

## EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories and Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure, Transport, Cities and Regional Development

*Seat of Government (Administration) Act 1910*

### ***Australian Capital Territory National Land (Lakes) Ordinance 2022***

The *Australian Capital Territory National Land (Lakes) Ordinance 2022* (the Ordinance) deals with the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory (ACT), relating to the areas of Lake Burley Griffin (the Lake) located on National Land. National Land is those areas of the ACT which are still administered by the Commonwealth following the establishment of self-government in the ACT. This Ordinance relates to the waters of the Molonglo River between Scrivener Dam and Molonglo Reach, but does not include Kingston Harbour. Amongst other matters, the Ordinance: provides for the grant of permits to use the Lake for various activities; regulates boating and other activities on the Lake and in the surrounding area; includes requirements for the safe operation of boats, including drug and alcohol offences; and provides for the reporting and investigation of boating accidents and closure of the Lake area for safety and maintenance, and for approved events. Most of the provisions are updated versions of laws that applied to *Lakes Ordinance 1976* in the National Land under the *National Land Ordinance 1989* (NLO).

#### Authority

The Ordinance is made under paragraph 12(1)(d) of the *Seat of Government (Administration) Act 1910* (the Act). The provision empowers the Governor General to make ordinances for the peace, order and good government of the ACT with respect to **National Land** as defined by the *Australian Capital Territory (Planning and Land Management) Act 1988*.

Subsection 33(3) of the Acts Interpretation Act 1901 provides that a power in an Act to make a legislative instrument includes the power to repeal or amend the instrument, subject to any conditions that apply to the initial power. The Ordinance replaces the NLO.

#### Purpose and operation

Prior to ACT self-government in 1989, a range of Ordinances, regulations and applied NSW laws governed the management of land in the ACT by the Commonwealth. As part of the transition to ACT self-government, most land within the ACT became Territory Land, and most of the land management laws became ACT enactments, able to be amended or repealed by the Legislative Assembly of the ACT.

The NLO gave effect to the provisions of 13 pre-self-government laws in relation to National Land over which the Commonwealth retained responsibility. The *Australian Capital Territory (Planning and Land Management Act) 1988* defines **National Land** to mean land in the ACT declared by the Minister, by notice in the Commonwealth Gazette, to be National Land (section 27(1)). Such land must be used, or intended to be used, by or on behalf of the Commonwealth (section 27(2)). Specified land whose management is vested in a person or body by an Act is also National Land (section 27(3)). The ACT Government manages the remaining land (**Territory Land**, defined in section 28), which comprises most of the ACT. The initial declarations of National Land were notified on 2 March 1989 and there has been a series of amendments since then.

Under the *Legislative Instruments Act 2003*, all legislative instruments, such as Ordinances, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Sunsetting ensures that legislative instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

The NLO is due to be repealed on 1 April 2022 pursuant to paragraph 51(1)(c) of the *Legislation Act 2003* and the *Legislation (Deferral of Sunsetting – ACT Self–Government Instruments) Certificate 2019*. The laws applied by the NLO fall into three categories: unleased land (including public places and roads), leased land, and lake areas (Lake Burley Griffin). This Ordinance deals with matters previously covered by the *Lakes Ordinance 1976* in the NLO. The other laws that were given effect by the NLO are covered by the *Australian Capital Territory National Land (Leased) Ordinance 2022* and the *Australian Capital Territory National Land (Unleased) Ordinance 2022*.

As was the case in 1989 when the NLO was made, consistency in the management of National Land and Territory Land, as is appropriate, remains a key policy aim in developing the Ordinance. The provisions in this Ordinance reflect more modern drafting principles and greater consistency with updated ACT legislation applying to Territory Land, but their substance is in large part unchanged.

The purpose of the Ordinance is to modernise the laws regulating the management and use of the Lake, in so far as the Lake is located on National Land. The ACT is responsible for the regulation of the remaining portions of the Lake, namely Molonglo Reach and Kingston Harbour, which are located on Territory Land. Presently, the National Land areas of the Lake are regulated under the *Lakes Ordinance 1976*, a ‘relevant pre-Self Government law’ of the NLO.

The *Lakes Ordinance 1976* has had few significant amendments since its commencement and is no longer consistent with the regulatory arrangements applying to lakes located on Territory Land under ACT legislation. The Ordinance will modernise the arrangements applying to the National Land portions of the Lake and where appropriate be based on ACT government laws, the *Lakes Act 1976 (ACT)* (the ACT Lakes Act) and *Lakes Regulation 2019 (ACT)* (the ACT Lakes Regulation) as these laws are in force in the ACT. The ACT Lakes Act and the ACT Lakes Regulation regulate the areas of the Lake which are located on Territory Land as well as other lakes located on Territory Land in the ACT.

The Lake is actively used by a range of organisations and individuals for recreation and commercial use, including yachting, boating, rowing, swimming, fishing, and non-water related activities along its foreshore and islands. Many water-related events are regularly held on the Lake, including training schools and regattas. The National Capital Authority (NCA) is primarily responsible for the administration and management of the Lake’s use and the Australian Federal Police (AFP) have enforcement powers, including the regulation of safety and drug and alcohol offences.

There are a number of water-related activities and vehicles that are not permitted to access the Lake, such as houseboats and water-skiing. These restrictions of use remain unchanged.

The Ordinance has modernised existing offences however, no new offences have been integrated.

### Consultation

With the Attorney-General's approval, the Department of Infrastructure, Transport, Regional Development and Communication (the Department) conducted a thematic review in 2018-2019 of the NLO and seven other sunseting instruments relating to the administration of the ACT. As part of the review, the Department sought comments from a wide range of agencies, including the NCA, the AFP, the Departments of Finance, Defence, Foreign Affairs and Trade, Prime Minister and Cabinet, and Veterans' Affairs, the former Department of Environment and Energy, and the ACT Government.

The Department also convened a working group, comprising representatives from the NCA, the Department of Finance and the ACT Government, to consider the provisions of the NLO and the applied pre-self-government laws in detail.

Public consultation was undertaken via the release of an exposure draft of the Ordinance inviting submissions from 21 February to 1 March 2022. As part of this, Lake user groups from the ACT's rowing, yacht and dragon boat clubs were involved in discussions about the Ordinance.

Issues raised during public consultations on the exposure draft included concerns that it did not enable a number of Lake users to continue their current practices. These issues were further consulted on and accepted as valid. The exposure draft was amended to allow for those current practices to continue.

The Australian Maritime Safety Authority was also consulted on the proposed changes to support the alignment of safety requirements relating to the use of commercial and recreational vessels on the Lake.

The Ordinance will continue to be monitored to support improvement and alignment with Lake use and safety requirements.

The Department has, by way of letter to the Office of Best Practice Regulation, certified the NLO is operating effectively and efficiently, and a Regulation Impact Statement is not required for the NLO to be remade.

### Other matters

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth). A detailed explanation of the provisions of the Ordinance is set out in Attachment A.

The Ordinance is compatible with human rights. A Statement of Compatibility with Human Rights is at Attachment B.

## **ATTACHMENT A —NOTES ON CLAUSES**

This attachment explains the operation of individual provisions in the *Australian Capital Territory National Land (Lakes) Ordinance 2022*.

### **Part 1—Preliminary**

#### **Division 1—Preliminary**

Part 1 of the Ordinance deals with preliminary issues.

##### Section 1 – Name

Section 1 provides that the name of the Ordinance is the *Australian Capital Territory National Land (Lakes) Ordinance 2022* (the Ordinance).

##### Section 2 – Commencement

This section provides for the Ordinance to commence on 1 April 2022.

##### Section 3 – Authority

Section 3 states that the Ordinance is made under the *Seat of Government (Administration) Act 1910*.

### **Division 2—Simplified outline of this Ordinance**

##### Section 4 – Simplified outline of this Ordinance

Section 4 gives a simplified outline of what the Ordinance does.

### **Division 3—Interpretation**

##### Section 5 – Definitions

Section 5 defines terms used in the Ordinance. These definitions are based on equivalent definitions contained in the ACT Lakes Act, the ACT Lakes Regulation and the *Legislation Act 2001* (ACT). Definitions of particular note are as follows:

**lake** means:

- (a) Lake Burley Griffin; or
  - (b) any other area of National Land declared by the Minister to be a lake under section 148.
- Note: This Ordinance applies to the lake area of Lake Burley Griffin to the extent that it is National Land (see section 7). The *Lakes Act 1976* (ACT) and instruments made under that Act apply in relation to the remaining area of Lake Burley Griffin.

**lake area** means an area consisting of a lake, the foreshores of the lake and the islands (if any) in the lake.

**Lake Burley Griffin** means the waters of the Molonglo River between Scrivener Dam and Molonglo Reach (within the meaning of the *Lakes Act 1976* (ACT) as in force at the commencement of this Ordinance), but does not include Kingston Harbour (within the meaning of that Act).

**Marine Safety (Domestic Commercial Vessel) National Law** means the Marine Safety (Domestic Commercial Vessel) National Law of the Commonwealth.

Note: The Marine Safety (Domestic Commercial Vessel) National Law is set out in Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* and,

when applying as a law of the Commonwealth, may be referred to as the Marine Safety (Domestic Commercial Vessel) National Law of the Commonwealth (see section 4 of that Act)

**National Capital Authority** means the body continued in existence by the *Australian Capital Territory (Planning and Land Management) Act 1988*.

**National Land** has the same meaning as in the *Australian Capital Territory (Planning and Land Management) Act 1988*.

**rules** means rules made under section 157.

**Transport for NSW** means the body of that name constituted by the *Transport Administration Act 1988* (NSW), as in force at the commencement of this Ordinance.

#### Section 6 – References to entering a place of inspection

This section provides that a reference to entering a place of inspection is, in relation to a boat, a reference to boarding the boat. The ACT Government has responsibility for management and regulation of taking of water on National Land.

### **Division 4—Application of this Ordinance**

#### Section 7 – Application of this Ordinance—National Land

This section provides that this Ordinance applies in relation to a lake or lake area to the extent that the lake or lake area is on National Land. ‘Lake’, ‘Lake area’ and ‘National Land’ are defined in section 5 of the Ordinance. ‘Lake area’ is defined as meaning an area consisting of a lake, the foreshores of the lake and the islands (if any) in the lake. A note to this section states that the ACT Lakes Act and instruments made under that Act apply in relation to the lakes and lake areas in the ACT to the extent that those lakes and lake areas are not National Land. With respect to Lake Burley Griffin, Molonglo Reach and Kingston Harbour do not fall within National Land and hence are subject to the provisions of the ACT Lakes Act and instruments made under that Act.

This section also outlines that this Ordinance does not apply to the management, or regulation, of the taking of water on National Land. A note to this section states that the ACT Executive has responsibility for the management and regulation of the taking of water on National Land.

#### Section 8 – Application of this Ordinance—emergencies

This section provides that this Ordinance, other than Part 5 which deals with drug and alcohol offences, does not apply to emergency and police officials exercising emergency functions under the *Emergencies Act 2004* (ACT) or official actions taken to prevent, minimise or remedy serious or material environmental harm under the emergency powers provisions of the *Environment Protection Act 1997* (ACT). This provision is based on section 7 of the ACT Lakes Act. Notes to this section state that an authorised officer includes the Environment Protection Authority appointed under the *Environment Protection Act 1997* (ACT), and place an evidential burden of proof on a defendant in relation to the matters it sets out.

## **Part 2—Management and control of a lake**

### Section 9 – Alterations in flow and water level

This section provides that the Minister may alter the level or flow of water in a lake for the purposes of the maintenance and preservation of a lake, as well as the maintenance, testing and preservation of associated works.

### Section 10 – Compensation for damage

This section provides that, if any land is injuriously affected by an authorised act to alter flow and water levels by the Minister, the owner of the land must be paid compensation by the Commonwealth. This section provides that the definition of *owner of land* includes anyone with an interest in the land.

## **Part 3—Use of a lake**

### **Division 1—Introduction**

#### Section 11 – Simplified outline of this Part

This section provides an outline of this Part.

#### Section 12 – Offences in Part do not apply to inspectors

This section provides that an offence in this Part does not apply to an inspector exercising a function of the inspector under this Ordinance. A note to the section places an evidential burden for this on the defendant.

### **Division 2—Regulation of use**

#### Section 13 – Rules may prescribe areas to regulate use

This section provides that the rules may prescribe an area within a lake area to one of seven categories of areas, concerning use, as outlined in the paragraphs (a) – (g).

#### Section 14 – General restrictions on boats

This section enables four offences of strict liability for using an area of the lake in a way that is inconsistent with how the area has been prescribed for the purposes of section 13. A person found guilty of this offence is liable for a penalty of 23 penalty units. This does not apply to conduct that is authorised by a regulated activity permit. A note to the section places an evidential burden on the defendant.

#### Section 15 – Restrictions on swimming and diving

Sub section 15(1) provides that it is an offence of strict liability, with a maximum penalty of 4 penalty units, to swim or dive in an area prescribed for the purposes of section 13 to be an area where swimming or diving is not permitted. This does not apply to conduct that is authorised by a regulated activity permit. A note to the subsection places an evidential burden on the defendant.

Sub section 15(2) provides that a person commits an offence of strict liability, with a maximum penalty of 23 penalty units, if the persons swims directly under Kings Avenue Bridge or Commonwealth Avenue Bridge, between these bridge or dives into Lake Burley Griffin from these bridges, where the swimming or diving is not in an area prescribed to be a swimming area for the purposes of section 13. A person found guilty of this offence is liable

for a penalty of 23 penalty units. This does not apply to conduct that is authorised by a regulated activity permit. A note to the section places an evidential burden on the defendant.

This section is based on section 16 of the ACT Lakes Act.

#### Section 16 – Buoys, wharves and jetties

This section provides for approvals to anchor a permanent buoy in a lake or erect a wharf or jetty in a lake area. Subsection 16(1) states that approval can be sought by a written application to the Minister, and notes that a fee may be prescribed for the application. Subsection 16(2) provides that the Minister may give approval, subject to any conditions they find necessary.

This approval may be given for multiple buoys, or for a standing approval for a period of time.

Subsections 16(3) and 16(4) enables offences of strict liability for anchoring a buoy in a lake and erecting a wharf or jetty in a lake area, respectively, if it has not been approved by the Minister. A person found guilty of this offence is liable for a penalty of 4 penalty units.

This section is based on section 18 of the ACT Lakes Act.

#### Section 17 – Restriction on kind of boat that may use wharf or jetty

This section states that the rules may impose restrictions by prescribing the kinds of boats that may use a wharf or jetty in a lake area. Subsection 17(2) enables an offence of strict liability for attaching a boat to a wharf or jetty where a boat is in contravention of these rules. A person found guilty of this offence is liable for a penalty of 4 penalty units.

This section is based on section 19 of the ACT Lakes Act.

#### Section 18 – Mooring permit

This section provides for a mooring permit system for prescribed mooring areas. Subsection 18(1) states that a permit may be sought via a written application to the Minister, and notes that a fee may be prescribed for the application. Subsection 18(2) allows the Minister to grant a written mooring permit, on with any conditions as the Minister thinks fit. A mooring permit holder can apply to the Minister for a condition to be varied or revoked under subsection 18(4).

Subsection 18(3) provides that the mooring permit will state a time period and will be in force for the period. The period must not exceed 12 months.

Subsection 18(5) gives the Minister the power to vary, revoke or impose further conditions on a permit at any time, by notice in writing to the permit holder.

This section is based on section 26 of the ACT Lakes Act.

#### Section 19 – Mooring offences

This section sets out the offences for mooring without a mooring permit.

Subsection 19(1) enables an offence of strict liability for mooring a boat on a lake without a mooring permit. A person found guilty of this offence is liable for a penalty of 38 penalty units.

Subsection 19(2) enables an offence of strict liability for a mooring permit holder who moors a boat on a lake at a place that is not a prescribed mooring area. A person found guilty of this offence is liable for a penalty of 23 penalty units. This does not apply if the mooring is

authorised by a regulated activity permit, as per subsection 19(3). A note to the subsection places an evidential burden on the defendant.

Subsection 19(4) enables an offence of strict liability for a mooring permit holder who moors a boat in a prescribed mooring area to something other than a buoy anchored, a wharf or jetty erected, in accordance with an approval given by the Minister under section 16. A person found guilty of this offence is liable for a penalty of 4 penalty units.

Subsection 19(5) enables an offence of strict liability for a mooring permit holder who moors a boat in a prescribed mooring area and does not comply with the condition on their mooring permit. A person found guilty of this offence is liable for a penalty of 4 penalty units.

### Section 20 – Speed limits

This section allows the rules to prescribe the speed limit for operating a boat on a lake. The paragraphs under subsection 20(2) outline what the rules may prescribe including a different speed limit for different parts of a lake; a different speed limit for different classes of boat; and a different speed limit for different circumstances of operation.

Subsection 20(3) enables an offence of strict liability for operating a boat on a place in a lake at a speed greater than the allowed speed limit of the boat in that place. A person found guilty of this offence is liable for a penalty of 15 penalty units. This does not apply if operating the boat at that speed is authorised by a regulated activity permit. A note to subsection 20(4) places an evidential burden on the defendant.

This section is based on section 20 of the ACT Lakes Act.

### Section 21 – Restrictions on kinds of boats

This section allows the rules to prescribe what kinds of boats, and for what purpose, can operate on all or part of a lake.

Subsection 21(2) enables an offence of strict liability for operating a kind of boat on a part of the lake that is in contravention of the rules. A person found guilty of these offences is liable for a penalty of 15 penalty units.

Subsection 21(3) enables an offence of strict liability for operating a boat on a lake where the rules prescribe purposes for operating a boat of that kind on the lake, or on the part of the lake where the person is operating the boat, and the boat is not operated for a purpose prescribed by the rules. A person found guilty of this offence is liable for a penalty of 15 penalty units.

Subsection 21(4) provides that subsections (2) and (3) do not apply if operating the boat is authorised by a regulated activity permit. A note to subsection 21(4) places an evidential burden on the defendant.

This section is based on section 21 of the ACT Lakes Act.

### Section 22 – Signs

Subsection 22(1) gives the Minister power to give information or warning to people using the lake area by installing a sign in a lake area. This information may relate to whether the area is a prescribed area for a specific use, any prescribed speed limits and any restrictions on kinds of boat that may use wharf or jetty, or restrictions on kinds of boats allowed. This section is based on section 14 of the ACT Lakes Act.

Subsection 22(2) enables an offence of strict liability for a person (other than the Minister or a person authorised by the Minister) who interferes with, changes or removes a sign installed



under subsection (1). A person found guilty of this offence is liable for a penalty of 4 penalty units. This section is based on section 17 of the ACT Lakes Act.

### **Division 3—Closed areas**

#### Section 23 – Closure of lake area for safety, maintenance etc.

Subsection 23(1) gives the Minister the power to temporarily close a lake area or part of a lake area by publishing a notice on the NCA’s website.

Subsection 23(2) provides that the Minister should only exercise this power if they are satisfied by at least one of the circumstances set out in paragraphs (a) to (e).

Subsection 23(3) states that the Minister must, at least 5 business days before the area is to be closed, publish a notice about the proposal to close the area on the NCA’s website. However, subsection 23(4) affirms that this does not apply in urgent circumstances.

Subsection 23(5) allows the Minister to cause a boundary of a closed area to be marked by such means as the Minister thinks necessary.

Subsection 23(6) enables an offence of strict liability for entering or remaining in an area that is closed under subsection where an inspector has told the person that the area is a closed area and the person must not enter, or remain in, the area. A person found guilty of this offence is liable for a penalty of 38 penalty units.

#### Subsection 24 – Closing parts of lake area for events

Subsection 24(1) gives the Minister the power to, by notice published on the NCA’s website, close a part of a lake area for a period for the conduct of an event by an entity.

Subsection 24(2) states that the Minister must, at least 5 business days before the area is to be closed, publish a notice about the proposal to close the area on the NCA’s website that specifies the area to be closed, the period of closure, the event to be conducted and the entity that is to conduct the event.

Subsection 24(3) enables an offence of strict liability for entering or remaining in an area that is closed under subsection (1) where an inspector has told the person that the area is a closed area and the person must not enter, or remain in, the area. A person found guilty of this offence is liable for a penalty of 38 penalty units.

This section is based on section 23 of the ACT Lakes Act.

#### Section 25 – Access to leased or occupied land

This section provides that the Minister must not close a part of a lake area under section 23 or 24 that provides access to land: held under lease from the Commonwealth; occupied with the authority of the Australian Capital Territory or the Commonwealth; or under a law in force in the Australian Capital Territory.

### **Division 4—Power boats**

#### Section 26 – Restrictions—power boats

Subsection 26(1) enables an offence of strict liability for operating a power boat on a lake without authorisation under section 27. Section 26(2) enables an offence of strict liability for the owner of a power boat who allows someone else to operate a power boat who is not

authorised to do so under section 27. A person found guilty of these offences is liable for a penalty of 38 penalty units.

Subsection 26(3) enables an offence for being a passenger on a power boat on a lake where the operator of the boat is not authorized to do so under section 27 and the passenger knows the other person is not allowed to operate the boat. A person found guilty of these offences is liable for a penalty of 8 penalty units.

#### Section 27 – Authorisation to use power boats

Subsection 27(1) provides that a person can make a written application to the Minister to operate a domestic commercial vessel, or any other power boat for a stated purpose, on a lake. A note to the subsection states that a fee may be prescribed for this application and refers to section 155.

Subsection 27(2) provides that a sports club can make a written application to the Minister for authorisation to operate a power boat on a lake in connection with training for a competition in an aquatic sport. A note to the subsection states that a fee may be prescribed for this application and refers to section 155.

Subsection 27(3) provides that the Minister may impose conditions to an authorisation made under subsections 27(1) and 27(2). Subsection 27(4) states that a person or sports club authorised under subsection 27(3) can make a written application to have a condition of the authorisation varied or revoked. Subsection 27(5) provides that the Minister can vary, revoke or impose further conditions on an authorisation at any time by notice in writing.

Subsection 27(6) provides that the Minister can revoke an authorisation by a notice in writing if a person or sports club fails to comply with a provision of this Ordinance or a condition of the authorisation.

Subsection 27(7) states that a notice may be served on a sports club by giving a copy of the notice to a member of the governing body of the club, or by sending it by prepaid post, addressed to the governing body of the club, at the club's last known address.

This section is based on section 29 of the ACT Lakes Act.

#### Section 28 – Operating power boat near swimming area

This section enables an offence of strict liability for operating a power boat in a prescribed swimming area or within 60 metres of a prescribed swimming area. A person found guilty of this offence is liable for a penalty of 23 penalty units.

The offence does not apply if the person is operating the boat to undertake works or maintenance for the Commonwealth or the ACT, or if the operation of the boat is authorised by a regulated activity permit.

A note to the section places an evidential burden on the defendant in relation to the matter in this section.

### **Division 5—Other prohibitions**

#### Section 29 – Anchoring boats at night

Subsection 34(1) provides an offence of strict liability, with a maximum penalty of 38 penalty units, for anchoring a boat on a lake at night. This does not apply if anchoring the boat is authorised by a regulated activity permit. A note to the section places an evidential burden on the defendant.

Subsection 34(3) provides a defence to a prosecution for this offence if the defendant proves that the boat was anchored to allow fishing by a hand-held rod and line, and the defendant or someone else was fishing by a hand-held rod and line for most of the time the boat was anchored. A note to the section places a legal burden on the defendant.

This section is based on section 25 of the ACT Lakes Act.

Subsection 34(4) provides a defence to a prosecution for this offence if the defendant proves that the boat was anchored for the purpose of viewing a fireworks display, and defendant or someone else was on the boat for that purpose when the boat was anchored. A note to the section places a legal burden on the defendant.

### Section 30 – Use of hovercraft prohibited

This section enables an offence, with a maximum penalty of 38 penalty units, for operating a hovercraft in or over a lake area. This does not apply if operating the hovercraft is authorised by a regulated activity permit. A note to the section places an evidential burden on the defendant.

This section is based on section 31 of the ACT Lakes Act, under which the operation of a hovercraft is permitted in or over a lake area subject to the grant of a permit.

### Section 31 – Houseboats prohibited

This section provides an offence of strict liability for using a boat as a houseboat or place of living in a lake area. A person found guilty of this offence is liable for a penalty of 23 penalty units. This does not apply if the use is authorised by a regulated activity permit or is in accordance with an agreement under section 35 in relation to a person undertaking a commercial activity. A note to the section places an evidential burden on the defendant.

This section is based on section 33 of the ACT Lakes Act.

### 32 Camping or caravanning

This section provides that a person commits an offence of strict liability, with a maximum penalty of 23 penalty units, if the person camps or keeps a caravan in a lake area at night. This does not apply if the camping or the keeping of the caravan is authorised by a regulated activity permit or is in accordance with an agreement under section 35 in relation to a person undertaking a commercial activity. A note to the section places an evidential burden on the defendant.

A defendant who wishes to rely on this provision in a proceeding in which this offence is alleged bears an evidential burden in relation to that matter. An evidential burden is defined to mean the burden of adducing or pointing to evidence that suggests a reasonable possibility that some matter exists or does not exist

In particular, a defendant wishing to rely on subsection (2) must point to or adduce some evidence that suggests a reasonable possibility that the camping or keeping a caravan is in accordance with an agreement made under section ^35.

Consistent with the Commonwealth *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide to Framing Offences) it is appropriate for the evidential burden to fall on the defendant to rely upon this subsection because these are matters more likely to be within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove these facts.

Specifically, the question of whether the camping or keeping a caravan is in accordance with a commercial activity approved under section 35 is likely to be a matter within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove this fact.

Subsection 32(2) must also be seen as beneficial for the defendant in placing a limit on the criminal liability otherwise associated with camping or keeping a caravan in a lake area at night. As discussed in the Guide to Framing Offences, an evidential burden (rather than a legal burden of proof) is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden). For the defendant, the evidential burden in relation to a matter means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. For example, in a prosecution under subsection (1), the defendant could produce evidence that the camping or keeping a caravan at night was undertaken as part of a commercial activity, such as a ticketed musical festival, and the prosecutor would then have the burden of proving that these activities were not in accordance with an agreement made under section 35 of the Ordinance.

This section is based on section 34 of the ACT Lakes Act.

#### Section 33 – Waterskiing and other prohibited activities

Subsection 33(1) enables an offence of strict liability for towing another person by a boat on or over the lake (including waterskiing or parasailing from the boat), or wakeboarding or wakesurfing from the boat (including doing so without a rope). A person found guilty of this offence is liable for a penalty of 23 penalty units.

Subsection 33(2) enables an offence of strict liability for being towed by a boat on or over a lake (including waterskiing or parasailing from the boat), or wakeboarding or wakesurfing from a boat (including doing so without a rope). A person found guilty of this offence is liable for a penalty of 23 penalty units.

Subsection 33(3) provides that subsections (1) and (2) do not apply if the person's conduct is authorised by a regulated activity permit.

A note to the section places an evidential burden on the defendant.

#### Section 34 – Commercial activity

This section provides an offence of strict liability for undertaking a commercial activity in a lake area where the activity is not undertaken in accordance with an agreement under section 35, or authorised by a regulated activity permit. A person found guilty of this offence is liable for a penalty of 23 penalty units.

This section is based on section 36 of the ACT Lakes Act.

#### Section 35 – Agreements to undertake commercial activities in lake area

This section provides that the Minister may enter into a written agreement to allow a person to undertake a commercial activity in a lake area.

This section is based on section 35 of the ACT Lakes Act.

### **Division 6—Interference**

#### Section 36 – Interfering with use of waters or land

This section enables an offence, with a maximum penalty of 23 penalty units, for the operation of the boat that interferes with another person's lawful use of the lake area.

### Section 37 – Interfering with other boats

This section provides an offence for causing wash that damages or impacts unreasonably on another boat, while operating a boat. A person found guilty of this offence is liable for a penalty of 23 penalty units.

### Section 38 – Interfering with dredges or immobile boats

This section provides an offence for the operator of a boat who passes a dredge or other boat that is engaged in underwater operations and restricted in its ability to manoeuvre on a side that is not indicated for safe passage. Safe passage is displayed by shapes or lights on one side in accordance with section 69 or 70. A person found guilty of this offence is liable for a penalty of 23 penalty units.

### Section 39 – Interfering with navigation aids

This section enables an offence, with a maximum of 23 penalty units, for securing a boat to a device used for the safety of navigation that is in or on a lake, for example a beacon or a marine mark.

### Section 40 – Interfering with equipment on boats

This section provides that it is an offence to sever, detach or untie any rope, cable, chain or other means by which a boat is secured on a lake without authorisation from the operator or owner of the boat. A person found guilty of this offence is liable for a penalty of 23 penalty units.

### Section 41 – Interfering with safety equipment

This section provides that it is an offence to untie or detach any safety equipment stored in a lake area for a purpose other than securing the safety of a person, preventing the loss of, or damage to, property; or maintenance or replacement of the equipment. A person found guilty of this offence is liable for a penalty of 23 penalty units.

## **Division 7—Admission charges**

### Section 42 – Power for Delegate for Lakes to charge for admission

This section gives the Minister the power to authorise the Delegate for Lakes to charge for admission to a lake area or a part of a lake area during a period and specify the amount of the admission charge. Subsection 42(2) provides that the Delegate for Lakes may exclude a person who does not pay the relevant admission charge.

This section is based on section 37 of the ACT Lakes Act.

### Section 43 – Exclusive right of occupation and use

Subsection 43(1) provides that the Minister may, in writing and with conditions, grant a person the exclusive right to occupy and use a part of a lake area for a set period and purpose.

Subsection 43(2) provides that, subject to a maximum amount determined by the Minister, the person may charge for admission to that part of the lake area.

Subsection 43(3) provides that if the Minister grants exclusive right of occupation, the person may exclude any person from that part of the lake during that period for which the right is granted, and may exclude any other person who does not pay the admission charge.

This section is based on section 37 of the ACT Lakes Act.

## **Division 8—Exemptions**

Division 8 allows the Minister to make certain exemptions and declarations by notifiable instrument, rather than by legislative instrument. These determinations do not alter the content of the law, but rather apply the law to particular individuals and portions of National Land. Due to their administrative rather than legislative character, the nomination of these determinations as notifiable instruments does not create a substantive exemption from the requirements of the Legislation Act.

### Section 44 – Exemption by Minister

Subsection 44(1) gives the Minister the power to, on application in writing and by notifiable instrument, exempt a person or boat from a provision of this Part. Subsection 44(2) provides that an exemption may be given subject to conditions.

Subsection 44(3) restricts the Minister from exempting a person or boat unless the Minister is satisfied that the exemption is in the public interest, will not jeopardise the safety of a boat or a person on board a boat and will not compromise the conduct of a safety investigation.

Subsection 44(4) provides that, if the Minister is satisfied that an exemption will meet the requirements of subsection (3) only if the exemption is subject to conditions, the Minister must only grant the exemption subject to those conditions.

### Section 45 – Breaching condition of exemption

This section provides it in an offence of strict liability, with a maximum penalty of 38 penalty units, to fail to comply with a condition of an exemption from a provision of this Part.

## **Part 4—Safety**

### **Division 1—Simplified outline of this Part**

#### Section 46 – Simplified outline of this Part

This section provides a simplified outline of this part.

### **Division 2—Safe operation of boats**

#### Section 47 – Operating unsafe boat

This section provides that a person commits an offence, with a maximum penalty of imprisonment for 6 months, or 38 penalty units, or both, if the person operates an unsafe boat on a lake. This is consistent with the penalty for the equivalent offence set out in section 38 of the ACT Lakes Act.

#### Section 48 – Reckless or negligent operation of boats

This section provides that a person commits an offence if the person recklessly or negligently operates a boat on a lake, and the operation gives rise to a danger of harm, death or damage to property. A person found guilty of this offence is liable for a penalty of imprisonment for 6 months, or 38 penalty units, or both. This is consistent with the penalty for the equivalent offence set out in section 39 of the ACT Lakes Act.

#### Section 49 – Exceeding power rating for boat

Subsection 49(1) provides an offence for operating a boat with a motor that exceeds the appropriate power rating of that boat.

Subsection 49(2) defines the *appropriate power rating*.

### Section 50 – Minimum distance requirements for power boats

Subsection 50(1) provides that it is an offence to operate a boat on a lake at a speed of 10 knots or more when the boat is less than 60 metres from a person on or in the lake or another boat (other than a power boat or a boat that is moored or anchored). A person found guilty of this offence is liable for a penalty of 23 penalty units.

Subsection 50(2) provides a defence to prosecution for this offence if the defendant proves that it was not possible for the boat to be 60 metres or more from the person or other boat, and the defendant operated the boat at a safe distance from the person or other boat. The defendant will bear a legal burden here.

Subsection 50(3) provides that it is an offence to operate a boat on a lake at a speed of 10 knots or more when less than 30 metres from a power boat, a boat that is moored or anchored, or any land, structure or other thing. A person found guilty of this offence is liable for a penalty of 15 penalty units.

Subsection 50(4) provides a defence to a prosecution if the defendant proves that it was not possible for the boat to be 30 metres or more from the other boat, land, structure or other thing and the defendant operated the boat at a safe distance from the other boat, land, structure or other thing. The defendant will bear a legal burden here.

Subsection 50(5) defines *safe distance* for this section.

### Section 51 – Dangerous operation of boat

This section provides an offence, with a maximum penalty of 23 penalty units, for operating a boat on a lake at a speed that is dangerous to the public, or in any other way that is dangerous to the public.

### Section 52 – Unsafe towing or pushing of boat or object

This section enables three respective offences, with a maximum penalty of 23 penalty units each, to operate a boat towing or pushing another boat or object where the other boat or object is not secured to the boat, the visibility from the boat is obscured by the other boat or object, and there is no other person who can observe and provide safety instructions to the person operating the boat.

## **Division 3—Right of way rules**

### **Subdivision A—General**

#### Section 53 – Keeping out of the way and keeping course

This section provides what is required of a boat to *keep out of the way* of another boat, and to *keep its course*, respectively.

Notes to this section state that this may constitute an offence under section 89, for failure to follow a direction of an inspector, and section 51 for endangering the public.

#### Section 54 – Exception for boat races

This section states that this Division does not apply boats taking part in a boat race and, where there is conflict with a rule approved for the race by the entity controlling the race and this Division, the approved rule will prevail.

### **Subdivision B—Specific right of way rules**

#### Section 55 – Sailing boats

This section outlines who has right of way when sail boats approach each other on a lake.

#### Section 56 – Power boats

This section outlines the correct right of way when power boats approach each other on a lake.

#### Section 57 – Power boats and sailing boats

This section outlines the correct right of way when a power boat approaches a sail boat on a lake.

#### Section 58 – Overtaking

This section asserts what should happen when a boat is overtaking another boat and defines *overtaking*.

#### Section 59 – Navigating channels

This section states that a boat must not exit a marked channel or fairway other than as shown by the markings.

### **Division 4—Conduct of people**

#### Section 60 – Dangerous conduct

This section provides that it is an offence, with a maximum penalty of 23 penalty units, when on a boat on a lake to do something that is dangerous to the public.

#### Section 61 – Conduct on power boats

This section creates offences for certain dangerous conduct on power boats.

When a person on a power boat being propelled by its engine on a lake extends a part of their body outside the perimeter of the boat, subsections 61(1) and (2) impose an offence of strict liability on the operator of the boat and the person who has done so, respectively. A person found guilty of these offences is liable for a penalty of 15 penalty units.

Subsection 61(3) provides that it is an offence to operate a power boat being propelled by its engine on a lake where another person is on the bow of the power boat in a position that puts that person at an increased risk of falling overboard. Subsection 61(4) provides an offence for the person on the bow. A person found guilty of these offences is liable for a penalty of 15 penalty units, respectively.

Subsection 61(5) provides that it is an offence of strict liability to operate a power boat being propelled by its engine on a lake where another person is on, or hanging onto a swim ladder or swim platform attached to a powerboat or the transom of the power boat. Subsection 61(6) provides an offence for the person who is on, or hanging onto, the structure. A person found guilty of these offences is liable for a penalty of 15 penalty units, respectively.

Subsections (7) and (8) exempts people from subsections (1) to (6) who are anchoring, mooring or casting off, fishing, or securing the safety of a person or property, or have a relevant regulated activity permit. A note to the section places an evidential burden on the defendant.

#### Section 62 – Passengers on domestic commercial vessels

This section provides offences relating to the conduct of passengers on domestic commercial vessels. This includes obstructing someone engaged in the navigation or operation of the vessel; damaging a vessel or equipment on the vessel; using a part of the vessel or equipment



on the vessel for a purpose for which it was not intended; interfering with a safety sign or a plate fixed to the boat indicating the boat's capability and capacity; being on a roof, awning or mast of the vessel; or entering a prohibited area. The penalty for each of these offences is 23 penalty units.

This section is based on Rule 12 of the International Regulations for Preventing Collisions at Sea.

## **Division 5—Lights and shapes**

This Division provides for the various lighting requirements and sets out the different requirements for different types of boats.

### Section 63 – Liability of persons on boat where no master

This section provides that, where there is no master on a boat, then a reference in this Division to the master of the boat is taken to be a reference to each person who is on the boat. A note to the section provides that an offence provision that ordinarily applies to the master of the boat will apply to each of them. This section places an evidential burden of proof on a defendant. This is appropriate as the matter set out in this Division are peculiarly within the knowledge of the defendant. Further, it would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

### Section 64 – Visible distance of lights

This section outlines the visible distance lighting requirements for boats and provides offences for failure to comply.

Subsection 64(1) provides that it is an offence of strict liability if a boat is showing a light required under this Division and the light is not visible at the required distance. The maximum penalty for this offence is 15 penalty units. Subsection 64(2) provides the required distance for an all-round light or stern light.

Subsection 64(3) provides the distance required for a masthead light.

Subsection 64(4) provides the distance required for a sidelight.

### Section 65 – Lights for power boats

This section enables an offence of strict liability, with a maximum penalty of 15 penalty units, for the master of a power boat if the boat is under way on a lake at night or when visibility on the lake is restricted because of a weather event and the boat does not show the required lights. The subsections set out the light requirements for various lengths and speeds of power boats.

### Section 66 – Lights for sailing boats and boats being rowed

This section outlines the lighting requirements for sail boats and boats being rowed as determined by length and provides offences for failure to comply. There is a total of 4 offences and the maximum penalty for each under is 15 penalty units.

### Section 67 – Lights for rowing boats, dragon boats, kayaks and canoes

This section outlines the lighting requirements for rowing boats, dragon boats, kayaks and canoes and provides two offences for failure to comply. The penalty for offences under this section is 15 penalty units.

### Section 68 – Lights for boats at anchor

This section outlines the lighting requirements for a boat at anchor on a lake at night or when visibility is restricted because of a weather event, and provides an offence of 15 penalty units for failure to comply.

Subsection 68(2) provides that this does not apply if the boat is less than 7 metres in length, and is not in or near a narrow channel, fairway or anchorage, and is not in an area where other boats normally navigate. A note to the section places an evidential burden on the defendant.

#### Section 69 – Lights on certain boats restricted in their ability to manoeuvre

Subsection 69(1) enables an offence for the master of a boat that is at least 12 metres in length engaged in underwater operations (including dredging operations and diving operations) that does not comply with relevant lighting requirements when on a lake at night or when visibility is restricted because of a weather event. A person found guilty of these offences is liable for a penalty of 23 penalty units.

Subsection 69(2) outlines circumstances to which the offence would not apply. A note to the section places an evidential burden on the defendant.

#### Section 70 – Shapes on certain boats restricted in their ability to manoeuvre

Subsection 70(1) imposes an offence on the master of a boat that is at least 12 metres in length commits an offence if engaged in underwater operations (including dredging operations and diving operations) that does not show relevant shape requirements when restricted to move while on a lake at night or when visibility is restricted because of a weather event. A person found guilty of these offences is liable for a penalty of 23 penalty units.

Subsection 70(2) outlines circumstances to which the offence would not apply. A note to the section places an evidential burden on the defendant.

#### Section 71 – Emergency lights

This section outlines the emergency light requirements for boats under way or anchored on a lake at night or when visibility is restricted because of a weather event, and provides offences of maximum 23 penalty units for non-compliance.

Subsection 71(3) outlines circumstances to which the offences would not apply. A note to the section places an evidential burden on the defendant.

### **Division 6—Unnecessary use of lights and signals**

#### Section 72 – Unnecessary use of distress signals

This section provides that there are respective offences, when in a lake area or on a boat on a lake, to use distress signalling equipment, or makes a distress signal, where there is no distress. A person found guilty of these offences is liable for a penalty of 23 penalty units each.

#### Section 73 – Unnecessary use of warning or guide lights and signals

This section provides offences, when operating or on a boat on a lake or in a lake area, for making a visual or sound signal used as a warning or guide to boats without adequate reason. A person found guilty of these offences is liable for a penalty of 23 penalty units each.

#### Section 74 – Unauthorised use of emergency patrol signals

This section provides an offence, with a maximum penalty of 23 penalty units, for displaying an emergency patrol signal while operating a boat.

Subsection 74(2) outlines circumstances to which this offence would not apply. A note to the section places an evidential burden on the defendant.

## **Division 7—Lifejackets for recreational boats**

### Section 75 – Children under 12 years

Subsection (1) provides that a person commits an offence of strict liability, with a maximum penalty of imprisonment for 23 penalty units, if the person operates a recreational boat on a lake, less than 8 metres in length and under way, and a child under 12 years old is in an open area on the boat and is not wearing an appropriate lifejacket.

Subsection (2) of this offence sets out a defence if the defendant proves that, at the time of the alleged offence, that the person took all reasonable steps to ensure that the child was wearing an appropriate lifejacket. A defendant bears a legal burden in relation to subsection (2) of this offence.

This section is based on section 42 of the ACT Lakes Act.

### Section 76 – Wearing a lifejacket on certain recreational boats

This section provides that a person commits a strict liability offence, with a maximum penalty 23 penalty units, if either the person is on a recreational boat to which this section applies and the person is not wearing an appropriate lifejacket (subsection (1)), or the person is operating a recreational boat and another person on the boat is not wearing an appropriate lifejacket (subsection (2)). These two offences apply to a recreational boat which is either an off-the-shore boat, or that is less than 4.8 metres in length and is not a kiteboard, paddleboard, sailboard or surfboard (subsection (3)).

This section is based on section 43 of the ACT Lakes Act.

### Section 77 – Direction by master to wear lifejacket on boat

This section provides that a person commits a strict liability offence, with a maximum penalty 23 penalty units, if the person is on a recreational boat on a lake and the person fails to comply with a direction of the master of the boat to wear an appropriate lifejacket.

This section is based on section 44 of the ACT Lakes Act.

A note to the section indicates there is a possible defence to this offence in section 78.

### Section 78 – Failure to wear lifejackets—defence

This section provides that it is a defence to a prosecution of a person for an offence against subsection 76(2) or section 77 if, at the time of the alleged offence, the person proves that the person was not operating the boat and there was no available appropriate lifejacket on the boat when the person was required to wear an appropriate lifejacket. A defendant bears a legal burden in relation to this defence.

This section is based on section 45 of the ACT Lakes Act.

### Section 79 – Owner and operator of boat to ensure lifejackets are available

This section sets out the responsibilities of owners and operators of recreational boats on a lake in relation to lifejackets, and creates an offence.

If a person owns or operates a recreational boat on a lake (that is not a canoe, kayak, kiteboard, paddleboard, sailboard or surfboard) (subsection (1)), they must ensure that the boat carries the required number of lifejackets (see subsection (4)), which are appropriate for the intended wearers, in good condition, properly maintained, and are easily accessible and clearly marked (subsection (2)). Failing to comply with these requirements is a strict liability

offence with a maximum penalty of 23 penalty units (subsection (3)). Strict liability is appropriate in these circumstances as the offences do not contain a fault element and are regulatory in nature.

This section is based on section 47 of the ACT Lakes Act and section 7 of the ACT Lakes Regulation.

#### Section 80 – Owner and operator of boat to provide information about lifejackets

This section empowers an inspector to give directions to a person who is the owner or operator of a recreational boat (other than a canoe, kayak, kiteboard, paddleboard, sailboard or surfboard (subsection (1)) that is operating on a lake to provide the inspector with information relating to the maintenance, condition or storage of lifejackets for the boat (subsection (2)). It is a strict liability offence, with a maximum penalty of 23 penalty units, to fail to comply with a direction under this section within 24 hours of the direction being given to the person (subsection (3)). Strict liability is appropriate in these circumstances as the offences do not contain a fault element and are regulatory in nature.

This section is based on section 48 of the ACT Lakes Act.

### **Division 8—Other safety equipment for recreational boats**

#### Section 81 – Application of this Division

Subsection 81(1) provides that this division does not apply to a recreational boat that is a canoe, kayak, kiteboard, paddleboard, sailboard or surfboard.

Subsection 81(2) provides that this division does not apply in relation to a recreational boat which is ordinarily operated in a State or the Northern Territory and which complies with the requirements for safety equipment that apply to the boat in the State or the Northern Territory and the boat has been in the ACT for less than 90 consecutive days.

This section is based on sections 49 and 50 of the ACT Lakes Act.

#### Section 82 – Owner and operator of boat to ensure safety equipment available

This section sets out the responsibilities of owners and operators of recreational boats on a lake in relation to safety equipment, and creates an offence.

If a person owns or operates a recreational boat on a lake, they must ensure that the boat carries the required safety equipment, and that the equipment complies with the required standards, is in good condition, properly maintained, replaced when the manufacturer's expiry date is reached, and is easily accessible (subsection (1)). Failing to comply with these requirements is a strict liability offence with a maximum penalty of 23 penalty units (subsection (2)). Strict liability is appropriate in these circumstances as the offences do not contain a fault element and are regulatory in nature.

The details of the relevant required safety equipment for recreational boats is dealt with in section 84. The details of the required standards for safety equipment is dealt with in section 85.

This section is based on section 51 of the ACT Lakes Act.

#### Section 83 – Owner and operator of boat to provide information about safety equipment

This section empowers an inspector to give directions to a person who is the owner or operator of a recreational boat that is operating on a lake to provide the inspector with information relating to the maintenance, condition or storage of safety equipment for the boat (subsection (1)). It is a strict liability offence, with a maximum penalty of 23 penalty units, to

fail to comply with a direction under this section within 24 hours of the direction being given to the person (subsection (2)). Strict liability is appropriate in these circumstances as the offences do not contain a fault element and are regulatory in nature.

This section is based on section 52 of the ACT Lakes Act.

#### Section 84 – Required safety equipment for recreational boats

The table in this section details the required safety equipment for recreational boats, including a small tender and a dragon boat that meets the dragon boat operating requirements.

This section is based on section 9 of the ACT Lakes Regulation.

#### Section 85 – Required standards for safety equipment

This section details the required standards for safety equipment, including anchors, bailers, buckets and fire buckets, bilge bumps, fire extinguishers, paddles and oars and waterproof torches.

This section is based on division 2.4 of the ACT Lakes Regulation.

### **Division 9—Hatches and exterior doors on recreational boats**

#### Section 86 – Application of this Division

This section asserts that this Division does not apply to a recreational boats ordinarily operated in a State or the Northern Territory, where the relevant requirements for safety equipment that apply to the boat are met and the boat has been in the ACT for less than 90 consecutive days.

#### Section 87 – Construction

This section concerns recreational boats with hulls constructed on or after 1 January 1991. The effect of this section is to create offences concerning boats that have a hatch or exterior door that can be used to enter or leave the boat, but cannot be opened from both the outside and the inside of the boat.

It is an offence for the owner of a boat to operate the boat (subsection (2)), for a person to operate the boat (subsection (3)), and to supply the recreational boat, knowing that the boat will be, or is likely to be, used for recreational purposes on a lake. A person found guilty of these offences is liable for a penalty of 23 penalty units each.

#### Section 88 – Locking hatches and exterior doors

This section creates an offence for a person who operates a recreational boat on a lake with a hatch or exterior door on the boat that can be used to enter or leave the boat locked while the boat is under way, when it is reasonably practicable for it to be unlocked. A person found guilty of these offences is liable for a penalty of 23 penalty units each.

### **Division 10—Safety directions**

#### Section 89 – Safe use of lake areas or associated works

It is a strict liability offence, with a maximum penalty of 23 penalty units, to fail to comply with a direction under this section where the person is given a direction by an inspector, and at that time the inspector produces their identity card and warns the person that failing to comply with the direction is an offence (subsection (2)). Strict liability is appropriate in these circumstances as the offences do not contain a fault element and are regulatory in nature.

This offence of failing to comply with a direction under this section applies to the person even if complying with the direction is an offence against another provision in the Act (subsection (3)). However, it is a defence to a prosecution for an offence against the Act if the person was complying with a direction given under this section at the time the offence was committed. A defendant bears a legal burden in relation to this defence.

This section is based on section 54 of the ACT Lakes Act.

#### Section 90 – Passengers on domestic commercial vessels

This Section provides that a person commits an offence of strict liability, with a maximum of 23 penalty units if a person is given a direction by a designated person (as defined in subsections 90(1), 90(2) and 90(3)) under this section and the person fails to comply with this direction. Subsection 90(4) who the designated person cannot give a direction to.

### **Division 11 – Obstructions**

#### Section 91 – Lighting and marking obstruction to navigation

Subsection 91(1) gives an inspector the power to direct the owner of an obstruction to navigation to mark or light the obstruction.

The paragraphs to subsection 91(2) outline the requirements for this direction, including that it must be written, state a time for completion, how the lighting or marking is to be carried out, and a period it must be maintained.

Subsection 91(3) provides that is an offence of strict liability, with a maximum penalty of 23 penalty units, to fail to comply with a direction under subsection (1).

Subsection 91(4) gives power to an inspector to take action to mark or light an obstruction if the owner fails to do so within the time required by a direction. Subsection 91(5) states that the Commonwealth can recover reasonable costs or expenses of causing the obstruction to be marked or lit from the owner by action in a court of competent jurisdiction as a debt due to the Commonwealth.

#### Section 92 – Removing and disposing of obstruction to navigation

Subsection 92(1) gives an inspector the power to direct the owner of an obstruction to navigation to remove the obstruction. The paragraphs to this subsection outline the requirements for this direction.

Subsection 92(2) provides that is an offence of strict liability, with a maximum penalty of 23 penalty units, to fail to comply with a direction under subsection (1).

Subsection 92(3) gives an inspector the power to remove an obstruction to navigation in any way they consider appropriate regardless of whether a direction has been given. Subsection 92(3) provides that this removal may include destruction or authorising another entity to remove the obstruction.

Subsection 92(5) states that an inspector removes an obstruction to navigation under subsection (3), the Commonwealth may recover the reasonable costs and expenses from the owner of the obstruction by action in a court of competent jurisdiction as a debt due to the Commonwealth.

Subsection 92(6) provides that if an obstruction to navigation is removed under subsection (4) other than by its destruction, an inspector may dispose of the removed obstruction, in any way the inspector considers appropriate. The paragraphs to this subsection provide the circumstances this is allowed.

### Section 93 – Operator of boat must warn of obstruction or danger

This section provides that it is an offence to operate a boat on a lake if any equipment associated with the boat is a potential obstruction to navigation or a danger to other boats and the person does not give other operators of boats on the lake adequate warning of the potential obstruction or danger. A person found guilty of these offences is liable for a penalty of 23 penalty units.

### Section 94 – Obstructing fairways and channels

This section provides that it is an offence, with a maximum penalty of 23 penalty units, to obstruct, or restrict or impede access to, a fairway or channel while operating a boat on a lake. Subsection 94(2) provides that this does not apply if the conduct is authorised by a regulated activity permit. A note to the section places an evidential burden for this on the defendant.

### Section 95 – Obstructing wharves and jetties etc

This section provides that it is an offence to, while operating a boat on a lake (other than launching, landing or mooring the boat), obstruct the approach to or proper use of a wharf, jetty, boatshed, slip, launching ramp, courtesy mooring or emergency mooring in the lake area. A person found guilty of these offences is liable for a penalty of 23 penalty units.

### Section 96 – Obstructing boats

Subsection 96(1) provides that a person commits an offence, with a maximum penalty of 23 penalty units, if they obstruct or impede the launching, securing or removal of a boat on a lake.

Subsection 96(2) provides that it is an offence, with a maximum penalty of 23 penalty units to obstructs or impedes the safe navigation of a boat on a lake.

### Section 97 – Obstructing passengers

This section provides that a person commits an offence, with a maximum penalty of 23 penalty units, if they obstruct or impede passengers from embarking on or disembarking from a boat on a lake.

### Section 98 – Obstructing loading or unloading cargo

This section enables an offence, with a maximum penalty of 23 penalty units, for obstructing or impeding the loading of cargo onto, or unloading of cargo from, a boat on a lake.

### Section 99 – Causing obstruction, nuisance or damage with objects

Subsection 99(1) provides it in an offence, with a maximum penalty of 23 penalty units, to do anything that causes an object to obstruct a boat from navigating a lake, for example throwing or extending something over the lake.

Subsection 99(2) provides it in an offence, with a maximum penalty of 23 penalty units, to do anything that would result in an object causing a nuisance or danger to a person.

Subsection 99(3) provides it in an offence, with a maximum penalty of 23 penalty units, to do anything that would result in an object to cause damage to property.

### Section 100 – Moving vehicles and boats in lake area

This Section provides for situations in which an inspector a vehicle or boat in the lake may direct an owner or person in charge of the vehicle or boat to move it, assist with moving, organise the move or removal (subsections 100(1) and 100(2)) and that the Commonwealth may recover the costs of moving or removing from the owner by action in a court of competent jurisdiction as a debt due to the Commonwealth and the inspector or person

assisting the inspector is not liable for damage that may be caused by the inspector or person assisting (subsection 100(3)).

## **Part 5 Drug and alcohol offences**

### Section 101 – Simplified outline of this Part

This section provides an outline of this Part.

### Section 102 – Prescribed concentration of alcohol in blood or breath

Section 102 sets out the offence, penalties and evidentiary requirements for prosecuting the offence of operating a boat on the lake while under the influence of alcohol.

Subsection 102(1) provides that a person commits an offence of strict liability if they operate a boat on the lake and register the prescribed concentration of alcohol in their blood or breath during the relevant period.

A note to subsection 102(1) provides that the “relevant period” is defined in section 5.

Subsection 102(2) provides that a person convicted of the offence against subsection 102(1) is punishable by a maximum penalty of imprisonment for 12 months and 15 penalty units,

A table at subsection 102(2) sets out the penalties that apply for specified levels of blood or breath alcohol concentrations if the court convicts a person of this offence.

Subsection 102(3) provides the definition of “prescribed concentration” of alcohol for certain categories of persons set out in paragraphs (a) to (c).

Subsection 102(4) provides that in prosecuting a person for an offence under subsection 102(1), evidence may be given of their blood or breath alcohol concentration based on an analysis of a sample carried out in accordance with the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) as it applies under section 106. Paragraph (a) sets out the requirements for the analysis of a blood sample and paragraph (b) sets out the requirements for a breath sample.

The penalties in this section are consistent with the penalty for the equivalent offences set out in sections 63 – 66 of the ACT Lakes Act.

### Section 103 – Defence—lower concentration of alcohol from allowable source

This section sets out the requirements for a defence to a prosecution under subsection 102(1) for certain categories of person who register a very low blood or breath alcohol concentration.

Subsection 103(1) sets out the circumstances in which this section applies. Paragraph (a) provides that the person must have been charged with an offence against section 102(1). Paragraph (b) describes the categories of person to whom this section applies. Paragraph (c) describes the level the person’s blood or breath alcohol concentration must be below.

A note to subsection 103(1) provides that the “relevant period” is defined in section 5.

Subsection 103(2) provides the basis for a defence if the defendant can prove their blood or breath alcohol concentration was caused by the factors set out in paragraphs (a) and (b).

An example is provided under subsection 103(2) of such a circumstance.

A note to subsection 103(2) provides that the defendant has the legal burden in relation to this subsection.

### Section 104 – Prescribed drug in oral fluid or blood



Section 104 sets out the offence, penalties and evidentiary requirements for prosecuting the offence of operating a boat on the lake while under the influence of a prescribed drug.

Subsection 104(1) provides that a person commits an offence of strict liability, with a maximum penalty of 3 months imprisonment and 20 penalty units, if they operate a boat on the lake and register a prescribed drug in their oral fluid or blood during the relevant period.

A note to subsection 104(1) provides that the “relevant period” is defined in section 5.

Subsection 104(2) provides that a person cannot rely on a defence of mistake of fact about the identity of the prescribed drug if they make the claims set out in paragraphs (a)-(b), being that they have considered, but were mistaken about the identity of the drug, and still believed it was a controlled drug within the meaning of section 301.1 of the *Criminal Code*.

Subsection 104(3) provides that in prosecuting a person for an offence under subsection 104(1), evidence may be given of the presence of a prescribed drug in their oral fluid or blood based on an analysis of a sample carried out in accordance with the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) as it applies under section 106 that indicates a prescribed drug is present in the sample. Paragraph (a) sets out the requirements for the analysis of an oral fluid sample and paragraph (b) sets out the requirements for a blood sample.

The penalties in this section are consistent with the penalty for the equivalent offences set out in section 67 of the ACT Lakes Act.

#### Section 105 – Under the influence of alcohol or drugs

Section 105 sets out the offence and penalties for operating a boat on the lake while under the influence of alcohol or drugs and how the charges may apply.

Subsection 105(1) provides that a person commits an offence, with a maximum penalty of 12 months imprisonment and 23 penalty units, if they operate a boat on the lake while under the influence of alcohol or a drug that renders them incapable of properly controlling the boat.

Subsection 105(2) describes how a person may be charged with the offence set out at 105(1). Paragraph (a) sets out what the charge may allege and paragraph (b) sets out how that charge may be proven.

A note to subsection 105(2) notes that a police officer with a screening device may not arrest a person under this section unless certain requirements are met and refers to section 106 which applies section 45 of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT).

The penalties in this section are consistent with the penalty for the equivalent offences set out in section 67 of the ACT Lakes Act.

#### Section 106 – Application of *Road Transport (Alcohol and Drugs) Act 1977* (ACT)

Section 106 describes how the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) applies in the context of this Ordinance.

Subsection 106(1) applies provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) mentioned in subsection 106(2) to persons operating a boat on the lake in the manner set out in paragraphs (a)-(j). Paragraphs (a)-(f) provide that references to roads, driving a vehicle and vehicles apply to the lake, operating a boat and boats. Paragraphs (g)-(j) clarify how references to the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) and the *Director of Public Prosecutions Act 1983* must be interpreted in relation to this Ordinance.

Subsection 106(2) sets out how the provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) provided in paragraphs (a)-(f) apply to a person who operates a boat on the lake.

Subsection 106(3) provides that an entity with a function under the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) may exercise that function in relation to a person operating a boat on the lake.

An example is provided under subsection 106(3) of entities with functions under the *Road Transport (Alcohol and Drugs) Act 1977* (ACT).

Subsection 106(4) provides that the operation of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) under this section is not restricted by Part 8 of this Ordinance (Enforcement).

A note to subsection 106(4) states that additional powers to collect evidence applied under this section are not constrained by other powers under this Ordinance. The note further specifies this section applies offences from the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) to persons operating boats on the lake.

## **Part 6 – Boating accidents**

### Section 107 – Simplified outline of this Part

This section provides an outline of this Part.

### Section 108 – Obligation to stop

This section provides that the master of a boat commits an offence of strict liability, with a penalty of 23 penalty units, if the boat is involved in a boating accident with another boat or that results in the death or injury of another person and the master fails to stop the boat.

### Section 109 – Obligation to give assistance

This section provides that the master of a boat commits an offence, with a penalty of 38 penalty units, if the boat is involved in a boating accident with another boat or that results in the death or injury of another person and the master negligently fails to provide assistance to an injured person or the damaged boat.

### Section 110 – Obligation to give information when involved in boating accident

This section provides that the master of a boat commits an offence of strict liability, with a penalty of 38 penalty units, if the boat is involved in an accident and the master fails to comply with a request from another party involved in the accident to provide any of the information set out in subparagraphs (b)(i)-(iv).

### Section 111 – Obligation to report boating accidents to the Minister

This section sets out the requirements for reports of boating accidents to be provided to the Minister, and the offence and penalties that apply if this is not done.

Subsection 111(1) provides that the owner or master of the boat must provide a report, containing the details set out in subsection 111(5), to the Minister as soon as practicable after the accident.

Subsection 111(2) provides that the owner or master of a boat does not need to submit a report if the other has already done so.

Subsection 111(3) provides that a report is not required if the boat is a recreational boat and none of the circumstances set out at paragraphs (a)-(c) apply.

Subsection 111(4) provides a person commits an offence of strict liability, with a penalty of 38 penalty units, if they are required to give a report to the Minister and fail to do so.

Subsection 111(5) sets out in paragraphs (a)-(d) the particulars of the accident the report should include.

### Section 112 – Obligation to preserve evidence

This section provides that a person commits an offence, with a penalty of 38 penalty units, if they are the owner or master of a boat that has been involved in an accident and they negligently fail to preserve evidence that may be required to investigate the accident.

An example is provided under this section of types of evidence that may reasonably be required.

## **Part 7 – Safety investigations**

### Section 113 – Simplified outline of this Part

This section provides an outline of this Part.

### Section 114 – Safety investigations

This section sets out provisions providing the Minister with the power to order safety investigations into boating accidents and safety hazards.

Subsection 114(1) provides that the Minister may order an investigation into any of the matters set out in paragraphs (a)-(c).

Subsection 114(2) sets out the purposes of a safety investigation in paragraphs (a)-(b). Paragraph (a) provides investigations may be conducted into boating accidents or other safety concerns. Paragraph (b) provides for investigations to make recommendations to prevent future incidents.

Subsection 114(3) provides that a Minister may order an investigation, regardless of whether the matter is already being investigated or subject to court proceedings.

### Section 115 – Appointment of safety investigators

This section sets out provisions providing the Minister with the power to appoint safety investigators to carry out safety investigations.

Subsection 115(1) provides the Minister with the power to appoint a safety investigator. The appointment must be in writing.

Subsection 115(2) sets out in paragraphs (a)-(b) the categories of persons who may be appointed as safety investigators.

Subsection 115(3) provides that a safety investigator is subject to the Minister's control and direction, except in relation

### Section 116 – People assisting safety investigators

This section provides that a person may assist a safety investigator in the investigation if the conditions set out in paragraphs (a)-(b) are met.

### Section 117 – Conduct of safety investigations

This section sets out provisions for the conduct of safety investigations.

Subsection 117(1) provides that the safety investigation may determine the manner in which the investigation is conducted.

Subsection 117(2) provides that a safety investigation may extend to all relevant matters.

Subsection 117(3) provides that the safety investigator may rely on evidence from any criminal or civil proceedings or coronial or judicial inquiry.

Subsection 117(4) provides that at any time during the investigation, the Minister may discontinue the investigation and require the report to be prepared and submitted.

#### Section 118 – Safety investigator may require people to give information, produce documents or answer questions

This section provides that a safety investigator may issue a notice requiring a person to give information, produce documents or answer questions relevant to the investigation.

Subsection 118(1) provides that the safety investigator may give a written notice to a person they believe has relevant information or documents.

Subsection 118(2) provides the notice may require a person to give information or produce documents relevant to the investigation, or appear before the investigator to answer questions.

Subsection 118(3) sets out what a notice relating to the provision of information or documents must state, listed in paragraphs (a)-(c). This includes the date by which the person must comply, which must be at least 14 days from the date they receive the notice, the way the person must comply and that it is an offence to fail to comply with the notice.

Subsection 118(4) sets out what a notice relating to a requirement to appear before the investigator must state, listed in paragraphs (a)-(b). This includes the time and place the person must attend and that it is an offence to fail to comply with the notice.

Subsection 118(5) provides that the safety investigator may require a person to answer questions and to give answers under oath or affirmation, and orally or in writing.

Subsection 118(6) provides that the safety investigator may administer the oath or affirmation.

Subsection 118(7) provides for a person required to appear before the safety investigator to be paid a reasonable allowance for travel expenses.

Subsection 118(8) provides that a person commits an offence of strict liability, with a penalty of 38 penalty units, if they fail to comply with a notice issued under subsection 118(2).

#### Section 119 – Safety investigation reports

Section 119 sets out the requirements for investigation reports to be prepared by the safety investigator.

Subsection 119(1) requires a safety investigator to prepare an investigation report after completing the investigation or if requested to do so by the Minister under subsection 117(4).

Subsection 119(2) sets out the matters an investigation report must include in paragraphs (a)-(c). This includes findings of fact or, if unable to be established, the investigator's opinion as to the most likely facts, the cause of the accident, and recommendations to prevent a similar incident in the future.

Subsection 119(3) requires the safety investigator to provide a person with a reasonable opportunity to respond to any adverse comment about them that the investigator intends to include in the report.

Subsection 119(4) requires the investigator to submit the report to the Minister.

Subsection 119(5) provides that the investigator may prepare an interim report for the Minister at any time during the investigation.

#### Section 120 – Actions by Minister following safety investigations

Section 120 sets out the actions a Minister may take after receiving a safety investigation report into a boating accident or safety incident and provides the basis on which the Minister may publish all or part of a report.

Subsection 120(1) provides actions the Minister may undertake after receiving the report. Paragraph (a) provides that the Minister can take action to improve safety procedures and paragraph (b) provides that the Minister may recommend criminal or other legal proceedings.

Subsection 120(2) provides that the Minister may conduct further investigations before taking action.

#### Section 121 – Public release of safety investigation reports and recommendations

Section 121 provides the basis on which the Minister to publish safety investigations and recommendations.

Subsection 121(1) provides that a safety investigator may make recommendations to the Minister at any time during the investigation.

Subsection 121(2) provides that the Minister may make the recommendations public.

Subsection 121(3) provides that the Minister may publish all or part of any safety investigation report.

A note to this subsection states that subsections 122(2) and (3) provide authorisation to publish information for the purposes of the *Privacy Act 1988* or other laws.

Subsection 121(4) requires the Minister not to publish all or part of an investigation report if it is likely to prejudice the rights of a person in a related criminal proceeding.

#### Section 122 – Protection from liability

This section provides protection from liability for persons who have provided information in relation to a safety investigation. This section is drafted to exclude civil actions for defamation or a breach of confidence, and is not designed to exclude judicial review.

Subsection 122(1) sets out the conditions under which this section applies.

Subsection 122(2) precludes civil proceedings being brought against any of the entities listed in paragraphs (a)-(e) in relation to allegations that information provided under subsection 122(1) is defamatory or a breach of confidence.

## **Part 8—Enforcement**

### **Division 1—Introduction**

#### Section 123 – Simplified outline of this Part

This section provides a simplified outline of this part.

#### Section 124 – Powers not to be exercised before identity card shown

The section provides an inspector who is not a police officer must show their identity card when exercising a power under Division 4 (Gathering information) of this Part.

#### Section 125 – People assisting inspectors

This section provides that a person may assist an inspector under this Part if necessary, reasonable and following direction.

## **Division 2—Entry and inspection**

### Section 126 – Entering places of inspection

Subsection 126(1) outlines the requirements for when an inspector may enter a place of inspection. A note to this section provides that a place of inspection includes boarding a boat, and refers to the definition in sections 5 and 6.

Subsection 126(2) provides that an inspector may board a boat in the lake area if they believe an offence against the Ordinance has been committed.

### Section 127 – Producing identity cards

This section provides an inspector who is not a police officer must not remain at a place of inspection under section 126 if they do not produce their identity card, if requested by an occupier.

### Section 128 – Consent to entry

Subsection 128(1) provides an inspector may enter the place of inspection without the occupiers consent to ask the occupier for consent to enter the place under section 126.

Subsection 128(2) provides where an inspector is seeking consent to enter a place of inspection under section 126, the inspector must, if not a police officer, produce their identity card, and explain to the occupier the purpose of the inspection, that anything found and seized may be used as evidence in court, and that consent is allowed to be refused.

Subsection 128(3) states if consent is provided by the occupier, the inspector must obtain written acknowledgement that the occupier understands the information outlined in Subsection 128(2)(b).

The acknowledgement of consent must record the date and time of consent, and the inspector must provide a copy of the acknowledgment of consent to the occupier.

Subsection 128(6) states a court must presume that consent was not provided by an occupier to an inspector under section 126 if the question whether the occupier consented to the entry arises, acknowledgement of consent is not produced in evidence for the entry, and it cannot be proved the occupier consented to entry of the inspector.

### Section 129 – Warrants

This section allows an inspector to apply to a magistrate for a warrant to enter a place of inspection. To obtain a warrant, the inspector must provide the magistrate with information on the oath or affirmation stating why a warrant is being sought. The magistrate may refuse a warrant application until the inspector provides sufficient information.

Subsection 129(4) provides a magistrate may only issue a warrant if satisfied that the thing (relevant evidence) or activity for which the warrant is being issued will be used as evidence of an offence against this Ordinance, and the evidence or activity, will be within or occur within the next 14 days, at the place of inspection.

Subsection 129(5) sets out the details that the warrant must include at paragraphs (a) – (e).

This section is consistent with sections 96 and 97 of the ACT Lakes Act. It is also consistent with similar provisions in the *Commonwealth Regulatory Powers (Standard Provisions) Act 2014*.

### Section 130 – Warrants—applications made other than in person

This section provides that an inspector may make an application for a warrant by telephone, fax, email, radio or other form of communication where it is not possible for the application to be made in person. The inspector must ensure that they have the relevant information needed, including the reason for which the warrant is being sought.

Subsection 130(4) states the magistrate must provide the inspector with a written copy of the warrant immediately if reasonably practicable to do so.

Subsection 130(5) provides where it is not possible for the magistrate to provide a written copy of the warrant to the inspector, the magistrate must tell the inspector the terms of the warrant and the date and time for which the warrant has been issued. The inspector required to complete a form of warrant (the warrant form), including the name of the magistrate, terms of the warrant, and date and time for which the warrant has been issued.

Subsection 130(6) provides the written warrant or properly completed warrant form authorises the inspector to enter and exercise their powers as stated in the warrant issued by the magistrate.

Subsection 130(7) requires the inspector to provide the magistrate with the information at subsection 130(2) which has been sworn and affirmed, and if completed, the warrant form. Subsection 130(8) requires the magistrate to attach this information to the warrant.

Subsection 130(9) enables a court to find an inspector to not be authorised by a warrant under this section if the question whether the exercise of power was authorised by a warrant arises, a warrant is not produced in evidence, and it is not proved that a warrant was authorised under this section.

### Section 131 – General powers on entry

Subsection 131(1) provides an inspector who enters a place of inspection under section 126 to carry out any of the activities outlined in the paragraphs (a) – (e).

Subsection 131(2) provides that a person commits an offence, with a maximum penalty of 38 penalty units, if the person fails to comply with the request of an inspector to give the inspector reasonable help under subsection 131(1)(e).

### Section 132 – Power to seize evidence

This section provides an inspector who enters a place of inspection in accordance with a warrant issued under this Division may seize the evidence for which the warrant was issued.

Subsection 128(2) provides if the inspector who enters a place of inspection under section 126 has been provided consent by the occupier, the inspector may seize a thing if the inspector is satisfied the thing is connected with an offence against this Ordinance and the seizure is consistent with the purpose of entry when seeking consent to enter.

Subsection 128(3) allows an inspector who enters a place of inspection under section 126 to seize anything connected with an offence against this Ordinance and seizure of the thing will prevent the thing being concealed, lost or destroyed, or used to commit, continue or repeat the offence.

Subsection 128(4) allows an inspector who enters a place of inspection under section 126 to seize anything that may pose a risk to the health and safety of a person, public or private property or the environment.

The powers of an inspector under subsections 128(3) and 128(4) are additional to the powers of the inspector under subsection (1) or (2) or under any other law.

Subsection 128(6) enables the inspector to move the thing from the place of inspection to another place, or leave the thing at the place of inspection but restrict access to it.

Note: Division 6 of this Part (Dealing with things seized) applies to a thing seized under this section.

Subsection 132(7) provides that a person commits an offence, with a maximum penalty of 38 penalty units, if the person interferes with a seized thing to which access has been restricted under subsection 132(6)(b) and the person does not have approval by the inspector to interfere with the thing.

#### Section 133 – Powers of magistrates

This section provides any power conferred on a magistrate by this Division is done so in a personal capacity and not as a court or as a member of a court. This section provides the magistrate need not accept the power conferred.

Subsection 133(3) provides the magistrate has the same protection and immunity as if the magistrate were exercising power as the court of which the magistrate is a member or as a member of the court of which the magistrate is a member.

### **Division 3—Boarding of boats**

#### Section 134 – Facilitating boarding of boats

This section provides a person must allow an inspector to board a boat under section 126. The inspector may make this request to the master of the boat or anyone else. Section 134(3) provides that it is an offence, with a maximum penalty of 38 penalty units, for a person to fail to comply with the request to allow an inspector to board a boat under section 126.

#### Section 135 – Directing boats after boarding

This section provides when an inspector boards a boat, the master of the boat must follow the instructions of the inspector as outlined in paragraphs (a) to (d). Subsection 135(2) provides that it is an offence, with a maximum penalty of 38 penalty units, to fail to comply with a direction under subsection (1).

#### Section 136 – Requiring information after boarding

The paragraphs under subsection 136(1) outline the details that an inspector may request from a person when the inspector has boarded a boat under section 126 to assist in their inspection. Subsection 136(2) provides that it is an offence, with a maximum penalty of 38 penalty units, to fail to provide the information requested by the inspector.

### **Division 4—Gathering information**

The number of penalty units for the offences in this division is 38 penalty units. This is for consistency with the number of penalty units for the corresponding offences in Division 9.5 of the ACT Lakes Act, to ensure the dollar amounts in the two regimes are as close as possible.

#### Section 137 – Master may be required to answer questions

This section provides a master of a boat must answer questions from the inspector relating to the nature and operation of the boat.

Subsection 137(2) provides that it is an offence of strict liability, with a maximum penalty of 38 penalty units, if a person fails to answer questions from an inspector.



### Section 138 – Master may be required to produce records

This section provides an inspector may request documentation in the master's possession about the operations of the boat. Subsection 138(2) provides that it is an offence of strict liability, with a maximum penalty of 38 penalty units, if a person fails to produce documents requested by the inspector.

### Section 139 – Requirement to provide information about owner or master of boat

This section provides an inspector may request information orally or in the form of documentation from a person about the owner or master of the boat.

Subsection 139(3) provides that it is an offence, with a maximum penalty of 38 penalty units, if a person has the information and fails to provide the information to the inspector.

## **Division 5—Seizing boats**

### Section 140 – Inspector may seize boat

This section empowers an inspector to seize a boat in the lake area and bring the boat to a holding area if the inspector believes the boat has been involved in an offence against this Ordinance.

Subsection 140(2) sets out the requirement that an inspector must, within 14 days of seizing the boat under subsection 140(1), give written notice to the owner of the boat. If the owner of the boat cannot be located, written notice must be provided to the person who had possession or control at the time of seizure. Subsection 140(3) states where it is not practicable for the inspector to give the notice to the person, the inspector may fix the notice to the boat.

Information to be included in the notice is outlined in Subsection 140(4)(a)-(e).

Subsection 140(5) provides that a person commits an offence, with a maximum penalty of 38 penalty units, if the boat has been seized under subsection 140(1) and the person operates or allows the boat to be operated without consent of the inspector.

### Section 141 – When Commonwealth to pay compensation relating to seizure

This section provides where a boat has been seized under section 140 with no reason or probable cause, the Commonwealth is liable to pay the owner reasonable compensation for any loss or damage incurred as a result of the seizure.

Subsection 141(2) enables the owner of the boat to institute proceedings in a court for the recovery of compensation payable by the Commonwealth.

### Section 142 – Owner to pay costs of seizure

This section applies if a boat was seized under section 140 in reasonable circumstances and the Commonwealth has incurred costs in relation to the seizure and holding of the boat.

Subsection 140(2) provides an the owner of a boat is liable to pay the Commonwealth the cost of the seizure and holding of the boat and any compensation for loss or damage incurred by the Commonwealth as a result of seizure and holding of the boat.

Subsection 140(3) states where an amount payable cannot be agreed between the owner and the Commonwealth, the Commonwealth may recover the costs or compensation by action in a court of competent jurisdiction as a debt due to the Commonwealth.

## **Division 6—Dealing with things seized**

### Section 143 – Receipts for things seized

This section provides when a thing is seized, the inspector must provide a receipt to the person from whom it was seized as soon as practicable. If it is not possible to provide a receipt at time of seizure, the inspector must leave a receipt in a secure way at the place of seizure.

Note: For notice of seizure of a boat, see section 140.

#### Section 144 – Access to things seized

This section enables a person, apart from the seizure, who is entitled to a thing seized under section 132 or 140 to inspect the seized item and inspect the thing. If the thing is a document, the person may take extracts or make copies of the document.

#### Section 145 – Return of things seized

Subsection 145(1) provides an item seized under section 132 or 140 must be returned to the owner. Where an item has been lost, the Commonwealth must pay the owner reasonable compensation for the reasons outlined in paragraphs (a) and (b).

Subsection 145(2) provides if a court finds an offence relating to the seized thing under section 132 and 140 and orders the seized thing to be forfeited, the thing will be forfeited to the Commonwealth.

Subsection 145(3) provides if the court does not order the seized thing to be forfeited, the Commonwealth must return the item to the owner. If the item has been lost, the Commonwealth must pay reasonable compensation to the owner.

#### Section 146– Disposal of things seized

This section enables an inspector to dispose of a seized item under section 132 and 140 if the inspector has taken reasonable steps under section 145 to return the thing to the person from whom it was seized, and the inspector has been unable to contact the person, or the person has refused possession of the thing. The inspector may dispose of the thing in any way they consider appropriate.

### **Part 9 – Administration**

#### Section 147 – Simplified outline of this Part

This section provides a simplified outline of this part.

#### Section 148 – Declaration of areas of lake

The section provides that the Minister may by notifiable instrument declare an area of National Land to be a lake for the purpose of this Ordinance.

This section allows the Minister to make certain exemptions and declarations by notifiable instrument, rather than by legislative instrument. These determinations do not alter the content of the law, but rather apply the law to particular individuals and portions of National Land. Due to their administrative rather than legislative character, the nomination of these determinations as notifiable instruments does not create a substantive exemption from the requirements of the *Legislation Act 2003*.

#### Section 149 Delegate for Lakes

This section provides that the Minister must appoint a Delegate for the lake.

Subsection 149(1) provides that the Delegate must be either the Chief Executive of the National Capital Authority; or a member of the staff of the National Capital Authority. A note in this subsection provides that for rules in relation to appointing a person to act in an office, refer to subsection 33(4) of the *Acts Interpretation Act 1901*.

Subsection 149(2) provides that the Minister may appoint the Delegate by naming the person appointed or by nominating the person holding or occupying a specified position or office at a particular time or from time to time.

#### Section 150 – Inspectors

This section provides for who are inspectors for the purpose of this Ordinance.

Subsection 150(1) provides that the Minister may in writing appoint any of the following as in inspector, the Chief Executive of the National Capital Authority, and a member of the staff of the National Capital Authority. A note in this subsection provides that for rules in relation to appointing a person to act in an office, refer to subsection 33(4) of the *Acts Interpretation Act 1901*.

Subsection 150(2) provides that the Minister may appoint the appointment by naming the person appointed or by nominating the person holding or occupying a specified position or office at a particular time or from time to time.

Subsection 150(3) provides that for the purposes of the Ordinance, the following persons are also inspectors of the lake: Delegates for Lakes; and a police officer.

#### Section 151– Identity cards for inspectors

This section provides for issuing of identity cards for inspectors, penalties for inappropriate use, and situations in which the penalties and issuing of cards do not apply.

Subsection 151(1) provides that the Minister must issue an identity card to an inspector (other than a police officer).

Subsection 151(2) provides what the identity card must contain and comply with.

Subsection 151(3) provides that a person commits an offence of strict liability of 1 penalty unit where the person issues with the identity card ceases to be an inspector and does not return the identity card to the Minister within 7 days after ceasing to be an inspector.

Subsection 151(4) provides for that the offence in subsection 151(3) does not apply where the identity card is lost, stolen or destroyed. A note in this subsection provides that a defendant bears an evidential burden in relation to the matter in this subsection.

### **Part 10 – Miscellaneous**

Although drafted, provisions providing for administrative review of the Minister's decisions have not been included at this time. This is due to doubt regarding the ability of the Administrative Appeals Tribunal (AAT) to review decisions made under ACT ordinances. The *Administrative Appeals Tribunal Amendment Act 2005* deleted the definition of ACT enactment in subsection 3(1) of the Administrative Appeals Tribunal Act 1975 (AAT Act). As it stands the definition of enactment in subsection 3(1) of the AAT Act specifically excludes an Ordinance from the Australian Capital Territory. A subsequent amendment to this ordinance, containing the administrative review provisions, can be made once the AAT Act is amended to confirm the AAT can review decisions made under ACT ordinances.

#### Section 152 – Simplified outline of this Part

This section provides a simplified outline of this part.

#### Section 153 – Act and omissions of representatives of individual

This section applies to a prosecution for an offence against this Ordinance and provides that an offence cannot be punished by imprisonment of the offence if the person would not have

been convicted of the offence without subsection 153(3) or 153(4); with subsection 153(4) not applying if the individual has taken reasonable precautions to avoid the act or omission.

This places an evidential burden of proof on the defendant. This is appropriate as the offences in question concern knowledge, intention, opinion, belief or purpose, which are peculiarly within the knowledge of the defendant. Further, it would also be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish these matters.

#### Section 154 – Privilege against self-incrimination

This Section provides that an individual is not excused from answering the questions, give the information or producing the document or other thing – if they are required to so under sections in the Ordinance as listed in subsection 154(1) – on the ground listed in subsection 153(2) that doing so might incriminate the individual in relation to the offence. A note to this subsection provides a body corporate is not entitled to claim the privilege against self-incrimination.

This section abrogates the privilege against self-incrimination as it provides an individual is not excused from answering questions, giving information or producing the document or other thing requested under the section on the ground that doing so might tend to incriminate the individual in relation to an offence. This is justified in this situation because it is consistent with ensuring public safety on and around Lake Burley Griffin through the thorough investigation of marine safety and accidents. Subsection 154(3) provides that, although a person required to give information under this section cannot refuse to do so because this might incriminate them, any information provided cannot be used in evidence in criminal proceedings against the person.

#### Section 155 – Fees for making applications

This Section provides for that rules may prescribed fees for making an application to the Minister under a provision of this Ordinance, subsection 155(1), but that the fee must not amount to taxation, subsection 155(2). Subsection 155(3) provides that rules may prescribe different fees for different kinds of applications; or make provision about exempting a person from payment of the fee; or make provision about waiving, postponing or refunding the fee (completely or partially).

#### Section 156 – Compensation for acquisition of property

Subsection 156 This section provides that the Commonwealth is liable to pay a reasonable amount of

#### Section 157 – Rules

This section provides that the Minister may by legislative instrument, make rules required for this ordinance as set out in paragraph 157(1)(a) – (b). Paragraphs 157(1)(a) – (d) sets out that the rules may not create an offence or civil penalty, provide powers of arrest or detention, entry search or seizure, impose a tax or directly amend the text of this Ordinance.

### **Part 11—Application, savings and transitional provisions**

#### **Division 1—Transitional provisions relating to commencement of this Ordinance**

##### Section 158 – Definitions for this Division

This section provides a definition of the term *old Ordinance* for this Division.

##### Section 159 – Approval of buoys, wharves and jetties

This section provides for the continuation of approvals for the anchoring of buoys or the erection of wharves and jetties under the old Ordinance. Paragraph (a) provides that approvals continue as if made under this Ordinance. Paragraph (b) provides that such approvals are subject to the same conditions under which they were granted.

#### Section 160 – Mooring permits

This section provides for mooring permits issued under the old Ordinance continue under this Ordinance for the period specified in the permit.

#### Section 161 – Use of power boats

This section provides that an authority given under the old Ordinance for the use of a power boat continues under this Ordinance as if granted under this Ordinance and subject to the same conditions (if any).

#### Section 162 – Commercial activities

This section provides that an agreement entered into under the old Ordinance for the undertaking of commercial activities in a lake area will continue to have effect as if it was entered into under this Ordinance.

## **Attachment B**

### **Statement of Compatibility with Human Rights**

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

#### ***Australian Capital Territory National Land (Lakes) Ordinance 2022***

The *Australian Capital Territory National Land (Lakes) Ordinance 2022* (the Ordinance) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

The Ordinance is concerned with the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory (ACT) relating to the areas of the Lake located on National Land. National Land is those areas of the ACT which are still administered by the Commonwealth following the establishment of self-government in the ACT. Amongst other matters, the Ordinance: provides for the grant of permits to use a lake for various activities; regulates boating and other activities on a lake and in the surrounding area; includes requirements for the safe operation of boats, including drug and alcohol offences; and provides for the reporting and investigation of boating accidents, and closure of lake area for safety, maintenance, and for approved events.

The Ordinance is made under section 12(1)(d) of the *Seat of Government (Administration) Act 1910*. That provision empowers the Governor-General to make ordinances for the peace, order and good government of the ACT with respect to ***National Land***, as defined by the *Australian Capital Territory (Planning and Land Management) Act 1998*. The Ordinance repeals the *National Land Ordinance 1989* (NLO), which it replaces.

Prior to ACT self-government in 1989, a range of Commonwealth Ordinances, regulations and applied NSW laws governed the management of land in the ACT. As part of the transition to ACT self-government, most land within the ACT became Territory Land, and most of the existing Commonwealth land management laws became ACT enactments, able to be amended or repealed by the Legislative Assembly of the ACT. The NLO gave effect to the provisions of 13 pre-self-government laws in relation to national land over which the Commonwealth retained responsibility.

### **Human rights implication**

The Ordinance engages the following rights:

- The right to the presumption of innocence under Article 14(2) *International Covenant on Civil and Political Rights* (ICCPR)
- The right to claim privilege against self-incrimination under Article 14(3) ICCPR
- The right to privacy under Article 17 ICCPR

#### **The right to the presumption of innocence - Article 14(2) ICCPR**

The presumption of innocence imposes on the prosecution the burden of proving a charge beyond reasonable doubt. This fundamental duty is unchanged in the Ordinance. However, some offences are strict liability offences which do not require the prosecution to prove a mental element, such as intention or recklessness, on the part of the offender. These offences are regulatory in nature and strict liability is necessary to ensure the integrity of the

regulatory regime by allowing for effective enforcement. Many of the strict liability offences in the Ordinance relate to safety on the lake and are committed when a person does an activity for which there is no regulated permit or does not follow requirements set out in the Ordinances, for example: drug and alcohol related offences; using an area of the lake in a way that is inconsistent with how the area has been prescribed for the purposes; operating a boat in an unsafe manner and inconsistent with a regulated permit for the activity; operating a power boat on a lake without a regulated permit; operating a power boat in a prescribed swimming area or within 60 metres of a prescribed swimming area; operating a power boat at speed greater than set by permit or limit of the power boat; towing another person by a boat on or over the lake (including waterskiing or parasailing from the boat), or wakeboarding or wakesurfing from the boat (including doing so without a rope); non-compliance with lights and safety equipment; damaging navigation, interfering with maintenance work interfering with signs; entering or remaining in an area that is closed where an inspector has told the person that the area is a closed area and the person must not enter, or remain; and camping or keeping a caravan in a lake area at night without a permit or regulated activity permit; commercial activity without a permit.

The limitations on the right to the presumption of innocence arising from strict liability elements of certain offences are necessary to allow for effective enforcement of regulatory provisions. The limitations are reasonable and proportionate.

#### The right to claim privilege against self-incrimination under Article 14(3) ICCPR

The privilege against self-incrimination allows a person to refuse to disclose information they would otherwise be compelled to provide on the basis that disclosure of the information would potentially incriminate them. In the determination of any criminal charge Article 14(3) provides that everyone is entitled to a number of minimum guarantees, paragraph (g) being not to be compelled to testify against themselves or confess guilt.

Section 154 of the Ordinance provides that, with regards to the provisions identified in 154(1)(a) – (i), an individual is not excused from answering a question, giving information or producing a document or other thing on the grounds that doing so might tend to incriminate the individual in relation to an offence. Section 154 then provides immunity against the use of disclosed information in later proceedings, other than proceedings for an offence against one of the sections listed in the subsections or offences relating to providing false or misleading information, as prescribed by the *Criminal Code Act 1995*.

Section 154(3) notes that any evidence obtained as a direct or indirect consequence of the answering of a question, giving of information or production of a document or other thing are not admissible in evidence against an individual in criminal proceedings other than proceedings for an offence against a section mentioned in subsection (1) or an offence against section 137.1 or 137.2 of the Criminal Code that relates to a section mentioned in subsection (1). Therefore, this evidence is not admissible for any other purposes or charges, other than the offences outlined in section 154(1).

The offences listed in section 154(1) are: section 83 (Owner and operator of boat information about safety equipment); section 110 (Obligation to give information when involved in boating accident); section 111 (Obligation to report boating accidents to Minister); section 118 (Safety investigator may require people to give information, produce documents or answer questions); section 136 (Requiring information after boarding); section 137 (Master may be required to answer questions); section 138 (Master may be required to produce records); and section 139 (Requirement to provide information about owner or master of boat). An abrogation of the privilege against self-incrimination is intended to ensure boats are

operating safely and to enable the thorough investigation of accidents on and around Lake Burley Griffin, with implications for public safety. If the design of a vessel is flawed, or a vessel operator's actions had negative consequences, there is a public interest in obtaining a full account of a matter, which outweighs an individual's right not to incriminate themselves.

Section 154 abrogates the privilege against self-incrimination for the public interest on the basis of safety which, in this instance, outweighs the public interest in ensuring access to justice and personal liberty enshrined in this privilege. The limited restriction applied to the privilege against self-incrimination is targeted, reasonable and specific to the offences listed in section 154.

#### The right to privacy - Article 17 ICCPR

An applicant for a permit must provide certain personal information, including their name and contact details. A permit holder must also advise changes to their contact details.

As government agencies, the National Capital Authority is subject to obligations under the *Privacy Act 1988* that limit the collection, use and disclosure of personal information. Accordingly, any limitation on an applicant's right to privacy is reasonable, necessary and proportionate.

#### **Conclusion**

The Ordinance is compatible with human rights as, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Assistant Minister for Regional Development and Territories,  
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