



# **Greenhouse and Energy Minimum Standards Act 2012**

**No. 132, 2012**

**An Act to promote the development and adoption  
of products that use less energy and produce fewer  
greenhouse gases, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# **Greenhouse and Energy Minimum Standards Act 2012**

**No. 132, 2012**

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**An Act to promote the development and adoption of products that use less energy and produce fewer greenhouse gases, and for related purposes**

*[Assented to 21 September 2012]*

The Parliament of Australia enacts:

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*Greenhouse and Energy Minimum Standards Act 2012 No. 132, 2012 1*

Section 1

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## Part 1—Preliminary

### Division 1—Preliminary

#### 1 Short title

This Act may be cited as the *Greenhouse and Energy Minimum Standards Act 2012*.

#### 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	21 September 2012
2. Sections 3 to 16	1 October 2012.	1 October 2012
3. Section 17	1 October 2013.	1 October 2013
4. Sections 18 to 177	1 October 2012.	1 October 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## **Division 2—Guide to this Act**

### **3 Guide to this Act**

#### *Overview*

This Act is about promoting the development and adoption of products to reduce energy use and greenhouse gas production (see the objects in Division 3 of this Part).

This is achieved by applying greenhouse and energy minimum standards (GEMS) in association with the supply and commercial use of products that use energy, or affect the energy used by another product. These standards are provided for by requirements in Ministerial determinations (GEMS determinations).

#### *Key concepts (Part 2)*

The key concepts used in this Act are unfolded in Part 2. These include GEMS products, GEMS determinations, models of GEMS products, registration of models against GEMS determinations, and supplying (or offering to supply) GEMS products.

#### *Supply and commercial use of products (Part 3)*

Generally speaking, a product (a GEMS product) covered by a GEMS determination can only be supplied or offered for supply, or used for a commercial purpose, if:

- (a) the model of the product is registered under this Act against the determination; and
- (b) the product complies with the determination; and
- (c) the supply, offer or use complies with the determination.

Contravention of these rules may result in prosecution for offences or exposure to liability for civil penalties.

*GEMS determinations and registration (Parts 4, 5 and 6)*

GEMS determinations cover different product classes. They specify requirements for energy consumption, greenhouse gas production, labelling and some other matters, including the environment and human health.

Generally speaking, all models of GEMS products must be registered on the GEMS Register to make sure they comply with relevant GEMS determinations. A senior officer of the Department (the GEMS Regulator) is responsible for the registration system and, more broadly, the administration of this Act.

*Compliance and enforcement (Parts 7 and 8)*

Compliance with the rules about supply and commercial use can be monitored, and suspected contraventions can be investigated, by GEMS inspectors appointed under the Act. The Act sets out the circumstances in which inspections can take place, the powers of inspectors and the requirements for obtaining warrants for entry to premises without consent and, in the case of investigation warrants, for the seizure of evidential material.

A contravention of this Act may result in prosecution for an offence, exposure to liability for a civil penalty (under an infringement notice or a court order), suspension or cancellation of registration, the imposition of enforceable undertakings and court orders for injunctions. Details of offences, contraventions and adverse decisions, including the names of those involved, may also be publicised.

*Merits review and protection of information (Parts 9 and 10)*

Decisions about registration may be reviewed internally and by the Administrative Appeals Tribunal. The Act also protects commercially sensitive information against unauthorised disclosure.



*Introductory matters (Part 1)*

There is a Dictionary in Division 4 of this Part. The Dictionary is a list of every term that is defined in this Act. A term is either defined in the Dictionary itself, or elsewhere in this Act. If a term is defined elsewhere, the Dictionary includes a signpost.

The application of this Act to the Crown and in the external Territories is dealt with in Division 5 of this Part. That Division also provides for when this Act is intended to operate concurrently with State and Territory laws.

## **Division 3—Objects of this Act**

### **4 Objects of this Act**

The objects of this Act are:

- (a) to give effect to certain obligations that Australia has under the Climate Change Convention; and
- (b) to promote the development and adoption of products that:
  - (i) use less energy; or
  - (ii) produce fewer greenhouse gases; or
  - (iii) contribute to reducing the amount of energy used, or greenhouse gases produced, by other products.

## **Division 4—The Dictionary and other interpretive provisions**

### **5 The Dictionary**

In this Act:

*acquisition of property*: see section 174.

*affected*:

- (a) for when a model's registration in relation to a product class is *affected* by a replacement determination—see subsection 13(3); and
- (b) for when a person is *affected* by a reviewable decision—see section 164.

*agency* means:

- (a) a Department of State; or
- (b) any agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth or of a State or Territory.

*Australia*, when used in a geographical sense, includes the external Territories.

*authorised to test GEMS products* in a product class: see section 125.

*category A product* for a product class: see subsection 11(4) and section 29.

*category B product* for a product class: see subsection 11(4) and section 29.

*civil penalty order*: see subsection 130(4).

*civil penalty provision*: see section 129.

*Climate Change Convention* means the United Nations Framework Convention on Climate Change, done at New York on

**Part 1** Preliminary

**Division 4** The Dictionary and other interpretive provisions

**Section 5**

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9 May 1992, as amended and in force for Australia from time to time.

Note: The text of the Convention is set out in Australian Treaty Series 1994 No. 2 ([1994] ATS 2). In 2012, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

**Commonwealth place** means a place referred to in paragraph 52(i) of the Constitution.

**constitutional corporation** means a corporation to which paragraph 51(xx) of the Constitution applies.

**constitutional trade or commerce** means trade or commerce:

- (a) between Australia and a place outside Australia; or
- (b) among the States; or
- (c) between a State and a Territory; or
- (d) between 2 Territories; or
- (e) within a Territory.

**contact person**, for a registration, means a contact person currently entered in the GEMS Register in relation to the registration.

**contravene** an offence or civil penalty provision has a meaning affected by section 6.

Note: The meaning of **contravention** is correspondingly affected (see section 18A of the *Acts Interpretation Act 1901*).

**covered by**: a product class is **covered by** a GEMS determination if:

- (a) the GEMS determination specifies that it covers the product class (see subsection 11(2)); and
- (b) the GEMS determination is in force (see sections 34 and 35).

**damage**, in relation to data, includes damage by erasure of data or addition of other data.

**enforceable**:

- (a) for when a provision is **enforceable** under Division 3 of Part 8 (infringement notices)—see section 145; and
- (b) for when a provision is **enforceable** under Division 4 of Part 8 (enforceable undertakings)—see section 153; and

- (c) for when a provision is *enforceable* under Division 5 of Part 8 (injunctions)—see section 156.

*evidential burden*, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

*evidential material*: any of the following is *evidential material*:

- (a) a thing with respect to which an offence against, or a civil penalty provision under, this Act has been contravened or is suspected, on reasonable grounds, to have been contravened;
- (b) a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of such an offence or civil penalty provision;
- (c) a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of contravening such an offence or civil penalty provision.

Note: The expression *this Act* has an extended meaning (see the definition in this section).

*family of models*: see subsection 12(3).

*foreign jurisdiction* means a foreign country, or a part of a foreign country.

*GEMS* is short for Greenhouse and Energy Minimum Standards.

*GEMS business premises* means any premises that are open to the public on a regular basis and:

- (a) that are used for, or in connection with, the supply of one or more GEMS products; or
- (b) at which one or more GEMS products are used for a commercial purpose.

*GEMS determination*: see subsection 11(2) and section 23.

*GEMS labelling requirements*: see section 26.

*GEMS level requirements*: see section 25.

*GEMS product*: see subsection 11(1).

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**GEMS Register:** see section 39.

**GEMS Regulator:** see section 70.

**high efficiency level** for a product class: see paragraph 27(1)(a).

**import into Australia** includes bring into Australia.

**investigation powers:** see sections 96, 97 and 100.

**investigation warrant** means:

- (a) a warrant issued by an issuing officer under section 107; or
- (b) a warrant signed by an issuing officer under section 108.

**issuing officer** means:

- (a) a magistrate; or
- (b) a Federal Magistrate; or
- (c) a Judge of the Federal Court of Australia.

**just terms:** see section 174.

**limited grandfathering period** for a product class: see section 31.

**manufacture**, in relation to a product, means the creation of a product essentially different from the matters or substances that go into that creation, but does not include the following activities (whether performed alone or in combination with each other):

- (a) restoration or renovation processes such as repairing, reconditioning, overhauling or refurbishing;
- (b) minimal operations of pressing, labelling, ticketing, packaging and preparation for sale, whether conducted alone or in combination with each other;
- (c) quality control inspections.

**manufacturer** of a product means the person who performs, or has had performed on the person's behalf, the last process of manufacture of the product.

**model:** see subsection 12(2).

**model identifier:** see paragraph 12(2)(c).

**monitoring powers:** see sections 88, 89 and 92.

**monitoring warrant** means a warrant issued under section 94.

**offer to supply:** see subsection 14(3).

**operate:** a product that uses energy **operates** at any time when the product is using energy.

**participating jurisdiction:** see section 33.

**penalty unit**, in relation to a civil penalty provision, has the same meaning as in section 4AA of the *Crimes Act 1914*.

**person assisting** a GEMS inspector:

- (a) in relation to Division 4 of Part 7 (monitoring powers)—see section 93; and
- (b) in relation to Division 5 of Part 7 (investigation powers)—see section 101.

**person who has GEMS information:** see section 122.

**premises** includes the following:

- (a) a structure, building, vehicle, vessel or aircraft;
- (b) a place (whether or not enclosed or built on);
- (c) a part of a thing referred to in paragraph (a) or (b).

**product classes:** see paragraph 11(2)(a).

**protected information:** see subsection 169(3).

**register** a model in relation to a product class: see section 43.

**registered against** a GEMS determination: see section 13.

**registrant**, for a model's registration in relation to a product class, means:

- (a) unless paragraph (b) applies—the person who applied for the model to be registered in relation to that product class; or
- (b) if the GEMS Regulator, under section 47, has varied the registration to specify another person as the registrant for the

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registration—the person for the time being specified as the registrant for the registration in accordance with that section.

**related provision:** each of the following is a **related provision**:

- (a) an offence against this Act;
- (b) a civil penalty provision under this Act;
- (c) an offence against the *Crimes Act 1914* or the *Criminal Code* that relates to this Act.

**relevant court** means:

- (a) the Federal Court of Australia; or
- (b) a Supreme Court of a State or Territory.

**replacement determination:** see subsection 11(5) and section 35.

**reviewable decision** has the meaning given by section 164.

**revoked determination:** see subsection 11(5).

**second-hand:** a product is **second-hand** at the time of supplying or offering to supply the product if, and only if, there has been a supply of the product (other than a wholesale supply) in Australia before that time.

**Secretary** means the Secretary of the Department.

**secure** means secure by any means (including by locking up or placing a guard).

**supply:** see subsection 14(1).

**suspension notice:** see subsection 51(1).

**this Act** includes regulations and GEMS determinations made under this Act.

**transitional GEMS labelling requirement** means a GEMS labelling requirement that is expressed in the GEMS determination to be made for the purpose mentioned in paragraph 26(2)(c).



## **6 Contravening offence and civil penalty provisions**

- (1) This section applies if a provision of this Act declares that a person contravening another provision of this Act (the *conduct rule provision*):
- (a) commits an offence; or
  - (b) is liable to a civil penalty.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (2) For the purposes of this Act, the person is taken to contravene the offence or the civil penalty provision (as the case requires) if the person contravenes the conduct rule provision.

## Division 5—Application of this Act

### 7 Act binds Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) However, this Act does not make the Crown liable to be prosecuted for an offence.
- (3) To avoid doubt, subsection (2) does not prevent the Crown from being liable to pay a pecuniary penalty under section 130 or 146.  
Note: Section 130 deals with civil penalty orders and section 146 deals with infringement notices.
- (4) The protection in subsection (2) does not apply to an authority of the Crown.

### 8 Extension to external Territories

This Act extends to every external Territory.

### 9 Concurrent operation of State and Territory laws

- (1) This Act is not intended to exclude or limit the operation of a law of a State or Territory (the *State or Territory law*) to the extent that:
  - (a) the State or Territory law applies minimum requirements (however described) relating to greenhouse gas production or energy use in association with the supply and commercial use of a product that uses energy, or affects the energy used by another product; and
  - (b) if the product is a GEMS product (in a product class covered by a GEMS determination)—those requirements are more stringent than the corresponding requirements applying to the product class under the GEMS determination; and
  - (c) the State or Territory law is capable of operating concurrently with this Act.

- (2) Subject to subsection (1), this Act is not intended to exclude or limit the concurrent operation of a State or Territory law if such a law makes:
- (a) an act or omission that is an offence against a provision of this Act; or
  - (b) a similar act or omission;  
an offence against the State or Territory law.
- (3) Subsection (2) applies even if the State or Territory law does any one or more of the following:
- (a) provides for a penalty for the offence that differs from the penalty provided for in this Act;
  - (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Act;
  - (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Act.

## **Part 2—Key concepts**

### **Division 1—Guide to this Part**

#### **10 Guide to this Part**

This Part is about some of the key concepts used in this Act, and the inter-relationships between those concepts.

This Act applies to GEMS products, which are products that use energy, or affect the amount of energy used by another product, and belong to a product class for which a GEMS determination has been made (under Part 4).

GEMS products may be determined to be category A products or category B products. Category B products have a higher impact on energy use or greenhouse gas production than category A products. Different penalty levels apply to contraventions of the main rules about supply and use of GEMS products in Part 3, depending on the category of the product.

GEMS products belong to a particular model if they have the same technical specifications, brand name (or manufacturer) and a unique identifier. Generally speaking, all models of GEMS products must be registered under Part 5 (in the GEMS Register) against GEMS determinations.

A model's registration may be affected by a replacement determination updating the GEMS determination against which the model was initially registered. This might affect whether products of the model can be supplied, or used for commercial purposes.

There is a broad concept of supply and offer to supply. This affects the application of the main rules in Division 2 of Part 3 about supplying and offering to supply GEMS products.

## Division 2—Key concepts

### 11 GEMS products, GEMS determinations and product classes

- (1) A **GEMS product** is a product that:
  - (a) uses energy or affects the amount of energy used by another product; and
  - (b) is in a product class covered by a GEMS determination.
- (2) A **GEMS determination** is a determination made by the Minister under section 23 that:
  - (a) specifies one or more classes of products (**product classes**) that it covers; and
  - (b) specifies requirements for products in those product classes in accordance with Part 4.

Note 1: For paragraph (a), a class of products may be specified by reference to a range of matters, including:

- (a) the function the products perform; and
- (b) the materials from which the products are manufactured; and
- (c) the size or capacity of the products; and
- (d) whether the products contain a particular feature (for example a screen or monitor) or are capable of operating in different modes (for example in standby mode).

Note 2: For when a GEMS determination is in force, see sections 34 and 35.

- (3) A single product may be in more than one product class (whether or not specified in the same GEMS determination).

Note: If a single product is in more than one product class, the product must comply with requirements under this Act for each of those product classes.

For example, a product that operates both as a washing machine and as a clothes dryer would need to comply with separate requirements for washing machines (where washing machines are a product class) and clothes dryers (where clothes dryers are a product class).

- (4) A GEMS product in a product class covered by a GEMS determination is either a **category A product** or a **category B product** for that product class, as specified in the determination (see section 29).

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Note: Different penalty levels apply for certain offences under this Act, depending on whether a product is a category A product or a category B product for a product class.

- (5) A **replacement determination** is a GEMS determination made in accordance with section 35 that specifies that it replaces another GEMS determination (a **revoked determination**).

## 12 Models of GEMS products to be registered in relation to product classes

- (1) A model of a GEMS product in a particular product class must be registered under Part 5 in relation to that product class, unless the model is exempt from registration in relation to that product class as specified in a GEMS determination (see section 30).

Note 1: If the model is in more than one product class, the model will need to be registered under Part 5 in relation to each of those product classes.

Note 2: Offences apply in relation to supplying a GEMS product, or using a GEMS product for a commercial purpose, if the model of the product is not registered (see Part 3).

- (2) Two or more GEMS products are of the same **model** if, and only if:
- (a) the products have the same technical specifications, in so far as those specifications relate to the extent to which the products comply with the requirements of this Act; and
  - (b) either:
    - (i) there is a single brand or trademark used in supplying or offering to supply the products; or
    - (ii) if there is no such brand or trademark—the products have the same manufacturer; and
  - (c) there is a single unique identifier (the **model identifier**) used in supplying or offering to supply the products, or manufacturing the products, to identify the products as being of that model.

Note 1: The expression **this Act** has an extended meaning (see the Dictionary in section 5).

Note 2: A model may be registered in relation to a product class even if there is only one product of that model (see subsection 41(2)).

- (3) A single registration may cover 2 or more models in relation to a product class only if those models are in the same **family of models**
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in accordance with the GEMS determination for that product class (see section 28).

- (4) A model cannot be covered by more than one registration in relation to a particular product class.

### **13 Models to be registered against GEMS determinations**

- (1) Under Part 5, a model of a GEMS product is *registered against* a GEMS determination in relation to a product class.
- (2) The GEMS determination against which the model is registered in relation to the product class is either:
  - (a) the GEMS determination against which the model is registered under section 43 (registration by the GEMS Regulator); or
  - (b) a replacement determination against which the model is taken to be registered because of subsection 36(2) (registration not affected by replacement determination).
- (3) A model's registration in relation to a product class is, or is not, *affected* by a replacement determination as specified in the replacement determination (see section 36).

Note: If a model's registration is affected by a replacement determination:

- (a) the registration will cease to be in force under section 48 on the day the replacement determination comes into force; and
- (b) products of the model imported into, or manufactured in, Australia after the replacement determination comes into force might not be able to be supplied, or used for a commercial purpose, unless the model is registered against the replacement determination (see Part 3).

### **14 Supplying and offering to supply GEMS products**

- (1) A *supply* of a GEMS product includes a supply of the product by way of sale, exchange, gift, lease, loan, hire or hire-purchase.
- (2) For the purposes of subsection (1), it is irrelevant whether the supply is:
  - (a) for consideration; or
  - (b) a wholesale or retail supply.

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Note: Offences under this Act relating to supplying, or offering to supply, GEMS products do not apply in relation to second-hand products.

- (3) ***Offer to supply*** a GEMS product includes make available, expose, display or advertise the product for supply.



## **Part 3—Requirements for suppliers and commercial users of GEMS products**

### **Division 1—Guide to this Part**

#### **15 Guide to this Part**

This Part sets out the main rules that govern supplying and offering to supply GEMS products and using GEMS products for commercial purposes.

Division 2 permits a GEMS product to be supplied or offered for supply only if certain GEMS determination requirements and registration requirements have been complied with.

Division 3 permits a GEMS product to be used for a commercial purpose only if certain GEMS determination requirements and registration requirements have been complied with.

Generally speaking, a product imported into, or manufactured in, Australia before the relevant GEMS determination comes into force may continue indefinitely to be supplied (or offered for supply), or used for a commercial purpose, without complying with the requirements of the GEMS determination or being registered against it (unless there is a limited grandfathering period (see section 31)).

The rules in Division 2 governing supplying, and offering to supply, GEMS products do not apply to second-hand products. The rules in Division 3 governing use of GEMS products for commercial purposes do not apply to products supplied to the user in Australia.

A particular model of a GEMS product may be exempt (under section 37) from particular requirements of GEMS determinations on certain conditions. In addition, models of products in a

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particular product class may be exempt (under section 30) from registration requirements in relation to that product class.

A particular use of a GEMS product may also be exempt from the application of the rules in Division 3 if it is personal use, for testing purposes or is prescribed by the regulations (see section 20).

Contravening the rules in Division 2 or 3 may result in prosecution for offences or exposure to liability for civil penalties. All offences are strict liability. Different penalties apply depending on whether the relevant GEMS product is a category A or a category B product.

Division 4 sets out general provisions about the supply and use of GEMS products, and in particular the potential constitutional limitations that might apply.

## **Division 2—Supplying GEMS products**

### **16 Supplying GEMS products—complying with GEMS determinations**

- (1) A person must not supply, or offer to supply, a GEMS product if:
  - (a) the product is in a product class covered by a GEMS determination; and
  - (b) either or both of the following apply:
    - (i) the product does not comply with a requirement of the GEMS determination;
    - (ii) a requirement of the GEMS determination is not complied with in supplying, or offering to supply, the product.
- (2) Subsection (1) does not apply if:
  - (a) the product is a second-hand product at the time of the supply or offer; or
  - (b) the following conditions are satisfied:
    - (i) the model of the product is exempt under section 37 from the requirement;
    - (ii) any conditions of the exemption (see subsection 37(2)) are complied with in connection with the supply or offer; or
  - (c) the following conditions are satisfied:
    - (i) the product is imported into, or the product's last process of manufacture is performed in, Australia at a time (the *earlier time*) before the GEMS determination comes into force;
    - (ii) if there is a limited grandfathering period under the GEMS determination for the product class (see section 31)—the supply or offer occurs before the end of that period;
    - (iii) all transitional GEMS labelling requirements of the GEMS determination are complied with in supplying or offering to supply the product;

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- (iv) the product currently complies with any pre-existing GEMS determination that was in force at the earlier time;
- (v) if there was no such pre-existing GEMS determination—the supply of the product (or an offer to supply the product) in a State or Territory at the earlier time would not have contravened a law of the State or Territory relating to energy use by products, or greenhouse gases resulting from operating products.

*Strict liability offence—category A products*

- (3) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category A product for the product class.

Penalty: 60 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Strict liability offence—category B products*

- (4) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category B product for the product class.

Penalty: 120 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Civil penalty provision—category A products*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category A product for the product class.

Civil penalty: 60 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

*Civil penalty provision—category B products*

- (6) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category B product for the product class.

Civil penalty: 120 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

*Evidential burden for matters in subsection (2)*

- (7) In a prosecution for an offence against subsection (3) or (4), the prosecution bears an evidential burden in relation to the matters in paragraphs (2)(b) and (c), despite subsection 13.3(3) of the *Criminal Code*.

Note: However, a defendant still bears an evidential burden in relation to a matter in paragraph (2)(a), because subsection 13.3(3) of the *Criminal Code* still applies in relation to that paragraph.

- (8) In proceedings for a civil penalty order for a contravention of subsection (5) or (6):
- (a) a person who wishes to rely on paragraph (2)(a) bears an evidential burden in relation to a matter in that paragraph; and
  - (b) the person applying for the order bears an evidential burden in relation to the matters in paragraphs (2)(b) and (c).

## **17 Supplying GEMS products—model not registered**

- (1) A person must not supply, or offer to supply, a GEMS product if:
- (a) the product is in a product class covered by a GEMS determination; and

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- (b) the model of the product is not registered against that GEMS determination in relation to that product class.
- (2) Subsection (1) does not apply if:
  - (a) the product is a second-hand product at the time of the supply or offer; or
  - (b) the model of the product is exempt under section 30 from registration in relation to that product class.

*Strict liability offence—category A products*

- (3) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category A product for the product class.

Penalty: 60 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Strict liability offence—category B products*

- (4) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category B product for the product class.

Penalty: 120 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Civil penalty provision—category A products*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category A product for the product class.

Civil penalty: 60 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

*Civil penalty provision—category B products*

- (6) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category B product for the product class.

Civil penalty: 120 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

*Evidential burden for matters in subsection (2)*

- (7) In a prosecution for an offence against subsection (3) or (4), the prosecution bears an evidential burden in relation to a matter in paragraph (2)(b), despite subsection 13.3(3) of the *Criminal Code*.

Note: However, a defendant still bears an evidential burden in relation to a matter in paragraph (2)(a), because subsection 13.3(3) of the *Criminal Code* still applies in relation to that paragraph.

- (8) In proceedings for a civil penalty order for a contravention of subsection (5) or (6):
- (a) a person who wishes to rely on paragraph (2)(a) bears an evidential burden in relation to a matter in that paragraph; and
  - (b) the person applying for the order bears an evidential burden in relation to a matter in paragraph (2)(b).

### **Division 3—Using GEMS products for commercial purposes**

#### **18 Using GEMS products for commercial purposes—complying with GEMS determinations**

- (1) A person must not use a GEMS product for a commercial purpose if:
  - (a) the GEMS product is in a product class covered by a GEMS determination; and
  - (b) the GEMS product does not comply with a requirement of the GEMS determination; and
  - (c) that is the person's first use of the GEMS product.
- (2) Subsection (1) does not apply if:
  - (a) the product was supplied to the person in Australia; or
  - (b) the use of the product is exempt under section 20; or
  - (c) the following conditions are satisfied:
    - (i) the model of the product is exempt under section 37 from the requirement;
    - (ii) any conditions of the exemption (see subsection 37(2)) are complied with in connection with the use of the product; or
  - (d) the following conditions are satisfied:
    - (i) the product is imported into, or the product's last process of manufacture is performed in, Australia at a time (the *earlier time*) before the GEMS determination comes into force;
    - (ii) if there is a limited grandfathering period under the GEMS determination for the product class (see section 31)—the use of the product occurs before the end of that period;
    - (iii) the product currently complies with any pre-existing GEMS determination that was in force at the earlier time;



- (iv) if there was no such pre-existing GEMS determination—the use of the product for a commercial purpose in a State or Territory at the earlier time would not have contravened a law of the State or Territory relating to energy use by products, or greenhouse gases resulting from operating products.

*Strict liability offence—category A products*

- (3) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category A product for the product class.

Penalty: 60 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Strict liability offence—category B products*

- (4) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category B product for the product class.

Penalty: 120 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Civil penalty provision—category A products*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category A product for the product class.

Civil penalty: 60 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

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*Civil penalty provision—category B products*

- (6) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category B product for the product class.

Civil penalty: 120 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

*Evidential burden for matters in subsection (2)*

- (7) In a prosecution for an offence against subsection (3) or (4), the prosecution bears an evidential burden in relation to the matters in paragraphs (2)(c) and (d), despite subsection 13.3(3) of the *Criminal Code*.

Note: However, a defendant still bears an evidential burden in relation to a matter in paragraph (2)(a) or (b), because subsection 13.3(3) of the *Criminal Code* still applies in relation to those paragraphs.

- (8) In proceedings for a civil penalty order for a contravention of subsection (5) or (6):
- (a) a person who wishes to rely on paragraph (2)(a) or (b) bears an evidential burden in relation to a matter in that paragraph; and
  - (b) the person applying for the order bears an evidential burden in relation to the matters in paragraphs (2)(c) and (d).

**19 Using GEMS products for commercial purposes—model not registered**

- (1) A person must not use a GEMS product for a commercial purpose if:
- (a) the GEMS product is in a product class covered by a GEMS determination; and
  - (b) the model of the GEMS product is not registered against that GEMS determination in relation to that product class; and
  - (c) that is the person's first use of the GEMS product.

- (2) Subsection (1) does not apply if:
- (a) the product was supplied to the person in Australia; or
  - (b) the use of the product is exempt under section 20; or
  - (c) the model of the product is exempt under section 30 from registration in relation to that product class.

*Strict liability offence—category A products*

- (3) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category A product for the product class.

Penalty: 60 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Strict liability offence—category B products*

- (4) A person commits an offence of strict liability if the person contravenes subsection (1) and the product is a category B product for the product class.

Penalty: 120 penalty units.

Note 1: For offences of strict liability, see subsection 6.1(1) of the *Criminal Code*.

Note 2: See subsection (7) (evidential burden for matters in subsection (2)).

*Civil penalty provision—category A products*

- (5) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category A product for the product class.

Civil penalty: 60 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

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*Civil penalty provision—category B products*

- (6) A person is liable to a civil penalty if the person contravenes subsection (1) and the product is a category B product for the product class.

Civil penalty: 120 penalty units.

Note 1: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

Note 2: See subsection (8) (evidential burden for matters in subsection (2)).

*Evidential burden for matters in subsection (2)*

- (7) In a prosecution for an offence against subsection (3) or (4), the prosecution bears an evidential burden in relation to a matter in paragraph (2)(c), despite subsection 13.3(3) of the *Criminal Code*.

Note: However, a defendant still bears an evidential burden in relation to a matter in paragraph (2)(a) or (b), because subsection 13.3(3) of the *Criminal Code* still applies in relation to those paragraphs.

- (8) In proceedings for a civil penalty order for a contravention of subsection (5) or (6):
- (a) a person who wishes to rely on paragraph (2)(a) or (b) bears an evidential burden in relation to a matter in that paragraph; and
  - (b) the person applying for the order bears an evidential burden in relation to a matter in paragraph (2)(c).

**20 Exempt uses of GEMS products**

The following uses of a product are exempt for the purposes of this Division:

- (a) personal use by an individual;
- (b) use for the purpose of testing the product (whether the testing is to determine whether the product complies with requirements of GEMS determinations, or for any other purpose);
- (c) a use specified in regulations made for the purposes of this paragraph.

## **Division 4—General provisions relating to supply and use of GEMS products**

### **21 Constitutional limitation**

#### *References to supply*

- (1) Without limiting its effect apart from this subsection, this Act also has the effect it would have if each reference to supply in relation to a product were, by express provision, confined to:
- (a) supply of the product, being a supply whose regulation is reasonably appropriate and adapted to give effect to Australia's obligations under:
    - (i) the Climate Change Convention; or
    - (ii) another agreement between Australia and one or more other countries; or
  - (b) supply of the product by or to a constitutional corporation; or
  - (c) supply of the product in the course of constitutional trade or commerce; or
  - (d) supply of the product using a postal, telegraphic, telephonic, or other like service (within the meaning of paragraph 51(v) of the Constitution); or
  - (e) supply of the product by or to the Commonwealth or a Territory, or by or to an authority or instrumentality of the Commonwealth or a Territory; or
  - (f) supply of the product occurring in a Commonwealth place or a Territory.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

#### *References to offer to supply*

- (2) Without limiting its effect apart from this subsection, this Act also has the effect it would have if each reference to an offer to supply in relation to a product were, by express provision, confined to:

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- (a) an offer to supply the product, being an offer whose regulation is reasonably appropriate and adapted to give effect to Australia's obligations under:
  - (i) the Climate Change Convention; or
  - (ii) another agreement between Australia and one or more other countries; or
- (b) an offer to supply the product made by or to a constitutional corporation; or
- (c) an offer to supply the product made in the course of constitutional trade or commerce; or
- (d) an offer to supply the product made using a postal, telegraphic, telephonic, or other like service (within the meaning of paragraph 51(v) of the Constitution); or
- (e) an offer to supply the product made by or to the Commonwealth or a Territory, or by or to an authority or instrumentality of the Commonwealth or a Territory; or
- (f) an offer to supply the product occurring in a Commonwealth place or a Territory.

*References to use for commercial purposes*

- (3) Without limiting its effect apart from this subsection, this Act also has the effect it would have if each reference to use of a product for a commercial purpose were, by express provision, confined to:
  - (a) use of a product for a commercial purpose, being a use whose regulation is reasonably appropriate and adapted to give effect to Australia's obligations under:
    - (i) the Climate Change Convention; or
    - (ii) another agreement between Australia and one or more other countries; or
  - (b) use of the product for a commercial purpose by a constitutional corporation; or
  - (c) use of the product for a commercial purpose in the course of constitutional trade or commerce; or
  - (d) use of the product for a commercial purpose in providing a postal, telegraphic, telephonic, or other like service (within the meaning of paragraph 51(v) of the Constitution); or

- (e) use of the product for a commercial purpose by the Commonwealth or a Territory, or by an authority or instrumentality of the Commonwealth or a Territory; or
- (f) use of the product for a commercial purpose occurring in a Commonwealth place or a Territory.

## Part 4—GEMS determinations

### Division 1—Guide to this Part

#### 22 Guide to this Part

This Part is about how GEMS determinations are made, and the requirements (GEMS requirements) which are imposed by the determinations.

Division 2 provides for GEMS determinations to be made by Ministerial determination, subject to the consent of a certain number of States and Territories to the making and replacement of GEMS determinations.

GEMS determinations must contain requirements relating to energy use or greenhouse gas production (GEMS level requirements) or requirements about labelling (GEMS labelling requirements). They may also contain other requirements relating to efficiency levels, performance, the environment and human health.

Division 3 provides for GEMS determinations to be updated by replacement determinations. Replacement determinations must specify whether they affect the registration of models of GEMS products.

If a replacement determination affects a model's registration, the registration ceases to be in force under Part 5 from the time the replacement determination comes into force. This might affect a person's ability to supply or use for a commercial purpose products of the model imported into, or manufactured in, Australia after that time (see Part 3).

If a replacement determination does not affect a model's registration, the model is taken to continue to be registered against the replacement determination, and may continue to be supplied (or



offered for supply) and used for commercial purposes relying on that registration.

Division 4 allows product models to be exempted from requirements of GEMS determinations.

## Division 2—Making GEMS determinations

### 23 Minister may make GEMS determinations

- (1) The Minister may, by legislative instrument, make a determination that specifies one or more classes of products that it covers, if the products in those classes:
  - (a) use energy; or
  - (b) affect the amount of energy used by other products.

Note: A determination under this subsection is referred to in this Act as a **GEMS determination** and classes of product covered by GEMS determinations are referred to as **product classes** (see section 11).

- (2) A GEMS determination may specify one or more classes of product that are not covered by the determination.

### 24 GEMS requirements—general

- (1) A GEMS determination must specify either or both of the following for each product class covered by the determination:
  - (a) GEMS level requirements in accordance with section 25;
  - (b) GEMS labelling requirements in accordance with section 26.
- (2) A GEMS determination may also specify other requirements, in accordance with section 27, for a product class covered by the determination.

Note: Offences apply in relation to supplying a GEMS product, or using a GEMS product for a commercial purpose, if requirements of a GEMS determination are not complied with (see Part 3).

### 25 GEMS requirements—GEMS level requirements

The **GEMS level requirements** for a product class are as follows:

- (a) requirements relating to one or more of the following:
  - (i) the amount of energy used by operating products in that product class;
  - (ii) the amount of greenhouse gases resulting from operating products in that product class;

- (iii) the effect of those products on the amount of energy used by operating other products;
- (b) requirements for conducting tests in relation to products in that product class, using the methods specified in the determination, in order to determine whether products in that product class meet the requirements referred to in paragraph (a).

## **26 GEMS requirements—GEMS labelling requirements**

- (1) The *GEMS labelling requirements* for a product class are as follows:
  - (a) requirements relating to the information that must be communicated in connection with supplying or offering to supply products in that product class (see subsection (2));
  - (b) requirements relating to the manner in which that information must be communicated (see subsection (2));
  - (c) requirements for conducting tests in relation to products in that product class, using the methods specified in the determination, in order to rate them against criteria specified for the product class in the determination for the purposes of complying with a requirement under paragraph (a).

Note: Requirements under paragraph (a) or (b) may relate, for example, to one or more of the following:

- (a) the characteristics, contents, placement and quality of labels or marks attached or applied to products or displayed on packaging for products;
- (b) documents or other material used for, or provided in connection with, the supply of products;
- (c) advertising products.

- (2) A requirement may only be specified under paragraph (1)(a) or (b) in relation to a product class for the purpose of:
  - (a) ensuring that products in that product class can be compared with other products in relation to a matter that is, or could be, the subject of a requirement of the GEMS determination for that product class; or
  - (b) assisting with monitoring compliance with this Act; or
  - (c) providing a transition to regulation of products in the product class under the GEMS determination (including because the

**Part 4** GEMS determinations

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products were not previously covered by a GEMS determination or because the GEMS determination is a replacement determination).

Note 1: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

Note 2: A requirement specified for the purpose of paragraph (2)(c) is a *transitional GEMS labelling requirement*.

**27 GEMS requirements—other requirements**

- (1) A GEMS determination may specify any or all of the following for any one or more product classes covered by the determination:
  - (a) requirements for products in that product class to meet a specified level (the *high efficiency level*) at a particular time (see subsection (2));
  - (b) requirements relating to the performance of products in that product class (see subsection (3));
  - (c) requirements relating to the impact of products in that product class on the environment or the health of human beings (see subsection (3));
  - (d) requirements of a kind specified in the regulations for the purposes of this paragraph;
  - (e) requirements for conducting tests in relation to products in that product class, using the methods specified in the determination, in relation to a requirement mentioned in paragraph (a), (b), (c) or (d).
- (2) The requirements referred to in paragraph (1)(a) (high efficiency level) must relate to one or more of the following:
  - (a) the amount of energy used by operating products in that product class;
  - (b) the amount of greenhouse gases resulting from operating products in that product class;
  - (c) the effect of those products on the amount of energy used by operating other products that use energy.
- (3) Requirements may only be specified in relation to a product class under paragraph (1)(b) (product performance) or (c) (impact of products on environment or human health) if the GEMS

determination also specifies GEMS level requirements for the product class.

## **28 GEMS determinations—families of models**

A GEMS determination must specify, for each product class covered by the determination, the circumstances in which 2 or more models in that product class are in the same family of models.

Note: See also subsection 12(3) (registration may cover 2 or more models only if those models are a family of models).

## **29 GEMS determinations—category A and category B products**

- (1) A GEMS determination must specify, for each product class covered by the determination, whether products in that product class are category A products or category B products.

Note: Different penalty levels apply for certain offences under this Act, depending on whether a product is a category A product or a category B product for a product class.

- (2) Before specifying that products in a product class are category B products, the Minister must be satisfied that products in that class have a high impact on energy use or greenhouse gas production.

## **30 GEMS determinations—models exempt from registration**

A GEMS determination may specify, for a product class covered by the determination, that models of products in that product class are exempt from registration under Part 5 in relation to that product class.

Note: See subsection 12(1) for the requirement for models of GEMS products to be registered under Part 5.

## **31 GEMS determinations—limited grandfathering period**

- (1) A GEMS determination may specify, for a product class covered by the determination, a *limited grandfathering period* for products in the product class.
- (2) The limited grandfathering period:

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- (a) starts when the GEMS determination comes into force; and
- (b) ends at a time specified in the GEMS determination.

Note: The effect of specifying a limited grandfathering period is that a product in the product class imported into, or whose last process of manufacture is performed in, Australia before the GEMS determination comes into force might not be able to be supplied or used for a commercial purpose after the end of that period unless:

- (a) the product complies with the GEMS determination; and
- (b) the model of the product is registered against the GEMS determination.

### 32 GEMS determinations—not to give preference

The Minister must not make a GEMS determination that has the effect of giving preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State.

### 33 GEMS determinations—consent of participating jurisdictions

- (1) Before making a GEMS determination, the Minister must obtain consent to the terms of the determination:
  - (a) if a method for obtaining the consent of participating jurisdictions is set out in the agreement (or agreements) referred to in subsection (3)—in accordance with that method; or
  - (b) in any other case—from at least two-thirds of the participating jurisdictions.

Note: For an exception to this rule, see subsection 36(3).

- (2) The Commonwealth is a *participating jurisdiction* for the purposes of this Act.
- (3) A State or Territory is a *participating jurisdiction* at a particular time for the purposes of this Act if:
  - (a) the Commonwealth has agreed with the State or Territory that the State or Territory will be a participating jurisdiction for the purposes of this Act; and

- (b) the State or Territory remains a participating jurisdiction for the purposes of this Act at that time, in accordance with the agreement.

**34 GEMS determinations—when a GEMS determination comes into force**

A GEMS determination comes into force:

- (a) 12 months after the day it is made; or
- (b) if the determination specifies that it comes into force on another day that is after the day the determination is made—on that other day.

Note: Product classes specified in the GEMS determination will be covered by it from the time it comes into force.

## Division 3—Replacing GEMS determinations

### 35 Replacing GEMS determinations

#### *Making replacement determinations*

- (1) The Minister may:
  - (a) by legislative instrument, revoke a GEMS determination (a **revoked determination**) that covers one or more product classes; and
  - (b) make another GEMS determination in accordance with Division 2 that specifies that it replaces the revoked determination.

Note: A GEMS determination made as referred to in paragraph (b) is referred to in this Act as a **replacement determination** (see section 11).

- (2) The revoked determination ceases to be in force immediately before the replacement determination comes into force.

Note 1: For when a GEMS determination comes into force, see section 34.

Note 2: Product classes specified in the revoked determination will cease to be covered by it from the time it ceases to be in force.

#### *Revoking GEMS determination without making replacement determination*

- (3) The Minister may, by legislative instrument, revoke a GEMS determination without making a replacement determination, but only if the Minister has obtained consent to the revocation:
  - (a) if a method for obtaining the consent of participating jurisdictions is set out in the agreement (or agreements) referred to in paragraph 33(3)(a)—in accordance with that method; or
  - (b) in any other case—from at least two-thirds of the participating jurisdictions.
- (4) A GEMS determination revoked under subsection (3) ceases to be in force at the time specified in the instrument of revocation.



Note: Product classes specified in the GEMS determination will cease to be covered by it from the time it ceases to be in force.

*No other power to vary or revoke GEMS determination*

- (5) Subsection 33(3) of the *Acts Interpretation Act 1901* (which deals with the variation and revocation of instruments) does not apply in relation to a GEMS determination.

### **36 Whether registrations affected by replacement determination**

- (1) A replacement determination must specify whichever of the following applies in relation to the registrations of models in product classes that were covered by the revoked determination:
- (a) that the replacement determination affects the registration of all models registered against the revoked determination in relation to all of those product classes;
  - (b) that the replacement determination affects the registration of specified models registered against the revoked determination in relation to one or more of those product classes;
  - (c) that the replacement determination does not affect the registration of any model registered against the revoked determination in relation to any of those product classes.
- (2) If the replacement determination does not affect the registration of a particular model in relation to a product class, the model is taken to be registered against the replacement determination in relation to that product class.

Note: This subsection does not affect when the registration ceases to be in force under subsection 48(2).

- (3) Subsection 33(1) (consent of participating jurisdictions to terms of GEMS determination) does not apply in relation to the replacement determination if:
- (a) the determination does not affect the registration of any model in relation to any of those product classes; and
  - (b) the product class or classes covered by the replacement determination are the same as those that were covered by the revoked determination.

## **Division 4—Exempting models from requirements of GEMS determinations**

### **37 Exempting models from requirements of GEMS determinations**

- (1) The GEMS Regulator may, by legislative instrument, in accordance with regulations (if any) made for the purposes of this subsection, exempt a specified model of a GEMS product from one or more requirements of a GEMS determination in relation to all or specified supplies or uses of products of that model.

Note: Models covered by exemptions must still be registered under Part 5.

- (2) The exemption may specify conditions to which the exemption is subject, including the following:
  - (a) a condition that products of that model be labelled in a specified way in connection with a specified supply;
  - (b) a condition relating to the supply or commercial use of products of that model.

Example: For paragraph (b), a condition that a supplier be satisfied, before supplying a product of the model, that the product will only be used for a particular purpose.

- (3) A person must comply with a condition of an exemption to the extent that it applies to the person.
- (4) Regulations made for the purposes of subsection (1) may (without limitation) provide for or in relation to the following:
  - (a) exemptions to be made only on application by specified persons;
  - (b) the manner and form of such an application;
  - (c) the documentation or other information, and any fee, that must accompany such an application;
  - (d) giving further documentation or information to the GEMS Regulator for the purposes of determining such an application;

- (e) matters to which the GEMS Regulator may or must have regard in exempting a model under subsection (1) or specifying a condition under subsection (2).
- (5) The GEMS Regulator must not make an exemption that has the effect of giving preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State.

## **Part 5—Registering models of GEMS products**

### **Division 1—Guide to this Part**

#### **38 Guide to this Part**

This Part is about registering models of GEMS products on the GEMS Register against GEMS determinations.

Division 2 establishes the GEMS Register and sets out what information is to be contained in the register.

Division 3 is about how models of GEMS products are registered. A manufacturer or importer of a model of a product in Australia, or someone else connected to the supply of the model in Australia, may apply for registration. To be registered against a GEMS determination, the model must comply with the requirements of the determination.

Division 4 is about how registrations may be varied to cover additional models, or to record a change in the identity of the registrant.

Division 5 is about when a registration comes into force, and when it ceases to be in force. Generally, registrations last for 5 years.

Division 6 is about suspending and cancelling registrations. This may happen, for example, if inaccurate information is given with an application, or the model or the registrant does not comply with this Act.

Division 7 sets out a number of requirements for registrants, including requirements to give information and to have products tested.

Division 8 deals with a variety of matters, including determining when a model complies with a GEMS determination, making and determining applications and notifying applicants of decisions.

## Division 2—GEMS Register

### 39 Establishment of GEMS Register

- (1) The GEMS Regulator must establish and maintain a register to be known as the GEMS Register.
- (2) The GEMS Regulator may keep the GEMS Register in any form that he or she considers appropriate.
- (3) The GEMS Regulator may publish on the internet part or all of the GEMS Register.
- (4) The regulations may specify information contained in the GEMS Register that must be published under subsection (3).

### 40 Information to be entered in GEMS Register

*Information that must be entered in GEMS Register*

- (1) The following information must be entered in the GEMS Register for each registration of a model or models of GEMS products in relation to a product class:
  - (a) the product class;
  - (b) the day the registration comes into force;
  - (c) the day the registration ceases to be in force;
  - (d) a unique identifier for the registration;
  - (e) the model identifier for each model covered by the registration;
  - (f) the brand or trademark (if any) used in connection with supplies of those models;
  - (g) the names, with the contact details referred to in subsection 42(2), of the registrant and contact person (or persons) in relation to the registration;
  - (h) whether the registration is suspended;

- (i) details to identify the relevant GEMS determination against which the model was registered as referred to in subsection 43(1), including the day the determination was made;
- (j) if the model is taken to be registered against a replacement determination in accordance with subsection 36(2)—that fact and details to identify the replacement determination, including the day the replacement determination was made;
- (k) if the model’s registration is affected by a replacement determination—that fact and details to identify the replacement determination, including the day the replacement determination was made;
- (l) any information specified in the regulations in relation to that product class.

*Other information that may be entered in GEMS Register*

- (2) The GEMS Regulator may enter in the GEMS Register any other information he or she considers appropriate.

*Varying information in the GEMS Register*

- (3) The GEMS Regulator must vary information contained in the GEMS Register as soon as practicable after becoming aware that the information is no longer correct.

## Division 3—Registering models of GEMS products

### 41 Registration on application

- (1) A person may apply to the GEMS Regulator to register in relation to a product class:
  - (a) a single model of GEMS products, specified in the application; or
  - (b) 2 or more models of GEMS products, specified in the application, that are in the same family of models.

Note 1: See section 43 for when the GEMS Regulator may register the model or models.

Note 2: Under subsection 43(3), the applicant must have an appropriate connection to the supply of the model in Australia (for example as an importer or manufacturer).

- (2) To avoid doubt, a person may apply to register a model even if there is only one product of that model.

### 42 Application requirements—contact persons and contact details

#### *Contact persons*

- (1) The application must contain the name of one or more contact persons for the registration who meet the requirements specified in the regulations for the purposes of this subsection.

Note: The registrant is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

Example: The regulations might specify a requirement that a contact person be one or more of the following:

- (a) an individual;
- (b) an officer or employee of the applicant;
- (c) a person whom the GEMS Regulator is satisfied has an appropriate connection to the supply of the model in Australia.

#### *Contact details*

- (2) The application must contain the contact details specified in the regulations for the applicant and contact person (or persons).
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Note: For additional requirements relating to applications, see section 64.

### 43 Registration by the GEMS Regulator

- (1) The GEMS regulator must, on application under section 41, **register** the model, in relation to the product class, against the relevant GEMS determination for that product class (see section 44), unless subsection (2), (3) or (4) of this section applies.

Note 1: If a replacement determination is made that covers the model but does not affect the model's registration in relation to the product class, the model is taken to be registered against the replacement determination (see subsection 36(2)).

Note 2: For notice of decisions on applications under this Part, see section 67.

- (2) The GEMS Regulator must refuse to register a model in relation to a product class if he or she is not satisfied that:
- (a) the model complies with the requirements of the relevant GEMS determination referred to in section 44 for that product class; or
  - (b) if the application is to register 2 or more models that include the model—those models are in the same family of models.

Note: Generally the GEMS determination referred to in paragraph (a) will be the GEMS determination that covers that product class, as in force at the time of making the decision on the application.

- (3) The GEMS Regulator must refuse to register a model in relation to a product class if he or she is not satisfied that:
- (a) at least one of the following applies:
    - (i) the applicant manufactures the model;
    - (ii) the applicant imports the model into Australia;
    - (iii) the applicant has an appropriate connection to the supply of the model in Australia, determined in accordance with regulations made for the purposes of this paragraph (if any); or
  - (b) the applicant meets all other requirements specified in regulations made for the purposes of this paragraph (if any).

Example: For paragraph (b), the regulations might require the person to be registered under a law of the Commonwealth in connection with carrying on business in Australia.

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- (4) The GEMS Regulator may refuse to register a model in relation to a product class if he or she is satisfied that there are grounds for refusing the application under section 66.

**44 Relevant GEMS determination with which model must comply**

- (1) For the purposes of section 43, the relevant GEMS determination is the GEMS determination covering that product class that is in force at the time of making the decision on the application, unless subsection (2) or (3) applies.
- (2) If the application is made:
- (a) after a GEMS determination (the *new determination*) that covers the product class is made; but
  - (b) before that determination comes into force;
- then, unless subsection (3) applies, the relevant GEMS determination is the new determination.

Note: The product class might not be covered by an existing GEMS determination, or the new determination might be a replacement determination.

- (3) If:
- (a) a GEMS determination (the *old determination*) that covers the product class is in force at the time the application is made; and
  - (b) a replacement determination that replaces the old determination has been made but has not come into force at that time; and
  - (c) the applicant elects under subsection (4) for the application to be determined on the basis that the model complies with the requirements of the old determination for that product class;
- the relevant GEMS determination is the old determination.
- (4) The applicant may make an election for the purposes of paragraph (3)(c) in the application under section 41.

## **45 Conditions**

- (1) The GEMS Regulator may impose conditions on a model's registration in relation to a product class at any time by written notice given to the registrant.

Note: The registrant is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (1A) A condition of the model's registration must be reasonably appropriate and adapted to giving effect to the purposes of this Act.

- (2) The registrant must comply with a condition of the model's registration.

Note: The model's registration may be suspended or cancelled if the registrant breaches a condition of the registration (see sections 49 and 54).

## Division 4—Varying registrations

### 46 Varying registration to cover additional models

- (1) The registrant may apply to the GEMS Regulator to vary a model's registration in relation to a product class to cover one or more additional models of GEMS products.

Note: For requirements relating to applications, see section 64.

- (2) The GEMS Regulator must vary the registration in accordance with the application, unless subsection (3) or (4) applies.

Note: For notice of decisions on applications under this Part, see section 67.

- (3) The GEMS Regulator must refuse the application if he or she is not satisfied that the varied registration would only cover models that are in the same family of models.

- (4) The GEMS Regulator may refuse the application if he or she is satisfied that there are grounds for refusing the application under section 66.

### 47 Varying registration to change registrant

- (1) The registrant (the *old registrant*) may apply to the GEMS Regulator to vary the model's registration in relation to a product class to specify another person (the *new registrant*) as the registrant for the registration.

- (2) The application must be accompanied by the written consent of the new registrant.

Note: For additional requirements relating to applications, see section 64.

- (3) Section 42 (application requirements for registration) applies in relation to the application as if a reference in that section to the applicant were a reference to the new registrant.

- (4) The GEMS Regulator must vary the registration in accordance with the application, unless subsection (5) or (6) applies.

Note: For notice of decisions on applications under this Part, see section 67.

- (5) The GEMS Regulator must refuse to vary the registration if he or she is not satisfied that:
- (a) at least one of the following applies:
    - (i) the new registrant manufactures the model;
    - (ii) the new registrant imports the model into Australia;
    - (iii) the new registrant has an appropriate connection to the supply of the model in Australia, determined in accordance with regulations made for the purposes of this paragraph (if any); or
  - (b) the new registrant meets all other requirements specified in regulations made for the purposes of this paragraph (if any).
- Example: For paragraph (b), the regulations might require the person to be registered under a law of the Commonwealth in connection with carrying on business in Australia.
- (6) The GEMS Regulator may refuse to vary the registration if he or she is satisfied that there are grounds for refusing the application under section 66.

## Division 5—When is a registration in force

### 48 When is a registration in force

#### *When registration comes into force*

- (1) A model's registration against a GEMS determination in relation to a product class comes into force at the beginning of the day after the GEMS Regulator decides to register the model against that GEMS determination in relation to that product class under subsection 43(1).

#### *When registration ceases to be in force*

- (2) A model's registration against a GEMS determination in relation to a product class ceases to be in force at the earliest of the following times:
  - (a) the beginning of the day after the end of the registration period for the registration (see subsection (3));
  - (b) the beginning of the day after the registration is cancelled;
  - (c) if a replacement determination has been made that affects the registration of the model in relation to the product class—the earlier of the following:
    - (i) the beginning of the day a registration of the model against the replacement determination comes into force;
    - (ii) the beginning of the day the replacement determination comes into force.

Note: The GEMS determination against which the model is registered at the time the registration ceases to be in force may be different from that in force at the time it was originally registered (see subsection 36(2)).

#### *Registration period—generally 5 years*

- (3) For the purposes of paragraph (2)(a), the **registration period** for a model's registration is 5 years beginning on the day the registration comes into force (subject to subsections (4), (5) and (6)).

*Shorter registration period specified by GEMS Regulator*

- (4) The registration period for a model's registration ends on an earlier day specified by the GEMS Regulator in the notice of the decision to register the model if the GEMS Regulator specifies such a day in accordance with criteria prescribed by regulations made for the purposes of this subsection.

Note: For notice of decisions on applications under this Part, see section 67.

*Longer registration period—model registered before relevant determination in force*

- (5) If the relevant determination against which the model is registered is a new determination within the meaning of subsection 44(2), the registration period is extended by the number of days in the period:
- (a) beginning on the day the registration comes into force; and
  - (b) ending on the day before the new determination comes into force.

*Registration period—effect of suspension of registration*

- (6) The registration period is extended by the number of days in any period:
- (a) beginning on a day a suspension of the registration comes into force; and
  - (b) ending on the day that suspension ceases to be in force.

## **Division 6—Suspending and cancelling registrations**

### **Subdivision A—Suspending registrations**

#### **49 Suspending a model's registration**

The GEMS Regulator may suspend a model's registration in relation to a product class if:

- (a) the GEMS Regulator suspects, on reasonable grounds, that:
  - (i) the model does not comply with a requirement for that product class of the GEMS determination against which the model is registered; or
  - (ii) any of the documentation or other information given to the GEMS Regulator at any time in connection with the registration was not accurate at the time it was given; or
  - (iii) changes have been made to the model so that any test results given in connection with the model's registration no longer accurately reflect the extent to which the model complies with the requirements of the GEMS determination against which the model was registered; or
  - (iv) the registrant has breached a condition of the registration or of an exemption under section 37 relating to the model; or
- (b) the GEMS Regulator is satisfied that the registrant has failed to comply with one or more of the following in relation to the model:
  - (i) section 55 (notifying GEMS Regulator of changes);
  - (ii) a notice under section 56 (giving information to GEMS Regulator);
  - (iii) a notice under section 57 (giving product of model to GEMS Regulator);
  - (iv) a notice under section 61 (requirement for registrant—testing products or cancelling registration); or
- (c) the GEMS Regulator has, despite reasonable attempts, been unable to contact:



- (i) any contact person for the registration; and
- (ii) the registrant.

### **50 Effect of suspension**

Each model covered by a suspended registration is taken to not be registered in relation to the product class while the suspension is in force.

### **51 When is a suspension in force**

- (1) A suspension comes into force at the time notice of the suspension (the *suspension notice*) is given to the registrant under section 165.

Note: The registrant is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (2) The suspension notice must specify a day on which the suspension ceases to be in force.

### **52 Conditions on suspension**

- (1) The GEMS Regulator may impose conditions on a suspension in the suspension notice.
- (2) The registrant must comply with a condition of a suspension.

Note: The model's registration may be cancelled if the registrant breaches a condition of the suspension (see section 54).

### **53 GEMS Regulator may vary suspension notice**

- (1) The GEMS Regulator may, if he or she considers it appropriate in the circumstances, vary the suspension notice to do either or both of the following:
  - (a) specify a different day on which the suspension ceases to be in force;
  - (b) impose different conditions on the suspension.
- (2) The GEMS Regulator must give the registrant a copy of the suspension notice as varied under subsection (1).

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Note: The registrant is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (3) Subsection (1) does not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to a suspension notice.

**Subdivision B—Cancelling registrations**

**54 Cancelling a model's registration**

- (1) The GEMS Regulator may cancel a model's registration in relation to a product class if the GEMS Regulator is satisfied that:
- (a) the model does not comply with a requirement for that product class of the GEMS determination against which the model is registered; or
  - (b) the registrant has failed to comply with one or more of the following in relation to the model:
    - (i) section 55 (notifying GEMS Regulator of changes);
    - (ii) a notice under section 56 (giving information to GEMS Regulator);
    - (iii) a notice under section 57 (giving product of model to GEMS Regulator);
    - (iv) a notice under section 61 (testing products or cancelling registration—belief model non-compliant); or
  - (c) any of the documentation or other information given to the GEMS Regulator at any time in connection with the registration was not accurate at the time it was given; or
  - (d) changes have been made to the model so that any test results given in connection with the model's registration no longer accurately reflect the extent to which the model complies with the requirements of the GEMS determination against which the model was registered; or
  - (e) the registrant has breached a condition of:
    - (i) the registration; or
    - (ii) a suspension of the registration; or
    - (iii) an exemption under section 37 relating to the model; or
  - (f) the registration has been suspended, and the GEMS Regulator has, despite reasonable attempts after the suspension, been unable to contact:

- (i) any contact person for the registration; and
  - (ii) the registrant.
- (2) The GEMS Regulator must, by written notice given to the registrant, cancel a registration of a model in relation to a product class if the registrant applies for the GEMS Regulator to do so.
- Note: The registrant is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).
- (3) A cancellation comes into force at a time specified in the notice given under section 165 or subsection (2) of this section that is after the notice is given.
- (4) To avoid doubt, if the registration covers more than one model, the registration is cancelled in relation to each of those models.

## Division 7—Requirements for registrants

### Subdivision A—Notifying GEMS Regulator of changes

#### 55 Requirement for registrant to notify GEMS Regulator of changes

- (1) The registrant for a model's registration must inform the GEMS Regulator as soon as reasonably practicable after any of the following occurs:
  - (a) the registrant becomes aware that any of the information entered in the GEMS Register in relation to the registration is incorrect;
  - (b) circumstances have changed such that the registrant may no longer satisfy the requirements of paragraphs 43(3)(a) and (b) or 47(5)(a) and (b) (appropriate connection to supply of model and other requirements for registrant);
  - (c) the registrant decides to change a contact person for the registration, or a contact person for the registration no longer satisfies the requirements of regulations made for the purposes of subsection 42(1);
  - (d) changes have been made to the model so that any test results given in connection with the model's registration no longer accurately reflect the extent to which the model complies with the requirements of the GEMS determination against which the model was registered.
- (2) The registrant may inform the GEMS Regulator by written notice or a method specified in the regulations.

#### *Civil penalty provision*

- (3) The registrant is liable to a civil penalty if the registrant contravenes subsection (1).

Civil penalty: 60 penalty units.

Note: It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

**Subdivision B—Giving information relating to import,  
manufacture etc. of products**

**56 Requirement for registrant to give information relating to  
import, manufacture etc. of products**

*Giving information relating to import, manufacture etc. of products*

- (1) The GEMS Regulator may give the registrant for a registration of a model in relation to a product class a written notice requiring the registrant to give the GEMS Regulator specified information relating to the manufacture, import, supply, or export of products of the model by the registrant.

Example: Information about:

- (a) the number of products of the model manufactured in, imported into, supplied in, or exported from, Australia by the registrant during a specified period; or
  - (b) whether the registrant has ceased manufacturing, importing, supplying or exporting products of the model in, into or from Australia.
- (2) The GEMS Regulator may require the registrant to give the specified information on a periodic basis.

*Matters to be included in notice*

- (3) A notice under subsection (1) must also specify the following matters:
- (a) the day on which the notice is given;
  - (b) the name of the registrant;
  - (c) the model of the GEMS product;
  - (d) that the information must be given:
    - (i) within 14 days after the notice is given, or within such longer period as is specified in the notice; or
    - (ii) if the information is to be given on a periodic basis—before the time or times worked out in accordance with the notice;
  - (e) that the GEMS Regulator may suspend the registration under section 49, or cancel the registration under section 54, if the registrant does not comply with the notice.

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- (4) A notice under subsection (1) must set out the effect of sections 137.1 and 137.2 of the *Criminal Code* (false or misleading information or documents).
- (5) This section only applies in relation to a registrant if the registrant is a constitutional corporation.

**Subdivision C—Giving product of registered model to GEMS Regulator**

**57 Requirement for registrant to give product—determining whether model complies with GEMS determination**

*Giving product of registered model*

- (1) The GEMS Regulator may give the registrant for a registration of a model in relation to a product class a written notice requiring the registrant to give a product of that model to a specified GEMS inspector.
- (2) The power under subsection (1) may only be exercised:
  - (a) for the purpose of determining whether the model complies with the GEMS determination against which the model is registered; and
  - (b) if the GEMS Regulator is satisfied that it would not be practical for a GEMS inspector or person authorised to test GEMS products in that product class to purchase the product.

*Matters to be included in notice*

- (3) A notice under subsection (1) must also specify the following matters:
  - (a) the day on which the notice is given;
  - (b) the name of the registrant;
  - (c) the model of the GEMS product;
  - (d) the manner in which the GEMS product is to be provided;
  - (e) that the product must be given within 14 days after the notice is given, or within such longer period as is specified in the notice;

- (f) that the GEMS Regulator may suspend the registration under section 49, or cancel the registration under section 54, if the registrant does not comply with the notice.
- (4) A notice under subsection (1) must set out the effect of sections 137.1 and 137.2 of the *Criminal Code* (false or misleading information or documents).

*Notice not a legislative instrument*

- (5) A notice under subsection (1) is not a legislative instrument.

**58 Requirement for registrant to give product—retention and return of product**

*Retention etc. of product*

- (1) If a product is given to a GEMS inspector in accordance with a requirement under subsection 57(1), the GEMS inspector:
  - (a) may take possession of the product; and
  - (b) may retain the product (but see subsection (2) of this section); and
  - (c) must provide a receipt for the product.

Note: The product may be tested under section 126.

*Return of product*

- (2) The GEMS Regulator must take reasonable steps to return the product to the registrant or a contact person for the registration when the earliest of the following happens:
  - (a) it is no longer necessary to retain the product for the purposes of determining whether the model complies with the GEMS determination against which it is registered;
  - (b) it is decided that the product is not to be used in evidence;
  - (c) the 6-month period after the product was given to the GEMS Regulator ends.

*Exception to requirement to return product*

- (3) Subsection (2):
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- (a) is subject to any contrary order of a court; and
- (b) does not apply if the product:
  - (i) is forfeited or forfeitable to the Commonwealth; or
  - (ii) is the subject of a dispute as to ownership.
- (4) The GEMS Regulator is not required to take reasonable steps to return the product because of subsection (2) if:
  - (a) proceedings in respect of which the product may afford evidence were instituted before the end of 6 months after the product was given to the GEMS Regulator, and have not been completed (including an appeal to a court in relation to those proceedings); or
  - (b) the product may continue to be retained because of an order under section 59; or
  - (c) the Commonwealth or the GEMS Regulator is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of a State or Territory) to retain, destroy, dispose of or otherwise deal with the product.

**59 Requirement for registrant to give product—issuing officer may permit product to be retained**

- (1) The GEMS Regulator may apply to an issuing officer for an order permitting the retention of a product given in accordance with subsection 57(1) for a further period if proceedings in respect of which the product may afford evidence have not commenced before the end of:
  - (a) 6 months after the product was given; or
  - (b) a period previously specified in an order of an issuing officer under this section.

Note: See section 127 for provisions relating to the powers of issuing officers under this Act.

- (2) Before making the application, the GEMS Regulator must:
  - (a) take reasonable steps to discover who has an interest in the retention of the product; and
  - (b) if it is practicable to do so, give notice of the proposed application to each person whom the GEMS Regulator believes to have such an interest.



*Order to retain product*

- (3) The issuing officer may order that the product continue to be retained for a period specified in the order if the issuing officer is satisfied that it is necessary for the product to continue to be retained:
  - (a) for the purposes of determining whether the model of the product complies with the GEMS determination against which it is registered; or
  - (b) for the purposes of an investigation as to whether a related provision has been contravened; or
  - (c) to enable evidence of a contravention mentioned in paragraph (b) to be secured for the purposes of a prosecution or an action to obtain a civil penalty order.
- (4) The period specified must not exceed 3 years.

**60 Requirement for registrant to give product—disposal of product**

- (1) The GEMS Regulator may dispose of a product given in accordance with subsection 57(1) if:
  - (a) the GEMS Regulator has taken reasonable steps to return the product to the registrant or a contact person for the registration; and
  - (b) either:
    - (i) the GEMS Regulator has been unable to locate both the registrant and any contact person for the registration; or
    - (ii) if the GEMS Regulator has been able to locate the registrant or any contact person for the registration—any person so located has refused to take possession of the product.
- (2) The GEMS Regulator may dispose of the product in such manner as the GEMS Regulator thinks appropriate.

Note: If the operation of this section would result in an acquisition of property otherwise than on just terms, see section 174.

## **Subdivision D—Testing products or cancelling registration**

### **61 Requirement for registrant—testing products or cancelling registration**

- (1) The GEMS Regulator may give a registrant for a registration of a model in relation to a product class a written notice requiring the registrant to take the action specified in subsection (2) if the GEMS Regulator believes, on reasonable grounds, that the model does not comply with the GEMS determination against which it is registered.

Note: The registrant is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (2) The registrant must either:
- (a) apply under subsection 54(2) to cancel the registration of the model within a period specified in the notice; or
  - (b) do both of the following within a period specified in the notice:
    - (i) arrange for further testing and examination (at the registrant's own expense) of one or more specified products of the model, or products of another model that is covered by the same registration, as specified in the notice;
    - (ii) notify the GEMS Regulator of the results of the test or examination.
- (3) A notice under subsection (1) must also specify the following matters:
- (a) the day on which the notice is given;
  - (b) the name of the registrant for the registration of the model in relation to the product class;
  - (c) the model of the GEMS product;
  - (d) the manner in which the GEMS Regulator believes that the model does not comply with the GEMS determination against which the model is registered;
  - (e) for the purposes of paragraph (2)(b)—the manner in which the specified product or products must be tested or examined, including any or all of the following:

- (i) the matters in relation to which the product or products must be tested;
  - (ii) the methods for testing;
  - (iii) any specified persons who are required to examine or test the product or products;
  - (f) that the GEMS Regulator may suspend the registration under section 49, or cancel the registration under section 54, if the registrant does not comply with the notice.
- (4) A notice given under subsection (1) is not a legislative instrument.

### **Subdivision E—Notifying other persons of suspension or cancellation of registration**

#### **62 Requirement for registrant to notify other persons of suspension or cancellation of registration**

- (1) The registrant for a registration must take the action mentioned in subsection (2) as soon as practicable after the registrant is given notice of a suspension or cancellation of the registration under subsection 54(2) or section 165.
- (2) The registrant must take all reasonable steps to ensure that any person the registrant is aware might supply products of the models covered by the registration is informed of the suspension or cancellation.
- (3) The registrant is liable to a civil penalty if the registrant contravenes subsection (1).

Civil penalty:       60 penalty units.

Note:       It is generally not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision (see section 144).

## Division 8—Miscellaneous

### 63 Requirements for determining whether model complies with GEMS determination

- (1) A model of a GEMS product in a product class complies with a GEMS determination if the requirements specified by the GEMS Regulator under subsection (2) for determining such compliance are met.
- (2) The GEMS Regulator may, by legislative instrument, specify requirements for a product class for the purposes of subsection (1).
- (3) Without limiting subsection (2), the specified requirements for a product class may relate to the following:
  - (a) the number of products of a model in that class that must be tested and examined to determine the model's compliance;
  - (b) the results that must be achieved for that product class in testing and examining those products.

### 64 Applications—basic requirements

#### *General requirements*

- (1) An application under this Part:
  - (a) must be made in the approved form; and
  - (b) for an application under section 41 to register one or more models of GEMS product—must be accompanied by the fee imposed under the *Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012* for such an application; and
  - (c) for any other application—must be accompanied by the fee specified by the GEMS Regulator by legislative instrument.
- (2) To be in the approved form for the purposes of paragraph (1)(a), the application must:
  - (a) be made in the manner and form approved in writing by the GEMS Regulator; and

- (b) include any documentation or other information required by the GEMS Regulator by the form approved for the purposes of paragraph (a).

Examples: For the purposes of paragraph (2)(b), the requirements to be imposed may include any (or all) the following:

- (a) test results for a model must accompany the application;
  - (b) such a test must be conducted by a person authorised to test GEMS products in the relevant product class;
  - (c) sample labels must accompany the application;
  - (d) documentation or information (including any statement) supplied with the application must be verified by statutory declaration.
- (3) An approved form made for the purposes of paragraph (1)(a), or a legislative instrument made for the purposes of paragraph (1)(c), may specify different documentation or other information, or fees, as the case requires, for different:
- (a) product classes; and
  - (b) classes of applications; and
  - (c) classes of models.

*Additional provisions about fees*

- (4) A fee in relation to an application under this Part is payable by the applicant to the GEMS Regulator on behalf of the Commonwealth.
- (5) The GEMS Regulator may, despite anything in this Act or the *Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012*, in a particular case or in particular classes of cases:
- (a) waive or reduce a fee that would otherwise be payable in relation to an application under this Part; or
  - (b) refund the whole or a part of a fee that would otherwise be payable in relation to an application under this Part.
- (6) A fee that is payable in relation to an application under this Part (other than an application under section 41 to register one or more models) must not be such as to amount to taxation.

Note: The *Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012* imposes fees for applications under section 41 as taxes.

### **65 Applications—GEMS Regulator may request further information**

- (1) The GEMS Regulator may, for the purposes of determining an application under this Part, give the applicant a written notice requesting the applicant to give the GEMS Regulator further specified documentation or information by the time specified in the notice.

Note: The registrant or applicant for a registration is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (2) Without limiting subsection (1), the GEMS Regulator may request the applicant to give the GEMS Regulator results of testing, in relation to a model or models to which the application relates, that has been conducted by a person who is authorised to test GEMS products in that product class.
- (3) The GEMS Regulator may require the documentation or information to be verified by statutory declaration.

Note: Failure to comply with a request under this section may result in the application being refused (see section 66).

### **66 Grounds for refusing an application**

- (1) The following are grounds for refusing an application under this Part:
  - (a) the application does not comply with section 64 (basic requirements for applications);
  - (b) the applicant has not given the GEMS Regulator further documentation or information by the time specified in a notice given under section 65 in relation to the application;
  - (c) the documentation or other information provided in the application, or as requested by a notice under section 65, is not accurate.
- (2) It is also a ground for refusing an application to register a model under section 41, or to vary a registration under section 47, that the application does not comply with section 42 (including as that section applies because of subsection 47(3)).

Note: Section 42 contains requirements for registration applications relating to contact persons and contact details.

- (3) It is also a ground for refusing an application to register a model under section 41, or to vary a registration under section 47, that the GEMS Regulator is satisfied a person covered by subsection (4) has:
- (a) contravened a provision of this Act; or
  - (b) breached a condition of a model's registration under this Act; or
  - (c) been the registrant for a registration of a model under this Act that has been:
    - (i) suspended; or
    - (ii) cancelled (other than on application by the registrant).

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (4) The persons covered by this subsection are as follows:
- (a) for an application under section 41—the applicant;
  - (b) for an application under section 47—the new registrant;
  - (c) in any case—a contact person nominated in the application;
  - (d) if the applicant or new registrant referred to in paragraph (a) or (b) is a body corporate—any director, officer or shareholder of the body corporate who participates, or is to participate, in the management of the affairs of the body corporate.

## 67 Notice of decisions

- (1) The GEMS Regulator must give the applicant written notice of the GEMS Regulator's decision on an application under this Part.

Note 1: See also section 165 for additional requirements for reviewable decisions.

Note 2: The registrant or applicant for a registration is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (2) If the application is under section 47 (varying registration to change registrant), the notice must also be given to the new registrant.

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- (3) The GEMS Regulator must notify the applicant for an application to register a model under section 41, or to vary a registration under section 46 or 47, that the application is still under consideration if the GEMS Regulator has not made a decision on the application within 42 days of receiving it.
- (4) The period of 42 days is extended, for each notice requesting further information under section 65, by the number of days in the period:
  - (a) beginning on the day the notice was given; and
  - (b) ending on the day the information is received.
- (5) A failure to comply with the requirements of this section does not affect the validity of a decision under this Part.

**68 Notice given to contact person taken to be given to applicant or registrant**

If a notice that a person may or must give under this Act to the applicant or registrant for a registration is given to a contact person for the registration, it is taken to have been given to the applicant or registrant.



## **Part 6—The GEMS Regulator**

### **Division 1—Guide to this Part**

#### **69 Guide to this Part**

This Part establishes the office of the GEMS Regulator and defines the functions and powers of the GEMS Regulator.

Division 2 provides that the GEMS Regulator must be an SES employee occupying a position in the Department.

The main functions of the GEMS Regulator, as set out in Division 3, are to administer the Act and maintain the GEMS Register. The GEMS Regulator can also assist in the development of GEMS determinations.

Division 4 enables State and Territory laws to confer functions on the GEMS Regulator.

Division 5 gives the GEMS Regulator facilitative powers and functions, including the capacity to make arrangements with Commonwealth, State and Territory agencies and to engage consultants, and the power of delegation.

## **Division 2—Who is the GEMS Regulator**

### **70 The GEMS Regulator**

- (1) The Secretary must, by writing, designate a position in the Department as the position of GEMS Regulator.

Note: For creation of positions, see section 77 of the *Public Service Act 1999*.

- (2) The position of GEMS Regulator can only be occupied by an SES employee.
- (3) The ***GEMS Regulator*** is the SES employee who occupies that position.
- (4) An instrument under subsection (1) is not a legislative instrument.

## **Division 3—Functions of GEMS Regulator under this Act**

### **71 Functions of the GEMS Regulator under this Act**

The GEMS Regulator has the following functions:

- (a) to administer this Act;
- (b) to maintain the GEMS Register;
- (c) to assist in developing GEMS determinations, including by undertaking or commissioning research in relation to:
  - (i) GEMS determinations; or
  - (ii) product classes that are, or could be, covered by a GEMS determination;
- (d) to provide information and advice in relation to:
  - (i) GEMS determinations; and
  - (ii) product classes that are, or could be, covered by a GEMS determination; and
  - (iii) the operation of this Act;
- (e) to monitor and enforce compliance with this Act;
- (f) to review and evaluate the operation of this Act;
- (g) such other functions as are conferred on the GEMS Regulator by this Act or any other law of the Commonwealth.

Note 1: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

Note 2: Other functions may be conferred on the GEMS Regulator by State or Territory law (see Division 4).

## **Division 4—Conferral of functions etc. on GEMS Regulator by State and Territory laws**

### **72 Commonwealth consent to conferral of functions etc. on GEMS Regulator by State and Territory laws**

- (1) A law of a State or Territory may confer powers or functions, or impose duties, on the GEMS Regulator.

Note: Section 74 sets out when such a law imposes a duty on the GEMS Regulator.

- (2) Subsection (1) does not authorise the conferral of a power or function, or the imposition of a duty, by a law of a State or Territory to the extent to which:
- (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on the GEMS Regulator; or
  - (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.
- (3) The GEMS Regulator cannot exercise a power, or perform a duty or function, under a law of a State or Territory without the written approval of the Minister.

### **73 How duty is imposed on GEMS Regulator by State and Territory laws**

#### *Application*

- (1) This section applies if a law of a State or Territory purports to impose a duty on the GEMS Regulator.

Note: Section 74 sets out when such a law imposes a duty on the GEMS Regulator.

#### *State or Territory legislative power sufficient to support duty*

- (2) The duty is taken not to be imposed by this Act (or any other law of the Commonwealth) to the extent to which:

- (a) imposing the duty is within the legislative powers of the State or Territory concerned; and
- (b) imposing the duty by the law of the State or Territory is consistent with the constitutional doctrines restricting the duties that may be imposed on the GEMS Regulator.

Note: If this subsection applies, the duty will be taken to be imposed by force of the law of the State or Territory (the Commonwealth having consented under section 72 to the imposition of the duty by that law).

*Commonwealth legislative power sufficient to support duty but State or Territory legislative powers are not*

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by the law of the State or Territory), the duty is taken to be imposed by this Act to the extent necessary to ensure that validity.
- (4) If, because of subsection (3), this Act is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Act.
- (5) The duty is taken to be imposed by this Act in accordance with subsection (3) only to the extent to which imposing the duty:
  - (a) is within the legislative powers of the Commonwealth; and
  - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on the GEMS Regulator.
- (6) Subsections (1) to (5) do not limit section 72.

#### **74 When State and Territory laws impose a duty on GEMS Regulator**

For the purposes of sections 72 and 73, a law of a State or Territory imposes a duty on the GEMS Regulator if:

- (a) the law confers a power or function on the GEMS Regulator; and

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- (b) the circumstances in which the power or function is conferred give rise to an obligation on the GEMS Regulator to exercise the power or to perform the function.

## **Division 5—General provisions relating to GEMS Regulator**

### **75 Powers of the GEMS Regulator**

The GEMS Regulator has power to do all things necessary or convenient to be done in connection with the performance of the GEMS Regulator's functions.

### **76 GEMS Regulator has privileges and immunities of the Crown**

The GEMS Regulator has the privileges and immunities of the Crown.

Note: The GEMS Regulator is an SES employee in the Department and does not have a legal identity separate from the Commonwealth (see section 70).

### **77 GEMS Regulator may charge for services**

- (1) The GEMS Regulator may charge fees for services provided by, or on behalf of, the GEMS Regulator in the performance of his or her functions.
- (2) A fee charged under subsection (1) must not be such as to amount to taxation.

### **78 Arrangements with other agencies**

The GEMS Regulator may make an arrangement with an agency of the Commonwealth, a State or a Territory for the services of officers or employees of the agency to be made available to assist the GEMS Regulator in performing his or her functions or duties, or exercising his or her powers.

### **79 Consultants**

The GEMS Regulator may, on behalf of the Commonwealth, engage consultants to assist in the performance of the GEMS Regulator's functions.

### **80 Delegation**

- (1) The GEMS Regulator may, by writing, delegate one or more of his or her powers or functions under this Act (other than his or her functions or powers as a GEMS inspector) to an officer or employee of an agency (however described) of the Commonwealth, a State or a Territory.

Note: The GEMS Regulator is made a GEMS inspector by force of section 83.

- (2) However, the GEMS Regulator must not delegate a power or function, under subsection (1), to an officer or employee of an agency of a State or Territory without the agreement of the State or Territory.
- (3) A delegate of the GEMS Regulator is subject to the GEMS Regulator's directions while exercising the delegate's delegated powers and functions.



## **Part 7—Monitoring and investigation**

### **Division 1—Guide to this Part**

#### **81 Guide to this Part**

This Part is about ensuring compliance with this Act.

Division 2 provides for officers of Commonwealth, State or Territory agencies to be appointed as GEMS inspectors.

Division 3 authorises GEMS inspectors to enter public areas of premises used in connection with the supply of GEMS products. Inspectors may purchase GEMS products there (and exercise certain other powers) in order to investigate compliance with this Act.

Division 4 (monitoring) authorises a GEMS inspector to enter premises and exercise a range of powers (monitoring powers) for the purposes of monitoring compliance with this Act. An inspector may do so with the occupier's consent or under a monitoring warrant (issued by a magistrate or judge (an issuing officer)). If evidence of a contravention of this Act is found, the inspector may secure the evidence for up to 24 hours (or for an extended period authorised by an issuing officer).

Division 5 (investigation) authorises a GEMS inspector to enter premises and exercise a range of powers (investigation powers) if the inspector has reasonable grounds for suspecting that there is something on the premises that is connected with a contravention of this Act. An inspector may enter the premises with the occupier's consent or under an investigation warrant issued by an issuing officer. An investigation warrant also authorises the inspector to seize that thing, or similar things, as specified in the warrant.

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Division 6 contains rules relevant to both monitoring and investigation, such as the obligations and other powers of GEMS inspectors when entering premises, and the rights and responsibilities of occupiers.

Division 7 requires a person, on demand, to give a GEMS inspector information, or to appear for an examination, in relation to an investigation, or to prevent a contravention of this Act.

Division 8 deals with the powers of a GEMS inspector to test, examine or sample GEMS products to determine whether the products, or models of the products, comply with this Act (including any relevant GEMS determination).

Division 9 deals with the powers of issuing officers in relation to the issue of warrants.

## **Division 2—GEMS inspectors**

### **82 Appointment of GEMS inspectors**

- (1) The GEMS Regulator may, in writing, appoint an officer or employee of an agency (however described) of the Commonwealth, a State or a Territory as a GEMS inspector for the purposes of this Part.

#### *Prerequisites to appointment*

- (2) The GEMS Regulator must not appoint a person as a GEMS inspector unless the GEMS Regulator is satisfied that the person has suitable training or experience to properly exercise the powers of a GEMS inspector.
- (3) The GEMS Regulator must not appoint an officer or employee of an agency as a GEMS inspector without the agreement of:
  - (a) if the agency is an agency of the Commonwealth—the agency; and
  - (b) if the agency is an agency of a State or Territory—the State or Territory.

#### *GEMS inspector to comply with directions*

- (4) A GEMS inspector must, in exercising powers as such, comply with any directions of the GEMS Regulator.
- (5) If a direction is given under subsection (4) in writing, the direction is not a legislative instrument.

### **83 GEMS Regulator is an inspector**

The GEMS Regulator is a GEMS inspector by force of this section.

### **84 Identity cards**

- (1) The GEMS Regulator must issue an identity card to a GEMS inspector appointed under section 82.

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- (2) The Secretary must issue an identity card to the GEMS Regulator.

*Form of identity card*

- (3) The identity card must:
- (a) be in the form approved, in writing, by the GEMS Regulator;  
and
  - (b) contain a recent photograph of the GEMS inspector.

*GEMS inspector must carry card*

- (4) A GEMS inspector must carry his or her identity card at all times when exercising powers as a GEMS inspector.

**85 Offence for not returning identity card**

- (1) A person commits an offence of strict liability if:
- (a) the person has been issued with an identity card; and
  - (b) the person ceases to be a GEMS inspector; and
  - (c) the person does not return the identity card to the GEMS Regulator within 14 days after ceasing to be a GEMS inspector.

Penalty: 1 penalty unit.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

*Defence: card lost or destroyed*

- (2) Subsection (1) does not apply if the identity card was lost or destroyed.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

## **Division 3—Inspecting public areas of GEMS business premises**

### **86 Inspection powers in public areas of GEMS business premises**

- (1) A GEMS inspector may enter a public area of GEMS business premises when the premises are open to the public and exercise the following powers for a purpose referred to in subsection (2):
    - (a) the power to inspect GEMS products;
    - (b) the power to purchase any GEMS product that is available for sale;
    - (c) the power to inspect or collect written information, advertising or any other document that is available, or made available, to the public in relation to GEMS products;
    - (d) the power to discuss product features of any GEMS products with any person;
    - (e) the power to observe practices relating to the supply of GEMS products.
  - (2) A GEMS inspector may only exercise a power under subsection (1) for one or more of the following purposes:
    - (a) determining whether a provision of this Act has been, or is being, complied with;
    - (b) determining whether information given in compliance or purported compliance with a provision of this Act is correct;
    - (c) investigating a possible contravention of a related provision.
- Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).
- (3) Subsection (1) does not affect any right of the occupier of the premises to refuse to allow a GEMS inspector to enter, or remain on, the premises.
  - (4) Subsection (1) does not limit the powers of a GEMS inspector under Division 4, 5 or 6 of this Part or any other power of a person to enter a public area of GEMS business premises.

## Division 4—Monitoring

### Subdivision A—Monitoring powers

#### 87 GEMS inspector may enter premises by consent or under a warrant

- (1) A GEMS inspector may enter any premises and exercise the monitoring powers for either or both of the following purposes:
- (a) determining whether a provision of this Act has been, or is being, complied with;
  - (b) determining whether information given in compliance or purported compliance with a provision of this Act is correct.

Note 1: The *monitoring powers* are set out in sections 88, 89 and 92.

Note 2: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (2) However, a GEMS inspector is not authorised to enter the premises unless:
- (a) the occupier of the premises has consented to the entry and the GEMS inspector has shown his or her identity card if required by the occupier; or
  - (b) the entry is made under a monitoring warrant.

Note 1: If entry to the premises is with the occupier's consent, the GEMS inspector must leave the premises if the consent ceases to have effect (see section 113).

Note 2: See Division 6 for general provisions relating to monitoring, such as:

- (a) obligations of GEMS inspectors in entering premises; and
- (b) other powers of GEMS inspectors; and
- (c) occupier's rights and responsibilities on entry.

#### 88 Monitoring powers of GEMS inspectors

The following are the *monitoring powers* that a GEMS inspector may exercise in relation to premises under section 87:

- (a) the power to search the premises and any thing on the premises;

- (b) the power to examine or observe any activity conducted on the premises;
- (c) the power to inspect, examine, take measurements of or conduct tests on any thing on the premises (including by operating a GEMS product);
- (d) the power to make any still or moving image or any recording of the premises or any thing on the premises;
- (e) the power to inspect any document on the premises;
- (f) the power to take extracts from, or make copies of, any such document;
- (g) the power to take onto the premises such equipment and materials as the GEMS inspector requires for the purpose of exercising powers in relation to the premises;
- (h) the powers set out in sections 89 and 92.

### **89 Operating electronic equipment**

- (1) The *monitoring powers* include the power to:
  - (a) operate electronic equipment on the premises (including operating the equipment to access information not held on the premises); and
  - (b) use a disk, tape or other storage device that:
    - (i) is on the premises; and
    - (ii) can be used with the equipment or is associated with it.
- (2) The *monitoring powers* include the powers mentioned in subsection (3) if information (*relevant data*) is found in the exercise of the power under subsection (1) that is relevant to determining whether:
  - (a) a provision of this Act has been, or is being, complied with; or
  - (b) information given in compliance or purported compliance with a provision of this Act is correct.
- (3) The powers are as follows:
  - (a) the power to operate electronic equipment on the premises to put the relevant data in documentary form and remove the documents so produced from the premises;

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- (b) the power to operate electronic equipment on the premises to transfer the relevant data to a disk, tape or other storage device that:
  - (i) is brought to the premises for the exercise of the power; or
  - (ii) is on the premises and the use of which for that purpose has been agreed in writing by the occupier of the premises;and remove the disk, tape or other storage device from the premises.
- (4) A GEMS inspector may operate electronic equipment as mentioned in subsection (1) or (3) only if the GEMS inspector believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

Note: For compensation for damage to electronic equipment, see section 121.

**90 Accessing information held on certain premises—notification to occupier**

- (1) If:
  - (a) an exercise of power under subsection 89(1) involves operating electronic equipment on premises to access information held on other premises; and
  - (b) it is practicable to notify the occupier of the premises on which the information is held that the information has been accessed;the GEMS inspector must:
  - (c) do so as soon as practicable; and
  - (d) if the GEMS inspector has exercised, or intends to exercise, powers under subsection 89(3) to allow for continued access to that information—state that fact in the notification.
- (2) A notification under subsection (1) must include sufficient information to allow the occupier of the premises on which the accessed information is held to contact the GEMS inspector.



**91 Expert assistance to operate electronic equipment**

- (1) This section applies if a GEMS inspector enters premises under a monitoring warrant.

*Securing equipment*

- (2) A GEMS inspector may do whatever is necessary to secure any electronic equipment that is on the premises if the GEMS inspector believes on reasonable grounds that:
- (a) there is information (*relevant data*) on the premises relevant to determining whether:
    - (i) a provision of this Act has been, or is being, complied with; or
    - (ii) information given in compliance or purported compliance with a provision of this Act is correct; and
  - (b) the relevant data may be accessible by operating the equipment; and
  - (c) expert assistance is required to operate the equipment; and
  - (d) the relevant data may be destroyed, altered or otherwise interfered with if the GEMS inspector does not take action under this subsection.
- (3) The GEMS inspector must give notice to the occupier of the premises, or another person who apparently represents the occupier, of:
- (a) the GEMS inspector's intention to secure the equipment; and
  - (b) the fact that the equipment may be secured for up to 24 hours.

*Period equipment may be secured*

- (4) The equipment may be secured until the earlier of the following happens:
- (a) the 24-hour period ends;
  - (b) the equipment has been operated by the expert.

Note: For compensation for damage to electronic equipment, see section 121.

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*Extensions*

- (5) The GEMS inspector may apply to an issuing officer for an extension of the 24-hour period if the GEMS inspector believes on reasonable grounds that the equipment needs to be secured for more than that period.
- (6) Before making the application, the GEMS inspector must give notice to the occupier of the premises, or another person who apparently represents the occupier, of his or her intention to apply for an extension. The occupier or other person is entitled to be heard in relation to that application.
- (7) The provisions of this Division relating to the issue of monitoring warrants apply, with such modifications as are necessary, to the issue of an extension.
- (8) The 24-hour period may be extended more than once.

**92 Securing evidence of the contravention of a related provision**

- (1) This section applies if a GEMS inspector enters premises under a monitoring warrant for either or both of the following purposes:
  - (a) determining whether a provision of this Act has been, or is being, complied with;
  - (b) determining whether information given in compliance or purported compliance with a provision of this Act is correct.
- (2) The *monitoring powers* include the power to secure a thing for a period not exceeding 24 hours if:
  - (a) the thing is found during the exercise of monitoring powers on the premises; and
  - (b) a GEMS inspector believes on reasonable grounds that:
    - (i) a related provision has been contravened with respect to the thing; or
    - (ii) the thing affords evidence of the contravention of a related provision; or
    - (iii) the thing is intended to be used for the purpose of contravening a related provision; and
  - (c) the GEMS inspector believes on reasonable grounds that:

- (i) it is necessary to secure the thing in order to prevent it from being concealed, lost or destroyed before a warrant to seize the thing is obtained; and
  - (ii) it is necessary to secure the thing without a warrant because the circumstances are serious and urgent.
- (3) If a GEMS inspector believes on reasonable grounds that the thing needs to be secured for more than 24 hours, the GEMS inspector may apply to an issuing officer for an extension of that period.
- (4) The GEMS inspector must give notice to the occupier of the premises, or another person who apparently represents the occupier, of his or her intention to apply for an extension. The occupier or other person is entitled to be heard in relation to that application.
- (5) The provisions of this Division relating to the issue of monitoring warrants apply, with such modifications as are necessary, to the issue of an extension.
- (6) The 24-hour period may be extended more than once.

### **Subdivision B—Persons assisting GEMS inspectors**

#### **93 Persons assisting GEMS inspectors**

*GEMS inspectors may be assisted by other persons*

- (1) A GEMS inspector may be assisted by other persons in exercising powers or performing functions or duties under this Division and Division 6, if that assistance is necessary and reasonable. A person giving such assistance is a **person assisting** the GEMS inspector for the purposes of this Division and Division 6.

*Powers, functions and duties of a person assisting the GEMS inspector*

- (2) A person assisting the GEMS inspector:
  - (a) may enter the premises; and

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- (b) may exercise powers and perform functions and duties under this Division and Division 6 for the purposes of assisting the GEMS inspector to determine whether:
    - (i) a provision of this Act has been, or is being, complied with; or
    - (ii) information given in compliance or purported compliance with a provision of this Act is correct; and
  - (c) must do so in accordance with a direction given to the person assisting by the GEMS inspector.
- (3) A power exercised by a person assisting the GEMS inspector as mentioned in subsection (2) is taken for all purposes to have been exercised by the GEMS inspector.
  - (4) A function or duty performed by a person assisting the GEMS inspector as mentioned in subsection (2) is taken for all purposes to have been performed by the GEMS inspector.
  - (5) If a direction is given under paragraph (2)(c) in writing, the direction is not a legislative instrument.

**Subdivision C—Monitoring warrants**

**94 Monitoring warrants**

*Application for warrant*

- (1) A GEMS inspector may apply to an issuing officer for a warrant under this section in relation to premises.

*Issue of warrant*

- (2) The issuing officer may issue the warrant if the issuing officer is satisfied, by information on oath or affirmation, that it is reasonably necessary that one or more GEMS inspectors should have access to the premises for the purpose of determining whether:
  - (a) a provision of this Act has been, or is being, complied with; or

- (b) information given in compliance or purported compliance with a provision of this Act is correct.
- (3) However, the issuing officer must not issue the warrant unless the GEMS inspector or another person has given to the issuing officer, either orally or by affidavit, such further information (if any) as the issuing officer requires concerning the grounds on which the issue of the warrant is being sought.

*Content of warrant*

- (4) The warrant must:
  - (a) describe the premises to which the warrant relates; and
  - (b) state that the warrant is issued under this section; and
  - (c) state the purpose for which the warrant is issued; and
  - (d) authorise, on any one or more occasions while the warrant remains in force, one or more GEMS inspectors (whether or not named in the warrant):
    - (i) to enter the premises; and
    - (ii) to exercise the powers set out in this Division and Division 6 in relation to the premises; and
  - (e) state whether entry is authorised to be made at any time of the day or during specified hours of the day; and
  - (f) specify the day (not more than 6 months after the issue of the warrant) on which the warrant ceases to be in force.

## Division 5—Investigation

### Subdivision A—Investigation powers

#### 95 GEMS inspector may enter premises by consent or under a warrant

- (1) If a GEMS inspector has reasonable grounds for suspecting that there may be evidential material on any premises, the GEMS inspector may:
  - (a) enter the premises; and
  - (b) exercise the investigation powers.

Note: The *investigation powers* are set out in sections 96, 97 and 100.

- (2) However, a GEMS inspector is not authorised to enter the premises unless:
  - (a) the occupier of the premises has consented to the entry and the GEMS inspector has shown his or her identity card if required by the occupier; or
  - (b) the entry is made under an investigation warrant.

Note 1: If entry to the premises is with the occupier's consent, the GEMS inspector must leave the premises if the consent ceases to have effect (see section 113).

Note 2: See Division 6 for general provisions relating to investigation, such as:

- (a) obligations of GEMS inspectors in entering premises; and
- (b) other powers of GEMS inspectors; and
- (c) occupier's rights and responsibilities on entry.

#### 96 Investigation powers of GEMS inspectors

The following are the *investigation powers* that a GEMS inspector may exercise in relation to premises under section 95:

- (a) if entry to the premises is with the occupier's consent—the power to search the premises, and any thing on the premises, for the evidential material the GEMS inspector has reasonable grounds for suspecting may be on the premises;

- (b) if entry to the premises is under an investigation warrant:
  - (i) the power to search the premises and any thing on the premises for the kind of evidential material specified in the warrant; and
  - (ii) the power to seize evidential material of that kind if the GEMS inspector finds it on the premises;
- (c) the power to inspect, examine, take measurements of or conduct tests on evidential material referred to in paragraph (a) or (b) (including by operating a GEMS product constituting evidential material);
- (d) the power to make any still or moving image or any recording of the premises or evidential material referred to in paragraph (a) or (b);
- (e) the power to take onto the premises such equipment and materials as the GEMS inspector requires for the purpose of exercising powers in relation to the premises;
- (f) the powers set out in sections 97 and 100.

### **97 Operating electronic equipment**

- (1) The *investigation powers* include the power to:
  - (a) operate electronic equipment on the premises (including operating the equipment to access evidential material not held on the premises); and
  - (b) use a disk, tape or other storage device that:
    - (i) is on the premises; and
    - (ii) can be used with the equipment or is associated with it;if a GEMS inspector has reasonable grounds for suspecting that the electronic equipment, disk, tape or other storage device is or contains evidential material.
- (2) The *investigation powers* include the following powers in relation to evidential material described in subsection (1) found in the exercise of the power under that subsection:
  - (a) if entry to the premises is under an investigation warrant—the power to seize the equipment and the disk, tape or other storage device referred to in that subsection;

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- (b) the power to operate electronic equipment on the premises to put the evidential material in documentary form and remove the documents so produced from the premises;
  - (c) the power to operate electronic equipment on the premises to transfer the evidential material to a disk, tape or other storage device that:
    - (i) is brought to the premises for the exercise of the power; or
    - (ii) is on the premises and the use of which for that purpose has been agreed in writing by the occupier of the premises;and remove the disk, tape or other storage device from the premises.
- (3) A GEMS inspector may operate electronic equipment as mentioned in subsection (1) or (2) only if the GEMS inspector believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.
- Note: For compensation for damage to electronic equipment, see section 121.
- (4) A GEMS inspector may seize equipment or a disk, tape or other storage device as mentioned in paragraph (2)(a) only if:
- (a) it is not practicable to put the evidential material in documentary form as mentioned in paragraph (2)(b) or to transfer the evidential material as mentioned in paragraph (2)(c); or
  - (b) possession of the equipment or the disk, tape or other storage device by the occupier could constitute an offence against a law of the Commonwealth.

**98 Accessing evidential material held on certain premises—  
notification to occupier**

- (1) If:
  - (a) an exercise of power under subsection 97(1) involves operating electronic equipment on premises to access evidential material held on other premises; and



- (b) it is practicable to notify the occupier of the premises on which the evidential material is held that the evidential material has been accessed;
- the GEMS inspector must:
- (c) do so as soon as practicable; and
  - (d) if the GEMS inspector has exercised, or intends to exercise, powers under subsection 97(2) to allow for continued access to that evidential material—state that fact in the notification.
- (2) A notification under subsection (1) must include sufficient information to allow the occupier of the premises on which the evidential material is held to contact the GEMS inspector.

### **99 Expert assistance to operate electronic equipment**

- (1) This section applies if a GEMS inspector enters premises under an investigation warrant to search for evidential material.

#### *Securing equipment*

- (2) The GEMS inspector may do whatever is necessary to secure any electronic equipment that is on the premises if the GEMS inspector believes on reasonable grounds that:
- (a) there is evidential material of the kind specified in the warrant on the premises; and
  - (b) the evidential material may be accessible by operating the electronic equipment; and
  - (c) expert assistance is required to operate the equipment; and
  - (d) the evidential material may be destroyed, altered or otherwise interfered with, if the GEMS inspector does not take action under this subsection.
- (3) The GEMS inspector must give notice to the occupier of the premises, or another person who apparently represents the occupier, of:
- (a) the GEMS inspector's intention to secure the equipment; and
  - (b) the fact that the equipment may be secured for up to 24 hours.

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*Period equipment may be secured*

- (4) The equipment may be secured until the earlier of the following happens:
- (a) the 24-hour period ends;
  - (b) the equipment has been operated by the expert.

Note: For compensation for damage to electronic equipment, see section 121.

*Extensions*

- (5) The GEMS inspector may apply to an issuing officer for an extension of the 24-hour period, if the GEMS inspector believes on reasonable grounds that the equipment needs to be secured for more than that period.
- (6) Before making the application, the GEMS inspector must give notice to the occupier of the premises, or another person who apparently represents the occupier, of the GEMS inspector's intention to apply for an extension. The occupier or other person is entitled to be heard in relation to that application.
- (7) The provisions of this Division relating to the issue of investigation warrants apply, with such modifications as are necessary, to the issue of an extension.
- (8) The 24-hour period may be extended more than once.

**100 Seizing evidence of contravention of related provision**

- (1) This section applies if a GEMS inspector enters premises under an investigation warrant to search for evidential material.
- (2) The *investigation powers* include seizing a thing that is not evidential material of the kind specified in the warrant if:
- (a) in the course of searching for the kind of evidential material specified in the warrant, the GEMS inspector finds the thing; and
  - (b) the GEMS inspector believes on reasonable grounds that:
    - (i) a related provision has been contravened with respect to the thing; or

- (ii) the thing affords evidence of the contravention of a related provision; or
- (iii) the thing is intended to be used for the purpose of contravening a related provision; and
- (c) the GEMS inspector believes on reasonable grounds that it is necessary to seize the thing in order to prevent its concealment, loss or destruction.

## **Subdivision B—Persons assisting GEMS inspectors**

### **101 Persons assisting GEMS inspectors**

*GEMS inspectors may be assisted by other persons*

- (1) A GEMS inspector may be assisted by other persons in exercising powers or performing functions or duties under this Division and Division 6, if that assistance is necessary and reasonable. A person giving such assistance is a **person assisting** the GEMS inspector for the purposes of this Division and Division 6.

*Powers, functions and duties of a person assisting the GEMS inspector*

- (2) A person assisting the GEMS inspector:
  - (a) may enter the premises; and
  - (b) may exercise powers and perform functions and duties under this Division and Division 6 in relation to evidential material; and
  - (c) must do so in accordance with a direction given to the person assisting by the GEMS inspector.
- (3) A power exercised by a person assisting the GEMS inspector as mentioned in subsection (2) is taken for all purposes to have been exercised by the GEMS inspector.
- (4) A function or duty performed by a person assisting the GEMS inspector as mentioned in subsection (2) is taken for all purposes to have been performed by the GEMS inspector.

- (5) If a direction is given under paragraph (2)(c) in writing, the direction is not a legislative instrument.

### **Subdivision C—General provisions relating to seizure**

#### **102 Copies of seized things to be provided**

- (1) This section applies if:
- (a) an investigation warrant is being executed in relation to premises; and
  - (b) a GEMS inspector seizes one or more of the following from the premises under this Division:
    - (i) a document, film, computer file or other thing that can be readily copied;
    - (ii) a storage device, the information in which can be readily copied.
- (2) The occupier of the premises, or another person who apparently represents the occupier and who is present when the warrant is executed, may request the GEMS inspector to give a copy of the thing or the information to the occupier or other person.
- (3) The GEMS inspector must comply with the request as soon as practicable after the seizure.
- (4) However, the GEMS inspector is not required to comply with the request if possession of the document, film, computer file, thing or information by the occupier or other person could constitute an offence against a law of the Commonwealth.

#### **103 Receipts for seized things**

- (1) The GEMS inspector must provide a receipt for a thing that is seized under this Division.
- (2) One receipt may cover 2 or more things seized.

## **104 Return of seized things**

- (1) The GEMS Regulator must take reasonable steps to return a thing seized under this Division when the earliest of the following happens:
- (a) the reason for the thing's seizure no longer exists;
  - (b) it is decided that the thing is not to be used in evidence;
  - (c) the period of 60 days after the thing's seizure ends.

Note: See subsections (2) and (3) for exceptions to this rule.

### *Exceptions*

- (2) Subsection (1):
- (a) is subject to any contrary order of a court; and
  - (b) does not apply if the thing:
    - (i) is forfeited or forfeitable to the Commonwealth; or
    - (ii) is the subject of a dispute as to ownership.
- (3) The GEMS Regulator is not required to take reasonable steps to return a thing because of paragraph (1)(c) if:
- (a) proceedings in respect of which the thing may afford evidence were instituted before the end of the 60 days and have not been completed (including an appeal to a court in relation to those proceedings); or
  - (b) the thing may continue to be retained because of an order under section 105; or
  - (c) the Commonwealth or the GEMS Regulator is otherwise authorised (by a law, or an order of a court, of the Commonwealth or of a State or Territory) to retain, destroy, dispose of or otherwise deal with the thing.

### *Return of thing*

- (4) A thing that is required to be returned under this section must be returned to the person from whom it was seized (or to the owner if that person is not entitled to possess it).

### **105 Issuing officer may permit a thing to be retained**

- (1) The GEMS Regulator may apply to an issuing officer for an order permitting the retention of a thing seized under this Division for a further period if proceedings in respect of which the thing may afford evidence have not commenced before the end of:
  - (a) 60 days after the seizure; or
  - (b) a period previously specified in an order of an issuing officer under this section.
- (2) Before making the application, the GEMS Regulator must:
  - (a) take reasonable steps to discover who has an interest in the retention of the thing; and
  - (b) if it is practicable to do so, give notice of the proposed application to each person whom the GEMS Regulator believes to have such an interest.

#### *Order to retain thing*

- (3) The issuing officer may order that the thing may continue to be retained for a period specified in the order if the issuing officer is satisfied that it is necessary for the thing to continue to be retained:
  - (a) for the purposes of an investigation as to whether an offence against, or civil penalty provision under, this Act has been contravened; or
  - (b) for the purposes of an investigation as to whether a related provision has been contravened; or
  - (c) to enable evidence of a contravention mentioned in paragraph (a) or (b) to be secured for the purposes of a prosecution or an action to obtain a civil penalty order.
- (4) The period specified must not exceed 3 years.

### **106 Disposal of things**

- (1) The GEMS Regulator may dispose of a thing seized under this Division if:
  - (a) the GEMS Regulator has taken reasonable steps to return the thing to a person; and
  - (b) either:

- (i) the GEMS Regulator has been unable to locate the person; or
  - (ii) the person has refused to take possession of the thing.
- (2) The GEMS Regulator may dispose of the thing in such manner as the GEMS Regulator thinks appropriate.

Note: If the operation of this section would result in an acquisition of property otherwise than on just terms, see section 174.

## **Subdivision D—Investigation warrants**

### **107 Investigation warrants**

#### *Application for warrant*

- (1) A GEMS inspector may apply to an issuing officer for a warrant under this section in relation to premises.

#### *Issue of warrant*

- (2) The issuing officer may issue the warrant if the issuing officer is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that there is, or there may be within the next 72 hours, evidential material on the premises.
- (3) However, the issuing officer must not issue the warrant unless the GEMS inspector or another person has given to the issuing officer, either orally or by affidavit, such further information (if any) as the issuing officer requires concerning the grounds on which the issue of the warrant is being sought.

#### *Content of warrant*

- (4) The warrant must:
- (a) state the offence or offences, or civil penalty provision or civil penalty provisions, to which the warrant relates; and
  - (b) describe the premises to which the warrant relates; and
  - (c) state that the warrant is issued under this Subdivision; and
  - (d) specify the kinds of evidential material that are to be searched for under the warrant; and

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- (e) state that the evidential material specified may be seized under the warrant; and
- (f) state that any thing found in the course of executing the warrant that the person executing the warrant believes on reasonable grounds to be evidence of the contravention of a related provision, may be seized under the warrant; and
- (g) name one or more GEMS inspectors; and
- (h) authorise the GEMS inspectors named in the warrant:
  - (i) to enter the premises; and
  - (ii) to exercise the powers set out in this Division and Division 6 in relation to the premises; and
- (i) state whether entry is authorised to be made at any time of the day or during specified hours of the day; and
- (j) specify the day (not more than 1 week after the issue of the warrant) on which the warrant ceases to be in force.

**108 Investigation warrants by telephone, fax etc.**

*Application for warrant*

- (1) A GEMS inspector may apply to an issuing officer by telephone, fax or other electronic means for a warrant under section 107 in relation to premises:
  - (a) in an urgent case; or
  - (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.
- (2) The issuing officer may require communication by voice to the extent that it is practicable in the circumstances.
- (3) Before applying for the warrant, the GEMS inspector must prepare an information of the kind mentioned in subsection 107(2) in relation to the premises that sets out the grounds on which the warrant is sought. If it is necessary to do so, the GEMS inspector may apply for the warrant before the information is sworn or affirmed.



*Issuing officer may complete and sign warrant*

- (4) The issuing officer may complete and sign the same warrant that would have been issued under section 107 if the issuing officer is satisfied that there are reasonable grounds for doing so:
  - (a) after considering the terms of the information; and
  - (b) after receiving such further information (if any) as the issuing officer requires concerning the grounds on which the issue of the warrant is being sought.
- (5) After completing and signing the warrant, the issuing officer must inform the GEMS inspector, by telephone, fax or other electronic means, of:
  - (a) the terms of the warrant; and
  - (b) the day on which and the time at which the warrant was signed.

*Obligations on GEMS inspector*

- (6) The GEMS inspector must then do the following:
  - (a) complete a form of warrant in the same terms as the warrant completed and signed by the issuing officer;
  - (b) state on the form the following:
    - (i) the name of the issuing officer;
    - (ii) the day on which, and the time at which, the warrant was signed;
  - (c) send the following to the issuing officer:
    - (i) the form of warrant completed by the GEMS inspector;
    - (ii) the information referred to in subsection (3), which must have been duly sworn or affirmed.
- (7) The GEMS inspector must comply with paragraph (6)(c) by the end of the day after the earlier of the following:
  - (a) the day on which the warrant ceases to be in force;
  - (b) the day on which the warrant is executed.

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*Issuing officer to attach documents together*

- (8) The issuing officer must attach the documents provided under paragraph (6)(c) to the warrant signed by the issuing officer.

**109 Authority of warrant**

- (1) A form of warrant duly completed under subsection 108(6) is authority for the same powers as are authorised by the warrant signed by the issuing officer under subsection 108(4).
- (2) In any proceedings, a court is to assume (unless the contrary is proved) that an exercise of power was not authorised by a warrant completed and signed under section 108 if:
- (a) it is material, in those proceedings, for the court to be satisfied that the exercise of power was authorised by that section; and
  - (b) the warrant signed by the issuing officer authorising the exercise of the power is not produced in evidence.

**110 Offence relating to warrants by telephone, fax etc.**

A GEMS inspector must not:

- (a) state in a document that purports to be a form of warrant under section 108 the name of an issuing officer unless that issuing officer signed the warrant; or
- (b) state on a form of warrant under that section a matter that, to the GEMS inspector's knowledge, departs in a material particular from the terms of the warrant signed by the issuing officer under that section; or
- (c) purport to execute, or present to another person, a document that purports to be a form of warrant under that section that the GEMS inspector knows departs in a material particular from the terms of a warrant signed by an issuing officer under that section; or
- (d) purport to execute, or present to another person, a document that purports to be a form of warrant under that section where the GEMS inspector knows that no warrant in the terms of the form of warrant has been completed and signed by an issuing officer; or

- (e) give to an issuing officer a form of warrant under that section that is not the form of warrant that the GEMS inspector purported to execute.

Penalty: Imprisonment for 2 years.

### **111 Completing execution of an investigation warrant after temporary cessation**

- (1) This section applies if a GEMS inspector, and all persons assisting, who are executing an investigation warrant in relation to premises, temporarily cease its execution and leave the premises.
- (2) The GEMS inspector, and persons assisting, may complete the execution of the warrant if:
  - (a) the warrant is still in force; and
  - (b) the GEMS inspector and persons assisting are absent from the premises:
    - (i) for not more than 1 hour; or
    - (ii) if there is an emergency situation, for not more than 12 hours or such longer period as is allowed by an issuing officer under subsection (5); or
    - (iii) for a longer period if the occupier of the premises consents in writing.

#### *Application for extension in emergency situation*

- (3) A GEMS inspector, or person assisting, may apply to an issuing officer for an extension of the 12-hour period mentioned in subparagraph (2)(b)(ii) if:
  - (a) there is an emergency situation; and
  - (b) the GEMS inspector or person assisting believes on reasonable grounds that the GEMS inspector and the persons assisting will not be able to return to the premises within that period.
- (4) If it is practicable to do so, before making the application, the GEMS inspector or person assisting must give notice to the occupier of the premises of his or her intention to apply for an extension.

*Extension in emergency situation*

- (5) An issuing officer may extend the period during which the GEMS inspector and persons assisting may be away from the premises if:
- (a) an application is made under subsection (3); and
  - (b) the issuing officer is satisfied, by information on oath or affirmation, that there are exceptional circumstances that justify the extension; and
  - (c) the extension would not result in the period ending after the warrant ceases to be in force.

**112 Completing execution of warrant stopped by court order**

A GEMS inspector, and any persons assisting, may complete the execution of a warrant that has been stopped by an order of a court if:

- (a) the order is later revoked or reversed on appeal; and
- (b) the warrant is still in force when the order is revoked or reversed.

## **Division 6—General provisions relating to monitoring and investigation**

### **Subdivision A—Obligations of GEMS inspectors in entering premises**

#### **113 Consent**

- (1) Before obtaining the consent of an occupier of premises for the purposes of paragraph 87(2)(a) or 95(2)(a) (entering premises by consent), a GEMS inspector must inform the occupier that the occupier may refuse consent.
- (2) A consent has no effect unless the consent is voluntary.
- (3) A consent may be expressed to be limited to entry during a particular period. If so, the consent has effect for that period unless the consent is withdrawn before the end of that period.
- (4) A consent that is not limited as mentioned in subsection (3) has effect until the consent is withdrawn.
- (5) If a GEMS inspector entered premises because of the consent of the occupier of the premises, the GEMS inspector, and any person assisting the GEMS inspector, must leave the premises if the consent ceases to have effect.

#### **114 Announcement before entry under warrant**

- (1) Before entering premises under a monitoring warrant or an investigation warrant, a GEMS inspector must:
  - (a) announce that he or she is authorised to enter the premises; and
  - (b) show his or her identity card to the occupier of the premises, or to another person who apparently represents the occupier, if the occupier or other person is present at the premises; and
  - (c) give any person at the premises an opportunity to allow entry to the premises.

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- (2) However, a GEMS inspector is not required to comply with subsection (1) if the GEMS inspector believes on reasonable grounds that immediate entry to the premises is required:
  - (a) to ensure the safety of a person; or
  - (b) to ensure that the effective execution of the warrant is not frustrated.
- (3) If:
  - (a) a GEMS inspector does not comply with subsection (1) because of subsection (2); and
  - (b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises;the GEMS inspector must, as soon as practicable after entering the premises, show his or her identity card to the occupier or other person.

**115 GEMS inspector to be in possession of warrant**

- (1) A GEMS inspector executing a monitoring warrant must be in possession of the warrant issued by the issuing officer under section 94, or a copy of the warrant as so issued.
- (2) A GEMS inspector executing an investigation warrant must be in possession of:
  - (a) the warrant issued by the issuing officer under section 107, or a copy of the warrant as so issued; or
  - (b) the form of warrant completed under subsection 108(6), or a copy of the form as so completed.

**116 Details of warrant etc. to be given to occupier**

- (1) A GEMS inspector must comply with subsection (2) if:
  - (a) a monitoring warrant or an investigation warrant is being executed in relation to premises; and
  - (b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises.
- (2) The GEMS inspector executing the warrant must, as soon as practicable:

- (a) if the warrant is a monitoring warrant issued under section 94—make a copy of the warrant available to the occupier or other person (which need not include the signature of the issuing officer who issued it); and
- (b) if the warrant is an investigation warrant—do one of the following:
  - (i) if the warrant was issued under section 107—make a copy of the warrant available to the occupier or other person (which need not include the signature of the issuing officer who issued it);
  - (ii) if the warrant was signed under section 108—make a copy of the form of warrant completed under subsection 108(6) available to the occupier or other person; and
- (c) inform the occupier or other person of the rights and responsibilities of the occupier or other person under Subdivision C.

## **Subdivision B—Other powers of GEMS inspectors**

### **117 Use of force in executing a warrant**

In executing a monitoring warrant or an investigation warrant:

- (a) a GEMS inspector may use such force against things as is necessary and reasonable in the circumstances; and
- (b) a person assisting the GEMS inspector may use such force against things as is necessary and reasonable in the circumstances.

### **118 GEMS inspector may ask questions and seek production of documents**

#### *Application*

- (1) This section applies if:
  - (a) a GEMS inspector enters premises for the purposes of determining whether:
    - (i) a provision of this Act has been, or is being, complied with; or

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- (ii) information given in compliance or purported compliance with a provision of this Act is correct; or
- (b) a GEMS inspector enters premises to search for evidential material.

*Entry with consent*

- (2) If the entry is authorised because the occupier of the premises consented to the entry, the GEMS inspector may ask the occupier to answer any questions, and produce any document, relating to:
  - (a) the operation of the provision mentioned in subparagraph (1)(a)(i); or
  - (b) the information mentioned in subparagraph (1)(a)(ii); or
  - (c) evidential material.

*Entry under a warrant*

- (3) If the entry is authorised by a monitoring warrant or an investigation warrant, the GEMS inspector may require any person on the premises to answer any questions, and produce any document, relating to:
  - (a) in the case of a monitoring warrant:
    - (i) the operation of the provision mentioned in subparagraph (1)(a)(i); or
    - (ii) the information mentioned in subparagraph (1)(a)(ii); or
  - (b) in the case of an investigation warrant—evidential material of the kind specified in the warrant.

*Offence*

- (4) A person commits an offence if:
  - (a) the person is subject to a requirement under subsection (3); and
  - (b) the person fails to comply with the requirement.

Penalty for contravention of this subsection: 30 penalty units.



## **Subdivision C—Occupier’s rights and responsibilities on entry**

### **119 Occupier entitled to observe execution of warrant**

- (1) The occupier of premises to which a monitoring warrant or an investigation warrant relates, or another person who apparently represents the occupier, is entitled to observe the execution of an investigation warrant if the occupier or other person is present at the premises while the warrant is being executed.
- (2) The right to observe the execution of the warrant ceases if the occupier or other person impedes that execution.
- (3) This section does not prevent the execution of the warrant in 2 or more areas of the premises at the same time.

### **120 Occupier to provide GEMS inspector with facilities and assistance**

- (1) The occupier of premises to which a monitoring warrant or an investigation warrant relates, or another person who apparently represents the occupier, must provide:
  - (a) a GEMS inspector executing the warrant; and
  - (b) any person assisting the GEMS inspector;with all reasonable facilities and assistance for the effective exercise of their powers.
- (2) A person commits an offence if:
  - (a) the person is subject to subsection (1); and
  - (b) the person fails to comply with that subsection.

Penalty for contravention of this subsection: 30 penalty units.

## **Subdivision D—General provisions**

### **121 Compensation for damage to electronic equipment**

- (1) This section applies if:
  - (a) as a result of electronic equipment being operated as mentioned in Division 4 or 5:

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- (i) damage is caused to the equipment; or
    - (ii) the data recorded on the equipment is damaged; or
    - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
  - (b) the damage or corruption occurs because:
    - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
    - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in a relevant court for such reasonable amount of compensation as the court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees or agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.

## **Division 7—Giving GEMS information to GEMS inspectors**

### **122 Meaning of *person who has GEMS information***

A person is a *person who has GEMS information* if the GEMS Regulator believes, on reasonable grounds, that the person is capable of giving information, or producing a document, relevant for the purposes of investigating or preventing:

- (a) a possible contravention of a provision of this Act; or
- (b) a possible offence against this Act, or against the *Crimes Act 1914* or the *Criminal Code* that relates to this Act.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

### **123 GEMS Regulator may require a person to provide information**

- (1) The GEMS Regulator may give a written notice to a person who has GEMS information requiring the person to:
  - (a) give to a GEMS inspector specified in the notice any information that is specified in the notice; or
  - (b) produce to a GEMS inspector specified in the notice any document (or part of a document) that is specified in the notice.

*Matters to be included in notice*

- (2) The notice must also specify:
  - (a) the day on which the notice is given; and
  - (b) the person to whom the notice is given; and
  - (c) the manner in which the information is to be given or the document produced; and
  - (d) that the information is to be given, or the document produced, within 14 days after the notice is given, or within such longer period as is specified in the notice; and

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- (e) that the person may commit an offence if the person does not comply with the notice.
- (3) The notice must set out the effect of sections 137.1 and 137.2 of the *Criminal Code* (false or misleading information or documents).

*Offence for failing to comply with a notice*

- (4) A person commits an offence if:
  - (a) the person is required to give information or produce a document to a GEMS inspector under subsection (1); and
  - (b) the person does not give the GEMS inspector the information or produce the document within the period specified in the notice.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

**124 GEMS Regulator may require a person to appear before a GEMS inspector**

- (1) The GEMS Regulator may give a written notice to a person who has GEMS information requiring the person to appear before the GEMS inspector specified in the notice:
  - (a) to answer any questions put by the GEMS inspector; and
  - (b) to produce to the GEMS inspector any documents that are referred to in the notice.
- (2) The notice must also specify:
  - (a) the day on which the notice is given; and
  - (b) the person to whom the notice is given; and
  - (c) the time and place at which the person is to appear; and
  - (d) that the person may commit an offence if the person does not comply with the notice.

The time referred to in paragraph (c) must be more than 14 days after the notice is given.
- (3) The notice must set out the effect of sections 137.1 and 137.2 of the *Criminal Code* (false or misleading information or documents).

*Offence for failing to appear*

- (4) A person commits an offence if:
- (a) the person is required to appear before a GEMS inspector under subsection (1); and
  - (b) the person does not appear before the GEMS inspector.

Penalty for contravention of this subsection: Imprisonment for 6 months or 30 penalty units, or both.

*Offence for failing to answer questions or produce a document*

- (5) A person commits an offence if:
- (a) the person is required under subsection (1) to appear before a GEMS inspector; and
  - (b) when appearing before the GEMS inspector, the person does not:
    - (i) answer a question put by the GEMS inspector; or
    - (ii) produce a document to the GEMS inspector as required by notice given under that subsection.

Penalty for contravention of this subsection: Imprisonment for 6 months or 30 penalty units, or both.

## Division 8—Testing compliance of GEMS products

### 125 Authorising persons to test GEMS products

A person is *authorised to test GEMS products* in a product class for the purpose of determining whether a GEMS product or model of GEMS products in that product class complies with a provision of this Act if the person satisfies the requirements specified for that product class by the GEMS Regulator, by legislative instrument, for the purposes of this section.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

### 126 Testing GEMS products etc.

- (1) A person who is authorised to test GEMS products in a product class may test, examine and sample any of the following GEMS products in that product class for the purpose of determining whether the product, or a model of the product, complies with a provision of this Act:
- (a) a GEMS product purchased by the person;
  - (b) a GEMS product given to the GEMS Regulator under section 57 (requirement for registrant to give product—determining whether model complies with GEMS determination);
  - (c) a GEMS product purchased by a GEMS inspector under section 86 (inspection powers in public areas of GEMS business premises);
  - (d) a GEMS product seized under:
    - (i) section 96 (investigation powers of GEMS inspectors);
    - or
    - (ii) section 100 (seizing evidence of contravention of related provision).

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (2) Without limiting subsection (1), the power under that subsection:

- (a) includes the power to test, examine and sample a GEMS product in accordance with requirements specified under section 63; and
- (b) may be exercised in relation to a GEMS product even though that might result in:
  - (i) damage to, or the destruction of, the product or a package containing the product; or
  - (ii) the reduction in the value of the product or a package containing the product.
- (3) However, if the GEMS product is covered by paragraph (1)(b) or (d), the person must not be more destructive in exercising the power under subsection (1) in relation to the product than is reasonable for the purpose of determining whether the product, or a model of the product, complies with a provision of this Act.

Note: If the operation of this section would result in an acquisition of property otherwise than on just terms, see section 174.

## Division 9—Issuing officers

### 127 Powers of issuing officers

*Powers conferred personally*

- (1) A power conferred on an issuing officer by this Act is conferred on the issuing officer:
  - (a) in a personal capacity; and
  - (b) not as a court or a member of a court.

*Powers need not be accepted*

- (2) The issuing officer need not accept the power conferred.

*Protection and immunity*

- (3) An issuing officer exercising a power conferred by this Act has the same protection and immunity as if the issuing officer were exercising the power:
  - (a) as the court of which the issuing officer is a member; or
  - (b) as a member of the court of which the issuing officer is a member.



## **Part 8—Enforcement**

### **Division 1—Guide to this Part**

#### **128 Guide to this Part**

This Part provides for a range of actions to be taken to enforce this Act.

Division 2 allows a court to order a person to pay a pecuniary penalty for contravening a civil penalty provision of this Act.

Division 3 allows GEMS inspectors to give infringement notices for alleged contraventions of civil penalty provisions of this Act. If a person does not pay an amount in accordance with the notice, the person may be required to pay a higher amount under a civil penalty order, or be subject to a criminal prosecution (if the alleged contravention also constitutes an offence).

Division 4 deals with enforceable undertakings. If a person gives an undertaking relating to complying with this Act, the undertaking may be enforced by a court order.

Division 5 allows injunctions to be sought for contraventions, or potential contraventions, of this Act.

Division 6 allows the GEMS Regulator to publicise details of enforcement action taken under this Part, including the names of persons in relation to whom the action has been taken. In addition, certain adverse decisions relating to the registration of models of GEMS products may be publicised, including the names of registrants.

## Division 2—Civil penalties

### Subdivision A—Preliminary

#### 129 *Civil penalty provisions*

A provision of this Act is a *civil penalty provision* if:

- (a) either:
  - (i) the provision sets out at its foot a pecuniary penalty, or penalties, indicated by the words “Civil penalty”; or
  - (ii) another provision of this Act provides that the provision is a civil penalty provision, or that a person is liable to a civil penalty if the person contravenes the provision; and
- (b) the provision is a subsection, or a section that is not divided into subsections.

Note: See also section 6 for references in this Act to contravening a civil penalty provision or an offence provision.

### Subdivision B—Obtaining a civil penalty order

#### 130 Civil penalty orders

##### *Application for order*

- (1) The GEMS Regulator may apply to a relevant court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.
- (2) The GEMS Regulator must make the application within 6 years of the alleged contravention.

##### *Court may order person to pay pecuniary penalty*

- (3) If the relevant court is satisfied that the person has contravened the civil penalty provision, the court may order the person to pay to the Commonwealth such pecuniary penalty for the contravention as the court determines to be appropriate.

Note: Subsection (5) sets out the maximum penalty that the court may order the person to pay.

- (4) An order under subsection (3) is a *civil penalty order*.

*Determining pecuniary penalty*

- (5) The pecuniary penalty must not be more than:
- (a) if the person is a body corporate—5 times the pecuniary penalty specified for the civil penalty provision; and
  - (b) otherwise—the pecuniary penalty specified for the civil penalty provision.
- (6) In determining the pecuniary penalty, the court may take into account all relevant matters, including:
- (a) the nature and extent of the contravention; and
  - (b) the nature and extent of any loss or damage suffered because of the contravention; and
  - (c) the circumstances in which the contravention took place; and
  - (d) whether the person has previously been found by a court to have engaged in any similar conduct.

**131 Civil enforcement of penalty**

- (1) A pecuniary penalty is a debt payable to the Commonwealth.
- (2) The Commonwealth may enforce a civil penalty order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgement debt.

**132 Conduct contravening more than one civil penalty provision**

- (1) If conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted under this Division against a person in relation to the contravention of any one or more of those provisions.
- (2) However, the person is not liable to more than one pecuniary penalty under this Division in relation to the same conduct.

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**133 Multiple contraventions**

- (1) A relevant court may make a single civil penalty order against a person for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions of the same or a similar character.

Note: For continuing contraventions of civil penalty provisions, see section 142.

- (2) However, the penalty must not exceed the sum of the maximum penalties that could be ordered if a separate penalty were ordered for each of the contraventions.

**134 Proceedings may be heard together**

A relevant court may direct that 2 or more proceedings for civil penalty orders are to be heard together.

**135 Civil evidence and procedure rules for civil penalty orders**

A relevant court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty order.

**136 Contravening a civil penalty provision is not an offence**

A contravention of a civil penalty provision is not an offence.

**Subdivision C—Civil proceedings and criminal proceedings**

**137 Civil proceedings after criminal proceedings**

A relevant court may not make a civil penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention.

### **138 Criminal proceedings during civil proceedings**

- (1) Proceedings for a civil penalty order against a person for a contravention of a civil penalty provision are stayed if:
  - (a) criminal proceedings are commenced or have already been commenced against the person for an offence; and
  - (b) the offence is constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the contravention.
- (2) The proceedings for the order (the *civil proceedings*) may be resumed if the person is not convicted of the offence. Otherwise:
  - (a) the civil proceedings are dismissed; and
  - (b) costs must not be awarded in relation to the civil proceedings.

### **139 Criminal proceedings after civil proceedings**

Criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person in relation to the contravention.

### **140 Evidence given in civil proceedings not admissible in criminal proceedings**

- (1) Evidence of information given, or evidence of production of documents by an individual, is not admissible in criminal proceedings against the individual if:
  - (a) the individual previously gave the evidence or produced the documents in proceedings for a civil penalty order against the individual for an alleged contravention of a civil penalty provision (whether or not the order was made); and
  - (b) the conduct alleged to constitute the offence is the same, or substantially the same, as the conduct alleged to constitute the contravention.
- (2) However, subsection (1) does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the civil penalty order.

### **Subdivision D—Miscellaneous**

#### **141 Ancillary contravention of civil penalty provisions**

- (1) A person must not:
- (a) attempt to contravene a civil penalty provision; or
  - (b) aid, abet, counsel or procure a contravention of a civil penalty provision; or
  - (c) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
  - (d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or
  - (e) conspire with others to effect a contravention of a civil penalty provision.

Note: Section 144 (which provides that a person's state of mind does not need to be proven in relation to a civil penalty provision) does not apply to subsection (1) of this section.

#### *Civil penalty*

- (2) A person who contravenes subsection (1) in relation to a civil penalty provision is taken to have contravened the provision.

#### **142 Continuing contraventions of civil penalty provisions**

- (1) If an act or thing is required under a civil penalty provision to be done:
- (a) within a particular period; or
  - (b) before a particular time;
- then the obligation to do that act or thing continues until the act or thing is done (even if the period has expired or the time has passed).
- (2) A person who contravenes a civil penalty provision that requires an act or thing to be done:
- (a) within a particular period; or
  - (b) before a particular time;

commits a separate contravention of that provision in respect of each day during which the contravention occurs (including the day the relevant civil penalty order is made or any later day).

### **143 Mistake of fact**

- (1) A person is not liable to have a civil penalty order made against the person for a contravention of a civil penalty provision if:
  - (a) at or before the time of the conduct constituting the contravention, the person:
    - (i) considered whether or not facts existed; and
    - (ii) was under a mistaken but reasonable belief about those facts; and
  - (b) had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.
- (2) For the purposes of subsection (1), a person may be regarded as having considered whether or not facts existed if:
  - (a) the person had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
  - (b) the person honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.
- (3) A person who wishes to rely on subsection (1) or (2) in proceedings for a civil penalty order bears an evidential burden in relation to that matter.

### **144 State of mind**

- (1) In proceedings for a civil penalty order against a person for a contravention of a civil penalty provision (other than subsection 141(1)), it is not necessary to prove:
  - (a) the person's intention; or
  - (b) the person's knowledge; or
  - (c) the person's recklessness; or
  - (d) the person's negligence; or

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- (e) any other state of mind of the person.
- (2) Subsection (1) does not affect the operation of section 143 (which is about mistake of fact).



## **Division 3—Infringement notices**

### **Subdivision A—Preliminary**

#### **145 Enforceable provisions**

A civil penalty provision is *enforceable* under this Division.

### **Subdivision B—Infringement notices**

#### **146 When an infringement notice may be given**

- (1) If a GEMS inspector has reasonable grounds to believe that a person has contravened a provision enforceable under this Division, the GEMS inspector may give to the person an infringement notice for the alleged contravention.
- (2) The infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place.
- (3) A single infringement notice must relate only to a single contravention of a single civil penalty provision unless subsection (4) applies.
- (4) A GEMS inspector may give a person a single infringement notice relating to multiple contraventions of a single provision if:
  - (a) the provision requires the person to do a thing within a particular period or before a particular time; and
  - (b) the person fails or refuses to do that thing within that period or before that time; and
  - (c) the failure or refusal occurs on more than one day; and
  - (d) each contravention is constituted by the failure or refusal on one of those days.

Note: For continuing contraventions of civil penalty provisions, see section 142.

### **147 Matters to be included in an infringement notice**

- (1) An infringement notice must:
  - (a) be identified by a unique number; and
  - (b) state the day on which it is given; and
  - (c) state the name of the person to whom the notice is given; and
  - (d) state the name of the person who gave the notice; and
  - (e) give brief details of the alleged contravention, including:
    - (i) the provision that was allegedly contravened; and
    - (ii) the maximum penalty that a court could impose for the contravention; and
    - (iii) the time (if known) and day of, and the place of, the alleged contravention; and
  - (f) state the amount that is payable under the notice (see subsection (2)); and
  - (g) give an explanation of how payment of the amount is to be made; and
  - (h) state that, if the person to whom the notice is given pays the amount within 28 days after the day the notice is given, then (unless the notice is withdrawn) neither criminal proceedings, nor proceedings for a civil penalty order, will be brought in relation to the conduct constituting the alleged contravention; and
  - (i) state that payment of the amount is not an admission of guilt or liability, but that the giving of the notice and the payment of the amount may be publicised under section 162; and
  - (j) state that the person may apply to the GEMS Regulator to have the period in which to pay the amount extended; and
  - (k) state that the person may choose not to pay the amount and, if the person does so, that the following proceedings may be brought against the person in relation to the conduct constituting the alleged contravention:
    - (i) proceedings for a civil penalty order;
    - (ii) criminal proceedings, if the conduct also constitutes an offence; and
  - (l) set out how the notice can be withdrawn; and

- (m) state that if the notice is withdrawn any amount paid under the notice must be refunded; and
  - (n) state that if the notice is withdrawn, the following proceedings may be brought against the person in relation to the conduct constituting the alleged contravention:
    - (i) proceedings for a civil penalty order;
    - (ii) criminal proceedings, if the conduct also constitutes an offence; and
  - (o) state that the person may make written representations to the GEMS Regulator seeking the withdrawal of the notice.
- (2) For the purposes of paragraph (1)(f), the amount to be stated in the notice for the alleged contravention of the provision must be equal to one-fifth of the maximum penalty that a court could impose on the person for that contravention.

#### **148 Extension of time to pay amount**

- (1) A person to whom an infringement notice has been given may apply to the GEMS Regulator for an extension of the period referred to in paragraph 147(1)(h).
- (2) If the application is made before the end of that period, the GEMS Regulator may, in writing, extend that period. The GEMS Regulator may do so before or after the end of that period.
- (3) If the GEMS Regulator extends that period, a reference in this Division, or in a notice or other instrument under this Division, to the period referred to in paragraph 147(1)(h) is taken to be a reference to that period so extended.
- (4) If the GEMS Regulator does not extend that period, a reference in this Division, or in a notice or other instrument under this Division, to the period referred to in paragraph 147(1)(h) is taken to be a reference to the period that ends on the later of the following days:
  - (a) the day that is the last day of the period referred to in paragraph 147(1)(h);
  - (b) the day that is 7 days after the day the person was given notice of the GEMS Regulator's decision not to extend.

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- (5) The GEMS Regulator may extend the period more than once under subsection (2).

### 149 Withdrawal of an infringement notice

*Representations seeking withdrawal of notice*

- (1) A person to whom an infringement notice has been given may make written representations to the GEMS Regulator seeking the withdrawal of the notice.

*Withdrawal of notice*

- (2) The GEMS Regulator may withdraw an infringement notice given to a person (whether or not the person has made written representations seeking the withdrawal).
- (3) When deciding whether or not to withdraw an infringement notice (the **relevant infringement notice**), the GEMS Regulator:
- (a) must take into account any written representations seeking the withdrawal that were given by the person to the GEMS Regulator; and
  - (b) may take into account the following:
    - (i) whether a court has previously imposed a penalty on the person for a contravention of a provision enforceable under this Division;
    - (ii) the circumstances of the alleged contravention;
    - (iii) whether the person has paid an amount, stated in an earlier infringement notice, for a contravention of a provision enforceable under this Division if the contravention is constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the contravention in the relevant infringement notice;
    - (iv) any other matter the GEMS Regulator considers relevant.

*Notice of withdrawal*

- (4) Notice of the withdrawal of the infringement notice must be given to the person. The withdrawal notice must state:
- (a) the person's name and address; and
  - (b) the day the infringement notice was given; and
  - (c) the identifying number of the infringement notice; and
  - (d) that the infringement notice is withdrawn; and
  - (e) that proceedings seeking a civil penalty order may be brought in relation to the alleged contravention.

*Refund of amount if infringement notice withdrawn*

- (5) If:
- (a) the GEMS Regulator withdraws the infringement notice; and
  - (b) the person has already paid the amount stated in the notice;
- the Commonwealth must refund to the person an amount equal to the amount paid.

**150 Effect of payment of amount**

- (1) If the person to whom an infringement notice for an alleged contravention of a provision is given pays the amount stated in the notice before the end of the period referred to in paragraph 147(1)(h):
- (a) any liability of the person for the alleged contravention is discharged; and
  - (b) neither criminal proceedings, nor proceedings for a civil penalty order, may be brought in relation to the conduct constituting the alleged contravention; and
  - (c) the person is not regarded as having admitted guilt or liability for the alleged contravention.
- (2) Subsection (1) does not apply if the notice has been withdrawn.

**151 Effect of this Division**

This Division does not:

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- (a) require an infringement notice to be given to a person for an alleged contravention of a provision enforceable under this Division; or
- (b) affect the liability of a person for an alleged contravention of a provision enforceable under this Division if:
  - (i) the person does not comply with an infringement notice given to the person for the contravention; or
  - (ii) an infringement notice is not given to the person for the contravention; or
  - (iii) an infringement notice is given to the person for the contravention and is subsequently withdrawn; or
- (c) prevent the giving of 2 or more infringement notices to a person for an alleged contravention of a provision enforceable under this Division; or
- (d) limit a court's discretion to determine the amount of a penalty to be imposed on a person who is found to have contravened a provision enforceable under this Division.

**152 Further provision by regulation**

The regulations may make further provision in relation to infringement notices given in relation to contraventions of provisions enforceable under this Division.

## **Division 4—Enforceable undertakings**

### **Subdivision A—Preliminary**

#### **153 Enforceable provisions**

Offence provisions and civil penalty provisions in this Act are *enforceable* under this Division.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

### **Subdivision B—Accepting and enforcing undertakings**

#### **154 Acceptance of undertakings**

- (1) The GEMS Regulator may accept any of the following undertakings:
  - (a) a written undertaking given by a person that the person will, in order to comply with a provision enforceable under this Division, take specified action;
  - (b) a written undertaking given by a person that the person will, in order to comply with a provision enforceable under this Division, refrain from taking specified action;
  - (c) a written undertaking given by a person that the person will take specified action directed towards ensuring that the person does not contravene a provision enforceable under this Division, or is unlikely to contravene such a provision, in the future;
  - (d) a written undertaking given by a person that the person will, in order to provide compensation for loss or damage suffered as a result of a contravention by the person of a provision enforceable under this Division, pay another person an amount worked out in accordance with the undertaking.
- (2) The undertaking must be expressed to be an undertaking under this section.

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- (3) The person may withdraw or vary the undertaking at any time, but only with the written consent of the GEMS Regulator.
- (4) The consent of the GEMS Regulator is not a legislative instrument.
- (5) The GEMS Regulator may, by written notice given to the person, cancel the undertaking.

**155 Enforcement of undertakings**

- (1) If:
  - (a) a person has given an undertaking under section 154; and
  - (b) the undertaking has not been withdrawn or cancelled; and
  - (c) the GEMS Regulator considers that the person has breached the undertaking;the GEMS Regulator may apply to a relevant court for an order under subsection (2).
- (2) If the relevant court is satisfied that the person has breached the undertaking, the court may make any or all of the following orders:
  - (a) an order directing the person to comply with the undertaking;
  - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the court considers appropriate.



## **Division 5—Injunctions**

### **Subdivision A—Preliminary**

#### **156 Enforceable provisions**

Offence provisions and civil penalty provisions in Parts 3 and 5 are *enforceable* under this Division.

### **Subdivision B—Injunctions**

#### **157 Grant of injunctions**

##### *Restraining injunctions*

- (1) If a person has engaged, is engaging or is proposing to engage, in conduct in contravention of a provision enforceable under this Division, a relevant court may, on application by the GEMS Regulator, grant an injunction:
  - (a) restraining the person from engaging in the conduct; and
  - (b) if, in the court's opinion, it is desirable to do so—requiring the person to do a thing.

##### *Performance injunctions*

- (2) If:
  - (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do a thing; and
  - (b) the refusal or failure was, is or would be a contravention of a provision enforceable under this Division;the court may, on application by the GEMS Regulator, grant an injunction requiring the person to do that thing.

##### *Consent injunctions*

- (3) A relevant court may grant an injunction by consent of all the parties to proceedings under this section, whether or not the court

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is satisfied that the person has contravened, or will contravene, a provision enforceable under this Division.

### **158 Interim injunctions**

*Grant of interim injunctions*

- (1) Before deciding an application for an injunction under section 157, a relevant court may grant an interim injunction:
  - (a) restraining a person from engaging in conduct; or
  - (b) requiring a person to do a thing.

*No undertakings as to damages*

- (2) The court must not require an applicant for an injunction under section 157 to give an undertaking as to damages as a condition of granting an interim injunction.

### **159 Discharging or varying injunctions**

A relevant court may discharge or vary an injunction granted by that court under this Division.

### **160 Certain limits on granting injunctions not to apply**

*Restraining injunctions*

- (1) The power of a relevant court under this Division to grant an injunction restraining a person from engaging in conduct may be exercised:
  - (a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

*Performance injunctions*

- (2) The power of a relevant court under this Division to grant an injunction requiring a person to do a thing may be exercised:
- (a) whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that thing; and
  - (b) whether or not the person has previously refused or failed to do that thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that thing.

**161 Other powers of a relevant court unaffected**

The powers conferred on a relevant court under this Division are in addition to, and not instead of, any other powers of the court, whether conferred by this Act or otherwise.

## **Division 6—Publicising offences, contraventions and adverse decisions**

### **162 GEMS Regulator may publicise certain offences, contraventions and adverse decisions**

- (1) The GEMS Regulator may publicise, in any way he or she thinks appropriate, any or all of the following:
  - (a) that a person has been convicted of an offence against this Act, the nature of the conduct constituting the offence, and the person's name;
  - (b) that a civil penalty order has been made against a person for contravening a civil penalty provision, the nature of the conduct constituting the contravention, and the person's name;
  - (c) that a person has been given an infringement notice under section 146, the civil penalty provision that is believed to have been contravened, the nature of the conduct constituting the alleged contravention, and the person's name;
  - (d) that a person has paid the amount stated in an infringement notice given under section 146;
  - (e) that an undertaking given under section 154 by a person has been accepted, the terms of the undertaking, and the person's name;
  - (f) that an order has been made against a person under subsection 155(2) in relation to a breach of an undertaking given under section 154, the terms of the order and the person's name;
  - (g) that an injunction under section 157 restraining a person from engaging in conduct, or requiring a person to do an act or thing, has been granted or varied, the nature of the conduct, act or thing, and the person's name;
  - (h) that a decision has been made to do one or more of the following:
    - (i) impose or vary the conditions on a model's registration in relation to a product class;

- (ii) suspend a model's registration in relation to a product class under section 49;
- (iii) impose or vary the conditions on a suspension of a model's registration in relation to a product class under section 52 or 53;
- (iv) cancel a model's registration in relation to a product class under section 54;
- (i) the reasons for a decision referred to in paragraph (h);
- (j) the name of the registrant for a registration referred to in paragraph (h).

Note 1: This subsection constitutes an authorisation for the purposes of other laws, such as the *Privacy Act 1988*.

Note 2: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (2) This Division does not:
- (a) limit the power of the GEMS Regulator or anyone else to publicise a matter or a person's name; or
  - (b) prevent anyone else from publicising a matter or a person's name; or
  - (c) affect any obligation (however imposed) on anyone to publicise a matter or a person's name.

## **Part 9—Reviewing decisions**

### **Division 1—Guide to this Part**

#### **163 Guide to this Part**

This Part is about reviewing some decisions made under this Act (reviewable decisions). These include refusing to register a model of a GEMS product or to vary a model's registration, or suspending or cancelling a registration.

Reviewable decisions (other than those made by the GEMS Regulator personally) can be reviewed by the GEMS Regulator by way of an internal review, on the application of certain affected persons.

Reviewable decisions made by the GEMS Regulator personally or on an internal review can be reviewed by the Administrative Appeals Tribunal, on the application of certain affected persons.

## Division 2—Reviewing decisions

### 164 Persons affected by reviewable decisions

Column 1 of the table sets out each person *affected* by a reviewable decision. Column 2 of the tables sets out the *reviewable decision* by which the person is affected.

<b>Persons affected by reviewable decisions</b>		
<b>Item</b>	<b>Person <i>affected</i></b>	<b><i>Reviewable decision</i></b>
1	A person who applies to register a model of a GEMS product in relation to a product class.	A decision by the GEMS Regulator under section 43 to refuse to register the model
2	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 45 to impose conditions, or to vary the conditions imposed, on the registration
3	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 46 to refuse to vary the registration to cover one or more additional models of GEMS products
4	The following persons: (a) the registrant for a registration of a model in relation to a product class; (b) the new registrant referred to in section 47	A decision by the GEMS Regulator under section 47 to refuse to vary the registration to specify the new registrant as the registrant for the registration
5	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under subsection 48(4) to specify an earlier day on which the registration period for the registration ends
6	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 49 to suspend the registration
7	The registrant for a registration of a	A decision by the GEMS Regulator

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<b>Persons affected by reviewable decisions</b>		
<b>Item</b>	<b>Person affected</b>	<b>Reviewable decision</b>
	model in relation to a product class	under section 52 to impose conditions on a suspension of the registration
8	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 53 to vary, or refuse to vary, a suspension notice in relation to the registration
9	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under subsection 54(1) to cancel the registration

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### 165 Notification of decisions and review rights

- (1) As soon as practicable after making a reviewable decision, the person who made the decision must cause a written notice to be given to the person affected by the decision, containing:
- (a) the terms of the decision; and
  - (b) the reasons for the decision; and
  - (c) a statement setting out particulars of the person's review rights.

Note 1: If the reviewable decision relates to an application under Part 5, the requirements under this subsection are in addition to those under section 67.

Note 2: A registrant or applicant for a registration is taken to have been given a notice under this Act if the notice is given to a contact person for the registration (see section 68).

- (2) A failure to comply with the requirements of subsection (1) in relation to a decision does not affect the validity of the decision.

### 166 Internal review

- (1) A person affected by a reviewable decision (other than a decision made by the GEMS Regulator personally) may apply in writing to the GEMS Regulator for review (the *internal review*) of the decision.



- (2) An application for internal review must be made within:
  - (a) 30 days after the day on which the decision first came to the notice of the applicant; or
  - (b) such further period (if any) as the GEMS Regulator allows (either before or after the end of that period).
- (3) The GEMS Regulator must, on receiving an application, review the reviewable decision.
- (4) The GEMS Regulator may:
  - (a) make a decision affirming, varying or revoking the reviewable decision; and
  - (b) if the GEMS Regulator revokes the decision, make such other decision as the GEMS Regulator thinks appropriate.

### **167 Review of decisions by Administrative Appeals Tribunal**

- (1) Applications may be made to the Administrative Appeals Tribunal for review of the following decisions:
  - (a) a reviewable decision made by the GEMS Regulator personally;
  - (b) an internal review decision made by the GEMS Regulator under subsection 166(4).
- (2) An application under subsection (1) may be made only by, or on behalf of, a person affected by the reviewable decision.
- (3) Subsection (2) has effect despite subsection 27(1) of the *Administrative Appeals Tribunal Act 1975*.

**Part 10** Protecting information

**Division 1** Guide to this Part

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**Part 10—Protecting information**

**Division 1—Guide to this Part**

**168 Guide to this Part**

This Part is about protecting information (protected information) obtained by or disclosed to persons in connection with this Act.

Disclosing protected information is an offence if it might substantially prejudice the commercial interests of a person, and the disclosure is not authorised by this Part.

The ability of courts and tribunals to require the disclosure of protected information is also limited by this Part.

## **Division 2—Protecting information**

### **169 Offence—Disclosing commercially sensitive information**

#### *Offence*

- (1) A person commits an offence if:
  - (a) the person discloses information to another person; and
  - (b) the information is protected information; and
  - (c) there is a risk that the disclosure might substantially prejudice the commercial interests of a third person.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

#### *Exception—authorised disclosure*

- (2) Subsection (1) does not apply if the disclosure referred to in paragraph (1)(a) is authorised by section 170 (authorised disclosures).

Note: A defendant bears an evidential burden in relation to a matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

#### *Meaning of protected information*

- (3) **Protected information** is information that has been disclosed to, or obtained by, a person in the course of the person performing a function or duty, or exercising a power, under or in relation to this Act.

Note: The expression **this Act** has an extended meaning (see the Dictionary in section 5).

### **170 Authorised disclosures**

- (1) A person may disclose protected information if:
  - (a) the disclosure is made for the purposes of:
    - (i) performing a duty or function, or exercising a power, under or in relation to this Act; or

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- (ii) enabling another person to perform duties or functions, or exercise powers, under or in relation to this Act; or
  - (iii) assisting in the administration or enforcement of another law of the Commonwealth, a State, a Territory or a foreign jurisdiction relating to standards for products that use energy, or affect the amount of energy used by another product; or
  - (iv) assisting in the development of standards for products that use energy, or affect the amount of energy used by another product, or standards for testing such products (whether or not those standards are to be requirements of a law of the Commonwealth, a State, a Territory or a foreign jurisdiction); or
- (b) the disclosure is required or authorised by or under:
- (i) a law of the Commonwealth (including this Act); or
  - (ii) a law, of a State or Territory, that is prescribed by the regulations for the purposes of this subparagraph; or
- (c) the disclosure is expressly or impliedly authorised by the third person referred to in paragraph 169(1)(c); or
- (d) at the time of the disclosure, the protected information is already publicly available; or
- (e) both:
- (i) the disclosure is, or is a kind of disclosure that is, certified in writing by the Minister to be in the public interest; and
  - (ii) the disclosure is made in accordance with any requirements specified in the regulations; or
- (f) both:
- (i) the person believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of a person; and
  - (ii) the disclosure is for the purposes of preventing or lessening that threat; or
- (g) both:
- (i) the information disclosed is a summary of, or statistics derived from, protected information; and

- (ii) the information is not likely to enable the identification of a person.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (2) An instrument made under subparagraph (1)(e)(i) certifying that a particular disclosure is in the public interest is not a legislative instrument.
- (3) An instrument made under subparagraph (1)(e)(i) certifying that a kind of disclosure is in the public interest is a legislative instrument.

### **171 Disclosing commercially sensitive information to courts and tribunals etc.**

- (1) This section applies if:
- (a) information or a document is disclosed to, or obtained by, a person (the *public official*) in the course of the person performing a function or duty, or exercising a power, under or in relation to this Act; and
  - (b) there is a risk that disclosure of the information or document might substantially prejudice the commercial interests of a person other than the public official.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

#### *Information not to be disclosed to court or tribunal*

- (2) The public official must not, except for the purposes of this Act, be required to disclose the information to, or produce the document in or to, a court, tribunal, authority or other person having power to require the production of documents or the answering of questions.
- (3) For the purposes of subsection (2), the purposes of this Act include the purposes of another Act in relation to a requirement, power, function or duty provided for by or under this Act.

## **Part 11—Miscellaneous**

### **Division 1—Guide to this Part**

#### **172 Guide to this Part**

This Part deals with a variety of miscellaneous matters.

These include the following:

- (a) recovery of fees payable under this Act;
- (b) compensation for the acquisition of property;
- (c) the GEMS Regulator's annual report;
- (d) regular independent reviews of the operation of this Act;
- (e) the power to make regulations.

## **Division 2—Miscellaneous**

### **173 Recovery of fees**

The following amounts may be recovered in a court of competent jurisdiction as debts due to the Commonwealth:

- (a) an amount of a fee payable to the Commonwealth under this Act;
- (b) an amount of a fee payable to the Commonwealth in connection with the performance of the GEMS Regulator's functions (see section 77).

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

### **174 Compensation for acquisition of property**

- (1) If the operation of this Act would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

Note: The expression *this Act* has an extended meaning (see the Dictionary in section 5).

- (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

- (3) In this Act:

*acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.

*just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution.

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**175 Annual report**

- (1) The GEMS Regulator must prepare and give to the Minister a report on the operation of this Act during each financial year.
- (2) The GEMS Regulator must do so as soon as practicable after the end of each financial year.
- (3) The Minister must cause a copy of the report:
  - (a) to be tabled in each House of the Parliament within 15 sitting days of the day on which the report is given to the Minister; and
  - (b) to be given to each participating jurisdiction.

**176 Review of operation of this Act**

- (1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as possible after:
  - (a) the fifth anniversary of the commencement of this section; and
  - (b) each tenth anniversary of the day referred to in paragraph (a).
- (2) The review must be undertaken by persons who:
  - (a) in the Minister's opinion possess appropriate qualifications to undertake the review; and
  - (b) include one or more persons who are not APS employees.
- (3) The persons who undertake the review must give the Minister a written report of the review.
- (4) The Minister must cause a copy of the report of the review:
  - (a) to be tabled in each House of the Parliament within 15 sitting days of the day on which the report is given to the Minister; and
  - (b) to be given to each participating jurisdiction.

**177 Regulations**

- The Governor-General may make regulations prescribing matters:
- (a) required or permitted by this Act to be prescribed; or



- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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*[Minister's second reading speech made in—  
House of Representatives on 30 May 2012  
Senate on 10 September 2012]*

(109/12)

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158      *Greenhouse and Energy Minimum Standards Act 2012*      No. 132, 2012