Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017

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Date introduced: 30 March 2017
House: House of Representatives
Portfolio: Environment and Energy
Commencement:
  Sections 1 to 3 on Royal Assent.
  Schedule 1 on proclamation or six months after Royal Assent, whichever is earlier.
  Schedule 2 on the later of 1 January 2018 or immediately after the commencement of Schedule 1.
  Schedule 3 on 1 January 2020.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at June 2017.
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The Bills Digest at a glance

Background

• Australia is a party to the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), which was agreed in 1987. The ‘ozone layer’ provides important protection for life on earth by absorbing ultraviolet (UV) radiation from the sun. The Montreal Protocol aims to protect the ozone layer by reducing the production and consumption of ozone depleting substances such as chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs).

• In October 2016, parties to the Montreal Protocol, including Australia, agreed to an amendment to the Montreal Protocol (the Kigali Amendment). This amendment commits parties to a new international phase-down of hydrofluorocarbons (HFCs), which are potent greenhouse gases, mostly used in refrigeration and air-conditioning equipment.

• Australia had already announced in June 2016 a domestic HFC phase-down, beginning in January 2018.

Purpose of the Bill

• The Bill implements Australia’s international commitment to phase-down the import, export and production of HFCs from 1 January 2018 under the new Kigali Amendment.

• At the same time, the Bill implements the first tranche of proposed measures stemming from a recent review of the federal Ozone Protection and Synthetic Greenhouse Gas Management Program (OPSGGM Program) which controls the manufacture, import, export and uses of ozone depleting substances in Australia. This includes amendments to regulate two new synthetic greenhouse gases (nitrogen trifluoride and PFC-9-1-18) and amend licensing and reporting requirements.

• The Bill also adjusts provisions relating to the existing phase-out of HCFCs and prohibits the use of new HCFCs from 1 January 2020, in line with Australia’s commitments under the Montreal Protocol.

Stakeholder comments

• Stakeholders are supportive of the proposed HFC phase-down but do not appear to have commented directly on the Bill at the time of writing.
## List of abbreviations

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<th>Abbreviation</th>
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<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<td>BCM</td>
<td>bromochloromethane</td>
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<td>CFC</td>
<td>chlorofluorocarbon</td>
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<td>DEE</td>
<td>Department of the Environment and Energy</td>
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<td>GWP</td>
<td>Global warming potential</td>
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<td>HBFC</td>
<td>Hydrobromofluorocarbon</td>
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<td>HCFC</td>
<td>Hydrochlorofluorocarbon</td>
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<td>HFC</td>
<td>Hydrofluorocarbon</td>
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<td>Import Levy Act</td>
<td><em>Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995</em></td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<td>Kigali Amendment</td>
<td><em>Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer</em> (done in Kigali 10–15 October 2016)</td>
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<td>Kyoto Protocol</td>
<td><em>Kyoto Protocol to the United Nations Framework Convention on Climate Change</em></td>
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<td>Manufacture Levy Act</td>
<td><em>Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995</em></td>
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<td>Montreal Protocol</td>
<td><em>Montreal Protocol on Substances that Deplete the Ozone Layer</em></td>
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<td>NF₃</td>
<td>Nitrogen trifluoride</td>
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<td>ODS</td>
<td>Ozone depleting substance</td>
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<td>OPSGGM Act</td>
<td><em>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</em></td>
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<td>OPSGGM Program</td>
<td>Ozone Protection and Synthetic Greenhouse Gas Management Program</td>
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<td>PFC</td>
<td>Perfluorocarbon</td>
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<td>SES</td>
<td>Senior Executive Service</td>
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<td>SF₆</td>
<td>Sulfur hexafluoride</td>
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<td>SGG</td>
<td>Synthetic greenhouse gas</td>
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<td>UNFCCC</td>
<td><em>United Nations Framework Convention on Climate Change</em></td>
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<td>UV</td>
<td>Ultraviolet</td>
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Purpose of the Bill

The purpose of the Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017 (the Bill) is to amend the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (OPSGGM Act), the Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Act 1995 (Import Levy Act), and the Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Act 1995 (Manufacture Levy Act) to:

- implement Australia's commitment to phase-down the import, export and production of hydrofluorocarbons (HFCs) from 1 January 2018 under the new Kigali Amendment to the Montreal Protocol
- adjust provisions relating to the existing phase-out of hydrochlorofluorocarbons (HCFCs) and prohibit the use of new HFCs from 1 January 2020 (other than for permitted uses)
- extend the regime to regulate two new synthetic greenhouse gases (nitrogen trifluoride and PFC-9-1-18) and
- amend licensing and reporting requirements, including to enable licence renewals, reduce the reporting frequency for licence holders and introduce a minimum threshold for the cost recovery levy.

Structure of the Bill

The Bill contains three schedules, each with several parts. Schedule 1 contains four parts:

- Part 1 amends the existing HCFC phase-out scheme and implements a new HFC phase-down scheme
- Part 2 replaces terminology in the legislation relating to ‘products’ with the term ‘equipment’
- Part 3 removes the text of relevant international conventions from the OPSGGM Act and
- Part 4 extends the Minister’s power to delegate his or her functions and powers under the OPSGGM Act and regulations to Executive Level 2 employees, or acting Executive Level 2 employees.

Schedule 2 (which commences on 1 January 2018) contains five parts:

- Part 1 enables licence holders to renew their licences, rather than requiring new licence applications
- Part 2 reduces reporting requirements for licence holders from quarterly to twice yearly and introduces a minimum threshold for the cost recovery levy for licences
- Part 3 removes a requirement to specify maximum quantities of substances covered by a licence
- Part 4 extends the regime to regulate two new synthetic greenhouse gases (nitrogen trifluoride and PFC-9-1-18) and
- Part 5 clarifies how exports of HCFCs will be taken into account when calculating quota for the HCFC phase-out.

Schedule 3 (which commences on 1 January 2020) contains two parts, which both implement Australia’s obligations under the Montreal Protocol to restrict the use of new HCFCs from 1 January 2020.

Background

The ozone layer is a gaseous layer of naturally occurring ozone (O₃) molecules in the earth’s upper atmosphere (the stratosphere) above the earth’s surface. This ‘ozone layer’ absorbs ultraviolet (UV) radiation from the sun, thereby protecting life on earth. UV radiation is linked to skin cancer, genetic damage and immune system suppression in living organisms, as well as reduced productivity in agricultural crops and the food chain.¹

In the mid-1970s, it was discovered that some human-produced chemicals could lead to depletion of the ozone layer. These ozone depleting substances (ODSs) include chlorofluorocarbons (CFCs), halons, methyl chloroform, carbon tetrachloride, hydrochlorofluorocarbons (HCFCs) and methyl bromide.² These substances are (or were) used in refrigerators, air conditioners, fire extinguishers, aerosols, agricultural fumigants, in foam and as solvents for cleaning electronic equipment.³

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2. These gases deplete the ozone layer by releasing chlorine and bromine atoms into the stratosphere, which destroy ozone molecules. See further P Fraser, N Derek, P Krummel and P Steele, ‘What are ozone depleting substances?’, The Conversation, 13 September 2012.
**International commitments**

The [Montreal Protocol on Substances that Deplete the Ozone Layer](https://www.unenvironment.orgساندنتون/Environment/Global/Ozone/Montreal-Protocol) (the *Montreal Protocol*) was designed to reduce the production and consumption of ozone depleting substances and, thereby, protect the earth’s ozone layer. The Protocol was agreed in 1987 and entered into force in 1989.\(^4\)

The *Montreal Protocol* sets binding progressive phase-out obligations for developed and developing countries for all major ozone depleting substances, including CFCs, halons, and HCFCs. The Protocol has been amended several times to bring forward phase-out schedules and add new ozone depleting substances to the list of controlled substances.\(^5\) The *Montreal Protocol* is generally regarded as ‘one of the most successful and effective environmental treaties’.\(^6\) In 2016, scientists reported the first signs of healing in the ozone hole over Antarctica.\(^7\)

However, while CFCs have been phased out and HCFCs will be phased out by 2020 under the *Montreal Protocol*, some of the key replacements are still problematic. Many are potent greenhouse gases which means they contribute to climate change. In particular, the phase-out of ODS led to a shift towards HFCs, which are primarily used as refrigerants in refrigeration and air conditioning equipment, but also in the production of foams, as fire extinguishing agents, solvents and in aerosols.\(^8\) Many HFCs have high global warming potentials (GWPs). GWP is a measure used to compare the warming effects of the different greenhouse gases, which uses carbon dioxide as a reference. The warming potential of carbon dioxide is given a value of one, against which the other gases are compared.\(^9\) For example, a commonly used HFC in Australia is HFC-134a (a refrigerant), which has a GWP of 1300. This means that ‘it is 1300 times as potent in the atmosphere as carbon dioxide.’\(^10\)

**Kigali Amendment and the HFC phase-down**

In October 2016, following many years of negotiations, parties to the *Montreal Protocol* agreed to an international phase-down of HFCs. This agreement was made through an amendment to the *Montreal Protocol* in Kigali in Rwanda, now known as the ‘Kigali Amendment’.\(^11\) As noted earlier, HFCs are a type of synthetic greenhouse gas, mostly in refrigeration and air-conditioning equipment, and are not to be confused with HCFCs (which are both ozone depleting and greenhouse gases). HFCs are not manufactured in Australia, but are imported.\(^12\) Australia had already announced in June 2016 a domestic HFC phase-down, beginning in January 2018.\(^13\) Australia reportedly played a key role in securing the Kigali agreement.\(^14\)

The Kigali Amendment will enter into force on 1 January 2019, provided that it is ratified by at least 20 parties to the *Montreal Protocol*.\(^15\) The Explanatory Memorandum suggests that ‘Australia will deliver on its commitment to start phasing down imports of HFCs from 2018 through this Bill, which will also allow ratification of the Kigali Amendment’.\(^16\)

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7. S Soloman, D Ivy, D Kinnison, M Mills, R Neely III, A Schmidt, ‘[Emergence of healing in the Antarctic ozone layer](https://science.sciencemag.org/content/353/6296/980), Science, 353(6296), 15 July 2016.
9. Ibid. Note that the GWP for each greenhouse gas is calculated over a specific time interval. The standard generally used to calculate carbon dioxide equivalents is 100 years, although a 20-year GWP is sometimes used for gases with shorter lifetimes. For further information, see, for example, United States Environment Protection Agency (US EPA), ‘[Understanding global warming potentials](https://www.epa.gov/global-warming-potentials)’, US EPA website, 14 February 2017.
10. Ibid.
12. I Rae, ‘[How a saviour of the ozone hole became a climate change villain: and how we’re going to fix it](https://www.science.org.au)', The Conversation, 18 October 2016.
13. This followed a study commissioned by the Department of the Environment which found that viable lower and zero Global Warming Potential (GWP) alternatives were available or being developed for commercial release in the near future, for the majority of existing uses of HFCs: see further DEE, ‘[HFC consumption in Australia in 2013 and an assessment of the capacity of industry to transition to nil and lower GWP alternatives](https://www.environment.gov.au/energy-and-climate-change/energy/factsheets/hfc-consumption-in-australia-2013-and-an-assessment-of-the-capacity-of-industry-to-transition-to-nil-and-lower-gwp-alternatives),’ DEE website, 2014.
15. If that condition is not met by that date, the Amendment will become effective on the 90th day following the date of ratification by the 20th party: see Kigali Amendment, Article IV. See also United Nations Environment Programme, [Frequently asked questions relating to the Kigali Amendment to the Montreal Protocol](https://www.unenvironment.orgساندنتون/Environment/Global/Ozone/Montreal-Protocol), 17 February 2017.
HFCs contribute between 1–2 per cent of Australia’s greenhouse gas emissions. According to the Regulation Impact Statement attached to the Explanatory Memorandum, current Australian consumption of HFCs is 7.82 Mt CO₂-e (in 2016) and the objective of the HFC phase-down ‘is to reduce this to 1.17 Mt CO₂-e by 2036’. 17

**Australia’s regulatory regime**

The **OPSGGM Act and related Acts**18 implement Australia’s obligations under the **Montreal Protocol**. The Department of the Environment and Energy (the Department) administers the **Ozone Protection and Synthetic Greenhouse Gas Management Program** (OPSGGM Program) which controls the manufacture, import, export and major end-uses of ozone depleting substances (ODSs) in Australia.

The specific ODSs currently controlled under the **OPSGGM Act** are CFCs; HCFCs; halons (1211, 1301 and 2402); carbon tetrachloride (CCl₃); methyl chloroform (CH₂CCl₃); hydrobromofluorocarbon (HBFC); methyl bromide; and bromochloromethane (BCM).19

However, the **OPSGGM Act** also regulates synthetic greenhouse gases (SGGs). The SGGs that are controlled under the **OPSGGM Act** are HFCs, perfluorocarbons (PFCs) and sulfur hexafluoride (SF₆).20 In 2012–13, SGGs accounted for 1.8 per cent of Australia’s greenhouse gas emissions.21 This aspect of the regime also implements Australia’s obligations under the **Kyoto Protocol**, an international agreement on climate change.22 The greenhouse gases covered by the **Kyoto Protocol** are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), HFCs, PFCs and sulfur hexafluoride (SF₆).23 The **Doha Amendment** to the **Kyoto Protocol**, agreed in 2012, amended this list to add nitrogen trifluoride (NF₃).24 Australia ratified the Doha Amendment in November 2016.25

Together, ODSs and SGGs are referred to as ‘controlled substances’ under the **OPSGGM Program**. The import, export and manufacture of controlled substances, and the import and manufacture of certain products or equipment containing (or designed to contain) some of these substances, is prohibited in Australia unless the correct licence or exemption is held.26 There are four types of import/export licences under the Act:27

1. **ODS/SGG equipment licences**: used to import equipment that contains ozone depleting substances or synthetic greenhouse gases, including air conditioning and refrigeration equipment that contain a HFC or HCFC.28
2. **Controlled substances licences**: used to import, export and manufacture SGGs, HCFCs and methyl bromide.29
3. **Essential uses licences**: for the import, export and manufacture of CFCs, halons, methyl chloroform, carbon tetrachloride, and BCMs. These are only available for uses which meet a strictly limited range of essential use criteria approved by the parties to the Montreal Protocol, including laboratory and analytical uses.30

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17. Ibid., Attachment, p. 1.
20. Ibid. PFCs are used, for example, as refrigerants or as fire extinguishing agents, although the aluminium industry is the main source of Australia’s PFCs emissions, which are a by-product of the smelting process. SF₆ is an insulating gas used by the electricity supply industry to prevent arcing in electrical switchgear. Emissions occur due to leakage and during equipment maintenance and decommissioning; DEE, ‘Synthetic greenhouse gases’, op. cit.
23. Kyoto Protocol, Annex A.
25. M Turnbull (Prime Minister), J Bishop (Minister for Foreign Affairs), J Frydenberg (Minister for the Environment and Energy), Ratification of the Paris Agreement on climate change and the Doha Amendment to the Kyoto Protocol, media release, 10 November 2016.
27. **OPSGGM Act**, section 13A. See also DEE, ‘Licences and reporting requirements’, DEE website.
29. **OPSGGM Act**, subsection 13A(2). A controlled substance licence covers ‘bulk’ gases: that is, gases in containers, such as cylinders. Controlled substance licences do not cover products or equipment such as refrigerators or car air conditioners which already have gas in them. These are covered by SGG equipment licences, which are required under subsection 13A(6A) for the import of equipment that contains SGGs: see further DEE, ‘Controlled substances licence to import synthetic greenhouse gases (SGGs): HFCs, PFCs and/or SF₆’, DEE website.
4. Used substances licences: for the import and export of used or recycled CFCs, HCFCs, methyl bromide, HBFCs, halons, carbon tetrachloride and methyl chloroform is prohibited without a used substance licence. There are some limited exemptions under the OPSGGM Act. Licence holders are also required to pay quarterly levies and to report to the Department every three months in relation to the type and amount of ODSs and SGGs manufactured, imported and exported, including in relevant equipment.

**Review of the Ozone Protection and Synthetic Greenhouse Gas Management Program**

In May 2014, the Minister for the Environment announced a review of the OPSGGM Program. The review had two objectives, being to identify opportunities to:

- reduce emissions of ODSs and SGGs in line with international efforts and
- improve and streamline the operation of the program, including reducing regulatory compliance costs.

As part of the review, the Department of the Environment released an Options Paper for public consultation in October 2015, which received 57 submissions. A final review report does not appear to have been publicly released. However, a government statement was issued in April 2016, together with a list of Measures to achieve emissions reduction and efficiency and effectiveness gains in the Ozone Protection and Synthetic Greenhouse Gas Management Programme. Some of the key regulatory measures on this list included:

- an 85 per cent phase-down of HFC imports, commencing on 1 January 2018, with the 85 per cent phase-down being reached from 2036
- provision for bans on the import and manufacture of specified equipment containing specified high global warming potential HFCs and
- compliance powers will be strengthened. This will include new offence provisions, infringement notices for refrigeration and air conditioning and fire protection schemes, and publication of compliance actions. Also, licences will be able to be suspended.

Key ‘streamlining’ measures proposed by the review to ‘reduce the burden on business’ included:

- extend the maximum duration of end use licences and permits from two to three years
- introduce licence renewals
- reduce reporting requirements from quarterly to twice yearly (while retaining flexibility for more frequent reporting if licence holders prefer to do so) and
- waive of small levy debts up to $330.

The Government’s stated aim was for these measures to be in place by the start of January 2018. The Department’s website indicates that the current Bill includes ‘most of the efficiency measures announced in the review, including streamlining of licensing provisions, waiving uneconomic levy debts and reduce reporting frequency’. At the same time, the Departmental website stated:

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30. OPSGGM Act, subsection 13A(3). See also DEE, ‘Essential uses licences’, DEE website.
31. OPSGGM Act, subsection 13A(4).
32. See further DEE, ‘Exemptions: do I need a licence?’, DEE website.
33. DEE, ‘Licences and reporting requirements’, DEE website.
39. Ibid.
40. Ibid.
The HFC phase-down was prioritised for drafting in this Bill as it was important to provide industry and consumers investment certainty. Further measures including strengthened compliance and enforcement powers covering more of the program and additional efficiency measures will follow in a second tranche of amendments, planned for 2018.41

Committee consideration

Selection of Bills Committee

At its meeting on 10 May 2017, the Selection of Bills Committee deferred consideration as to whether the Bill should be referred to a committee for inquiry and report until its next meeting.42

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills raised a number of issues in relation to the Bill.43

The first set of issues related to item 20 of Schedule 1 of the Bill, which seeks to repeal and replace section 13 of the OPGSM Act with a more clearly drafted version. Section 13 sets out an offence and civil penalty provision relating to unlicensed manufacture, import or export of ODSs and SGGs (see further ‘Key issues and provisions’). The Committee noted that the revised structure of section 13 results in a reversal of the evidential burden of proof, meaning the defendant will now be required to establish applicable exceptions to the unlicensed manufacture, import or export offence in proposed subsections 13(2), (3), (5) or (6).44 The Committee noted the Explanatory Memorandum suggests that the reverse burden is justified because ‘the matters to be proved under these subsections (namely, that the defendant held a licence or that the circumstances of the activity meant the defendant was subject to an exemption) are particularly within the defendant’s knowledge’.45 However, the Committee was concerned:

... it is not clear from the information provided that each of the matters outlined in the exceptions is, in fact, particularly within the defendant’s knowledge. It is also noted that the Guide to Framing Commonwealth Offences states that in general it is expected that provisions which reverse the onus of proof will be peculiarly within the knowledge of the defendant rather than within their particular knowledge (which is a more stringent standard).46

The Committee has requested the Minister’s advice as to how each of the matters outlined in the exceptions are peculiarly within the knowledge of the defendant and how it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.47

The Committee was also concerned that proposed section 13 leaves ‘significant matters’ to delegated legislation, in particular, the exceptions to the offence rely on certain circumstances, types of equipment, amounts of relevant substances, and conditions being prescribed in the Regulations. The Committee acknowledged that ‘some of these matters may be technical in nature and therefore potentially appropriate for inclusion in delegated legislation’. Nevertheless, the Committee noted the lack of justification in the Explanatory Memorandum, and stated its expectation that ‘explanatory material should provide details as to why it is appropriate for these matters to be included in delegated, rather than primary, legislation’.48 Further, the Committee considered that ‘specific consultation obligations’ should be included in the Bill in relation to those matters, and that compliance with those obligations should be a condition of the validity of the legislative instrument.49 The Committee also requested a detailed justification for the strict liability nature of the offence in proposed section 13.50

41. Ibid.
44. Ibid., p. 32.
45. Ibid., p. 32. See also Explanatory Memorandum, op. cit., p. 50.
46. Ibid., p. 32.
47. Ibid.
48. Ibid., p. 33.
49. Ibid.
50. Ibid., p. 34. See item 20, proposed subsection 13(7).
The Committee also raised issues in relation to proposed section 45C (inserted by item 2 of Schedule 3), which introduces a new offence in relation to the use of HCFCs that are manufactured or imported on or after 1 January 2020 (see further ‘Key issues and provisions’). Proposed subsection 45C(2) provides for an exemption to that offence if the prohibited use is for a purpose prescribed in the Regulations. The Committee was concerned that the proposed provision contains a reserve burden of proof in that the defendant would need to prove that their use of a HCFC was for a purpose prescribed by the Regulations. The Committee also commented that this means significant elements of the offence (or exceptions) are provided for in Regulations rather than primary legislation. The Committee noted the Explanatory Memorandum’s justification that this approach is ‘necessary to ensure that the OPSGGM Act reflects any allowable uses that may be agreed under the Montreal Protocol before 2020’, and that it ‘is envisaged that the prescribed uses would align with those prescribed under the Montreal Protocol’. Nevertheless, the Committee again observed that where the Parliament delegates its legislative power in relation to significant regulatory matters, specific consultation obligations should be included in the Bill.

The Committee therefore again requested the Minister’s advice in relation to the types of exempted purposes that are likely to be prescribed in the Regulations, the type of consultation to be undertaken prior to prescribing allowable purposes under proposed subsection 45C(2), and whether specific consultation requirements can be included in the Bill. Finally, the Committee also requested a more detailed justification from the Minister for the proposed application of strict liability in subsection 45C(3).

Policy position of non-government parties/independents

At the time of writing, non-government parties and independents do not appear to have commented directly on this Bill. However, the Australian Greens have been calling for a phase-down on the production and consumption of HFCs for many years.

Position of major interest groups

Major interest groups do not appear to have commented on the Bill itself. However, some commented on the Kigali Amendment when it was announced. For example, the Fire Protection Association Australia, Climate Institute, and Synthetic Greenhouse Gas Management Programme options paper released in October 2015 during the review of the OPSGGM Program. Most seemed broadly supportive of an HFC phase-down, while some argued for a more ambitious approach to the phase-down. For example, the Climate Institute strongly supported the government’s proposal for a HFC phase-down, noting that it had supported a phase-down for some time as part of a strategy.

52. Ibid., p. 35.
53. Ibid., p. 36. See also Explanatory Memorandum, op. cit., p. 30.
54. Ibid.
55. Ibid., p. 37.
56. See, for example, C Milne (Australian Greens Leader), Senate backs Greens call to phase out globe-warming refrigerants at 25th anniversary meeting, media release, 1 November 2012.
57. Fire Protection Association Australia, Global success for Australia led by the Department of the Environment and Energy, media release, 19 October 2016.
58. Australian Institute of Refrigeration Air Conditioning and Heating (AIRAH), AIRAH gives a thumbs-up to announcement of HFC phase-down, media release, 29 June 2016.
60. For all published submissions made to the consultation on the Options Paper, see DEE, Consultation on the Ozone Protection and Synthetic Greenhouse Gas Management Programme options paper, DEE website.
to achieve greenhouse gas emissions reductions. Indeed, the Climate Institute considered the Government should ‘fast track’ an HFC phase-down through parliament.61

In its submission, the Australian Refrigeration Association (ARA) supported the proposed HFC phase-down, considering that ‘the need and opportunity for HFC phase down is both environmentally and commercially warranted in Australia’. In fact, the ARA recommended ‘a more ambitious Australian strategy for HFC phase down’.62

Financial implications
According to the Explanatory Memorandum, the total financial impact of the measures contained in the Bill is estimated to be $3.04 million annually. The HFC phase-down will impose an estimated annual regulatory burden of $4.2 million, while the efficiency measures in the Bill are estimated to result in an annual regulatory burden saving of $548,000.63 A Regulation Impact Statement was prepared for options to reduce HFCs and is set out in full in an attachment to the Explanatory Memorandum.64

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments in section 3 of that Act. The Government considers that the Bill is compatible.65

Parliamentary Joint Committee on Human Rights
The Parliamentary Joint Committee on Human Rights considered that the Bill did not raise human rights concerns.66

Key issues and provisions

New HFC phase-down scheme

Part 1 of Schedule 1 of the Bill contains amendments to implement the new HFC phase-down scheme in Australia, in order to implement Australia’s commitment, under the Kigali Amendment, to reduce the use of HFCs by 85 per cent (compared to current consumption levels) by 2036.67 This phase-down will be achieved by establishing a quota scheme with a diminishing cap on imports of HFCs starting on 1 January 2018. As the Minister noted in his second reading speech, this is similar to the previous approach which was successfully used to phase-out CFCs and HCFCs.68

HFCs are already regulated under the OPSGGM Act as SGGs, with various HFCs listed in Part IX of Schedule 1 of the Act. Under subsection 13(1A), for example, it is currently an offence to import, export or manufacture SGGs (defined in section 7 to include HFCs) without a controlled substance licence (unless an exemption applies).

However, to achieve the phase-down, item 47 of Schedule 1 inserts a new Part IVA into the OPSGGM Act to implement the HFC phase-down by establishing an HFC import quota scheme:

The HFC phase-down will be undertaken through the gradual reduction over 18 years of the maximum amount of new HFCs permitted to be imported into Australia (there are no HFCs manufactured in Australia).69

61. The Climate Institute, Submission to the DEE, Consultation on the Ozone Protection and Synthetic Greenhouse Gas Management Programme options paper, November 2015.
64. Ibid., Attachment.
65. The Statement of Compatibility with Human Rights can be found at pages 5–9 of the Explanatory Memorandum to the Bill.
67. J Bishop (Minister for Foreign Affairs), G Hunt (Minister for Industry, Innovation and Science) and J Frydenberg (Minister for the Environment and Energy), Australia plays lead role to secure 85 per cent reduction in global HFC emissions, media release, 16 October 2016.
69. Explanatory Memorandum, op. cit., p. 11.
New Part IV introduces the concept of a ‘regulated HFC activity’, to be defined in **proposed subsection 36B** as the manufacture or import of HFCs. 70 The definition does not include the import of recycled or used SGGs, the import of HFCs in SGG equipment, or the manufacture or import of HFCs in circumstances prescribed in Regulations. 71

To facilitate the HFC phase-down, **item 30 in Schedule 1** of the Bill amends section 18 of the OPSSGM Act, which sets out the conditions that apply to certain licences under the Act. **Item 30** would repeal subsections 18(1) to (3) and replace them with a **new table** setting out conditions for different licence types. Items 1–3 in the proposed table effectively replicate the existing conditions for controlled substance licences and licences that are not SGG licences. Items 4 to 6 in the proposed table set out new conditions for SGG licences (which are defined in section 7 as a controlled substance licence that relates to SGGs).

In short, under item 4, the licensee must not engage in a ‘regulated HFC activity’ (as defined in **proposed subsection 36B**, at **item 47 of Schedule 1**) unless the licensee has been allocated a quota 72 and the total quantity of HFCs involved in regulated HFC activities engaged in by the licensee is not more than the licensee’s quotas. 73 Under items 5 and 6 in the table, once the Kigali Amendment enters into force for Australia, SGG licencees may also only import or export HFCs from countries that are registered as a **Montreal Protocol country**. 74

**Proposed section 36A** in the **new Part IVA** then enables Regulations to be made prescribing an HFC industry limit for each calendar year. Those Regulations must be consistent with Australia’s international obligations. 75 Under **proposed subsection 36A(2)**, the sum of all HFC quotas allocated for a calendar year must not exceed the HFC industry limit for that year. **Proposed subsection 36B(2)** sets out a formula for working out the quantity of HFCs that is taken to be involved in ‘regulated HFC activities’ engaged in by an SGG licensee in a period.

The proposal to set out the details relating to HFC industry limits in Regulations is different to the process for HCFCs, for which the yearly industry limits are set out in the Act itself (see section 24 of the OPSSGM Act). The Explanatory Memorandum suggests it is necessary to prescribe the industry limits and the quota allocation process in Regulations because:

> ... the HFC phase-down schedule requires Australia to achieve an 85% phase-down of HFC imports by 31 December 2036. Given the period during which the phase-down will be in place, having the ability to prescribe the industry limits in the OPSSGM Regulations will provide flexibility in the administration of the phase-down, should Australia need to vary the schedule within the limits set under the Montreal Protocol. 76

The Department has also published the proposed phase-down schedule, including yearly limits, in a **table on its website**. 77

**Proposed section 36C** also enables Regulations to provide the processes for applying HFC quotas, processes for the Minister to allocate, vary, stop or cancel allocated quotas. **Proposed section 36F** would provide for the transfer of the unused part of HFC quotas. **Item 48** provides that the HFC phase-down in the **new Part IVA** would apply from 2018.

**Reserve HFC quotas**

**Proposed section 36G** in **new Part IVA** deals with the allocation of reserve HFC quotas. 78 The Explanatory Memorandum suggests that allocation of reserve HFC quota would be ‘on an ad hoc basis’:

> The amount of reserve HFC quota available at any time is intended to be the difference between Australia’s industry limit and the Montreal Protocol limit for the relevant year, if a difference exists. If no difference exists, no reserve

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70. **Item 13** also inserts a definition of ‘regulated HFC activity’ which refers to **proposed section 36B**.
71. The relevant regulations would be made under **proposed subsection 13(3)** at **item 20 of Schedule 1**.
72. **Proposed subsection 18(1)**, item 4, paragraph (a).
73. **Proposed subsection 18(1)**, item 4, paragraphs (b) and (c).
75. **Proposed section 36A(3)**.
76. Explanatory Memorandum, op. cit., p. 20; see also p. 22.
77. DEE, *Domestic HFC phase-down: frequently asked questions*, DEE website.
78. **Item 48** provides that a reserve HFC quota must not come into force before 1 January 2018.
quota will be available in the relevant year. It is envisaged reserve HFC quota would only be granted in exceptional circumstances and where criteria to be specified in the OPSGGM Regulations have been met. 79

Proposed subsection 36G(1) would provide that the Minister must not allocate a reserve HFC quota unless satisfied that circumstances prescribed by the Regulations exist. In relation to the sorts of circumstances in which reserve quota could be allocated, the Explanatory Memorandum suggests that it would be ‘in exceptional circumstances, such as for medical, veterinary, defence, public safety or energy efficiency purposes where HFCs are not available from another source’. 80

Proposed subsection 36G(2) would also provide for the process for the allocation of reserve HFC quotas to be prescribed in Regulations. Proposed subsections 36G(3) and (4) provide for Regulations to be made to set a limit on how much reserve quota the Minister may allocate. Under proposed subsection 36G(5), these Regulations must be consistent with Australia’s international obligations. The total of HFC quota and HFC reserve quota could not exceed Australia’s Montreal Protocol limit. 81

Much of the detail relating to HFC reserve quotas under proposed section 36G has been left to Regulations. The Explanatory Memorandum suggests that this provides flexibility ‘should Australia need to vary the schedule within the limits set under the Montreal Protocol’. 82

Directions to export HFCs

Proposed section 36H would allow the Minister to direct a SGG licensee to export a specified quantity of HFCs within a specified time if the licensee exceeds their total HFC quota for that year. Under proposed subsection 36H(2), the specific quantity directed to be exported must be no greater than the amount by which the SGG licensee has exceeded their relevant quota or quotas. As noted earlier in this Digest, once the Kigali Amendment enters into force for Australia, SGG licensees may also only import or export HFCs from countries that are registered as a Montreal Protocol country. 84

The note to new subsection 36H(1) would clarify that it is a condition of a licence under subsection 18(1) that the licensee complies with the directions of the Minister to export HFCs where quota has been exceeded. 85 Under existing subsection 18(7) (which is not being amended by the Bill), a licensee must not contravene a licence condition: the maximum penalty for an individual is 500 penalty units (equivalent to $90,000) or 2,500 penalty units ($450,000) for a corporation. 86

Under section 66 of the OPSGGM Act, applications may be made to the Administrative Appeals Tribunal (AAT) for review of certain decisions made under the Act. As a result of item 52, which inserts a new paragraph 66(eb) into the OPSGGM Act, decisions to direct an SGG licensee to export a quantity of HFCs under proposed section 36H will also be reviewable by the AAT.

Finally, proposed section 36J clarifies that HFC quotas (including reserve quotas) may be varied or cancelled, and ‘no compensation is payable’ in this situation.

Global warming potentials

As noted earlier, the HFC phase-down will be based on a yearly industry limit and under proposed subsection 36A(1) the HFC limit will be expressed in ‘CO2e megatonnes’. CO2e, or carbon dioxide equivalent is a unit used to compare the global warming potential (GWP) of a greenhouse gas, based on its ability to absorb...
heat and its lifetime in the atmosphere, compared to carbon dioxide (CO₂) (see the discussion of GWPs in the background section of this Digest). This is a different approach to the limits for HCFCs in the OPSGGM Act, which are set based on their ozone depleting potential (or ODP).  

Item 17 of Schedule 1 to the Bill proposes to insert a new section 9A to clarify that a reference in the Act to ‘CO₂e megatonnes’ is a reference to the quantity of an HCFC or HFC that results from multiplying its mass in megatonnes by its 100-year GWP. Item 5 then proposes to amend section 7 of the OPSGGM Act to insert a definition of ‘100-year global warming potential’ as the amount (if any) specified for that substance by a table in Schedule 1 of the Act.

The current Parts V and IX of Schedule 1 of the OPSGGM Act list the HCFCs and HFCs regulated under the Act. Items 55 and 56 of Schedule 1 of the Bill repeal and replace these lists. The key difference is that the revised parts would provide the GWPs for all HFCs and some HCFCs. As noted above, these GWPs will be used to calculate the quota limits for HFCs. The GWP values are from the Independent Panel on Climate Change (IPCC) Fourth Assessment Report, published in 2007. These values were updated by the IPCC in its Fifth Assessment Report, published in 2013. However, the lists of HFCs and HCFCs and their associated GWP values are the same as those agreed in the Kigali amendment.

Note also that one HFC, HFC-161, currently included in Part IX of Schedule 1 of the OPSGGM Act is not included in the proposed replacement Part IX substituted by item 56 in Schedule 1 of the Bill. This is presumably because it is not listed in the Kigali amendment.

HCFC scheme

Under the Montreal Protocol, developed countries have agreed to phase-out HCFCs by 2020. Australia’s phase-out schedule is implemented by allocating HCFC importers and manufacturers a limited quota under Part IV of the OPSGGM Act. According to the Department’s website, Australia already largely phased out consumption of HCFC by 2016, four years ahead of the schedule required under the Protocol.

HCFC ban from 2020

Schedule 3 of the Bill contains two parts, which both implement Australia’s obligations under the Montreal Protocol to restrict the use of new HCFCs from 1 January 2020.

Item 2 of Part 1 of Schedule 3 inserts a new section 45C into the OPSGGM Act which contains a strict liability offence for the use of an HCFC that was manufactured or imported on or after 1 January 2020. The maximum penalty is 300 penalty units for an individual (currently equivalent to $54,000).

Proposed subsection 45C(2) would provide an exception to the offence for uses for purposes prescribed by Regulations. The Explanatory Memorandum suggests that enabling particular purposes to be prescribed in Regulations is needed to reflect any allowable uses that may be agreed under the Montreal Protocol, and it ‘is envisaged that the prescribed uses would align with those prescribed under the Montreal Protocol’. As noted earlier in this Digest, the Senate Scrutiny of Bills Committee raised a number of issues in relation to proposed section 45C.

Section 38 of the OPSGGM Act contains a strict liability offence for manufacture and import of equipment that contains or uses scheduled substances, in contravention of Schedule 4 of the OPSGGM Act. Schedule 4 then sets out a list of various types of equipment such as dry cleaning machinery and refrigeration and air conditioning equipment. Item 18 in Part 2 of Schedule 3 of the Bill would amend Schedule 4 of the OPSGGM Act to add a new item 11 to the Schedule, being ‘HCFC equipment’. This would prohibit persons from manufacturing or

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87. OPSGGM Act, section 24.
88. Item 5 proposes to amend section 7 of the Act to insert a definition of ‘CO₂e megatonnes’ which will refer to section 9A.
90. IPCC, Climate change 2013: the physical science basis, Cambridge University Press, Cambridge, 2013, see especially Chapter 8, Appendix 8.A.
91. They are also consistent with the GWPs set out in Regulation 2.02 of the National Greenhouse and Energy Reporting Regulations 2008.
92. Montreal Protocol, Article 2F. Note that there is a very small allowance until 2030 for servicing of existing refrigeration and air conditioning equipment.
93. ‘Montreal Protocol on substances that deplete the ozone layer’, DEE website.
94. Explanatory Memorandum, op. cit., p. 50.
importing equipment that contains or uses HCFCs on or after 1 January 2020.\textsuperscript{95} This amendment complements the ban on the use of HCFCs set out in \textit{proposed section 45C}.\textsuperscript{96}

**Amendments to the existing HCFC scheme**

The Bill also proposes amendments which aim to ‘streamline and improve the HCFC phase-down provisions’ in the \textit{OPSGGM Act}.\textsuperscript{97} Most are relatively minor, such as \textit{items 6, 8, 13, 14, 16 and 37 in Schedule 1} which move definitions of ‘HCFC quota’, ‘HCFC reserve quota’ and ‘HCFC quota period’ without making substantive changes to their meaning. However, some of the more substantive or complex amendments are outlined below.

**Calculating quantities of HCFCs**

Under the \textit{OPSGGM Act}, licence holders engaged in a ‘regulated HCFC activity’ are allocated a quota which must not be exceeded.\textsuperscript{98} A ‘regulated HCFC activity’ is currently defined in section 7 of the \textit{OPSGGM Act} as the manufacture or import of HCFCs. \textit{Item 38 in Schedule 1} proposes to move this definition into a \textit{new section 25A} which will continue to define a regulated HCFC activity as the manufacture or import of HCFCs.\textsuperscript{99} \textbf{Proposed subsection 25A(2)} then clarifies the quantity of HCFCs that is taken to be involved in regulated HCFC activities engaged in by a licensee in a period for the purposes of calculating quotas under the regime. This proposed subsection uses the same wording as the current subsection 18(1A), which is to be repealed by \textit{item 30}. Under both subsections, the relevant quantity involved in regulated HCFCs activities is reduced by a ‘heel allowance percentage’:

Heel is a residual amount of gas remaining in an imported transport cylinder after all usable gas has been decanted or offloaded. Removal of the heel risks damaging the cylinder through changes in pressure or introducing contaminants into the gas. Removing the heel also increases safety risks for the handler. As the heel is not removed from the imported cylinder, the \textit{OPSGGM Act} excludes a heel allowance percentage (currently set at 5%) from the calculation of levies applied to ODS and SGG imports and manufacture, and the HCFC import quota.\textsuperscript{100}

\textbf{Proposed subsection 25A(2)} would continue to provide that the ‘heel allowance percentage’ for HCFCs is not taken into account when calculating the quantity of HCFCs that are involved in a regulated HCFC activity. The relevant ‘heel allowance percentage’, currently five per cent, is prescribed by the Regulations.\textsuperscript{101}

\textit{Item 86 in Part 5 of Schedule 2} would then amend this \textit{proposed subsection 25A(2)}. It is important to note that these two amendments have different commencement dates. The first amendment (\textit{item 38}) is contained in \textit{Schedule 1} of the Bill, which commences on proclamation or six months after Royal Assent, whichever is earlier. The subsequent amendment, \textit{item 86 in Schedule 2}, would commence on the later of 1 January 2018 or immediately after the commencement of \textit{Schedule 1}.\textsuperscript{102} Although somewhat confusing, this approach is perhaps intended to give licensees sufficient notice and time to adjust to the new approach that will be taken to exports of HCFCs, as outlined below.

\textbf{Proposed subsection 25A(2)} as amended by \textit{item 86 in Schedule 2} will provide a new formula for calculating the quantity of HCFCs taken to be involved in regulated HCFC activities. In short, the key difference is that the formula allows HCFC exports to be subtracted from imports of HCFCs and continues to provide a heel allowance percentage.\textsuperscript{103} As the Explanatory Memorandum notes, this formula ‘aligns with the definition of consumption under the Montreal Protocol, which is production and imports minus exports’.\textsuperscript{104}
However, HCFCs exported under a direction given to the licensee under proposed section 35A are not included. Proposed section 35A is inserted by item 45 of Schedule 1 of the Bill and would allow the Minister to direct licensees to export specified amounts of HCFCs if a licensee exceeds their quota. The Explanatory Memorandum states that ‘this is to ensure Australia avoids non-compliance with Montreal Protocol obligations’. A Ministerial direction to export HCFCs under proposed section 35A is reviewable by the AAT.

Transferring HCFC quotas
Section 35 of the OPSGGM Act currently enables a licensee to transfer the unused part of their HCFC quota to another person. In particular, under subsection 35(2), a licensee may transfer their quota, or part of their quota, without transferring their licence.

Item 43 in Schedule 1 would replace subsection 35(2) and insert a new subsection 35(2A). The amended subsection 35(2) would continue to allow a licensee to transfer their entire unused HCFC quota to another licence holder, without transferring their licence. New subsection 35(2A) clarifies that a licensee may transfer a percentage of their unused HCFC quota or quotas to another licensee, while retaining the remaining percentage.

Licencing and reporting changes
Parts 1 to 3 of Schedule 2 of the Bill contain amendments to the licensing provisions in the ozone legislation.

Licence renewals
Part 1 of Schedule 2 contains amendments enabling licences holders to renew their licences at the end of the two year licence period, rather than requiring a new licence application. Currently, licences stay in force for a maximum period of two years. Licence holders are currently required to apply for a new licence at the end of each licence period.

Item 9 of Schedule 2 would amend section 19 and item 10 would insert a new Division 5 into Part III of the OPSGGM Act to provide for licences to be renewed. Proposed section 19AA in this new Division provides for licence holders to apply to the Minister for a licence renewal no later than 60 days before their licence expires. Proposed section 19AB enables the Minister to request further information from the licence holder relating to their renewal application within 60 days after a renewal application is received. Proposed section 19AC requires the Minister to decide to renew or refuse to renew a licence and to give the applicant written notice of that decision. In deciding whether to grant a licence renewal, the Minister must have regard to the same matters as for the initial grant of a licence, such as Australia’s international obligations. Under proposed subsection 19AD(1), the Minister must make a decision on a renewal application within 60 days (or within 60 days of receiving further information requested under proposed section 19AB), otherwise the Minister is deemed to have refused the application. A decision to refuse a licence renewal (including deemed refusal) will be subject to AAT review.

The introduction of licence renewal provisions reflects the measures proposed as a result of the review of the OPSGGM Program. However, the licence period would remain two years, despite the fact that the duration of licences under the scheme was proposed to be extended to three years. It is unclear why this measure was not included in this Bill, although it may be included in the second tranche of amendments foreshadowed by the Department (as discussed in the Background section of this Digest).

105. Schedule 2, Part 5, item 86, proposed subsection 25A(2).
106. Explanatory Memorandum, op. cit., p. 49.
107. Item 52 of Schedule 1, which amends section 66 of the OPSGGM Act.
108. OPSGGM Act, sections 8A and 19.
110. Proposed subsections 19AC(2) and (3). The matters for the initial grant of a licence are set out in existing subsections 16(3A) to (6).
111. Item 13 of Schedule 2 of the Bill, which amends section 66 of the OPSGGM Act.
112. OPSGGM Act, section 8A which is unamended by this Bill.
Reporting requirements

Part 2 of Schedule 2 reduces the reporting requirements for licence holders from quarterly to twice yearly, with flexibility to allow those who wish to continue to report quarterly to do so. It also reflects the measures stemming from the review of the OPSGGM Program.114

Currently, under sections 46 and 46A of the OPSGGM Act, a person who manufactured, imported or exported a scheduled substance,115 or ODS or SGG equipment during a quarter is required to provide a report to the Minister. This includes a requirement to report a nil amount if the person did not undertake any of those activities during the quarter.116 The report must be provided to the Minister within 15 days after the end of the relevant quarter. A person who fails to comply with these requirements commits a strict liability offence.117 The Explanatory Memorandum states:

The requirement for licence holders to report on activity, even if the licence holder has not undertaken any activity during the quarter, imposes a regulatory burden on businesses as considerable time and resources can be spent to lodge the quarterly reports.118

Item 60 in Schedule 2 inserts a new definition of ‘reporting period’ into section 7 of the OPSGGM Act, as the period of six months starting on 1 January or 1 July. Item 62 would then repeal subsections 46(1) and (2) and replace them with new subsections to clarify which activities will trigger the reporting requirements. In particular, proposed subsection 46(1) includes a table of activities such as manufacturing, importing, exporting or destroying a scheduled substance or SGG, or importing ODS or SGG equipment. Under proposed subsection 46(1A), reports must be provided to the Minister within 15 days of the end of the reporting period. In other words, for those who have engaged in relevant activities, reports will only be required twice a year instead of quarterly.119 Reports of nil quantity would also no longer be required. Failure to comply with the reporting requirements would still be a strict liability offence, subject to the same penalty.120

To reflect the change to reporting periods, items 51–58 and items 71–74 in Schedule 2 make consequential amendments to the Import Levy Act and the Manufacture Levy Act.

Licence levy thresholds and late payment penalty

Under the Import Levy Act, a levy is imposed on the holders of licences who import scheduled substances, or ODS or SGG equipment. Additionally, under the Manufacture Levy Act, a levy is imposed on the holders of licences who manufacture scheduled substances. The Bill proposes to remove the late payment penalty for such levies and to introduce a new threshold below which licence holders will no longer be required to pay the cost recovery levy.

Late payment penalty

Unless the Minister has allowed a longer period, levies under the regime are currently due 60 days after the end of the reporting period to which the levy relates.121 If a levy is not paid by the date, subsection 69(2) of the OPSGGM Act currently imposes a late payment penalty on the licence holder. The late payment penalty is calculated at the rate of 30 per cent per annum of the unpaid levy, calculated from the due date. Item 70 of Schedule 2 would repeal subsection 69(2) of the OPSGGM Act, removing the late payment penalty.

The Explanatory Memorandum states, although the ‘late payment penalty was initially intended to be a deterrent, it has not had this effect’:

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114. Ibid.
115. ‘Scheduled substance’ is defined in the section 7 of the OPSGGM Act to mean a substance referred to in Schedule 1 of the OPSGGM Act, whether existing alone or in a mixture. Schedule 1 contains lists of various ODSs and SGGs.
116. OPSGGM Act, subsections 46(3), 46A(4A) and (4B).
117. OPSGGM Act, subsections 46(2A) and 46A(6).
118. Explanatory Memorandum, op. cit., p. 43.
119. Note that Item 65 repeals the current section 46A, since the activities covered by section 46A would be covered by the table in proposed subsection 46(1).
120. Proposed subsection 46(2) and existing subsection 46(2A).
121. OPSGGM Act, subsection 69(1). Note Item 69 would amend this subsection to replace the reference to ‘quarter’ with a reference to ‘reporting period’ as a result of the amendments to the reporting periods outlined elsewhere in this Digest.
The majority of licence holders that have been subjected to the requirement to pay a late payment penalty are repeat offenders, suggesting the late payment penalty has a limited deterrent value. In addition, late payment penalty amounts have been of a small value, resulting in an excess of non-cost effective transactions to the Department per year (approximately 2200 transactions in 2014) ...^{122}

The Explanatory Memorandum suggests that other provisions in the *OPSGGM Act* ‘can be used as a stronger deterrent against the late payment of levy, including taking such matters into account in considering whether the licence holder is a fit and proper person’.^{123}

**Levy threshold**

According to the Explanatory Memorandum, levy liabilities are often for very small amounts: ‘for example, the levy liability for importing 100 refrigerators containing 200 grams of refrigerants would be $3.30’.^{124} The Explanatory Memorandum suggests that ‘having a large number of small value levy transactions can impose a significant regulatory burden on licence holders’ and that ‘eliminating small value levy transactions will result in efficiencies for both business and the Government’.^{125}

Item 70 therefore proposes to insert a new subsection 69(3) into the *OPSGGM Act* which will enable a licence levy threshold to be specified in Regulations. If the amount of the levy liability in a reporting period is under this threshold, the licence holder would not need to pay the levy. This amendment reflects the outcomes of the review of the OPSGGM Program, which included a proposed waiver of small levy debts up to $330.^{126}

The Explanatory Memorandum considers:

It is appropriate for the levy threshold to be specified in the OPSGGM Regulations in order to provide sufficient flexibility to vary the threshold over time due to changing circumstances. Such changing circumstances could include changes due to inflation or to the rate of the levy that is imposed for the purposes of the Import Levy Act and the Manufacture Levy Act. The rate of levy imposed under both of those Acts is prescribed in regulations made for the purposes of those Acts.^{127}

Item 76 is a transitional provision to clarify that if the total debts owed immediately before the commencement of the item are $330 or less, then those debts cease to be payable on commencement of the item.

**Other changes to licence provisions**

**Termination of licences**

Section 19A of the *OPSGGM Act* currently enables the Minister to terminate a licence. Under the current subsection 19A(2), the Minister must not terminate a licence (other than an SGG licence or an ODS/SGG equipment licence) unless satisfied that it is necessary to do so for the purposes of giving effect to an adjustment or amendment of the *Montreal Protocol*.^{128} Item 11 in Schedule 2 would replace subsection 19A(2) to provide that the Minister must not terminate any licence unless satisfied that it is necessary for the purpose of giving effect to an adjustment of the *United Nations Convention on Climate Change* (*UNFCCC*)^{129} or the *Kyoto Protocol*, as well as the *Montreal Protocol*. This reflects the fact that the *OPSGGM Act* implements Australia’s obligations not only under the *Montreal Protocol*, but also Australia’s obligations under the *UNFCCC* and the *Kyoto Protocol*.^{130}

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122. Explanatory Memorandum, op. cit., p. 45.
123. Ibid. See also *OPSGGM Act*, subsection 16(4).
125. Ibid.
127. Explanatory Memorandum, op. cit., p. 45.
128. *OPSGGM Act*, subsection 19A(2). Note that the Minister has a separate power to cancel a licence under section 20 of the *OPSGGM Act*, where the Minister is satisfied that the licensee is no longer a fit and proper person to hold a licence or the licensee has contravened a condition of the licence.
130. Explanatory Memorandum, op. cit., p. 35.
New and used gases

Section 13A of the OPSGGM Act currently outlines the different types of licences under the Act and sets out the activities allowed by the licences (as discussed in the background section of this Digest). In particular, subsection 13A(2) currently sets out the activities allowed under controlled substances licences, being the manufacture, import and export of HCFCs, methyl bromide and SGGs. Items 22-26 of Schedule 1 amend section 13A.

Item 23 would insert a proposed subsection 13A(2A) to provide that a controlled substances licence does not apply to recycled or used HCFCs, methyl bromide or SGGs. As the Explanatory Memorandum notes:

Instead, a used substances licence would be required to import or export these substances. This differentiates new and used gas and is required to prevent used substances being counted against Australia’s Montreal Protocol consumption and yearly industry limits under the HFC phase-down. Used gases are accounted for in the country of manufacture. 131

Subsection 13A(3) currently sets out the activities allowed under essential uses licences, being the manufacture, import and export of stage-1 or stage-2 scheduled substances. These are defined in section 7 of the Act as CFCs, halons, methyl chloroform, carbon tetrachloride, and bromochloromethane. Item 25 inserts proposed subsection 13A(3A) to provide that an essential uses licence does not apply to recycled or used stage-1 or stage-2 scheduled substances. 132 Again, these could be imported or exported under a used substances licence.

Subsection 13A(4) currently sets out the activities allowed under used substance licences: that is, the import or export of recycled or used stage-1 or stage-2 scheduled substances, HCFCs or methyl bromide. Item 26 proposes to amend subsection 13A(4) to allow the import or export of recycled or used SGGs133 under a used substances licence. As noted previously, SGGs are defined in section 7 of the OPSGGM Act as HFCs, PFCs and sulfur hexafluoride. This would mean, for example, that recycled or used HFCs could be imported or exported under a used substances licence. The Explanatory Memorandum states ‘this amendment is required for consistency with the Montreal Protocol which differentiates between new and used gas’. 134

Maximum quantities

Currently subsection 16(3) of the OPSSGM Act provides that a licence (other than an HCFC licence, an SGG licence or an equipment licence) must specify:

• the substance or substances to which it relates and
• the activities it allows and
• the maximum quantities of the substance (or substances), allowed for those activities.

Item 77 in Part 3 of Schedule 2 would replace subsection 16(3) to provide that a licence must specify the substance or substances to which it relates and the activities it allows. However, under proposed paragraph 16(3)(b), the maximum quantities of the substance (or substances), allowed for those activities, may be specified. In other words, it will no longer be a mandatory requirement to specify maximum quantities of substances for activities permitted by licences. The Explanatory Memorandum suggests that this amendment is needed because it is ‘not always appropriate or possible’ to specify maximum quantities of substances. An example is given of the import of methyl bromide under a controlled substances licence:

While the use of methyl bromide is generally prohibited under the OPSGGM Act, there are some circumstances in which it can be used. Methyl bromide is a highly effective fumigant used to protect the biosecurity interests of Australia and other nations across the world. Under the Montreal Protocol, one of the permitted uses of methyl bromide is for certified Quarantine and Pre-Shipment uses and the Montreal Protocol does not place limits on the use of methyl bromide for certified Quarantine and Pre-Shipment uses. Therefore, the requirement under paragraph 16(3)(b) of the OPSGGM Act to specify the maximum quantity for the import of methyl bromide for

131. Explanatory Memorandum, op. cit., p. 15.
132. Item 9 in Schedule 1 of the Bill inserts a new definition of ‘recycled or used stage-1 or stage-2 scheduled substances’ into the OPSGGM Act.
133. Item 9 in Schedule 1 of the Bill inserts a new definition of ‘recycled or used SGGs’ into the OPSGGM Act.
134. Explanatory Memorandum, op. cit., p. 15.
This amendment also reflects the measure, proposed as a result of the review of the OPSGGM Program, to remove licence conditions that limit the amount of methyl bromide that can be imported for Quarantine and Pre-Shipment applications.\textsuperscript{136}

\textbf{New substances}

Part 4 of Schedule 2 of the Bill proposes to add two new synthetic greenhouse gases (SGGs) to be regulated under the \textit{OPSGGM Act}: nitrogen trifluoride and PFC-9-1-18. PFC 9-1-18 has a limited number of medical applications, while nitrogen trifluoride is used in the electronics industry (semiconductor and LCD manufacture), and is increasingly a replacement for PFCs and sulfur hexafluoride.\textsuperscript{137} The Explanatory Memorandum suggests that nitrogen trifluoride and an additional PFC (PFC-9-1-18) were ‘included in the Kyoto Protocol for the second commitment period’.\textsuperscript{138}

The second commitment period under the \textit{Kyoto Protocol} was established by the \textit{Doha Amendment}, as noted in the background to this Digest. While nitrogen trifluoride was added by the Doha Amendment, PFCs were already included in Annex A of the \textit{Kyoto Protocol}.

SGG or synthetic greenhouse gas is currently defined in section 7 of the Act to mean an HFC, a PFC or sulfur hexafluoride. Item 79 of Schedule 2 would replace this definition to add nitrogen trifluoride.

Each SGG is defined in section 7 by reference to the lists of ‘scheduled substances’ in Schedule 1 of the \textit{OPSGGM Act}. Item 78 would insert a definition of nitrogen trifluoride in section 7 of the Act, also referring to Schedule 1 of the Act. Item 84 would insert a \textit{new Part XII} into Schedule 1 of the Act in order to include nitrogen trifluoride, while item 83 would amend the existing listing of PFCs in Part X of Schedule 1 to add PFC-9-1-18.

As the Explanatory Memorandum states, the inclusion of these new substances means that a controlled substances licence will be required for the import, export of manufacture of these gases, and equipment licences will be required for the import of equipment containing these gases.\textsuperscript{139} These licence holders will also be required to provide reports and pay relevant levies to the Department in relation to the import, export or manufacture of those substances.\textsuperscript{140}

The inclusion of these additional substances also implements the measures proposed as a result of the review of the OPSGGM Program.\textsuperscript{141}

\textbf{Other amendments}

\textbf{Objectives of the Act}

Items 3 and 4 of Schedule 1 of the Bill amend the objectives in section 3 of the \textit{OPSGGM Act}. The current objectives refer to the \textit{Montreal Protocol} and controls on ODSs. However, as noted in the background to this Digest, as a result of the Kigali Amendment, the \textit{Montreal Protocol} will now regulate not just ODSs, but also SGGs. Items 3 and 4 therefore amend section 3 to refer to both ODSs and SGGs to reflect this change.

\textbf{Delegation powers}

Part 4 of Schedule 1 proposes to amend the delegation provision in section 67A of the \textit{OPSGGM Act} to extend the Minister’s delegation power. Subsection 67A(1) currently enables the Minister to delegate his or her

\textsuperscript{135} Explanatory Memorandum, op. cit., p. 47.

\textsuperscript{136} Department of the Environment, \textit{Measures to achieve emissions reduction and efficiency and effectiveness gains in the Ozone Protection and Synthetic Greenhouse Gas Management Programme}, April 2016, p. 11.


\textsuperscript{138} Explanatory Memorandum, op. cit., p. 47.

\textsuperscript{139} Ibid., p. 48.

\textsuperscript{140} Ibid., p. 48.

\textsuperscript{141} Department of the Environment, \textit{Measures to achieve emissions reduction}, op. cit., p. 7. Note that the measures also proposed to add HFC-41-10mee. This appears to have been a typographical error as no such substance is listed under the \textit{Montreal Protocol} or the Kigali Amendment. However, HFC-43-10mee is covered by the regime and is already listed under the \textit{OPSGGM Act}. 
functions and powers under the \textit{OPSGGM Act} and regulations to a Senior Executive Service (SES) employee or acting SES employee.\textsuperscript{142} \textbf{Item 118 of Schedule 1} replaces subsection 67A(1) to extend this power of delegation to Executive Level 2 employees, or acting Executive Level 2 employees, in the Department.

\textbf{Other drafting changes}

Many other amendments in the Bill adjust the wording of relevant provisions, to provide clearer drafting and to reflect current drafting practices, without making any substantive changes. For example, several items in \textbf{Schedule 2} rename the current ‘ODS/SGG equipment licence’ as an ‘equipment licence’.\textsuperscript{143}

Most items in \textbf{Part 2 of Schedule 1} replace the word `products’ in the \textit{OPSGGM Act}, the \textit{Import Levy Act} and the \textit{Manufacture Levy Act} with the term `equipment’. \textbf{Item 63 in Schedule 1} would then insert a definition of `equipment’ to define equipment as including products.

\textbf{Items 112–117 in Part 3 of Schedule 1} revise the definitions of relevant international agreements (such as the \textit{Montreal Protocol}, the \textit{Framework Convention on Climate Change} and the \textit{Kyoto Protocol}) and remove the text of those agreements from Schedules 2 to 3E of the \textit{OPSGGM Act}. This avoids the need for amendments to the \textit{OPSGGM Act} if these conventions are amended. Notes to the new definitions refer readers to the Australian Treaties Library on the AustLII website, consistent with current legislative drafting practices where legislation involves international conventions.

The Bill also proposes to replace section 13 of the \textit{OPSGGM Act} with a more clearly drafted version. Section 13 currently prohibits the manufacture, import and export of HCFCs, methyl bromide, HBFCs, and other ODSs and SGGs, as well as equipment containing ODSs and SGGs. Under section 13, undertaking these activities without a licence is an offence of strict liability (see subsection 13(8)), with a civil penalty of up to 500 penalty units for an individual (currently equivalent to $90,000). \textbf{Item 20 in Part 1 of Schedule 1} replaces section 13 with a new version of the same provision. As the Explanatory Memorandum notes, \textbf{proposed section 13} `would retain existing prohibitions and exemptions, but would be structured more clearly’.\textsuperscript{144} \textbf{Proposed subsection 13(7)} continues to provide that the offence is a strict liability offence, and the maximum penalty also remains the same. However, the revised structure of section 13 results in a reversal of the evidential burden of proof, meaning the defendant will now be required to establish applicable exceptions to the unlicensed manufacture, import or export offence in \textbf{proposed subsections 13(2), (3), (5) or (6)}.\textsuperscript{145} As noted earlier in this Digest, the Senate Scrutiny of Bills Committee raised a number of issues in relation to this proposed subsection.

\textbf{Bulk substances and equipment}

Section 9 of the \textit{OPSGGM Act} currently provides that certain parts of the Act (Parts III, IV and VII) do not regulate scheduled substances (other than SGGs) in bulk. The section is intended to distinguish between the regulation of products that contain and use scheduled substances in their operation or were manufactured with controlled substances, from those parts that are intended to control substances in their bulk form. In particular, under section 9, products that solely store or transport scheduled substance are not taken to be products that use scheduled substances in their operation.

\textbf{Item 66 in Part 2 of Schedule 1} of the Bill would replace and redraft section 9 in an attempt to provide greater clarity as to when a scheduled substance is considered to be a bulk scheduled substance and when it is considered to be contained in equipment under the \textit{OPSGGM Act}. As the Explanatory Memorandum states `the distinction between bulk scheduled substances as opposed to those imported in equipment is an important one, as it informs whether or not quota may be required and the kind of licence that may be required’:

\textit{Only HCFCs imported as bulk scheduled substances currently require quota. Under the proposed amendments ... both HFCs and HCFCs imported as bulk scheduled substances would require quota under the respective HFC and HFC quota schemes. HFCs and HCFCs contained in equipment would be exempt from quota requirements (although are still subject to the other licensing requirements of the \textit{OPSGGM Act}).}\textsuperscript{146}

\begin{footnotes}
\footnotetext{142} Although note that some powers are excepted from this under subsection 67A(2).
\footnotetext{143} See, for example, \textbf{items 5, 14–18 in Part 1 of Schedule 2} of the Bill.
\footnotetext{144} Explanatory Memorandum, op. cit., p. 14.
\footnotetext{145} Ibid.
\footnotetext{146} Explanatory Memorandum, op. cit., p. 26.
\end{footnotes}
Proposed subsection 9(2) would provide that a scheduled substance is a ‘bulk scheduled substance’, unless it falls under one of two exemptions:

- the substance is contained in equipment for a purpose other than, or in addition to, the purpose of storing or transporting the substance or
- the substance is used in the operation of equipment.

If a scheduled substance falls under either of these exemptions, it would be considered to be contained in equipment for the purposes of the **OPSGGM Act**, and relevant requirements relating to equipment may apply.\(^{147}\)

Note that item 63 of **Schedule 1** to the Bill inserts definitions of ‘bulk scheduled substance’, ‘containing’ and ‘using’ (which all refer back to section 9) into section 7 of the **OPSGGM Act**.

A key difference in the proposed new section is that **proposed subsection 9(6)** would enable Regulations to provide that a scheduled substance is or is not a bulk scheduled substance; that a scheduled substance is or is not taken to be contained in equipment; or is or is not taken to be used in the operation of equipment.

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\(^{147}\) Ibid., p. 26.