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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

PRODUCT STEWARDSHIP BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Parliamentary Secretary for Sustainability and Urban Water, Senator the Hon Don Farrell)

PRODUCT STEWARDSHIP BILL 2011

OUTLINE

Objectives and policy background

The Product Stewardship Bill 2011 (the Bill) establishes a national framework to enable Australia to more effectively manage the environmental, health and safety impacts of products, and in particular those impacts associated with the disposal of products.

The Bill implements a commitment in the *National Waste Policy: Less Waste, More Resources* (November 2009) that:

> *the Australian Government, with the support of state and territory governments, will establish a national framework underpinned by legislation to support voluntary, co-regulatory and regulatory product stewardship and extended producer responsibility schemes to provide for the impacts of a product being responsibly managed during and at end of life.*

The National Waste Policy has been endorsed by all Australian governments, through both the Environment Protection and Heritage Council (November 2009) and the Council of Australian Governments (August 2010).

Product stewardship involves shared responsibility for reducing the environmental, health and safety footprint of manufactured goods and materials across the life cycle of a product (National Waste Policy, key direction 1). It has been widely adopted in Australia and internationally as one approach to managing the environmental, health and safety impacts of products and materials, and particularly the impacts associated with disposal of products.

Waste in Australia is growing and its nature is changing. Products in particular are increasingly complex, often contain hazardous substances, and at end of life place an increasing cost on the general community, rather than those who use or benefit from their use.

There are a number of key drivers for a national approach to product stewardship. These include a need to have the regulatory tools to respond to the growing, complex and hazardous waste stream, meet international obligations and encourage responsible action. A national approach will avoid the inefficiency associated with different state and territory laws applying to the same products.

There are also information asymmetries, where a lack of information prevents consumers and producers from understanding the impacts of a product. The community has indicated a willingness to recycle, but lacks the information and capacity to determine whether the statements about a product or scheme are valid. Accreditation of voluntary product stewardship schemes can help avoid ‘green wash’, encourage voluntary action and avoid the need for regulation.

The Bill is a 'framework' bill in the sense that regulations will determine the products and persons that obligations apply to. This framework approach, which enables assessment of whether product stewardship requirements should be established for particular classes of products, has been endorsed by all Australian governments through the National Waste Policy. It avoids the need for product-specific legislation and promotes a consistent approach to matters such as reporting, compliance and enforcement.

Key provisions

Scope of obligations

The Bill will provide the basis for obligations to be imposed on manufacturers, importers, distributors and others to take action that relates to one or more of the following:

- avoiding generating waste from products;
- reducing or eliminating the amount of waste from products to be disposed of;
- reducing or eliminating hazardous substances in products and waste from products;
- managing waste from products as a resource;
- ensuring that products and waste from products is treated, disposed of, recovered, recycled and reused in a safe, scientific and environmentally sound way.

Circumstances in which obligations may be imposed

Obligations will only apply to classes of products identified in regulations under the co-regulatory or mandatory provisions of the Bill. Before a decision to make regulations is made, the Australian Government's requirements for regulatory impact analysis will be met in accordance with the Best Practice Regulation Handbook. This will have regard to the following:

- the problem or issues that give rise to the need for action;
- the objectives of government action;
- the feasible alternative options to achieve these objectives;
- the costs and benefits of the alternative options; and
- the net benefit of each option for the community as a whole.

In addition to regulatory impact analysis requirements, the Minister will have to be satisfied that the regulations meet criteria identified in the Bill and further the objects of the Bill.

Voluntary provisions

The Bill provides the basis for accreditation of voluntary product stewardship arrangements. The purpose of voluntary accreditation is to provide an avenue for encouraging and recognising product stewardship without the need to regulate, and to provide assurance to the community that a voluntary product stewardship arrangement is operating to achieve the outcomes it has committed to achieve. Details of the accreditation process would be set out in a Ministerial determination.

Co-regulatory provisions

A co-regulatory approach involves a combination of government regulation and industry action. Government sets the minimum outcomes and operational requirements, while industry has flexibility as to how those outcomes and requirements are achieved. In practice, it is likely that the co-regulatory provisions of the Bill would be used where a substantial part of an industry wants to take action, but is concerned about the rest of the industry 'free riding' on their efforts. This is the case for the national computer and television recycling scheme, which would be supported by the co-regulatory provisions and associated regulations.

Mandatory provisions

Under the mandatory provisions, regulations may establish prescriptive product stewardship requirements and establish offences or civil penalties that apply if those requirements are not met. Regulations could, amongst other things, require specified actions to be taken with respect to the reuse, recycling, treatment or disposal of products or prohibit the manufacture and import of products containing hazardous substances.

Financial Impact Statement

The Bill provides a framework for establishing product stewardship requirements for particular classes of products. The cost of implementation will depend on the scope of regulations made under the Bill. The cost of implementing regulations will be considered on a case-by-case basis as part of the regulatory impact analysis process, the requirements of which will need to be met prior to making any regulations under the Bill.

The Regulation Impact Statement (RIS) for the National Waste Policy indicated there are potential savings from national rather than state by state regulation of product stewardship. It indicated that if states and territories were to pursue their own approach then the cost to the economy would be between $212m and $414m above business as usual, while a national approach to product stewardship would have a net saving of $147 million. The RIS relating to national television and computer product stewardship indicated there would be a net benefit to the community from regulation.

PRODUCT STEWARDSHIP BILL 2011

NOTES ON CLAUSES

Part 1 – Introduction

Overview of Part

1. Part 1 of the Bill covers how the Bill is to be cited (when enacted) and when its provisions commence. It sets out the objects of the Bill and product stewardship criteria. Part 1 also contains a dictionary listing every term defined in the Bill and sets out the Bill's application e.g. to the Crown and external territories and its relationship with State and Territory laws.

Division 1 – Preliminary

Clause 1 - Short title

2. Once enacted, the short title of the Bill will be the *Product Stewardship Act 2011*.

Clause 2 - Commencement

3. The table in this clause sets out when the Bill's provisions commence.

4. Clauses 1 and 2 and anything else in the Bill not elsewhere covered by the table commence on the day that the Product Stewardship Act receives Royal Assent.

5. Clauses 3 to 111 commence on a day or days to be fixed by Proclamation.

6. It is intended that no provision will commence later than six months after the Product Stewardship Act receives Royal Assent.

Division 2 – Guide to this Act

Clause 3 - Guide to this Act

7. This clause provides a guide to the Bill.

Division 3 – Objects of this Act and product stewardship criteria

Clause 4 – Objects of this Act

Object – reducing the impact of products

8. Clause 4 sets out the objects of the Bill, which are drawn from the aims of the National Waste Policy (pages 6-7). The objects assist in determining the scope of voluntary, co-regulatory and mandatory product stewardship.

9. Paragraph 4(1)(a) states that it is an object of the Bill to reduce the impact that products have on the environment, throughout their lives. This is a broad objective that encompasses all of the environmental impacts of a product from the time when the product begins to be manufactured to the time when it is waste (see definition of 'life' of a product). Part 4(1)(a) therefore covers environmental impacts associated with the manufacture, distribution, use and disposal of a product.

10. Paragraph 4(1)(b) states that it is an object of the Bill to reduce the impact that substances contained in products have on the environment, and on the health and safety of human beings, throughout the lives of those products. This encompasses the effect that hazardous substances in products can have throughout the life of a product, from the time the product begins to be manufactured to the time when it is waste.

11. Subclause 4(2) begins by stating that it is Parliament's intention that the object in subclause 4(1) be achieved by encouraging or requiring manufacturers, importers, distributors and other persons to take responsibility for the products having the impacts described in subclause 4(1). This is consistent with the notion that product stewardship involves participants in the product supply and consumption chain, rather than the general community, bearing responsibility for the costs of resource recovery and waste management.

12. Subclause 4(2) then goes on, in paragraphs (a) to (e), to refer to more specific actions that are largely confined to impacts associated with the disposal of products. The one exception is the reference in paragraph 4(2)(c) to 'reducing or eliminating hazardous substances in products' - this is relevant to impacts that hazardous substances in a product may have during the whole of the product's life, not just following disposal of the product.

13. Paragraphs 4(2)(a) to (e) are particularly significant for the operation of the co-regulatory and mandatory provisions of the Bill. As discussed further below, obligations under the co-regulatory and mandatory provisions must relate to one or more of paragraphs (a) to (e). In broad terms, this means that obligations under the Bill must relate to waste avoidance, resource recovery or reducing hazardous content in products. It is not possible for obligations to be imposed with respect to other matters that fall within the broader objective in subclause 4(1).

14. Subclause 4(2) should be read in conjunction with the definition of 'waste' in clause 6, which makes clear that waste, in relation to a product, means waste associated with the product after it is disposed of. This makes clear that paragraphs 4(2)(a)-(e) are not intended to cover waste produced in the manufacturing process.

Other objects

15. Subclause 4(3) sets out additional objects of the Bill including contributing to Australia meeting its international responsibilities concerning the impacts referred to in subclause 4(1). The Australian Government has responsibilities arising from a number of international agreements including agreements related to hazardous substances, wastes, persistent organic pollutants and ozone-depleting substances. Relevant instruments to which Australia is a party include the Basel Convention on

the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Stockholm Convention on Persistent Organic Pollutants.

16. Subclause 4(3) also makes reference to the object of contributing to reducing greenhouse gas emissions, energy use and water consumption in connection with manufacturing, importing and distributing products. These are in part co-benefits from other objects of the Bill concerning waste reduction, re-use and recycling in subclause 4(2). This object is also relevant to commitments that may be made by administrators of voluntary arrangements concerning the broader life cycle impacts of their products (see commentary on Part 2 below).

17. The use of the words 'in connection with' in clause 4(3) are intended to be broad enough to cover the extraction and processing of raw materials needed to manufacture products. This recognises that re-using and recycling products (referred to in paragraph 4(2)(e)) will tend to reduce the greenhouse gas emissions, energy use and water consumption associated with the extraction and processing of raw materials. It does not mean that the Bill can regulate the extraction and processing of raw materials.

Clause 5 – Product stewardship criteria

18. Clause 5 sets out the product stewardship criteria. The product stewardship criteria are intended to be basic filter criteria to help determine whether the Bill should apply to a particular class of products. Unless the Minister is satisfied that two or more product stewardship criteria for a class of products are met then a voluntary arrangement cannot be accredited and regulations cannot be made under the co-regulatory or mandatory provisions (see subclause 19(3) and clauses 19 and 39).

19. The product stewardship criteria are only one factor in determining whether regulations can be made with respect to a class of products. Under both the co-regulatory and mandatory provisions, the Minister would also have to be satisfied that making the regulations will further the objects of the (subclauses 19(3) and 39). In addition, Australian Government policy concerning regulatory impact analysis would have to be followed.

20. The national market criterion (paragraph 5(a)) directs the Minister's attention to whether relevant products are sold throughout Australia. This criterion was included because, where products are in a national market, a national approach will avoid inefficiencies and inconsistencies associated with different approaches being adopted by State and Territory governments.

21. The hazardous substance criterion (paragraph 5(b)) directs the Minister's attention to whether the products contain hazardous substances. This criterion was included because hazardous substances in products can increase the impacts that products have on the environment and human health and safety, including at the end of products' lives. There is a stronger case for product stewardship action where hazardous substances are present.

22. The third criterion (paragraph 5(c)) relates to material conservation and resource recovery, and associated benefits such as reducing greenhouse gas emissions. This criterion may be satisfied, for example, where reuse or recycling requires less energy or water than production of a new product.

23. The fourth criterion (paragraph 5(d)) addresses the situation in which governments are currently incurring significant costs associated with end-of-life management of a class of products.

24. The willingness to pay criterion (paragraph 5(e)) directs the Minister's attention to the cost that would be imposed on consumers by product stewardship action, and whether consumers are willing to pay that cost. In practice, this would involve an assessment by the Minister as to whether consumers are willing to pay the costs associated with the particular action in question.

25. The final criterion (paragraph 5(f)) relates to whether product stewardship action would offer business opportunities that would make a contribution to the economy. This was included as a criterion because the presence of business opportunities strengthens the case for taking product stewardship action.

Division 4 – The Dictionary

Clause 6 – The Dictionary

26. The Dictionary contains a list of every term that is defined in the Bill. It includes some 'signpost' definitions that refer readers to the clauses in which terms are substantively defined. Key definitions are explained below.

administrator

27. As described in more detail in clauses 12 and 20, the administrator of a product stewardship arrangement is the body corporate responsible for ensuring that certain outcomes are achieved in relation to a class of products.

civil penalty order

28. This definition refers readers to clause 42, which allows the Minister to apply to a relevant court for an order that a person pay the Commonwealth a pecuniary penalty if the person has contravened a civil penalty provision in the Bill or regulations in the preceding 6 years. (See also the definition of 'this Act' below).

constitutional corporation

29. This definition provides that a constitutional corporation is a corporation to which section 51(xx) of the Constitution applies. Section 51(xx) of the Constitution provides that the Commonwealth Parliament may pass laws with respect to 'foreign corporations, and trading or financial corporations found within the limits of the Commonwealth.'

co-regulatory arrangement

30. Clause 20 outlines the key elements of a co-regulatory arrangement, including that it is an arrangement (however described) that is designed to achieve the outcomes specified in regulations in relation to a class of products.

executive officer

31. Executive officer of a body corporate is defined in subclause 51(4) as a person (whether or not they are a director of the body corporate) who is concerned in, or takes part, in the management of the body corporate.

improvement notice

32. An improvement notice is a notice the Minister may issue to the administrator of an approved co-regulatory arrangement under clause 29.

inspector

33. An inspector is a person appointed by the Minister under clause 68 to exercise the powers and perform the functions of an inspector (e.g. to enter and search premises under warrant).

liable party

34. A liable party in relation to a class of products is a person who is obliged, under clause 19, to be a member of an approved co-regulatory arrangement. Regulations that establish product stewardship requirements for a class of products would define the 'liable parties' for those products.

life

35. The life of a product is defined to include the time when the product begins to be manufactured, and the time when the product is waste. This is relevant to the scope of the objects of the Bill, as discussed in the commentary above on clause 4.

magistrate

36. This term is defined to include a Federal Magistrate under certain circumstances. This is necessary as section 16C of the *Acts Interpretation Act 1901* provides that a reference to a 'magistrate' does not include Federal Magistrates unless the contrary intention appears.

penalty unit

37. 'Penalty unit' is defined in section 4AA of the *Crimes Act 1914*. It is currently $110.

product

38. The primary definition of a product is a thing (including a substance or mixture of substances) that is manufactured. This is a deliberately broad definition that is intended to provide flexibility for the Bill to apply to the full range of manufactured goods or materials that may conceivably be subject to product stewardship requirements. The definition of 'product' can be expanded by regulations.

product stewardship criteria

39. Clause 5 sets out the product stewardship criteria, two or more of which would have to be satisfied before either:

- the Minister can approve a voluntary arrangement relating to a specified class of products; or
- regulations can be made for the purposes of the co-regulatory arrangement or mandatory provisions.

product stewardship logo
40. A product stewardship logo is a logo designated under clause 14. It is available for use by persons in accordance with an accredited voluntary product stewardship arrangements in certain circumstances.

recover
41. 'Recover', in relation to products or waste from products, includes to recover resources, materials or energy from those products or that waste.

relevant court
42. 'Relevant court' means the Federal Court of Australia or a Supreme Court of a State or Territory.

reviewable decision
43. Decisions made under the Bill that are open to internal and Administrative Appeals Tribunal review, as identified in clause 93.

this Act
44. 'This Act' is defined to include regulations, and other legislative instruments, made under the Product Stewardship Act. This means, for example, that the ability of the Minister to apply for a civil penalty order against a person contravening a civil penalty provision 'in this Act' (clause 42) also applies to civil penalties in regulations. The expansive definition of 'this Act' was included to simplify the Bill, as it would otherwise be necessary to also include references to regulations and other legislative instruments throughout the Bill.

voluntary arrangement
45. Clause 12(2) outlines the key elements of a voluntary arrangement, including that the arrangement is designed to further the objects of the Bill by achieving one or more measurable outcomes in relation to a class of products.

waste
46. Waste, in relation to a product, means waste associated with the product after it is disposed of. This definition is relevant to the scope of the objects clause, co-regulatory and mandatory provisions. It is discussed further in the commentary on clause 4.

47. Some terms that are used in the Bill are defined in the *Acts Interpretation Act 1901*. In particular:

Minister
48. Where a provision of an Act refers to 'the Minister', this is a reference to the Minister or Ministers administering the provision (section 19). (Note also that under clause 110 of the Bill the Minister may delegate his or her functions or powers).

person
49. 'Person' includes a body politic or corporate as well as an individual (section 22).

Division 5 – Application of this Act

Clause 7 – Act binds the Crown

50. This clause provides that the Bill binds the Crown in each of its capacities. However, in line with usual practice the Bill provides that the Crown is not liable to a pecuniary penalty or to be prosecuted for an offence under the Bill. The protection from prosecution or civil penalty proceedings does not apply to an authority of the Crown.

Clause 8 – Extension to external Territories

51. The Bill applies to all of Australia's external territories. This clause does not imply that product stewardship obligations will automatically apply to the external territories. For example, collection and recycling obligations for a particular product as specified in regulations may not extend to remote regions, which could include external territories, where the cost of doing so outweighs the benefits.

Clause 9 – Relationship to State and Territory laws

52. Generally, the Bill does not seek to exclude the operation of State and Territory laws, to the extent that those laws are capable of operating concurrently with the Bill (subclause 9 (1)).

53. As the Bill was developed with the support of all Australian Governments to establish a nationally-consistent approach to product stewardship, it is unlikely that duplicative schemes for the same class of products will be established. For example, as all Australian Governments have agreed to a national scheme for recycling televisions and computers to be established under this Bill it is unlikely that duplicative schemes would be established under State or Territory laws.

54. However, if a duplicative scheme is established under State or Territory laws then it will be possible for regulations to prescribe the relevant State or Territory law as an 'excluded law' (subclause 9(2)). The 'excluded law' may be particular provisions of an act or regulations, rather than the whole of an act or regulations. The effect of prescribing a State or Territory law as an 'excluded law' will be that the provisions of the Bill and regulations dealing with co-regulatory and mandatory product stewardship will apply to the exclusion of that law.

55. Under subclause 9(3) the exclusion of a State or Territory law only applies to the extent that:

- regulations have been made with respect to the class of products under the co-regulatory or mandatory provisions;
- the excluded law deals with the subject matters set out in paragraph 9(3)(b) in respect of the same class of products as those regulations; and
- the excluded law would apply to or deal with matters within the relevant heads of Commonwealth legislative power.

56. The approach in clause 9 is similar to that adopted in other Commonwealth legislation, such as section 136 of the *Airports Act 1996*. It seeks to minimise

regulatory duplication and provide certainty by providing a mechanism to deal with possible conflicts between State and Territory laws on the one hand, and the Bill on the other.

Part 2 – Voluntary product stewardship

Overview of Part

57. Part 2 relates to the accreditation of voluntary product stewardship arrangements. The purpose of accreditation is to provide an avenue for encouraging and recognising product stewardship without the need to regulate, and to provide assurance to the community that a voluntary product stewardship arrangement is operating to achieve the outcomes it has committed to achieve.

58. Voluntary product stewardship arrangements are arrangements designed to further the objects of the Bill by achieving one or more measurable outcomes in relation to a class of products (clause 12). Under these provisions it would be possible, for example, for an industry association or non-government organisation to put forward a proposal for the ongoing collection and recycling of a class of products.

59. Much of the detail concerning voluntary product stewardship will be set out in a legislative instrument made by the Minister. The legislative instrument would deal with matters such as who may apply for accreditation, the circumstances in which an application may be made, and who makes accreditation decisions (clause 13).

60. The Part provides for the use of a government product stewardship logo in connection with accredited voluntary product stewardship arrangements (clause 11 and paragraph 12(2)(b)). This will provide an incentive for industry to bring forward voluntary arrangements and will provide a basis for consumers to identify accredited voluntary arrangements.

61. The Part does not provide special protection to a product stewardship logo. The relevant sanctions for misuse of the logo and misleading or deceptive conduct would be the normal sanctions in the *Copyright Act 1968, Trade Marks Act 1995* and *Competition and Consumer Act 2010*.

62. The Minister is required to publish information on each accredited voluntary product stewardship arrangements on the Department's website, including reports on the operation of the arrangements (clause 108).

Division 1 – Guide to this Part

Clause 10 – Guide to this Part

63. This clause provides a guide to this Part.

Division 2 – Voluntary arrangements

Clause 11 - Exercising rights in product stewardship logo in accordance with accredited voluntary arrangement

64. Clause 11 provides that a person is licensed or authorised to exercise the Commonwealth's intellectual property rights in a product stewardship logo if the person is exercising those rights in accordance with an accredited voluntary arrangement.

65. The Commonwealth's 'intellectual property rights' are defined in clause 15 by reference to its rights under the *Copyright Act 1968* and the *Trade Marks Act 1995*.

Clause 12 - What is an *accredited voluntary arrangement*

Accredited voluntary arrangement

66. Subclause 12(1) provides that an accredited voluntary arrangement is a voluntary arrangement accredited under a Ministerial determination made under clause 13.

67. The National Waste Policy referred to accreditation of voluntary product stewardship 'schemes'. The word 'arrangement' has been used instead of 'scheme' to avoid confusion with the legislative scheme that may be established for a particular class of products.

Voluntary arrangements

68. Subclause 12(2) sets out the basic elements of a voluntary arrangement.

69. Paragraph 12(2)(a) requires the arrangement be designed to further the objects of the Bill by achieving one or more measurable outcomes in relation to a class of products. Subject to the scope of eligible voluntary arrangements being narrowed by the Ministerial determination, this means that a voluntary arrangement may be directed towards reducing any or all of the environmental, health and safety impacts that fall within subclause 4(1). This could include, for example, environmental impacts associated with the manufacture and distribution of a product as well as the environmental impacts associated with the disposal of a product.

70. Paragraph 12(2)(b) requires the arrangement have a written document stipulating the persons, or classes of persons authorised to exercise the Commonwealth's intellectual property rights in a product stewardship logo in connection with products and the circumstances in which use is authorised.

71. This written document may be varied over time. For example, the written document may initially authorise only members of the arrangement to display the logo, but as the arrangement evolves other parties such as participating retailers may be authorised to use a logo.

72. In practice, a condition of accreditation (see 13(2)(f)) is likely to provide that changes to the rules concerning use of a product stewardship logo must be proposed by the arrangement administrator and approved by the accrediting authority.

73. Paragraph 12(2)(c) requires the arrangement to have a person (the administrator) who is primarily responsible for ensuring that the voluntary arrangement achieves the measurable outcomes referred to in paragraph 12(2)(a).

74. Paragraph 12(2)(d) requires the administrator to be a body corporate. This is intended to promote continuity and good governance.

Clause 13 - Accreditation of voluntary arrangements

75. Subclause 13(1) enables the Minister, by legislative instrument, to determine matters relating to the accreditation of voluntary arrangements.

76. Subclause 13(2) enumerates matters that may be addressed in a determination. The matters enumerated are not intended to limit the Minister's power under subclause 13(1).

77. Under subclause 13(2) a determination may provide for any or all of the following:

- who may apply for accreditation of a voluntary arrangement in relation to a class of products (e.g. an administrator);

- the circumstances in which a person may apply for such accreditation (e.g. a determination may set out a process for the accrediting authority to call for expressions of interest from proposed administrators of voluntary arrangements and decide which of the expressions of interest may proceed to a full application);

- who may make a decision on such an application (the accrediting authority) (e.g. the Minister);

- matters about which the accrediting authority must be satisfied before accrediting a voluntary arrangement (e.g. that outcomes of the arrangement must relate to particular matters);

- grounds on which the accrediting authority may or must refuse to accredit a voluntary arrangement, which may for example include that:
    - the applicant has not provided the accrediting authority with the requisite information or documents;
    - the applicant has provided the accrediting authority with false and misleading information or documents;
    - the arrangement does not satisfy the requirements set out in subclause 12(2);
    - the administrator is not a fit and proper person;

- the imposition of conditions by the accrediting authority on a voluntary arrangement, which may be either standard or arrangement-specific conditions and may for example include:
    - that the administrator of a voluntary arrangement take reasonable steps to ensure the arrangement's outcomes are achieved (see note 2(a) to the clause);
    - that the administrator of a voluntary arrangement provide annual reports as to whether the outcomes it has committed to have been achieved;
    - that the product stewardship logo only be displayed in a specified way (see note 2(b) to the clause);

- reviewing the operation of accredited voluntary arrangement (e.g. the accrediting authority may require an administrator to organise a review of an arrangement at a particular time or in certain circumstances, such as if an arrangement is failing to achieve outcomes);

- cancellation by an accrediting authority of a voluntary arrangement's accreditation (e.g. a determination may set out the general grounds for cancelling accreditation and also make provision for an administrator to apply to the accrediting authority requesting cancellation).

78. Note 1 following subclause 13(2) refers readers to clause 102, which sets out the requirements relating to applications, including that applications must be made in the manner and form approved in writing by the Minister.

Preconditions to accreditation

79. Subclause 13(3) has the effect of requiring the accrediting authority to refuse to accredit a voluntary arrangement on certain grounds, including where the objects of the Bill would not be furthered by accreditation and where the product stewardship criteria are not satisfied. These two requirements are basic filters common to the co-regulatory and mandatory provisions.

Public interest and appropriate use of logo – relevant matters

80. The accrediting authority must refuse to accredit a voluntary arrangement where satisfied that it is not in the public interest to accredit the arrangement (13(3)(e)). The 'public interest' may include matters other than the objects of the Bill (subclause 13 (4)).

Clause 14 - What is a *product stewardship logo*

81. Clause 14 provides for the Minister to make a legislative instrument that identifies one or more product stewardship logos. It anticipates that the Commonwealth will have intellectual property rights in a product stewardship logo under the *Copyright Act 1968*, and may also have rights under the *Trade Marks Act 1995*.

Clause 15 - What are the Commonwealth's intellectual property rights in a product stewardship logo

82. Clause 15 defines the Commonwealth's intellectual property rights in a product stewardship logo as the rights it holds under the *Copyright Act 1968* and the *Trade Marks Act 1995*.

83. Generally, the Commonwealth's right under the *Copyright Act 1968*, as an owner of copyright in an artistic work to do an act comprised in that copyright, is the exclusive right to do, or authorise other persons to do, all or any of the following acts:

- to reproduce the work in a material form;
- to publish the work;
- to communicate the work to the public.

84. Generally, the Commonwealth's rights under the *Trade Marks Act 1995*, as a registered owner of a trade mark, extend to the right to use, or authorise other persons to use, the trade mark in relation to goods and/or services, but only goods and/or services:

- dealt with or provided in the course of trade; and
- in respect of which the trade mark is registered.

Clause 16 - Commonwealth's intellectual property rights not limited

85. For the avoidance of doubt, clause 16 provides this Part does not limit the Commonwealth's intellectual property rights in a product stewardship logo or the operation of the *Trade Marks Act 1995* or the *Copyright Act 1968*.

Part 3 – Co-regulatory product stewardship

Overview of Part

86. Part 3 deals with co-regulatory arrangements. The co-regulatory provisions of the Bill use a combination of industry action and supporting Government regulation to achieve outcomes specified in regulations, such as recycling outcomes for a class of products (subclause 21(1)).

87. The co-regulatory provisions only apply where regulations have been made with respect to a product. Before regulations can be made the Minister would have to be satisfied that the regulations would further the objects of the Bill and that the product meets two or more of the 'product stewardship criteria' specified in the Bill (subclause 19(3)). As a matter of government policy, the usual regulatory impact assessment requirements would also apply.

88. Liable parties in relation to a class of products (as defined in regulations) must be members of an approved product stewardship arrangement (subclause 18(1)). This is intended to ensure a level playing field for the relevant industry, and that there are no 'free riders'. Civil penalties, including daily penalties and penalties for executive

officers of a body corporate involved in the contravention of the obligation, may apply (see Part 5).

89. Product stewardship arrangements are operated by administrators. Proposed administrators apply to the Minister to approve an arrangement (clause 25). The administrator of an approved co-regulatory arrangement will be required to take all reasonable steps to ensure that outcomes specified in regulations are achieved (clause 23). A failure to do so may result in the Minister issuing an improvement notice (clause 29) or cancelling the arrangement's approval (clause 28). The regulations may also establish reporting obligations for administrators (clause 24).

90. The outcomes that are specified in regulations for a co-regulatory arrangement must relate to one or more of the following:

- avoiding generating waste from products;
- reducing or eliminating the amount of waste from products to be disposed of;
- reducing or eliminating hazardous substances in products and in waste from products;
- managing waste from products as a resource;
- ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way (subclause 21(3)).

91. In considering possible product stewardship arrangements, parties will be required to comply with any other laws which may be applicable. For example, an arrangement could be prohibited under the competition provisions in Part IV of the *Competition and Consumer Act 2010*. Generally, persons may apply for authorisation from the Australian Competition and Consumer Commission (ACCC) when the conduct they propose to engage in might constitute conduct prohibited by Part IV of the *Competition and Consumer Act 2010*. Parties considering a potential product stewardship arrangement that could raise competition concerns should contact the ACCC for further information on 1300 302 502, or at www.accc.gov.au.

92. If the Product Stewardship Bill is passed by the Parliament then, consistent with the announcement of the Environment Protection and Heritage Council of 5 November 2009, the first set of regulations to be made under the co-regulatory provisions would be to establish a national collection and recycling scheme for televisions, computers and computer peripherals. A consultation paper concerning those regulations was released for comment on 8 March 2011.

Division 1 – Guide to this Part

Clause 17 – Guide to this Part

93. This clause provides a guide to this Part.

Division 2 – Requirements for liable parties and administrators of co- regulatory arrangements

Subdivision A - Requirement for liable party to be member of approved co-regulatory arrangement

Clause 18 – Liable party to be member of approved co-regulatory arrangement

94. Clause 18 requires a liable party to be a member of an approved co-regulatory arrangement. This obligation is central to the operation of the co-regulatory provisions as it seeks to ensure that non-participants in an industry arrangement do not gain an advantage over participants.

95. In some cases there will be a substantial incentive for a liable party to contravene this provision. For example, it is proposed that regulations under the co-regulatory provisions will establish a national recycling scheme for computers and televisions. As part of this scheme, it is likely that importers and manufacturers of televisions will be 'liable parties' required to be members of an approved product stewardship arrangement. The regulations will require the administrators of those arrangements to meet collection and recycling targets, and in order to achieve these targets it is likely that administrators will charge fees to members. These fees could be substantial, providing a significant incentive for avoidance of subclause 18(1).

96. Given the substantial incentive for avoidance of subclause 18(1), a number of penalties and compliance provisions apply, including:

- A basic civil penalty of 200 penalty units, or 1000 units for a body corporate, (subclauses 18(1), 43(1));
- A daily penalty for ongoing contraventions, which increase the basic penalty by 10 per cent each day the contravention continues (subclause 18(9), subclause 43(2), clause 59);
- As alternative to the above, a penalty equal to the commercial benefits obtained from the contravention (subclause 43(3)); and
- Liability for executive officers involved in contraventions (clause 51).

97. Taken together, these penalties and compliance provisions should provide an adequate deterrent to contraventions of subclause 18(1).

98. As is apparent from later provisions of the Bill (such as paragraph 20(2)(c)), it is possible for a co-regulatory arrangement to have a single member. This means that it would be possible for a liable party to establish its own co-regulatory arrangement.

Minister to give notice before applying for civil penalty order

99. Subclauses 18(2) and 18(3) specify that the Minister cannot apply for a civil penalty order unless the Minister first issues a written notice to the liable party which provides it with at least 14 days to become a member of an approved co-regulatory arrangement, and it fails to comply with the notice. This is intended to ensure that liable parties have an opportunity to become a member of an approved co-regulatory arrangement before penalties are imposed.

Variation and revocation of notice

100. Subclause 18(4) enables a person to whom a notice has been given to apply to the Minister to vary the notice to specify a later day or revoke the notice. Under subclause 18(5) the person's application must be in writing and made before the day specified in the notice.

101. Subclause 18(6) allows the Minister to vary the notice to specify a later day or revoke the notice. The person who has applied to vary or revoke the notice may apply to the Administrative Appeals Tribunal to seek review of the Minister's decision (clause 93, item 4). If the decision was made by a delegate of the Minister, internal review is also available (clause 95).

102. Subclauses 18(4) and (6) do not affect the operation of subsection 33(3) of the *Acts Interpretation Act 1901* (Subclause 18(8)). This ensures that the Minister has the power to revoke or vary a notice at his or her own initiative, rather than just on the application of the person who has been served with the notice.

Clause 19 – Who is a *liable party* in relation to a class of products

Regulations may specify liable parties

103. Subclause 19(1) defines liable party, in relation to a class of products, as a person in a class (or classes) of persons specified as liable parties in regulations.

104. Subclause 19(2) limits who can be identified as a liable party in regulations to a person who has at any time:

- imported the relevant product into Australia;
- manufactured the relevant product in Australia;
- distributed the relevant product in Australia; or
- used the relevant product in Australia.

105. Regulations may define a liable party with reference to a threshold. For example, a liable party may be a constitutional corporation which imported over a certain number of products of a specified class in a specified period. It would also be possible for the definition of 'liable party' to provide that such a threshold is exceeded where imports of that corporation, together with related parties, exceed the threshold.

106. A threshold could also be based on the turnover of a company – for example, the definition of 'brand owner' in existing State and Territory laws related to packaging have a $5 million turnover threshold (e.g. regulation 46I, *Protection of the Environment Operations (Waste) Amendment (Used Packaging Materials) Regulation 2006* (NSW)).

107. Subclause 19(2) is intended to allow sufficient flexibility to cater for different products and approaches to product stewardship. Other product stewardship schemes, either in Australia or overseas, have imposed obligations on importers, manufacturers, distributors and users of products. For example, the *National Environment Protection (Used Packaging Materials) Measure* and related state laws apply to large users of packaging, such as supermarkets.

108. Subclause 19(2) refers to a person 'who has at any time' been in any of the categories referred to in the subclause. This is preferable to limiting the subclause to persons who are currently in those categories, as it may be appropriate to impose a continuing obligation on a person to become a member of an approved arrangement.

109. It will be possible to have different liable parties for different product classes, and a particular person may be a liable party in relation to more than one product class.

Satisfying product stewardship criteria and furthering objects

110. Under subclause 19(3) the Governor-General cannot make regulations specifying liable parties in relation to a class of product unless the Minister is satisfied that:

- making regulations furthers the objects of the Bill; and
- the product satisfies 2 or more of the product stewardship criteria.

111. In addition, as a matter of Australian Government policy, the requirements for a regulatory impact analysis will also have to be met before a product is subject to co-regulatory requirements.

112. The constitutional limitations in clause 34 provide a further constraint on the classes of persons that may be identified in regulations as liable parties.

Exempting liable parties

113. Subclause 19(4) allows regulations to provide for the granting of exemptions to liable parties. This has been included as a safeguard in case it is required in future regulations.

Clause 20 – What is an *approved co-regulatory arrangement*

114. Clause 20 sets out the basic elements of a co-regulatory arrangement, including that the arrangement is designed to achieve the outcomes specified in regulations and that there is an administrator who is responsible for ensuring that these outcomes are achieved.

115. Clause 20 does not require an arrangement to be in writing. This provides flexibility for arrangements to evolve over time without the need for administrators to continually re-seek approval for any changes from the Minister. This is consistent with the co-regulatory philosophy of avoiding government intervention as long as outcomes and basic operational requirements are met.

116. While flexibility is afforded to administrators in how they achieve outcomes, there are a number of safeguards to ensure that the operation of co-regulatory arrangements can be effectively monitored. In particular:

- the application for approval of a co-regulatory arrangement must include a written description of the arrangement (subclause 25(2));
- the regulations may require an administrator to notify the Minister of changes in the circumstances of the arrangement (subclause 24(3)); and

- the regulations may require administrators may to submit reports on the operation of the arrangement (subclause 24(4)).

117. Subclause 20(1) provides that the co-regulatory arrangement is approved 'in relation to a class of products'. In reading this subclause and other provisions using this phrase, regard should be had to section 23 of the *Acts Interpretation Act 1901*, which provides that "[i]n any Act, unless the contrary intention appears ... words in the singular number include the plural...". The effect of this rule of interpretation is that an arrangement may deal with more than one class of products. For example, if computers and televisions are identified in regulations as different classes of products, it would be possible for one co-regulatory arrangement to deal with both computers and televisions. In considering whether to approve such an arrangement under clause 26, the Minister would consider whether requirements relating to both classes of products have been met and make a single decision approving or refusing the application.

Clause 21 – Outcomes for co-regulatory arrangements

118. Clause 21 requires that regulations must specify one or more outcomes which must be achieved by co-regulatory arrangements that relates to a class of products, and provides that these outcomes must relate to one or more of the following:

- avoiding generating waste from products;
- reducing or eliminating the amount of waste from products to be disposed of;
- reducing or eliminating hazardous substances in products and in waste from products;
- managing waste from products as a resource; or
- ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way.

119. Paragraph 21(2)(a) provides the scope for a method or formula to be outlined in the regulations for determining how an outcome may be achieved. For example, a formula could allocate a national recycling target to different co-regulatory arrangements based on the market share of their members. Outcomes could also be expressed by a reference to a published figure or document.

120. Paragraph 21(2)(b) allows the regulations to require different outcomes to be achieved by the end of different periods. For example, different recycling targets could be set for each financial year.

121. Paragraph 21(2)(c) provides scope for the regulations to specify requirements on how outcomes are achieved. For example, administrators may be required to meet an Australian Standard published on a specified date.

Clause 22 – Matters to be dealt with by co-regulatory arrangements

122. This clause allows regulations to specify basic operational requirements that a co-regulatory arrangement must adequately address to be approved, or to maintain approval.

123. Subclause 22(2) requires matters to relate to one or more of the following:

- the governance of the arrangement (including how it resolves disputes);
- the membership of the arrangement (including requirements for becoming or ceasing to be a member of the arrangement);
- how the arrangement communicates information to the public; and
- other matters that may be relevant to the operation of the arrangement or the achievement of outcomes under clause 21.

124. While these matters are likely to be common across product classes, it is envisaged that regulations could specify different matters for different classes of products.

Subdivision B—Requirements for administrators of approved co-regulatory arrangements

Clause 23 – Administrator to achieve outcomes for co-regulatory arrangement

125. Clause 23 requires the administrator of an approved co-regulatory arrangement to take all reasonable steps to ensure that the arrangement achieves the outcomes specified in regulations made under clause 21, and complies with any requirements specified in regulations for meeting those outcomes.

126. If the arrangement administrator does not comply with this clause, the Minister may give an improvement notice (clause 29), require an audit of the arrangement to be carried out (clause 30) or cancel the arrangement's approval (clause 28).

127. The requirement to 'take all reasonable steps' recognises that in some circumstances outcomes may not entirely be within the control of the administrator. For example, the ability to achieve collection and recycling targets for a class of products may depend in part upon how many of those products are delivered by members of the public at collection points.

Subdivision C—Requirements for liable parties and administrators

Clause 24 – Requirements relating to record-keeping, giving information and reporting

Record-keeping and giving information

128. Clause 24 allows regulations to require a liable party or the administrator of an approved co-regulatory arrangement to make and keep records or provide information to the Minister or an inspector.

129. Subclause 24(3) makes clear that regulations may require the administrator of an approved co-regulatory arrangement to notify the Minister of specified matters, including a change to the membership of the arrangement. A requirement that administrators report on their membership will help the Minister determine whether liable parties have met their obligation under clause 18.

Reporting

130. Subclause 24(4) provides that the regulations may require the administrator of an approved co-regulatory arrangement to provide reports regarding the operation of the arrangement, in accordance with the regulations. Regulations may, for example, require the administrator to submit an audited annual report addressing performance in meeting outcomes specified in regulations. Reports provided to the Minister under subclause 24(4) may be published on the Department's website pursuant to subparagraph 108(1)(d)(ii).

Civil penalty provisions

131. Under subclause 24(5) the regulations may make provision for pecuniary penalties not exceeding 250 penalty units (for a body corporate) or 50 penalty units (in any other case) for a contravention of requirements to make records or provide information.

132. These penalty levels are consistent with the recommendation in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 39) that where an Act authorises the creation of offences in a regulation it should specify that these offences may carry a maximum fine not exceeding 50 penalty units for an individual and 250 penalty units for a body corporate.

Division 3—Approval of co-regulatory arrangements

Clause 25 – Approving co-regulatory arrangements - application

133. Clause 25 allows the administrator of a co-regulatory arrangement to apply to the Minister for approval of the arrangement, and specifies that the application must be accompanied by a written description of the arrangement that addresses certain matters, including how the arrangement proposes to achieve the outcomes specified in regulations. A note to the clause alerts readers to clause 102, which contains general requirements for applications under the Bill.

Clause 26 – Approving co-regulatory arrangements - decision

Minister to approve or refuse to approve arrangement

134. Subclause 26(1) requires the Minister to either approve or refuse to approve a co-regulatory arrangement. The Minister cannot impose conditions on that approval.

135. There is scope for the Minister to consult with the applicant on any aspect of their arrangement while it is under consideration for approval. The applicant may choose to modify some aspects of their application to meet any concerns the Minister has.

136. The Minister may also consult with other parties to inform consideration of the application. For instance, the Minister may consult with the Australian Competition and Consumer Commission on whether competition issues might arise from the

arrangement and whether applicants have sought authorisation under the *Competition and Consumer Act 2010*.

When the Minister must refuse to approve arrangement

137. Subclause 26(2) sets out when the Minister must refuse to approve a co-regulatory arrangement. The matters set out in subclause 26(2) are mainly directed to ensuring that approved arrangements will function properly and achieve the outcomes set by regulations.

The Minister must also reject an application where satisfied that it is not in the public interest to approve the arrangement.

Fit and proper person

138. Subclause 26(3) provides that in determining whether the administrator is a fit and proper person (for the purposes of paragraph 26(2)(d)), the Minister must have regard to matters specified in regulations. The Minister may also have regard to any other matter.

Public interest

139. Subclause 26(4) provides that in determining whether it is in the public interest to approve the arrangement (for the purposes of paragraph 26(2)(e)), the Minister must have regard to the objects of the Bill and any other matter.

140. For example, the Minister would refuse to accredit a proposed product stewardship arrangement based on competition concerns where the ACCC has previously denied or revoked an authorisation, or such an authorisation has expired for that arrangement.

When the Minister may refuse to approve an arrangement

141. Subclause 26(5) provides that the Minister may refuse an arrangement if:

- the Minister has requested further documentation or information from the applicant under clause 103 and the applicant fails to provide this information; or
- documentation or information provided from the applicant is false or misleading.

Notice of decision

142. Subclause 26(6) requires the Minister to provide applicants with a written notice of the decision on the application. Subclause 108(1) also requires the Minister to publish information on the arrangement on the Department's website, including a summary of approved co-regulatory arrangements and the name and contacts details of the arrangement administrator. There is no requirement to publish information on the website about unsuccessful applications.

Division 4 - Reviewing co-regulatory arrangements and cancelling approvals

Clause 27 - Reviewing approved co-regulatory arrangements

143. Subclause 27(1) requires the Minister to review an approved co-regulatory arrangement before the end of 5 years from when the arrangement is approved and each successive 5 year period. However, subclause 27(1) does not limit the Minister from reviewing an approved arrangement at any other time or cancelling the approval of a co-regulatory arrangement.

144. Examples of matters that a review could consider includes (but is not limited to) the effectiveness of the arrangement in achieving one or more outcomes in clause 21 or whether the administrator remains a fit and proper person. Having reviewed the arrangement, the Minister has the power to cancel the arrangement if satisfied that one of the matters in clause 28 are satisfied.

Clause 28 - Cancelling approvals of co-regulatory arrangements

General grounds for cancelling arrangement's approval

145. Subclause 28(1) sets out the general grounds for the Minister cancelling the approval of a co-regulatory arrangement. The Minister may cancel approval in a range of circumstances. These include a failure to achieve outcomes specified in regulations, a failure to comply with reporting or other requirements, or where the Minister is satisfied that the administrator is not a fit or proper person.

146. The Minister may also revoke the approval of a product stewardship arrangement where there has been a material change in circumstances since the arrangement was accredited. An example of this (without limiting the other circumstances justifying revocation) would be where the parties had been granted an authorisation under competition law by the ACCC prior to approval, but the authorisation had expired or been revoked by the ACCC. This would be a material change in circumstances and the Minister may revoke the accreditation of the arrangement.

147. Clause 28 does not require the Minister to give notice of cancellation of an approved co-regulatory arrangement to the administrator or its members. However, the general principles of procedural fairness would apply. These principles mean that the Minister would ordinarily need to notify both the administrator and members of the Minister's proposed decision to cancel the arrangement, and give the administrator and members an opportunity to comment.

Fit and proper person

148. Subclause 28(2) provides that in determining whether the administrator is a fit and proper person (for the purposes of paragraph 28(1)(d)), the Minister must have regard to matters specified in regulations. The Minister may also have regard to any other matter.

Cancelling arrangement's approval on application by administrator

149. Subclause 28(3) enables the Minister to cancel the approval of a co-regulatory arrangement at the request of the administrator. Where the Minister is satisfied that the administrator has consulted with its members concerning the cancellation, the rules of procedural fairness would be met without the need for the Minister to separately contact the members of the arrangement.

Division 5 - Enforcing approved co-regulatory arrangements

Clause 29 – Improvement notices

150. The Minister may give an improvement notice to an administrator if the Minister believes on reasonable grounds that the administrator has not taken reasonable steps to achieve the arrangement's outcomes in accordance with the regulations and that it is in the public interest to do so (subclause 29(1)).

151. The notice must specify the contravention that the Minister believes is occurring, the reasons for that belief and a reasonable period within which the administrator must take the action necessary to prevent any further contravention (subclause 29(2)).

Varying or revoking a notice

152. Subclause 29(5) enables the Minister to vary or revoke an improvement notice if he or she is satisfied that it is in the public interest. The Minister may do so by giving written notice to the administrator. Any variations to an improvement notice must be set out in the Minister's notice given to the administrator (subclause 29(6)).

Civil penalty provision

153. If an improvement notice is not complied with, the Minister can bring civil penalty proceedings (subclause 29(7)) or cancel the arrangement (subparagraph 28(1)(e)(iii)). The maximum civil penalty for an administrator (as a body corporate) is 500 penalty units (subclauses 29(7), 43(1)). This penalty is within the range of penalties for analogous provisions in other Commonwealth legislation, such as section 38DC of the *Great Barrier Reef Marine Park Act 1975* (500 penalty units for individuals, 2500 penalty units for bodies corporate). See also section 193 of the Model Work Health and Safety Act 2010 ($50,000 for an individual and $250,000 for a body corporate, equivalent to 454 and 2,273 penalty units respectively).

Clause 30 – Directed audits - general

154. The Minister may also require an administrator to carry out an audit. The main situations in which a Minister may require an audit is where the Minister believes on reasonable grounds that:

- the administrator has not taken reasonable steps to achieve the arrangement's outcomes in accordance with the regulations (paragraph 30(1)(a)); or

- the administrator has not complied with, or is unlikely to comply with an improvement notice given to the administrator under clause 29 (paragraph 30(1)(b)).

155. An audit notice issued by the Minister in writing must specify certain matters, including the matters to be addressed by the audit report, the form of audit report and the time before which it must be given to the Minister (subclause 30(3)).

Clause 31 – Directed audits – Appointing auditor and carrying out of audit

156. An administrator who has been issued a notice under clause 30 must appoint an auditor and arrange the audit in accordance with the notice. A failure to do so may attract a civil penalty for an administrator (as a body corporate) of up to 500 penalty units (subclauses 31(1), 43(1)). This penalty is comparable to penalties applying to similar offences in other Commonwealth legislation, such as section 459 of the *Environment Protection and Biodiversity Act 1999*.

157. Subclause 31(3) specifies that an auditor cannot be appointed without the Minister's approval and subclause 31(4) specifies that an officer or employee of the administrator cannot be appointed as an auditor. This is to ensure the audit is conducted appropriately and independently. The cost of undertaking the audit would be borne by the administrator.

Division 6 - Other matters relating to co-regulatory product stewardship

Clause 32 – Co-regulatory product stewardship - anti-avoidance

158. The intention of this anti-avoidance provision is to ensure that persons that would otherwise be identified as a liable party under regulations do not engage in behaviour specifically designed to avoid the costs of being a liable party.

159. It could apply, for example, where an importer of products covered by regulations redirects these imports through several subsidiaries in order to avoid a liability threshold.

Minister may determine Act has effect as if person were a liable party

160. Subclause 32(1) enables the Minister to make a written determination to identify a specified person as a prospective liable party. A prospective liable party would be subject to the same obligations as a liable party under clause 18.

161. A liable party identified under subclause 32(1) will have the benefit of the notice requirement applying to other liable parties. The effect of clause 18(2) is that the Minister must issue a written notice requiring the liable party to become a member of an arrangement by a specified date, and that notice must be breached, before civil penalty proceedings may be commenced

162. A determination under subclause 32(1) is a reviewable decision (clause 93, item 7).

Condition for making determination-avoidance scheme etc.

163. Subclause 32(2) specifies that the Minister can only make a determination if at any time after the commencement of this Bill that one or more persons enters into, begin to carry out or are carrying out a scheme that the Minister believes, on reasonable grounds, is intended to help them avoid being a liable party. Further, if regulations are made in accordance with paragraph 34(1)(a) the prospective party must be a constitutional corporation.

Determination not a legislative instrument

164. Subclause 32(5) makes clear that the Minister's written determination is not a legislative instrument. This provision is simply to assist readers, as the determination is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 33 – Co-regulatory product stewardship - replacing administrator

165. Clause 33 provides that the Minister's approval is required before an administrator can be changed. This ensures that the Minister can assess whether the new administrator is a fit and proper person.

Clause 34 – Co-regulatory product stewardship - constitutional connection

166. Clause 34 sets out the limitations to apply in relation to regulations specifying liable parties in order to ensure that there is the necessary connection with the relevant constitutional powers, namely that either:

- liable parties in relation to a class of products must be a constitutional corporation; or
- the regulations are appropriate and adapted to give effect to Australia's obligations under an international agreement.

167. Subclause 34(2) requires regulations made under this Part to identify whether they are made in accordance with paragraph 34(1)(a) or (b). If regulations are made to give effect to Australia's obligations under an international agreement, paragraph 34(2)(b) requires the regulations to identify the specific agreement that the regulations draw their power from.

Clause 35 – Co-regulatory product stewardship - reading down provision in relation to administrators

168. Clause 35 provides for the co-regulatory provisions to read as if the administrator of the co-regulatory arrangement were expressly required to be a constitutional corporation. This, in effect, provides for an alternative constitutional basis for the co-regulatory provisions.

Part 4—Mandatory product stewardship

Overview of Part

169. The objective of Part 4 is to make provision for imposing product stewardship obligations through regulations. It is envisaged that mandatory product stewardship will be used where other types of product stewardship have been explored and found unsuitable, or where mandatory arrangements would deliver greater benefit to the community than other options.

170. Regulations may require people or organisations involved in the life of a product to take, or not to take, actions that relate to one or more of the following:

- avoiding generating waste from products;
- reducing or eliminating the amount of waste from products to be disposed of;
- reducing or eliminating hazardous substances in products and in waste from products;
- managing waste from products as a resource; or
- ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way. (Clause 37(2))

171. Regulations may make provision for penalties not exceeding a fine of 50 penalty units for offences against regulations, and pecuniary penalties of 200 penalty units for contraventions of civil penalty provisions (clause 38). In each case penalties for bodies corporate will be 5 times higher.

172. Before regulations can be made the Minister would have to be satisfied that the regulations would further the objects of the Bill and that the product meets two or more of the 'product stewardship criteria' specified in the Bill (clause 39). As a matter of government policy, the usual regulatory impact assessment requirements would also apply.

Division 1 – Guide to this Part

Clause 36 – Guide to this Part

173. This clause provides a guide to this Part.

Division 2 – Mandatory provisions

Clause 37 - Mandatory requirements may be specified in regulations

Basic rule – requiring people to take, or not take, specified action

174. Subclause 37(1) provides that regulations can be made under the mandatory provisions requiring one or more specified persons, or classes of person, to take, or not to take, specified action in relation to a specified class of products. The specified action must relate to one or more of the matters enumerated in subclause 37(2).

175. Similarly broad regulation-making powers are found in comparable 'framework' legislation, such as the *Waste Minimisation Act 2008* (NZ) (section 23), *Waste Avoidance and Resource Recovery Act 2007* (WA) (Schedule 3, Division 3), *Waste Avoidance and Resource Recovery Act 2001* (NSW) (section 16).

176. The note following subclause 28(2) alerts readers to the limitations on the power to make regulations in clause 29 (satisfying product stewardship criteria and furthering objects) and 30 (constitutional connection).

Specific action covered by subclause (1)

177. Subclause 37(3) provides a non-exhaustive list of matters that can be addressed in regulations made for the purposes of subclause 37(1). It provides that regulations made in relation to a class of products may:

- prohibit (either absolutely or conditionally), limit, restrict or otherwise affect the manufacture, import, export, distribution or use of a product in that class (paragraph 37(3)(a));

- prohibit (either absolutely or conditionally), limit or restrict substances that may be contained in a product in that class (paragraph 37(3)(b));

- require certain products to be labelled or marked in accordance with the regulations (paragraph 37(3)(c));

- specify packaging requirement for a product in that class (paragraph 37(3)(d));

- require communication in accordance with the regulations regarding distributing, reusing, recycling, recovering, treating or disposing a product in that class (paragraph 37(3)(e));

- require a person to make product return payments in relation to products in that class (paragraph 37(3)(f));

- specify other requirements for reusing, recycling, recovering, treating or disposing of a product in that class (paragraph 37(3)(g));

- require a person to keep records relating to a product in that class in accordance with regulations (paragraph 37(3)(h));

- require a person to give the Minister specified information relating to a product in that class (paragraph 37(3)(i));

- provide for the Minister to exempt a specified person from a requirement specified in regulations made under subclause (1) (paragraph 37(3)(j)).

171. Under clause 37(3)(b), regulations under the Bill could prohibit, limit or restrict hazardous substances in products manufactured in, imported into or sold in Australia. This power could be used where Australia has international obligations to

control particular hazardous substances. Other jurisdictions have adopted controls on hazardous substances in products. For example, EU Directive 2002/95 bans the placing on the EU market of new electrical and electronic equipment containing more than agreed levels of lead, cadmium, mercury, hexavalent chromium, polybrominated biphenyl (PBB) and polybrominated diphenyl ether (PBDE) flame retardants. Any such regulations would only be introduced in Australia following regulatory impact analysis.

178. Under paragraphs 37(3)(g) and related provisions, schemes could be established to provide, for example, for producers of identified classes of products to take specified action to deal with those products at end of life.

Meaning of product return payment

179. Paragraph 37(3)(f) provides that regulations may require a person to make product return payments in relation to products in a specified class. The term 'product return payment' is defined in subclause 37(5).

180. A product return payment provides an additional regulatory tool which may be adopted in cases where there is a need for an incentive to be provided for the return of a product in order to more effectively provide for the reuse, recycling or safe disposal of that product. As 'product' is defined broadly, this may include packaging.

181. Limitations on the circumstances in which product return payments may be used are discussed under clause 39 below.

Product return payment is not taxation

182. Subclause 37(6) provides that regulations requiring a person to make a product return payment must not amount to taxation.

Clause 38 - Contravening mandatory product stewardship requirements

Offences and civil penalties in regulations

183. Paragraph 38(1)(a) enables regulations made under subclause 37(1) to make provision for a maximum penalty of 50 penalty units for offences. Where a body corporate is convicted of an offence against the regulations, a court can impose 5 times this amount by virtue of subsection 4B(3) of the *Crimes Act 1914*. These penalties are consistent with the recommended maximum penalty for offences contained in regulations (*A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, page 43).

184. Paragraph 38(1)(b) enables regulations made under subclause 37(1) to make provision for pecuniary penalties not exceeding 1000 penalty units for a body corporate and 200 penalty units in any other case for contravening a civil penalty provision. Setting a civil penalty higher than a fine for a corresponding offence is consistent with Commonwealth practice (see *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, page 57).

185. If a person continues contravening a civil penalty provision in the regulations then subclause 59(3) will apply, with the effect that the penalty in the regulations will increase by 10% for each day the person fails to comply with the requirement (including the day the relevant civil penalty order was made).

186. Subclause 51(1) (civil liability of executive officer of body corporate) can apply to civil penalty provisions in regulations made under paragraph 37(1), where the regulations provide for this (see subparagraph 51(1)(a)(ii)).

Infringement notices in regulations

187. The regulations may make provision for infringement notices in respect of strict liability offences or civil penalty provisions created under subclause 37(1).

188. If provision is made for infringement notices in regulations, then the usual safeguards recommended in *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (e.g. as to the notice contents and service requirements) will be included in those regulations. These requirements have not been included in the Bill as infringement notices are only relevant to the regulations.

189. Subclause 38(3) sets out the limits for the penalty payable to the Commonwealth pursuant to any infringement notice regime created by regulations:

- for an offence it must not exceed one-fifth of the maximum penalty for committing the offence (paragraph 38(3)(a)); or
- for a civil penalty provision – one-tenth of the maximum pecuniary penalty for contravening the civil penalty provision (paragraph 38(3)(b)).

Clause 39 – Mandatory product stewardship - satisfying product stewardship criteria and furthering objects etc.

190. Clause 39 sets out a limitation on the making of regulations i.e. regulations cannot be made unless the Minister is satisfied that:

- the regulations will further the objects of the Bill specified in clause 4; and
- two or more of the product stewardship criteria in clause 5 are satisfied; and
- if the regulations would require a person to make a product return payment in relation to a product in that class, then certain other requirements are met, including that the persons required to make product return payments in relation to the relevant class of products are likely to be appropriately compensated.

191. The limitations with respect to product return payments are intended to make clear that the purpose of these payments is not to put an impost on the persons required to make the payments, but rather to provide for ‘refunds’ to encourage consumers to return used products for reuse, recycling or other end-of-life management.

192. The requirement that persons required to make product return payments are appropriately compensated could be met, for instance, where retailers are compensated for the refund amounts by wholesalers, the wholesalers in turn

incorporate the refund amount into higher prices to retailers for their products, and the retailers then incorporate this into higher prices to consumers.

Clause 40 - Mandatory product stewardship – constitutional connection

193. Clause 40 sets out a limitation on the making of regulations i.e. the regulations must be underpinned by one or more specific heads of constitutional power including:

- *the corporations' power* (section 51 (xx)) - the regulations are expressed only to apply to action taken, or not taken, by a constitutional corporation (paragraph 40(1)(a));
- *the trade and commerce power* (section 51 (i)) (together with the territories power in s 122) - the regulations are expressed only to apply in relation to action in the course of constitutional trade or commerce (paragraph 40(1)(b));
- *the external affairs power* (section 51 (xxix)) - the regulations are appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries (paragraph 40(1)(c)).

194. Regulations must specify whether they are made under paragraphs 40(1)(a), (b) or (c) and if they are made in accordance with paragraph 40(1)(c) the relevant international agreement or agreements must be referred to.

Part 5 – Enforcing this Act

Overview of Part

195. Part 5 of this Bill sets out the rules for obtaining civil penalty orders including, in some circumstances, against executive officers of bodies corporate. It also provides powers for the Minister to publicise offences, contraventions and decisions, accept enforceable undertakings and obtain injunctions. Provisions of the kind contained in Part 5 are common in Commonwealth legislation dealing with civil penalties and other enforcement measures.

Division 1 – Guide to this Part

Clause 41 – Guide to this Part

196. This clause provides a guide to this Part.

Division 2 – Civil penalty provisions

Subdivision A – Obtaining a civil penalty order

Clause 42 -Civil penalty orders

Application for order

197. Subclause 42(1) allows the Minister to apply to a relevant court for an order that a person who has contravened a civil penalty provision under the Bill or

regulations to pay the Commonwealth a pecuniary penalty. The Minister is able to make an application within 6 years of a person contravening a civil penalty provision.

198. As noted above, 'relevant court' is defined by clause 6 to mean the Federal Court of Australia or a Supreme Court of a State or Territory.

199. Subclause 42(2) empowers a relevant court to order a person to pay the Commonwealth a pecuniary penalty if the court is satisfied that the person contravened the civil penalty provisions.

200. Subclause 42(3) provides that the order made under subclause 42(2) is a civil penalty order.

201. Subclause 42(4) specifies that a pecuniary penalty under subclause 42(2) must not exceed the amount worked out under subclause 43 (see below).

Relevant matters in determining pecuniary penalty

202. Subclause 42(5) enumerates relevant matters that a court may take into account in determining the pecuniary penalty. The matters listed are designed to aid the court in performing its function and help ensure that the penalty imposed is proportionate to the contravention.

Clause 43 - Maximum amount of pecuniary penalty

General rule

203. Subclause 43(1) provides that, as a general rule, the maximum penalty for breach of a civil penalty provision is the amount specified in the provision, or 5 times that amount for bodies corporate. This 'corporate multiplier' is consistent with the approach to criminal offences under subsection 4B(3) of the *Crimes Act 1914*, and is the approach recommended in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (pages 66-67).

Special rule – continuing contraventions

204. Subclause 43(2) provides that the maximum amount payable under subclause 43(1) will be increased in the case of continuing contraventions in accordance with subclause 59(3) (see below).

Special rule – not being a member of an approved co-regulatory arrangement

205. Subclause 42(3) is a 'commercial benefits' provision that stipulates a special rule for a contravention of subclause 18(1) (liable party to be a member of an approved co-regulatory arrangement). The penalty for this contravention is the greater of:

- the amount calculated under the general rule plus any increase under the rule for continuing contravention; and

- an amount equivalent to the total benefits gained from a liable party not being a member of an approved co-regulatory arrangement (provided this can be ascertained by a court).

206. This special rule seeks to ensure that a liable party cannot profit from contravening clause 18(1). It is possible that in some cases the financial gain from avoidance will exceed the penalties that would otherwise be payable, even taking into account the special rule concerning continuing contraventions. Given that the amount of financial gain is likely to vary widely, this is best dealt with by a 'commercial benefits' provision rather than increasing the basic penalty. The rule is also appropriate because in many cases a breach of the obligation to be a member of an approved co-regulatory arrangement will lead to a direct and measurable financial gain, equal to the membership fee that should have been paid to an arrangement administrator.

Special rule – civil liability of executive officer of a body corporate

207. Subclause 43(4) relates to the penalty for executive officers of a body corporate. Under these provisions the penalty for an executive officer is the relevant penalty for an individual, rather than the higher penalty that applies to a body corporate. The penalty for executive officers includes both the basic amount of the civil penalty and any amount for continuing contraventions (see subclause 51(3)). However, it is not affected by any higher penalty that may apply to a body corporate under the commercial benefits provision.

Clause 44 - Involvement in contravening civil penalty provision

208. Clause 44 prohibits a person from involvement in contravening a civil penalty provision. Subclause 44(1) enumerates the various ways in which a person can be involved in a contravention and aims to capture a wide variety of behaviour ranging from aiding or abetting to conspiracy.

Civil penalty

209. Under subclause 44(2) the contravention of subclause 44(1) is deemed a contravention of the relevant civil penalty provision. This affects the penalty that applies. For example, if a person were to aid the contravention of a civil penalty provision with a maximum penalty of 100 penalty units, the same maximum penalty would apply for aiding the contravention.

Clause 45 - Civil enforcement of penalty

210. Subclause 45(1) provides that a pecuniary penalty imposed under a civil penalty order is a debt payable to the Commonwealth.

211. Subclause 45(2) enables the Commonwealth to enforce the civil penalty order as if it were a debt recovery order made in civil proceedings i.e. a judgment debt.

Clause 46 - Conduct contravening more than one civil penalty provision

212. Clause 46 is a 'civil double jeopardy' provision. It enables proceedings to be instituted in relation to 2 or more civil penalty provisions, but provides that a person is not liable to more than one pecuniary penalty in relation to the same conduct.

213. This is consistent with the recommendation in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 63) that a person should not penalised twice for the same or substantially the same conduct.

Clause 47 - Multiple contraventions

214. Subclause 47(1) enables a court to make a single civil penalty order for multiple contraventions of a civil penalty provision on the proviso that the contraventions are founded on similar facts, or are part of a series of contraventions of the same or similar character.

215. Subclause 47(2) clarifies that the penalty imposed for multiple contraventions must not exceed the maximum sum for separate penalties that could be ordered for each contravention.

Clause 48 - Proceedings may be heard together

216. Clause 48 allows a court to direct that 2 or more proceedings for civil penalty orders may be heard together.

Clause 49 - Civil evidence and procedure rules for civil penalty orders

217. Clause 49 requires a relevant court to apply the rules of evidence and civil procedure when hearing proceedings for civil penalty orders.

Clause 50 - Contravening a civil penalty provision is not an offence

218. This clause clarifies that contravention of a civil penalty provision is not an offence.

Subdivision B – Civil liability of executive officers of bodies corporate

Clause 51 - Civil liability of executive officer of body corporate

Civil penalty provision for executive officer – contravention of civil penalty provision by body corporate

219. Under subclause 51(1) if a body corporate contravenes subclause 18(1) or a civil penalty provision specified in regulations made under subclause 37(1), and an executive officer knew that (or was reckless or negligent as to whether) the contravention would occur, the officer will be subject to a civil penalty if he or she was in a position to influence the conduct of the body corporate, in relation to the contravention, but failed to take all reasonable steps to prevent it. Subclause 51(1) is a civil penalty provision.

220. Executive officer liability is appropriate for a breach of subclause 18(1) because of the substantial gains that could be obtained by contravention of this civil penalty provision. It may also be appropriate for some civil penalty provisions that could be included in regulations concerning mandatory product stewardship in the future, such as provisions that prohibit the manufacture or import of products containing hazardous substances. The aim in both cases is to ensure that compliance with the Bill is taken seriously at a high level within corporations.

221. These provisions are similar to provisions in existing Commonwealth legislation (see, for example, Division 4 of Part 5 of the *National Greenhouse and Energy Reporting Act 2007*).

Amount of pecuniary penalty

222. Subclause 51(3) provides that the maximum pecuniary penalty a court can impose for a contravention against subclause 51(1) by an executive officer is the penalty that would apply to an individual who had contravened that provision. For example, an executive officer who aided a contravention of clause 18(1) would be liable for a maximum penalty of 200 penalty units rather than the 1000 penalty units applying to bodies corporate.

223. Where there is a continuing contravention, the maximum penalty will be adjusted accordingly, but the pecuniary penalty applying to an executive officer is not affected by the 'commercial benefits' penalty.

Meaning of reckless and meaning of negligent

224. Subclauses 51(4) and (5) explain the terms 'reckless' and 'negligent' This is necessary because the provision is a civil penalty provision, and therefore the definition of these terms in the *Criminal Code Act 1995* do not apply.

Clause 52 - Reasonable steps to prevent contravention

225. Subclause 52(1) enumerates the matters to which a Court must have regard in determining whether the chief executive officer has failed to take all reasonable steps to prevent a contravention of a civil penalty provision. These include whether the officer has arranged reviews of the corporation's compliance; steps they have taken to ensure the corporation's employees, agents and contractors are aware of requirements under the provisions of the Bill; and any actions they took on becoming aware that the corporation was contravening the Bill.

Subdivision C – Civil proceedings and criminal proceedings

Clause 53 - Civil proceedings after criminal proceedings

226. Clause 53 ensures that an order is not made against a person where the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. It is analogous to the 'double jeopardy' rule applicable to criminal offences.

Clause 54 - Criminal proceedings during civil proceedings

227. Clause 54 clarifies that any proceedings that have commenced for a civil penalty order against a person will be stayed if criminal proceedings are commenced or have already been commenced against a person for substantially the same conduct alleged to constitute the contravention. The civil proceedings will be dismissed if the person is convicted of the offence but may be resumed if the person is not convicted of the offence.

Clause 55 - Criminal proceedings after civil proceedings

228. Clause 55 reserves the right to commence criminal proceedings notwithstanding the imposition of a civil penalty order.

Clause 56 - Evidence given in civil proceedings not admissible in criminal proceedings

229. Where criminal proceedings are commenced against a person who has already given evidence or produced documents in proceedings for a civil penalty order arising from the same or substantially the same conduct, clause 56 clarifies that evidence of this type is inadmissible in the criminal proceedings. However, this restriction does not apply where the criminal proceedings relating to the falsity of the evidence in the civil proceedings.

Subdivision D – Miscellaneous

Clause 57 - Mistake of fact

230. Subclause 57(1) provides that a person is not liable to have a civil penalty order made against him or her for a contravention of a civil penalty provision if the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts and had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

231. A person who wishes to rely on the subclause 57(1) bears an evidential burden in relation to that matter. This approach is justified where a matter is peculiarly within the defendant's knowledge and not available to the prosecution.

Clause 58 - State of mind

232. Subclause 58(1) provides that it is not necessary to prove the state of mind of a person in proceedings for a civil penalty order. However, this subclause does not affect the operation of clauses 51 (civil liability of executive officer of body corporate) and 57 (mistake of fact).

Clause 59 - Continuing contraventions

233. Clause 59 applies where an act or thing is required, under a civil penalty provision, to be done within a particular period or before a particular time. This would apply to a liable party's failure to become a member of an approved arrangement by a

date specified in a Ministerial notice (see subclause 18(9)). It would also apply, for example, to a requirement under clause 24 that an annual report be submitted by a specified date.

234. The effect of subclause 59(3) is that in these cases the pecuniary penalty is increased by an amount equal to 10% of the pecuniary penalty specified for the initial contravention for each day the person fails to comply with the requirement (including the day the relevant civil penalty order was made).

235. This provision provides a substantial deterrent against continuing contraventions. However, it is less punitive than the usual rule in a criminal context, which is that a separate offence is committed for each day the contravention continues and that the maximum penalty is increased accordingly (see *Crimes Act 1914*, section 4K).

Division 3 – Publicising offences, contraventions and decisions

Clause 60 - Minister may publicise certain offences, contraventions and decisions

236. Subclause 60(1) enables the Minister to publicise convictions and contraventions in respect of which a court order has been made. It also enables the Minister to publicise certain administrative decisions made under the Bill, such as decisions to cancel an arrangement's accreditation or approval. Information that is published can identify the relevant person or administrator. It is envisaged that publicising these matters will act as a deterrent to contravention.

237. The note following subclause 60(1) indicates that the subclause constitutes an authorisation for the purposes paragraph 14(1)(d) of the *Privacy Act 1988*. Paragraph 14(1)(d) provides that a record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless the disclosure is required or authorised by or under law.

Division 4 – Enforceable undertaking

Clause 61 - Acceptance of undertakings

238. Clause 61 enables the Minister to accept written undertakings (or variations to or withdrawal of undertakings) in connection with civil penalty provisions or an offence under the Bill. This provision is intended to act as an alternative to civil penalty proceedings or prosecution.

Clause 62 - Enforcement of undertakings

239. Where the Minister considers that a person has breached any terms of an undertaking given, clause 62 provides for the Minister to apply to a relevant court for an order to direct the person either to comply with the terms of the undertaking, pay the Commonwealth an amount up to that of any financial benefit the person has gained as a result of the breach, compensate any other person for loss or damage resulting from the breach, or anything else that the Court considers appropriate.

Division 5 - Injunctions

Clause 63 - Injunctions

Restraining injunctions

240. Subclause 63 (1) empowers a relevant court, on the application of the Minister, to grant an injunction either to restrain a person who has engaged, is engaging in or is proposing to engage in conduct in contravention of a civil penalty provision or an offence provision in the Bill from engaging in that conduct, or to require the person to take such specified action as the Court determines in order to comply with the Bill.

Performance injunctions

241. Subclause 63(2) empowers a relevant court, on the application of the Minister, to grant an injunction requiring a person who has refused or failed, or is refusing or failing, or is proposing to refuse or fail, and the refusal or failure was, is or would be a contravention of a civil penalty provision or an offence provision in the Bill to take such specified action as the Court determines in order to comply with the Bill.

Clause 64 - Granting interim injunctions

242. Subclause 64(1) enables the court to grant an interim injunction.

243. Subclause 64(2) prevents the court from requiring the Minister or anyone else to give an undertaking in relation to damages as a condition of granting an interim injunction.

Clause 65 - Discharging or varying injunctions

244. Clause 65 enables the court to discharge or vary an injunction.

Clause 66 Certain limits on granting injunctions not to apply

Restraining injunction

245. Subclause 66(1) allows restraining injunctions to be granted or varied irrespective of whether or not it appears to a relevant court that:

- a person intends to engage again, or is continuing engaging in such conduct; and
- a person has previously engaged in such conduct; and
- there is imminent danger of substantial damage to any person due to a person's conduct.

Performance injunction

246. Subclause 66(2) allows an injunction requiring a person to do an act or thing to be granted or varied irrespective of whether or not it appears to the court that:

- a person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
- a person has previously refused or failed to do that act or thing; and
- there is imminent danger of substantial damage to any person due to a person's refusal or failure to do that act or thing.

Part 6 – Compliance powers

Overview of Part

247. Part 6 of this Bill sets out the compliance powers which may be exercised by inspectors appointed by the Minister. The Part also enables the Minister to require a person to provide information or appear before an inspector. Provisions of the kind contained in Part 6 are common in Commonwealth legislation dealing with compliance powers.

Division 1 – Guide to this Part

Clause 67 – Guide to this Part

248. This clause provides a guide to this Part.

Division 2 – Power of inspectors

Subdivision A – Appointment of inspectors

Clause 68 - Minister may appoint inspectors

249. In order to assist the Minister in the administration and operation of the Bill, subclause 68(1) empowers the Minister to appoint an officer or employee of a Commonwealth, State and Territory agency as an inspector.

Prerequisites to appointment

250. Subclause 68(2) empowers the Minister to appoint a person as an inspector if the Minister is satisfied that the person has suitable skills and experience to exercise the powers and functions of an inspector.

251. Subclause 68(3) prevents the Minister from appointing an officer or employee of a Commonwealth agency as an inspector without the agreement of the relevant agency and prevents the appointment of an inspector from a State or Territory agency without the agreement of the State or Territory.

Inspector to comply with directions

252. Subclause 68(4) requires inspectors to comply with any directions of the Minister while exercising their powers or performing their functions as inspectors. These directions will be used to ensure that if a State or Territory officer is appointed

as an inspector, that officer has same accountability as if he or she were an Australian Public Service employee (see *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, page 79).

253. Subclause 68(5) enables the Minister to revoke the appointment of a person as an inspector if the person fails to comply with the Minister's direction under subclause 68(4).

254. Subclause 68(6) provides that a direction given in writing under subclause 68(4) is not a legislative instrument. The subclause is included to assist readers, as the direction is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 69 - Identity cards

255. Subclause 69(1) requires the Minister to issue an identity card to an inspector appointed under clause 68. Subclause 68(2) stipulates that the identity card must be in the form approved by the Minister and contain a recent photograph of the inspector.

256. Subclause 68(3) requires an inspector to carry his or her identity card at all times when exercising powers or performing functions as an inspector.

257. Subclause 68(4) prohibits an inspector from exercising powers as an inspector without being able to produce his or her identity card at the request of the occupier of premises to be inspected and the inspector fails to comply with this requirement.

Clause 70 - Offence for failing to return identity card

258. Subclause 70(1) makes it a strict liability offence for an inspector to fail to return their identity card to the Minister as soon as practicable after ceasing to be an inspector, and provides for a penalty of 1 penalty unit.

259. This penalty is consistent with *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 70) which provides it should be an offence for an authorised officer to fail to return an identity card on ceasing to be an authorised officer (maximum penalty: 1 to 5 penalty units).

Defence – card lost or destroyed

260. Subclause 70(3) provides that subclause 70(1) does not apply if the identity card was lost or stolen. The note following subclause 70(3) alerts the reader that a defendant bears the evidential burden in relation to this matter.

Subdivision B – Powers of inspectors

Clause 71 - Purposes for which powers can be used

261. Clause 71 enables inspectors to exercise their powers for purposes identified in the clause. This includes investigating a possible offence that is in the *Crimes Act 1914* or *Criminal Code Act 1995* and relates to the Bill or a legislative instrument

made under the Bill. An example of such an offence would be s 136 of the *Criminal Code Act 1995* (false and misleading statements) as it relates to an application under the Bill.

Clause 72 - Inspection powers – with consent

262. Subclause 72(1) enables an inspector to enter premises and exercise certain powers provided the occupier consents to entry and the exercise of those powers.

263. Under subclause 72(2) before obtaining an occupier's consent, inspectors are required to inform the occupier that he or she may refuse their consent or withdraw their consent at any stage.

264. Subclause 72(3) stipulates what an inspector who enters premises in accordance with subclause 72(1) may do. This ranges from searching the premises to operating equipment on the premises in order to gain access to a document or record pertaining to one or more stewardship products. Compensation may be payable under clause 105 if equipment or data is damaged or destroyed as a result of the inspector operating the equipment.

Clause 73 - Refusing consent is not an offence

265. Clause 73 makes it clear that it is not an offence for occupiers to refuse to allow an inspector to enter or remain on their premises without a warrant. This safeguard is consistent with the Scrutiny of Bills Committee's views in its Fourth Report of 2000 into entry and search provisions in Commonwealth legislation (that is, that refusing entry, where entry is not under a warrant, must not be an offence).

Clause 74 - Inspection powers – with warrant

266. Subclause 74(1) empowers an inspector to enter premises and exercise powers specified in subclause 74(2) if the inspector has a warrant for the entry (subdivision D deals with applications for warrants).

267. Subclause 74(2) empowers an inspector who enters premises under warrant to do one or more of the following:

- exercise the powers enumerated in subclause 72(3);
- require persons on the premises to answer questions and produce documentation;
- seize or secure any evidential material on the premises.

268. The power to require persons to answer questions and produce documentation will facilitate the safe and efficient inspection of premises. Questions may, for example, relate to whether hazardous substances are present in particular parts of the premises, or whether particular records are kept on the premises.

269. Subclause 74(4) provides that a person commits an offence if they do not answer an inspector's questions or produce a requested book, record or document. The penalty is 30 penalty units. This is the recommended penalty for withholding

information in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 41).

270. A person can refuse to answer a question or produce documentation on the ground that this might tend to incriminate the person or make him or her liable to a penalty (see clause 104).

Clause 75 -Announcement before entry under warrant

271. Subclause 75(1) requires an inspector, before entering premises under a warrant, to announce that he or she is authorised to enter the premises and to provide any person at the premises the opportunity to allow entry.

272. However, under subclause 75(2) an inspector need not comply with subclause 75(1) if he or she reasonably considers that immediate entry is necessary to ensure the effective execution of the warrant is not frustrated.

273. Subclause 75(3) requires inspectors to show his or her identity card to the occupier as soon as practicable after entering premises if the inspector has entered under subclause 75(2) and the occupier is present at the premises.

Clause 76 - Copy of warrant to be given to occupier

274. Subclause 76(1) requires an inspector to give to the occupier of premises (if present) a copy of the warrant being executed in relation to the premises, identify himself or herself to the occupier and inform the occupier of their rights and responsibilities under clause 77 (observing execution of warrant) and 78 (providing facilities and assistance).

275. Subclause 76(2) provides that the copy of the warrant need not include the signature of the magistrate who issued the warrant.

Clause 77 - Occupier entitled to observe execution of warrant

276. Subclause 77 allows an occupier who is present at the premises to observe the execution of the warrant. Under subclause 77(2) if the occupier impedes the execution of the warrant their right to observe the execution ceases.

277. Subclause 77(3) provides that clause 77 does not prevent the execution of the warrant in 2 or more areas of the premises at the same time.

Clause 78 - Occupier to provide inspector with facilities and assistance

278. Subclause 78(1) requires the occupier of premises to which a warrant relates to provide an inspector executing the warrant and any person assisting an inspector with all reasonable facilities and assistance for the effective exercise of their powers.

279. Subclause 78(2) makes it an offence for the occupier if he or she does not provide all reasonable facilities and assistance. The penalty for a contravention of this subclause is 30 penalty units. This is the recommended penalty for failing to provide

reasonable facilities and assistance to an officer who is on premises under warrant in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 85).

Subdivision C – General provisions relating to seizure

Clause 79 - Copies of seized things to be provided

280. Subclause 79(1) provides that if an inspector seizes, under a warrant, a document, film, computer file or a storage device the inspector must, on request of the occupier of the premises, give a copy of the thing or the information seized to the occupier as soon as practicable after the seizure.

281. Subclause 79(1) does not apply if possession or the thing or information by the occupier or other person could constitute an offence (subclause 79(2)).

Clause 80 - Receipt for things seized

282. Clause 80 provides that receipts are to be issued to occupiers for things seized. Under this provision, it will be possible for the items to be listed on the same receipt. It is not envisaged that inspectors would be required to identify absolutely every item individually where those items can be adequately identified by a class description.

Clause 81 - Return of seized things

283. Subclause 81(1) requires the Minister to take reasonable steps to return seized things if the reason for the seizure no longer exists or it is decided the seized things are not to be used as evidence; or period of 60 days after seizure has ended.

284. Subclause 81(2) sets out when the Minister is not required to return seized things e.g.

- if proceedings were instituted and have not completed before the end of 60 days and the seized things will be afforded as evidence; or
- if a magistrate has issued an order under clause 82 permitting a thing to be retained; or
- if the Commonwealth, the Minister or an inspector is authorised by a Commonwealth, State or Territory court to retain, destroy, dispose of or otherwise deal with a thing.

285. Seized things must be returned from either the person from whom it was seized or the owner if that person is not entitled to possess it.

Clause 82 - Magistrate may permit a thing to be retained

286. Subclause 82(1) describes how the Minister may apply to a magistrate for an order to retain a seized thing beyond the 60 day retention period (or before the end of a period specified in an order of a magistrate) where proceedings in respect of which the thing may afford evidence have not commenced.

287. Subclause 82(2) provides that if the magistrate is satisfied that it is necessary for an extension of time to be granted to enable investigation of whether or not an offence has been committed against the Bill or to enable the evidence to be secured for the purposes of a prosecution, the magistrate may grant an extension for such period as is specified in an order. Before making an application under this subclause, the Minister must take reasonable steps to establish who has an interest in the retention of the seized goods and, if practicable, notify such persons (subclause 82(3)).

Clause 83 – Disposal if thing cannot be returned

288. This clause provides that the Minister may dispose of a thing seized under this Part, in a manner the Minister considers appropriate, if there is no owner of the thing or the Minister has made reasonable efforts to locate the owner and cannot locate the owner.

Subdivision D – Applying for warrants to enter premises

Clause 84 - Ordinary warrants

Application for warrant

289. Subclause 84(1) provides for the issuing of ordinary warrants to inspectors to enter premises.

Issue of warrant

290. Subclause 84(2) allows the magistrate to issue a warrant if he or she is satisfied (by information on oath or affirmation) that it is reasonable that one or more inspectors should have access to the premises for the purposes stipulated in subclause 84(2).

291. Subclause 84(3) allows the magistrate to request further information either orally or by affidavit from an inspector concerning the grounds on which the warrant is being sought, and provides that where such information has been sought the warrant must not be issued until that information has been given provided.

Content of warrant

292. Subclause 84(4) specifies the contents of the warrant e.g. the warrant authorises the inspector to enter the premises using such assistance and force as is necessary and reasonable. The warrant must also state the purpose for which it is issued, indicate when the entry is authorised, and specify the day on which it ceases to have effect (warrants may be issued for a maximum of one week).

Clause 85 - Warrants by telephone, fax etc.

Application for warrant

293. In the case of urgent warrants, subclause 85 (1) allows for an inspector to apply for a warrant by telephone, fax or other electronic means. Subclause 85(2) provides that where practical, the magistrate may require communication by voice and may record such communication.

294. Subclause 85(3) requires the inspector must prepare information setting out the grounds on which the warrant is sought and subclause 85(4) provides that if necessary the inspector may apply for the warrant before the information is sworn or affirmed.

Issue of warrant

295. Subclause 85(5) provides that if the magistrate is satisfied that there are reasonable grounds for doing so, he or she may then issue a warrant as if the application had been made under clause 84.

Obligations of magistrate and inspector once warrant issued

296. Subclause 85(6) requires the magistrate to advise the inspector of the terms of the warrant, the day on which and the time at which the warrant was signed, specify the day on which it ceases to have effect (warrants may be issued for a maximum of one week), and record on the warrant the reasons for its issue.

297. Subclauses 85(7) sets out the obligations of an inspector if the magistrate completes and signs the warrant. The inspector must complete a form of warrant in the same terms as advised by the magistrate and record the name of the magistrate, and the time and date on which the warrant was signed. The inspector must send this form of warrant to the magistrate together with duly sworn or affirmed information pertaining to the grounds on which the warrant was sought.

298. Subclause 85(8) requires the inspector to send the form of warrant together with duly sworn or affirmed information pertaining to the grounds on which the warrant was sought to the magistrate within one day after the execution or expiry (whichever is earlier) of the warrant.

299. Subclause 85(9) requires the magistrate to attach the documents (supplied under subclause 85(8)) to the warrant and deal with them as if they were an ordinary warrant made under clause 84.

What a warrant authorises

300. Subclause 85(10) provides that a warrant completed under subclause 75(7) by an inspector is authority for the same powers as are authorised by a warrant signed by a magistrate.

Clause 86 - Signed form of warrant not produced in evidence

301. Under clause 86 a court must assume, unless the contrary is proved, that an inspector's exercise of powers was not authorised under clause 85 if:

- if the court needs to be satisfied (in proceedings) that the inspector's powers were exercised pursuant to clause 85; and
- the warrant signed by the magistrate authorising the inspector to exercise those powers fails to be produced in evidence.

Subdivision E – Power of magistrates

Clause 87 - Federal Magistrates – consent to nomination

302. 'Magistrate' includes State magistrates (see section 16C(2), *Acts Interpretation Act 1901*). By virtue of the extended definition in clause 6 of Bill also includes Federal Magistrates who fall under subclause 87(2).

303. Under clause 87(2) a Federal Magistrate may consent, in writing, to be nominated by the Minister to be a magistrate for the purposes of the Bill.

Clause 88 - Powers of magistrates

Power conferred personally

304. Subclause 88(1) provides that a power conferred on a magistrate under subdivision E is conferred in a personal capacity as opposed to as a court or a member of a court.

Powers need not be accepted

305. Under subclause 88(2) the magistrate (other than a Federal Magistrate) is not required to accept the power conferred.

Protection and immunity

306. Subclause 88(3) stipulates that a magistrate exercising a power conferred by this Part of the Bill has the same protection and immunity as if he or she were exercising the 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 – Information gathering powers

Clause 89 - Meaning of a *person who has product stewardship information*

307. Clause 89 defines a "person who has product stewardship information" as being a person whom the Minister believes, on reasonable grounds, to be capable of providing information relevant for the purposes of investigating or preventing a contravention of a civil penalty provision or an offence provision in the Bill.

Clause 90 - Minister may require a person to provide information

308. Subclause 90(1) enables the Minister, by written notice, to require a person who has product stewardship information to provide such information, documents or records as specified in the notice to an inspector within a specified period. Subclause 90(2) stipulates the matters required in the Minister's notice.

309. Subclause 90(3) requires the Minister's notice to set out the effect of sections 137.1 and 137.2 of the *Criminal Code Act 1995*. These provisions make it an offence to knowingly give false or misleading information or documents in compliance or purported compliance with a law of the Commonwealth.

Offence for failing to comply with a notice

310. Under subclause 90(4) a person commits an offence if he or she is required to provide an inspector with the information, book, record or document and fail to do this within the period specified in the notice. The penalty is 6 months imprisonment. There are similar provisions in other Commonwealth legislation such as, section 61 of the *Water Efficiency Labelling and Standards Act 2005*.

Clause 91 - Minister may require a person to appear before an inspector

311. Subclause 91(1) enables the Minister, by written notice, to require a person who has product stewardship information to appear before an inspector to answer questions put by the inspector and produce such information, documents or records as specified in the notice. Subclause 91(2) stipulates the matters required in the Minister's notice.

312. Subclause 91(3) requires the Minister's notice to set out the effect of sections 137.1 and 137.2 of the *Criminal Code Act 1995*. These provisions make it an offence to knowingly give false or misleading information, or produce false or misleading documents, to an inspector respectively.

Offence for failing to appear

313. Under subclause 91(4) a person commits an offence if he or she is required to appear before inspector and fail to do this. The penalty is 6 months imprisonment. There are similar provisions in other Commonwealth legislation such as, section 62 of the *Water Efficiency Labelling and Standards Act 2005*.

Offence for failing to answer questions or produce a book, record or document

314. Under subclause 91(5) a person commits an offence if he or she is required to appear before an inspector and when appearing before an inspector the person fails to answer the inspector's questions or produce a book, record or document to the inspector as required by the Minister's notice. The penalty is 6 months imprisonment. There are similar provisions in other Commonwealth legislation, such as section 62 of the *Water Efficiency Labelling and Standards Act 2005*.

Part 7 – Reviewing decisions

Overview of Part

315. Part 7 provides for the review of certain decisions made under the Bill and stipulates the persons able to seek review.

Division 1 – Guide to this Part

Clause 92 - Guide to this Part

316. This clause provides a guide to this Part.

Division 2 – Reviewing decisions

Clause 93 - Persons affected by reviewable decision

317. Clause 93 sets out the decisions made by the Minister under the Bill which are open to review. These decisions are referred to as a 'reviewable decisions' in column 2 of the table. The clause also lists (in column 1 of the table) the persons able to seek review of a reviewable decision. These persons are referred to as a person **'**affected' by the reviewable decision.

318. The approach of specifying persons affected by reviewable decisions differs from the default position set out in section 27 of the *Administrative Appeals Tribunal Act 1975* (see clause 96(3)). Section 27 provides that where an Act provides for a right of appeal to the Tribunal, a person whose interests are affected by the decision may apply to the AAT for review of the decision.

319. Clause 93 adopts a modified approach to section 27 because of the particular policy and statutory context, as outlined below with respect to each reviewable decision.

Items 1, 2 and 3 – voluntary arrangements

320. Items 1-3 in the table allow the administrator of a voluntary arrangement to seek review of the following decisions:

- an accrediting authority's decision to refuse to accredit the voluntary arrangement under clause 13;
- an accrediting authority's decision to impose conditions on the voluntary arrangement's accreditation under clause 13; and
- the decision by an accrediting authority to cancel or refuse to cancel the accreditation of the voluntary arrangement under clause 13.

321. It is appropriate to confine 'person affected' to the administrator of the voluntary arrangement or a person licensed or authorised to use a product stewardship logo because other persons' interests would not be materially affected. Further, if third parties can seek review of these decisions this may discourage applicants from proposing voluntary arrangements.

Item 4 – notice to liable parties

322. Item 4 relates to the notice the Minister may issue to a liable party, requiring it to become a member of an approved co-regulatory arrangement in a specified period. The person who receives this notice may apply to vary or revoke it, and may seek review of the Minister's decision to vary the notice, or to refuse to vary or revoke the notice.

323. It is appropriate to confine 'person affected' by this decision to the person receiving (and applying to vary or revoke) the notice. The notice will have a negligible impact on any other person's interests and therefore review is best limited to the person subject to the notice.

Items 5 and 6 – co-regulatory arrangements

324. Under item 5, the administrator of a co-regulatory arrangement is a 'person affected' by the Minister's decision to refuse to approve the co-regulatory arrangement under clause 26.

325. It is appropriate to limit review rights to the administrator because only administrators may apply to the Minister. It is unlikely that persons other than the applicant will have a material interest in the refusal of an application.

326. In addition, it would not be appropriate for another person to effectively require an unwilling administrator to administer an arrangement. This could be result of allowing persons other than the administrator to review the Minister's refusal, in circumstances in which the administrator has elected not to review that decision. (Note in this regard the requirement in clause 23 applying to administrators of co-regulatory arrangements, and improvement notices in clause 29).

327. Under item 6, the administrator of an approved co-regulatory arrangement may seek review of decisions to cancel approval or refuse to cancel approval of the arrangement. It is appropriate to limit review rights to the administrator for the reasons expressed in the preceding paragraphs.

Item 7 – anti-avoidance notice

328. Item 7 specifies that a prospective liable party subject an anti-avoidance determination made under clause 32 by the Minister is a person affected and therefore, may seek review of the Minister's determination.

329. In this case, the person subject to the determination will be directly impacted by that determination but the determination will not have a material impact on other persons' interests. It is therefore considered appropriate to limit review rights to the person subject to the notice.

Item 8 – consent to replacement of administrator

330. Item 8 specifies that a proposed new administrator is a person affected by a decision by the Minister under clause 33 to refuse to consent to that person's appointment as administrator.

331. It is appropriate to limit review rights to the proposed new administrator because this body would be required to administer the co-regulatory arrangement. As with items 5 and 6 above, it would not be appropriate for another person to effectively require an unwilling administrator to administer an arrangement. This could be result of allowing persons other than the administrator to review the Minister's refusal, in circumstances in which the administrator has elected not to review that decision.

Clause 94 - Notification of decisions and review rights

332. Subclause 94(1) requires the Minister to ensure that the affected person, in relation to a reviewable decision, is given written notice containing the terms of the decision, reasons for the decision and information regarding the person's review rights.

333. Subclause 94(2) provides that a failure to comply with subclause 94(1) does not affect the validity of the Minister's decision.

Clause 95 - Internal review

334. Subclause 95(1) enables an affected person to apply to the Minister for internal review of a reviewable decision provided the decision has not been made by the Minister personally. This application should be in writing.

335. Subclause 95(2) provides that an application for internal review must be made within 30 days of receipt of the decision by the applicant or for a further period allowed by the Minister. Under subclause 95(3) the Minister must review the decision.

336. Subclause 95(4) enables the Minister to affirm, vary or revoke the decision and substitute such other decision as he or she sees thinks appropriate.

Clause 96 - Review of decisions by Administrative Appeals Tribunal

337. Clause 96 allows an affected person to apply to the Administrative Appeals Tribunal for review of a reviewable decision made by the Minister personally or of an internal review decision made under subclause 95(4).

Part 8 Protecting information

Overview of Part

338. Part 8 seeks to ensure that information obtained by a person performing a function or duty, or exercising a power under the Bill is not disclosed unnecessarily or put to unauthorised use.

Division 1 – Guide to this Part

Clause 97 – Guide to this Part

339. This clause provides a guide to this Part.

Division 2 – Protecting information

Clause 98 Offence – Disclosing commercially sensitive information

Offence

340. Subclause 98(1) makes it an offence for a person to disclose protected information he or she has obtained in performing a function or duty, or exercising a power, under or in relation the Bill to another person and there is a risk that the disclosure might substantially prejudice the commercial interests of a third person. The penalty for this offence is two years' imprisonment or 120 penalty units, or both. This is the penalty recommended by *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 47) for offences of this kind.

341. A definition of 'protected information' is provided in subclause 98(3).

Exception – authorised disclosure

342. Subclause 98(2) stipulates that subclause 98(1) does not apply if disclosure is authorised by clause 99. Clause 99 sets out the circumstances in which disclosure of information is authorised.

Clause 99 – Authorised disclosure

343. Clause 99 sets out the circumstances when a person may disclose information for example:

- the disclosure is necessary for duties, functions or powers under the Bill (subparagraph 99(1)(a)(i)-(ii)); or
- the disclosure assists in the administration or enforcement of another Commonwealth, State or Territory law (subparagraph 99(1)(a)(iii)); or
- the disclosure is required or permitted by a Commonwealth, State or Territory law prescribed by regulations (paragraph 99(1)(b)); or

- the person whose commercial interests may be prejudiced has expressly or impliedly authorised disclosure (paragraph 99(1)(c)); or

- the information disclosed is already publicly available (paragraph 99(1)(d)); or

- the Minister has certified (in writing) that disclosure is in the public interest and the disclosure is made in accordance with requirements specified in the regulations (paragraph 99(1)(e)); or

- a person believes on reasonable grounds that disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of a person and the disclosure is for the purposes of preventing or lessening that threat (paragraph 99(1)(f)); or

- summaries of information, or statistics derived from the information, are released and this release is not likely to enable the identification of a person (paragraph 99(1)(g)).

344. Subclause 99(3) provides that the Minister's certification in writing that disclosure is in the public interest is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. The subclause is included to assist readers, as the direction is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 100 - Disclosing commercially sensitive information to courts and tribunals etc.

345. Subclause 100(1) applies if information is disclosed to, or obtained by a person (the public official) in the course of the person exercising a power or function under the Bill and there is a risk that the disclosure might substantially prejudice the commercial interests of a person other than the public official.

Information not to be disclosed to court or tribunal

346. Under subclause 100(2) the public official is not required, except for the purposes of the Bill, to disclose information or produce a document to a court or tribunal or other persons having power to require the production of documents or answering of questions.

Part 9 Miscellaneous

Overview of Part

347. Part 9 deals with miscellaneous matters which are not addressed elsewhere in the Bill, such as delegations and regulations.

Division 1 – Guide to this Part

Clause 101 – Guide to this Part

348. This clause provides a guide to this Part.

Division 2 – Miscellaneous

Clause 102 - Requirements relating to applications

349. Subclause 102(1) specifies the requirements relating to applications made under the Bill. Applications must be made in the manner and form approved in writing by the Minister and accompanied by specified documentation or information. Application fees may also be specified by regulations.

350. Subclause 102(2) provides that documentation or information accompanying an application, or statements made in an application may need to be verified by a statutory declaration.

351. Subclause 102(3) enables the Minister to approve various forms for different classes of applications. Similarly, the subclause provides scope for regulations to specify different fees depending on the nature of the application.

352. Sublcause 102(4) enables the Minister to waive the whole or part of a fee payable for an application under the Bill.

Clause 103 Applications—requesting additional information

353. Subclause 103(1) enables the Minister to request (by written notice) additional information for the purposes of determining an application. The notice would specify the additional documentation or information required and the timeframe for providing them.

354. Subclause 103(2) provides that the further documentation or information requested by the Minister may need to be verified by statutory declaration.

Clause 104 - Privilege against self-incrimination not affected

355. Clause 104 provides that the Bill does not affect a person’s right to refuse to answer questions, give information or provide documents on the grounds that those actions may incriminate a person or make the person liable for a penalty.

Clause 105 - Compensation for damage to electronic equipment

356. Clause 105 requires the Commonwealth to pay reasonable compensation to the owner of electronic equipment which has been damaged or corrupted due to insufficient care being exercised by the person operating the equipment, or in selecting that person to operate the equipment pursuant to the inspection powers under clauses 72 and 74.

357. Where the Commonwealth and the affected person disagree over the amount of the compensation, the person may take the matter to the Federal Court or State or Territory Supreme Court. In determining the compensation payable, the Court is to have regard to whether the occupier, or the occupier's employees and agents, had provided appropriate warning or guidance on the operation of the equipment.

Clause 106 - Compensation for acquisition of property

358. Clause 106 requires the Commonwealth to pay reasonable compensation where operation of the Bill would result in the acquisition of property from a person otherwise than on just terms within the meaning of section 51 (xxxi) of the Constitution. Where the Commonwealth and the person disagree over the amount of the compensation, the person may take the matter to a relevant court to determine a reasonable amount of compensation.

Clause 107 - Annual report

359. Clause 107 requires the Minister to prepare a report on operation of the Bill during each financial year as soon as practicable after the end of the financial year. The Minister must cause a copy of the report to be tabled in both Houses of Parliament within 15 sitting days after the report is completed. This report may form part of the responsible Department's annual report.

Clause 108 - Publishing material on Department's website

360. Subclause 108 requires the Minister to publish on the Department's website information regarding each accredited voluntary arrangement and approved co-regulatory arrangement. The information must include:

- a summary of the arrangement;
- the name of the arrangement's administrator;
- contact details of the arrangement's administrator that are specified in the regulations; and
- copies of reports relating to the operation of the arrangement as referred to in
    - paragraph 13(2)(f) (conditions of the voluntary arrangement's accreditation) and
    - subclause 24(4) (requirements for administrator of approved co-regulatory arrangement).

361. Subclause 108(2) does not allow the Minister to publish information if he or she is satisfied that the information might substantially prejudice the commercial interests of a person and publishing the information is not in the public interest.

Clause 109 - Review of operation of this Act

362. This clause provides for an independent review of the operation of the Bill after it has been in operation for 5 years and every 5 years after the first review. The persons undertaking the review are required to provide the Minister with a written report of the review, which the Minister must then cause to have tabled in each House of Parliament within 15 sitting days after the report is completed.

Clause 110 - Delegation

363. Subclause 110(1) provides that the Minister may delegate his or her functions or powers under the Bill to the Secretary of the Department or a Senior Executive Service employee (or acting SES employee) in the Department. Given the powers of the Minister, it is appropriate to limit delegations of power to SES employees. (See section 34 of the *Public Service Act 1999* for a definition of 'SES employees').

364. Subclause 110(2) provides that the delegate must comply with any direction of the Minister.

Clause 111- Regulations

365. Clause 111 provides for the making of regulations prescribing matters necessary or convenient to be prescribed for the purposes of the Bill.