **Miscellaneous provisions** —
  - a. powers to identify a **penalty notice offence** and set a penalty amount, including for offences under the MEM Act and MEMMR Regulation
  - b. **double jeopardy** provisions protect offenders from being prosecuted for the same or a similar offence under multiple pieces of legislation
  - c. a person that holds a permit under Section 37 of the FM Act (issued before 19 December 2014) may use it in their defence, when prosecuted for an offence under Section 62 of the MEM Act
  - d. provisions for offences and circumstances under which boats and/or motor vehicles may be seized and forfeited.

A description of these provisions and amendments for the proposed Regulation are also provided in [Table 1 of Chapter 5](#).

### 7.1.2. Identification of impacts under the base case (Option 1)

Under Option 1, the existing powers of the MEM Regulation would continue to support the management of marine parks and aquatic reserves. A list of the expected protections and the impacted party — i.e. society, the environment, businesses or the government — is provided in Table 2.

Table 2 Impact of the MEM Regulation under the base case (Option 1)

Provision	Impact: Under the base case (Option 1)	Type of impact			
		Social	Environment	Businesses	Government
Consent procedures (Part 2)	<ul style="list-style-type: none"> <li>• <b>Businesses</b> and <b>individual</b> applicants would be consistently assessed for permits to conduct commercial and recreational activities in marine parks and aquatic reserves, which require consent.</li> <li>• <b>Ministers</b> have clear and consistent regulatory criteria to grant consent for these activities.</li> </ul>	✓		✓	✓
	<ul style="list-style-type: none"> <li>• <b>Ministers</b> have the power to cancel, suspend or vary any approved permits and restrict the number of permits issued for a marine park or aquatic reserve. These provisions mean that compliance may be consistently applied across all permit holders.</li> </ul>		✓		✓
Functions of authorised officers and relevant Ministers (Part 3)	<b>Removal of persons, property and heavily fouled vessels —</b> <ul style="list-style-type: none"> <li>• <b>Authorised officers</b> have the power to minimise the potential for damage to a marine park and minimise the conflicts between the users of marine parks.</li> </ul>	✓	✓	✓	✓
	<b>Information regarding aquaculture or commercial fisheries —</b> <ul style="list-style-type: none"> <li>• <b>Relevant Ministers</b> have the power to request information from commercial fishers and aquaculture producers operating in marine parks and aquatic reserves, if required, to better inform park or reserve management.</li> </ul>		✓	✓	✓
	<ul style="list-style-type: none"> <li>• The actions of an <b>authorised officer</b> and a person under the direction of relevant Ministers or an authorised officer would be protected from an offence committed under the proposed Regulation or the MEMMR Regulation. These protections allow authorised officers to undertake their job effectively without fear of being charged with an offence and assure members of the community following a Ministerial direction that they will also be protected.</li> </ul>	✓			✓
	<ul style="list-style-type: none"> <li>• <b>Delegation of Ministers' functions —</b> <b>Ministers</b> can delegate their powers to a range of experts to ensure that actions to protect and manage marine protected areas can be implemented in a timely and efficient manner.</li> </ul>		✓		✓

Provision	Impact: Under the base case (Option 1)	Type of impact			
		Social	Environment	Businesses	Government
Miscellaneous provisions (Part 4)	<ul style="list-style-type: none"> <li>• <b>Seizure of things in marine parks or aquatic reserves</b> — Offences and circumstances under which boats or motor vehicles may be seized and forfeited to marine authorities are maintained.</li> </ul>		✓	✓	✓
	<ul style="list-style-type: none"> <li>• <b>Penalty notice offences — Authorised officers</b> would be able to issue penalty notices for prescribed offences with prescribed penalty amounts. These provisions provide all parties with clarity regarding the penalties for committing offences.</li> </ul>				✓
	<ul style="list-style-type: none"> <li>• <b>Penalty notice offences - Offenders</b> (which may comprise individuals or a business owner) would be fully aware of offences and the associated penalty amounts. This would provide a transparent process for managing an offence.</li> </ul>	✓		✓	
	<ul style="list-style-type: none"> <li>• <b>Double jeopardy — Offenders</b> (which may comprise individuals or a business owner) could be convicted of an offence only under either the marine estate regulations or the fisheries management legislation (not both).</li> </ul>	✓		✓	
	<ul style="list-style-type: none"> <li>• The <b>Australian Defence Force</b> would be exempt from approvals required under the MEM Regulation and MEMMR Regulation 1999. This activity will have no significant impact on marine parks as long as best practice principles are maintained.</li> </ul>				✓
	<ul style="list-style-type: none"> <li>• <b>Savings— Persons</b> that have obtained a permit under section 37 of the FM Act before 19 December 2014 will continue to be protected against prosecution for an offence against section 62 of the MEM Act.</li> </ul>	✓		✓	

## 7.2. Option 2: Make the proposed Marine Estate Management Regulation 2017

Under Option 2, the proposed Regulation would be made under the MEM Act. The proposed Regulation seeks to support implementation of the MEM Act and the MEMMR Regulation 1999, which prescribes management rules for marine parks.

DPI reviewed the MEM regulation, in consultation with OEH, and found that all but one of the existing regulatory provisions are required. The review also recommended several amendments to strengthen existing management arrangements for marine parks and aquatic reserves. A summary of the proposed amendments is provided in Table 1 of Chapter 5.

Under the proposed Regulation, all regulatory provisions of the MEM Regulation (base case) would continue with the exception of **Part 2, cl10(2) Conditions for the removal of consent**, which would be removed. A summary of the impacts, costs and benefits from the amended provisions is provided below in Table 3.

Table 3 shows that Option 2 provides increased protections to biodiversity in marine protected areas relative to the base case (Option 1) and improve an officer's powers to enforce these protections. There are likely to be increases in costs to the government, businesses and the community from implementing and complying with these measures, but

these are considered to be minor. For these reasons, Option 2 — the proposed Regulation — is preferred to the MEM Regulation (base case).

**Table 3 Impacts, benefits and costs of the amended provisions under Option 2 (the proposed Regulation) relative to the base case**

Provisions under the proposed Regulation	Proposed amendment	Impact	Benefits and costs
Part 2, cl9(j) Assessment criteria (j) for consent procedures	<b>Provision</b> will be expanded to include consideration of preventing and mitigating any damage, in addition to making good any damage, to marine parks and aquatic reserves.	This amendment expands the criteria that Ministers must consider when providing consent for activities conducted in marine parks and aquatic reserves. It therefore strengthens the procedure for providing consent.	Changes will strengthen the protections to biodiversity in marine parks and aquatic reserves.
Part 2, cl11(d) and Part 3, cl26(b) and Part 4, cl27	<b>Amendments</b> will improve the legal accuracy of the existing provisions. Amendments will not change the effect or powers of the regulation, relative to the base case (Option 1).	Amendments have no significant impact on society, the environment, businesses or government.	N/A
Part 2, cl10(2) Condition for the refusal of consent	The removal of cl10(2) — which states that, except in emergencies, the relevant Minister must not give consent to the carrying out of any activity in a zone or marine park that is inconsistent with the objects of the zone.	In the absence of these powers, marine parks and aquatic reserves maintain an appropriate level of protection through the MEM Act and the MEMMR Regulation. The MEMMR Regulation prescribes the detailed regulatory provisions that must be met for each of the zones. For example, Section 1.11 contains requirements to protect animals, plants and habitat in a sanctuary zone.	There are no additional benefits or costs from this amendment, as regulatory requirements contained in the MEM Act and the MEMMR Regulation provide an appropriate level of protection to marine protected areas.
Part 3, cl21 to cl24 Functions of an authorised officer and Ministers	<b>Functions</b> will be expanded to apply to the management of aquatic reserves. Authorised officers will have the powers to remove persons, property and heavily fouled hulls from aquatic reserves and relevant Ministers can request information on commercial fishing and aquaculture activities in aquatic reserves.	This amendment extends the powers of authorised officers and relevant Ministers in aquatic reserves, powers which are currently limited to the management of marine parks (under the base case).	These amendments will strengthen powers of authorised officers and relevant Ministers, improving the protection that officers can implement in aquatic reserves. There will also be increased costs of non-compliance. Overall, these powers reinforce behaviours that protect the biodiversity of marine protected areas.
Part 3, cl22(1)(c) to cl22(1)(d) Functions of an authorised officer and Ministers removal of property	<b>Provisions</b> will improve the powers to manage property that has or is likely to cause damage to marine parks and aquatic reserves, and to ensure that property is not interfering or likely to interfere with a person's enjoyment of a marine park or aquatic reserve.	This amendment strengthens the powers of authorised officers for the removal property from aquatic reserves and marine parks.	This improves protection of marine protected areas from damage caused by property. These amendments could potentially increase costs for non-compliant persons.

Provisions under the proposed Regulation	Proposed amendment	Impact	Benefits and costs
from a marine park or aquatic reserve			

### 7.3. Option 3: Allow the Marine Estate Management Regulation 2009 to lapse

Under Option 3, the MEM Regulation would lapse on 1 September 2017. Further, the regulatory provisions detailed in the base case (section 7.1) would cease to exist and no new regulation would be made in its place.

The MEM Act and the MEMMR Regulation would remain in place under Option 3 and would continue to be described by and afford power to marine parks and aquatic reserves.

If regulatory provisions of the MEM Regulation were to lapse, other legislation could potentially be used to help manage marine parks and aquatic reserves (see Box 1).

Box 1 shows that not all of the existing management powers under the MEM Regulation could be maintained using other legislation. The regulatory framework would also be dispersed and management responsibilities would fall to multiple ministers and agencies. Under this option, it would be more difficult to administer these powers for the marine estate.

Box 1 List of potential alternative legislation that may provide powers to provisions of the MEM Regulation

Provisions of the MEM Regulation 2009	Other legislation
Part 3, cl21 to 24 powers to remove persons, property and heavily fouled vessels from marine parks and aquatic reserves.	<p>Aspects of these powers may be provided by the:</p> <ul style="list-style-type: none"> <li>• <i>Crown Lands Act 1989</i></li> <li>• <i>Local Government Act 1993</i></li> <li>• <i>National Parks and Wildlife Act 1974</i></li> <li>• <i>Marine Safety Act 1998</i></li> <li>• <i>Fisheries Management Act 1994</i>.</li> </ul> <p>For example, s15A of the <i>Marine Safety Act 1998</i> may potentially provide the powers to authorised officers to give directions relating to the safe use of vessels on navigable waters, which has some overlap with powers under the MEM Regulation 2009.</p>
Part 3, cl24 powers to obtain information on commercial fishing and aquaculture activities in marine parks and aquatic reserves.	<ul style="list-style-type: none"> <li>• The FM Act could potentially provide for the: <ul style="list-style-type: none"> <li>a. collection of information on aquaculture (in Part 6, Division 2)</li> <li>b. commercial fishing (in Part 4, Division 5) for fisheries management purposes.</li> </ul> </li> </ul> <p>Powers under the FM Act are not available to the Minister for the Environment who is currently jointly responsible for the MEM Act, together with the Minister for Primary Industries.</p>
Part 4, cl27 Seizure of things in marine parks and aquatic reserves.	<ul style="list-style-type: none"> <li>• The FM Act could potentially provide powers for the seizure of things in relation to fisheries offences (in Part 9, Division 4).</li> <li>• <i>Marine Safety Act 1998</i> could provide powers for the seizure, impoundment or forfeiture of recreational vessels for marine safety offences (in Part 2, Division 2).</li> </ul>

### 7.3.1. Impacts under Option 3

Lapse of the MEM Regulation would have a range of impacts, costs and benefits for the NSW community, environment, businesses, and the government. Potential impacts include:

1. **Consent procedures** — there would be no regulatory provisions or powers to guide decision making for the approval and management of permits to undertake activities in marine protected areas that require consent as prescribed under the MEM Act, the MEM Regulation and the MEMMR Regulation.

With no consent procedures, the NSW Government may be pressured to implement non-standardised consent procedures:

- a. businesses and applicants may experience inconsistencies in the assessment of permit applications and the management of permits. This would create barriers for new businesses, businesses obtaining new permits and the renewal of permits.
- b. Ministers would have no clear and consistent regulatory criteria to grant consent for prohibited activities and limited powers to cancel, suspend or vary approved permits.

While non-standardised procedures provide an alternative approach, to approve permits for activities in the marine estate that require consent, it is less transparent. Non-standardised procedures would likely reduce the consistency in the approval and management of permits, increasing the potential for damage to marine protected areas.

#### 2. Functions of authorised officers and Ministers:

- a. **Removal of persons, property and vessels, and collection of information from commercial fishing and aquaculture activities** — authorised officers' powers for these activities would be significantly reduced and so there is potential for increased damage to marine parks. Authorised officers would also have reduced powers to manage disagreements between the multiple users of this resource. Increased damages and disturbance between users has potential to discourage users from returning to the area and may also reduce visitor expenditures in the region (i.e. local businesses).
- b. **Protections to authorised officers** — authorised officers exercising their functions and persons operating under the direction of the Minister or an authorised officer, would have no protections for actions that may result in a separate offence under the MEM Regulation and/or the MEMMR Regulation. For example, in exercising his/her duty, an officer removes a vessel that is damaging the habitat, but in doing so, causes minor additional damage to the habitat.
- c. **Delegation of Ministers' functions** — Ministers would lose the power to delegate any functions given to them under the MEMMR Regulation, making it infeasible to implement compliance measures and other controls under this regulation.

#### 3. Miscellaneous provisions:

- a. **Seizure of things in marine parks** — there would be no powers to ensure that the government is able to seize boats and motor vehicles that are involved in illegal activities.
- b. **Penalty notice offences and penalties** — without penalty notice offences, offenders would need to attend court to manage their offence.
- c. **Double jeopardy provisions** — persons that are convicted of an offence under the MEM Regulation may also be convicted of a second offence for the same incident (or omission) under the FM Act, if the common law elements of double jeopardy cannot be established.

- d. Exemptions for Australian Defence Force activities** — the MEMMR Regulation would apply to the Australian Government Department of Defence activities in marine parks and aquatic reserves.
- e. Permits issued prior to commencement of the MEM Act** – persons that commit an offence under s62 of the MEM Act could be prosecuted for an offence even where they hold a valid permit under s37 of the FM Act. As a result, select persons would lose rights that they were previously allocated under conditions of purchased permits.

### 7.3.2. Costs and benefits under Option 3

The following section provides a qualitative assessment of the costs and benefits of Option 3 — the MEM Regulation is allowed to lapse — relative to the base case.

#### Society: individuals and the community

Under Option 3, lapse of the MEM Regulation would provide the community with reduced transparency about the activities that are permitted in marine parks and aquatic reserves. A list of the benefits and costs to the community under Option 3 is provided in Table 4.

Table 4 Social benefits and costs under Option 3

Regulatory provision	Benefits and costs
Consent procedures (Part 2)	<p><b>Consent procedures</b> under the MEM Regulation allow people to undertake activities that require consent in marine protected areas. The removal of these provisions would mean that:</p> <ul style="list-style-type: none"> <li>The procedures for obtaining consent are no longer <b>standardised</b>, there may be variability in compliance standards which could increase the likelihood of damages to marine protected areas.</li> <li>Damaged marine protected areas are likely to be less attractive to local and international tourists, reducing expenditures on local businesses and the attractiveness of these areas to future visitors.</li> <li>Under the MEM Regulation, applicants are provided with <b>supplementary tools</b> to assist with the completion of application for consent. These documents may not be available or maintained under Option 3 which could increase the time and cost required to obtain permit under a non-standardised system.</li> <li>Ministers would have no regulatory powers to restrict the number of permits allocated to a marine park or aquatic reserve. For example, some marine parks such as Port Stephens-Great Lakes have restrictions on the number of permits provided to businesses for dolphin watching.</li> </ul> <p>Relative to the base case the removal of this restriction may increase the number of dolphin watching events and reduce the cost of activities, but increase pressures on marine protected areas and dolphin populations.</p>
Functions of authorised officers and Minister (Part 3)	<ul style="list-style-type: none"> <li><b>Removal of persons, property and fouled vessels</b> — these powers have the potential to impose compliance costs on affected parties.</li> </ul> <p>The removal of these provisions (under Option 3) would weaken community incentives to protect the biodiversity, use and enjoyment of marine protected areas. Under Option 3, there would be no detrimental consequences for actions that are prescribed as inappropriate under the base case.</p>
Miscellaneous provisions (Part 4)	<ul style="list-style-type: none"> <li><b>Seizure of things in marine parks or aquatic reserves</b> — under Option 3 certain illegal activities under the MEM Act and MEMMR Regulation could not be deemed to be a forfeiture offence (which allows for the seizure of vessels and vehicles).</li> </ul> <p>If found guilty of a forfeiture offence, a person is likely to:</p> <ol style="list-style-type: none"> <li>lose capital assets if the court orders their forfeiture</li> <li>incur court costs for the proceedings (i.e. costs of responding to court orders).</li> </ol> <p>The removal of these powers would reduce the costs on offenders and reduce protections to the biodiversity and social benefits of marine parks and aquatic reserves. Without these provisions there are fewer consequences for behaviours that could damage marine parks and aquatic reserves.</p> <ul style="list-style-type: none"> <li><b>Penalty notice offences and penalty amounts</b> — under Option 3, there would be no</li> </ul>

Regulatory provision	Benefits and costs
	<p>penalty notices offences. All offences under the MEM Act and MEMMR would have to be prosecuted in court, thereby increasing the administration costs to offenders and to government.</p> <ul style="list-style-type: none"> <li>• <b>Double jeopardy</b> — under Option 3, an offender could be convicted of multiple offences for the same incidence and relative to the base case may have to pay greater penalty amount if found guilty, as in the base case offenders would only be charged once for the same incident (or omission).</li> <li>• <b>Savings</b> — under Option 3, persons that have obtained a permit under section 37 of the FM Act (before 10 December 2014) would not be protected from prosecution, which was the original intent of the provision.</li> </ul>

## Environment

Under Option 3, provisions that aim to conserve biodiversity in the marine estate in partnership with the MEM Act and the MEMMR Regulation 1999 would be removed. As Option 3 reduces protections to marine parks and aquatic reserves, there are no additional environmental benefits under this scenario.

Table 5 Environmental benefits under Option 3

Regulatory provision	Costs
Consent procedures (Part 2)	<ul style="list-style-type: none"> <li>• Under Option 3, a person or business is not required to have a <b>permit</b> for activities conducted in a marine estate or aquatic reserve. This means that management rules as prescribed in the MEMMR Regulation 1999 may not be complied with. Furthermore, procedures would not exist to ensure that activities conducted in marine protected areas maintain the condition of these areas. Relative to the base case, Option 3 would increase the likelihood of damage to marine protected areas.</li> <li>• Ministers and authorised officers' powers to uphold compliance with the conditions of issued permits would be removed, weakening protections to marine parks and aquatic reserves.</li> </ul>
Functions of authorised officers (Part 3)	<ul style="list-style-type: none"> <li>• <b>Removal of persons, property and heavily fouled vessels</b> — the removal of authorised officers powers to remove persons and things that are having or may have a damaging effect on marine parks or aquatic reserves — increases the likelihood of damages to these resources.</li> <li>• <b>Information regarding aquaculture or commercial fishing</b> — under Option 3, the Ministers would have no powers to request information about the practices of these operations, increasing the probability of damages that may result from incorrect practices.</li> <li>• <b>Minister delegations</b> — removal of these delegations would reduce the likelihood that actions to protect and manage marine parks and aquatic reserves under the MEMMR Regulation are taken in a timely and efficient manner. Note that the Ministers would still retain the ability to delegate any function allocated to them under the MEM Act.</li> </ul>
Miscellaneous provisions (Part 4)	<ul style="list-style-type: none"> <li>• <b>Penalty notice offences and penalty amounts</b> — the removal of penalty notice offences and penalty amounts for prohibited actions, increases the possibility of damage to marine protected areas.</li> <li>• <b>Seizure of things in marine parks or aquatic reserves</b> — under Option 3, the powers of authorised officers to seize boats for offences declared to be forfeiture offences would be removed, but the offence would still remain. As such, the punishment for these offences is likely to be less severe without these powers.</li> </ul>

## Business

Under Option 3, the lapse of the MEM Regulation would provide businesses with reduced transparency about the activities that are permitted in marine parks and aquatic reserves. A list of the benefits and costs to businesses is provided in Table 6.

Table 6 Benefits and cost to businesses under Option 3

Regulatory provision	Benefits and costs
<p><b>Consent procedures</b> (Part 2)</p>	<ul style="list-style-type: none"> <li>• The removal of <b>standardised consent procedures</b> under Option 3 would hinder businesses in obtaining consent for conducting activities within marine parks and aquatic reserves and maintain compliance standards for these activities. Potential costs to businesses include reduced: <ul style="list-style-type: none"> <li>• transparency about the activities for which a permit could be approved</li> <li>• clarity about the application process and the costs of completing applications to obtain a permit</li> <li>• consistency in the assessment of applications, which reduces variability in the outcome of application assessments across marine parks and aquatic reserves (this could increase costs for businesses operating across multiple marine parks and/or aquatic reserves, as the removal of consent procedures may increase administration and operating costs).</li> </ul> </li> <li>• Under Option 3 — no regulation — the removal of <b>supplementary tools</b> to assist with the completion of application for consent could increase the time and costs of completing applications. Supplementary tools could include policies and procedures documents on permits in addition to the permit application forms.</li> </ul>
<p><b>Functions of authorised officers and Ministers</b> (Part 3)</p>	<ul style="list-style-type: none"> <li>• <b>Removal of persons, property and fouled vessels</b> — without these powers, people committing offences under the provisions described in the base case would not face consequences. The removal of these provisions could harm efforts to protect the biodiversity, use and enjoyment of marine parks and aquatic reserves. These provisions maintain consequences for inappropriate actions (as prescribed by the proposed Regulation) and would not exist under Option 3.</li> <li>• <b>Information regarding aquaculture or commercial fishing</b> — without these provisions Ministers could not collect information from aquaculture and commercial fishing businesses that may be essential for the monitoring and management of the marine protected areas. These provisions would only be implemented to obtain information that is not otherwise being collected and/or is not available to the Minister for Environment. The removal of these provisions (under Option 3) would reduce the potential costs to businesses that may be audited and may increase the potential damage to marine parks and aquatic reserves.</li> </ul>
<p><b>Miscellaneous provisions</b> (Part 4)</p>	<ul style="list-style-type: none"> <li>• <b>Penalty notice offences and penalty amounts</b> — under option 3, businesses that have been found committing an offence could not be served with a penalty infringement notice and associated penalty amount. Under this option an offender would be taken to court, increasing the administration costs to offenders and the government.</li> <li>• <b>Double jeopardy</b> — Under Option 3, business owners that commit offences could be charged for more than one offence for the same incident (or omission), reducing certainty of a court process and the associated penalty amount. The costs to prosecuted offenders under Option 3 are likely to be more than their costs under the base case.</li> <li>• <b>Seizure of things in marine parks or aquatic reserves</b> — the removal of powers for forfeiture offences, as prescribed by the MEM Act and the MEMMR Regulation, means that a business owner's boat could not be seized which reduces the disincentives for committing offences that are declared forfeiture offences. Under the MEM Regulation (the base case) a person found guilty of these offences may face the following costs: <ol style="list-style-type: none"> <li>a. lost revenue as a result of the seizure of an individuals' capital assets</li> <li>b. loss of the value of capital assets if the court order their forfeiture</li> <li>c. large court costs (i.e. costs of responding to court orders).</li> </ol> Complying with these regulations will impose some costs on businesses. But without these provisions — under Option 3 —incentives that reinforce business decisions to protect the biodiversity of marine protected areas are removed, increasing the likelihood of damaging behaviours. </li> <li>• <b>Savings</b> — under Option 3 businesses that have obtained a permit under section 37 of the FM Act (before 10 December 2014) would not be protected from prosecution, which was the original intent of the provision.</li> </ul>

## Government

Under Option 3, the NSW Government powers that are prescribed under the base case would be removed. This would reduce authorised officers' powers to manage and maintain the condition of NSW marine parks and aquatic reserves. A list of the benefits and costs to the government under Option 3 is provided in Table 7.

Table 7 Benefits and costs to the NSW Government under Option 3

Regulatory provision	Benefits and costs
Consent procedures (Part 2)	<ul style="list-style-type: none"> <li>The removal of consent procedures under Option 3 would mean that the Ministers have no standardised and legislated powers to:               <ol style="list-style-type: none"> <li>provide consent (as permit) for activities that are prohibited in marine parks and aquatic reserves</li> <li>apply consistent procedures across applicants</li> <li>assist in maintaining compliance requirements.</li> </ol> <p>Under the base case, the Ministers are provided powers to streamline activities and minimise the administrative costs of providing these services. It is likely that these costs would be increase under Option 3, without consent procedures.</p> <p>In 2014-15, the NSW Government approved 306 permits for 332 activities in marine parks and aquatic reserves. Since this time, the number of approvals has remained relatively constant. As a large number of permits are approved each year, the removal of these provisions is likely to increase government's administration and compliance costs.</p> </li> <li>Under Option 3, the Ministers do not have powers to request information from commercial fishers and aquaculture producers operating in marine parks and aquatic reserves. Without these provisions, the Ministers have fewer powers to implement controls that could increase administrative costs to the government.</li> </ul>
Functions of authorised officers and Ministers (Part 3)	<ul style="list-style-type: none"> <li>Under Option 3 there would be no powers to take actions against persons who damage or interfere with marine estates or aquatic reserves. Removal of these provisions would mean that people could cause harm to and leave property that damages marine protected areas, without consequences for their actions. This could significantly increase damages to the biodiversity of the marine protected area and damage tourism in these areas.</li> </ul>
Miscellaneous provisions (Part 4)	<ul style="list-style-type: none"> <li><b>Penalty notice offences and penalty amounts</b> — Under Option 3, penalty offences and penalty amounts would no longer be clearly specified and offenders would have to attend court.           <p>Under Option 3, authorised officers are likely to spend more time and public resources (less administrative costs) to issue and manage offences. Additionally, Option 3 would likely increase the number of offences taken to court, increasing pressure on the court system and costs to the NSW Government.</p> </li> <li><b>Seizure of things in marine parks or aquatic reserves</b> — Provisions ensure that the government is able to seize boats and motor vehicles that are involved in illegal activities would no longer exist under Option 3.           <p>This provision allows authorised officers to enforce protection measures and the ability to seize boats involved in forfeiture offences acts as a deterrent for illegal fishing activities in marine parks and aquatic reserves. Where these provisions are removed (under Option 3) the costs of enforcement are likely to increase.</p> </li> <li><b>Exemptions for Australian Defence Force activities</b> — the removal of exemptions for Australian Defence Force activities in marine protected areas would result in additional administrative costs for Australia Defence Force activities to successfully obtain permission and manage their obligations.</li> </ul>

Evidence presented in this section shows that Option 3 would reduce powers to protect biodiversity in marine protected areas. In particular, the protections afforded to marine protected areas would be greater if provisions of the MEM Regulation were maintained, as prescribed by the base case (Option 1).

While the provisions of Option 1 would increase administration and compliance costs to the community, businesses and the government relative to Option 3, it is considered that these costs are commensurate with the protections provided to marine protected areas.

It is therefore concluded that the base case — to remake the MEM Regulation — is preferred to Option 3 where the MEM Regulation is allowed to lapse.

#### **7.4. Conclusion: the preferred option**

In conclusion, making the proposed Regulation (Option 2) under the MEM Act is the preferred option. It generates the greatest net benefits to the community, environment, businesses and government. Option 2 provides increased protection to biodiversity in marine protected areas relative to the base case (Option 1). Option 3 is not preferred to either base case or the proposed Regulation, as the lapse of the MEM Regulation would reduce powers that protect biodiversity in marine protected areas.

## References

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