

Australian Capital Territory

Lakes Regulation 2019

Subordinate law SL2019–8

made under the

Lakes Act 1976, s 56 (Regulation-making power)

EXPLANATORY STATEMENT

This explanatory statement relates to the *Lakes Regulation 2019* (the regulation) as made under the *Lakes Act 1976* (the Act). It has been prepared in order to assist the reader of the regulation. It does not form part of the regulation and has not been endorsed by the Legislative Assembly.

The statement must be read in conjunction with the Act and regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

The *Lakes Regulation 2019* is a new regulation to support the operation of the Act and the *Lakes Amendment Act 2018*. The regulation is designed to:

- Promote safety, particularly the safe operation of boats on ACT lakes; and
- Harmonisation with surrounding NSW maritime law.

The regulation supports the operation of the principal legislation including boat driver licenses, lifejacket and safety equipment requirements and standards and rules of the water to prevent collisions.

There are no direct financial impacts associated with the regulation as it seeks to harmonise the regulation of boating in the ACT in line with existing nationally adopted safety and navigation requirements for boating. The resultant benefit are to ensure the protection of life and property.

The majority of the provisions in the regulation were formerly in the Act, however due to the nature of the provisions and to maintain consistency with other jurisdictions it was determined these provisions would be more appropriate as regulations.

Human rights Implications

The regulation is consistent with the *Human Rights Act 2004* (the Human Rights Act). The provisions in the regulation enable the Territory to provide for the safe operation of boats and protection of life and property for user of lakes; ensure community safety is maintained; and creates regulatory consistency for users of ACT and NSW waterways.

The regulation contains strict liability offences. Offences of strict liability can be seen as engaging a person's right to a fair trial (section 21 of the Human Rights Act) and a person's right to be presumed innocent until proven guilty (section 22(1) of the Human Rights Act), as the offences do not require the establishment of a mental element, such as intention, knowledge, recklessness or negligence.

Section 28 (1) of the Human Rights Act provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28 (2) of the Human Rights Act then provides that, in deciding whether a limit on a human right is reasonable, all relevant factors must be considered. Section 28 (2) further provides five factors that must be considered when determining whether a limit on human rights is considered justified.

To the extent that any provision of the regulation places a limitation on an individual's human rights, that limitation is considered reasonable and justifiable in a free and democratic society, taking into account the factors enumerated in section 28 (2) of the Human Rights Act, namely:

(a) The nature of the right affected

The right to the presumption of innocence before the law has long been recognised in common law and, in the ACT, is now codified in section 22 (1) of the Human Rights Act. However, the right may be subject to limits, particularly when those who are subject to an offence provision would be expected to be aware of its existence.

The following strict liability offences in the regulation are regulatory in nature, and target regulatory requirements that are central to establishing and maintaining a safe environment for the use of ACT lakes:

- Operating unregistered boat (s 18);
- Breaching condition of registration (s 19);
- Speed limit when people under 18 years old (s 20);
- Exceeding power rating for boats (s 21);
- Operating power boats near swimming areas (s 22);
- Conduct on power boats (s 37);
- Interfering with navigation aids (s 42);
- Interfering with safety equipment (s 44);
- Visibility of lights (s 47);
- Lights for power boats underway (s 49);

- Lights for sailing boats underway and boats being rowed (s 50);
- Lights to be carried by rowing boats, kayaks and canoes (s 51); and
- Emergency lights (s 55).

(b) The importance of the purpose of the limitation

The purpose of providing a reverse onus of proof through strict liability offences is to ensure the effective enforcement of and compliance with key requirements in the Act and the regulation. The engagement with the right to be presumed innocent in section 22 (1) of the Human Rights Act is aimed at ensuring the effective operation of the regulatory framework.

(c) The nature and extent of the limitation

The strict liability offences engage the right to be presumed innocent by shifting the onus of proof from the prosecution onto a defendant. The requirements to which the offences apply are not burdensome in nature and are central to establishing and maintaining a safe environment for the use of ACT lakes.

The penalties are considered proportionate and not unduly harsh for offences of a regulatory nature.

(d) The relationship between the limitation and its purpose

The use of strict liability offences for the regulation is appropriate because the offences apply to people who enjoy recreational boating activities on ACT lakes. The regulation places them on notice that they must abide by the laws that govern the activity, thereby placing themselves in a relationship of responsibility with the broader community. Compliance is necessary to ensure the prevention of injury or serious detriment to all lake users and to the community.

(e) Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

An evidential onus, rather than a strict liability offence, would be less restrictive on the right to be presumed innocent found in section 22 (1) of the Human Rights Act. It would not, however, prove to be as effective in enforcing the proposed offences. Strict liability offences provide that the defendant's act alone, rather than the reasons that the defendant acted in that way or his or her intention in so doing, should dictate the offence.

The inclusion of strict liability within an offence limits the range of defences that may be available for a person accused of the offence to which it applies; but a number of defences remain open to the accused, depending on the particular circumstances of each case. Section 23 (1) (b) of the *Criminal Code 2002* (the Code) provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Code provides that other defences may also be available for strict liability offences, including the defence of intervening conduct or event, as provided by section 39 of the Code.

It is on this basis that the Government believes that the use of strict liability offences contained in the regulation is:

- relevant to the policy objectives of community safety, which is demonstrably justifiable and reasonable; and
- comparable with strict liability provisions in regulations in other jurisdictions.

Outline of Provisions

Part 1 Preliminary

Clause 1 Name of regulation

This clause names the regulation as the *Lakes Regulation 2019*.

Clause 2 Commencement

This regulation commences on the day after its notification day.

Clause 3 Dictionary

This is a formal provision stating that the dictionary at the end of the regulation is part of the regulation.

Clause 4 Notes

This is a formal provision stating that a note included in the regulation is explanatory and not part of the regulation.

Clause 5 Offences against regulation—application of Criminal Code etc

This is a formal provision stating that other legislation applies in relation to offences against the regulation.

Part 2 Required number of lifejackets, required safety equipment and required standards—Act, s 47 (1) (a) and s 50

Division 2.1 Definitions—pt 2

Clause 6 Definitions—pt 2

This clause defines for this part an accompanied sailing boat, dragon boat operating requirements, off-the-shore boat, small boat, small tender and tender which are all types of boats for which certain rules for life jackets and safety equipment apply in certain circumstances as detailed in clauses 7, 8 and 9.

Division 2.2 Required number of lifejackets for recreational boats—Act, s 47 (1) (a)

Clause 7 Required number of lifejackets for recreational boats—Act, s 47 (1) (a)

This clause details the prescribed number of life jackets required to be carried on recreational boats. These requirements have been developed in consideration of the size and purpose of each type of boat and brings the ACT into alignment with current NSW regulation.

Division 2.3 Required safety equipment—Act, s 50

Clause 8 Meaning of *general requirement*—div 2.3

This clause defines for this division the meaning of *general requirement* in relation to safety equipment.

Clause 9 Required safety equipment—Act, s 50

This clause details the prescribed safety equipment for a recreational boat including any specific rule or exceptions that may apply due to the type of boats as detailed in clause 6. These requirements have been developed in consideration of the size and purpose of each type of boat and brings the ACT into alignment with current NSW regulation.

Division 2.4 Required standards—Act, s 50

Clause 10 Anchors with chain or line

This clause details the suitability requirements for chains and ropes used to secure an anchor.

Clause 11 Bailers

This clause details the requirements for bailers used to bail water from a boat. The requirement for a bailer to have a lanyard or rope in subsection (2) is necessary for collecting water for use in case of fire on a boat (when there is no bucket on-board), or where the bailer is dropped or thrown overboard.

Clause 12 Buckets and fire buckets

This clause details the requirements for buckets or fire buckets used for both bailing water from the boat and collecting water for use in case of fire on a boat.

Clause 13 Bilge pumps

This clause details the requirements for bilge pumps for draining water from compartments on a boat.

Clause 14 Fire extinguishers

This clause details the requirements for fire extinguishers on boats. The requirements include a reference to Australian Standard AS 1799.1-2009 in relation to a fire extinguisher suitable for the type of fuel carried on a boat. AS 1799.1-2009 does not need to be notified because section 47 (6) of the *Legislation Act 2001* has been disapplied by section 122 (3) of the Act.

The reason for disapplying the application of section 47 (6) of the *Legislation Act* is to avoid breaching copyright by publishing Australian Standards as notifiable instruments on the ACT Legislation Register. The copyright in Australian Standards is owned by a non-government organisation, Standards Australia.

Many Australian and international standards are available for viewing at the National Library of Australia. To further assist with public access, copies of the relevant standards are made available for viewing upon request at the Environment, Planning and Sustainable Development Directorate's offices. Contact details are available on the Directorate's website, <http://www.environment.act.gov.au/about/contact>.

Clause 15 Paddles and oars

This clause details the requirements for paddles and oars on a boat.

Clause 16 Waterproof torches

This clause details the requirements for waterproof torches carried on a boat.

Part 3 Boat registration

Clause 17 Application—pt 3

This clause details that this part does not apply to a person operating a domestic commercial vessel. Registration for domestic commercial vessels is regulated under the *Marine Safety (Domestic Commercial Vessel) National Law*.

Clause 18 Operating unregistered boat

This clause states that it is an offence for a person to operate a boat on a lake if the boat is not registered under a law of a State.

An offence against this section is a strict liability offence.

Clause 19 Breaching condition of registration

This clause states that it is offence for a person who is operating a registered boat on a lake, to breach a condition of the boat registration.

An offence against this section is a strict liability offence.

Part 4 Safe operation of boats

Clause 20 Speed limit when people under 18 years old

This clause states that it is an offence for a person to operate a boat on a lake at a speed of more than 60 knots while a person under the age of 18 years is on the boat.

An offence against this section is a strict liability offence.

Clause 21 Exceeding power rating for boats

This clause provides that it is an offence for a person to operate a boat on a lake if the boat is powered by a motor that exceeds the power rating for the boat.

An offence under this section is a strict liability offence.

This provision includes a reference to Australian Standard AS 1799.1-2009 in relation to the maximum power capacity of small power boats.

AS 1799.1-2009 does not need to be notified because section 47 (6) of the *Legislation Act 2001* has been disapplied by section 122 (3) of the Act. The justification for disapplying the application of section 47 (6) is detailed above under clause 14.

Clause 22 Operating power boats near swimming areas

This clause states that it is an offence for a person to operate a boat on a lake within 60 meters of a designated swimming area. This provision is not intended to apply to a person if the operation of the boat near a swimming area is for life saving purposes and the provision specifically does not apply to a person if the operation of the boat is for the purpose of lake maintenance works for the Territory.

An offence against this section is a strict liability offence.

Clause 23 Minimum distance requirements

This clause states that it is an offence for a person to operate a boat on a lake at a speed of 10 knots within minimum distances of persons, boats, land, structures (e.g. diving platforms) or other things, to minimise the risk of damage or harm to people and property. The clause clarifies that it is a defence to these offences if it was not possible to be the minimum distance away, for example in a narrow area of the Molonglo River, which is declared a lake.

Clause 24 Dangerous operation of boats

This clause states that it is an offence for a person to operate a boat on a lake in a manner, or at a speed, that is dangerous to the public.

Clause 25 Unsafe towing or pushing of boats or objects

This clause states that there are offences for a person to operate a boat on a lake when towing or pushing a boat or object if the boat or object is: not safely secured; obstructs the view of the person operating the boat; or if there is no other person on the boat or in a position to observe and give safety instructions to the operator of the boat.

Clause 26 Unsafe loading of boats

This clause states that it is an offence for a person to operate a boat on a lake and contravene a safe loading requirement that applies to the boat under the

laws of the State in which the boat is registered. This includes the number of people permitted in the boat by the boat registration. There are a number of defences to this offence for certain types of boats.

Part 5 Right of way rules

An inspector may issue a direction to a person that the rules under this part must be followed. Failing to comply with a direction is an offence under section 54 of the Act.

A breach of a rule under this part may be dangerous to the public and could constitute an offence under section 24 of the regulation.

Clause 27 Keeping out of the way

This clause details that a boat to which this part applies, as far as is practical, must keep out of the way of another boat.

Clause 28 Keeping course

This clause details that a boat to which this part applies must keep its course and speed unless this could cause the boat to collide with another boat.

Clause 29 Sailing boats

This clause details the rules that apply when one sailing boat is approaching another sailing boat on a lake to prevent a collision.

Clause 30 Power boats

This clause details the rules that apply when a power boat is approaching another power boat on a lake to prevent a collision.

Clause 31 Power boats and sailing boats

This clause details the rules that apply when a power boat and a sailing boat are approaching one another on a lake to prevent a collision.

Clause 32 Rowing boats and sailing boats

This clause details the rules that apply when a rowing boat and a sailing boat are approaching one another on a lake to prevent a collision.

Clause 33 Overtaking boats

This clause details the rules that apply when a boat is overtaking another boat on a lake to prevent a collision. This provision includes a definition of overtaking for the purposes of this section.

Clause 34 Navigating channels

This clause details that a boat must not exit a channel or fairway on a lake shown by bearings, buoys or other means other than as shown on the bearings, buoys or other means.

Clause 35 Exception to rules—boat races

This clause details that this part does not apply to a boat taking part in a boat race in relation to the other boats in the race to the extent that it conflicts with any rules applied by the entity controlling the race.

Part 6 Conduct of people

Clause 36 Dangerous conduct

This clause states that it is an offence for a person to do something that is dangerous to the public when on a boat on a lake.

Clause 37 Conduct on power boats

This clause creates strict liability offences for unsafe conduct by the boat operator or the passengers on power boats. The provision states that if the boat is being propelled by its engine, it is an offence for a person, and for the person operating the boat, if:

- the person extends any part of their body outside the perimeter of a power boat; or
- the person is on, or is hanging onto, a swim ladder, swim platform or transom attached to the power boat.

Strict liability is appropriate in these circumstances as the offences do not contain a fault element and is essential to ensure both the operator of the boat, and the passengers, are responsible for safe conduct when on the water.

This clause also creates offences for a person, and for the person operating the power boat, for the person to be in a position on the boat that puts them at an increased risk of falling overboard while the boat is being propelled by its engine on a lake. These offences are not strict liability.

The offences in this clause do not apply to a person who is anchoring, mooring or casting off, or fishing while anchored, moored or drifting or the conduct is to secure the safety of a person or property.

Clause 38 Passengers on domestic commercial vessels

This clause states that it is an offence for a person on a domestic commercial vessel to obstruct someone engaged in the navigation or operation of the vessel; wilfully damage a part of the vessel or equipment on the vessel; use a part of the vessel or equipment on the vessel for a purpose for which it was not intended; remove, damage, or deface a sign or notice on the vessel that relates to the vessel's safe and proper use or a survey plate; or is in or on a prohibited part of the vessel.

Part 7 Interference

Clause 39 Interfering with use of waters or land

This clause states that it is an offence for a person who operates a boat on a lake to interfere with another person's lawful use of a lake area.

Clause 40 Interfering with other boats

This clause states that it is an offence for a person who operates a boat on a lake to cause wash that damages or impacts unreasonably on another boat. This can include impacting on a boat operating on the lake and a boat moored or anchored on a lake.

Clause 41 Interfering with dredges or immobile boats

This clause states that a person who operates a boat on a lake, must pass a dredge, or other immobile boat, that is engaged in underwater operations, on the side indicating safe passage. It creates an offence to pass on the side of the dredge, or other immobile boat, that is not displaying the shapes or lights indicating safe passage

A dredge, or other boat, that is restricted in its ability to manoeuvre when engaged in underwater operations must display a combination of shapes or lights indicating safe passage on one side.

Clause 42 Interfering with navigation aids

This clause states that it is an offence for a person to secure a boat to a navigation aid such as a beacon, buoy or marine marking in or on a lake.

An offence under this section is a strict liability offence. Strict liability is appropriate in this circumstance as the offence does not contain a fault element and is essential that navigation aids remain unencumbered at all times.

Clause 43 Interfering with equipment on boats

This clause states that it is an offence for a person to sever, untie, or detach any rope, cable, chain or other means by which a boat is secured on a lake if not authorised to do so by the person who is operating the boat or the owner of the boat.

Clause 44 Interfering with safety equipment

This clause states that it is an offence for a person to untie or detach any safety equipment stored in a lake area other than for securing the safety of a person or preventing the loss or damage to property.

An offence under this section is a strict liability offence. Strict liability is appropriate in this circumstance as the offence does not contain a fault element and is essential that safety equipment is not interfered with unnecessarily.

Part 8 Lights and shapes

Division 8.1 Preliminary

Clause 45 Definitions—pt 8

This clause details the meaning of the lighting terms for the lighting requirements for boats where they operate on a lake at night or where visibility is restricted. The clause also details that an operator of a boat for this division is the master of the boat or if no-one is in charge or command of the boat each person on the boat or if no-one is on the boat the owner of the boat.

Clause 46 Meaning of *visibility is restricted*

This clause details the meaning of *visibility is restricted* for a person when on a lake.

Clause 47 Visibility of lights

This clause states that it is an offence for the operator of a boat that is underway, anchored on lake at night or when visibility is restricted and the required lights under this part are not visible for the prescribed distance as detailed in this section.

An offence under this section is a strict liability offence.

Division 8.2 Boats underway at night or when visibility is restricted

Clause 48 Application—div 8.2

This clause states that this division applies to an operator of a boat if the boat is under way on a lake at night or when visibility is restricted.

Clause 49 Lights for power boats underway

This clause states that is an offence for the operator of a power boat to not show the lights that apply to the size of vessels described in this section.

An offence under this section is a strict liability offence.

Clause 50 Lights for sailing boats underway and boats being rowed

This clause states that an operator of a sailing boat or a boat being rowed commits an offence if the boat does not display the lights detailed in this section.

An offence under sub-sections (2), (3) and (4) of this section is a strict liability offence.

Clause 51 Lights to be carried by rowing boats, kayaks and canoes

This clause provides that it is an offence if an operator of a rowing boat, dragon boat, kayak or canoe does not display the lights detailed in this section. This section also details the meaning of the lighting terms that apply to the boats described in this section.

An offence under sub-section (1) is a strict liability offence.

Division 8.3 Boats at anchor

Clause 52 Lights for boats at anchor on a lake at night

This clause states that that it is an offence if an operator of a boat is anchored on a lake at night or when visibility is restricted and does not show an all round white light. If the boat has cabin or deck lights these should also be displayed where the boat is anchored in a busy area of a lake.

This section does not apply to a boat less than 7 metres in length if the boat is not in or near a narrow channel, fairway or anchorage or in an area where other boats normally navigate.

Division 8.4 Diving boats, dredges etc and emergency lights

Clause 53 Lights on certain boats restricted in their ability to manoeuvre

This clause states that it is an offence if an operator of a boat, if the boat is:

- greater than 12m in length;
- engaged in underwater operations on a lake at night or when visibility is restricted; and
- restricted in its ability to manoeuvre;

does not show two all round red lights to indicate the side on which the underwater activities are occurring and two all round green lights to indicate the side on which another boat may pass.

The lighting provisions do not apply to a diving boat, if it is impractical to exhibit the lights as required and if alternate lights are displayed as detailed in this section.

Clause 54 Shapes on certain boats restricted in their ability to manoeuvre

This clause states that it is an offence if an operator of a boat, if the boat is:

- greater than 12m in length;
- engaged in underwater operations on a lake during the day; and
- restricted in its ability to manoeuvre;

does not show two balls in a vertical line to indicate the side on which the underwater activities are occurring and two diamonds in a vertical line to indicate the side on which another boat may pass.

These signalling provisions do not apply to a diving boat, if it is impractical to display the shapes as required and if lights are displayed as detailed in this section.

For this section underwater operations includes dredging operations and diving operations.

Clause 55 Emergency lights

This clause states that that it is an offence if an operator of a boat underway or anchored on a lake at night or when visibility is restricted does not carry an electric torch or ignited lantern ready for immediate use. This clause also states that it is an offence if a light required to be shown under this division fails and the boat does not show the emergency light.

An offence under this section is a strict liability offence.

Part 9 Unnecessary use of lights and signals

Clause 56 Unnecessary use of distress signals

This clause states that it is an offence if a person is on a boat on a lake, or in a lake area, and they use distress signalling equipment or makes a distress signal unnecessarily. It is also an offence for the person operating the boat if another person on the boat uses distress signalling equipment or makes a distress signal unnecessarily.

Clause 57 Unnecessary use of lights and signals

This clause states that it is an offence if a person is on a boat on a lake, or in a lake area, and they display or make a light or other visual signal used as a warning or guide to boats where there is no adequate reason to display or make the light or signal. It is also an offence for the person operating the boat if another person on the boat displays a warning light or signal with no adequate reason.

Clause 58 Unauthorised use of emergency patrol signals

This clause states that it is an offence for a person who operates a boat on a lake to display an emergency patrol signal unless the person has been allowed, in writing, by a police officer to display the emergency patrol signal or is operating the boat for a relevant person as defined under this section for the purpose of carrying out an emergency patrol.

Part 10 Obstructions to navigation

Clause 59 Failing to warn about obstructions

This clause states that it is an offence for a person who operates a boat on a lake for the boat or any equipment associated with the boat to potentially obstruct navigation for, or present a danger to, another boat if the person

does not warn the person operating the other boat of the obstruction or danger.

Clause 60 Obstructing fairways and channels

This clause states that it is an offence for a person who operates a boat on a lake for the boat to obstruct, restrict or impede access to a fairway or channel in the lake.

Clause 61 Obstructing wharves and jetties

This clause states that it is an offence for a person who operates a boat on a lake for the boat to obstruct the approach to, or restrict or impede the proper use of, a landing place in a lake area. This offence does not apply to a person that is currently launching, landing or mooring their boat.

Clause 62 Obstructing boats

This clause states that it is an offence for a person to obstruct or impede the launching or securing of a boat on a lake or the removal of a boat from a lake. It is also an offence if a person obstructs or impedes the safe navigation of a boat on a lake.

Clause 63 Obstructing passengers

This clause states that it is an offence for a person to obstruct or impede passengers from embarking on or disembarking from a boat on a lake.

Clause 64 Obstructing cargo

This clause states that it is an offence for a person to obstruct or impede the loading or unloading of cargo to or from a boat on a lake.

Clause 65 Causing obstruction, nuisance or damage with objects

This clause states that it is an offence for a person to throw or place an object into a lake or does anything else that obstructs or is likely to obstruct a boat from navigating the lake or causes or is likely to cause a nuisance, danger or damage to a person or property.

Clause 66 Failing to light or mark obstructions

This clause provides that it is an offence for a person who owns an obstruction to navigation and the obstruction is in a lake area and the person does not mark or light the obstruction in a way that allows for the safe navigation of boats in the area of the obstruction.

Part 11 Hatches and exterior doors on recreational boats

Clause 67 Application—pt 11

This clause details that this part does not apply in relation to a recreational boat if the boat is ordinarily operated in another State, it complies with the

requirements for safety equipment that apply to the boat in that State and has been in the ACT for fewer than 90 consecutive days.

Clause 68 Construction

This clause states that an owner, a person who supplies a recreational boat to another person, or a person operating a recreational boat on a lake commit an offence if a hatch or exterior door on the boat that can be used to enter or leave the boat cannot be opened from both the outside and the inside of the boat. These offences only apply to a recreational boat if the hull construction of the boat commenced on or after 1 January 1991.

Clause 69 Locking hatches and exterior doors

This clause states that it is an offence for a person to operate a recreational boat on a lake if a hatch or exterior door on the boat that can be used to enter or leave the boat is locked while the boat is under way and it is reasonably practicable for the door or hatch to be unlocked while the boat is under way.