

2004 - 2005 - 2006

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**COPYRIGHT AMENDMENT BILL 2006**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Philip Ruddock MP)

## **COPYRIGHT AMENDMENT BILL 2006**

### **GENERAL OUTLINE**

The Copyright Amendment Bill contains a range of major reforms to the *Copyright Act 1968* (the Act). The reforms in the Bill have been guided by the following principles:

- the need for copyright to keep pace with developments in technology and rapidly changing consumer behaviour
- recognising reasonable consumer use of technology to enjoy copyright material; Australian consumers should not be in a significantly worse position than consumers in similar countries
- reforms should not unreasonably harm or discourage the development of new digital markets by copyright owners
- Australia has a unique regime that should be maintained
- copyright laws should not be brought into disrepute with technical and out of date provisions
- copyright piracy is becoming easier and the law needs to be constantly updated to tackle piracy
- copyright industries are important and need to be supported.

Many of the amendments implement Government decisions arising from several copyright law reviews finalised in 2005-2006 and other policy initiatives. Other amendments will implement obligations under the Australia-United States Free Trade Agreement (AUSFTA) concerning technological protection measures.

**Schedules 1 to 5** introduce significant reforms to Australia's copyright regime aimed at addressing copyright piracy. In addition to these amendments, a number of the criminal law offence provisions of the Act harmonise the criminal law offence

provisions with Commonwealth criminal law policy and the *Criminal Code Act 1995* (Criminal Code).

**Schedule 1** creates indictable, summary and strict liability offences with a range of penalty options. The strict liability offences will be underpinned by an infringement notice scheme in the *Copyright Regulations 1969*. This will give police and prosecutors a wider range of enforcement options depending on the seriousness of the relevant conduct.

**Schedule 2** contains amendments to evidential presumption provisions in civil and criminal proceedings which will assist copyright owners and reduce costs in the litigation process. They will provide that statements contained on labels, marks, certificates etc. are presumed to be correct unless the contrary is established rather than the existing 'admissible as prima facie evidence'. There are also new presumptions recognising the labelling practices of commercially released films and computer software that will apply in both criminal and civil proceedings. The amendments also introduce a presumption of originality for computer programs.

**Schedule 3** contains amendments to ensure that the definition of 'article' can include an electronic reproduction or an electronic copy of a work or other subject-matter for the purposes of civil proceedings. This is to overcome doubts about the protection of digital files or their download over the Internet.

**Schedule 4** contains amendments to give a court enhanced power to grant relief to copyright owners in civil actions which involve commercial-scale electronic infringements, such as in the peer-to-peer context. The new provisions will operate so that, in such cases, a court may take into account likely infringements as well as a proved infringement in deciding what relief to grant.

**Schedule 5** contains amendments to the Customs 'Notice of Objection' provisions in the Act to reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices. It will also ensure that the Notice of Objection provisions remain consistent with changes made to the *Trade Marks Act 1995* in the current Parliamentary sittings.

**Schedule 6** contains amendments concerning new copyright exceptions in response to the Government's 'Fair Use and Other Copyright Exceptions' review. These exceptions will provide flexibility to allow copyright material to be used for socially useful purposes, and better recognise the rights of consumers to enjoy certain copyright material they have legitimately acquired, where this does not significantly harm the interests of copyright owners. This Schedule also contains amendments relating to the exceptions applicable to libraries and archives to enable them to better assist their users in the online environment. There are new exceptions for key national cultural institutions to more effectively deal with items of historical and cultural significance to Australia that are in their collections. Some of these amendments arose from the Digital Agenda review, others from the Fair Use review or for WIPO Copyright Treaty compliance.

**Schedule 7** contains an amendment to clarify who made a communication for the purposes of the communication right so that a person who merely browses the Internet is not considered to be determining the content of the copyright material accessed online.

**Schedule 8** contains amendments arising from the Government's response to a review of the 2001 Digital Agenda reforms in relation to the use of copyright material for educational purposes and the educational statutory licences. Amendments to the educational statutory licences are intended to benefit educational institutions dealing with online material.

**Schedule 9** repeals and replaces provisions dealing with encoded broadcasts and includes amendments implementing the Government's review of unauthorised access to and use of subscription broadcasts as well as harmonising the provisions with Criminal Code style and Commonwealth criminal law policy.

**Schedules 10 and 11** contain amendments to enhance the jurisdiction of the Copyright Tribunal. Many of the amendments implement the Government's response to the Copyright Law Review Committee report on the *Jurisdiction and Procedures of the Copyright Tribunal*. The remaining amendments deal with internal administration and operation of the Tribunal.

**Schedule 12** contains amendments to implement the AUSFTA obligations in relation to technological protection measures. Australia is committed to implementing these obligations by 1 January 2007.

## **FINANCIAL IMPACT STATEMENT**

The proposed amendments are expected to have minimal direct impact on Commonwealth expenditure or revenue. There may be resourcing issues arising from the amendments in Schedules 1-4 for law enforcement and prosecution agencies by the introduction of infringement notices and proceeds of crime remedies. Stronger enforcement measures such as proceeds of crime remedies will also assist in minimising lost revenue to the Government through the detection of other economic related crime such as tax evasion and money laundering. The amendments in Schedule 5 will assist in reducing the cost and administrative burden for copyright owners in lodging Notices of Objection with the Australian Customs Service.

## **REGULATION IMPACT STATEMENT**

The Office of Best Practice Regulation (OBPR) has advised that Regulatory Impact Statements are not required for the amendments made by Schedules 1-5, Schedule 6 Part 4, nor Schedules 7-12. This is because those amendments can be characterised as machinery of Government changes and/or do not have a significant direct or indirect impact on business, and/or do not substantially alter existing arrangements.

The Regulatory Impact Statement which has been approved by OBPR in respect of amendments made in Schedule 6 (Parts 1-3) (Exceptions to infringement of Copyright) is set out below.

### **SCHEDULE 6 (PARTS 1-3) (Exceptions to infringement of copyright)**

#### **ISSUE IDENTIFICATION**

This Regulation Impact Statement relates to those amendments in the Bill that are the outcome of the Fair Use and Other Copyright Exceptions review.

Under the Act, copyright is the exclusive right to authorise, and to prohibit, a number of specific acts in relation to protected material. Essentially, copyright is the right to stop copying by other persons. Copyright also includes the exclusive right to control the way material is publicly disseminated, eg, through public performance, broadcasting or making it available online.

The exclusive economic rights granted to copyright owners promote creativity and innovation. Copyright enables creators to profit from their work. It protects creators from 'free-riding' or unauthorised exploitation by others which would undermine the incentive to create and invest in new works wanted by the public.

The Act also recognises a wide range of public interests in allowing copyright material to be used for useful purposes such as news reporting, advancing research and education, promoting arts and culture and stimulating entertainment. This second objective requires that the rights of copyright owners are restricted in some circumstances. Consequently, the Act contains a number of exceptions and statutory licences which allow other persons to use copyright material for particular purposes without infringing copyright.

The exceptions and statutory licences are important for safeguarding the balance struck in the Act between the interests of copyright owners and of copyright users.

In recent years, major reforms have been made to the Act to strengthen copyright. These changes give copyright owners greater control over the distribution and use of their material. Copyright owners are able to control the making available online of their material and most electronic copying. In part, this stronger copyright protection

responds to owner concerns that the distribution of unauthorised digital copies can easily destroy the value of their copyrights.

The Government is aware of concerns that exceptions to copyright have not kept pace with the legislative changes to provide stronger copyright protection.

On 5 May 2005 the Government published an issues paper seeking public comment on whether the Act should include a general exception associated with principles of 'fair use' or specific exceptions to facilitate public access (the Fair Use review).

The Government made a commitment to examine this issue in its 2004 election policy *Strengthening Australian Arts*.

## PROBLEM IDENTIFICATION

### *Private copying*

One issue identified during the Fair Use review is the lack of provision in the Act of copying for private or personal use. This situation is increasingly out of step with consumer attitudes and behaviour. Technology is giving consumers new and more convenient ways to use copyright material, particularly for personal entertainment. Many consumer devices are designed so that users can easily copy and store copyright material.

Copying for personal use is particularly popular in two areas. One is the 'format-shifting' of copyright material. Eg, many individuals who buy music own a variety of playing devices. Consumers increasingly expect that they should be able to listen to the music they purchase with several devices, notwithstanding that the devices may use different audio formats. Software makes this relatively easy to do. Consumers are able to copy music purchased on a CD to a personal computer in compressed digital audio formats. This allows a consumer the convenience of being able to copy the music files to a CD holding many songs or to carry an entire music collection in the memory of a portable player. Format-shifting also assists consumers to continue enjoying music that they purchased in superseded analogue formats (eg vinyl records).

A second common example of private copying is recording a broadcast to watch or listen to at a later time. Video cassette recorders have been used to time-shift analogue television broadcasts in Australian homes since the 1970's. Today a range of new consumer devices (eg DVD recorders, Personal Video Recorders, and digital TV tuner cards for PCs) are being marketed to simplify and encourage the private copying of television broadcasts.

Legal action has not been taken by copyright owners in Australia to stop such private copying. Nevertheless, such acts usually infringe copyright. Many ordinary Australians do not believe that 'format-shifting' music they have purchased or 'time-shifting' a broadcast for personal use should be legally wrong with a risk of civil legal action, however unlikely. Failure to recognise such common practices diminishes respect for copyright and undermines the credibility of the Act.

The failure to recognise the reality of private copying is also unsatisfactory for industries investing in the delivery of digital devices and services. Eg, the supply of

personal recording devices by broadcasters of subscription television services is proving to be important for the development of digital television. The availability of personal recording devices is also likely to be important for digital radio.

### *An extended use exception*

A second issue identified in the Fair Use review is the need to expand on the present system of exceptions and statutory licences that apply to specific uses of copyright material. This approach has been maintained for many years because it gives copyright owners and copyright users reasonable certainty as to the scope of acts that do not infringe copyright. No interests want completely to abandon that approach.

However, a consequence of enacting a complex system of exceptions is that the Act may need detailed amendments to reflect new technologies and uses. This can be a measured process when conflicting interests need to be balanced and the implications of change are uncertain. User interests are concerned that the rapid pace of technological change is challenging the ability of the Act to keep exceptions updated and maintain a copyright balance. It is argued that the fixed scope of existing exceptions inhibits, rather than encourages, public institutions to take-up new technology for socially useful purposes.

Currently the Act follows the lead of the United Kingdom in providing 'semi-open' fair dealing exceptions that apply to uses for four specific purposes. Proponents of greater flexibility point to the United States where a general 'fair use' exception allows the courts considerable freedom to determine whether acts qualify as an exception to copyright.

## OBJECTIVES

The principal objective is to ensure that exceptions and statutory licences in the Act continue to provide reasonable public access to copyright material.

In achieving this objective there is a need to:

- a. recognise common forms of private copying that do not undermine the economic incentives provided by copyright;
- b. ensure the exceptions in the Act maintain a balance of owner and user interest in the digital environment.

In achieving these objectives, it is necessary that any amendments to the Act comply with international copyright treaties. Australia is a party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It is in the process of joining the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Apart from the Rome Convention, each of these agreements includes a common international standard for copyright exceptions and limitations. The AUSFTA also

contains this standard. The international standard for copyright exceptions and limitations is referred to as the ‘three-step test’.

Under this test, exceptions and limitations to the rights of copyright owners must be confined:

- to certain special cases
- which do not conflict with a normal exploitation of the work, and
- do not unreasonably prejudice the legitimate interests of the right holder.

## OPTIONS

There are essentially five options with respect to providing new exceptions in the Act:

- (a) add new specific exceptions
- (b) add a flexible extended dealing exception
- (c) add new exceptions for private copying and a flexible extended dealing exception
- (d) provide a statutory licence for private copying, and
- (e) no specific action to amend the Act.

## IMPACT ANALYSIS

### **Option (a): add new specific exceptions**

This option would provide new specific exceptions that legitimise two common forms of private copying.

- (a) ‘time-shifting’ of broadcasts – allowing individuals in their homes to copy a broadcast for personal use to enable it to be viewed or listened to at a more convenient time, and
- (b) ‘format-shifting’ of certain categories of copyright material– allowing owners of legitimate copies of specified copyright material to copy it (and the underlying content) in a different format(s) for personal use.

The format-shifting exception would encompass the following categories of material:

- (a) sound recordings
- (b) books, newspapers, magazines and journals
- (c) films and television programs (only from analogue video to digital format but not between digital formats), and

- (d) photographs (only from digital to hardcopy or from hardcopy to digital but not between digital formats).

This approach would restore credibility to the Act by better reflecting public opinion and practices. It is consistent with current policy in providing specific exceptions that give certainty for copyright owners and users with respect to the scope of permitted acts.

This option benefits domestic consumers who would be assured that time-shifting and format-shifting do not infringe copyright. This option also provides legal certainty for industries that provide products and services that assist consumers carry out these copying activities. It will also facilitate the growth of digital television and radio services.

This option impacts on the owners of the copyright in television program content. However, in simply recognising present practices, market impact is likely to be negligible.

The Government acknowledges that a market for selling DVD copies of popular television programs is growing. That market has developed despite widespread private copying of television broadcasts. This indicates that consumers have not regarded ad-hoc home copies as a substitute for commercial standard DVDs. Further, the time-shifting exception only allows a copy of a program to be retained for a limited time. It does not permit the maker to library copies indefinitely.

It will also impact on the owners of copyright in the specified material particularly sound recordings. However the impact will be limited. Music has traditionally been sold as a physical product, eg, a music CD. A new market for music downloads is developing. A right to format-shift should not significantly affect either market. Before exercising a right to format-shift, a consumer would have to obtain ownership of a legitimate copy of the music. A consumer is not likely to buy the same music in different formats. This market reality is recognised by copyright owners who licence format-shifting. Eg, suppliers of music downloads often licence the purchaser to copy it to CD, in some cases an unlimited number of times. The format-shifting exception will apply to sound recordings sold before such licensing arrangements were introduced.

The new exceptions will protect markets by not allowing consumers to sell or distribute copies made for the maker's personal use.

Also consumers would not be permitted to interfere with technical protection measures that may be used by copyright owners to prevent copying of broadcasts or sound recordings.

In addition to the two exceptions for private copying, further new specific exceptions would be added to permit:

- (a) fair dealings with copyright material by libraries, museums or archives
- (b) format-shifting of copyright material for non-commercial and teaching purposes by educational institutions

- (c) fair dealings with copyright material for the benefit of people with disability, and
- (d) fair dealings with copyright material for the purpose of parody and satire.

The exceptions to benefit cultural institutions and persons with a disability and for parody would be based on principles of fairness; that is, a court would be required to assess whether a use is ‘fair’ rather than whether it complies with the three-step test in international treaties.

The exception for educational institutions would be limited to format-shifting. This would assist schools to keep using teaching materials acquired in obsolescent formats.

### **Option (b) add an extended dealing exception**

This option would provide an extended dealing exception based on the three-step test in the international copyright treaties. It would contain an exhaustive or closed list of purposes that cover uses for several socially beneficial purposes (including by schools, cultural institutions and to assist persons with disabilities).

In general, a person or organisation who wanted to raise this exception in defence to a claim of copyright infringement would need to show that their use was for one of the purposes listed in the exception and the use meets the three-step test. A court would determine the outcome. In this sense the exception would operate like a US style fair use exception and it could provide more flexibility than is available under existing specific exceptions and statutory licences in the Act.

On the other hand, the extended dealing exception would be less broad than US copyright law which provides an open list of purposes that may qualify as a ‘fair use’ exception. In particular, this option provides no solution for common forms of private copying because it is not consistent with treaty obligations to include such general uses in a flexible exception.

It is considered that an extended dealing exception would achieve flexibility in a way that is consistent with Australian copyright law. In the public consultation phase of the Fair Use review, no significant interest supported fully adopting the US approach.

This option benefits users by providing a flexible exception to supplement the present range of specific exceptions and statutory licence. It may allow the Act to respond better to rapidly changing technology within its scope.

On the other hand, this approach may add to the complexity of the Act. There would be some uncertainty for copyright owners until case law developed. Until the scope was interpreted by the courts, there may be disruption to existing licensing arrangements. Similarly, a user considering relying on this exception would need to weigh the legal risk of possible litigation.

Under this option, common acts such as time-shifting or format-shifting would continue to be an infringement of copyright.

**Option (c) add new exceptions for private copying and an extended dealing exception**

This option combines the specific exceptions for time and format-shifting proposed in option (a) with the extended dealing exception proposed in option (b). It provides the flexibility and public benefits of an extended dealing exception while also recognising that time and format-shifting for private use should not be an infringement.

**Option (d) provide a statutory licence for private copying**

This option would provide a statutory licence as a solution to the issue of private copying. Under the three-step test, a wider range of private copying could be allowed for private use if the copyright owners receive compensation. Permitted private copying could extend beyond time-shifting and format-shifting. Eg, a statutory licence might permit consumers to copy a CD borrowed from a friend and to keep indefinitely (or 'library') a copy of a movie recorded from a television or radio broadcast. Copyright owners would be compensated by a tax or levy imposed on recording devices and media.

The main disadvantage of this approach is the extent to which it interferes with the markets of copyright owners. Many owners do not consider a statutory licence would provide adequate compensation for wide-scale copying and that it would disrupt current and emerging markets. They also fear it would encourage commercial piracy. On the other hand, consumers would be concerned that they might pay twice for a copy (eg first in purchasing a digital player and again buying an authorised download) and that copyright owners could block the authorised private copying through applying anti-copying software to their copyright material.

The administrative costs of operating a statutory licence covering a wide range of digital recording devices and media and would also be substantial. Significant additional costs imposed on particular products by a statutory licence may distort markets and affect competition.

**Option (e) - no specific action to amend the Act**

This option would retain the current copyright exceptions leaving it market forces to meet consumer needs.

This option would not deal with the specific issues of time-shifting and format-shifting nor provide better public access to copyright material.

**CONSULTATION**

The Government has consulted directly with key stakeholders. An issues paper requesting submissions was published by the Attorney-General's Department on 5 May 2005. A large number of organisations and individuals responded.

In general, the positions of different stakeholders are as follows:

- Individual artists/authors: Organisations advocating for individual artists and authors are concerned to protect income for their constituents through strong

copyright protection. Generally they oppose, on principle, the weakening of copyright and propose that several existing exceptions be further restricted or repealed altogether. These organisations regard private copying as illegitimate but accept it is prevalent and difficult to prevent. Consequently they generally support legislative change that permits private uses such as time-shifting and format-shifting so long as artists/authors receive payment through a government imposed compensation scheme. It is argued that users should have to pay for any additional convenience or benefit they are given.

- Corporate rights-holders and distribution industries: Major copyright industries (including movies, entertainment software, business software and the recording industry) want to safeguard present and emerging markets. These interests generally are untroubled by the extension of copyright law and oppose legislative change that would restrict copyright. These industries contend that markets are adapting to changing consumer expectations and behaviours. All interests oppose an open-ended 'fair-use' exception and statutory licences for private copying because they would disrupt markets. These industries recognise that TPM and contracts are critical for digital markets to function. They are sensitive that granting extensive new copying rights to users is likely to increase demands that owners should be prevented from using TPM or contracts to block those uses.
- Copyright related industries: This sector includes the telecommunications companies, television and radio broadcasters, Internet service providers (ISP) and manufacturers of consumer devices. These industries generally are interested in specific issues that relate to their business interests.
- Personal consumers: Advocates for private consumers argue current exceptions do not provide sufficient flexibility for individuals to enjoy and protect goods they have purchased. They support specific exceptions for time-shifting, format-shifting and back-up copying as well as an open-ended exception. They argue that such exceptions would not harm copyright owners. Consumer interests are opposed to a statutory licence for private copying.

## CONCLUSIONS AND RECOMMENDED OPTION

Option (a) is to add specific exceptions for private copying and other socially beneficial purposes. It provides most certainty and stability for copyright owners and users. However, it provides no better flexibility for responding to new technology.

Option (b) would add a new extended dealing exception. This option would give the Act limited flexibility to adapt to changing technology (for the specified purposes) but it would not address the legality of time and format-shifting.

Option (c) provides for new specific exceptions and an extended dealing exception. This approach would resolve the legal position with respect to time-shifting and format-shifting and also allow the courts to determine if other uses should be permitted as exceptions to copyright.

Option (d) is to introduce a statutory licence for private copying. This option ensures copyright owners are compensated for private copying but would cause significant disruption to copyright markets and would be difficult to implement.

Option (e) is not to amend the Act. It does not resolve the identified issues.

Option (c) is recommended as it achieves the objectives without causing major disruption to copyright markets.

#### IMPLEMENTATION AND REVIEW

Option (c) is legislatively simple to implement by amending the Act.

The Government will monitor the effects of legalising time-shifting and format-shifting and the development of case law with respect to an open-ended exception. It will review the new arrangements if necessary.

## NOTES ON CLAUSES

### Clause 1 - Short title

This clause is a formal provision that provides for the Bill, when enacted, to be cited as the *Copyright Amendment Act 2006*.

### Clause 2 - Commencement

This clause provides for the commencement of the provisions of the Bill. It does so by reference to a table set out in subclause 2(1). Item 1 of the table provides that sections 1 to 3 and any other provisions not otherwise specifically referred to, commence on the day on which the Act receives the Royal Assent.

Schedule 1, Part 1 and Schedules 3, 4, 5 and 6 commence on 1 January 2007.

Schedule 1, Part 2 shall commence only if the Archives Amendment Bill 2006 is passed by Parliament and the *Archives Amendment Act 2006* commences. This reflects the fact that these changes are to ensure consistency with the Archives Amendment Act, and will not be relevant if that Act does not commence. The date of commencement of Schedule 1, Part 2 will be immediately after the commencement of Schedule 1, Part 1, or, at the time that the Archives Amendment Act commences, whichever is the later.

Schedules 6, 7 8 and 10 commence the day on which this Act receives the Royal Assent.

Schedule 9 commences the 28<sup>th</sup> day after the day on which this Act receives the Royal Assent.

Schedule 11 commences immediately after the commencement of Schedule 10.

Schedule 12, part 1 commences immediately after the commencement of Schedule 12, Part 2.

Schedule 12, Part 2 shall commence only if the Archives Amendment Bill 2006 is passed by Parliament and the *Archives Amendment Act 2006* commences. This reflects the fact that these changes are to ensure consistency with the Archives Amendment Act, and will not be relevant if that Act does not commence. The date of commencement

of Schedule 12, Part 2 will be immediately after the commencement of Schedule 12, Part 1, or, at the time that the Archives Amendment Act commences, whichever is the later.

**Clause 3 - Schedules**

This clause provides that the provisions in the Act specified in the Schedules in Column 1 are amended or repealed as set out in those Schedules, to commence on the date set out in column 2 corresponding to each Schedule.

## **Schedule 1—Criminal laws**

### **Part 1—Main amendments**

#### *Copyright Act 1968*

##### **Items 1- 4      Sections 49, 50, 51A(4) and 110B(3)**

1.1      These items add a notation which advises that declarations made under ss 49, 50, 51A(4) and 110B(3) will be subject to the offences created under ss 203A, 203D, 203F and 203G as amended.

1.2      Generally, these offences relate to the making of declarations about copies of works or other subject-matter made by libraries, the management and storage of such declarations, the making of false and misleading declarations and the disposal or destruction of these declarations.

##### **Item 5              Subsection 126B(8)**

1.3      This item repeals the previous sub-s 126B(8) which applied strict liability to the elements of the offence created under sub-s 126B(7). The offence related to the production of documents as supporting evidence of a chain of ownership under sub-ss 126B(5) and 126B(6) where a person is reckless as to whether the document is false or misleading.

1.4      Sub-section 126B(8) was originally included as an amendment in the *Copyright Amendment (Parallel Importation) Act 2003* to address a ‘knowledge of law’ issue. A ‘knowledge of law’ issue arises where an element of an offence requires the prosecution to establish that a defendant had actual knowledge or was reckless about the existence of a particular statutory provision. To overcome this situation, ‘knowledge of law’ provisions were added to provide that strict liability applied to those elements (that is, the prosecution is not required to establish that person had knowledge or recklessness in relation to that element).

1.5      These provisions are now unnecessary since the amendment of sub-s 9.3(2) of the Criminal Code. The effect of sub-ss 9.3(1) and (2) of the Criminal

Code is that, if an offence is created to operate so that a prosecution is required to establish that a defendant had actual knowledge or was reckless about the existence of a particular statutory provision, that needs to be made expressly clear. That is not the intended operation in the case of sub-s 126B(8) and it is therefore unnecessary to retain it.

## **Item 6            Section 132**

1.6    Item 6 repeals s 132 which contained the copyright offence provisions under Part V, Division 5. It substitutes new ss 132AA – 132 AU as outlined below.

1.7    The amendments convert these offences (all of which are summary offences) into indictable, summary and strict liability offences. The strict liability offences will be underpinned by an infringement notice scheme in the Copyright Regulations. This will provide police and prosecutors with a wider range of penalty options to pursue against suspected offenders depending on the seriousness of the conduct. It will also ensure that these offences comply with Commonwealth criminal law policy and the Criminal Code.

1.8    The amendments draw a clear line between indictable and summary offences. Under the previous provisions, summary offences carried a maximum penalty of 5 years imprisonment. This is not consistent with the standard Commonwealth criminal law policy as set out in s 4G of the *Crimes Act 1914* (Crimes Act). That is, provisions with penalties in excess of 12 months imprisonment should be indictable offences unless there is a clear reason otherwise.

1.9    The tiered offences also ensure that penalties are not expressed generally but are reflective of the moral culpability of a particular offence. Again this is to ensure compliance with Commonwealth criminal law policy.

1.10   The amended indictable, summary and strict liability offences contain the same physical elements. The indictable and summary offences contain different fault elements that apply to some physical elements of circumstance. In contrast, the strict liability offences contain no fault elements.

1.11 Eg, proof of subsistence of copyright is an element of most of the repealed s 132 offences. The fault element for that physical element, defaults to ‘recklessness’ (see sub-s 5.6(2) of the Criminal Code). This is preserved in the case of newly created indictable offences. Indictable offences have a higher fault threshold than strict liability or summary offences.

1.12 Where necessary, the amendments remove the term ‘ought reasonably to know’. Formulations of this kind are an attempted compromise between requiring proof of fault and imposing strict liability but are uncertain in their application in a criminal offence. The consequence of removing the term ‘ought reasonably to know’ is that the relevant fault element defaults to ‘recklessness’ (see sub-s 5.6(2) of the Criminal Code). This also ensures that the Act is consistent with the Criminal Code in its use of standard fault element terminology.

1.13 The use of the Criminal Code terminology is designed to remove ambiguity in alternative terminology and provides a much simpler basis for understanding and applying Commonwealth offences. Existing offences in the Act have been re-drafted in accordance with the preferred Criminal Code style of separating different physical elements of each offence into separate paragraphs. This provides a clearer and firmer basis for any prosecution.

1.14 The fault element of ‘negligent as to that fact’ has been specified for some summary offences in the Act. This element has been included in paragraphs 132AD(3)(b) and (3)(c), 132AE(3)(b) and (3)(c), 132AF(4)(b), (4)(c), (5)(b) and (5)(c), 132AG(4)(b), (4)(c), 5(b) and (5)(c), 132AH(3)(b) and (3)(c), 132AI(4)(b) (4)(c), (5)(b)-(d), 132AJ(3)(b) and (3)(c), 132AL(4)(c), (4)(d), (5)(c) and (5)(d), 132AN(3)(c), 132AO(3)(c), 132AQ(3)(d), 132AR(3)(e), 132AS(3)(e), 248PA(3)(c), 248PB(3)(c), 248PC(3)(c), 248PD(3)(c), 248PE(3)(d), 248PF(3)(c), 248PG(3)(c) and (e), 248PF(3)(c) and (e), 248PI(3)(c), 248PJ(4)(c) and (5)(d), 248PK(3)(c), 248PL(3)(c), 248PM(3)(c), 248QB(3)(c), 248QC(3)(c), 248QD(3)(c), 248QE(4)(c) and (5)(d), 248QF(3)(c), 248QG(3)(c) and 248QH(3)(c) (see also s 5.5 of the Criminal Code). This creates lesser offences that may be treated summarily to allow for a quicker and more cost effective resolution. The use of negligence as a fault element is justified in these offences because a person should not be able to avoid criminal

liability on the grounds that they did not have some subjective awareness about the risks involved with their activities.

1.15 The amendments also create strict liability offences that will be underpinned by an infringement notice scheme that will be provided for in the Copyright Regulations.

### **Subdivision A —Preliminary**

#### *New s 132AA Definitions*

1.16 New s 132AA provides definitions for terms that appear in Division 5 of Part 5 (Offences and summary proceedings).

1.17 Under new s 132AA, the definitions of ‘article’, ‘copyright material’, ‘distribute’ and ‘place of public entertainment’ remain unchanged from the previous definition provision under sub-s 132(9) (except for the references to Subdivision E in relation to ‘distribute’).

1.18 The definition of ‘profit’ sets out the circumstances that would provide an exception to most of the offences in Part V, Division 5. It is amended to make it clear that it does not include a ‘benefit, advantage or gain’ received by the defendant through the private or domestic use of the copyright material by *another* person. Under the amendment, a person would only be able to argue that he/she came within the exception if the ‘benefit, advantage or gain’ received by the person came through the private or domestic use of the copyright material by *that* person.

#### *New s 132AB Geographical application*

1.19 New s 132AB is consistent with the previous sub-s 132(6) and confines the application of offences in Subdivisions B, C, D, E and F to acts that occur within Australia.

## **Subdivision B—Substantial infringement on a commercial scale**

### *New s 132AC Commercial-scale infringement prejudicing copyright owner*

1.20 New sub-ss 132AC(1) and (2) convert the existing summary offence in existing ss 132(5DB) and (6A) into an indictable offence. This makes it consistent with Commonwealth criminal law policy as set in s 4G of the Crimes Act, which provides that an offence with a maximum penalty in excess of 12 months is an indictable offence.

1.21 New sub-s 132AC(1) creates an offence involving infringing activity on a commercial scale that has a substantial prejudicial impact on the copyright owner. Such activity is inherently serious. A strict liability offence or an on-the-spot fine does not contain a sufficiently high maximum penalty to provide an appropriate deterrent.

1.22 The offence addresses the issue of infringing activity which has no profit motive. Eg, that would include the situation where a film was placed on a website without the copyright owner's authorisation was subsequently downloaded by a large number of people or peer-to-peer activities. While there is no commercial gain or profit motive for the infringer, this activity results in a clear loss for the copyright owner when it is conducted on a commercial scale.

1.23 New sub-s 132AC(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AC(1).

1.24 New sub-s 132AC(3) creates a related summary offence by incorporating the elements of new sub-s 132AC(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraphs 132AC(3)(c) and (d).

1.25 Further, new sub-s 132AC(4) makes it clear that an offence under new sub-s 132AC(3) is a summary offence notwithstanding the maximum penalty is more than 12 months. The inherent seriousness of the offence, even at summary offence level provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.26 New sub-s 132AC(5) provides guidance to determine the element of ‘commercial scale’ under the new s 132AC. This is an inclusive definition that requires courts to consider the volume and value of the infringing copies and any other matter relevant to the issue. This is a determination to be made in the specific circumstances of the case.

1.27 New sub-ss 132AC(6) and 132AC(7) provide for exceptions to the offences established by new s 132AC.

1.28 New sub-s 132AC(6) is similar to the exception available under the former sub-s 132(5E) with respect to anything lawfully done for the purposes of law enforcement or national security by or on behalf of specified authorities. The evidential burden of this defence is on the defendant (see sub-s 13.3(3) of the Criminal Code).

1.29 New sub-s 132AC(7) mirrors the exception formerly available under the previous sub-s 132(5EA) with respect to anything lawfully done by specified bodies (eg libraries, educational institutions) performing their functions. The evidential burden of proving such a defence rests with the defendant.

1.30 New sub-s 132AC(3) provides for a maximum penalty of 2 years imprisonment and/or 120 penalty units for the summary offence.

### **Subdivision C—Infringing copies**

#### *New s 132AD Making infringing copy commercially*

1.31 New s 132AD creates indictable, summary and strict liability offences relating to making an infringing copy commercially. The offences are based on the previous paragraph 132(1)(a) and sub-s 132(6AB). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.32 Under sub-s 132AD(1), a person commits an indictable offence where they make an infringing copy of a work or other subject-matter in which copyright subsists with the intention of selling, letting for hire or obtaining a commercial advantage or profit from the article.

1.33 New sub-s 132AD(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by sub-s 132AD(1).

1.34 Additionally, new sub-s 132AD(3) creates a related summary offence by incorporating the elements of new sub-s 132AD(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraphs 132AD(3)(b) and (c).

1.35 Pursuant to new sub-s 132AD(3), the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.36 New sub-s 132AD(4) makes it clear that an offence under new sub-s 132AD(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.37 New sub-ss 132AD(5) and (6) create a strict liability offence with the same physical elements as the new sub-s 132AD(1) and (3) offences, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.38 The elements of the strict liability offence in new sub-s 132AD(5) includes a physical element that an article was made in preparation for, or in the course of, obtaining a commercial advantage or profit. For the purposes of this subsection, proof that the defendant did obtain a commercial advantage or profit is *not* required.

#### *New s 132AE Selling or hiring out infringing copy*

1.39 New s 132AE creates indictable, summary and strict liability offences relating to selling or hiring out of an infringing copy. The offences are based on the previous paragraph 132(1)(b) and sub-s 132(6AB). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.40 Under new paragraphs 132AE(1)(a) – (c), a person commits an indictable offence where they sell or let for hire an infringing copy of a work or other subject-matter in which copyright subsists.

1.41 New sub-s 132AE(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by sub-s 132AE(1).

1.42 New sub-s 132AE(3) creates a related summary offence by incorporating the elements of new sub-s 132AE(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements in new paragraphs 132AE(3)(b) and (c).

1.43 Pursuant to new sub-s 132AE(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.44 New sub-s 132AE(4) makes it clear that an offence under new sub-s 132AE(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.45 New sub-ss 132AE(5) and (6) creates a strict liability offence with the same physical elements as new sub-ss 132AE(1) and (3) offences, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AF Offering infringing copy for sale or hire*

1.46 New s 132AF creates indictable, summary and strict liability offences relating to offering of an infringing copy for sale or hire. The offences are based on the previous paragraph 132(1)(b) and sub-s 132(6AB). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.47 New sub-ss 132AF(1) and (2) create two separate indictable offences.

1.48 New sub-s 132AF(1) creates an offence where an infringing copy is offered or exposed for sale or hire ‘by way of trade’ and copyright subsists in the work or other subject-matter at that time.

1.49 New sub-s 132AF(2) creates a further offence where such offer or exposure for sale or hire is done ‘with the intention of obtaining a commercial advantage or profit’.

1.50 New sub-s 132AF(3) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offences created by new sub-ss 132AF(1) and (2).

1.51 New sub-ss 132AF(4) and (5) create related summary offences by incorporating the elements of new sub-ss 132AF(1) and (2) respectively with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraphs 132AF(4)(b) and (c) as well as paragraphs 132AF(5)(b) and (c).

1.52 Pursuant to new sub-ss 132AF(4) and (5) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.53 New sub-s 132AF(6) makes it clear that offences under new sub-ss 132AF(4) and (5) are a summary offences notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offences provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.54 New sub-ss 132AF(7) and (8) create strict liability offences with the same physical elements as new sub-ss 132AF(1) and (2) offences respectively, except that they contain no fault elements.

1.55 The strict liability offence in new sub-s 132AF(8) includes a physical element that the offer or exposure of an article for sale or hire was made in preparation for, or in the course of, obtaining a commercial advantage or profit. For the purposes of this subsection, proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.56 The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AG Exhibiting infringing copy in public commercially*

1.57 New s 132AG creates indictable, summary and strict liability offences relating to exhibiting an infringing copy in public by way of trade, or with the intention of obtaining a commercial advantage or profit. The offences are based on the previous paragraph 132(1)(c) and sub-s 132(6AB). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.58 New sub-ss 132AG(1) and (2) create two separate indictable offences.

1.59 New sub-s 132AG(1) creates an offence of exhibiting an infringing article in public 'by way of trade' where copyright subsists in the work or other subject-matter at the time of exhibition.

1.60 New sub-s 132AG(2) creates a further offence where such an exhibition is done 'with the intention of obtaining a commercial advantage or profit'.

1.61 New sub-s 132AG(3) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offences created by new sub-ss 132AG(1) and (2).

1.62 New sub-ss 132AG(4) and (5) create related summary offences by incorporating the elements of new sub-ss 132AG(1) and (2) respectively with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraphs 132AG(4)(b) and (c) as well as paragraphs 132AG(5)(b) and (c).

1.63 Pursuant to new sub-ss 132AG(4) and (5), the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.64 New sub-s 132AG(6) makes it clear that offences under new sub-ss 132AG(4) and (5) are summary offences notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offences provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.65 New sub-ss 132AG(7) and (8) create strict liability offences with the same physical elements as new sub-ss 132AG(1) and (2) offences respectively, except that they contain no fault elements.

1.66 The elements of the strict liability offence in new sub-s 132AG(8) include a physical element that an article was exhibited in public in preparation for, or in the course of, obtaining a commercial advantage or profit. For the purposes of this new sub-section, the proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.67 The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AH Importing infringing copy commercially*

1.68 New s 132AH creates indictable, summary and strict liability offences relating to commercially importing an infringing copy. The offences are based on the previous paragraphs 132(1)(d) and sub- s 132(6AC). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.69 New sub-s 132AH(1) makes it an offence to import an infringing copy of a work or subject-matter, in which copyright subsists with the intention of doing any of the acts listed in new sub-paragraphs 132AH(1)(a)(i) – (ix). Prohibited acts include specific acts done ‘by way of trade’ or ‘for trade’ (subparagraphs 132AH(1)(a)(iii), (v) and (viii)) and with the intention of obtaining a commercial advantage or profit (sub-paragraphs 132AH(1)(a)(iv), (vi) and (ix)).

1.70 New sub-s 132AH(2) provides a maximum penalty of 5 years imprisonment and/or 650 penalty units for the indictable offence created by new sub-s 132AH(1).

1.71 New sub-s 132AH(3) creates related summary offences by incorporating the elements of new sub-s 132AH(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraphs 132AH(3)(b) and (c).

1.72 Pursuant to new sub-s 132AH(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.73 New sub-s 132AH(4) makes it clear that the offence under new sub-s 132AH(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.74 New sub-s 132AH(5) creates a strict liability offence with the same physical elements as the new sub-s 132AH(1) offence except that it contains no fault elements.

1.75 The elements of the strict liability offence in new sub-s 132AH(5) include reference to acts done to obtain a commercial advantage or profit. For the purposes of this subsection, the proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.76 The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice in the Copyright Regulations.

#### *New s 132AI Distributing infringing copy*

1.77 New s 132AI creates indictable, summary and strict liability offences relating to distribution of an infringing copy. The offences are based on the previous sub-ss 132(2) and (6AB). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.78 New sub-ss 132AI(1) and (2) create two separate indictable offences.

1.79 New sub-s 132AI(1) sets out the elements of the indictable offence relating to the distribution of an infringing copy of a work or other subject-matter in which copyright subsists with the intention of trading or obtaining a commercial advantage or profit.

1.80 The second indictable offence under s 132AI is created by new sub-s 132AI(2) which makes it an offence to distribute an infringing copy of a work or other subject-

matter in which copyright subsists if the extent of the distribution ‘affects prejudicially the owner of the copyright’.

1.81 New sub-s 132AI(3) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offences created by new sub-ss 132AI(1) and (2).

1.82 New sub-ss 132AI(4) and 132AI(5) create related summary offences by incorporating the elements of new sub-s 132AI(1) and (2) respectively with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraphs 132AI(4)(b) and (c) as well as paragraphs 132AI(5)(b), (c) and (d).

1.83 New sub-ss 132AI(4) and (5) provide that the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.84 New sub-s 132AI(6) makes it clear that the offences under new sub-ss 132AI(4) and (5) are summary offences notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offences provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.85 New sub-ss 132AI(7) and (8) create strict liability offences with the same physical elements as new sub-s 132AI(1) and (2) offences respectively, except that they contain no fault elements.

1.86 The elements of the strict liability offence in new paragraphs 132AI(7)(a) – (c) include a reference to distribution done in preparation for, or in the course of obtaining commercial advantage or profit. For the purposes of this subsection, proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.87 The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AJ Possessing infringing copy for commerce*

1.88 New s 132AJ creates indictable, summary and strict liability offences relating to possession of an infringing copy for commerce. The offences are based on the previous sub-ss 132(2A) and (6AB). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.89 Under new sub-s 132AJ(1), it is an offence to possess an infringing copy of a work or subject-matter in which copyright subsists with the intention of doing any of the acts listed in new sub-paragraphs 132AJ(1)(a)(i) – (ix). These include ‘selling it’, ‘letting it for hire’, ‘distributing it for trade’, ‘distributing it to obtain a commercial advantage or profit’ and ‘by way of trade exhibiting it in public’.

1.90 New sub-s 132AJ(2) provides for a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AJ(1).

1.91 New sub-s 132AJ(3) creates a related summary offence by incorporating the elements of new sub-s 132AJ(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraphs 132AJ(3)(b) and (c).

1.92 New sub-s 132AJ(3) provides that the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.93 New sub-s 132AJ(4) makes it clear that the offence under new sub-s 132AJ(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.94 Similarly, new sub-s 132AJ(5) creates a strict liability offence with the same physical elements as new sub-s 132AJ(1) offence except that it contains no fault elements.

1.95 The elements of the strict liability offence in new sub-s 132AJ(5) include a reference to acts done to obtain a commercial advantage or profit. For the purposes of this new subsection, proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.96 The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AK Aggravated offence – work etc. converted to digital form*

1.97 New s 132AK is based on the existing sub-s 132(6AA). New sub-s 132AK(1) provides that where a person contravenes new ss 132AD, 132AE, 132AF, 132AG, 132AH, 132AI or 132AJ and the article to which the contravention relates is an infringing copy made by converting the work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form, the person commits an aggravated offence (see also Supplementary Explanatory Memorandum to *Copyright Amendment (Digital Agenda) Act 2000* at paragraph 93).

1.98 New sub-s 132AK(2) provides that the maximum penalty for contravention of this offence is 850 penalty units and/or 5 years imprisonment. This section is intended to operate so that where an offence involves the digitisation of copyright material a higher monetary penalty but not an increased prison term may be imposed.

1.99 New sub-s 132AK(3) requires that, in proving an aggravated offence under new s 132AK, the prosecution must prove the fault element of recklessness in relation to the circumstance that the work or other subject-matter was converted into a digital or other electronic machine-readable form. In addition, the note at new sub-s 132(3) clarifies that the prosecution must prove all of the physical and fault elements of the basic indictable offence.

1.100 The requirement at new sub-s 132AK(4) is intended to limit the prosecution of an aggravated offence to the act of initial conversion of the work or other subject-matter. The offence does not extend to infringing copies made electronically by copying another electronic version.

*New s 132AL Making or possessing device for making infringing copy*

1.101 New s 132AL creates indictable, summary and strict liability offences relating to the making or possessing of a device for making an infringing copy. The offences are based on the previous sub-ss 132(3) and (6A). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.102 New sub-ss 132AL(1) and (2) create two separate indictable offences.

1.103 Under new sub-s 132AL(1), the elements of the indictable offence are that the person made a device, intending it to be used for making an infringing copy of a work or other subject-matter. Further, copyright subsists at the time of the making of the device.

1.104 The second indictable offence under new s 132AL is included at new sub-s 132AL(2) which makes it an offence to possess a device with the intention that it be used for making an infringing copy of a work or other subject-matter. Copyright must subsist in the work or other subject-matter at the time of the possession.

1.105 New sub-s 132AL(3) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offences created by new sub-ss 132AL(1) and (2).

1.106 New sub-ss 132AL(4) and (5) create related summary offences by incorporating the elements of new sub-ss 132AL(1) and (2) respectively with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraphs 132AL(4)(c) and (d) as well as paragraphs 132AL(5)(c) and (d).

1.107 To avoid any doubt about the applicable fault elements, new sub-s 132AL(6) clarifies that the fault element to be applied to new paragraphs 132AL(4)(b) and (5)(b) is recklessness.

1.108 Pursuant to new sub-ss 132AL(4) and (5) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.109 New sub-s 132AL(7) makes it clear that the offences under new sub-ss 132AL(4) and (5) are summary offences notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.110 Similarly, new sub-ss 132AL(8) and (9) create strict liability offences with the same physical elements as new sub-s 132AL(1) and (2) offences respectively, except that they contain no fault elements. The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.111 New sub-s 132AL(11) clarifies that for the purposes of prosecuting an offence under new s 132AL, it is not intended that the prosecution be required to prove that a specific work or other subject-matter was intended to be, or will be copied, using the device. Eg, if evidence is provided that there were a number of DVDs in a room where a device is located, it is not intended that the prosecution would have to specify which of those DVDs were, in fact, to be copied.

1.112 Offences under the new s 132AL are drafted with the intention that the elements of the offence must exist at the time of the making or possession of the device and not at a later time.

*New s 132AM Advertising supply of infringing copy*

1.113 New s 132AM creates a summary offence relating to the advertising of the supply of an infringing copy. The offence is based on the previous sub-ss 133A(1) and (2). It has been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.114 Pursuant to new sub-s 132AM(1), a summary offence is committed by the publication of an advertisement for supply in Australia of a copy of an infringing copy of a work or subject-matter. The offence applies regardless of whether the supply of the infringing copy is from inside or outside Australia.

1.115 The maximum penalty in new sub-s 132AM(1) is 30 penalty points and/or 6 months imprisonment.

1.116 New sub-s 132AM(2) replicates existing sub-s 133A(2) and clarifies that the scope of the offence includes electronic communication of a work or other subject-matter (including from outside of Australia), where the communication is received and results in an infringing copy being made by the recipient. Where this occurs, the ‘supply’ is deemed to occur at the place where the copy is created.

### **Subdivision D—Airing of works, sound recordings and films**

#### *New s 132AN Causing work to be performed publicly*

1.117 New s 132AN creates indictable, summary and strict liability offences relating to causing a work to be performed publicly. The offences are based on the previous sub-ss 132(5) and (6A). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.118 New sub-s 132AN(1) makes it an offence to cause a literary, dramatic or musical work to be performed in public at a public place of entertainment where such a performance infringes copyright in the work.

1.119 New sub-s 132AN(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AN(1).

1.120 New sub-s 132AN(3) creates a related summary offence by incorporating the elements of new sub-s 132AN(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraph 132AN(3)(c).

1.121 Pursuant to new sub-s 132AN(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.122 New sub-s 132AN(4) makes it clear that the offence under new sub-s 132AN(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher

than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.123 Similarly, new sub-s 132AN(5) creates a strict liability offence with the same physical elements as the new sub-s 132AN(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AO Causing recording or film to be heard or seen in public*

1.124 New s 132AO creates indictable, summary and strict liability offences relating to causing a sound recording or cinematograph film to be heard or seen in public. The offences are based on the previous sub-ss 132(5AA) and (6A). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.125 New sub-s 132AO(1) makes it an offence to cause a sound recording or film to be seen or heard in public in a public place of entertainment, where such an act would infringe copyright in the recording or film.

1.126 New sub-s 132AO(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AO(1).

1.127 New sub-s 132AO(3) creates a related summary offence by incorporating the elements of new sub-s 132AO(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new sub-s 132AO(3)(c).

1.128 Pursuant to new sub-s 132AO(3), the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.129 New sub-s 132AO(4) makes it clear that the offence under new sub-s 132AO(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.130 New sub-s 132AO(5) creates a strict liability offence with the same physical elements as the new sub-s 132AO(1) offence except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

### **Subdivision F—Electronic rights management information**

#### *New s 132AQ Removing or altering electronic rights management information*

1.131 New s 132AQ creates indictable, summary and strict liability offences relating to the removal or alteration of electronic rights management information. The offences are based on the previous sub-ss 132(5C) and (6A). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.132 New sub-s 132AQ(1) makes it an offence to remove or alter electronic rights management information from a copy of a work or other subject-matter without permission of the owner or exclusive licensee of the copyright where such an act will enable, induce, facilitate or conceal an infringement of copyright.

1.133 New sub-s 132AQ(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AQ(1).

1.134 New sub-s 132AQ(3) creates a related summary offence by incorporating the elements of new sub-s 132AQ(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance element at new paragraph 132AQ(3)(d).

1.135 Pursuant to new sub-s 132AQ(3), the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.136 New sub-s 132AQ(4) makes it clear that the offence under new sub-s 132AQ(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.137 New sub-s 132AQ(5) creates a strict liability offence with the same physical elements as the new sub-s 132AQ(1) offence except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.138 To avoid ambiguity, paragraphs 132AQ(1)(c), (3)(c) and (5)(c), include the word 'or' to clarify that the removal or alteration is permissible if the person obtains the permission of either the owner *or* the exclusive licensee.

*New s 132AR Distributing, importing or communicating copies after removal or alteration of electronic rights management information*

1.139 New s 132AR creates indictable, summary and strict liability offences relating to distribution, importation or communication of copies after removal or alteration of electronic rights management information. The offences are based on the previous sub-ss 132(5D) and (6A). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.140 New sub-s 132AR(1) makes it an offence to do certain acts with a copy of a work or subject-matter (eg distributing and importing for trade/commercial advantage or profit purposes, or communicating to the public) which has its electronic rights management information altered or removed without permission, and where such an act will induce, enable, facilitate or conceal an infringement of copyright. To commit the offence, the defendant must also know that the electronic rights management has been removed or altered.

1.141 New sub-s 132AR(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AR(1).

1.142 New sub-s 132AR(3) creates a related summary offence by incorporating the elements of new sub-s 132AR(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new sub-s 132AR(3)(d). The summary offence further removes the requirement under new sub-s 132AR(1)(e) of the indictable offence that the defendant must know that the electronic rights management has been removed or altered.

1.143 Pursuant to new sub-s 132AR(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.144 New sub-s 132AR(4) makes it clear that the offence under new sub-s 132AR(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.145 New sub-s 132AR(5) creates a strict liability offence with the same physical elements as new sub-s 132AR(1) offence except that it contains no fault elements.

1.146 The elements of the strict liability offence in new sub-s 132AR(5), include a reference to distribution or importation done in preparation for, or in the course of obtaining commercial advantage or profit. For the purposes of this subsection, proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.147 The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 132AS Distributing or importing electronic rights management information*

1.148 New s 132AS creates indictable, summary and strict liability offences relating to distribution or importation of electronic rights management information. The offences are based on the previous sub-ss 132(5DA) and (6A). They have been drafted to conform with Criminal Code drafting principles of separating different elements of the offence into separate paragraphs.

1.149 New sub-s 132AS(1) makes it an offence to distribute or import into Australia electronic rights management information for trade/commercial advantage or profit purposes in certain circumstances. First, this is where the person has done so without the permission of the owner or exclusive licensee of the copyright. The second element is that either the electronic rights management information has been removed from a copy of the work or other subject-matter without permission, or has been removed with permission but altered without permission. Finally, to commit the offence, the person must know that the information has been either removed or altered

without permission, and the act of distribution or importation will enable, induce, facilitate or conceal an infringement of copyright.

1.150 New sub-s 132AS(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 132AS(1).

1.151 New sub-s 132AS(3) creates a related summary offence by incorporating the elements of new sub-s 132AS(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraph 132AS(3)(e).

1.152 Pursuant to new sub-s 132AS(3), the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.153 New sub-s 132AS(4) makes it clear that the offence under new sub-s 132AS(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 132.

1.154 New sub-s 132AS(5) creates a strict liability offence with the same physical elements as the new sub-s 132AS(1) offence except that it contains no fault elements.

1.155 The strict liability offence in new sub-s 132AS(5) includes reference to distribution or importation done in preparation for, or in the course of obtaining commercial advantage or profit. For the purposes of this subsection, proof that the defendant did obtain a commercial advantage or profit is *not* required.

1.156 The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

#### *New s 132AT Defences*

1.157 New s 132AT(1) mirrors the previous defences available under sub-s 132(5E) with respect to anything lawfully done for the purposes of law enforcement or national security by or on behalf of specified authorities. The evidential burden of this defence is on the defendant (see sub-s 13.3(3) of the Criminal Code).

1.158 Similarly, new sub-s 132AT(2) mirrors the previous exception available under sub-s 132(5EA) with respect to anything lawfully done by specified bodies (eg libraries, educational institutions) performing their functions. A notation clarifies that the evidential burden of proving such a defence rests with the defendant.

### **Subdivision G—Evidence**

#### *New s 132AU Prosecution to prove profit*

1.159 New sub-s 132AU(1) clarifies that s 132AU applies to the prosecution of offences under Division 5 where an element of the offence is that the defendant intended to obtain a profit, or did something for, in preparation for, or in the course of, obtaining a profit.

1.160 It is not the intention of the Act to criminalise a person's private or domestic use of copyright. New sub-s 132AU(2) provides that, in circumstances outlined in new sub-s 132AU(1), the burden is on the prosecution to prove that any advantage, benefit or gain made by the defendant does not result from, or is not associated with, the person's private or domestic use of any copyright material.

1.161 The new section notes the definition of 'profit' included in s 132AA. This clarifies that the exclusion from prosecution applies to the private or domestic use of the copyright material by the person who receives the profit and is not extended to a defendant who obtains a profit through another person's private or domestic use of the goods.

#### **Item 7            Subsection 132A(1)**

1.162 Sub-s 132A(1) provides evidential presumptions with respect to subsistence and ownership in copyright. This item amends sub-s 132A(1) to omit 'section 132' and replace it with 'this Division except for section 132AM'.

1.163 The offences under s 132AM were included in existing sub-s 133A(1) and are therefore not subject to the presumptions established by the previous s 132A. The amendment ensures that, under the amendments, the s 132A presumptions continue to apply to only those offences previously within its scope.

## **Item 8            Sections 133 and 133A**

1.164 This item repeals ss 133 and 133A and substitutes new provisions outlined below.

### **Subdivision H—Extra court orders**

*New s 133 Destruction or delivery up of infringing copies etc.*

1.165 New s 133 allows the court to order the destruction, or delivery up of infringing copies, circumvention devices used or intended to be used in conduct constituting certain offences, or devices used or intended to be used for making infringing copies. This new section applies in circumstances where a person is charged with an offence under Division 5, with the exception of offences under new s 132AM.

1.166 New s 132AM is excluded because it relates to the advertisement for the supply of, and not the dealing with, infringing copies and is therefore not applicable. Previously the offences under new s 132AM were included in sub-s 133A(1), and were not subject to the orders allowable under s 133.

### **Subdivision I—Procedure and jurisdiction**

*New s 133A Courts in which offences may be prosecuted*

1.167 The previous s 133A has been repealed and the offence previously constituted by s 133A relating to advertisement for supply of infringing copies of works or other subject-matter, has been included within the Act at new s 132AM.

1.168 New s 133A is based on the previous sub-ss 132(7) and (8) and 133A(3). New sub-s 133A(1) confers jurisdiction on the Federal Court, or on any other court of competent jurisdiction for prosecution of offences under Division 5.

1.169 New sub-ss 133A(2) and (3) make it clear that the Federal Court has jurisdiction to hear and determine summary and strict liability offences only since it is not able to conduct trials by jury.

### *New 133B Infringement notices*

1.170 New sub-s 133B provides for the regulations to establish an infringement notice scheme for offences in Division 5 of Part V. This scheme will provide for authorised officers to issue infringement notices as an alternative to prosecution.

1.171 Pursuant to new sub-s 133B(2) any such infringement notice must equal one-fifth of the maximum fine that could be imposed for a person found guilty of that strict liability offence. Accordingly, the infringement notice must equal 12 penalty units (\$1320).

### **Item 9            Application of amendments of Division 5 of Part V**

1.172 This item makes it clear that the amendments to this Part apply only to events that occur after the commencement of the Part and will not apply retrospectively. This is to ensure that the amendments do not apply retrospectively.

### **Item 10           Subsections 135L(4) and 135ZY(4)**

1.173 This item omits '\$500' and substitutes '5 penalty units'. This reflects current drafting practices for penalty clauses and will ensure that further increases in the value of penalty units are applied uniformly across offences in the Act.

### **Item 11           Paragraph 136(2)(d)**

1.174 This item amends paragraph 136(2)(d) to ensure that a contravention of the new offences relating to causing works, sound recordings to be heard in public etc. in Subdivision D of Division 5 of Part 5 are included within a reference to proceedings for infringement of copyright in the Copyright Tribunal provisions in Division 1 of Part VI.

### **Item 12           Saving**

1.175 This item notes that the existing paragraph 136(2)(d) continues to apply to proceedings brought in respect of an alleged contravention of sub-s 132(5) or (5AA) (that is, causing works, sound recordings to be heard in public etc.) prior to commencement of the amendment to paragraph 136(2)(d). Sub-section (2) under this

item provides that paragraph 136(2)(d) (as in force before the commencement of the amendment) applies in that way whether the proceedings were started before or after that amendment. This item ensures that the amendments have no retrospective effect so that they apply only to conduct committed after the commencement.

### **Item 13        Sections 172 and 173**

1.176 This item repeals ss 172 and 173 and substitutes new ss 172 and 173.

#### *New s 172 Offences by witnesses*

1.177 The new s 172 creates offences relating to witnesses at Copyright Tribunal proceedings. New sub-s 172(1) creates the offence of failing to appear as a witness before the Tribunal after the tender of reasonable expenses.

1.178 New sub-s 172(2) creates the offence of failing to produce a document or article to the Tribunal after the tender of reasonable expenses.

1.179 The amendments have created two separate offences from the previous sub-s 172(3) offence. This is in accordance with the Criminal Code style of separating offences into different provisions.

1.180 New sub-s 172(3) creates the offence relating to refusal to swear or make an affirmation before the Copyright Tribunal. New sub-s 172(4) creates the offence of refusing to answer a question or produce a document or article when appearing before the Copyright Tribunal.

1.181 The maximum penalty for all the offences under new s 172 has been increased to 30 penalty units and/or imprisonment for 6 months. This is now consistent with the Commonwealth standard imprisonment/fine differential as set out in s 4B of the Crimes Act.

1.182 New sub-s 172(5) as amended provides the defence of reasonable excuse which was previously included under sub-s 172(4). The amendments clarify that the defendant bears an evidential burden of proof for such a defence.

### *New s 173 Offences relating to the Tribunal*

1.183 New s 173 mirrors the offences relating to the Copyright Tribunal as in the previous s 173. It has been drafted to conform with Criminal Code drafting principles of separating different offences into separate provisions.

1.184 This item separates the offences into the following:

- insulting a member (new sub-s 173(1)),
- interrupting proceedings of the Tribunal (new sub-s 173(2)),
- using insulting language (new sub-s 173(3)),
- creating a disturbance (new sub-s 173(4)),
- taking part in creating or continuing a disturbance (new sub-s 173(5)),
- contravention of direction limiting publication of evidence (new sub-s 173(6)), and
- contempt of Tribunal (new sub-s 173(7)).

1.185 Importantly, new s 173 provides for a definition of ‘engage in conduct’ applicable to the section. This includes to perform an act, or, to omit to perform an act. This amendment expands the application of the section to omissions. Eg, repealed paragraph 173(f) made an offence of doing ‘any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of court’. Under the new provision (new sub-s 173(7)), this is expanded to include failing to perform an act. This amended definition ensures consistency with the Criminal Code (s 4.1).

1.186 This item provides for higher penalties. The maximum penalty for breach of new s 173 is increased to 30 penalty units and/or 6 months imprisonment. This is now consistent with the Commonwealth standard imprisonment/fine differential as set in s 4B of the Crimes Act.

### **Item 14      Application of new sections 172 and 173**

1.187 New ss 172 and 173 refer to acts or omissions which occur after the date of commencement. This ensures that the amendments do not have retrospective effect.

**Item 15          Subsection 195A(2)**

1.188 This item repeals the previous sub-s 195A(2) which currently provides that a reference to the ‘prescribed retention period’ in Part X (after the making of a copy of the whole or a part of a work, an eligible item or another subject-matter what was made in reliance on ss 49, 50, 51A or 110B) shall be read as a reference to such period as is declared by the regulations to be the prescribed retention period. Since the offences to which this term relates are being amended to refer to the period as prescribed by the regulations, it is no longer necessary to retain sub-s 195A(2).

**Item 16          Transitional provision – Regulations for sub-s 195A(2)**

1.189 This amendment provides transitional arrangements for the repeal of previous sub-s 195A(2).

**Item 17          Sections 203A and 203D**

1.190 This item repeals existing ss 203A and 203D and substitutes new s 203A and s 203D.

*New s 203A Offence - failing to keep declarations relating to copying in library or archives*

1.191 New s 203A is based on the previous sub-s 203A(1) and creates an offence in relation to the failure to keep declarations relating to copying or reproducing works or other subject-matter in libraries or archives.

1.192 The new offence is a strict liability offence pursuant to new sub-s 203A(3). As a strict liability offence there are no fault elements applicable to any of the physical elements of the offence. The maximum penalty for the new offence is 5 penalty units.

1.193 New sub-s 203A(2) provides defences for the new sub-s 203A(1) offence and is based on the previous defence under sub-s 203A(5). Under sub-paragraphs 203A(2)(a)(i) and (ii), the offence in sub-s 203A(1) will not apply where:

- the reproduction or copying took place before the day the person became the officer in charge, and

- on that day the declaration was not in the possession of the person administering the library or archives.

1.194 Under paragraph 203A(2)(b), the offence in sub-s 203A(1) will not apply if the person took all reasonable precautions, and exercised due diligence, to ensure that the declaration was kept in the records of the library or archives.

1.195 The amendments clarify that the defendant bears a legal burden of proof for such a defence (see s 13.4 of the Criminal Code).

1.196 New sub-s 203A(4) is consistent with the previous sub-s 203A(4) exception and prohibits conviction more than once under this section in relation to the same declaration.

*New s 203D Offence – not arranging declarations chronologically*

1.197 New s 203D is based on the previous sub-s 203D(1) and creates an offence in relation to the failure to arrange declarations in chronological order. These are declarations relating to copying or reproducing works or other subject-matter in libraries or archives.

1.198 The new offence is a strict liability offence pursuant to new sub-s 203D(3). As a strict liability offence there are no fault elements applicable to the physical elements of the offence. The maximum penalty for the new offence is 5 penalty units.

1.199 New sub-s 203D(2) provides a defence for the new sub-s 203D(1) offence and is based on the previous defence under sub-s 203D(5).

1.200 Under sub-s 203D(2), the offence in sub-s 203D(1) will not apply if the person took all reasonable precautions, and exercised due diligence, to ensure that the declarations were arranged in the records reflecting the dates on which the declarations were made.

1.201 The amendments clarify that the defendant bears a legal burden of proof for such a defence (see s 13.4 of the Criminal Code).

**Item 18          Application of new sections 203A and 203D**

1.202 To ensure that the new sections do not have retrospective effect, this item provides that they apply only to the persons who hold the relevant positions in the libraries or archives on or after the commencement of this Part.

**Item 19          Subsection 203E(6)**

1.203 This item repeals sub-s 203E(6) and substitutes new sub-s 203E(6). New sub-s 203E(6) is based on repealed sub-s 203E(6) and creates an offence in relation to the failure to provide reasonable facilities and assistance to an inspector who is attending premises at a library or archives to inspect records.

1.204 Generally, criminal offences should be drafted so that each physical element of the offence is in a separate paragraph. In particular, conduct, circumstances and results constituting the offence should each be set out in separate paragraphs. The amendments separate existing offences in line with the Criminal Code style of drafting.

1.205 The new sub-s 203E(6) remains a strict liability offence by virtue of new sub-s 203E(6A). As a strict liability offence there are no fault elements applicable to the physical elements of the offence.

1.206 The maximum penalty for the new offence is 5 penalty units.

**Item 20          Subsection 203E(10)**

1.207 This item repeals existing sub-s 203E(10) and substitutes new sub-s 203E(10). New sub-s 203E(10) is based on repealed sub-ss 203E(10) and (11) and creates an offence in relation to making a record of information, or divulging or communicating information acquired directly, or indirectly, in the course of an inspection made under sub-s 203E(4).

1.208 Generally, criminal offences should be drafted so that each physical element of the offence is in a separate paragraph. In particular, conduct, circumstances and results constituting the offence should each be set out in separate paragraphs. The amendments separate existing offences in line with the Criminal Code style of drafting.

1.209 The substituted new subsection remains a strict liability offence by virtue of sub-s 203E(10). As a strict liability offence there are no fault elements applicable to the physical elements of the offence.

1.210 The maximum penalty for the new offence is 5 penalty units.

**Item 21 Subsection 203E(11)**

1.211 This item repeals sub-s 203E(11) and substitutes new sub-s 203E(11). New sub-s 203E(11) is based in part on repealed sub-s 203E(10) and provides defences to the offence created by new sub-s 203E(10). These are where the defendant makes a record, divulgement or communication with the intention of:

- informing the owner of copyright in the work or other subject-matter that a copy has been made of the work or other subject-matter, or
- enforcing a right that a person has under the Act in connection with a work or other subject-matter in which copyright subsists, or
- ensuring compliance with a provision of Division 5 of Part III (copying of works in libraries and archives) or with a provision of this part.

1.212 The amendments clarify that the defendant bears a legal burden of proof for such a defence under new sub-s 203E(11).

**Item 22 Application of new subsections 203E(10) and (11)**

1.213 To ensure that the new sections do not have retrospective effect, this item clarifies that new sub-ss 203E(10) and 203E(11) apply to the communication or divulgence of information by the defendant after the commencement of this Part, irrespective of when that information was acquired. Eg, information obtained by the defendant before the commencement of this Part, but which is communicated after the commencement of this Part, would be subject to the amended provisions.

**Item 23 Sections 203F and 203G**

1.214 This item repeals existing ss 203F and 203G and substitutes new ss 203F and 203G.

*New s 203F False and misleading declarations*

1.215 New s 203F is based on the offence created by the previous sub-s 203F(1), that is, making declaration for the purposes of ss 49, 50, 51A or 110B that is a false or misleading in a material particular.

1.216 The new provision omits the fault term ‘ought reasonably to know’ from the offence. The fault clause of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. This ensures that the Act is consistent with the Criminal Code in its use of fault element terminology.

1.217 The maximum penalty for the offence is changed from a monetary amount to 5 penalty units.

*New s 203G Offence – disposing of or destroying certain declarations*

1.218 New s 203G is based on the offence created by the previous sub-s 203F(2), that is, the disposal, destruction, or causing the disposal or destruction of a declaration made for the purposes of ss 49, 50, 51A, or 110B, before the end of the prescribed period for retention.

1.219 The new provision has a different fault element. Previously the fault element for the physical element of circumstance was ‘knows, or ought reasonably to know’. Under the new provisions, it now contains the fault element of ‘recklessness’ which applies by default as a result of sub-s 5.6(2) of the Criminal Code.

1.220 The offences relating to sub-ss 116A(3) and 132(5F) in the existing s 203G have been repealed and it is therefore unnecessary to include those offence provisions.

**Item 24      Application of new sections 203F and 203G**

1.221 To ensure that the amendments do not have retrospective effect, this item clarifies that new ss 203F and 203G inserted by item 23 apply only to acts done after the commencement of this Part.

**Item 25          Subsection 203H(4)**

1.222 This item repeals existing sub-s 203H(4) and substitutes new sub-s 203H(4). New sub-s 203H(4) is based on the offence provided for by the repealed provision, that is, makes or attaches a notification under sub-s 203H(1) or 203H(2) to a work, sound recording or film and that statement is false or misleading in a material particular.

1.223 The amendment omits the fault term ‘ought reasonably to know’ from the offence. The fault clause of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. This amendment is to ensure that the Act is consistent with the Criminal Code in its use of fault element terminology.

1.224 The maximum penalty for the offence is changed from a monetary amount to 5 penalty units.

**Item 26          Application of new sub-s 203H(4)**

1.225 To ensure that the amendments do not have retrospective effect, this item clarifies that new sub-s 203H(4), inserted by item 25, applies only to acts done after the commencement of this Part.

**Item 27          Subsection 248A(1)**

1.226 This item inserts in sub-s 248A(1) a definition of ‘20 year protection period’ of a performance. This definition is included in sub-s 248CA(1) and is included as an element of some of the offences in Part XIA. It will also apply under the new offences under Subdivision A of Division 3 of Part XIA so far as they relate to a cinematograph film of a performance.

**Item 28          Subsection 248A(1)**

1.227 This item inserts into sub-s 248A(1) a definition of ‘50 year protection period’ of a performance. Currently, this is included in sub-s 248CA(2) and is included as an element of some of the offences in Part XIA. It will also apply under the new offences under Subdivision A of Division 3 of Part XIA so far as they relate to a sound recording of a performance.

**Item 29          Subsection 248CA(1)**

1.228 This item amends sub-s 248CA(1) to omit the phrase ‘subsection (2) and’ and substitute the phrase ‘subsection’. This amendment removes reference to sub-s 248CA(2) as a consequence of its repeal by item 30.

**Item 30          Subsection 248CA(2)**

1.229 This item repeals sub-s 248CA(2). This subsection provided for an extended 50 year protection period for sound recordings of certain performances. Under the new provisions the extended protection period is articulated within the text of the relevant sections and therefore the existing sub-s 248CA(2) is not required.

**Item 31          Paragraphs 248CA(4)(b) to (h)**

1.230 This item repeals paragraphs 248CA(4)(b) to (h) and substitutes references to new provisions. The amendments reflect the substantial changes in numbering of the offences under this Part as a result of the amendments made by this Bill.

**Item 32          Subsection 248F(1)**

1.231 This item repeals existing sub-s 248F(1), which is the application provision for Part XIA, and provides that, except for section s 248QA, the Part applies to an act done on or after the commencement of this Part (1 October 1989) in relation to a performance given on or after that commencement.

1.232 New sub-s 248F(1) inserted by this item preserves this position in relation to Part XIA (eg civil actions under Division 2) except Subdivisions A, B and C of Division 3 as they have been amended under this Schedule. Their application is provided for in new sub-ss 248P(1) and 248QA(1).

**Item 33          Subsections 248P, 248Q, 248QA, 248QB and 248S**

1.233 This item repeals ss 248P, 248Q, 248QA, 248QB and 248S which are the offence provisions under Part XIA, Division 5.

1.234 The new provisions convert the existing summary offences into indictable, summary and strict liability offences. This change ensures that offences under the Act comply with the Commonwealth criminal law policy and the Criminal Code.

1.235 The amendments draw a clear line between indictable and summary offences. Under the previous provisions summary offences carried a maximum penalty of 5 years imprisonment. This is not consistent with s 4G of the Crimes Act. That is, offences which carry a maximum penalty in excess of 12 months imprisonment should be indictable offences unless there is a clear reason otherwise.

1.236 The tiered amendments also ensure that penalties are not expressed generally but are reflective of the moral culpability of a particular offence. Again this is to ensure compliance with Commonwealth criminal law policy.

1.237 Under the amendments, the indictable, summary and strict liability offences contain the same physical elements. The indictable and summary offences contain different fault elements that apply to the circumstance paragraph/s. In contrast the strict liability offences contain no fault elements.

1.238 Eg, the new indictable offence at new sub-s 248PA(1) contains the element that the recording is made without the authority of the performer. The fault element for that physical element defaults to 'recklessness' (see sub-s 5.6(2) of the Criminal Code). This is preserved in the case of newly created indictable offences. Indictable offences have a higher fault threshold than strict liability or summary offences.

1.239 Where necessary, the amendments remove the term 'ought reasonably to know'. Formulations of this kind are an attempted compromise between requiring proof of fault and imposing strict liability but are uncertain in their application in a criminal offence. The consequence of removing the term 'ought reasonably to know' is that the relevant fault element defaults to 'recklessness' (see sub-s 5.6(2) of the Criminal Code). This also ensures that the Act is consistent with the Criminal Code in its use of standard fault element terminology.

1.240 The use of the Criminal Code terminology is designed to remove ambiguity in alternative terminology and provides a much simpler basis for understanding and applying Commonwealth offences. Existing offences in the Act have been re-drafted

in accordance with the preferred Criminal Code style of separating different physical elements of each offence into separate paragraphs. This provides a clearer and firmer basis for any prosecution.

1.241 Some new summary offences contain the fault element of ‘negligent as to that fact’, which is made explicit in the relevant paragraphs (eg see new paragraph 248PA(3)(c)) (see also s 5.5 of the Criminal Code). This creates lesser offences that may be treated summarily to allow for a quicker and more cost effective resolution. The use of negligence as a fault element is justified in these offences because a person should not be able to avoid criminal liability on the grounds that they did not have some subjective awareness about the risks involved with their activities.

1.242 The amendments also create strict liability offences which comply with drafting requirements of s 6.1 of the Criminal Code. These offences have no fault provisions which will be underpinned by an infringement notice scheme in the Copyright Regulations.

### **Subdivision A—General Offences**

#### *New s 248P Scope of this Division*

1.243 New sub-s 248P(1) is based on existing sub-ss 248P(7) and 248Q(7) and clarifies that new Subdivision A applies to acts done in Australia on or after the commencement of this Subdivision.

1.244 New sub-s 248P(2) clarifies that this section has effect despite s 14.1 of the Criminal Code, which is the default standard geographical jurisdiction provision applying to Commonwealth offences.

1.245 New Subdivision A of Division 3 will commence as a result of Part 1 of Schedule 1 of this Bill.

*New s 248PA Unauthorised direct recording during protection period*

1.246 New s 248PA creates indictable, summary and strict liability offences relating to unauthorised direct recording during the protection period. The offences are based on the existing sub-s 248P(1).

1.247 New sub-s 248PA(1) makes it an offence to make a direct recording of a performance during the protection period without the authority of the performer. The notation after new sub-s 248PA(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.248 New sub-s 248PA(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PA(2).

1.249 New sub-s 248PA(3) creates a related summary offence by incorporating the elements of new sub-s 248PA(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraph 248PA(3)(c).

1.250 New sub-s 248PA(3) provides that the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.251 New sub-s 248PA(4) makes it clear that the offence under new sub-s 248PA(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248P.

1.252 Similarly, new sub-s 248PA(5) creates a strict liability offence with the same physical elements as the new sub-s 248PA(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PB Unauthorised indirect recording during protection period*

1.253 New s 248PB creates indictable, summary and strict liability offences relating to unauthorised indirect recording during the protection period. The offences are based on the existing sub-s 248P(2).

1.254 New sub-s 248PB(1) makes it an offence to make an indirect recording of a performance during the protection period without the authority of the performer. The notation after new sub-s 248PB(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.255 New sub-s 248PB(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PB(1).

1.256 New sub-s 248PB(3) creates a related summary offence by incorporating the elements of new sub-s 248PB(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraph 248PB(3)(c).

1.257 New sub-s 248PB(3) provides that the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.258 New sub-s 248PB(4) makes it clear that the offence under new sub-s 248PB(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248P.

1.259 New sub-s 248PB(5) creates a strict liability offence with the same physical elements as the new sub-s 248PB(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.260 It is not the intention of the Act to criminalise a person's private or domestic use of copyright. New sub-s 248PB(7) preserves the exception, formerly found under sub-s 248P(7B). Under this exception, the s 248PB offences do not apply if the

indirect recording was for private or domestic purposes. The notation clarifies that the defendant bears the evidential burden of establishing this defence.

*New s 248PC Unauthorised communication to public during 20-year protection period*

1.261 New s 248PC creates indictable, summary and strict liability offences relating to unauthorised communication during the 20 year protection period. The offences are based on the existing sub-s 248P(3).

1.262 New sub-s 248PC(1) makes it an offence to communicate a performance to the public either directly or without the authority of the performer.

1.263 New sub-s 248PC(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PC(1).

1.264 New sub-s 248PC(3) creates a related summary offence by incorporating the elements of new sub-s 248PC(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraph 248PC(3)(c).

1.265 Pursuant to new sub-s 248PC(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.266 New sub-s 248PC(4) makes it clear that the offence under new sub-s 248PC(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248P.

1.267 Similarly, new sub-s 248PC(5) creates a strict liability offence with the same physical elements as the new sub-s 248PC(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.268 New sub-s 248PC(7) clarifies that the offences at new sub-ss 248PC(1), (3) and (5) do not apply to the communication to the public of an authorised recording.

*New s 248PD Playing unauthorised recording publicly during 20-year protection period*

1.269 New s 248PD creates indictable, summary and strict liability offences relating to causing an unauthorised recording to be heard or seen in public during the 20 year protection period. The offences are based on the existing sub-s 248P(5).

1.270 New sub-s 248PD(1) converts the existing offence into an indictable offence of causing the recording of a performance to be heard in public within the 20 year protection period, without authorisation.

1.271 The new sub-s 248PD(1) removes the fault element of ‘knows or ought reasonably to know’. Under the new provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.272 New sub-s 248PD(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PD(1).

1.273 New sub-s 248PD(3) creates a related summary offence by incorporating the elements of new sub-s 248PD(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraph 248PD(3)(c).

1.274 Pursuant to new sub-s 248PD(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.275 New sub-s 248PD(4) makes it clear that the offence under new sub-s 248PD(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248P.

1.276 Similarly, new sub-s 248PD(5) creates a strict liability offence with the same physical elements as the new sub-s 248PD(1) offence, except that it contains no fault

elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PE Possessing equipment to make or copy unauthorised recording*

1.277 New s 248PE creates indictable, summary and strict liability offences relating to the possession of a plate or recording equipment to make or copy an unauthorised recording during the protection period of the performance. The offences are based on existing sub-s 248P(6).

1.278 New sub-s 248PE(1) converts the existing offence into an indictable offence of possession of a plate or recording equipment intending it to be used for making an unauthorised recording, or copy of an unauthorised recording of a performance, within the protection period.

1.279 New sub-s 248PE(1) removes the fault element of 'knows or ought reasonably to know'. Under the amended provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.280 The notation after new sub-s 248PE(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.281 New sub-s 248PE(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PE(1).

1.282 New sub-s 248PE(3) creates a related summary offence by incorporating the elements of new sub-s 248PE(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraph 248PE(3)(c).

1.283 To avoid doubt about the applicable fault element for the circumstance element in new paragraph 248PE(3)(b), new sub-s 248PE(4) clarifies that the default fault element of 'recklessness' (see sub-s 5.6(2) of the Criminal Code) applies to that element.

1.284 Pursuant to new sub-s 248PE(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.285 New sub-s 248PE(5) makes it clear that the offence under new sub-s 248PE(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248P.

1.286 New sub-s 248PE(6) creates a strict liability offence with the same physical elements as the new sub-s 248PE(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.287 It is not intended that the use of the phrase 'is to be' requires proof of a specific intention. New sub-s 248PE(8) clarifies that for the purposes of prosecuting an offence under new s 248PE, the prosecution is not required to prove that a specific performance or recording intended to be, or will be, copied using the device. Eg, if there is evidence that there were a number of particular recordings in a room where a device is located, it is not intended that the prosecution would have to specify which of the many recordings were in fact to be copied.

1.288 Offences in new s 248PE are drafted with the intention that the elements of the offence must exist at the time of the making or possession of the device and not at a later time (that is, at the time of prosecution of the offence).

#### *New s 248PF Copying unauthorised recording*

1.289 New s 248PF creates indictable, summary and strict liability offences relating to copying an unauthorised recording. The offences are based on the existing sub-s 248Q(1).

1.290 The amended new sub-s 248PF(1) converts the existing offence into an indictable offence of making a copy of an unauthorised recording of a performance during the protection period.

1.291 New sub-s 248PF(1) removes the fault element of ‘knows or ought reasonably to know’. Under the amended provision the fault element of ‘recklessness’ applies by default as a result of new sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.292 The notation after new sub-s 248PE(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.293 New sub-s 248PF(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PF(1).

1.294 New sub-s 248PF(3) creates a related summary offence by incorporating the elements of new sub-s 248PF(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraph 248PF(3)(c).

1.295 Pursuant to new sub-s 248PF(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.296 New sub-s 248PF(4) makes it clear that the offence under new sub-s 248PF(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.297 New sub-s 248PF(5) creates a strict liability offence with the same physical elements as the new sub-s 248PF(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

#### *New s 248PG Unauthorised copying of exempt recording*

1.298 New s 248PG creates indictable, summary and strict liability offences relating to unauthorised copying of exempt recordings. The offences are based on the existing sub-s 248Q(2).

1.299 New sub-s 248PG(1) converts the existing offence into an indictable offence of making a copy of an exempt recording of a performance during the protection period without authority.

1.300 New sub-s 248PG(1) removes the fault element of ‘knows or ought reasonably to know’. Under the amended provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.301 New sub-s 248PG(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PG(1).

1.302 New sub-s 248PG(3) creates a related summary offence by incorporating the elements of new sub-s 248PG(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraphs 248PG(3)(c) and (e).

1.303 Pursuant to new sub-s 248PG(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.304 New sub-s 248PG(4) makes it clear that the offence under new sub-s 248PG(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.305 Similarly, new sub-s 248PG(5) creates a strict liability offence with the same physical elements as the new sub-s 248PG(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PH Unauthorised copying of authorised sound recording*

1.306 New s 248PH creates indictable, summary and strict liability offences relating to unauthorised copying of authorised sound recordings to be used in a sound-track. The offences are based on the existing new sub-s 248Q(3).

1.307 The amended new sub-s 248PH(1) converts the existing offence into an indictable offence of making a copy of an authorised sound recording of a performance with the intention that it be used as a sound-track during the 20 year protection period without authorisation.

1.308 New sub-s 248PH(1) removes the fault element of ‘knows or ought reasonably to know’. Under the amended provision the fault element of ‘recklessness’ applies by default as a result of new sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.309 New sub-s 248PH(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PH(1).

1.310 New sub-s 248PH(3) creates a related summary offence by incorporating the elements of new sub-s 248PH(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraphs 248PH(3)(c) and (e).

1.311 Pursuant to new sub-s 248PH(3) the maximum penalty for the summary offence is 120 penalty units and/ or imprisonment for 2 years.

1.312 New sub-s 248PH(4) makes it clear that the offence under new sub-s 248PH(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.313 Similarly, new sub-s 248PH(5) creates a strict liability offence with the same physical elements as the new sub-s 248PH(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

#### *New s 248PI Selling etc. unauthorised recording*

1.314 New s 248PI creates indictable, summary and strict liability offences relating to the selling, letting for hire, or by way of trade offering or exposing for sale or hire, an

unauthorised recording during the protection period of the performance. The offences are based on the existing paragraph 248Q(4)(a).

1.315 New sub-s 248PI(1) converts the existing offence into an indictable offence of selling or letting for hire or by way of trade exposing for trade or hire an unauthorised recording within the protection period of the performance.

1.316 New sub-s 248PI(1) removes the fault element of ‘knows or ought reasonably to know’. Under the new provision, the fault element of ‘recklessness’ applies by default as a result of new sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.317 The notation after new sub-s 248PI(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.318 New sub-s 248PI(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PI(1).

1.319 New sub-s 248PI(3) creates a related summary offence by incorporating the elements of new sub-s 248PI(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance elements at new paragraph 248PI(3)(c).

1.320 Pursuant to new sub-s 248PI(3) the maximum penalty for the summary offence is 120 penalty units and/ or imprisonment for 2 years.

1.321 New sub-s 248PI(4) makes it clear that the offence under new sub-s 248PI(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.322 New sub-s 248PI(5) creates a strict liability offence with the same physical elements as the new sub-s 248PI(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PJ Distributing unauthorised recording*

1.323 New s 248PJ creates indictable, summary and strict liability offences relating to the distribution of an unauthorised recording of a performance during the protection period. The offences are based on the existing paragraph 248Q(4)(b).

1.324 New sub-ss 248PJ(1) and 248PJ(2) separate the physical elements of two separate indictable offences. The offence under new sub-s 248PJ(1) relates to distribution with the intention of trading. The offence under new sub-s 248PJ(2) relates to the distribution that will prejudicially affect the financial interests of the performer in the performance.

1.325 It is intended that the latter offence will include distribution without a profit motive, but which has a financial impact on the performer. Eg, making a recording available on the Internet at no cost might prejudice the performer's financial interests in terms of sales of authorised recordings.

1.326 The new sub-s 248PJ(1) removes the fault element of 'knows or ought reasonably to know'. Under the amended provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.327 The notation after new sub-s 248PJ(1) clarifies that the protection period of the performance for that new subsection is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.328 New sub-s 248PJ(3) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-ss 248PJ(1) and 248PJ(2).

1.329 New sub-ss 248PJ(4) and (5) creates related summary offences by incorporating the elements of new sub-s 248PJ(1) and (2) respectively, with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance elements at new paragraphs 248PJ(4)(c) and (5)(d).

1.330 Pursuant to new sub-ss 248PJ(4) and (5) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.331 New sub-s 248PJ(6) makes it clear that offences under new sub-ss 248PJ(4) and (5) are a summary offences notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offences provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.332 Similarly, new sub-ss 248PJ(7) and (8) create strict liability offences with the same physical elements as the indictable offences at new sub-ss 248PJ(1) and (2) respectively, except that they contains no fault elements.

1.333 The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PK Commercial possession or import of unauthorised recording*

1.334 New s 248PK creates indictable, summary and strict liability offences relating to the commercial possession or importation of an unauthorised recording of a performance. The offences are based on the existing paragraphs 248Q(4)(c) and (d).

1.335 New sub-s 248PK(1) converts the existing offence into an indictable offence of possession or importation into Australia of an unauthorised recording within the protection period with an intention as specified under new paragraph 248PK(1)(a).

1.336 New sub-s 248PK(1) removes the fault element of 'knows or ought reasonably to know'. Under the amended provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.337 The notation after new sub-s 248PK(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.338 New sub-s 248PK(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PK(1).

1.339 New sub-s 248PK(3) creates related summary offences by incorporating the elements of new sub-s 248PK(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance element at new paragraph 248PK(3)(c).

1.340 Pursuant to new sub-s 248PK(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.341 New sub-s 248PK(4) makes it clear that the offence under new sub-s 248PK(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.341 Similarly, new sub-s 248PK(5) creates a strict liability offence with the same physical elements as the new sub-s 248PK(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PL Exhibiting unauthorised recording in public by way of trade*

1.342 New s 248PL creates indictable, summary and strict liability offences relating to the public exhibition of an unauthorised recording by way of trade. The offences are based on the existing paragraph 248Q(6)(a).

1.343 The amended new sub-s 248PL(1) converts the existing offence into an indictable offence of by way of trade exhibiting in public an unauthorised recording of a performance during the protection period.

1.344 New sub-s 248PL(1) removes the fault element of ‘knows or ought reasonably to know’. Under the amended provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.345 The notation after new sub-s 248PL(1) clarifies that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.346 New sub-s 248PL(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PL(1).

1.347 New sub-s 248PL(3) creates a related summary offence by incorporating the elements of new sub-s 248PL(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraph 248PL(3)(c).

1.348 Pursuant to new sub-s 248PL(3) the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.349 New sub-s 248PL(4) makes it clear that the offence under new sub-s 248PL(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.350 Similarly, new sub-s 248PL(5) creates a strict liability offence with the same physical elements as the new sub-s 248PL(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248PM Importing unauthorised recording for exhibition by way of trade*

1.351 New s 248PM creates indictable, summary and strict liability offences relating to the importation of an unauthorised recording for exhibition by way of trade. The offences are based on the existing paragraph 248Q(6)(b).

1.352 New sub-s 248PM(1) converts the existing offence into an indictable offence of importing into Australia by way of trade an unauthorised recording during the protection period, with the intention to exhibit the recording in public.

1.353 New sub-s 248PM(1) removes the fault element of 'knows or ought reasonably to know'. Under the amended provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.354 The notation after new sub-s 248PM(1) provides that the protection period of the performance is stipulated in new s 248CA (this will differ depending on whether the section relates to a cinematograph film or sound recording of the performance).

1.355 New sub-s 248PM(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248PM(1).

1.356 New sub-s 248PM(3) creates a related summary offence by incorporating the elements of new sub-s 248PM(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraph 248PM(3)(c).

1.357 New sub-s 248PM(3) provides that the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.358 New sub-s 248PM(4) makes it clear that the offence under new sub-s 248PM(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248Q.

1.359 Similarly, new sub-s 248PM(5) creates a strict liability offence with the same physical elements as the new sub-s 248PM(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

**Subdivision B—Acts relating to sound recordings of performances given before  
1 July 1995**

*New s 248QA Scope of this Subdivision*

1.360 New sub-s 248QA(1) is based on the provisions of the previous sub-s 248QA(1) and provides for the scope of this Subdivision. The new subsection provides for the protection of performances given at any time before 1 July 1995 which is the date of commencement of the *Copyright (World Trade Organization Amendments) Act 1994*, and applies to acts done in Australia on or after the commencement of this Subdivision in relation to such performances.

1.361 New sub-s 248(2) clarifies that this section has effect despite s 14.1 of the Criminal Code, which is the default standard geographical jurisdiction provision applying to Commonwealth offences.

1.362 New Subdivision B of Division 3 will commence as a result of Part 1 of Schedule 1 of this Bill.

*New s 248QB Possessing equipment for copying unauthorised sound recording*

1.363 New s 248QB creates indictable, summary and strict liability offences relating to the possession of equipment for copying an unauthorised sound recording of a performance. The offences are based on the previous sub-s 248QA(2).

1.364 New sub-s 248QB(1) converts the existing offence into an indictable offence of possession of a plate or recording equipment during the 50 year protection period of the performance, with the intention of using it for making a copy of an unauthorised sound recording of a performance.

1.365 New sub-s 248QB(1) removes the fault element of 'knows or ought reasonably to know'. Under the amended provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.366 New sub-s 248QB(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248QB(1).

1.367 New sub-s 248QB(3) creates a related summary offence by incorporating the elements of new sub-s 248QB(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraph 248QB(3)(c).

1.368 However, to avoid doubt about the applicable fault element for paragraph 248QB(3)(b) (that is, plate or sound recording 'is to be used' etc.), new sub-s 248QB(4) clarifies that the default fault element of 'recklessness' applies to that element.

1.369 Pursuant to new sub-s 248QB(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.370 New sub-s 248QB(5) makes it clear that the offence under new sub-s 248QB(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.371 Similarly, new sub-s 248QB(6) creates a strict liability offence with the same physical elements as the new sub-s 248QB(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

1.372 New sub-s 248QB(7) makes it clear for the purposes of the Criminal Code (see s 6.1 of the Criminal Code) that the offence under new sub-s 248QB(6) is a strict liability offence.

1.373 New sub-s 248QB(8) clarifies that for the purposes of prosecuting an offence under new s 248QB, it is not intended that the prosecution be required to prove that a specific performance or recording is intended to be, or will be, copied. Eg, if there was evidence that there were a number of particular recordings in a room where a device is located, it is not intended that the prosecution would have to specify which of the many recordings was in fact to be copied.

1.374 Offences as in new s 248QB are drafted with the intention that the elements of the offence must exist at the time of the making or possession of the device and not at a later time (that is, at the time of prosecution of the offence).

#### *New s 248QC Copying unauthorised sound recording*

1.375 New s 248QC creates indictable, summary and strict liability offences relating to copying of an unauthorised sound recording. The offences are based on the previous sub-s 248QA(3).

1.376 New sub-s 248QC(1) converts the existing offence into an indictable offence of copying an unauthorised sound recording of a performance during the 50 year protection period.

1.377 New sub-s 248QC(1) removes the fault element of ‘knows or ought reasonably to know’. Under the amended provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.378 New sub-s 248QC(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248QC(1).

1.379 New sub-s 248QC(3) creates a related summary offence by incorporating the elements of new sub-s 248QC(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance element at new paragraph 248QC(3)(c).

1.380 Pursuant to new sub-s 248QC(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.381 New sub-s 248QC(4) makes it clear that the offence under new sub-s 248QC(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.382 New sub-s 248QC(5) creates a strict liability offence with the same physical elements as the new sub-s 248QC(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248QD Selling etc. unauthorised sound recording*

1.383 New s 248QD creates indictable, summary and strict liability offences relating to selling, letting for hire, or by way of trade offering or exposing for sale or hire, an unauthorised sound recording of a performance. The offences are based on the existing sub-s 248QA(4)(a).

1.384 New sub-s 248QD(1) converts the existing offence into an indictable offence of selling, letting for hire or by way of trade offering or exposing for sale or hire, an unauthorised sound recording of a performance within the 50 year protection period.

1.385 New sub-s 248QD(1) removes the fault element of ‘knows or ought reasonably to know’. Under the amended provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology under the Criminal Code.

1.386 New sub-s 248QD(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248QD(1).

1.387 New sub-s 248QD(3) creates a related summary offence by incorporating the elements of new sub-s 248QD(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance element at new paragraph 248QD(3)(c).

1.388 Pursuant to new sub-s 248QD(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.389 New sub-s 248QD(4) makes it clear that the offence under new sub-s 248QD(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.390 New sub-s 248QD(5) creates a strict liability offence with the same physical elements as the new sub-s 248QD(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

#### *New s 218QE Distributing unauthorised sound recording*

1.391 New s 248QE creates indictable, summary and strict liability offences relating to distribution of an unauthorised recording. The offences are based on the existing paragraph 248QA(4)(b).

1.392 New sub-ss 248QE(1) and 248QE(2) separate the physical elements of two different indictable offences. The offence under new sub-s 248QE(1) relates to distribution with the intention of trading. The offence under new sub-s 248QE(2) relates to distribution that will prejudicially affect the financial interests of the performer in the performance.

1.393 It is intended that the latter offence will include distribution without a profit motive but which still has a financial impact on the performer. Eg, making a recording available on the Internet at no cost might prejudice the performer's financial interests in terms of sales of authorised recordings.

1.394 New sub-s 248QE(1) removes the fault element of 'knows or ought reasonably to know'. Under the new provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.395 New sub-s 248QE(3) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offences created by new sub-ss 248QE(1) and 248QE(2).

1.396 New sub-ss 248QE(4) and (5) create related summary offences by incorporating the elements of sub-s 248QE(1) and (2) respectively, with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraphs 248QE(4)(c) and (5)(d).

1.397 New sub-ss 248QE(4) and (5) provide that the maximum penalty for the summary offences is 120 penalty units and/or imprisonment for 2 years.

1.398 New sub-s 248QE(6) clarifies that offences under new sub-ss 248QE(4) and (5) are summary offences notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offences provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.399 New sub-ss 248QE(7) and (8) create strict liability offences with the same physical elements as the indictable offences at new sub-ss 248QE(1) and (2)

respectively. They contain no fault elements. The strict liability offences have a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248QF Commercial possession or import of unauthorised sound recording*

1.400 New s 248QF creates indictable, summary and strict liability offences relating to the commercial possession or importation of an unauthorised sound recording. The offences are based on the existing paragraphs 248QA(4)(c) and (d).

1.401 New sub-s 248QF(1) converts the existing offence into an indictable offence of possession or importation into Australia during the 50 year protection period of an unauthorised sound recording of a performance with the intention of doing any of the acts stipulated in sub-paragraphs 248QF(1)(a)(i)-(iv). These include selling, letting for hire and distributing to an extent that will affect prejudicially the financial interests of the performer in the performance.

1.402 New sub-s 248QF(1) removes the fault element of 'knows or ought reasonably to know'. Under the new provision the fault element of 'recklessness' applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.403 New sub-s 248QF(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248QF(1).

1.404 New sub-s 248QF(3) creates a related summary offence by incorporating the elements of new sub-s 248QF(1) with the inclusion of a different fault element of 'negligent as to that fact' for the circumstance element at new paragraph 248QF(3)(c).

1.405 Pursuant to new sub-s 248QF(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.406 New sub-s 248QF(4) makes it clear that the offence under new sub-s 248QF(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.407 New sub-s 248QF(5) creates a strict liability offence with the same physical elements as the new sub-s 248QF(1) offence. The strict liability offence contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248QG Exhibiting unauthorised sound recording in public by way of trade*

1.408 New s 248QG creates indictable, summary and strict liability offences relating to the public exhibition of an unauthorised sound recording by way of trade. The offences are based on the existing sub-s 248QA(6)(a).

1.409 New sub-s 248QG(1) converts the existing offence into an indictable offence of exhibiting in public by way of trade an unauthorised sound recording of a performance within the 50 year protection period.

1.410 New sub-s 248QG(1) removes the fault element of ‘knows or ought reasonably to know’. Under the new provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.411 New sub-s 248QG(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248QG(1).

1.412 New sub-s 248QG(3) creates a related summary offence by incorporating the elements of new sub-s 248QG(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance element at new paragraph 248QG(3)(c).

1.413 Pursuant to new sub-s 248QG(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.414 New sub-s 248QG(4) makes it clear that the offence under new sub-s 248QG(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.415 New sub-s 248QG(5) creates a strict liability offence with the same physical elements as the new sub-s 248PL(1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

*New s 248QH Importing unauthorised sound recording for exhibition by way of trade*

1.416 New s 248QH creates indictable, summary and strict liability offences relating to the importation of an unauthorised recording for exhibition by way of trade. The offences are based on the existing sub-s 248QA(5)(b).

1.417 New sub-s 248QH(1) converts the existing offence into an indictable offence of importation into Australia of an unauthorised sound recording of a performance within the 50 year protection period, with the intention of exhibiting the recording in public by way of trade.

1.418 New sub-s 248QH(1) removes the fault element of ‘knows or ought reasonably to know’. Under the new provision the fault element of ‘recklessness’ applies by default as a result of sub-s 5.6(2) of the Criminal Code. The amendment serves to ensure that the Act is consistent with fault element terminology in the Criminal Code.

1.419 New sub-s 248QH(2) provides a maximum penalty of 5 years imprisonment and/or 550 penalty units for the indictable offence created by new sub-s 248QH(1).

1.420 New sub-s 248QH(3) creates a related summary offence by incorporating the elements of new sub-s 248QH(1) with the inclusion of a different fault element of ‘negligent as to that fact’ for the circumstance element at new paragraph 248QH(3)(c).

1.421 Pursuant to new sub-s 248QH(3) the maximum penalty for the summary offence is 120 penalty units and/or imprisonment for 2 years.

1.422 New sub-s 248QH(4) makes it clear that the offence under new sub-s 248QH(3) is a summary offence notwithstanding the maximum penalty is more than 12 months imprisonment. The inherent seriousness of the offence provides cause for the higher than usual maximum penalty for a summary offence. However, this is still lower than the maximum penalty for the current summary offences in s 248QA.

1.423 New sub-s 248QH(5) creates a strict liability offence with the same physical elements as the new sub-s 248QH (1) offence, except that it contains no fault elements. The strict liability offence has a maximum penalty of 60 penalty points and will be underpinned by the infringement notice scheme in the Copyright Regulations.

### **Subdivision C —Prosecution and infringement notices**

#### *New s 248R Courts in which offences may be prosecuted*

1.424 New s 248R is based partly on previous s 248S and confers jurisdiction on the Federal Court, or on any other court of competent jurisdiction for prosecution of offences under Part XIA, Division 3.

1.425 New sub-ss 248S(2) and (3) make it clear that the Federal Court has jurisdiction to hear and determine summary and strict liability offences only since it is not authorised to conduct trials by jury.

#### *New s 248S Protection against multiple proceedings for same act*

1.426 New s 248S is based on previous s 248QB. It ensures that a defendant is protected from prosecution for offences under both new Subdivision A and Subdivision B in relation to a single act.

1.427 A defendant may infringe complementary provisions of both Subdivisions due to the specific application of Subdivision B to sound recordings given before 1 July 1995, which might also be protected under the more generally applicable provisions of Subdivision A.

#### *New s 248SA Infringement notices*

1.428 New sub-s 248SA provides for the making of regulations with respect to an infringement notice scheme to underpin the strict liability offences under Part XIA, Division 3. This will provide police and prosecutors will a wider range of penalty options to pursue against suspected offenders depending on the seriousness of the conduct. It will also ensure that these offences comply with Commonwealth criminal law policy and the Criminal Code.

1.429 Pursuant to new sub-s 248SA(2) any such infringement notice must equal one-fifth of the maximum fine that could be imposed for a person found guilty of that strict liability offence. Accordingly, the infringement notice must equal 12 penalty units (\$1320).

**Subdivision D—Destruction or delivery up of unauthorised recordings**

1.430 This item also adds the new title for Subdivision D, for consistency in drafting within Part XIA, Division 3, as amended.

**Part 2—Amendment contingent on the Archives Amendment Act  
2006**

*Copyright Act 1968*

**Item 34            Paragraphs 132SC(7)(b), 132APA(8)(b), 132APB(6)(b),  
132APC(6)(b) and 132AT(2)(b)**

1.431 Paragraphs 132SC(7)(b), 132APA(8)(b), 132APB(6)(b), 132APC(6)(b) and 132AT(2)(b) are repealed and replaced to ensure that the references to ‘archives’ in the Act are consistent with the definition in the *Archives Act 1983* as amended by the *Archives Amendment Act 2006*.

## **Schedule 2—Presumptions**

### *Copyright Act 1968*

#### **Items 1 and 2 Subsections 126A(2) and (3)**

2.1 Existing s 126A contains evidential presumptions in relation to the subsistence of copyright in civil proceedings under Part V. This section was introduced by the *Copyright (Parallel Importation) Act 2003* and provides that certain statements relating to subsistence from marks, labels or foreign certificates are admissible in civil proceedings under Part V as ‘prima facie evidence’ of the facts so stated. This is not consistent with the stronger formulation of ‘presumed unless the contrary is established’ which is used in other presumptions contained within the Act (see eg sub-s 127(1)) that may be used in Part V civil proceedings.

2.2 In order to create consistency in the Act, and to remove any incentives to challenge subsistence of copyright that the lower threshold may have created, new sub-ss 126A(2) and (3) omit the lower threshold, ‘prima facie evidence’, and replace it with the stronger presumption that the statements contained on the labels, marks or certificates are presumed to be as stated ‘unless the contrary is established’.

2.3 Item 1 also deletes from the heading to s 126A ‘Evidence in relation’ and substitutes ‘Presumptions relating’, to reflect this amendment.

#### **Items 3, 4, 5 and 6 Subsections 126B(2), (3), (5) and (6)**

2.4 Existing s 126B contains evidential presumptions in relation to the ownership of copyright in civil proceedings under Part V. This section was introduced by the *Copyright (Parallel Importation) Act 2003* and provides that certain information relating to ownership from marks, labels, foreign certificates or chain of ownership documents are admissible in civil proceedings under Part V as ‘prima facie evidence’ of the facts so stated.

2.5 In order to create consistency in the Act and to remove any incentives to challenge copyright ownership that the lower threshold may have created, new sub-ss 126B(2), (3), (5) and (6) omit the lower threshold, ‘prima facie evidence’, and

replace it with the stronger presumption that the statements contained on the labels, marks, certificates or chain of ownership documents are presumed to be as stated 'unless the contrary is established'.

2.6 A note inserted by item 3 also deletes from the heading to s 126B 'Evidence in relation' and substitutes 'Presumptions relating', to reflect the change in presumption.

## **Item 7 Section 130**

2.7 This item repeals s 130 and substitutes new provisions creating evidential presumptions in civil proceedings under Part V with respect to computer programs (new s 129A) and sound recordings (new s 130). These amendments are intended to more accurately reflect common labelling practices used in those industries.

### *New Section 129A Presumptions relating to computer programs*

2.8 The current labelling practices with respect to software is to affix the standard copyright symbol (©) together with the year of publication and name of the copyright owner. The more general presumption provisions (eg, in new sub-s 126A(2)) apply only where the label states the year and place of *first* publication or making of the work or subject-matter. There is uncertainty as to whether the standard copyright notice commonly used by software companies, as outlined above, satisfies this requirement.

2.9 New s129A is intended to more accurately reflect the labelling practices of the software industry. It is also drafted to be consistent with new ss 130, 132B and 131.

2.10 Under new sub-ss 129A(1) and (2), where a copy or part of the computer program has been supplied to the public and at that time bears a label or mark consisting of the copyright symbol (©) accompanied by a specified year and name of a person, then, unless the contrary is established, the presumption is that the work is original, was first published in the year indicated on the label or mark and that the person indicated on the label or mark was the owner of the copyright in the program when and where the articles or things were labelled or marked.

2.11 New sub-s 129A(3) clarifies that the presumption relating to statements about ownership under new sub-s 129A(2) does not preclude another person or persons from

also having ownership of the copyright in the work. This provision also ensures consistency of drafting within the Act (eg, new sub-s 130 (4)).

*New Section 130 Presumptions relating to sound recordings*

2.12 New s 130 is based on the existing s 130 which contains evidential presumptions in civil proceedings relating to certain statements on labels or marks used in the recording industry.

2.13 In order to create consistency in the Act and to remove any incentives to challenge copyright that the lower threshold may have created, new sub-ss 132(2) and (3) omit the lower threshold, ‘prima facie evidence’, and replace it with the stronger presumption that the statements contained on the labels, marks, certificates or chain of ownership documents are presumed to be as stated, ‘unless the contrary is established’.

2.14 New sub-s 130(2) sets out in a table the evidential presumptions relating to label or marks on a record, or part of a recording, which have been made in statement form.

2.15 Where the mark or label consists of a ‘P’ in a circle accompanied by a date and a person’s name, the presumptions are stipulated at new sub-s 130(3).

2.16 New sub-s 130(4) clarifies that the presumption relating to statements about ownership under this section does not preclude another person or persons from also having ownership of the copyright in the sound recording. This is consistent with the drafting of presumptions within the Act (see new sub-s 129A(3)).

**Item 8            Section 131**

2.17 This item adds a ‘(1)’ at the commencement of new s 131, for reasons of drafting, to accommodate the inclusion of further subsections under new s 131.

2.18 This item also replaces the heading to s 131 by the heading ‘Presumptions relating to films’ to reflect the amendments to s 131 made by item 9 below.

**Item 9            At the end of section 131**

2.19 This item inserts new subsections 131(2), (3) and (4). The intention of the amendments is to introduce a film specific presumption that more accurately recognises labelling practices used on commercially released films in Australia.

2.20 New sub-ss 131(2) and (3) provide that where articles or things embodying a film have been supplied commercially and at that time they bear a label or mark consisting of the copyright symbol (©) accompanied by a specified year and name of a person, then, unless the contrary is established, the presumption is that the film was first made in the year indicated, and the named person indicated was the owner of the copyright in the film when and where the articles or things were labelled or marked.

2.21 New sub-s 131(4) clarifies that the presumption relating to statements about ownership does not preclude another person or persons from having ownership of the copyright in the film. This is consistent with the drafting of presumptions in the Act (see eg new sub-s 129A(3)).

**Items 10, 11, 12 and 13 – Subsections 132A(2), (3), (4) and (5)**

2.22 Existing s 132A contains an evidential presumption in relation to the subsistence and ownership of copyright in criminal proceedings issued under s 132.

2.23 It provides that certain subsistence and ownership information from marks, labels, foreign certificates or chain of ownership documents are admissible in a prosecution under s 132 as ‘prima facie evidence’ of the facts so stated.

2.24 This is inconsistent with the stronger formulation of ‘presumed unless the contrary is established’ which is used in other presumptions contained within the Act (see eg sub-s 127(1)).

2.25 In order to create consistency in the Act and to remove any incentives to challenge copyright that the lower threshold may have created, new sub-ss 132A(2), (3), (4) and (5) omit the lower threshold, ‘prima facie evidence’, and replace it with the stronger presumption that the statements contained on the labels, marks, certificates or

chain of ownership documents are presumed to be as stated, ‘unless the contrary is established’.

#### **Item 14      Section 132B**

2.26 This item repeals s 132B and substitutes new provisions which create evidential presumptions in relation to criminal proceedings under the Act with respect to computer programs (new s 132AAA), sound recordings (new s 132B), and films (new s 132C). The new provisions are intended to more accurately reflect common labelling practices used in those industries.

##### *New s 132AAA Presumptions relating to computer programs*

2.27 The current labelling practices with respect to software is to affix the standard copyright symbol (©) together with the year of publication and name of the copyright owner. The more general presumption provisions (see new sub-s 132A(2)) apply only where the label states the year and place of *first* publication, or making of the work or subject-matter. There is uncertainty as to whether the standard copyright notice commonly used by software companies, as outlined above, satisfies this requirement.

2.28 New s 132AAA is intended to reflect the actual labelling practices of the software companies. It is also drafted to ensure consistency within the Act with respect to the formulation of evidential presumptions (new ss 129A, 130 and 131).

2.29 Under new sub-ss 132AAA(1) and (2), where a copy or part of the computer program has been supplied to the public and at that time bears a label or mark consisting of the copyright symbol (©) accompanied by a specified year and the name of a person, then, unless the contrary is established, the presumption is that the work is original, was first published in the year indicated on the mark, and that the person indicated on the mark was the owner of the copyright when and where the articles or things were labelled or marked.

2.30 New sub-s 132AAA(3) clarifies that the presumption relating to statements about ownership does not preclude another person or persons from also having ownership of the copyright in the work. This provision also ensures consistency of drafting within the Act (new sub-s 132B(4)).

*New Section 132B Presumptions relating to sound recordings*

2.31 New s 132B is based on existing s 132B which contains evidential presumptions in criminal proceedings relating to certain statements on labels and marks used in the recording industry.

2.32 New s132B is drafted to ensure consistency within the Act with respect to the formulation of evidential presumptions (new ss 129A, 130 and 131). The formulation of the presumptions under both new sub-ss 132B(2) and (3) is 'presumed unless the contrary is established'. This is a higher threshold than the current formulation under repealed 132B of 'admissible as prima facie evidence'. This creates consistency in the Act and removes any incentives to challenge copyright that the lower threshold may have created.

2.33 Sub-s 132B(2) sets out in table form the evidential presumptions relating to label or marks on a record, or part of a recording, that apply where the label or mark has been made in statement form.

2.34 Where the mark or label consists of a 'P' in a circle accompanied by a date and a person's name, then the presumptions applying are those provided for in new sub-s 132B(3).

2.35 New sub-s 132B(4) clarifies that the presumption relating to statements about ownership under this section does not preclude another person or persons from also having ownership of the copyright in the sound recording. This is consistent with the drafting of presumptions within the Act (new sub-s 132AAA(3)).

*New Section 132C Presumptions relating to films*

2.36 New s 132C introduces a film specific presumption in Division V (Criminal Proceedings) (except new s 132AM) that more accurately recognises labelling practices used on commercially released films in Australia.

2.37 New sub-ss 132C(1) and (2) are based on the existing presumption about film makers in existing s 131 for Part V (Civil Proceedings).

2.38 Further, new sub-s 132C(3) provides that where articles or things embodying a film have been supplied commercially and at that time bear a label or mark consisting of the copyright symbol (©) accompanied by a specified year and the name of a person, then, unless the contrary is established, the presumption is that the film was first made in the year indicated on the label or mark, and the person indicated on the label or mark was the owner of the copyright when and where the records or containers were labelled or marked.

2.39 New sub-s 132C(4) clarifies that the presumption as to ownership under this section does not preclude another person or persons from also having ownership of the copyright in the film. This is consistent with the drafting of presumptions within the Act (new sub-ss 133AAA(3) and 132B(3)).

#### **Item 15          Application**

2.40 This item provides that the amendments made by this Schedule apply to legal proceedings (whether civil or criminal) commenced after the commencement of this Schedule. This ensures that the amendments do not have retrospective effect.

## **Schedule 3—Technologically neutral definitions**

### *Copyright Act 1968*

#### **Item 1            Subsection 10(1) (definition of *infringing copy*)**

3.1     This item amends the definition of ‘infringing copy’ in sub-s 10(1) so that the reference to ‘article’ in sub-s 10(1) is extended to include ‘an electronic reproduction or copy’ of the work, recording, film, broadcast or edition. This is to ensure that the term ‘article’ is used consistently throughout the Act. Currently, the extended definition applies only in criminal offences under s 132.

#### **Item 2            Subsection 10(1) (definition of *record*)**

3.2     This item repeals the definition of ‘record’ in sub-s 10(1) and inserts a new definition, to ensure that technologically neutral definitions are used consistently throughout the Act. The new definition of ‘record’ under sub-s 10(1) includes a digital file (eg, a computer file) in which sounds are embodied.

3.3     Under the repealed definition, there was uncertainty as to whether the Act protected digital files or prevented their download over the Internet. A narrow reading of the definition of ‘record’ may have excluded such activity.

3.4     This amendment also ensures that the definition is consistent with the definition of ‘record’ in s 25 of the *Acts Interpretation Act 1901*.

#### **Item 3            At the end of s 38**

3.5     This item inserts new sub-s 38(3) to include a definition of ‘article’.

3.6     The amendment is designed to ensure the definition of ‘article’ in the civil secondary dealing provisions (existing ss 38 and 103) is consistent with the definition in the related criminal offences (new s 132AA).

3.7     Under the criminal offence provisions of the Act, ‘article’ is defined to specifically include a ‘reproduction or copy in electronic form’. This definition is not adopted in the existing related civil provisions in ss 38 and 103. The result is that

online distribution of, or the offer to sell, an infringing electronic reproduction may have constituted a criminal offence, but not necessarily a civil infringement under the Act.

3.8 The definition of ‘article’ inserted into new s 38 by this item is consistent with the definition in existing s 132AA, and addresses any discrepancy. The definition includes ‘a reproduction or copy ... in electronic form’. Section 103 is similarly amended by item 9.

**Item 4 At the end of s 44D**

3.9 This item inserts new sub-s 44D(4) to clarify that the definition of ‘article’ in new sub-s 38(3) inserted by item 3 does not affect s 44D.

3.10 Section 44D is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 5 Section 44E**

3.11 This item adds a ‘(1)’ before the words ‘The copyright’ in s 44E. This is purely for drafting reasons to accommodate the insertion of a further new subsection in s 44E by item 6.

**Item 6 At the end of s 44E**

3.12 This item inserts new sub-s 44E(2) to clarify that the definition of ‘article’ in new sub-s 38(3) inserted by item 3 does not affect s 44E.

3.13 Section 44E is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 7 Section 44F**

3.14 This item adds a ‘(1)’ at the commencement of new s 44F. This is purely for drafting reasons to accommodate the insertion of a further new subsection to s 44F by item 8.

**Item 8            At the end of s 44F**

3.15 This item inserts new sub-s 44F(2) to clarify that the definition of ‘article’ in new sub-s 38(3) inserted by item 3 does not affect s 44F.

3.16 Section 44F is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 9            At the end of s 103**

3.17 Consistent with the amendment made to s 38 by item 3, this item inserts new sub-s 103(3) to include a definition of ‘article’.

3.18 The amendment is designed to ensure that the definition of ‘article’ in the civil secondary dealing provisions (existing ss 38 and 103) is consistent with the definition in the related criminal offences (new s 132AA).

3.19 Under the criminal offence provisions of the Act ‘article’ is defined to specifically include a ‘reproduction or copy in electronic form’. This definition is not adopted in the existing related civil provisions in ss 38 and 103. The result is that, under the existing definitions, online distribution, or the offer to sell, an infringing electronic reproduction may have constituted a criminal offence, but not necessarily a civil infringement under the Act.

3.20 The definition of ‘article’ inserted into to new sub-s 103(3) by this item is consistent with the definition in existing s 132AA and addresses any discrepancy. The definition includes ‘a reproduction or copy ... in electronic form’.

**Item 10            At the end of s 112C**

3.21 This item inserts new sub-s 112C(3) to clarify that the definition of ‘article’ in new sub-s 103(3), inserted by item 9, does not affect s 112C.

3.22 Section 112C is concerned with the importation of physical items therefore the amended definition should not be applied to it.

**Item 11**                      **At the end of s 112D**

3.23 This item inserts new sub-s 112D(4). The amendment clarifies that the definition of ‘article’ in new sub-s 103(3), inserted by item 9, does not affect s 112D.

3.24 Section 112D is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 12**                      **Section 112DA**

3.25 This item adds a ‘(1)’ before the word ‘If’ in s 112DA. This is purely for drafting reasons, to accommodate the insertion of a further subsection to s 112DA by item 13.

**Item 13**                      **At the end of s 112DA**

3.26 This item inserts new sub-s 112DA(2). The amendment clarifies that the definition of ‘article’ inserted in new sub-s 103(3) by item 9, does not affect s 112DA.

3.27 Section 112DA is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 14**                      **Section 130A**

3.28 This item inserts into s 130A, before ‘In an action’ a ‘(1)’. This is purely for drafting reasons to accommodate the insertion of a further subsection to s 130A by item 15.

**Item 15**                      **At the end of s 130A**

3.29 This item inserts new sub-s 130A(2). The amendment clarifies that the definition of ‘article’ inserted in new sub-s 38(3) by item 3, and new sub-s 103(3) by item 9, does not affect s 130A.

3.30 Section 130A is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 16        Section 130B**

3.31 The amendment adds a '(1)' before the words 'In an action' in s 130B. This is purely for drafting reasons, to accommodate the insertion of a further subsection to s 130B by item 17.

**Item 17        At the end of s 130B**

3.32 This item inserts new sub-s 130B(2). The amendment clarifies that the definition of 'article' inserted in new sub-s 38(3) by item 3, and new sub-s 103(3) by item 9, does not affect s 130B.

3.33 Section 130B is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 18        Section 130C**

3.34 This item inserts in s 130C before the words 'In an action', a '(1)'. This is purely for drafting reasons to accommodate the insertion of a further subsection to s 130C inserted by item 19.

**Item 19        At the end of s 130C**

3.35 This item inserts new sub-s 130C(2). The amendment clarifies that the definition of 'article' inserted in new sub-s 38(3) by item 3, and new sub-s 103(3) by item 9, does not affect s 130C.

3.36 Section 130C is concerned with the importation of physical items and therefore the amended definition should not be applied to it.

**Item 20        Application**

3.37 This item clarifies that the amendments made by this Schedule only apply to acts done after the commencement of the Schedule. This ensures that the amendments do not have retrospective effect.

## **Schedule 4—Civil remedies and commercial-scale infringement online**

### *Copyright Act 1968*

#### **Item 1           At the end of s 115**

4.1     This item inserts in new sub-ss 115(5), (6), (7) and (8), under a new heading ‘consideration for relief for electronic commercial infringement’.

4.2     Under existing s 115, the relief that a court may grant in an action for an infringement of copyright includes an injunction and either damages or an account of profits (sub-s 115(2)). In assessing damages, the court may also award such additional damages as it considers appropriate in the circumstances having regard to certain matters outlined in paragraphs 115(4)(b)(i) – (iv). These include the flagrancy of the infringement, the need to deter similar infringements of copyright and whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form. A court may also grant relief in respect of an action for conversion or detention in relation to an infringing copy or a device (including a circumvention device) used or intended to be used for making copies (s 116).

4.3     In order to deal with issues that have arisen in cases involving large numbers of likely infringements over the Internet, new subs-ss 115(5)-(8) give a court additional power to grant relief in civil actions to copyright owners in certain commercial scale Internet infringement cases. This applies where the court is satisfied that:

- the respondent has committed an infringement (including by authorisation),
- it involved a communication of a work or other subject-matter to the public,
- because of this communication, it is likely there were other infringements of the copyright by the defendant that the plaintiff did not prove, and
- taken together, the proved infringement and the likely infringements occurred on a commercial scale.

4.4 Where a court is satisfied of these matters, it may have regard to the high probability of the likely infringements (as well as the proved infringements) in deciding what relief to grant in the action.

4.5 New paragraph 115(5)(c) is intended to be wide enough to capture commercial-scale Internet infringements that occur through peer-to-peer file sharing or by way of hypertext linking or downloads from remote websites. This is consistent with the definition of ‘communicate’ in sub-s 10(1) which includes ‘to make available online or electronically transmit’.

4.6 Pursuant to new paragraph 115(5)(d) the proved and likely infringements, taken together, must be on a ‘commercial scale’ before the court can have regard to such infringements in deciding what relief to grant. This is a safeguard to ensure that a plaintiff could not apply for this relief on the basis of an insufficient number of infringements.

4.7 Subsection (6) provides that the court may have regard to the high probability of the likely infringements (as well as the proved infringements) in deciding what relief to grant. It is the intention of the Bill that the determination of ‘commercial scale’ not be limited to proven infringements only. There are cases where it is appropriate to point to likely infringements to enable a plaintiff to meet the ‘commercial scale’ threshold. The plaintiff is required to establish, at least, that an infringement has occurred (see new paragraph 115(5)(a)). Once this is established, the court may have regard to likely infringements in the determination of scale.

4.8 New sub-s 115(7) provides for the matters that the Court may consider in determining if the infringement has occurred ‘on a commercial scale’ for the purposes of new paragraph 115(5)(d). This includes the volume and value of articles that are infringing copies constituting the proved infringements or infringing copies constituting the likely infringements assuming they actually occurred.

4.9 New sub-s 115(8) inserts a definition of ‘article’, consistent with amendments made by Schedule 3, inserting the same definition into various other sections.

## **Item 2            Application**

4.10 This item clarifies that the amendments contained in this Schedule 4 are to apply only to actions started after the commencement of the Schedule. This is to ensure that the amendments do not have retrospective effect.

## **Schedule 5—Customs seizure of imported infringing copies**

### *Copyright Act 1968*

#### **Item 1 Paragraph 135(5)(a)**

5.1 Section 135 outlines the ‘Notice of Objection’ scheme that allows officers of the Australian Customs Service (Customs) to seize copies of infringing copyright material where relevant copyright owners have objected to their importation. Under existing paragraph 135(5)(a), a Notice of Objection remains in force for two years unless otherwise revoked. The amendment made by this item extends the relevant period from two to four years.

5.2 This is intended to reduce the monetary and administrative burden for Customs and copyright owners in the administration of the scheme. It is also consistent with the amendments made to the trade marks Notice of Objection scheme under the *Trade Marks Amendment Act 2006*.

#### **Item 2 Application**

5.3 This item clarifies that amendments made to s 135 by Schedule 5 apply to notices lodged after the date of commencement of the Schedule (that is, 1 January 2007).

#### **Item 3 Section 135AA**

##### *New s 135AA Decision not to seize unless expenses are covered*

5.4 This item repeals existing s 135AA and substitutes new s 135AA. The amendment gives the Chief Executive Officer (CEO) of Customs authority to refuse to seize goods under sub-s 135(7) unless the objector gives the CEO a written undertaking that expenses for the seizure will be repaid.

5.5 Under repealed s 135AA, this required a deposit amount or a security from the objector. Under new s 135AA, the CEO may require a deposit of security before seizing infringing copies in cases where the objector has previously defaulted on an undertaking to repay expenses.

5.6 This amendment is consistent with similar changes made to the *Trade Marks Amendment Act 2006*.

5.7 It is also intended to reduce the monetary and administrative burden for Customs and copyright owners in the administration of the scheme. Eg, objectors normally lodge the security at the time of applying for the Notice of Objection. Currently the CEO requires a security of \$10,000. Copyright owners may be discouraged from lodging notices due to the financial burden of this payment, particularly on small businesses. In addition, there is a significant administrative burden on the CEO to manage the cash and documentation associated with security deposits.

#### **Item 4 Subsection 135AJ**

##### *New s 135AJ Failure to meet Commonwealth's expenses of seizure*

5.8 This item repeals existing 135AJ and substitutes new s 135AJ which outlines the consequences of failing to meet the Commonwealth's expenses of seizure as provided for in new s 135AA inserted by item 3.

5.9 Under repealed 135AJ, a debt became payable to the Commonwealth from the objector if the reasonable expenses incurred by the Commonwealth in taking certain action under Division 7 (eg seizing infringing copies) exceeded the amount deposited or the amount of the security given by the objector.

5.10 New 135AJ provides for similar consequences relating to a failure to pay an amount under an undertaking or where an amount paid or security amount is insufficient to meet the actual expenses incurred by Customs. These provide that:

- if an amount payable under an undertaking is not paid in accordance with an undertaking, the CEO may decide not to seize copies under the Notice of Objection
- an amount not paid under an undertaking is a debt due by the objector/s to the Commonwealth
- an amount that represents the difference between the amount paid by an objector under an undertaking and the actual expenses incurred by the CEO (provide the

expenses exceed the amount paid) is a debt due by the objector/s to the Commonwealth, and

- an amount that represents the difference between the amount of security given by an objector under new ss 135AA(2) and the actual expenses incurred by the CEO (provide the expenses exceed the amount of security) is a debt due by the objector/s to the Commonwealth.

**Item 5            Paragraph 195B(1)(c)**

5.11 This item inserts 'or 135AJ' into paragraph 195B(1)(c). This amendment is a consequence of the insertion of new s 135AJ by item 4 and ensures that decisions made by the CEO under that section are subject to review by the Administrative Appeals Tribunal under s 195B. This is consistent with the existing right of review for similar decisions by the CEO under new s 135AA inserted by item 3.

**Item 6            Transitional Provision**

5.12 This item includes a transitional provision to clarify the application of the amendments to existing Notices of Objection and deposit and security amounts. The transitional provisions allow for the return of the balance of deposit or security amounts on application by the objector in circumstances where:

- a notice was in force and a deposit or security was given to the CEO prior to the commencement of this Schedule, and
- subsequent to the commencement of this Schedule, the objector makes an undertaking under new s 135AA.

## **Schedule 6—Exceptions to infringement of copyright**

### *Copyright Act 1968*

#### **Part 1—Recording broadcasts for replaying at more convenient time**

##### **Item 1 Section 111**

6.1 This item repeals s 111 and substitutes new s 111. New s 111 broadens the scope of the copyright exception in s 111. Repealed s 111 provided an exception to the exclusive copyright rights of the maker of a television or sound broadcast in respect of such broadcasts. It permitted the ‘home taping’ of radio or television broadcasts for private and domestic use. The exception was of little practical benefit because of its limited scope to the broadcast only and not to any work, film or sound recording included within the broadcast. The exception did nothing to remedy the situation that notwithstanding most households engage in the practice of taping television programs to watch at a more convenient time, as a matter of law, it was technically an infringement of copyright to make a film or sound recording of any work, film or sound recording included within the broadcast. The exception was effectively limited to live-to-air broadcasts.

6.2 New s 111 clarifies that making a recording of a broadcast in certain circumstances does not infringe copyright in the broadcast, or any work or other subject-matter included in the broadcast. New s 111 reflects the intention that copyright law should ensure appropriate exceptions are provided to allow common domestic practices that do not unreasonably affect the copyright owner’s interests, such as video taping or recording television and radio programs in the home to watch or listen to at a later time.

6.3 New sub-s 111(1) sets out a number of conditions that must be satisfied for this exception to apply. First, a film or sound recording must be made of a broadcast. A film or sound recording made of a broadcast may not be used to make a further copy of the material broadcast. Secondly, the recording must be made in ‘domestic premises’. Thirdly, the recording must be solely for private and domestic use by watching or listening to the material broadcast at a time that is more convenient than the time of the broadcast. This final condition indicates that a recording may be made only so that a

television or radio broadcast can be time-shifted by private viewers or listeners; that is recorded at a time when it is not convenient to view or listen to the broadcast so it can be watched or listened to at a later time. Whilst the exception does not require immediate deletion of the television or radio program after watching or listening to it, the exception does not permit a person to record a broadcast and keep it indefinitely in a collection of films or sound recordings for repeated use.

6.4 New sub-s 111(2) provides that making a film or sound recording of a broadcast does not infringe copyright in the broadcast, or any work or other subject-matter included in the broadcast. This overcomes the limitation of the repealed s 111 by allowing for recording a broadcast and copyright material included in the broadcast.

6.5 New sub-s 111(3) contains restrictions preventing sales and other dealings with an article or thing embodying a film or recording of a broadcast. If the article or thing is dealt with, sub-s 111(2) is taken never to have applied. In that case, the making of the film or sound recording may infringe the copyright in the broadcast as well as included material. In some circumstances, the subsequent sale or dealing itself may also be an infringement of copyright and an offence.

6.6 New sub-s 111(4) clarifies that it is permissible to loan a recording of a broadcast to a member of the lender's family or household for that member's private and domestic use.

**Item 2            Subsection 248A(1) (after paragraph (a) of the definition of *exempt recording*)**

6.7 This item expands the definition of 'exempt recording' for the purposes of performers' rights under Part XIA.

6.8 The amendments to sub-s 248A(1) extend the definition of an 'exempt recording' to include an indirect film or sound recording made in domestic premises from a broadcast for private and domestic use by watching or listening to the performance at a more convenient time.

6.9 This exception to performers' rights supports the exception to copyright provided in sub-s 111(2). Without this amendment, a performer might be able to bring

an action for an unauthorised use of a performance against a person who records a broadcast of a performance under new s 111.

**Item 3            Subsection 248A(1) (at the end of paragraphs (aa) to (m) of the definition of *exempt recording*)**

6.10 This item adds the word ‘or’ at the end of each of paragraphs (aa) to (m) of the definition ‘exempt recording.’ This is a minor amendment to reflect current drafting style.

**Item 4            Subsection 248C(1A)**

6.11 This item inserts (aaa) after the word ‘paragraph’. It provides that a sound recording of a broadcast that is an exempt recording because of the amendments to sub-s 248A(1) at item 2 ceases to be an exempt recording if used for any other purpose without the authority of the performer. The purpose of this amendment is to restore performers’ rights if a sound recording of a broadcast of a performance is misused.

**Item 5            Subsection 248C(2)**

6.12 This item inserts (aaa) after (a), as a consequence of the amendment made by item 2. This amendment is similar to that made by item 4 and restores performers’ rights if a film of a broadcast of a performance is misused.

## **Part 2—Reproducing copyright material in a different format for private use**

### **Item 6           After section 43B**

#### *New s 43C Reproducing works in books, newspapers and periodical publications in different form for private use*

6.13 This item inserts new s 43C. New s 43C permits the owner of a book, newspaper or periodical publication to make a reproduction in a different form for his or her private and domestic use. For ease of reference the permitted reproduction is referred to as the ‘main copy’. This new exception will allow an owner of such an item to read or view the content in a different form without infringing the copyright in the book, newspaper or periodical publication.

6.14 New sub-s 43C(1) lists a number of conditions necessary for the new exception to operate. First, a reproduction may only be made from a copy of a work contained in a book, newspaper or periodical publication and it must be made by the article’s owner (paragraph 43C(1)(a)). Secondly, the main copy of a work must be made for the owner’s ‘private and domestic’ use instead of the copy contained in the book, newspaper or periodical (paragraph 43C(1)(b)). The phrase ‘instead of’ indicates that the owner may read or view a work by using the original book, newspaper or periodical publication and by means of a main copy; that is, the owner is not required to store the original.

6.15 Thirdly, the main copy must embody a work in a different form from the form in which it is embodied in the book, newspaper or periodical (paragraph 43C(1)(c)). This condition is intended to prevent the owner under this provision simply copying a work in the same form as in the original book, newspaper or periodical publication. Fourthly, the book, newspaper or periodical publication must not be an infringing copy of the work or a published edition of the work (paragraph 43C(1)(d)). This condition prevents a copy of a work which itself infringes copyright being used to make a main copy which does not infringe copyright because of the operation of this provision.

6.16 Finally, at the time a main copy is made by the owner, he or she must not have made, or be making, another copy that embodies the work in substantially the identical form to the form of the main copy (paragraph 43C(1)(e)). This condition is intended to restrict the owner from using the original book, newspaper or periodical publication to make multiple main copies of a work where each copy is in substantially the same form. This last condition is subject to the exception that it does not apply to a temporary reproduction of the work incidentally made as a necessary part of the technical process of making the main copy. This exception provides for the possibility that it may be necessary to make a temporary reproduction in the same form as the main copy. Eg, the technical process of making a main copy of a work in electronic form in a portable playing device from a book may require that a temporary reproduction in the required electronic form is made first in the memory of a personal computer. Without this exception, such a technical process would be blocked if the temporary reproduction was considered to be a 'main copy'.

6.17 New sub-s 43C(2) provides that the making of a main copy is not an infringement of copyright in a work or published edition of a work. A main copy is a reproduction of a work contained in a book, newspaper or periodical publication (see paragraph 43C(1)(a)). This exception to copyright is central to the operation of new s 43C.

6.18 New sub-s 43C(3) provides for dealings which may make a main copy an infringing copy. The purpose is to prevent sale, hire, trading in or distribution of a copy of a work made under this provision. If a specified dealing with a main copy occurs, sub-s 43C(2) is taken never to have applied to its making. The consequence is that the making of the main copy may become an infringement of copyright in the work or published edition of the work. In addition, the sale or other dealing with an infringing copy may also be an infringement of copyright and an offence in some circumstances.

6.19 New sub-s 43C(4) provides, for the avoidance of doubt, paragraph 43C(3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private use.

6.20 New sub-s 43C(5) provides that sub-s 43C(2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again to the making of another reproduction of the work from the main copy. This provision is intended to restrict the owner from using a main copy to make further reproductions.

6.21 New sub-s 43C(6) provides that sub-s 43C(2) is taken never to have applied if the owner of the book, newspaper or periodical publication disposes of it (in the form from which the main copy was made) to another person. The effect of this provision is that a main copy may become an infringing copy if the owner disposes of the original book, newspaper or periodical publication. The intention is to prevent a person acquiring the original item, making a main copy to keep for his or her future use and then passing ownership of the original book, newspaper or periodical publication to another person who might repeat the process. An owner who chooses to dispose of the original book, newspaper or periodical publication would be expected to delete or destroy any main copy made from the original prior to disposing of the original. It is not permitted to dispose of a main copy to another person with the original book, newspaper or periodical from which the main copy was made as sub-s 43C(3) prohibits dealings with a main copy.

6.22 New sub-s 43C(7) provides for the status of a temporary reproduction of a work incidentally made as a necessary part of the technical process of making a main copy. If sub-s 43C(2) applies to the making of the main copy only as a result of disregarding the making of a temporary reproduction, then the making of the temporary reproduction does not infringe copyright in the work or a published edition of the work if the temporary reproduction is destroyed at the first practical time during or after the making of the main copy. If the temporary reproduction is not destroyed at that time, the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the work or the published edition of the work. The intention is to require the maker to destroy a temporary reproduction made in a substantially identical form to the main copy.

## **Item 7           After Division 4A of Part III**

### **Division 4B—Acts not constituting infringements of copyright in artistic works**

#### *New s 47J Reproducing photograph in different format for private use*

6.23 This item inserts new s 47J. New s 47J permits the owner of a photograph to make a reproduction in a different form for his or her private and domestic use. For ease of reference the permitted reproduction is referred to as the ‘main copy’. This new exception will allow a photograph in hardcopy form to be reproduced in electronic form or a photograph in electronic form to be reproduced in hardcopy form.

6.24 New sub-s 47J(1) lists a number of conditions necessary for the new exception to operate. First, a reproduction can only be made from a photograph and it must be made by the owner of the original photograph for his or her private and domestic use instead of the original photograph (paragraph 47J(1)(a)). The phrase ‘instead of’ indicates that the owner may view a work by using the original photograph and by means of a main copy; that is, the owner is not required to store the original. Secondly, the original photograph must not be an infringing copy of a work or published edition of the work (paragraph 47J(1)(b)). This condition prevents an original photograph which infringes copyright being used to make a main copy which does not infringe copyright because of the operation of this provision.

6.25 Thirdly, the original photograph must be in hardcopy form and the main copy made in electronic form or the original photograph must be in electronic form and the main copy made in hardcopy form (paragraph 47J(1)(c)). Fourthly, at the time the owner makes a main copy, he or she must not have made, or be making, another reproduction of the original photograph that embodies the original photograph in a substantially identical form to the form of the main copy (paragraph 47J(1)(d)). This condition is intended to restrict the owner from using the original photograph to make multiple main reproductions of a photograph in substantially the same form.

6.26 The condition in paragraph 47J(1)(d) is subject to the exception that it does not apply to a temporary reproduction of the original photograph incidentally made as a necessary part of the technical process of making the main copy. This exception

provides for the possibility that it may be necessary to make a temporary reproduction in the same form as the main copy. Eg, the technical process of making a main copy of a photograph in electronic form in a portable digital device from a photograph in hardcopy form may require that a temporary reproduction in the required electronic form is made first in the memory of a personal computer. Without this exception, such a technical process would be blocked if the temporary reproduction was considered to be a 'main copy'.

6.27 New sub-s 47J(2) provides that the making of the main copy of a photograph is not an infringement of copyright in the original photograph or in a work, or published edition of a work, included in the original photograph. This exception to copyright is central to the operation of new s 47J.

6.28 New sub-s 47J(3) provides for dealings which may make a main copy an infringing copy. The purpose is to prevent sale, hire, trading in or distribution of a copy of a photograph made under this provision. If a specified dealing with a main copy occurs, sub-s 47J(2) is taken never to have applied to its making. The consequence is that the making of the main copy may become an infringement of copyright in the original photograph or in a work or published edition of a work included in the original photograph. In addition, the sale or other dealing with an infringing copy may also be an infringement of copyright and an offence in some circumstances.

6.29 New sub-s 47J(4) provides, for the avoidance of doubt, paragraph 47J(3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private use.

6.30 New sub-s 47J(5) provides that sub-s 47J(2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again to the making of another reproduction of the work from the main copy. This provision is intended to restrict the owner from using a main copy to make further reproductions.

6.31 New sub-s 47J(6) provides that sub-s 47J(2) is taken never to have applied if the owner of the original photograph disposes of it to another person. The effect of this provision is that a main copy may become an infringing copy if the owner disposes of

the original photograph. The intention is to prevent a person acquiring the original photograph, making a main copy to keep for his or her future use and then passing ownership of the original to another person who might repeat the process. An owner who chooses to dispose of the original photograph would be expected to delete or destroy any main copy made from the original photograph prior to disposing of it. It is not permitted to dispose of a main copy to another person with the original photograph as sub-s 47J(3) prohibits dealings with a main copy.

6.32 New sub-s 47J(7) provides for the status of a temporary reproduction incidentally made as a necessary part of the technical process of making a main copy. If sub-s 47J(2) applies to the making of the main copy only as a result of disregarding the making of a temporary reproduction, then the making of the temporary reproduction does not infringe copyright in the original photograph or a work, or a published edition of a work, included in the original photograph if the temporary reproduction is destroyed at the first practical time during or after the making of the main copy. If the temporary reproduction is not destroyed at that time, the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the original photograph or a work, or a published edition of a work, included in the original photograph. The intention is to require the maker to destroy a temporary reproduction made in a substantially identical form to the main copy.

#### **Item 8            After section 109**

##### *New s 109A Copying sound recording in different format for private use*

6.33 This item inserts new s 109A. New s 109A permits the owner of a record embodying a sound recording to make a copy in a different format for his or her private and domestic use. For ease of reference the permitted copy is referred to as the ‘main copy’. This new exception will allow the owner of a record to listen to the embodied music, words or other sounds by means of a playing device that uses a different audio format to the original record.

6.34 New sub-s 109A(1) lists a number of conditions necessary for the new exception to operate. First, a main copy must be made from a record embodying a sound recording and it must be made by the owner of the record for his or her private and domestic use instead of the record (paragraph 109A(1)(a)). The phrase ‘instead of’

indicates that the owner may listen to a sound recording using the original record and by means of a sound recording that is a main copy; that is, the owner is not required to store the original record. Secondly, the record must not have been made by downloading over the Internet a digital recording of a radio broadcast or similar program (paragraph 109A(1)(b)). The purpose of this exclusion is to avoid including within the scope of s 109A emerging markets for digital recordings such as 'podcasts'.

6.35 Thirdly, the record must not be an infringing copy of a sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording (paragraph 109A(1)(c)). This condition prevents a record which infringes copyright being used to make a main copy which is not an infringing copy because of the operation of this provision. Fourthly, the format in which sounds are embodied in the main copy must differ from the format in which sounds are embodied in the record (paragraph 109A(1)(d)). This condition is intended to restrict the owner simply copying a sound recording in the same format as embodied in the original record.

6.36 Fifthly, at the time the owner makes a main copy, he or she must not have made, or be making, another copy that embodies sounds in a format substantially identical to the format in which they are embodied in the main copy (paragraph 109A(1)(e)). This condition is intended to restrict the owner from making multiple main copies of a sound recording in substantially the same format. This last condition is subject to the exception that it does not apply to a temporary reproduction of the sound recording incidentally made as a necessary part of the technical process of making the main copy. This exception provides for the possibility that it may be necessary to make a temporary reproduction in the same format as the main copy. Eg, the technical process of making a main copy of a sound recording in a portable playing device from a CD may require that a temporary reproduction in the required new audio format is made first in the memory of a personal computer. Without this exception, such a technical process would be blocked if the temporary reproduction was considered to be a 'main copy'.

6.37 New sub-s 109A(2) provides that the making of a main copy is not an infringement of copyright in the sound recording embodied in the record or in a literary, dramatic or musical work or other subject-matter included in the sound recording. This exception to copyright is central to the operation of new s 109A.

6.38 New sub-s 109A(3) provides for dealings which may make a main copy an infringing copy. The purpose is to prevent sale, hire, trading in or distribution of a copy of a record made under this provision. If a specified dealing with a main copy occurs, sub-s 109A(2) is taken never to have applied to its making. The consequence is that the making of the main copy may become an infringement of copyright in the sound recording or in a work or other subject-matter included in the sound recording. In addition, the sale or other dealing with an infringing copy may also be an infringement of copyright.

6.39 New sub-s 109A(4) provides, for the avoidance of doubt, that paragraph 109A(3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private use.

6.40 New sub-s 109A(5) provides that sub-s 109A(2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again to making of another copy of the sound recording from the main copy. This provision is intended to restrict the owner from using a main copy to make further copies.

6.41 New sub-s 109A(6) provides that sub-s 109A(2) is taken never to have applied if the owner of the record disposes of it to another person. The effect of this provision is that a main copy may become an infringing copy if the owner disposes of the record. The intention is to prevent a person acquiring the record, making a main copy to keep for his or her future use and then passing ownership of the record to another person who might repeat the process. An owner who chooses to dispose of the record would be expected to delete or destroy any main copy made from the record prior to disposing of it. It is not permitted to dispose of a main copy to another person with the record as sub-s 109A(3) prohibits dealings with a main copy.

6.42 New sub-s 109A(7) provides for the status of a temporary copy of the sound recording incidentally made as a necessary part of the technical process of making the main copy. If sub-s 109A(2) applies to the making of the main copy only as a result of disregarding the making of a temporary copy, then the making of the temporary copy does not infringe copyright in the sound recording or in any work or other subject-matter included in the sound recording if the temporary copy is destroyed at the first

practical time during or after the making of the main copy. If the temporary copy is not destroyed at that time, the making of the temporary copy is taken always to have infringed copyright (if any) subsisting in the sound recording or in any work or other subject-matter included in the sound recording. The intention is to require the maker to destroy a temporary copy made in a substantially identical form to the main copy.

**Item 9            After section 110**

*New s 110AA Copying cinematograph film in different format for private use*

6.43 This item inserts new s 110AA. New s 110AA permits the owner of a videotape embodying a cinematograph film in analog form to make a copy of the film in electronic form for his or her private and domestic use. For ease of reference the permitted copy is referred to as the ‘main copy’.

6.44 New sub-s 110AA(1) lists a number of conditions necessary for the new exception to operate. First, the main copy must be made in electronic form from videotape embodying a cinematograph film in analog form and made by the owner of the videotape for his or her private and domestic use instead of the videotape (paragraph 110AA(1)(a)). This will permit a person, eg, to copy or ‘dub’ a film from a videotape to a DVD but not to copy a videotape to another videotape nor to copy a DVD to another DVD. The phrase ‘instead of’ indicates that the owner may view a film using the original videotape and by means of a main copy in electronic form; that is, the owner is not required to store the original videotape.

6.45 Secondly, the videotape must not be an infringing copy of the film, or of a broadcast, sound recording, work or published edition of a work (paragraph 110AA(1)(b)). This condition prevents a videotape which infringes copyright being used to make a main copy which is not an infringing copy because of the operation of this provision. Thirdly, at the time the owner makes a main copy, he or she must not have made, or be making, another copy that embodies the film in an electronic form substantially identical to the electronic form in which the film is embodied in the main copy (paragraph 110AA(1)(c)). This condition is intended to restrict the owner from making multiple main copies in substantially the same form.

6.46 The condition in paragraph 110AA(1)(c) is subject to the exception that it does not apply to a temporary copy of the film incidentally made as a necessary part of the technical process of making the main copy. This exception provides for the possibility that it may be necessary to make a temporary copy in the same form as the main copy. Eg, the technical process of making a main copy of a film in electronic form in the memory a computer from a videotape may require that a temporary copy in the required electronic form is made first on DVD (or vice versa). Without this exception, such a technical process would be blocked if the temporary copy was considered to be a 'main copy'.

6.47 New sub-s 110AA(2) provides that the making of a main copy is not an infringement of copyright in the cinematograph film or in a work or other subject-matter included in the film. This exception to copyright is central to the operation of new s 110AA.

6.48 New sub-s 110AA(3) provides for dealings which may make a main copy an infringing copy. The purpose is to prevent sale, hire, trading in or distribution of a copy of a film made under this provision. If a specified dealing with a main copy occurs, sub-s 110AA(2) is taken never to have applied to its making. The consequence is that the making of the main copy may become an infringement of copyright in the film or in a work or other subject-matter included in the film. In addition, the sale or other dealing with an infringing copy may also be an infringement of copyright.

6.49 New sub-s 110AA(4) provides, for the avoidance of doubt, that paragraph 110AA(3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private use.

6.50 New sub-s 110AA(5) provides that sub-s 110AA(2) is taken never to have applied if the owner of the videotape disposes of it to another person. The effect of this provision is that a main copy may become an infringing copy if the owner disposes of the videotape. The intention is to prevent a person acquiring the videotape, making a main copy to keep for his or her future use and then passing ownership of the videotape to another person who might repeat the process. An owner who chooses to dispose of the videotape would be expected to delete or destroy any main copy made from the videotape prior to disposing of it. It is not permitted to dispose of a main

copy to another person with the videotape as sub-s 110AA(3) prohibits dealings with a main copy.

6.51 New sub-s 110AA(6) provides for the status of a temporary copy of the film incidentally made as a necessary part of the technical process of making the main copy. If sub-s 110AA(2) applies to the making of the main copy only as a result of disregarding the making of a temporary copy, then the making of the temporary copy does not infringe copyright in the film or in any work or other subject-matter included in the film if the temporary copy is destroyed at the first practical time during or after the making of the main copy. If the temporary copy is not destroyed at that time, the making of the temporary copy is taken always to have infringed copyright (if any) subsisting in the film or in any work or other subject-matter included in the film. The intention is to require the maker to destroy a temporary copy made in a substantially identical form to the main copy.

### **Part 3—Uses of copyright material for certain purposes**

#### **Item 10 After section 200AA**

*New s 200AB Use of works and other subject-matter for certain purposes*

6.51 This item inserts new s 200AB. New s 200AB allows a court to decide if a particular use should be possible without a copyright owner's consent, that is, whether the copyright owner is able to control that use.

6.52 Before deciding the use is outside the copyright owner's control, a court would need to be satisfied that the particular use complies with the conditions set out in sub-s 200AB(1).

6.53 The intention is that s 200AB provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties.

6.54 New sub-s 200AB(1) provides that the copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all of the conditions listed in paragraphs 200AB(1) (a), (b), (c) and (d) exist. First, paragraph

200AB(1)(a) states that the circumstances of the use (including those described in paragraphs 200AB(1)(b), (c) and (d) must amount to a 'special case'. This condition is intended to ensure that the use is narrow in a quantitative as well as qualitative sense. Secondly, paragraph 200AB(1)(b) states that the use must be for one of the four purposes listed in sub-ss 200AB(2),(3),(4) and (5). This condition is intended to ensure that the use is certain and clearly elaborated. Thirdly, paragraph 200AB(1)(c) states that the use does not conflict with a normal exploitation of the work or subject-matter. The questions to be considered under this condition are whether the use closes off ways that copyright holders normally extract economic value from copyright in the Australian market or enters into economic competition with those ways, thereby depriving copyright holders of significant or tangible commercial gains. Forms of exploitation which, with a certain degree of likelihood, could acquire considerable economic or practical importance may also be considered. Fourthly, paragraph 200AB(1)(d) states that the use does not unreasonably prejudice the legitimate interests of the owner of the copyright or a person licensed by the owner of the copyright. This condition requires an assessment of the legitimate economic and non-economic interests of the copyright owner.

*Use by body administering library or archives*

6.55 New sub-s 200AB(2) allows for a use that is made by or on behalf of a body administering a library or archives. The use must be made for the purpose of maintaining or operating the library or archives, including providing a service of a kind usually provided by a library or service. This condition would encompass the internal administration of the library or archives as well as providing services to users. Further, the use must not be partly to obtain a commercial advantage. This would not necessarily preclude use on a cost recovery basis.

*Use by body administering educational institution*

6.56 New sub-s 200AB(3) provides for a use that is made by or on behalf of a body administering an educational institution (which is defined in sub-s 10(1)). The use must be made for the purpose of giving educational instruction, which would include classroom and remote teaching. The use must also not be made partly for a commercial advantage. This would not necessarily preclude use on a cost recovery basis.

*Use by or for person with a disability*

6.57 New sub-s 200AB(4) provides for a use made by, or for, a person with a disability. Where a person is unable to read, view or hear a work or other subject-matter in a particular form due to disability (or a combination of disabilities) the person may make a use of that work – eg to make an accessible version.

6.58 The use may be made by a person who has any disability that causes difficulty for the person in reading, viewing or hearing the work or other subject-matter in a particular form. This would include where the work is difficult (or impossible) for that person to access due to a disability affecting his or her sight, hearing, perception or dexterity.

6.59 The use may also be by another person in order to assist the person with disability. This would allow uses to be made for the person with disability by family members, friends or organisations. The use must be made for the purpose of the person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces or overcomes the difficulty in reading, viewing or hearing the work in the original form. The use must also not be made partly for a commercial advantage. This would not necessarily preclude a use made on a cost recovery basis.

6.60 It should be noted that due to new sub-s 200AB(6) (outlined below) this exception does not apply if other specific exceptions and statutory licences apply to the act and are not overtaken by s 200AB. Eg, where an act is permitted under a statutory licence for institutions assisting persons with disability, the institution cannot rely on this exception as a way of avoiding any obligations to pay remuneration by failing to meet a condition of the statutory licence.

*Use for parody or satire*

6.61 New sub-s 200AB(5) covers uses for parody and satire. This use does not have a non-commercial advantage condition in recognition that parody and satire may take place in the commercial media or other commercial setting. The conditions contained in sub-s 200AB(1) provide appropriate protection for the copyright owner against ‘free-riding’ for profit or gain.

*This section does not apply if under another provision the use does not, or might not, infringe copyright*

6.62 New sub-s 200AB(6) provides that sub-s 200AB(1) does not apply if, because of another provision, the relevant act is not an infringement or would not be an infringement where the conditions or requirements of that other provision are met. This condition ensures other specific exceptions and statutory licences continue to apply and are not overtaken by s 200AB. Eg, where an act is permitted under a statutory licence, a user cannot access s 200AB as a way of avoiding the obligation to pay remuneration by failing to meet a condition of the statutory licence.

6.63 New sub-s 200AB(7) defines phrases and words for the purpose of s 200AB. The definitions of ‘*conflict with a normal exploitation*’, ‘*special case*’ and ‘*unreasonably prejudice the legitimate interests*’ provide that these phrases have the same meaning as in Article 13 of the TRIPS Agreement (that is, the Agreement on Trade-Related Aspects of Intellectual Property Rights). The intention is that these phrases should not be interpreted more narrowly in s 200AB than Article 13 of the TRIPS Agreement requires. The word ‘*use*’ is defined as including any act that would infringe copyright apart from this section.

## **Part 4—Fair dealing for research or study**

### ***Copyright Act 1968***

#### **Item 11 Subsections 40(3) and (4)**

6.64 This item repeals sub-ss 40(3) and (4) and substitutes new sub-ss 40(3), 40(4) and 40(5). The purpose of the amendments is to improve the clarity of, and increase certainty in, the application of the existing exception in s 40 which permits ‘fair dealings’ with literary, dramatic or musical works for the purpose of research or study. The amendments are intended to provide certainty that a reproduction is a ‘fair dealing’ if done in accordance with those exceptions. A dealing not covered by the new provisions may nevertheless be a fair dealing for the purpose of research or study on the basis of the factors listed in s 40(2). The amendments also clarify the meaning of ‘reasonable portion’ for the purposes of s 40.

6.65 New sub-s 40(3) clarifies that a reproduction of (all or part of ) a literary, dramatic or musical work (or of an adaptation of such a work) contained in an article in a periodical publication, where the reproduction is made for the purposes of research or study, is taken to be a fair dealing with the work or adaptation. This is identical in its scope to previous paragraph 40(3)(a).

6.66 New sub-s 40(4) states that sub-s 40(3) does not apply if another article in the publication is also reproduced for the purpose of different research or a different course of study. It effectively allows more than one article from the same periodical publication to be reproduced (that is, it provides that this will constitute a fair dealing) where those articles are required for the same piece of research or the same course of study, but prohibits the reproduction of large portions of unrelated articles from a periodical publication.

6.67 Accordingly, whether two or more articles deal with the same or different subject-matter must be determined in light of the research or study being undertaken. The articles should only be regarded as dealing with the same subject-matter where they are required for the same or related research or study. New sub-s 40(4) is intended to reduce the uncertainty associated with the meaning of the term ‘different subject-matter’ used in previous sub-s 40(4).

6.68 New sub-s 40(5) applies to reproduction of a literary, dramatic or musical work (or of an adaptation of such a work) other than articles in periodical publications for the purposes of research and study. It set outs circumstances in which the reproduction is deemed to be a fair dealing for the purpose of research or study. The amendment is intended to clarify when a reproduction is of a ‘reasonable portion’ of those works by clarifying the interaction of paragraph 40(3)(b) and sub-ss 10(2) and 10(2A).

6.69 Subsection 10(2) provides guidance on the meaning of a ‘reasonable portion’ in situations where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, being an edition of not less than 10 pages. For a published literary or dramatic work in electronic form (other than a computer program), the relevant ‘reasonable portion’ test is in sub-s 10(2A).

6.70 New sub-s 40(5) makes the definition of ‘reasonable portion’ in sub-s 10(2) and sub-s 10(2A) exhaustive for the types of works it covers for the purposes s 40. Thus if a portion satisfies the relevant definition of ‘reasonable portion’ in either sub-s 10(2) or 10(2A) it is definitively reasonable. If it fails the relevant definition, it is definitively not reasonable.

## **Part 5—Official copying of library and archive material**

### *Copyright Act 1968*

#### **Item 12      At the end of subsections 49(2) and (2C)**

6.71 This item inserts a Note at the end of sub-ss 49(2) and (2C) to cross reference to the exception in sub-s 51A(1). Subsection 51A(1) permits reproduction and communication of works in a published form held in the collection of a library or archive for preservation and other purposes in specified circumstances. The Note is of no legal effect but points out that a copy under sub-ss 49(2) and (2C) can be made from a preservation copy of a fragile work.

#### **Item 13      Subsection 49(4)**

6.72 This item amends sub-s 49(4) by omitting the words ‘relate to the same subject-matter’, and substituting ‘are requested for the same research or course of study’. Subsection 49(4) applies to a situation where a request for reproduction of, or parts of, 2 or more articles contained in the same periodical publication. This item is consequential upon, and is to ensure consistency with, the amendment made by item 11 inserting new sub-s 40(4). In the case of a user-initiated request under s 49, the assessment of whether the articles relate to the same subject-matter would be made by the copying library on the basis of the information made known in the request by the user under sub-s 49(1).

#### **Item 14      After subsection 49(5)**

6.73 This item inserts new sub-ss 49(5AA) and 49(5AB). New sub-s 49(5AA) makes the definition of ‘reasonable portion’ in sub-s 10(2) and sub-s 10(2A) exhaustive for the types of works it covers for the purposes sub-s 49(5). Thus if a portion satisfies the relevant definition of ‘reasonable portion’ in either sub-s 10(2) or 10(2A) it is definitively reasonable. If it fails the relevant definition, it is definitively not reasonable. This is consistent with amendments made to s 40 by item 12, and to s 50 by item 19.

6.74 New sub-s 49(5AB) is inserted to provide guidance in determining what constitutes ‘a reasonable time at an ordinary commercial price’ for the purposes of the commercial availability test in paragraph 49(5)(b). It requires that an authorized officer making a copy in reliance on the exception in s 49 must take into consideration three factors: the time by which the person requesting the reproduction requires it, the time within which a new reproduction of the work at an ordinary commercial price could be delivered to the person, and whether an electronic reproduction of the work can be obtained within a reasonable time at an ordinary commercial price.

6.75 The policy intention is that s 49 should not be used to obtain a copy of a work without remuneration to the copyright owner if a new reproduction of the work at an ordinary commercial price could be delivered to the person requesting the reproduction by the time that person requires it, or if an electronic reproduction of the work can be obtained within a reasonable time at an ordinary commercial price.

**Item 15            Subsection 49(9) (definition of *library*)**

6.76 This item repeals the definition of library in sub-s 49(9) and substitutes a new definition of ‘library’. The purpose of the amendment is to clarify the type of library that is able to take advantage of the exceptions in ss 49 and 50. This is currently limited by the qualifications in s 18 and sub-ss 49(9) and 50(9).

6.77 One of the issues considered as part of the Digital Agenda review was whether libraries in ‘for profit’ organisations ought to be able to take advantage of provisions in the Act for non-remunerable copying. Australia has a distributed national collection of library material. The current application of ss 49 and 50 is integral to the effective operation of the Australian library network.

6.78 The amendment made by this item is designed to ensure that libraries will be entitled to rely on the exceptions in ss 49 and 50 if their collections (in whole or in part) are directly accessible to the public or are accessible to other library users through the library’s participation in an interlibrary loan system with libraries whose collections are directly accessible to the public.

**Item 16        Subsection 49(9)**

6.79 This item inserts into sub-s 49(9) a definition for ‘archives’. Consistent with amendments to the definition of ‘library’ made in item 15 , the definition of ‘archives’ inserted by this item makes clear that the critical test for whether an archive will be entitled to rely on exceptions in ss 49 and 50 is whether the collection of the archive is accessible to members of the public.

**Item 17        At the end of subsection 50(2)**

6.80 This item inserts a Note at the end of sub-s 50(2) to cross reference to the exception in sub-s 51A(1) which permits libraries to reproduce and communicate works for preservation and other purposes. The Note is of no legal effect but points out that a copy under sub-s 50(2) can be made from a preservation copy of a fragile work.

**Item 18        Subsection 50(6)**

6.81 This item amends sub-s 50(6) by omitting ‘subsection (4)’ and substituting ‘subsection (3)’. This purpose of this amendment is to ensure that a requesting library does not lose its immunity as a result of the supplying library not complying with requirements that must and can only be met by the supplying library.

6.82 Section 50 sets out requirements to which a supplying library must adhere and which provide immunity against actions for copyright infringement for the activities of reproducing and communicating the material. The effect of the current cross-referencing of subsections within s 50 is that a requesting library may lose its immunity as a result of the supplying library not complying with requirements that must - and can only - be met by the supplying library. This would be an unfair and unreasonable result for the requesting library and the amendment is designed to clarify immunity from liability under s 50.

6.83 Amending the reference in sub-s 50(6) to sub-s 50(3), rather than s 50(4), preserves the original policy intent that requesting libraries should not lose immunity from liability merely because of failure of the supplying library to comply with the requirements of the Act.

**Item 19      After subsection 50(7B)**

6.84 This item inserts new sub-ss 50 (7BA) and 50(7BB). The purpose of the amendment is to clarify the meaning of reasonable portion and to clarify aspects of the commercial availability test in relevant parts of s 50. New sub-s 50(7BA) makes the definition of ‘reasonable portion’ in sub-s 10(2) and sub-s 10(2A) exhaustive for the types of works it covers for the purposes of sub-ss 50(7A) and 50(7B). Thus if a portion satisfies the relevant definition of ‘reasonable portion’ in either sub-s 10(2) or 10(2A) it is definitively reasonable. If it fails the relevant definition, it is definitively not reasonable. The amendment ensures consistency with amendments made to s 40 by item 12, and to s 49 by item 14.

6.85 New sub-s 50(7BB) is inserted to provide guidance in determining what constitutes ‘a reasonable time at an ordinary commercial price’ for the purposes of the commercial availability test in subparagraphs 50(7A)(e)(ii) and 50 (7B)(e)(ii), (iii) and (iv). The amendment is consistent with that made by item 14 inserting new sub-s 49(5AB) in relation to the commercial availability test in s 49. New sub-s 50(7BB) requires that an authorized officer making a copy in reliance on the relevant exceptions in s 50 must take into consideration three factors: the time by which the person requesting the reproduction requires it, the time within which a new reproduction of the work at an ordinary commercial price could be delivered to the person, and whether an electronic reproduction of the work can be obtained within a reasonable time at an ordinary commercial price.

6.86 Consistent with the amendment made by item 14, the policy intention is that requests made by libraries or archives to other libraries or archives under s 50 to enable them to fulfil user requests made under s 49 should not be used to obtain a copy of a work without remuneration to the copyright owner if a new reproduction of the work at an ordinary commercial price could be delivered to the person requesting the reproduction by the time that person requires it, or if an electronic reproduction of the work can be obtained within a reasonable time at an ordinary commercial price.

**Item 20      Subsection 50(7C)**

6.87 This item amends sub-s 50(7C) by omitting ‘subsection (4)’ and substituting ‘subsection (3)’. Consistent with the amendment made by item 18, the purpose of this amendment is to ensure that a requesting library does not lose its immunity as a result of the supplying library not complying with requirements that must and can only be met by the supplying library.

6.88 Subsection 50(7C) provides that in the case of an electronic copy made by a supplying library on behalf of a requesting library, sub-s 50(4) does not apply unless as soon as practicable after it is supplied to the requesting library the copy held by the supplying library is destroyed. For the same reasons outlined in relation to item 18, under sub-s 50(7C), a requesting library may lose the protection of sub-s 50(4) if the supplying library does not destroy its reproduction of the requested material. The supplying library would retain its protection under s 50(3)(b).

6.89 This item therefore amends sub-s 50(7C) to refer to sub-s 50(3) rather than sub-s 50(4), preserving the original policy intent that requesting libraries should not lose immunity from liability merely because of the failure of the supplying library to comply with the requirements of the Act.

**Item 21      Subsections 50(8) and (9)**

6.90 This item repeals sub-ss 50(8) and (9) and substitutes new sub-s 50(8). The purpose of this amendment is to ensure consistency with amendments made by items 11, 13 and 19. The amendment is consequential upon, and to ensure consistency with, the amendment made by item 13 amending sub-s 49(4), so that it no longer refers to ‘the same subject-matter’ but instead refers to ‘the same research or course of study’.

6.91 Subsection 50(8) deals with a situation where a request for reproduction of, or parts of, 2 or more articles contained in the same periodical. New sub-s 50(8) provides that sub-s 50(4) does not apply to a reproduction or communication of all or part of two or more articles that are contained in the same periodical publication and that have been requested for the same purpose unless it is for the purpose of assisting a member of a Parliament in his or her duties, or unless it is to supply a reproduction to a person under s 49 and the reproduction of the articles was requested under s 49 for the same research or course of study.

6.92 Thus whilst more than one article may be copied from a periodical in the case of a request under paragraph 50(1)(aa) (meeting the needs of members of a Parliament), or under s 49 where the articles relate to the same research or course of study, a reproduction made for the purpose of satisfying a request by a library under sub-s 50(1)(a) (for the purpose of including the reproduction in the collection of the requesting library) is limited to one article per periodical.

6.93 The repeal of sub-s 50(9) is consequential upon the definition of ‘library’ inserted by item 15 and the definition of archives inserted by item 16. The definitions of ‘library’ and ‘archives’ inserted by those items will apply to s 50.

## **Item 22 Subsection 50(10)**

6.94 Section 50 provides an exception (with conditions) to allow libraries and archives to reproduce and communicate works for other libraries or archives. This item inserts a new definition of ‘library’ in sub-s 50(10). The purpose of the amendment is to specify which libraries are entitled to rely on the exception provided for in s 50. The amendment recognises the distributed nature of the national collection of library material and that s 50 is integral to the effective operation of the Australian library network.

6.95 Paragraph (a) of the new definition of ‘library’ is consistent with the definition of library inserted by item 15. The key criteria by which the library qualifies to rely on the exception is that the library’s collection is (in whole or in part) directly accessible to the public or is accessible to other library users through the library’s participation in an interlibrary loan system with libraries whose collections are directly accessible to the public.

6.96 Paragraph (b) of the new definition of ‘library’ also includes libraries whose principal purpose is to provide library services for members of a Parliament. This is consistent with the exception provided to these libraries in s 48A (copying by Parliamentary libraries for members of Parliament) and is designed to ensure the efficient participation in the library network by such libraries when they make or receive requests for copying or communicating which is carried out under s 50.

6.97 Paragraph (c) of the definition of ‘library’ also includes archives, but only if their collections are accessible to members of the public, consistent with the definition of ‘archives’ inserted by item 16. The intention is that such archives will be able to rely on the exception in s 50 to make and receive requests for copying by other libraries and archives.

**Item 23      Subsection 51A(4)**

6.98 This item repeals sub-s 51A(4) and substitutes a new sub-s 51A(4).

6.99 Existing sub-s 51A(1) permits reproduction and communication of works in a published form held in the collection of a library or archive for replacement purposes in specified circumstances. However, under sub-s 51A(4), s 51A(1) is subject to a commercial availability test - it does not apply to a work held in published form in the collection of a library or archives unless a copy of the work cannot be obtained within a reasonable time at an ordinary commercial price.

6.100 New sub-s 51A(4) permits reproduction of a published work for replacement and other purposes, notwithstanding that a later edition of that work may be commercially available. An authorized officer of the library or archives must make a declaration stating that no new copy of the work can be obtained within a reasonable time at an ordinary commercial price, and (new paragraph 51A(4)(b)) stating the reason justifying the reproduction of the particular edition in the collection.

6.101 The policy intention of this amendment is to ensure that where there is more than one edition of a work, new sub-s 51A(4) does not prevent reproduction of the earlier edition of the published work for replacement purposes under s 51A(1), where the library or archive is satisfied that there is good reason to make a replacement reproduction of the edition in the collection, notwithstanding that there may be a later edition available commercially.

**Item 24          Subsection 51A(6)**

6.102 This item inserts, in sub-s 51A(6), a definition for ‘administrative purposes’. Subsection 51A(2) permits reproduction of a work held in the collection of the library or archives for administrative purposes. The term ‘administrative purposes’ has until now been undefined. The purpose of the definition inserted by this item is to add clarity and to ensure that copying is appropriately limited under this section to only genuinely administrative purposes, being those directly related to the effective internal management, care and control of the collection of the library or archives. It is intended that ‘administrative purposes’ would include educating and training staff and volunteers in relation to activities directly related to the management of the collection of the library or archives. The definition would not cover reproduction to merely add to the collection of the library or archives so more copies are available for users.

**Item 25          Subsection 51A(6)**

6.103 This item inserts, in sub-s 51A(6), a definition of ‘officers of the library or archives’. The purpose of the amendment is to make clear that ‘officers of the library or archives’ includes authorised volunteers assisting with the care or control of the collection. The amendment will ensure that authorised volunteers in libraries and archives are able to be given appropriate training and are able to carry out their work, including by doing acts for which libraries and archives rely on the exception in s 51A. Eg, sub-s 51A(3) permits a reproduction of a work made for administrative purposes under sub-s 51A(2) to be communicated to officers of the library or archive through an internal computer system. It is intended that the Act should not operate in such a way to prevent authorised volunteers from receiving such communications.

**Item 26      After section 51A**

*New s 51B Copying significant works in key cultural institutions' collections*

6.104 This item inserts new s 51B. The purpose of the amendment is to provide for a new exception to allow certain key cultural institutions to make certain copies of culturally significant works in their collections.

6.105 New s 51B is one of three new exceptions (together with new ss 110BA and 112AA inserted by items 27 and 29 respectively) intended to widen the scope of the existing preservation exceptions as they apply to key Australian cultural institutions and as they apply to copyright material 'of historical and cultural significance to Australia'. These new exceptions only apply to particular libraries and archives and are separate and additional to those applicable to libraries and archives more generally.

6.106 New sub-s 51B(1) sets out the qualifying criteria to fall within the exception in s 51B. First, the work must be one that is held in the collection of a library or archives that has a statutory function (under a law of the Commonwealth, a State or a Territory) to develop and maintain a collection of material that may include works or other subject-matter that is protected under the Act. Second, an authorized officer of the relevant library or archives must be satisfied that the work is of historical or cultural significance to Australia.

6.107 New sub-ss 51B(2), (3) and (4) outline exceptions for different sub-categories of such works as explained below.

*Manuscript*

6.108 New sub-s 51B(2) covers works that are held in the form of manuscripts ('manuscript' is defined in sub-s 10(1) in relation to a literary, dramatic or musical work, as meaning the document embodying the work as initially prepared by the author, whether the document is in hardcopy form, electronic form or any other form). Artistic works are not included in the definition of manuscript, and are therefore covered separately by new sub-s 51B(3).

6.109 Currently, paragraph 51A(1)(a) permits reproduction of works held in manuscript form for the purpose of preservation against loss or deterioration. In many cases, such a preservation reproduction is made because the manuscript is in a fragile state and the risk of damage or deterioration is increased by any handling of it.

6.110 New sub-s 51B(2) deals with a work in manuscript form that is assessed by the library or archives to be an item that is of historical and cultural significance to Australia. The exception permits an authorized officer of the library or archive to make a single reproduction of the manuscript without infringing copyright, including a reproduction or copy in electronic form.

#### *Original artistic work*

6.111 New sub-s 51B(3) deals with an original artistic work that is assessed by the library or archives to be an item that is of historical and cultural significance to Australia. The exception provided for in sub-s 51B(3) permits an authorized officer of the library or archives to make a comprehensive photographic reproduction of the work from the original artistic work, including a reproduction or copy in electronic form. However this is subject to a commercial availability test – that is, it is permitted only if the officer is satisfied that a new photographic reproduction of the work cannot be obtained within a reasonable time at an ordinary commercial price.

#### *Published work*

6.112 Currently, paragraphs 51A(1)(b) and (c) permit reproduction of works in published form to replace the work where the work has been damaged or has deteriorated, or has been lost or stolen. In many cases, such a preservation reproduction is made because the published edition from which the reproduction is made is in a fragile state and the risk of damage or deterioration is increased by any handling of it.

6.113 New sub-s 51B(4) provides a new exception which permits an authorized officer of the library or archives to make a single reproduction of the work from the copy held by the institution, if satisfied that the work is of historical or cultural significance to Australia. However, the authorized officer of the library or archives must first be satisfied (before making the reproduction) that no new copy of the work -

or the edition in which it is held by the institution - can be obtained within a reasonable time at an ordinary commercial price.

6.114 The officer must also be satisfied that there is an appropriate justification for the reproduction of the particular work held in the collection. This is consistent with the requirements imposed on an authorized officer by new sub-s 51A(4), inserted by item 23. Where a copy of a work in published form is in a fragile state and any handling of it would risk damage or deterioration, the reproduction or copy made under this exception will ensure that the original item is better preserved by minimising the need for handling of that particular item - for the longer term benefit of Australia and the Australian people.

*Electronic copies and commercial availability*

6.115 New sub-s 51A(5) clarifies that for the purpose of sub-ss 51A(3) and (4), when considering the commercial availability of new copies, the authorized officer of the library or archives must also take into account whether an electronic copy of the work or edition (not just a hardcopy) can be obtained within a reasonable time at an ordinary commercial price. The amendment is intended to maintain the technical neutrality of the Act, and to ensure that the unremunerated exception in s 51A does not undermine the copyright owner's market in electronic copies of the work.

*Relationship with the rest of this Division*

6.116 New sub-s 51A(6) provides s 51A does not limit the operation of the rest of Division 5. Likewise the rest of Division 5 does not limit the operation of s 51A.

**Item 27      After section 110B**

*New s 110BA Copying significant recordings and films in key cultural institutions' collections*

6.117 This item inserts new s 110BA. New s 110BA is one of three new exceptions (together with new ss 51B and 112AA inserted by items 26 and 29 respectively) intended to widen the scope of the existing preservation exceptions as they apply to key Australian cultural institutions. The purpose of new s 110B is to provide for a new exception to allow key cultural institutions (being libraries and archives established

under a law of the Commonwealth or a State or Territory) to make certain copies of culturally significant sound recordings and films in their collections.

6.118 New sub-s 110BA(1) sets out the qualifying criteria to fall within the exception. First, the sound recording or film must be one that is held in the collection of a library or archives that has a statutory function (under a law of the Commonwealth, a State or a Territory) to develop and maintain a collection. Second, an authorized officer of the relevant library or archives must be satisfied that the recording or film is of historical or cultural significance to Australia.

6.119 New sub-ss 110B(2),(3) and (4) sets out permitted acts that may be done in respect of different sub-categories of such sound recordings and films.

*First record, or unpublished record, embodying sound recording*

6.120 New sub-s 110BA(2) deals with a first record of, or unpublished record of a sound recording that has been assessed under sub-s 110BA(1) to be an item that is of historical and cultural significance to Australia. It permits an authorized officer of the library or archives to make a single copy of the sound recording.

*Published sound recording*

6.121 New sub-s 110BA(3) deals with sound recording that is held in published form, that has been assessed under sub-s 110BA(1) to be an item that is of historical and cultural significance to Australia. The exception permits the national cultural institution to make a single copy of the sound recording, subject to a commercial availability test.

*First copy, or unpublished copy, of film*

6.122 New sub-s 110BA(4) deals with a first copy of, or an unpublished copy of, a cinematograph film that has been assessed under sub-s 110BA(1) to be an item that is of historical and cultural significance to Australia. The exception permits the national cultural institution to make a single copy of the film.

### *Published film*

6.123 New sub-s 110BA(5) deals with a published cinematograph film that has been assessed under sub-s 110BA(1) to be an item that is of historical and cultural significance to Australia. The exception permits the national cultural institution to make a single copy of the film, subject to a commercial availability test.

### *Commercially availability of copy of recording or film*

6.124 New sub-s 110BA(6) clarifies that when applying the commercial availability test in sub-ss 110BA(3) and (5), the authorized officer must take into account whether an electronic copy of the published sound recording or published film (not just an analogue copy) can be obtained within a reasonable time at an ordinary commercial price. This is intended to maintain the technical neutrality of the Act, and to ensure that the unremunerated exception in s 110BA does not undermine the copyright owner's market in electronic copies of the subject-matter. This is consistent with new s 51B(6) inserted by item 26.

### *Work or other subject-matter included in recording or film*

6.125 New sub-s 110BA(7) clarifies that so long as the copying of recordings or films is permitted by s 110BA, that copying does not infringe any copyright in works or other subject-matter that may be included in that recording or film. Accordingly no copyright clearances will need to be obtained from authors or makers of underlying works or subject-matter contained in a recording or film that is copied under s 110BA.

### *Relationship with the rest of this Division*

6.126 New sub-s 110(8) clarifies that the operation of s 110BA is not intended to limit the operation of the other provisions in Part IV Division 5. Likewise other provisions in Part IV Division 5 are not intended to limit the operation of s 110BA. The additional exceptions created by item 26 and 27 are intended to apply in addition to any exception that may apply under the exceptions applicable to libraries and archives more generally.

**Item 28      Subparagraphs 112(a)(ii) and (b)(ii)**

6.127 This item inserts in subparagraphs 112(a)(ii) and 112 (b)(ii) after ‘51A’ a reference to s 51B. This amendment is consequential to the insertion of new s 51B by item 26. It ensures that copying done under s 51B - in the same manner that copying expressly permitted by the other sections of the Act mentioned in subparagraphs 112(a)(ii) and (b)(ii) - does not infringe the copyright in a published edition of a work or works.

**Item 29      After section 112A**

*New section 112AA Copying significant published editions in key cultural institutions’ collections*

6.128 This item inserts new s 112AA. The purpose of the amendment is to provide for a new exception to allow key Australian cultural institutions (being certain libraries and archives established under a law of the Commonwealth, a State or a Territory) to make certain copies of culturally significant published editions in their collections.

6.129 New s 112AA is one of three new exceptions (together with new ss 51B and 110B inserted by items 26 and 27 respectively) intended to widen the scope of the existing preservation exceptions as they apply to key Australian cultural institutions and as they apply to copyright material ‘of historical and cultural significance to Australia’.

6.130 New sub-s 112AA(1) sets out the qualifying criteria to fall within the exception. First, the published edition must be one that is held in the collection of a library or archives that has a statutory function (under a law of the Commonwealth, a State or a Territory) to develop and maintain a collection. Second, an authorized officer of the relevant library or archives must be satisfied that the published edition is of historical or cultural significance to Australia.

6.131 New sub-s 112AA(2) deals with a published edition that has been assessed under sub-s 112AA(1) to be an item that is of historical and cultural significance to Australia. It permits an authorized officer of the library or archives to make a single facsimile copy of the published edition from the copy held in the collection subject to a commercial availability test. The authorized officer must first be satisfied that that a copy or facsimile copy of the edition (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.

6.132 New sub-s 112AA(3) clarifies that the authorized officer must take into account whether an electronic copy of the edition (not just a hardcopy) can be obtained within a reasonable time at an ordinary commercial price. This is intended to maintain the technical neutrality of the Act, and to ensure that the unremunerated exception in s 112AA does not undermine the copyright owner's market in electronic copies of the published edition. This is consistent with new sub-s 51B(6) inserted by item 26, and new sub-s 110BA(6) inserted by item 27.

6.133 New sub-s 112AA(4) clarifies that so long as the copying of the edition is permitted by s 112AA, such copying does not infringe any copyright in works that may be included in that published edition. Accordingly, no copyright clearances will need to be obtained from authors of underlying works contained in published edition that is copied under s 110BA. This is consistent with the protection provided in sub-s 110BA(7) inserted by item 27, in relation to underlying works in sound recordings and films that are copied under s 110BA.

6.134 New sub-s 112AA(5) clarifies that the operation of s 112AA is not intended to limit the operation of the provisions in the rest of Part IV Division 5. Likewise the provisions in Part IV Division 5 are not intended to limit the operation of s 112AA.

## **Schedule 7—Maker of communication**

### *Copyright Act 1968*

#### **Item 1           After subsection 22(6)**

7.1     This item inserts new sub-s 22(6A). The purpose of the amendment is to clarify the intended scope of the communication right by specifying circumstances when a person is not responsible for determining the content of a communication under sub-s 22(6).

7.2     When the right to communicate works and other subject-matter to the public was inserted into the Act by the *Copyright Amendment (Digital Agenda) Act 2000*, a definition of ‘communicate’ was inserted into sub-s 10(1) which was stated to mean ‘make available online or electronically transmit ... a work or other subject-matter, including a performance or live performance’. Sub-section 22(6) supplements that definition by providing that a communication is taken to have been made by the person responsible for the content of the communication. Although it was never intended that a person doing no more than merely accessing copyright material online could be considered to be exercising the communication right in relation to what was accessed, some have argued that this interpretation is possible.

7.3     New sub-s 22(6A) provides that for the purposes of sub-s 22(6) a person does not determine the content of a communication merely because that person takes one or more steps for the purpose of gaining access to what is made available online by someone else in the communication; or by receiving the electronic transmission of which the communication consists. The amendment is intended to make it clear that a person who merely accesses or browses material online is not considered to be responsible for determining the content of the communication and, therefore, is not the maker of the communication for the purposes of the communication right.

7.4     The item also inserts an example in an explanatory note that a person does not determine the content of material by merely doing the technical process necessary to receive a communication, eg, by clicking on a hyperlink.

## **Schedule 8—Responses to Digital Agenda review**

### **Part 1—Communication in the course of educational instruction**

#### *Copyright Act 1968*

##### **Item 1           After section 28**

#### *New s 28A Communication of works or other subject-matter in the course of educational instruction*

8.1     This item inserts new s 28A. New s 28A is intended to preserve the effect of the policy in s 28 for new delivery platforms in classrooms by ensuring that a communication of works or other subject-matter for the circumstances and purposes set out in s 28 is not deemed to be a ‘communication to the public’ and is therefore not subject to remuneration.

8.2     Section 28 provides an exception whereby literary, dramatic and musical works, films and sound recordings may be performed in the classroom without infringing copyright and with no remuneration payable. The policy underpinning s 28 is that performances of copyright materials in the classroom, to students in the course of instruction, should not give rise to a right of remuneration for the copyright owner.

8.3     It is intended that new s 28A will allow, eg, copyright materials to be communicated from a centrally located source ‘player’ to remote classrooms without being subject to a requirement to pay remuneration to the copyright owner.

## **Part 2—Educational copying of communications of free-to-air broadcasts**

### **Division 1—Main amendments**

#### *Copyright Act 1968*

##### **Item 2            Subsection 10(1)**

8.4    This item amends sub-s 10(1) to insert a definition of ‘free-to-air broadcast’ to apply throughout the Act. This definition was previously contained in s 135ZZI and referenced in sub-s 98(7) but has been moved to the main definition following the insertion of s 135C by item 3.

##### **Item 3            After section 135B**

#### *New s 135C Extended operation of this Part*

8.5    This item inserts new s 135C. This item responds to the increasing trend of broadcasters making the content of their broadcast material available online, either simultaneously or at a later time (eg, through services commonly referred to as web-casting or podcasting).

8.6    New s 135C extends the statutory licence in Part VA to facilitate the use by educational institutions of free-to-air broadcast material from online sources made available by broadcasters in the same way that Part VA currently permits copying and communication of broadcasts. This will facilitate the use of broadcast material made available online by education institutions and ensure that copyright owners are appropriately compensated of the use of their material.

8.7    The amendment will apply only to the content of material provided in free-to-air broadcasts, as defined in the amendment to sub-s 10(1) inserted by item 2.

## **Division 2—Consequential amendments**

### ***Copyright Act 1968***

#### **Item 4            Subsection 98(7) (definition of *free-to-air broadcast*)**

8.8    This item repeals the definition of ‘free-to-air broadcast’ in sub-s 98(7) as a result of the inclusion of the definition of ‘free-to-air broadcast’ in sub-s 10(1) by item 2.

#### **Item 5            Section 135ZZI (definition of *free-to-air broadcast*)**

8.9    This item repeals the definition of ‘free-to-air broadcast’ in s 135ZZI as a result of the inclusion of the definition of ‘free-to-air broadcast’ in sub-s 10(1) by item 2.

#### **Item 6            Subsection 153M(5)**

8.10   This item amends sub-s 153M(5) by omitting the term ‘free-to-air broadcast’ as a result of the inclusion of the definition of ‘free-to-air broadcast’ in sub-s 10(1) by item 2.

### **Part 3—Insubstantial parts of works in electronic form**

#### *Copyright Act 1968*

##### **Item 7            Subsection 135ZMB(2)**

8.11 This item repeals sub-s 135ZMB(2) and substitutes new sub-ss 135ZMB(1A) and 135ZMB(2). Subsection 135ZMB(1) provides an exception to allow the making of multiple reproductions or communication of parts of published literary or dramatic works that are in electronic form, if the reproduction or communication is carried out on the premises of an educational institution for the purposes of a course of study provided by it. This exception is qualified by new sub-ss 135ZMB(1A) and (2). The amendments preserve the technological neutrality of the Act by ensuring that rules applying to the reproduction of insubstantial parts of works in electronic form or the purposes of a course of study provided by an educational institution are consistent with those applying to works in hardcopy form.

*No exception for more than 2 pages or 1% of the number of pages*

8.12 New sub-s 135ZMB(1A) provides that if the form of the electronic work from which the reproduction or communication is made contains pages whose content is unlikely to change regardless of the system used to view, reproduce or communicate them (that is, it is paginated), then whether the portion reproduced or communicated falls within the exception depends on the number of pages of a work (as opposed to the percentage of words of a work). This is consistent with the rule in s 135ZG in relation to hardcopy works. If all of the circumstances in new paragraphs 135ZMB(1A)(a) to (d) exist then the reproduction or communication does not fall within the exception.

*No exception for more than 1% of words if work is not paginated*

8.13 New sub-s 135ZMB(2) provides that where the circumstance in paragraph (1A)(a) does not exist (that is, the literary or dramatic work in electronic form is not paginated), only then is the relevant test whether the amount copied or communicated is more than 1% of the number of words in the work. This ensures the treatment of insubstantial parts of works in electronic form is consistent with that applying to works in hardcopy form.

8.14 This item also includes three Notes about new headings which are inserted throughout the subsection for clarity and to assist the reading of s 135ZMB. The item inserts above sub-s 135ZMB(1) the heading 'Exception from infringement', above sub-s 135ZMB(3) the heading 'No exception for dealing with another part within 14 days', and above sub-s 135ZMB(4) the heading 'No exception for putting another part online at same time'.

**Item 8 At the end of section 135ZMB**

8.15 This item inserts new sub-ss 135ZMB(5) and (6).

*Non-continuous passages are different parts*

8.16 New sub-s 135ZMB(5) provides that when calculating the portion of a work being used, passages that are non-continuous are all different parts of the work.

8.17 The amendment addresses concerns raised by copyright owners that the provision previously allowed educational institutions to copy from diverse parts of a work and thus avoid providing remuneration under Part VB. The new subsection provides that 'in determining the percentage calculation that the extract that is copied must be continuous.'

8.18 New sub-s 135ZMB(6) clarifies that new sub-s 135ZMB(5) is restricted in its application to s 135ZMB.

## **Part 4—Electronic anthologies**

### *Copyright Act 1968*

#### **Item 9           After section 135ZMD**

##### *New s 135ZMDA Reproduction and communication of works from electronic anthologies by educational institutions*

8.19 This item inserts new s 135ZMDA. The purpose of the amendment is to ensure that the treatment under Part VB of anthologies in electronic form and those in hardcopy form is consistent, by introducing a provision equivalent to s 135K applicable to anthologies in electronic form.

8.20 Section 135ZK provides a statutory licence for educational institutions to make multiple reproductions of works published in hardcopy anthologies, subject to payment of remuneration to the relevant collecting society. Section 135ZK requires that the reproduction must be carried out solely for the educational purposes of the institution or of another educational institution.

8.21 Whilst s 135ZMD applies to multiple reproductions of copies in electronic form, subject to equitable remuneration, it only applies where a work has been separately published and is no longer commercially available.

8.22 New s 135ZMDA preserves the technological neutrality of the Act by providing for educational institutions to make reproductions or communications of works in an anthology that has been published in electronic form, subject to the payment of equitable remuneration. The published electronic form of the anthology from which the reproduction or communication is made must contain pages whose content is unlikely to change regardless of the system used to view, reproduce or communicate them (that is, be paginated); and the work copied cannot take more than 15 of those pages. As for s 135ZK, the reproduction must be carried out solely for the educational purposes of the institution or of another educational institution, a remuneration notice must be in force, and the body administering the educational institution must comply with sub-ss 135ZX(1) or (3) or s 135ZXA in relation to each reproduction or communication.

## **Part 5—Active caching for educational purposes**

### *Copyright Act 1968*

#### **Item 10      After section 200**

##### *New s 200AAA Caching on server for educational purposes*

8.23 This item inserts new s 200AAA, which provides for caching on a server for educational purposes. The purpose of new s 200AAA is to allow educational institutions to engage in active caching where cached material is not altered and not retained beyond the minimum period for the particular course of study.

8.24 In the Digital Agenda review, the issue arose as to how to best provide for proxy or forward caching by educational institutions where selected websites are loaded onto a proxy server where it is possible to store them for hours, days or weeks. It was outlined that this activity was likely to fall outside of the temporary copying provisions in ss 43A and 111A.

8.25 To achieve a balance between copyright owner and user interests, this item amends the Act to allow the active caching of websites by educational institutions under certain conditions.

8.26 New s 200AAA will allow an educational institution to make a work or other subject-matter available from a server, where it does so in connection with a course of educational instruction given by the educational institution's staff to students of the institution. New paragraph 200AAA(1)(i) requires that the server must be operated by or on behalf of a body administering an educational institution. New paragraph 200AAA(1)(ii) requires that the material must be restricted to the relevant staff and students giving or receiving the relevant educational instruction, and requires that access to the material must be made available from the server in a way that is intended to limit the availability of the material to those staff and students.

8.27 New sub-s 200AAA(2) provides that where the conditions in sub-s 200AAA(1) are met, copyright in the work or other subject-matter is not infringed by reproducing the work or communicating the work from the server.

8.28 New sub-s 200AAA(3) provides that where the work or subject-matter is retained on the server beyond the end of the relevant course of educational instruction, sub-s 200AAA(2) will not apply. The effect of this would be that the reproduction of the material and its communication from the server will amount to an infringement, not only from the time after the course of instruction ceased, but from the time it was originally reproduced and made available on the server.

## **Schedule 9—Unauthorised access to encoded broadcasts**

### *Copyright Act 1968*

#### **Item 1           Part VAA**

9.1     This item repeals Part VAA (Broadcast decoding devices) and substitutes new Part VAA (Unauthorised access to encoded broadcasts). The amendments contained in this Schedule implement the outcome of the Government’s policy review concerning unauthorised access to and use of subscription broadcasts. New Part VAA uses the term ‘encoded broadcast’ to refer to two different types of broadcasts – subscription broadcasts (most notably, pay television broadcasts) and encrypted broadcasts delivered by commercial or national broadcasting services. Although most of the provisions of new Part VAA inserted by this item apply to both types of broadcasts, some apply only to subscription broadcasts. The Schedule also contains amendments redrafting provisions to be consistent with the Criminal Code and Commonwealth criminal law policy.

#### **Part VAA—Unauthorised access to encoded broadcasts**

##### **Division 1— Preliminary**

###### *New s 135AL Definitions*

9.2     New s 135AL contains the definitions that apply in new Part VAA. Whilst the definitions of action, broadcaster and channel provider are in identical form to the definitions in repealed s 135AL there are also new definitions in new s 135AL:

- *Action* is defined to mean a proceeding of a civil nature between parties. The provision makes clear that *action* includes a counterclaim.
- *Broadcaster* is defined to mean a person who makes an encoded broadcast.
- *Channel provider* is defined to mean a person who does the following: packages a channel (which might include programs produced by the person); supplies a broadcaster with the channel; carries on a business that involves the supply of the channel. An additional requirement for the definition to apply is that, apart from any breaks for the purpose of the transmission of incidental matter, the channel is

broadcast as part of an encoded broadcast service. This definition is based on s 103C of the *Broadcast Services Act 1992*.

- *Decoder* is defined to mean a device (including a computer program) designed or adapted to decrypt, or facilitate the decryption of, an encoded broadcast. There is no existing equivalent for this term in the repealed Part VAA. The new definition focuses on the intended function of the device and does not incorporate an element of whether the decoder itself, or what it is used for, is authorised by the broadcaster or not.
- *Encoded broadcast* is defined to mean a *subscription broadcast* (which is separately defined) or an encrypted broadcast delivered by a commercial broadcasting service or a national broadcasting service (as defined in the Broadcasting Services Act). The definition is based on the definition of *encoded broadcast* in repealed s 135AL but includes a more specific reference to encryption of the broadcast and takes account of the new separate definition for the term *subscription broadcast*.
- *Subscription broadcast* is defined to mean a broadcast that is encrypted and is made available by the broadcaster only to persons authorised by the broadcaster to access the broadcast in intelligible form. The new definition is based on paragraph (a) of the previous definition of *encoded broadcast* in repealed s 135AL but includes a more specific reference to encryption of the broadcast. The specific reference to subscription fees in the previous definition has been removed. Whether or not a subscription fee is paid to access the broadcast in intelligible form would effectively be covered by the terms and conditions making up the broadcaster's authorisation.
- *Unauthorised decoder* is defined to mean a device (including a computer program) designed or adapted to decrypt, or facilitate the decryption of, an encoded broadcast without the authorisation of the broadcaster. The definition replaces the definition of *broadcast decoding device* in repealed s 135AL and includes a more specific reference to decryption. An *unauthorised decoder* is a specific type of *decoder*, being a device whose intended function in relation to an encoded broadcast is not authorised by the broadcast.

*New s 135AM Counterclaim*

9.3 New s 135AM is in identical form to previous s 135AM in repealed Part VAA. The provision provides that when the provisions of Part VAA are applied to a counterclaim, the references to the defendant are to be read as references to the plaintiff.

*New s 135AN This Part does not apply to law enforcement activity etc.*

9.4 New s 135AN replicates and combines sub-ss 135AN(2), 135ANA(2) and 135AS(2) of repealed Part VAA. New s 135AN provides a specific exception to new Part VAA in relation to anything lawfully done for the purposes of law enforcement or national security by or on behalf of the Commonwealth, a State or a Territory; or an authority of the Commonwealth or of a State or Territory.

9.5 New s 135AN also includes a note as to the evidentiary burden that applies in relation to a defendant in proceedings for an offence against Part VAA. It notes that such a defendant bears the evidential burden of proof in relation to the matter in this section, referring to sub-s 13.3(3) of the Criminal Code.

**Division 2—Actions**

**Subdivision A—Actions relating to unauthorised decoders**

*New s 135AOA Making or dealing with unauthorised decoder*

9.6 New s 135AOA replaces and simplifies repealed s 135AN, setting out the basis for civil actions that may be taken against a person who makes or deals with an unauthorised decoder.

9.7 New sub-s 135AOA(1) provides who may bring an action, who that action may be brought against and in what circumstances. An action may be brought by a channel provider, or anyone with an interest in the copyright in either the encoded broadcast or the content of the encoded broadcast. Each of these parties has an independent right of action. The action may be brought against a person who does any of the acts in relation to an unauthorised decoder described in sub-s 135AOA(2). New sub-s 135AOA(1) also specifies the state of mind a person who does any of these acts must have in order for a civil action to be successfully made out against that person.

The person doing the act must have known, or must ought reasonably have known, that the unauthorised decoder will be used to enable someone to gain access to an encoded broadcast without the authorisation of the broadcaster.

9.8 New sub-s 135AOA(2) provides a list of proscribed acts concerning an unauthorised decoder. Paragraph 135AOA(2)(a) proscribes the making of an unauthorised decoder. Paragraph 135AOA(2)(b) proscribes the selling of an unauthorised decoder or letting it for hire. Paragraph 135AOA(2)(c) proscribes the act of offering or exposing an unauthorised decoder for sale or hire if done by way of trade or with the intention of obtaining a commercial advantage or profit. Paragraph 135AOA(2)(d) proscribes the act of exhibiting an unauthorised decoder in public by way of trade or with the intention of obtaining a commercial advantage or profit. Paragraph 135AOA(2)(e) proscribes the act of distributing an unauthorised decoder (including by exporting the decoder from Australia) for the purpose of trade, or for a purpose that will prejudicially affect any of the persons specified, who are the same persons who may bring an action under sub-s 135AOA(1). Paragraph 135AOA(2)(f) proscribes the act of importing an unauthorised decoder into Australia for the purposes of commercial dealing, exhibition in public or distribution for trade purposes of for any purpose that will prejudicially affect any of the persons specified. Paragraph 135AOA(2)(g) proscribes the act of making an unauthorised decoder available online to an extent that will prejudicially affect any of the persons specified.

9.9 New sub-s 135AOA(3) imposes a time limit for bringing a civil action under s 135AOA. The action must be commenced within 6 years from when the act occurred.

9.10 New sub-s 135AOA(4) provides the onus of proof in relation to establishing the defendant's state of mind to bring a successful action under s 135AOA. The provision creates a presumption that the defendant knew, or ought reasonably to have known, that the decoder would be used to enable someone to gain access to an encoded broadcast without the authorisation of the broadcaster. The onus is on the defendant to prove that this presumption is false.

## **New Subdivision B—Actions relating to decoders for subscription broadcasts**

### *New section 135AOB Making decoder available online*

9.11 New sub-s 135AOB(1) creates a new civil cause of action that may be brought against a person who makes a decoder available online without the authorisation of the broadcaster, where the decoder has been supplied to the person or someone else by, or with the authorisation of the broadcaster of a subscription broadcast.

9.12 The person may have been supplied with a decoder by a broadcaster under an agreement between the broadcaster and the person for the supply of a subscription broadcast. The person may have acquired a decoder from another person who has been supplied with a decoder by a broadcaster, or may have acquired a decoder by some other means.

9.13 The cause of action applies where the making of the decoder available online prejudicially affects anyone who falls within any of the three categories of persons specified in sub-s 135AOB(1). The first category is anyone with an interest in the copyright in a subscription broadcast by the broadcaster who supplied the decoder. The second category is anyone with any interest in the copyright in the content of a subscription broadcast by the broadcaster who supplied the decoder. The third category is a channel provider who supplies the broadcaster who supplied the decoder with a channel for a subscription broadcast. Collectively these parties are referred to as ‘the affected parties’.

9.14 New sub-s 135AOB(1) also specifies the requisite state of mind that must be established for a successful action under s 135AOB. The person who makes the decoder available online must have known or ought reasonably to have known, that the decoder would be used to enable someone to gain access to a subscription broadcast without the authorisation of the broadcaster.

9.15 New sub-s 135AOB(2) imposes a time limit for bringing a civil action under s 135AOB. Any affected party must commence an action within 6 years from when the act occurred.

9.16 New sub-s 135AOB(3) provides the onus of proof in relation to establishing the defendant's state of mind in order to bring a successful action under s 135AOB. The provision creates a presumption that the defendant knew, or ought reasonably to have known, that the decoder would be used to enable someone to gain access to a subscription broadcast without the authorisation of the broadcaster. The onus is on the defendant to prove that this presumption is false.

### **New Subdivision C—Actions for unauthorised access to encoded broadcasts**

#### *New section 135AOC Causing unauthorised access*

9.17 New sub-s 135AOC(1) proscribes the act of causing unauthorised access to an encoded broadcast and permits civil action to be taken against a person for the doing of that act. The provision is divided into three parts – the proscribed act, the requirement for the act to have a prejudicial effect, and the requisite state of mind of the person doing the act.

9.18 New paragraph 135OC(1)(a) sets out the proscribed act – that without the authorisation of the broadcaster of an encoded broadcast, the person does an act causing themselves or any other person to gain access in intelligible form to the broadcast or to the sounds or images from the broadcast. The term 'access' is intended to mean that the person or anyone else has received the encoded broadcast or the sounds or images from the broadcast without the broadcaster's authorisation. The reference to 'sounds or images from the broadcast' acknowledges that an encoded broadcast ceases to be a 'broadcast' on first access and what is distributed following that first access is the sounds and images from the broadcast. Another person could gain access, eg, where the sounds and images from the encoded broadcast were distributed to them.

9.19 The provision may apply where all accessing of the encoded broadcast (whether it is the first or subsequent access) is not authorised by the broadcaster. It could also apply where the first access is authorised but subsequent access is not. This could occur, eg, where a subscriber accesses an encoded broadcast with the broadcaster's authorisation and an act is done that causes anyone else to gain access to the sounds and images from the broadcast without the broadcaster's authorisation.

9.20 The note following paragraph 135AOC(1)(c) provides examples of the sort of acts that would be caught by paragraph 135AOC(1)(a).

9.21 New paragraph 135AOC(1)(b) contains the second element that must be made out to establish the cause of action – the access gained as a result of the act referred to in paragraph (a) must prejudicially affect any of the specified ‘affected parties’. The first category specified is anyone with an interest in the copyright in an encoded broadcast by the broadcaster. The second category is anyone with any interest in the copyright in the content of an encoded broadcast by the broadcaster. The third category is a channel provider who supplies the broadcaster with a channel for a subscription broadcast.

9.22 New paragraph 135AOC(1)(c) contains the third element for the cause of action to apply and covers the state of mind of the person who did the act referred to in paragraph (a). The cause of action can only be made out where the person knows, or ought reasonably to know, that the access is not authorised by the broadcaster.

9.23 New sub-s 135AOC(2) imposes a time limit for bringing a civil action under s 135AOC. Any affected party must commence an action within 6 years commencing from when the act occurred.

9.24 New sub-s 135AOC(3) excludes some common consumer activities from the application of sub-s 135AOC(1). It provides that sub-s 135AOC(1) does not apply to an act that merely consists of starting the playing of sounds or images in or from the broadcast on a device. (This would include, eg, merely turning on a television, radio or computer.) The second excluded act is listening to sounds in or from the broadcast and/or seeing images in or from the broadcast. (This would include, eg, watching the television or listening to the radio.) The third excluded act covers the distribution of the sounds and images within a subscriber’s home. The exceptions apply only where a person has only done one or more of these acts and no other act causing unauthorised access. None of the exceptions would apply where a person has also done any other act causing unauthorised access. Finally, there is an exclusion for where unauthorised access to the sounds or images is gained from a film or sound recording of the encoded broadcast or a copy of such a film or sound recording. This would apply, eg, if someone has taped the encoded broadcast and gains access to the sounds and images as a result of that act. In this case, the act of reproducing the sounds and images by taping

the broadcast would be an exercise of the exclusive rights of the copyright owner in the broadcast and for which a corresponding exception to copyright may apply.

*New section 135AOD Unauthorised commercial use of subscription broadcast*

9.25 New sub-s 135AOD(1) proscribes the act of using a subscription broadcast, or the sounds or images from the broadcast, by way of trade or with the intention of obtaining a commercial advantage or profit, without the authorisation of the broadcaster. The provision is divided into three parts – the proscribed act, the requirement for the act to have a prejudicial effect, and the requisite state of mind of the person doing the act.

9.26 New paragraph 135AOD(1)(a) sets out the proscribed act – that without the authorisation of the broadcaster of a subscription broadcast, a person uses the broadcast, or the sounds or images from the broadcast, by way of trade or with the intention of obtaining a commercial advantage or profit. In the context of this provision, which is focussed on commercial use of the broadcast, ‘profit’ would mean some advantage, benefit or gain resulting from, or associated with, commercial use of the broadcast.

9.27 New paragraph 135AOD(1)(b) contains the second element to establish a cause of action – the use referred to in paragraph (a) must prejudicially affect any of the three specified categories of ‘affected parties’ The first category is anyone with an interest in the copyright in a broadcast. The second category is anyone with any interest in the copyright in any content of the broadcast. The third category is a channel provider who supplies the broadcaster who supplied the decoder with a channel for a subscription broadcast.

9.28 New paragraph 135AOD(1)(c) contains the third element which must be established for a cause of action to apply and covers the state of mind of the person who uses the broadcast as described in paragraph (a). The person must have known, or ought reasonably to have known, that the use is not authorised by the broadcaster.

9.29 New sub-s 135AOD(2) imposes a time limit for bringing a civil action under s 135AOD. Any affected party must commence an action within 6 years, commencing from when the act occurred.

## **New Subdivision D—Court orders**

### *New section 135AOE Relief*

9.30 New s 135AOE combines and simplifies sub-ss 135AN(4), 135AN(5), 135ANA(4) and 135ANA(5) from repealed Part VAA. New s 135AOE sets out the remedies that a court may grant in an action under Part VAA Division 2.

9.31 New sub-s 135AOE(1) provides that in an action under this Division, the relief that a court may grant includes an injunction and either damages or an account of profits. New sub-s 135AOE(2) provides that in assessing damages, the court may award additional punitive damages as it considers appropriate, having regard to relevant matters. These matters include, but are not limited to, the flagrancy of the defendant's actions, the need to deter acts similar to the relevant acts and any resulting benefit accrued to the defendant.

### *New section 135AOF Destruction of decoder*

9.32 New s 135AOF provides that in respect of any action brought under Part VAA Division 2, the court may order the relevant decoder (if any) to be destroyed or dealt with as specified in the order.

## **New Subdivision E—Jurisdiction and appeals**

9.33 New Subdivision E reintroduces matters covered by ss 135AP, 135AQ, 135AR and 135AS of repealed Part VAA. It is not intended that there be any change in the meaning of these provisions as a result of the repeal of the provisions and substitution of new Part VAA.

### *New section 135AP Exercise of jurisdiction*

9.34 New s 135AP provides that the jurisdiction of the Supreme Court of a State or Territory in an action under Part VAA is to be exercised by a single Judge of the Court.

### *New section 135AQ Appeals*

9.35 New sub-s 135AQ(1) provides that a decision of a court of a State or Territory under Part VAA is final and conclusive, subject to the qualification in new

sub-s 135AQ(2) that an appeal lies from such a decision to the Federal Court or, by special leave, to the High Court.

*New section 135AR Jurisdiction of Federal Court of Australia*

9.36 New s 135AR confers jurisdiction on the Federal Court in relation to actions brought under new Part VAA.

*New section 135AS Jurisdiction of Federal Magistrates Court*

9.37 New s 135AS confers jurisdiction on the Federal Magistrates Court in relation to actions brought under new Part VAA.

### **New Division 3—Offences**

#### **New Subdivision A—Offences**

*New section 135ASA Making unauthorised decoder*

9.38 New s 135ASA creates an indictable offence for making an unauthorised decoder. ('Unauthorised decoder' is defined in new s 135L.) The new offence is based on and combines paragraph 135AS(1)(a) and sub-s 135AS(4) of repealed Part VAA and is consistent with Commonwealth criminal law policy. Subsection 135ASA(1) stipulates the elements of the offence. The first, in paragraph (a), identifies the offending conduct - that a person makes an unauthorised decoder. In relation to this conduct, the fault element is 'intention' (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance - that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to this circumstance, the fault element is 'recklessness' (sub-s 5.6(2) Criminal Code).

9.39 New sub-s 135ASA(2) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-s 135ASA(1).

*New section 135ASB Selling or hiring unauthorised decoder*

9.40 New s 135ASB creates an indictable offence for selling or letting for hire an unauthorised decoder. The new offence is based on and combines part of paragraph

135AS(1)(b) and sub-s 135AS(4) of repealed Part VAA, redrafted in a manner consistent with Commonwealth criminal law policy.

9.41 New sub-s 135ASB(1) stipulates the elements of the offence. The first, in paragraph (a), identifies the offending conduct - a person sells or lets for hire an unauthorised decoder. In relation to this conduct, the fault element is the 'intention' (sub-s 5.6(1) Criminal Code) to sell or let for hire. The second element, in paragraph (b), identifies a circumstance –the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to this circumstance, the fault element is 'recklessness' (sub-s 5.6(2) Criminal Code).

9.42 New sub-s 135ASB(2) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-s 135ASB(1).

*New section 135ASC Offering unauthorised decoder for sale or hire*

9.43 New s 135ASC creates two separate indictable offences relating to offering an unauthorised decoder for sale or hire. The new offences are based on and combine part of paragraph 135AS(1)(b) and sub-s 135AS(4) of repealed Part VAA, redrafted to be consistent with Commonwealth criminal law policy.

9.44 New sub-s 135ASC(1) stipulates the elements of the first offence. The first element, in paragraph (a), identifies the offending conduct – that, with the intention of obtaining a commercial advantage or profit, the person offers or exposes an unauthorised decoder for sale or hire. In relation to this conduct, the fault element is 'intention' (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to this circumstance, the fault element is 'recklessness' (sub-s 5.6(2) Criminal Code).

9.45 New sub-s 135ASC(2) stipulates the elements of the second offence. The first element, in paragraph (a), identifies the offending conduct – that the person offers or exposes an unauthorised decoder for sale or hire. In relation to this conduct, the fault element is 'intention' (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the offer or exposure in paragraph (a) is by way of

trade. The third, in paragraph (c), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to paragraphs (b) and (c), the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.46 New sub-s 135ASC(3) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offences created by sub-ss 135ASC(1) or (2).

*New section 135ASD Commercially exhibiting unauthorised decoder in public*

9.47 New s 135ASD creates two indictable offences relating to commercially exhibiting an unauthorised decoder in public. The offences are based on and combine part of paragraph 135AS(1)(d) and sub-s 135AS(4) of repealed Part VAA and are consistent with Commonwealth criminal law policy.

9.48 New sub-s 135ASD(1) stipulates the elements of the first offence. The first element, in paragraph (a), identifies the offending conduct – that, with the intention of obtaining a commercial advantage or profit, the person exhibits an unauthorised decoder in public. In relation to this conduct, the fault element is ‘intention’ (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to this circumstance, the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.49 New sub-s 135ASD(2) stipulates the elements of the second offence. The first element, in paragraph (a), identifies the offending conduct – that the person exhibits an unauthorised decoder in public. In relation to this conduct, the fault element is ‘intention’ (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the exhibition referred to in paragraph (a) is by way of trade. The third, in paragraph (c), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to paragraphs (b) and (c), the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.50 New sub-s 135ASD(3) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-ss 135ASD(1) or (2).

*New section 135ASE Importing unauthorised decoder commercially*

9.51 New s 135ASE creates an indictable offence for importing an unauthorised decoder for the purposes of commercial dealing, distribution or exhibition. The offence is based on and combine part of paragraph 135AS(1)(e) and sub-s 135AS(4) of repealed Part VAA and is consistent with Commonwealth criminal law policy.

9.52 New sub-s 135ASE(1) stipulates the elements of the offence. The first, in paragraph (a), identifies the offending conduct – that the person imports an unauthorised decoder into Australia with the intention of doing any of the acts itemised in sub-paragraphs (i) – (vii). In relation to this conduct, the fault element is ‘intention’ (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to this circumstance, the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.53 New sub-s 135ASE(2) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-s 135ASE(1).

*New section 135ASF Distributing unauthorised decoder*

9.54 New s 135ASF creates an indictable offence for distributing an unauthorised decoder. The offence is based on and combine part of paragraph 135AS(1)(c) and sub-s 135AS(4) of repealed Part VAA and is consistent with Commonwealth criminal law policy.

9.55 New sub-s 135ASF(1) stipulates the elements of the offence. The first, in paragraph (a), identifies the offending conduct – that the person distributes (including by exporting from Australia) an unauthorised decoder with the intention of doing any of the acts itemised in paragraphs (i) – (ii). The acts are trading; obtaining a commercial advantage or profit; or engaging in any other activity that will prejudicially affect a channel provider or anyone with an interest in the copyright in either an

encoded broadcast or the content of an encoded broadcast. In relation to this conduct, the fault element is ‘intention’ (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to this circumstance, the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.56 New sub-s 135ASF(2) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-ss 135ASF(1).

*New section 135ASG Making unauthorised decoder available online*

9.57 New s 135ASG creates an indictable offence for making an unauthorised decoder available online. The offence is based on and combines part of sub-ss 135AS(1)(f) and 135AS(4) of repealed Part VAA and is consistent with Commonwealth criminal law policy.

9.58 New sub-s 135ASG(1) stipulates the elements of the offence. The first, in paragraph (a), identifies the offending conduct – that the person makes an unauthorised decoder available online. This would include the situation where a person uploads the unauthorised decoder onto a server connected to the Internet but would also include where the unauthorised decoder is made accessible by one or more persons on a more limited basis via an online network. In relation to this conduct, the fault element is ‘intention’ (sub-s 5.6(1) Criminal Code). The second, in paragraph (b), identifies a circumstance – that the unauthorised decoder is made available online to an extent that will prejudicially affect a channel provider or anyone with an interest in the copyright in either an encoded broadcast or the content of an encoded broadcast. The third, in paragraph (c), identifies a circumstance – that the unauthorised decoder will be used to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster. In relation to paragraphs (b) and (c), the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.59 New sub-s 135ASG(2) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-ss 135ASG(1).

*New section 135ASH Making decoder available online for subscription broadcast*

9.60 New s 135ASH sets out a new criminal offence of making an authorised decoder available online to enable it to be used by another to gain unauthorised access to a subscription broadcast. There was no equivalent of this offence in repealed Part VAA.

9.61 New sub-s 135ASH(1) stipulates the elements of the offence. The first, in paragraph (a), identifies conduct of the broadcaster – that a decoder was supplied (to the person or anyone else) by, or with the authorisation of, the broadcaster of a subscription broadcast. Eg, the person committing the offence may be a subscriber to a subscription broadcast service who has received a decoder directly from the broadcaster, or, the person may have acquired a decoder from a subscriber by some means. The second, in paragraph (b) identifies the offending conduct – that the person makes the decoder available online. This would include the situation where a person uploads the decoder onto a server connected to the Internet but would also include where the decoder is made accessible by one or more persons on a more limited basis via an online network. In relation to this conduct, the fault element is ‘intention’ (sub-s 5.6(1) Criminal Code). The third, in paragraph (c) identifies a circumstance – that the decoder is made available online without the authorisation of the broadcaster. The fourth, in paragraph (d) is a circumstance – that the decoder will be used to enable a person to gain access to a subscription broadcast without the authorisation of the broadcaster. The fifth, in paragraph (e), identifies a circumstance – that the decoder is made available online to an extent that will prejudicially affect a channel provider or anyone with an interest in the copyright in either an encoded broadcast or the content of an encoded broadcast. In relation to paragraphs (c) and (e), the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code).

9.62 New sub-s 135ASH(2) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-ss 135ASH(1).

*New section 135ASI Unauthorised access to subscription broadcast etc.*

9.63 New s 135ASI sets out a new criminal offence of unauthorised access to a subscription broadcast. There was no equivalent of this offence in repealed Part VAA.

The new offence corresponds to part of the civil action in new s 135AOC where the person causes himself / herself to have unauthorised access (the other part of s 135AOC covers where the person causes anyone else to gain unauthorised access and the corresponding offence for this is sub-s 135ASJ(3)).

9.64 New s 135ASI requires that the person must know that the access is not authorised by the broadcaster. This offence is confined to the person who does the act but this does not involve any commercial element or flow-on effect. It could, eg, cover acts carried out in a private home for no financial gain but with the intention of avoiding the payment of the relevant subscription fee for the service accessed. While such an act is considered serious enough to warrant constituting a criminal offence, it is considered less serious than the acts covered by s 135ASJ for which a much higher maximum penalty is set. The offence contains the same exceptions applying to the civil action in new s 135AOC and, as with new s 135AOC, those exceptions only apply where the person has not done any other act causing unauthorised access.

9.65 New s 135ASI stipulates the elements of the indictable offence. The first element, in paragraph (a), identifies the offending conduct – that the person does an act. Subject to paragraph (d), there is no limitation on what that act may be. What is important is the result of that act, which is the second element identified in paragraph (b) –the act (either alone or in conjunction with other acts) must result in the person gaining access in intelligible form to a subscription broadcast or sounds or images from a subscription broadcast. In relation to this circumstance, the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code). The third element, in paragraph (c), is that the access referred to in paragraph (b) is not authorised by the broadcaster and the person knows that it is unauthorised.

9.66 New paragraphs 135ASI(d) and 135ASI(e) set out acts that, so long as these acts are the only acts a person does, will not constitute an offence under s 135ASI. The excepted acts are the same as those set out for the civil action in new s 135AOC and relate to some common consumer activities. The offence in s 135ASI will not apply to an act that merely consists of starting the playing of sounds or images in or from the broadcast on a device. This would include, eg, merely turning on a television, radio or computer. The second excluded act is listening to sounds in or from the broadcast and/or seeing images in or from the broadcast. This would include, eg, watching the

television or listening to the radio. The third excluded act covers the distribution of the sounds and images within a subscriber's home. None of the exceptions would apply where a person has done any other act causing the unauthorised access. Finally, there is an exclusion in sub-s 135ASI(e) for where unauthorised access to the sounds or images is gained from a film or sound recording of the encoded broadcast or a copy of such a film or sound recording. This would apply, eg, if someone has taped the encoded broadcast and the person gains access to the sounds and images as a result of that act. In this case the act of reproducing the sounds and images by taping the broadcast would be an exercise of the exclusive rights of the copyright owner in the broadcast and for which a corresponding exception to copyright may apply.

9.67 The maximum penalty if a person is convicted of the indictable offence created by sub-ss 135ASI is a fine of 60 penalty units (currently \$6,600).

*New section 135ASJ Causing unauthorised access to encoded broadcast etc.*

9.68 New s 135ASJ contains three separate indictable offences related to causing unauthorised access to a decrypted encoded broadcast in different contexts. The offences created by sub-ss 135ASJ(1) and (2) are effectively corresponding offences to civil action in proposed s 135AOD. The offence created by sub-s 135ASJ(3) is effectively that part of the civil action in proposed s 135AOC relating to causing anyone else to gain unauthorised access to an encoded broadcast or sounds or images from an encoded broadcast. Each of these offences contains an exclusion for where the unauthorised access to the sounds or images is gained from a film or sound recording of the encoded broadcast. This would apply, eg, if someone had taped the broadcast, in which case the act would be an exercise of the exclusive rights of the copyright owner, but for which a corresponding exception may be applicable.

9.69 New sub-s 135ASJ(1) covers an act done in a trade context that results in the person gaining access to a decrypted encoded broadcast or another person gaining access to the sounds or images from the broadcast. The latter formulation is necessary as an encoded broadcast ceases to be a 'broadcast' on first access. What is distributed following that first access are the sounds and images from the broadcast.

9.70 New sub-s 135ASJ(2) covers an act that has the same result as the offence in sub-s 135ASJ(1) but where the act is done with the intention of obtaining a commercial

advantage or profit. Both sub-ss 135ASJ(1) and (2) contain an element that the access gained as a result of the act of the person is not authorised by the broadcaster. In relation to this circumstance, the fault element is ‘recklessness’ (sub-s 5.6(2) Criminal Code). In the context of this provision, which is focussed on commercial activity, ‘profit’ would mean some advantage, benefit or gain resulting from, or associated with, an act of a commercial nature.

9.71 New sub-s 135ASJ(3) covers an act that results in anyone else gaining access to an encoded broadcast or the sounds or images from the broadcast where that access is not authorised by the broadcaster. This provision contains similar exceptions to that in s 135ASJ with one difference. As the offence applies to an act resulting in anyone else gaining unauthorised access, the act of merely listening to the sounds in a broadcast or seeing images in or from the broadcast is not applicable in this context.

9.72 New sub-s 135ASJ(4) establishes a maximum penalty of a fine of 550 penalty units or 5 years imprisonment or both if a person is convicted of the indictable offence created by sub-ss 135ASJ(1), (2) or (3).

## **New Subdivision B—Prosecutions**

### *New section 135ATA Courts in which offences may be prosecuted*

9.73 New s 135ATA has been redrafted to be consistent with Commonwealth criminal law policy.

9.74 New sub-s 135ATA(1) provides that prosecutions for offences against Division 3 of Part VAA may be brought in the Federal Court or in any other court of competent jurisdiction.

9.75 New sub-s 135ATA(2) qualifies sub-s (1) by specifying that the Federal Court does not have jurisdiction to hear or determine prosecutions for indictable offences, notwithstanding s 15C of the Acts Interpretation Act.

9.76 New sub-s 135ATA(3) provides that the Federal Court has jurisdiction to hear and determine prosecutions for summary offences against Division 3 of Part VAA.

9.77 New sub-s 135ATA(4) makes reference to s 4J of the Crimes Act, which lets a court of summary jurisdiction try indictable offences in certain circumstances and

subject to limits on the penalties the court can impose. It provides that s 4J (except sub-s 4J(2)) of the Crimes Act applies in relation to the Federal Court and an indictable offence against Division 3 of Part VAA in the way in which that section would apply if the Federal Court were a court of summary jurisdiction.

### **New Subdivision C—Further orders by court**

#### *New section 135AU Destruction etc. of unauthorised decoders*

9.78 New s 135AU has been redrafted as a simplified version of s 135AU in repealed Part VAA. New sub-s 135AU(1) provides that a court trying a person for an offence against Division 3 of Part VAA may order that any article in the person's possession that appears to the court to be an unauthorised decoder be destroyed or otherwise dealt with as the court thinks fit. New sub-s 135AU(2) provides that the power of the court to make an order under sub-s 135AU(1) applies whether or not the person is convicted of the offence with which he or she is charged.

### **Item 2                      Application**

9.79 This item provides that the amendments made by item 1 apply in respect of acts done after the day on which this Schedule commences. This ensures that the offences inserted by item 1 do not operate retrospectively.

## **Schedule 10—Copyright Tribunal: amendments commencing first**

### **Part 1—Remuneration required by Parts VA and VB**

#### *Copyright Act 1968*

##### **Item 1           After subsection 135J(4)**

10.1 This item inserts new sub-s 135JA(4A). New s 135JA(4A) states, for the avoidance of doubt, the matters that may be considered in the determination of an annual amount of remuneration payable to a declared collecting society by the body administering educational institutions or institutions assisting persons with disabilities, for making or communication of copies of broadcasts. The determination, made by agreement between the society and the body or by the Copyright Tribunal, may be made by reference to amounts for those activities that differ because of differences in the classes of subject-matter included in broadcasts or because of differences in the classes of students at an institution administered by the administering body.

##### **Item 2           Subsection 135ZV(2)**

10.2 This item repeals sub-s 135ZV(2) and substitutes new sub-s 135ZV(2). New sub-s 135ZV(2) deals with the determination of the amount per copy payable to the declared collecting society by the body administering education institutions or institutions assisting persons with disabilities, for making copies of copyright materials. New sub-s 135ZV(2) allows different amounts to be determined in relation to different classes of materials copied, as well as in relation to different institutions administered by the administering body or different classes of students of an institution administered by the administering body.

##### **Item 3           After subsection 135ZW(4)**

10.3 This item inserts, after sub-s 135ZW(4), new sub-s 135ZW(4A). New s 135ZW(4A) states, for the avoidance of doubt, the matters that may be considered under sub-s 135ZV(1) in the determination of an annual amount of remuneration payable to a declared collecting society by the body administering educational

institutions or institutions assisting persons with disabilities, for making copies of copyright materials.

10.4 The determination, which may be made by agreement between the collecting society and the administering body, or by the Copyright Tribunal, may be made by reference to amounts for those activities that differ because of one or both of:

(a) differences in classes of materials or (b) differences in the classes of students at an institution administered by the administering body.

## **Part 2—Declarations of collecting societies**

### **Item 4 Subsections 135P(1) and (2)**

10.5 This item repeals existing sub-ss 135P(1) and (2), which allow the Attorney-General to declare a body to be the collecting society for the purposes of Part VA, and replaces them with new sub-ss 135P(1), (1A), (1B), (1C) and (2).

10.6 The new provisions require the Minister, on receiving an application by a body for declaration under sub-s 135P(1), to make or refuse the declaration, or to refer the application to the Copyright Tribunal, which is given the power to make a declaration. The body must be notified of the referral. New sub-s 135P(1B) which states that a declaration by the Minister under sub-s 135P(1A) is not a legislative instrument, has been included merely to assist the reading of s 135P, as the declaration is not a legislative instrument within the meaning of s 5 of the *Legislative Instruments Act 2003*.

### **Item 5 Saving**

10.7 This item provides a saving for the effect of declarations already made under existing s 135P(1) without preventing their revocation in the future.

### **Item 6 Subsection 135P(3)**

10.8 This item makes a formal amendment to s 135P(3) that is consequential upon the amendment made by item 4.

**Item 7            At the end of paragraphs 135P(3)(a) and (b)**

10.9 This item makes a formal amendment to paragraphs 135P(3)(a) and (b) to accord with current drafting practice.

**Item 8            At the end of subparagraphs 135P(3)(d)(i), (ii) and (iii)**

10.10 This item makes a formal amendment to sub-paragraphs 135P(3)(d)(i), (ii) and (iii) to accord with current drafting practice.

**Item 9            Section 135Q**

10.11 This item amends existing s 135Q, which allows the Attorney-General to revoke the declaration of a body as the collecting society for the purposes of Part VA, as a consequence of the amendment made by item 11 (see below).

**Item 10          At the end of paragraphs 135Q(a) and (b)**

10.12 This item makes a formal amendment to paragraphs 135Q(a) and (b) to accord with current drafting practice.

**Item 11          At the end of section 135Q**

10.13 This item inserts new sub-ss 135Q(2) and (3). The new provisions allow the Minister not only to revoke the declaration of a body as the collecting society for the purposes of Part VA, but also the option to refer the question of revoking the declaration to the Copyright Tribunal. New sub-s 135Q(1) requires that, before exercising that option, the Minister must be satisfied that the society's conduct has come within the description of paragraph 135Q(1)(a), (b), (c) or (d).

10.14 New sub-s 135Q(3) provides that the Tribunal, in considering a referral by the Minister under new sub-s 135Q(2), may revoke the declaration if satisfied that any of paragraphs 135Q(1)(a), (b), (c) or (d) applies to the body.

**Item 12          Sections 135R and 135S**

10.15 This item makes a formal amendment to ss 135R and 135S to accord with current drafting practice.

**Item 13          Subsection 135ZZB(1)**

10.16 This item repeals existing sub-s 135ZZB(1), which allows the Attorney-General to declare a body to be the collecting society for all or some classes of relevant copyright owners, and substitutes new sub-ss 135ZZB(1), (1A), (1B), (1C) and (1D).

10.17 The effect of the amendment is to require the Minister, on receiving an application under new sub-s 135ZZB(1) by a body for such a declaration, to make or refuse the declaration, or to refer the application to the Copyright Tribunal, which is given the power to make a declaration. The body must be notified of the referral.

10.18 New sub-s 135ZZB(1B), which states that a declaration by the Minister under sub-s 135ZZB(1A) is not a legislative instrument, has been included merely to assist the reading of s 135ZZB, as the declaration is not a legislative instrument within the meaning of s 5 of the *Legislative Instruments Act 2003*.

**Item 14          Subsection 135ZZB(2)**

10.19 This item makes a formal amendment to sub-s 135ZZB(2) that is consequential on the amendment made by item 13.

**Item 15          Subsection 135ZZB(3)**

10.20 This item makes a formal amendment to sub-s 135ZZB(3) that is consequential on the amendment made by item 13.

**Item 16          At the end of paragraphs 135ZZB(3)(a) and (b)**

10.21 This item makes a formal amendment to paragraphs 135ZZB(3)(a) and (b) to accord with current drafting practice.

**Item 17          At the end of subparagraphs 135ZZB(3)(d)(i), (ii) and (iii)**

10.22 This item makes a formal amendment to paragraph 135ZZB(3)(d)(i), (ii) and (iii) to accord with current drafting practice.

**Item 18          Subsection 135ZZB(4)**

10.23 This item makes a formal amendment to sub-s 135ZZB(4) that is consequential on the amendment made by item 13 and accords with current drafting practice.

**Item 19          Subsection 135ZZB(4)**

10.24 This item makes a formal amendment to sub-s 135ZZB(4) that is consequential on the amendment made by item 13 and accords with current drafting practice.

**Item 20          Saving**

10.25 This item saves the effect of declarations already made under existing sub-s 135ZZB(1) without preventing their revocation in the future.

**Item 21          Section 135ZZC**

10.26 This item amends existing s 135ZZC, which allows the Attorney-General to revoke the declaration of a body as the collecting society for the purposes of Part VB as a consequence of the amendment made by item 23 (see below).

**Item 22          At the end of paragraphs 135ZZC(a) and (b)**

10.27 This item makes a formal amendment to paragraphs 135ZZC(a) and (b) to accord with current drafting practice.

**Item 23          At the end of section 135ZZC**

10.28 This item inserts new sub-ss 135ZZC(2) and (3) at the end of s 135ZZC, which allows the Attorney-General to revoke the declaration of a body as the collecting society for the purposes of Part VB.

10.29 New sub-ss 135ZZC(2) and (3) allow the Minister the option to refer the question of revoking the declaration to the Copyright Tribunal. Before exercising that option, the Minister must be satisfied that the society's conduct has come within the description of paragraphs 135ZZC(1)(a), (b), (c) or (d). The Copyright Tribunal, in considering such a reference, may revoke the declaration if similarly satisfied.

**Item 24        Subsections 135ZZD and 135ZZE**

10.30 This item makes a formal amendment to ss 135ZZD and 135ZZE to accord with current drafting practice.

**Item 25        Subsection 135ZZT(1)**

10.31 This item repeals existing sub-s 135ZZT(1), which allows the Attorney-General to declare a body to be the collecting society for all or some classes of relevant copyright owners, and substitutes new sub-ss 135ZZT(1), (1A), (1B), (1C) and (1D).

10.32 The effect of the amendment is to require the Minister either to make or refuse the declaration sought in the application by a body under s 135ZZT(1), or to refer it for such declaration to the Copyright Tribunal, which is given the power to make a declaration. The body must be notified of the referral.

10.33 New sub-s 135ZZT(1B), which states that a declaration by the Minister under sub-s 135ZZT(1A) is not a legislative instrument, has been included merely to assist the reading of s 135ZZT, as the declaration is not a legislative instrument within the meaning of s 5 of the *Legislative Instruments Act 2003*.

**Item 26        Subsection 135ZZT(2)**

10.34 This item makes a formal amendment to sub-s 135ZZT(2) that is consequential on the amendment made by item 25.

**Item 27        Subsection 135ZZT(3)**

10.35 This item makes a formal amendment to s 135ZZT(3) that is consequential on the amendment made by item 25.

**Item 28        Subsection 135ZZT(4)**

10.36 This item makes a formal amendment to sub-s 135ZZT(4) that is consequential on the amendment made by item 25.

**Item 29          Subsection 135ZZT(4)**

10.37 This item makes a formal amendment to sub-s 135ZZT(4) that is consequential on the amendment made by item 25.

**Item 30          Saving**

10.38 This item saves the effect of declarations already made under existing sub-s 135ZZT(1) without preventing their revocation in the future.

**Item 31          Section 135ZZU**

10.39 This item amends existing s 135ZZU, which allows the Attorney-General to revoke the declaration of a body as the collecting society for the purposes of Part VC, as a consequence of the amendment made by item 32 (see below).

**Item 32          At the end of section 135ZZU**

10.40 This item inserts new sub-ss 135ZZU(2) and (3). Section 135ZZU allows the Minister to revoke the declaration of a body as the collecting society for the purposes of Part VC. The effect of the amendment is to allow the Minister the option to refer the question of revoking the declaration to the Copyright Tribunal for determination. Before exercising that option, the Minister must be satisfied under new sub-s 135ZZU(1) that the society's conduct has come within the description of paragraph 135ZZC(a), (b), (c) or (d). New sub-s 135ZZU(3) provides that the Tribunal, in considering such a reference, may revoke the declaration if satisfied that any of paragraphs 135ZZU(1)(a), (b), (c) or (d) applies to the body.

**Item 33          Subsections 135ZZV and 135ZZW**

10.41 This item makes a formal amendment to ss 135ZZV and 135ZZW to accord with current drafting practice.

**Item 34          Before section 148**

**Subdivision A—Preliminary**

10.42 This item inserts, before s 148, a new subdivision heading ‘Subdivision A—Preliminary’ for ease of reference.

**Item 35 Before section 149**

**Subdivision B—Applications relating to Parts III and IV**

10.43 This item inserts, before s 149, a new subdivision heading ‘Subdivision B—Applications relating to Parts III and IV’ for ease of reference.

**Item 36 Before section 153A**

**Subdivision C—Applications and references relating to Part VA**

10.44 This item inserts, before s 153A, a new heading ‘Subdivision C—Applications and references relating to Part VA’ for ease of reference.

**Item 37 After section 153BA**

*New s 153BAB References relating to declaration of collecting society*

10.45 This item inserts, after s 153BA, new s 153BAB to provide for the procedure before the Copyright Tribunal on a reference from the Minister under new paragraph 135P(1A)(c) inserted by this Schedule. The matter referred is the application by a body for declaration as the collecting society for Part VA.

10.46 New s 153BAB allows the Copyright Tribunal to make any person a party to the reference who applies to be such and who the Tribunal thinks has a sufficient interest in whether the declaration sought should be made, including an interest in whether there is in fact already a declaration that, under new s 135P(2), would prevent the making of the declaration being sought. The Tribunal is to allow the applicant for the declaration – also a party to the proceedings – and any other party to present their cases, and then must either make or refuse the declaration sought. The Registrar is to notify a declaration, if made, in the *Gazette*.

*New s 153BAC References relating to revocation of declaration of collecting society*

10.47 This item also inserts new s 135BAC to provide for the procedure before the Copyright Tribunal on a reference from the Minister under new s 135Q(2)(b) inserted

by this Schedule. The matter referred is the question whether the declaration of a collecting society for Part VA should be revoked. As well as the Minister and the society, the parties to the reference can include any person who is, on request, made a party by the Tribunal and who it thinks has sufficient interest in the question. After allowing the parties to present their cases, the Tribunal must either revoke the declaration or refuse to do so. A revocation must specify its date of effect and be published in the *Gazette* by the Registrar.

#### **Subdivision D—Applications and references relating to Part VB**

10.48 This item also inserts, after new 153BAC, a new subdivision heading ‘Subdivision D—Applications and references relating to Part VB’ for ease of reference.

#### **Item 38 After section 153DA**

##### *New s 153DC References relating to declaration of collecting society*

10.49 This item inserts new s 153DC to provide for the procedure before the Copyright Tribunal on a reference from the Minister under new paragraph 135ZZB(1A)(c) inserted by this Schedule. The matter referred is the application by a body for declaration as the collecting society for Part VB. New s 153DC allows the Tribunal to make any person a party to the reference who applies to be such and who the Tribunal thinks has a sufficient interest in whether the declaration sought should be made, or in whether an existing declared society’s coverage of copyright owners should be displaced as a consequence of the making of the declaration being sought. The Tribunal is to allow the applicant for the declaration – also a party to the proceedings – and any other party to present their cases, and then must either make or refuse the declaration sought. The Registrar is to notify a declaration, if made, in the *Gazette*.

##### *New s 153DD References relating to revocation of declaration of collecting society*

10.50 This item also inserts new s 153DD to provide for the procedure before the Copyright Tribunal on a reference from the Minister under new paragraph 135ZZC(2)(b) inserted by this Schedule. The matter referred is the question

whether the declaration of a collecting society for Part VB should be revoked. As well as the Minister and the society, the parties to the reference can include any person who is, on request, made a party by the Tribunal and who it thinks has sufficient interest in the question. After allowing the parties to present their cases, the Tribunal must either revoke the declaration or refuse to do so. A revocation must specify its date of effect and be published in the *Gazette* by the Registrar.

**Item 39        Before section 153E**

**Subdivision E—Applications relating to Part VII**

10.51 This item inserts, before s 153E, a new subdivision heading ‘Subdivision E—Applications relating to Part VII’, for ease of reference.

**Item 40        Before section 153L**

**Subdivision F—Applications relating to declarations of institutions**

10.52 This item inserts, before s 153L, a new subdivision heading ‘Subdivision F—Applications relating to declarations of institutions’, for ease of reference.

**Item 41        Before section 153M**

**Subdivision G—Applications and references relating to Part VC**

10.53 This item inserts, before s 153M, a new subdivision heading ‘Subdivision G—Applications and references relating to Part VC’, for ease of reference.

**Item 42        After section 153N**

***New s 153P References relating to declaration of collecting society***

10.54 This item inserts new s 153P to provide for the procedure before the Copyright Tribunal on a reference from the Minister under new paragraph 135ZZT(1A)(c) inserted by this Schedule. The matter referred is the application by a body for declaration as a collecting society for Part VC.

10.55 New s 153P allows the Tribunal to make any person a party to the reference who applies to be such and who the Tribunal thinks has a sufficient interest in whether

the declaration sought should be made, or in whether an existing declared society's coverage of copyright owners should be displaced as a consequence of the making of the declaration being sought. The Tribunal is to allow the applicant for the declaration – also a party to the proceedings – and any other party to present their cases, and then must either make or refuse the declaration sought. The Registrar is to notify a declaration, if made, in the *Gazette*.

*New s 153Q References relating to revocation of declaration of collecting society*

10.56 The item also inserts new s 153Q to provide for the procedure before the Copyright Tribunal on a reference from the Minister under new paragraph 135ZZU(2)(b) inserted by this Schedule. The matter referred is the question whether the declaration of a collecting society for Part VC should be revoked. As well as the Minister and the society, the parties to the reference can include any person who is, on request, made a party by the Tribunal and who it thinks has sufficient interest in the question. After allowing the parties to present their cases, the Tribunal must either revoke the declaration or refuse to do so. A revocation must specify its date of effect and be published in the *Gazette* by the Registrar.

**Item 43      Before section 154**

**Subdivision H—References and applications relating to licences and licence schemes**

10.57 This item inserts, before s 154, a new subdivision heading, 'Subdivision H—References and applications relating to licences and licence schemes', for ease of reference.

**Item 44      Before section 160**

**Subdivision I—General provisions**

10.58 This item inserts, before s 160, a new subdivision heading 'Subdivision I—General provisions' for ease of reference.

**Item 45      Paragraphs 195B(1)(a) and (b)**

10.59 This item makes a formal amendment to paragraphs 195B(1)(a) and (b) that is consequential on the amendment made by item 46.

**Item 46        At the end of subsection 195B(1)**

10.60 This item inserts, at the end of sub-s 195B(1), new paragraphs 195B(1)(e) and (f). The effect of the amendment made by this item, together with item 45, is to make reviewable by the Administrative Appeals Tribunal a decision of the Minister either to refuse to make a declaration of a body as a collecting society for Part VC or to revoke such a declaration.

**Item 47        Subsection 195B(2)**

10.61 This item makes a formal amendment to sub-s 195B(2) that is consequential on the amendment made by item 46.

**Item 48        Paragraph 195B(2)(c)**

10.62 This item makes a formal amendment to paragraph 195B(2)(c) that is consequential on the amendment made by item 46.

### **Part 3—Tribunal name**

#### *Copyright Act 1968*

#### **Item 49      Subsection 10(1) (definition of *the Copyright Tribunal*)**

10.63 This item amends the definition in sub-s 10(1) of ‘the Copyright Tribunal’ to reflect its new name, ‘the Copyright Tribunal of Australia’, as provided in Part VI as amended by item 50.

#### **Item 50      Part VI (heading)**

#### **Part VI—Copyright Tribunal of Australia**

10.64 This item repeals the existing heading for Part VI and substitutes a new heading, ‘Part VI—Copyright Tribunal of Australia’ to reflect the new name of the Copyright Tribunal of Australia.

#### **Item 51      Section 138**

10.65 This item amends s 138 to reflect the new name of the Copyright Tribunal of Australia.

### **Part 4—Registrar**

#### **Item 52      Subsection 10(1)**

10.66 This item inserts, in sub-s 10(1), a new definition of ‘Registrar’ as the Registrar of the Tribunal provided for in new s 170 inserted by this Schedule. The Registrar will take the place of the existing Secretary to the Tribunal.

#### **Item 53      Subsections 153F(8), 153G(7) and 153J(5)**

10.67 This item makes formal amendments to sub-ss 153F(8), 153G(7) and 153J(5) that are consequential on the replacement of the Secretary to the Tribunal by the Registrar.

**Item 54          Subsection 167(2)**

10.68 This item repeals existing sub-s 167(2) and substitutes new sub-ss 167(2) and (3). The effect of the amendment is to replace the reference to the Secretary of the Tribunal with references to the Registrar, and to allow the Registrar or a member of the Tribunal not only to summons a person to appear before the Tribunal and/or to produce documents to the Tribunal but also to specify the person to whom and the place and time at which the documents are to be produced.

**Item 55          Saving**

10.69 This item maintains the effect of a summons issued under existing sub-s 167(2) before its repeal.

**Item 56          Section 168**

10.70 This item makes a formal amendment to s 168 that is consequential on the replacement of the Secretary to the Tribunal by the Registrar.

**Item 57          Section 170**

10.71 This item repeals existing s 170 providing for the appointment of the Secretary and other Tribunal staff and substitutes new ss 170 and 170A.

10.72 New sub-ss 170(1) and (2) establish the position of Registrar of the Tribunal, to be occupied by a person engaged under the *Public Service Act 1999* or whose services are made available under that Act, and appointed by the Minister. New sub-s 170(3) provides that the position is not a public office under the *Remuneration Tribunal Act 1973*. New sub-s 170(4) provides for resignation of the Registrar. New sub-s 170(5) provides for termination of the Registrar's appointment by the Minister and new sub-s 170(6) provides for the termination of the appointment if the Registrar ceases to have the required connection under the Public Service Act. New sub-s 170(7) provides that the Tribunal President may appoint as acting Registrar a person with the same connection under the Public Service Act as the Registrar is required to have, during the latter's absence or a vacancy in the position. New sub-s 170(8) contains a standard provision preserving the validity of anything done by

or in relation to a person acting under s 170 notwithstanding a range of problems in connection with the appointment.

10.73 New s 170A maintains the existing requirement that other Tribunal staff be engaged under the Public Service Act or persons whose services are made available under that Act.

**Item 58 Transitional provision**

10.74 This item deems the Secretary of the Tribunal, at the commencement of the amendments, to have been appointed as Registrar under new s 170.

**Item 59 Before subsection 171(2)**

10.75 This item inserts new sub-s 171(1B). The amendment extends the protection and immunity of a High Court Justice to the Registrar when summoning the appearance of persons or the production of documents or certifying as to costs or copies of orders in Tribunal proceedings. The item makes a consequential amendment to the heading of s 171 to read 'Protecting persons connected with Tribunal proceedings'.

**Item 60 Subsection 174(2A)**

10.76 This item makes a formal amendment to sub-s 174(2A) that is consequential on the replacement of the Secretary to the Tribunal by the Registrar.

**Item 61 Saving**

10.77 This item saves the evidentiary value, in proceedings after the commencement of item 60, of a costs certificate signed by the Secretary under sub-s 174(2A) before the commencement of that item.

**Item 62 Section 175**

10.78 This item makes a formal amendment to s 175 that is consequential on the replacement of the Secretary to the Tribunal by the Registrar.

**Item 63      Saving**

10.79 This item saves the evidentiary value, in proceedings after the commencement of item 62, of a copy of an order of the Tribunal that was certified by the Secretary under s 175 before the commencement of that item.

## **Schedule 11—Copyright Tribunal: amendments commencing second**

### **Part 1—Licences and licence schemes**

#### **Division 1—Voluntary licences**

##### *Copyright Act 1968*

###### **Item 1            Subsection 136(1) (definition of *licence*)**

11.1 This item repeals the definition of ‘licence’ in sub-s 136(1) and substitutes a new definition of ‘licence’. The purpose of the amendment is to change the range of licences that can be the subject of an application to the Copyright Tribunal. Subject to having regard to the new definition of ‘licensor’ substituted by item 2, the new definition covers a licence to do any act comprised in the copyright in any work or other subject-matter.

###### **Item 2            Subsection 136(1) (definition of *licensor*)**

11.2 This item repeals the definition of ‘licensor’ in sub-s 136(1) and substitutes a new definition of ‘licensor’. The purpose of the amendment is to limit the licences and licence schemes that can be the subject of an application or reference to the Copyright Tribunal to those that are collectively administered. Accordingly, a licensor must be able to grant licences for a substantial number of copyright works or other subject-matter in a class of such materials, eg, literary works or musical works or sound recordings which were made by various different creators. The licensor may have that authority as owner of the relevant copyrights, as exclusive licensee or as agent for the owners.

### **Item 3            Application and transitional provisions**

11.3 This item provides for the application of the amendments made by Division 1, and for transitional arrangements. Sub-item (1) provides that amendments made by Division 1 apply in relation to licences granted before, on or after the commencement of the amendments and in relation to licence schemes formulated before, on or after that commencement. However where proceedings have been brought in the Copyright Tribunal under ss 154, 155, 156 or 157 of the Act and those proceedings have not been completed before the commencement of the amendments made by Division 1, sub-item (2) provides that the proceedings may be continued in the Tribunal under the Act as it stood prior to the commencement of Division 1.

### **Division 2—Substituting licence schemes**

#### **Item 4            Subsection 154(4)**

11.4 This item omits from sub-s 154(4) the words ‘, either confirming or varying the scheme,’ and substitutes the words ‘, confirming or varying the scheme or substituting for the scheme another scheme proposed by one of the parties,’. The purpose of the amendment is to enable the Copyright Tribunal, on a reference to it by a licensor to review a proposed licensing scheme, to substitute for it a new scheme, being one proposed by a party to the reference.

#### **Item 5            Subsections 154(7) and (8)**

11.5 This item repeals sub-ss 154(7) and (8) and substitutes new sub-s 154(7), providing that a licensing scheme confirmed, varied or substituted by the Copyright Tribunal under s 154 commences on the making of the order and continues for the duration of the order.

11.6 A note explains the term ‘scheme reflecting the Tribunal’s order’ used in new sub-s 154(7). The item makes a formal amendment that is consequential on item 4 and employs current drafting style.

**Item 6            Subsection 155(5)**

11.7 This item repeals sub-s 155(5) and substitutes new sub-s 155(5) dealing with the nature of the orders that can be made by the Copyright Tribunal in a reference to it to review a licensing scheme that is in operation. The purpose of the amendment is to enable the Tribunal to order the substitution of a new scheme, being one proposed by a party to the reference, in addition to varying or confirming the scheme that is the subject of the reference. New sub-s 155(5) also employs current drafting style.

**Item 7            Subsection 155(10)**

11.8 This item repeals sub-s 155(10) and substitutes new sub-s 155(10), providing that a licensing scheme that has been confirmed, varied or substituted by the Copyright Tribunal under s 155 continues on the making of the Tribunal's order for the duration of the order.

11.9 A note explains the term 'scheme reflecting the Tribunal's order' used in new sub-s 155(10). The item makes a formal amendment that is consequential on item 6 and employs current drafting style.

**Item 8            Subsection 156(1)**

11.10 This item omits from sub-s 156(1) the word 'again' and substitutes the words 'reflecting the order'. This is a formal amendment consequential on the amendments made by items 4 to 7.

**Item 9            Subsection 156(2)**

11.11 This item omits from sub-s 156(2) the word 'licence'. This is a formal amendment consequential on the amendment made by item 8.

**Item 10          Subsection 156(2)**

11.12 This item omits from sub-s 156(2) the word 'again'. This is a formal amendment consequential on the amendment made by item 8.

**Item 11          Subsection 156(4)**

11.13 This item repeals sub-s 156(4) and substitutes new sub-s 156(4) providing for the procedure to be followed on a reference to the Copyright Tribunal of a licensing scheme under s 156. The purpose of the amendment is to add to the Tribunal's powers by allowing it to substitute a new scheme proposed by a party to the reference. New sub-s 156(4) also employs current drafting style.

**Item 12          Subsection 157(6)**

11.14 This item repeals sub-s 157(6) and substitutes new sub-ss 157(6), 157(6A), 157(6B) and 157(6C) providing for the procedure to be followed by the Copyright Tribunal in applications relating to the grant of licences under sub-ss 157(1), (2), (3) and (4).

11.15 The purpose of the amendment is to add to the orders that can be made in each case, by allowing the Tribunal to order the grant of a licence to the applicant in the terms proposed by the applicant or another party to the application.

11.16 The amendment also simplifies and clarifies the prescription of the procedure applicable in each case.

11.17 This item also inserts five new headings which are inserted throughout existing s 157 for clarity and to aid its reading. Above sub-s 157(1) the item inserts 'Refusal or failure to grant licence under licence scheme'; above sub-s 157(2) it inserts 'Licence scheme sets unreasonable charges or conditions for case'; above sub-s 157(3) it inserts 'No licence scheme and licensor refuses or fails to grant reasonable licence'; above 157(5) it inserts 'Other parties to application'; and above 157(7) it inserts 'Definition of refusal or failure to grant a licence'.

**Item 13          Subsection 159(1)**

11.18 This item omits from sub-s 159(1) the first instance of the words ‘as confirmed or varied by’ and substitutes the word ‘reflecting’. This is a formal amendment that is consequential on preceding amendments in this Schedule that allow the Copyright Tribunal, in a reference to it to review a licence scheme, to substitute a new licence scheme.

**Item 14          Subsection 159(1)**

11.19 This item omits from sub-s 159(1) the words ‘the scheme, as confirmed or varied by the order’ and substitutes the words ‘that scheme’. This is a formal amendment that is consequential on preceding amendments in this Schedule that allow the Copyright Tribunal, in a reference to it to review a licence scheme, to substitute a new licence scheme.

**Item 15          Paragraph 159(2)(a)**

11.20 This item omits from paragraph 159(2)(a) the words ‘licence scheme as confirmed or varied by’ and substitutes the words ‘scheme reflecting’. This is a formal amendment that is consequential on preceding amendments in this Schedule that allow the Copyright Tribunal, in a reference to it to review a licence scheme, to substitute a new licence scheme.

**Item 16          Paragraph 159(2)(b)**

11.21 This item omits from paragraph 159(2)(b) the words ‘as so confirmed or varied’. This is a formal amendment that is consequential on preceding amendments in this Schedule that allow the Copyright Tribunal, in a reference to it to review a licence scheme, to substitute a new licence scheme.

**Item 17          Subsection 159(3)**

11.22 This item omits from sub-s 159(3) the first instance of the word ‘licence’. This is a formal amendment that is consequential on preceding amendments in this Schedule that allow the Copyright Tribunal, in a reference to it to review a licence scheme, to substitute a new licence scheme.

**Item 18          Subsection 159(3)**

11.23 This item omits from sub-s 159(3) the words ‘as confirmed or varied by’ and substitutes the word ‘reflecting’. This is a formal amendment that is consequential on preceding amendments in this Schedule that allow the Copyright Tribunal, in a reference to it to review a licence scheme, to substitute a new licence scheme.

**Item 19          Subsection 159(3)**

11.24 This item makes a purely drafting amendment by inserting in sub-s 159(3) a comma after the word ‘thing’.

**Item 20          At the end of section 159**

11.25 This item inserts at the end of s 159 new sub-ss 159(7), (8) and (9). New sub-s 159(7) clarifies that existing sub-ss 159(4) and (5) do not apply to an order that a person be granted a licence.

11.26 The power to make such orders is being introduced by preceding amendments in this Schedule and the rights of the beneficiary of such an order are dealt with in proposed new sub-s 159(8), which is headed ‘Order under section 157 that person be granted licence’. That subsection provides that the beneficiary is to be treated as if he or she had been granted a licence in the terms of the order and is liable for any licence fees.

11.27 A drafting note advises that non-compliance by the beneficiary with licence conditions would deprive him or her of the defence of the licence to infringement of copyright. New sub-s 159(9) allows the relevant copyright owner to recover in court the licence fees for which the beneficiary of the licence is liable under sub-s 159(8).

11.28 This item also inserts two notes about new headings to aid the reading of s 159. Above existing sub-s 159(1) the item inserts ‘Order under ss 154, 155 or 156’; and above existing sub-s 159(4) it inserts ‘Order under section 157 specifying conditions and charges’.

### **Division 3—Involvement of Australian Competition and Consumer Commission**

#### **Item 21 At the end of subsection 154(2)**

11.29 This item inserts new paragraph 154(2)(c). The amendment adds the Australian Competition and Consumer Commission as a party to a reference to the Tribunal under s 154 if it is made a party under new s 157B inserted by this Part.

#### **Item 22 At the end of paragraph 155(2)(a)**

11.30 This item inserts, at the end of paragraph 155(2)(a), the word ‘and’, as a formal amendment implementing current drafting practice.

#### **Item 23 At the end of subsection 155(2)**

11.31 This item inserts new paragraph 155(2)(d). The amendment adds the Australian Competition and Consumer Commission as a party to a reference to the Copyright Tribunal under s 155 if it is made a party under new s 157B inserted by this Part.

#### **Item 24 At the end of paragraph 156(3)(a)**

11.32 This item inserts, at the end of paragraph 156(3)(a), the word ‘and’, as a formal amendment implementing current drafting practice.

#### **Item 25 At the end of subsection 156(3)**

11.33 This item inserts new paragraph 156(3)(d). The amendment adds the Australian Competition and Consumer Commission as a party to a reference to the Copyright Tribunal under s 156 if it is made a party under new s 157B.

#### **Item 26 At the end of subsection 157(5)**

11.34 This item inserts a note at the end of subsection 157(5). That subsection allows the Copyright Tribunal to make a person or organisation a party to an application under s 157 if satisfied that they have a substantial interest in the matter in dispute. The note indicates that under s 157B, the Tribunal may also make the Australian Competition and Consumer Commission a party to the application.

**Item 27      After section 157**

*New s 157A Tribunal may have regard to ACCC guidelines; and*

*New s 157B Tribunal may make ACCC party to reference or application*

11.35 This item inserts new ss 157A and 157B.

11.36 New s 157A provides that, when making a decision on a reference or application regarding licences and licence schemes, the Copyright Tribunal may have regard to any relevant guidelines that may have been made by the Australian Competition and Consumer Commission (ACCC).

11.37 New s 157B provides that, in a reference or application regarding licences and licence schemes, the Copyright Tribunal may make the ACCC a party to the reference or application if the ACCC asks to be made a party and the Tribunal is satisfied that it is appropriate to do so.

## **Part 2—Distribution of amounts collected by declared collecting societies**

### ***Copyright Act 1968***

#### **Item 28 At the end of Division 3 of Part VA**

##### ***New s 135SA Applying to Tribunal for review of distribution arrangement***

11.38 This item inserts, at the end of Division 3 of Part VA, new s 135SA. New sub-s 135SA(1) allows the declared collecting society under Part VA or a member of the society to apply to the Tribunal for review of the arrangement that the society has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members. Section 135P in effect requires the society to ensure that the interests of its members who are relevant right holders or their agents are protected adequately, and this would apply to arrangements proposed or adopted for distributing remuneration collected by the society.

11.39 New sub-s 135SA(2) provides that if the Tribunal, on an application under new sub-s 135SA(1), varies the arrangement or substitutes a new arrangement, the arrangement reflecting the Tribunal's order will operate as if it had been adopted by the society.

#### **Item 29 At the end of Division 6 of Part VB**

##### ***New s 135ZZEA Applying to Tribunal for review of distribution arrangement***

11.40 This item inserts, at the end of Division 6 of Part VB, new s 135ZZEA. New sub-s 135ZZEA(1) allows a declared collecting society under Part VB or a member of the society to apply to the Tribunal for review of the arrangement that the society has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members. Section 135ZZB in effect requires the society to ensure that the interests of its members who are relevant right holders or their agents are protected adequately, and this would apply to arrangements proposed or adopted for distributing remuneration collected by the society.

11.41 New sub-s 135ZZEA(2) provides that if the Tribunal, on an application under new sub-s 135ZZEA(1), varies the arrangement or substitutes a new arrangement, the arrangement reflecting the Tribunal's order will operate as if it had been adopted by the society.

**Item 30 At the end of Division 3 of Part VC**

*New s 135ZZWA Applying to Tribunal for review of distribution arrangement*

11.42 This item inserts, at the end of Division 3 of Part VC, new s 135ZZWA.

11.43 New sub-s 135ZZWA(1) allows a declared collecting society under Part VC or a member of the society to apply to the Copyright Tribunal for review of the arrangement that the society has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members.

Section 135ZZT in effect requires the society to ensure that the interests of its members who are relevant right holders or their agents are protected adequately, and this would apply to arrangements proposed or adopted for distributing remuneration collected by the society.

11.44 New sub-s 135ZZWA(2) provides that if the Copyright Tribunal, on an application under new sub-s 135ZZWA(1), varies the arrangement or substitutes a new arrangement, the arrangement reflecting the Tribunal's order will operate as if it had been adopted by the society.

**Item 31 At the end of Subdivision C of Division 3 of Part VI**

*New s 153BAD Review of collecting society's distribution arrangement*

11.45 This item inserts, at the end of Subdivision C of Division 3 of Part VI, new s 153BAD providing for the procedure in an application to the Copyright Tribunal under new s 135SA.

11.46 New s 135SA provides for review of the arrangement that the declared collecting society for Part VA has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members. Section 135P in effect requires the society to ensure that the interests of its members who are relevant right holders or their agents are protected adequately, and this would apply to arrangements proposed or adopted for distributing remuneration collected by the society.

11.47 New sub-s 153BAD(2) provides that the parties to the application are the society, the member who made the application (if it was not made by the society) and any (other) member or an organisation representing members, if made a party by the Tribunal.

11.48 New sub-s 153BAD(3) allows the Tribunal, if requested by them, to make a member or such organisation a party to the application if it is satisfied that they have a substantial interest in the arrangement that is the subject of the application.

11.49 New sub-s 153BAD(4) requires the Tribunal to consider the application, give the parties the opportunity to present their cases and make an order either confirming or varying the arrangement or substituting another arrangement.

**Item 32        At the end of Subdivision D of Division 3 of Part VI**

*New s 153DE Review of collecting society's distribution arrangement*

11.50 This item inserts, at the end of Subdivision D of Division 3 of Part VI, new s 153DE providing for the procedure in an application to the Copyright Tribunal under new s 135ZZEA.

11.51 New s 135ZZEA provides for review of the arrangement that a declared collecting society for Part VB has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members. Section 135ZZB in effect requires the society to ensure that the interests of its members who are relevant right holders or their agents are protected adequately, and this would apply to arrangements proposed or adopted for distributing remuneration collected by the society.

11.52 New sub-s 153DE(2) provides that the parties to the application are the society, the member who made the application (if it was not made by the society) and any (other) member or an organisation representing members, if made a party by the Tribunal.

11.53 New sub-s 153DE(3) allows the Tribunal, if requested by them, to make a member or such organisation a party to the application if it is satisfied that they have a substantial interest in the arrangement that is the subject of the application.

11.54 New sub-s 153DE(4) requires the Tribunal to consider the application, give the parties the opportunity to present their cases and make an order either confirming or varying the arrangement or substituting another arrangement.

**Item 33            At the end of Subdivision E of Division 3 of Part VI**

*New s 153KA Review of collecting society's distribution arrangement*

11.55 This item inserts new s 153KA providing for the procedure in an application to the Copyright Tribunal under new s 183F inserted by this Part.

11.56 New s 183F provides for review of the arrangement that a declared collecting society for Division 2 of Part VII has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members. Section 153F in effect requires the society's rules to adequately protect its members in regard to distribution of remuneration collected by the society.

11.57 New sub-s 153KA(2) provides that the parties to the application are the society, the member who made the application (if it was not made by the society) and any (other) member or an organisation representing members, if made a party by the Tribunal.

11.58 New sub-s 153KA(3) allows the Tribunal, if requested by them, to make a member or such organisation a party to the application if it is satisfied that they have a substantial interest in the arrangement that is the subject of the application.

11.59 New sub-s 153KA(4) requires the Tribunal to consider the application, give the parties the opportunity to present their cases and make an order either confirming or varying the arrangement or substituting another arrangement.

**Item 34      At the end of Subdivision G of Division 3 of Part VI**

*New s 153R Review of collecting society's distribution arrangement*

11.60 This item inserts new s 153R providing for the procedure in an application to the Copyright Tribunal under new s 135ZZWA.

11.61 New s 135ZZWA provides for review of the arrangement that a declared collecting society for Part VC has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members.

Section 135ZZT in effect requires the society to ensure that the interests of its members who are relevant right holders or their agents are protected adequately, and this would apply to arrangements proposed or adopted for distributing remuneration collected by the society.

11.62 New sub-s 153R(2) provides that the parties to the application are the society, the member who made the application (if it was not made by the society) and any (other) member or an organisation representing members, if made a party by the Tribunal.

11.63 New sub-s 153R(3) allows the Tribunal, if requested by them, to make a member or such organisation a party to the application if it is satisfied that they have a substantial interest in the arrangement that is the subject of the application.

11.64 New sub-s 153R(4) requires the Tribunal to consider the application, give the parties the opportunity to present their cases and make an order either confirming or varying the arrangement or substituting another arrangement.

**Item 35      At the end of Division 2 of Part VII**

*New s 183F Applying to Tribunal for review of distribution arrangement*

11.65 This item inserts new s 183F. New sub-s 183F(1) allows a declared collecting society for Division 2 of Part VII or a member of the society to apply to the Copyright Tribunal for review of the arrangement that the society has adopted or proposes to adopt for allocating and distributing remuneration collected over a period to entitled members.

11.66 New s 153F in effect requires the society's rules to adequately protect its members in regard to distribution of remuneration collected by the society.

11.67 New sub-s 183F(2) provides that if the Tribunal, on an application under new sub-s 183F(1), varies the arrangement or substitutes a new arrangement, the arrangement reflecting the Tribunal's order will operate as if it had been adopted by the society.

### **Part 3—Manner of paying royalty for copying musical works**

#### ***Copyright Act 1968***

##### **Item 36 Subparagraph 55(1)(d)(ii)**

11.68 This item repeals sub-paragraph 55(1)(d)(ii) and substitutes a new sub-paragraph 55(1)(d)(ii). The existing provision provides that the manner of paying the royalty for making records of copyright musical works under s 55 is to be agreed between the record producer and the copyright owner or, failing agreement, is to be determined by the Copyright Tribunal or, if there is no agreement or determination, is as prescribed in the regulations. The amendment eliminates the last mentioned option, that is, the prescription of the manner of payment in the regulations.

##### **Item 37 Application**

11.69 New sub-paragraph 55(1)(d)(ii) inserted by this Part applies to an agreement about the manner of payment of royalty to which it refers, whether the agreement was made before, on or after the commencement of this Part.

##### **Item 38 Subsection 59(5)**

11.70 This item repeals sub-s 59(5) as a consequence of the amendment concerning sub-paragraph 55(1)(d)(ii) made by this Part.

## **Part 4—Records notices**

### *Copyright Act 1968*

#### **Item 39 At the end of paragraph 135K(1)(a)**

11.71 This item inserts, at the end of sub-s 135K(1)(a) the word ‘and’ as a consequence of the other amendments made by this Part to sub-s 135K(1). The item also inserts the heading ‘If records notice is given’ above sub-s 135K(1) to assist the reading of s 135K.

#### **Item 40 Paragraphs 135K(1)(b), (c) and (d)**

11.72 This item repeals existing paragraphs 135K(1)(b),(c) and (d) and substitutes new paragraph 135K(1)(b).

11.73 The effect of this amendment is that sub-s 135K(1) no longer prescribes the manner in which the administering body must keep records of copies made and communicated under Part VA. Instead, new paragraph 135K(1)(b) requires the administering body to establish and maintain a records system that has been determined either by agreement between the body and the collecting society or, where there has been a failure to reach agreement, by the Copyright Tribunal.

11.74 Either the administering body or the collecting society may apply to the Tribunal for a determination of the records system under new s 152BAA inserted by this Part.

#### **Item 41 Subsection 135K(2)**

11.75 This item repeals existing sub-s 135K(2) as a consequence of the repeal by this Part of existing paragraph 135K(1)(b), to which existing sub-s 135K(2) refers.

11.76 The item substitutes new sub-s 135K(2) providing that s 135E and s 135F do not apply to copies or communication of broadcasts made by or on behalf of an administering body during a period in which it does not comply with one or more of the requirements of the records system agreed or determined under new paragraph 135K(1)(b). Section 135E allows copying and communication of broadcasts

by or for the administering bodies of educational and certain other institutions, and s 135F allows the making and communication by them of preview copies.

11.77 The effect of the amendment is that unless the administering body complies with the record-keeping requirements that have been agreed on between it and the collecting society, or determined by the Copyright Tribunal, any copying or communication purportedly done under ss 135E or 135F during the relevant period will not be protected from copyright infringement.

11.78 This item also inserts the heading, 'If sampling notice is given', above sub-s 135K(3) to assist the reading of s 135K.

#### **Item 42      Application**

11.79 This item is a transitional provision for the amendments made by this Part to s 135K. The amendments will apply in relation to records notices given after the commencement of the amendments. Where a body that has given a notice before the commencement of the amendments enters into an agreement with the collecting society on a records system, they apply also in relation to that notice from the date of that agreement.

11.80 A note to the provision indicates that existing sub-ss 135K(1) and (2), and regulations made under them, apply wherever the amendments do not apply.

#### **Item 43      Subsection 135X(1)**

11.81 This item repeals sub-s 135X(1) as a consequence of the repeal, by this Part, of existing paragraphs 135K(1)(a), (b) and (d) and sub-s 135K(2) to which sub-s 135X(1) refers. As a collecting society has been declared under Part VA, the repeal has no practical consequences.

#### **Item 44      Subsection 135X(2)**

11.82 This item makes a formal drafting amendment to sub-s 135X(2) in consequence of the repeal of sub-s 135X(1) by this Part.

#### **Item 45      Subsection 135Y(1)**

11.83 This item makes a formal drafting amendment to sub-s 135Y(1) in consequence of the repeal of sub-s 135Y(2) by this Part.

**Item 46          Subsection 135Y(2)**

11.84 This item repeals sub-s 135Y(2) as a consequence of the repeal, by this Part, of existing paragraph 135K(1)(b), to which sub-s 135Y(2) refers. As a collecting society has been declared under Part VA, the repeal has no practical consequences.

**Item 47          At the end of paragraph 135ZX(1)(a)**

11.85 This item makes a formal amendment to paragraph 135ZX(1)(a) as a consequence of amendments made by this Part to paragraphs 135ZX(1)(b), (c) and (d).

11.86 This item also inserts a heading ‘If records notice is given’ above sub-s 135ZX(1) to assist the reading of s 135ZX.

**Item 48          Paragraphs 135ZX(1)(b), (c) and (d)**

11.87 This item repeals existing paragraphs 135ZX(1)(b),(c) and (d) and substitutes new paragraph 135ZX(1)(b).

11.88 The effect of this amendment is that sub-s 135ZX(1) no longer prescribes the manner in which the administering body must keep records of licensed copies made under Part VB. Instead, new paragraph 135ZX(1)(b) requires the administering body to establish and maintain a records system that has been determined either by agreement between the body and the collecting society or, where there has been a failure to reach agreement, by the Copyright Tribunal. Either the administering body or the collecting society may apply to the Tribunal for a determination of the records system under new s 152DB inserted by this Part.

**Item 49          Subsection 135ZX(2)**

11.89 This item repeals existing sub-s 135ZX(2) as a consequence of the repeal by this Part of existing paragraph 135ZX(1)(b), as existing sub-s 135K(2) refers to sub-s 135ZX(1). The item substitutes new sub-s 135ZX(2) providing that a list of sections in Part VB do not apply to hardcopy or analog reproductions or copies of works or other subject-matter made by or on behalf of an administering body during a period in which it does not comply with one or more of the requirements of the records system agreed or determined under new paragraph 135ZX(1)(b). Those listed sections

of Part VB allow reproduction and copying of works and other subject-matter by or for the administering bodies of educational and certain other institutions.

11.90 The effect of the amendment is that unless the administering body complies with the record-keeping requirements that have been agreed on between it and the collecting society, or determined by the Copyright Tribunal, any hardcopy or analog reproduction or copying purportedly done under those listed sections of Part VB during the relevant period will not be protected from copyright infringement.

11.91 This item also inserts the heading, 'If sampling notice is given', above sub-s 135ZX(3) to assist the reading of s 135ZX.

**Item 50          Subsection 135ZX(4)**

11.92 This item makes a formal amendment to sub-s 135ZX(4) consequential on the repeal of paragraph 135ZX(1)(b) by this Part.

11.93 This item also inserts a heading 'Regulations relevant to records notices and sampling notices' above sub-s 139ZX(4) to assist the reading of s 139ZX.

**Item 51          Subsection 135ZX(4)**

11.94 This item makes a formal amendment to sub-s 135ZX(4) consequential on the repeal of paragraph 135ZX(1)(b) by this Part.

**Item 52          Application**

11.95 This item is a transitional provision for the amendments made by this Part to s 135ZX. The amendments will apply in relation to records notices given after the commencement of the amendments. Where a body that has given a notice before the commencement of the amendments enters into an agreement with the relevant collecting society on a records system, they apply also in relation to that notice from the date of that agreement.

11.96 A note to the provision indicates that existing sub-ss 135ZX(1), (2) and (4), and regulations made under them, apply wherever the amendments do not apply.

**Item 53        After section 153BA**

*New s 153BAA Application to the Tribunal under subsection 135K(1)*

11.97 This item inserts new s 153BAA to provide for the procedure for an application to the Copyright Tribunal under new paragraph 135K(1)(b) inserted by this Part. The application is for the Tribunal to determine a records system for the copying of broadcasts under Part VA, and the parties are the collecting society and the body administering an educational or other institution under Part VA. New s 153BAA provides that the Tribunal must consider the application, must give those parties an opportunity to present their cases and must make an order determining the records system, having regard to any matters prescribed in the regulations.

**Item 54        After section 153DA**

*New s 153DB Application to the Tribunal under subsection 135ZX(1)*

11.98 This item inserts new s 153DB to provide for the procedure for an application to the Copyright Tribunal under new paragraph 135ZX(1)(b) inserted by this Part. The application is for the Tribunal to determine a records system for the reproduction and copying of works and other subject-matter under Part VB, and the parties are the relevant collecting society and the body administering an educational or other institution under Part VB. New s 153DB provides that the Tribunal must consider the application, must give those parties an opportunity to present their cases and must make an order determining the records system, having regard to any matters prescribed in the regulations.

## **Part 5—Alternative dispute resolution**

### *Copyright Act 1968*

#### **Item 55      Subsection 10(1)**

11.99 This item inserts in sub-s 10(1) a new definition of ‘alternative dispute resolution processes’ (ADR processes) which mirrors the definition of that expression in the *Administrative Appeals Tribunal Act 1975*. The new definition covers: conferencing, mediation, neutral evaluation, case appraisal, conciliation and other procedures or services added in the regulations. The definition could extend to still other procedures and services for the resolution of disputes, but expressly excludes arbitration and court procedures or services. The definition has been inserted for the purposes of new Division 4A, inserted in Part VI by this Part.

#### **Item 56      After Division 4 of Part VI**

##### *New Division 4A of Part VI*

11.100 This item inserts, after Division 4 of Part VI, new Division 4A, to provide for ADR processes to be available for use in applications and references to the Copyright Tribunal. The new sections inserted by this item are set out below.

##### *New s 169A Referral of proceeding for alternative dispute resolution process*

11.101 New s 169A allows the President or a Deputy President of the Tribunal, in any application or reference, to direct the holding of a conference of the parties or, alternatively, referral of the proceedings to any other form of ADR process, as defined in the amendment inserted by this Part in sub-s 10(1).

11.102 The referral to a conference or other ADR process can relate to all or any part of the proceedings or matter arising out of them. Such direction can be given regardless of whether such a direction has previously been given in the proceedings or whether any standing direction given under new sub-ss 169A(2) and (3) has applied.

11.103 New sub-ss 169A(2) and (3) allow the President to give a standing direction for the holding of conferences of the parties, or referral to other forms of ADR processes, in specified categories of applications or references to the Tribunal. In any ADR process conducted pursuant to any of these possible directions, the parties to the proceedings must act in good faith. New s 169A is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

*New s 169B Directions by President or Deputy President*

11.104 New s 169B allows the President and a Deputy President of the Copyright Tribunal to give, and revoke, directions about ADR processes, including directions relating to the procedure to be followed, who is to conduct the process and the procedure following the conclusion of the process.

11.105 New sub-s 169B(5) limits the persons who are entitled to conduct ADR processes to: a Tribunal member, the Tribunal Registrar, a person whose services are made available by arrangement with the Registrar of the Federal Court and a person engaged by the Tribunal Registrar under new s 169G inserted by this Part.

11.106 New s 169B is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

*New s 169C Agreement about the terms of a decision etc.*

11.107 New s 169C provides for the steps that the Copyright Tribunal can take in proceedings, following agreement between the parties in an ADR process on what decision by the Tribunal in the proceedings or a part of them or in a matter arising out of them would be acceptable to the parties. If that agreement is reduced to writing, signed by, or on behalf of, the parties and lodged with the Tribunal, and none of them notifies the Tribunal within 7 days of lodgement of a desire to withdraw from the agreement, the Tribunal may, if it thinks fit and is satisfied that it has the power to do so, make a decision in the terms of the agreement, without giving the parties an opportunity to present their cases on the subject of the agreed decision.

11.108 New s 169C is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

*New s 169D Evidence not admissible*

11.109 New sub-s 169D(1) provides that evidence of anything said or done in an ADR process is not admissible in any court or in any proceedings for the hearing of evidence before a person acting under a law or by the consent of the parties to the proceedings.

11.110 New sub-s 169D(2) makes an exception to that rule where, in proceedings being heard before the Copyright Tribunal, the parties agree to the admission of evidence.

11.111 Under new sub-s 169D(3), a case appraisal report or a neutral evaluation report prepared by a person conducting an ADR process is not subject to the rule in new sub-s 169D(1) unless a party notifies the Tribunal, before the hearing, that he or she objects to its admission.

11.112 New s 169D is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

*New s 169E Eligibility of a person conducting alternative dispute resolution process to sit as a member of the Tribunal*

11.113 New s 169E prevents a member of the Copyright Tribunal who has conducted an ADR process in relation to Tribunal proceedings from sitting on the Tribunal in those proceedings if a party notifies the Tribunal of objection to the member sitting, before any party has been given the opportunity to present their case.

11.114 New s 169E is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

*New s 169F Participation by telephone etc.*

11.115 New s 169F authorises a person conducting an ADR process to allow a person to participate by telephone, closed-circuit television or any other means of communication.

11.116 New s 169F is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

*New s 169G Engagement of persons to conduct alternative dispute resolution processes*

11.117 New s 169G allows the Registrar of the Copyright Tribunal, on behalf of the Commonwealth, to engage persons to conduct ADR processes, provided the Registrar is satisfied that they are suitable for that function, having regard to their qualifications and experience.

11.118 New s 169F is closely modelled on the corresponding provision in Division 3 of Part IV of the Administrative Appeals Tribunal Act.

**Item 57      Application**

11.119 This item provides that new Division 4A of Part VI introducing the use of ADR processes in Copyright Tribunal proceedings applies in relation to applications and references made to the Tribunal after the Division commences.

**Item 58      After subsection 171(1)**

11.120 This item inserts new sub-s 171(1A) providing that an ADR practitioner has, in the performance of his or her duties as such under the Act, the same protection and immunity as a Justice of the High Court. ‘ADR practitioner’ is defined in new sub-s 171(4) inserted by this Part.

**Item 59      At the end of section 171**

11.121 This item inserts new sub-s 171(4) to define ‘alternative dispute resolution practitioner’ for the purposes of s 171 as a person who conducts an ADR process under new Division 4A of Part VI inserted by this Part.

## **Part 6—Determination of questions relating to Parts VA and VB**

### *Copyright Act 1968*

#### **Item 60      After section 135J**

##### *New s 135JAA Determination of questions relating to this Division or the collecting society's rules*

11.122 This item inserts new s 135JAA providing for the determination of any question that is necessary or convenient to help an administering body of an educational or other institution or the collecting society to comply in the future with the requirements of Part VA on copying and communication of broadcasts.

11.123 New s 135JAA also provides for determination of questions that are necessary or convenient to help the collecting society to comply with its rules, required by Part VA, on protecting the interests of relevant right holders in regard to the collection and distribution of remuneration for that copying and communication.

11.124 For new s 135JAA to apply to a question, its determination must affect both the body and the collecting society. New s 135JAA does not apply to questions of which the determination is already covered by other provisions of Part VA or regulations under it.

11.125 A note to new sub-s 135JAA(1) cites a possible example of a question to which it might apply – a sampling system to provide information to the collecting society to determine how to distribute the remuneration it collects.

11.126 New sub-s 135JAA(2) provides that a question to which new s 135JAA does apply must be determined by agreement between the body and the collecting society or, failing such agreement, by the Copyright Tribunal, to which either can apply.

11.127 New sub-s 135JAA(3) provides that s 135E and s 135F do not apply to copies or communication of broadcasts made by or on behalf of an administering body during a period in which it does not comply with an agreement or determination under new sub-s 135JAA(2). Section 135E allows copying and communication of broadcasts by or for the administering bodies of educational and certain other institutions, and s 135F allows the making and communication by them of preview copies. The effect of new sub-s 135JAA(3) is that unless the administering body complies with the agreement between it and the collecting society, or the determination by the Copyright Tribunal, any copying or communication purportedly done under ss 135E or 135F during the relevant period will not be protected from copyright infringement.

**Item 61        After section 135ZW**

*New s 135JZWAA Determination of questions relating to this Part or a collecting society's rules*

11.128 This item inserts new s 135JZWAA providing for the determination of any question that is necessary or convenient to help an administering body of an educational or other institution or a declared collecting society to comply in the future with the requirements of Part VB on reproduction and copying of works and other subject-matter.

11.129 New s 135ZWAA also provides for determination of questions that are necessary or convenient to help a declared collecting society to comply with its rules, required by Part VB, on protecting the interests of relevant right holders in regard to the collection and distribution of remuneration for that reproduction and copying. For new s 135ZWAA to apply to a question, its determination must affect both the body and the collecting society. New s 135ZWAA does not apply to questions of which the determination is already covered by other provisions of Part VB or regulations under it. A note to new sub-s 135ZWAA(1) cites a possible example of a question to which it might apply – a sampling system to provide information to a collecting society to determine how to distribute the remuneration it collects.

11.130 New sub-s 135ZWAA(2) provides that a question to which new sub-s 135ZWAA does apply must be determined by agreement between the body and the collecting society or, failing such agreement, by the Copyright Tribunal, to which either can apply.

11.131 New s135ZWAA(3) provides that a list of sections in Part VB does not apply to reproductions, copies or communication of works or other subject-matter made by or on behalf of an administering body during a period in which it does not comply with an agreement or determination under new sub-s 135JAA(2). The sections allow reproduction, copying and communication of works and other subject-matter by or for the administering bodies of educational and certain other institutions. The effect of new sub-s 135ZWAA(3) is that unless the administering body complies with the agreement between it and the collecting society, or the determination by the Copyright Tribunal, any reproduction, copying or communication purportedly done under any of the list of sections during the relevant period will not be protected from copyright infringement.

**Item 62      After section 153B**

*New s 153BAAA Application to the Tribunal under subsection 135JAA(2)*

11.132 This item inserts new s 153BAAA providing for the procedure before the Copyright Tribunal in an application under new sub-s 135JAA(2) inserted by this Part. New s 153BAAA provides that the Tribunal is to consider the application, give the parties, being the collecting society and the administering body, an opportunity to present their cases and then make a determination of the question raised by the application, having regard to any matters prescribed by regulation.

**Item 63      After section 153D**

*New s 153DAA Application to the Tribunal under subsection 135ZWAA(2)*

11.133 This item inserts new s 153DAA providing for the procedure before the Copyright Tribunal in an application under new sub-s 135ZWAA(2) inserted by this Part. New s 153DAA provides that the Tribunal is to consider the application, give the parties, being the collecting society and the administering body, an opportunity to

present their cases and then make a determination of the question raised by the application, having regard to any matters prescribed by regulation.

## **Schedule 12—Technological protection measures**

### **Part 1—Main amendments**

#### *Copyright Act 1968*

##### **Item 1            Subsection 10(1)**

12.1 This item inserts a definition of ‘access control technological protection measure’. The new definition is in two parts. The first part defines which measures will be access control TPMs. The second part excludes certain measures that might otherwise fall within the definition. Where access to a work or other subject-matter is controlled in more than one way, each form of access control would be a separate access control TPM, provided that each type of control could be circumvented independently. Where an access control has different functions but each function cannot be circumvented independently, that access control would be considered to be only one access control TPM.

*device, product, technology or component (including a computer program)*

12.2 The definition refers to a device, product, technology or component (including a computer program) as the forms that access control TPMs could take. This element of the definition includes physical devices that are access control TPMs, computer programs that operate as access control TPMs and parts of computer programs that operate as TPMs. This element would also include technical processes where hardware requires codes or instructions provided by the material to be played on that hardware in order to gain access to the material.

*used in Australia or a qualifying country*

12.3 This element clarifies that a measure applied to copyright material in a qualifying country would come within the scope of the scheme. A qualifying country is defined in s 10(1). That definition requires a country to be a party to the Berne Convention or a member of the World Trade Organization (WTO), and as such, a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Regulation 4 of the Copyright (International Protection) Regulations

1969 also applies. That Regulation also extends protection under the Australian Copyright Act to copyright materials from a Berne Convention country, a Rome Convention country, a Universal Copyright Convention country, a WIPO Copyright Treaty country, a WIPO Performances and Phonograms Treaty country or a WTO country in certain circumstances.

*by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter*

12.4 Sub-paragraph (a)(i) of the definition provides that the scheme will not grant protection for measures placed on copyright material by someone other than the copyright owner or exclusive licensee, unless that person has applied that measure with the permission of or on behalf of that copyright owner or exclusive licensee.

12.5 To come within the scheme, the material protected by a measure must be material in which copyright subsists.

*in connection with the exercise of the copyright*

12.6 Sub-paragraph (a)(ii) of the definition requires a measure to have been applied in circumstances where the copyright owner or exclusive licensee is exercising an exclusive rights. The term 'connection' is used to reflect the need for this link. Eg the link would be established when a measure is applied to a work by a copyright owner where they are communicating the work to the public or where a copyright owner is making copies of other subject-matter.

12.7 The fact that a measure is applied to a work or other subject-matter in which copyright subsists would not be sufficient, in and of itself, to establish the link. The use of the measure must be connected to the exercise of an exclusive right by the owner of the copyright in that work or other subject-matter.

*in the normal course of its operation, controls access to the work or other subject-matter*

12.8 Paragraph (b) requires a measure to control access to the relevant work or other subject-matter in the normal course of its operation. A definition of 'controls access' is inserted by item 4.

*does not include such a device, product, technology or component to the extent that it*

12.9 The second part of the definition of access control technological protection measure excludes certain measures that might otherwise fall within the definition.

*geographic market segmentation*

12.10 Paragraph (c) excludes geographic market segmentation technologies such as region coding from the definition of an access control TPM. Paragraph (c) only applies to geographic market segmentation on non-infringing copies of films or computer programs (including computer games). Region coding measures prevent playback of films or electronic games in a geographic location when the film or electronic game is intended to be marketed in a different geographic location. An example of a region coding measure is Regional Playback Control (RPC) which is part of the DVD Content Scrambling System (CSS) used by DVD manufacturers. DVDs are coded for use in one of several regions and DVD players can operate to play only DVDs from a given region.

12.11 This has the effect of preventing playback in Australia of copyright material coded for another region that has been legitimately acquired overseas.

12.12 The exclusion is intended to apply to both electronic and hard copies of copyright material acquired overseas where the measure prevents playback in Australia. The exclusion is not intended to apply to geo-location or geo-filtration measures. Those measures allow a copyright owner to control who they make material available to on the basis of information such as a customer's Internet portal address or credit card details. These measures are not intended to be excluded because they block the *initial acquisition* of material and do not fall within the scope of paragraph (c). To be excluded under paragraph (c) the measure must prevent playback of material that *has been acquired* outside Australia not prevent the *initial acquisition* of material outside Australia.

*restricts the use of goods (other than the work) or services*

12.13 Paragraph (d) excludes measures which restrict the supply of spare parts by third parties or the provision of repair or maintenance services by third parties in

relation to the machine or device. Eg, it is intended that there would be no protection under the scheme for a measure used by a computer printer manufacturer to restrict the use of generic cartridges in its printers. Similarly it is intended that there would be no protection for a measure used by a garage door manufacturer to prevent the use of remote control garage door openers made by competitors. It is intended that protection would not be afforded to measures used by the providers of computer systems to restrict services being provided by competing computer system maintenance providers.

12.14 This provision has a similar effect to recent court decisions in the United States dealing with the *Digital Millennium Copyright Act 1998* by confirming that access controls which are used to prevent competition in non-copyright goods are not covered by the TPM scheme [see *Storage Technology Corporation v Custom Hardware Engineering* 421 F.3d 1307 (Fed. Cir. 2005), *The Chamberlain Group inc. v Skylink Technologies Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) and *Lexmark International v Static Control Components*, 387 F.3d 522 (Fed. Cir. 2004)].

12.15 Paragraph (d) is not intended to apply where the computer program is the principal object of the commercial exploitation of the machine or device and the measure restricts the use of that computer program.

12.16 In this definition the words ‘computer program’ have the same meaning as in s 47AB. This extends the definition of computer program to include a literary work that is incorporated in, or associated with, a computer program and is essential to the effective operation of that computer program.

**Item 2            Subsection 10(1) (definition of *circumvention device*)**

12.17 This item amends sub-s 10(1) to replace the definition of ‘circumvention device’. The new definition builds on the existing definition in the Act and implements the elements constituting the definition of a circumvention device from the AUSFTA. The definition sets out three alternate criteria to be applied in determining whether something is a circumvention device. Paragraph (a) requires a device to be promoted, advertised or marketed as having the purpose or use of circumventing the TPM. It does not require a device to have an actual circumvention purpose or use, only that it be promoted, advertised or marketed as having that purpose or use. Paragraph (b) would apply where a device only has a limited commercially significant

purpose or use, or no such purpose or use, other than circumvention of the TPM.

Paragraph (b) reflects the existing definition of circumvention device in sub-section 10(1). Paragraph (c) of the definition applies to a device which is designed or produced to enable or facilitate the circumvention of the TPM.

12.18 In this definition the words ‘computer program’ have the same meaning as in s 47AB. This extends the definition of computer program to include a literary work that is incorporated in, or associated with, a computer program and is essential to the effective operation of that computer program.

**Item 3            Subsection 10(1) (definition of *circumvention service*)**

12.19 This item amends sub-s 10(1) to replace the definition of ‘circumvention service’. The new definition builds on the existing definition in the Act and implements the elements constituting the definition of a circumvention service in the AUSFTA. The definition sets out three alternate criteria to be applied in determining whether something is a circumvention service. Paragraph (a) requires a service to be promoted, advertised or marketed as having the purpose or use of circumventing the TPM. It does not require a service to have an actual circumvention purpose or use, only that it be promoted, advertised or marketed as having that purpose or use. Paragraph (b) would apply where a service has a limited commercially significant purpose, or use, or no such purpose or use, other than circumvention of the TPM. Paragraph (b) reflects the existing definition of circumvention service in sub-section 10(1). Paragraph (c) of the definition applies to a service which is designed or produced to enable or facilitate the circumvention of the TPM.

**Item 4            Subsection 10(1)**

12.20 This item inserts a definition for ‘controls access’. An element of the definition of an access control TPM is that the measure must control access to the work or other subject-matter (paragraph (c) of the definition of an access control TPM). A measure controls access if it requires the application of information or a process in order to gain access. The application of information covers situations including access to a computer program where entry is granted through typing in a password. In all cases the information or process should occur with the permission of the owner or exclusive licensee of the work or other subject-matter.

**Item 5**            **Subsection 10(1) (definition of *technological protection measure*)**

12.21 This item amends sub-s 10(1) to replace the definition of ‘technological protection measure’ and substitute a new definition. The definition includes access control TPMs as well as other TPMs that fall within specified criteria.

*device, product, technology or component (including a computer program)*

12.22 The definition refers to a device, product, technology or component (including a computer program) as the forms that TPMs could take. This element of the definition includes physical devices that are TPMs, computer programs that operate as TPMs and parts of computer programs that operate as TPMs. This element would also include technological processes where hardware requires codes or instructions provided by the material to be played on that hardware in order to protect copyright.

*used in Australia or a qualifying country*

12.23 This element clarifies that a measure applied to copyright material in a qualifying country would come within the scope of the scheme. A qualifying country is defined in s 10(1). That definition requires a country to be a party to the Berne Convention or a member of the WTO, and, as such, a party to the TRIPS Agreement. Regulation 4 of the Copyright (International Protection) Regulations 1969 also applies. That regulation also extends protection under the Australian Copyright Act to copyright materials from a Berne Convention country, a Rome Convention country, a Universal Copyright Convention country, a WIPO Copyright Treaty country, a WIPO Performances and Phonograms Treaty country or a WTO country in certain circumstances.

*by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter*

12.24 Sub-paragraph (b)(i) of the definition provides that the scheme will not grant protection for measures placed on copyright material by someone other than the copyright owner or exclusive licensee, unless that person has placed that measure with the permission of or on behalf of that copyright owner or exclusive licensee.

12.25 To come within the scheme, the material protected by a measure must be material in which copyright subsists.

*in the normal course of its operation, prevents, inhibits or restricts the doing of an act comprised in the copyright*

12.26 Sub-paragraph (b)(ii) requires a measure to prevent, inhibit or restrict the doing of an act comprised in the copyright in the normal course of its operation.

12.27 An act comprised in the copyright is prevented if it is rendered impossible by the operation of the measure. An act comprised in the copyright is inhibited if undertaking the act is more difficult than it would be if the measure did not operate. An act comprised in the copyright is restricted if the measure limits the ability to exercise acts comprised in the copyright. Thus the operation of a copy control mechanism to limit the quantity of a reproduction would restrict the act of reproduction.

12.28 An ‘act comprised in the copyright’ is defined in s 13. A measure ‘prevents, inhibits or restricts the doing of an act comprised in the copyright’ if, after the measure is circumvented, the person would be in a position to do an act comprised in the copyright. This element does not require that a person actually does an act comprised in the copyright, only that it be possible that such an act could occur.

*does not include such a device, product, technology or component to the extent that it*

12.29 The second part of the definition of technological protection measure excludes certain measures that might otherwise fall within the definition.

*geographic market segmentation*

12.30 Sub-paragraph (b)(iii) is intended to operate, in the same way as paragraph (c) of the definition of ‘access control technological protection measure’, to exclude geographic market segmentation technologies such as region coding from the definition of technological protection measure. Sub-paragraph (b)(iii) only applies to geographic market segmentation on non-infringing copies of films or computer programs (including computer games). Region coding measures prevent playback of films or electronic games in a geographic location when the film or electronic game is intended to be marketed in a different geographic location. An example of a region

coding measure is Regional Playback Control (RPC) which is part of the DVD Content Scrambling System (CSS) used by DVD manufacturers. DVDs are coded for use in one of several regions and DVD players can operate to play only DVDs from a given region.

12.31 This has the effect of preventing playback in Australia of copyright material coded for another region that has been legitimately acquired overseas.

12.32 The exclusion is intended to apply to both electronic and hard copies of copyright material acquired overseas where the measure prevents playback in Australia. The exclusion is not intended to apply to geo-location or geo-filtration measures. Those measures allow a copyright owner to control who they make material available to on the basis of information such as a customer's Internet portal address or credit card details. These measures are not intended to be excluded because they block the *initial acquisition* of material and do not fall within the scope of sub-paragraph (b)(iii). To be excluded under sub-paragraph (b)(iii) the measure must prevent playback of material that *has been acquired* outside Australia not prevent the *initial acquisition* of material outside Australia.

*restricts the use of goods (other than the work) or services*

12.33 Sub-paragraph (b)(iv) is intended to operate, in the same way as paragraph (d) of the definition 'access control technological protection measure' to exclude measures which restrict the supply of spare parts or the provision of repair or maintenance services by third parties in relation to the machine or device. Eg, it is intended that there would be no protection under the scheme for a measure used by a computer printer manufacturer to restrict the use of generic cartridges in its printers. Similarly, it is intended that there would be no protection for a measure used by a garage door manufacturer to prevent the use of remote control garage door openers produced by competitors. It is intended that protection would not be afforded to measures used by the providers of computer systems to restrict services being provided by competing computer system maintenance providers.

12.34 Sub-paragraph (b)(iv) is not intended to apply where the computer program is the principal object of the commercial exploitation of the machine or device and the measure restricts the use of that computer program.

12.35 In this definition, the words ‘computer program’ have the same meaning as in s 47AB. This extends the definition of computer program to include a literary work that is incorporated in, or associated with, a computer program and is essential to the effective operation of that computer program.

**Item 6            Section 100AG (after table item 2)**

12.36 This item amends s 100AG by inserting table item 2A after table item 2. Section 100AG restricts the remedies available to new owners of copyright in sound recordings of live performances. New table item 2A restricts remedies available to new copyright owners for the civil actions of circumventing an access control TPM, manufacturing etc a circumvention device for a TPM and providing etc a circumvention service for a TPM, consistent with the policy that existed under the repealed TPM scheme.

**Item 7            Section 100AG (table item 3)**

12.37 This item amends s 100AG by omitting ‘116A’ from table item 3. Section 100AG relates to the remedies available to new owners of copyright in sound recordings of live performances. The reference to s 116A is no longer accurate as that section is repealed by these amendments.

**Item 8            Division 2A of Part V (heading)**

12.38 This item amends Division 2A of Part V to replace the heading to Division 2A of Part V.

**Item 9            Section 116A**

12.39 This item repeals s 116A and substitutes a new Subdivision A. New Subdivision A contains the civil actions and exceptions for circumventing an access control TPM (s 116AN), manufacturing etc a circumvention device for a TPM (s 116AO) and providing etc a circumvention service for a TPM (s 116AP).

## **Subdivision A—Technological protection measures**

### *New s 116AK Definitions*

12.40 New s 116AK defines ‘computer program’. The meaning of computer program in s 47AB is used in this subdivision because a number of the exceptions to liability are linked to acts not constituting infringements of copyright in computer programs found in Division 4A of Part III.

### *New s 116AL Interaction of this Subdivision with Part VAA*

12.41 New s 116AL clarifies the relationship between the TPM liability scheme and the liability scheme for unauthorised access to encoded broadcasts in Part VAA. Although the TPM liability scheme applies to broadcasts generally, it will not apply to encoded broadcasts covered by the scheme in Part VAA.

### *New s 116AM Geographical application*

12.42 This section limits the operation of Subdivision A to acts done in Australia.

### *New s 116AN Circumventing an access control technological protection measure*

12.43 New s 116AN implements Article 17.4.7(a)(i) of the AUSFTA and introduces a new action for the act of circumventing an access control TPM. Liability for the act of circumvention is limited to the circumvention of access control TPMs. There is no equivalent action for circumvention of TPMs that are not access control TPMs. This is consistent with the obligations in the AUSFTA which do not require Australia to implement an action for circumvention of TPMs that protect copyright.

12.44 New sub-s 116AN(1) provides copyright owners or exclusive licensees with civil remedies against people who circumvent access control TPMs. The provision is extended to copyright owners’ exclusive licensees who may use technological protection measures to protect copyright material. ‘Access control technological protection measure’ is defined in s10(1) (see Item 1).

12.45 New sub-s116AN(1) provides the elements that must be proven to establish liability for circumvention of an access control TPM. An important limitation on the

action is that a person will not be liable if they did not know, or could not have reasonably known they were circumventing an access control TPM. This protects a person who unknowingly circumvents. Eg, when a person opens a document in a particular application on a computer which, as part of a technical process, circumvents an access control TPM on the document so that the document can be displayed or altered, and that process occurs without the knowledge of the person using the application, then the person would not be liable.

*Exception—permission*

12.46 New sub-s 116AN(2) creates an exception to liability for circumventing an access control TPM where the person has the permission of the copyright owner or exclusive licensee to circumvent the access control TPM. Such permission may be given expressly or by implication. Permission would not be implied merely because an exception to copyright infringement allows an act to be done in relation to the copyright material. Permission may be implied, eg, where a copyright owner provides a copy of a work to a user and authorises the user to undertake specific activities. If the copyright owner does not expressly allow circumvention, but those specific activities cannot be undertaken without circumventing an access control technological protection measure, then a copyright owner may be taken to have given implied permission to circumvent.

*Exception—interoperability*

12.47 New sub-s 116AN(3) creates an exception to liability for circumventing an access control TPM for the purpose of creating interoperable computer programs. The exception implements the specific exception in Article 17.4.7(e)(i) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was an exception to liability for dealings in circumvention devices for the purpose of undertaking acts allowed by s 47D. Section 47D permits the reproduction or adaptation of computer programs for the purpose of making interoperable computer programs or articles (computer products). The scope of the specific exception in the AUSFTA is narrower than the interoperability exception in the repealed TPM scheme. The exception applies to a lawfully obtained non-infringing copy.

12.48 The new exception in sub-s 116AN(3) permits circumvention of an access control on a computer program for the *sole* purpose of achieving interoperability between computer programs. The exception does not apply where the circumvention is for purposes additional to the purpose of achieving interoperability between computer programs. The exception is further qualified in that it only applies where that information is not readily available from another source at the time of circumvention.

12.49 The interoperability exception applies to all three categories of liability: (i) the act of circumvention (s 116AN), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP) and (iii) manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 116AO and 116AP). The cumulative effect of ss 116AN, 116AO and 116AP means that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

*Exception—encryption research*

12.50 New sub-s 116AN(4) creates an exception to liability for circumventing an access control TPM for the purpose of encryption research. The exception applies to both a ‘person’ or ‘if the person is a body corporate—an employee of the person’. The latter is intended to cover encryption researchers who are employed by a university or corporation so that the exception may be used where action is taken against the university or corporation.

12.51 The exception implements the specific exception in Article 17.4.7(e)(ii) of the AUSFTA. The exception applies to a lawfully obtained non-infringing copy. The new exception in sub-s 116AN(4) permits circumvention of an access control TPM for the *sole* purpose of identifying and analysing flaws and vulnerabilities of encryption technology. The exception does not apply where the circumvention is for purposes additional to the purpose of identifying and analysing flaws and vulnerabilities of encryption technology. Paragraph 116AN(4)(d) applies to situations where a person has obtained permission, where they have made reasonable efforts to obtain permission but have received no response from the copyright owner or where the copyright owner is unable to be located (eg in the case of orphan works). It does not apply to a situation where the copyright owner has refused permission.

12.52 The encryption research exception applies to two of the three categories of liability: (i) the act of circumvention (s 116AN), and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of encryption research. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—computer security testing*

12.53 New sub-s 116AN(5) creates an exception to liability for circumventing an access control TPM for the purpose of computer security testing. The exception implements the specific exception in Article 17.4.7(e)(iv) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously an exception to liability for dealings in circumvention devices for computer security testing covered by s 47F. Section 47F permits the reproduction or adaptation of a computer program for the purpose of testing security or correcting a security flaw in the program, computer system or network. The new exception in sub-s 116AN(5) permits circumvention of an access control for the *sole* purpose of testing, investigating or correcting the security of a computer, computer system or computer network. The exception would allow the circumvention of a TPM protecting a program that causes a security vulnerability in a computer, computer system, or computer network. Eg, the exception would allow circumvention of a TPM that protects against removal of a malicious program that affects the security of a computer, computer system, or computer network. The exception does not apply where the circumvention is for purposes additional to the purpose of testing, investigating or correcting the security of a computer, computer system or computer network.

12.54 The computer security testing exception applies to two of the three categories of liability: (i) the act of circumvention (s 116AN), and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to

circumvent access control TPMs can be made available for the purpose of computer security testing. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—online privacy*

12.55 New sub-s 116AN(6) creates an exception to liability for circumventing an access control TPM for the purpose of online privacy. The exception implements the specific exception in Article 17.4.7(e)(v) of the AUSFTA. The new exception in sub-s 116AN(6) permits circumvention of an access control for the *sole* purpose of identifying and disabling an undisclosed capability to collect or disseminate personally identifying information about a natural person's online activities. The exception does not apply where the circumvention is for purposes additional to the purpose of identifying and disabling an undisclosed capability to collect or disseminate personally identifying information about a natural person's online activities.

12.56 The online privacy exception applies only to the act of circumvention (s 116AN). It does not apply to the manufacture etc of circumvention devices (s 116AO) or providing etc circumvention services (s 116AP). This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—law enforcement and national security*

12.57 New sub-s 116AN(7) creates an exception to liability for circumventing an access control TPM for the purpose of law enforcement and national security. The exception implements the specific exception in Article 17.4.7(e)(vi) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously an exception to liability for dealings in circumvention devices for government use of copyright material under s 183. Section s 183 provides that the copyright in a work or other subject-matter is not infringed if the use is for the services of the Commonwealth, a State or Territory. The scope of the specific exception in the AUSFTA is narrower than the exception in the repealed TPM scheme. As a result, the new exception in sub-s 116AN(7) permits circumvention of an access control in relation to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty. Law

enforcement is intended to cover any activity for the purposes of enforcing laws, whether the laws are of a criminal or civil nature. Eg, activities undertaken by the Australian Taxation Office for the purposes of enforcing tax laws would be covered by this exception. Performing a statutory function or duty includes activities that a statutory body is required to perform as part of its statutory function. Eg, activities undertaken by the Office of Film and Literature Classification in order to perform its statutory duty of classifying copyright material would be covered by this exception.

12.58 The law enforcement and national security exception applies to all three categories of liability: (i) the act of circumvention (s 116AN), (ii) the manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 116AO and 116AP). The cumulative effect of ss 116AN, 116AO and 116AP means that all types of circumvention devices and services can be made available for the purpose of law enforcement and national security.

*Exception—libraries etc.*

12.59 New sub-s 116AN(8) creates an exception to liability for circumventing an access control TPM for the purpose of acquisition decisions by libraries and other institutions. The exception implements the specific exception in Article 17.4.7(e)(vii) of the AUSFTA. The new exception in sub-s 116AN(8) permits circumvention of an access control for the *sole* purpose of making an acquisition decision. The exception does not apply where the circumvention is for purposes additional to the purpose of making an acquisition decision. The exception will not apply if the subject of the acquisition decision is otherwise available to the person (paragraph 116AN(8)(d)).

12.60 The acquisition decisions by libraries and other bodies exception applies to only one of the three categories of liability: (i) the act of circumvention (s 116AN). It does not apply to the manufacture etc of circumvention devices (s 116AO) or providing etc circumvention services (s 116AP). This means that circumvention devices and services cannot be made available for the purpose of libraries and other bodies making acquisition decisions. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—prescribed acts*

12.61 New sub-s 116AN(9) creates an exception to liability for acts which are prescribed in the Copyright Regulations. This sub-section implements Article 17.4.7(e)(viii) of the AUSFTA which provides for the creation of additional exceptions to liability for the act of circumventing an access control TPM. The process for making regulations is contained in new s 249.

*Burden of proof*

12.62 New sub-s 116AN(10) provides that the defendant bears a legal burden of proof for the exceptions in sub-ss 116AN(2)-(9). Hence the defendant must establish those elements of the exception which are peculiar to the knowledge of the defendant.

*New s 116AO Manufacturing etc. a circumvention device for a technological protection measure*

12.63 This provision gives effect to Article 17.4.7 (a)(ii) of the AUSFTA in so far as it relates to the manufacture, importation, distribution, provision, offering to the public or otherwise trafficking in circumvention devices.

12.64 The reference to ‘another person’ in new sub-s 116AO(1) clarifies that the dealing in such devices must be on a commercial or some other basis with the public ie another person. There is no right of action where someone manufactures or imports a circumvention device for their own use.

12.65 Sub-paragraph 116AO(1)(a)(iii) identifies the act of distribution. This is to be distinguished from sub-paragraph 116AO(1)(a)(v) which identifies the activity of providing to another person. The latter is to cover an active or deliberate transfer of a thing from one person to another while ‘distributes’ suggests that the person is acting more as a conduit or intermediary. Eg a transport company may not be providing devices by merely transporting them. However, it may be distributing the devices.

12.66 The reference to ‘offering to the public’ is not intended to require that this act be done for the purpose of obtaining a commercial profit.

12.67 The reference to ‘communicates’ in sub-paragraph 116AO(1)(a)(vi) picks up the definition of ‘communicate’ in sub-s 10(1) of the Act. This is intended to capture the distribution of circumvention devices in electronic form (such as computer programs).

*Exception—no promotion advertising etc*

12.68 New sub-s 116AO(2) provides an exception where the act of promoting, advertising or marketing is done by a person without direction or request of the person who has manufactured, imported, distributed etc. the circumvention device. This clarification is intended to address the situation where X and Y are competitors and person Y places an advertisement for vexatious purposes, with the effect that the device manufactured by X becomes a circumvention device despite the device not having that function.

*Exception—interoperability*

12.69 New sub-s 116AO(3) provides an exception from liability for manufacturing etc. a circumvention device for achieving interoperability of an independently created program. This provision gives effect to Article 17.4.7 (e)(i) of the AUSFTA which recognises the need for legitimate reverse engineering activities where information is not otherwise readily available to assist with the creation of an independently written interoperable program.

12.70 This exception will apply to a manufacturer etc. of a circumvention device, person X, where the circumvention device is used by another person, person Y, to circumvent for achieving interoperability of an independently created program with the original program.

12.71 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was an exception to liability for dealings in circumvention devices for the purpose of undertaking acts allowed by s 47D. Section 47D permits the reproduction or adaptation of computer programs for the purpose of making interoperable computer programs or articles (computer products). The scope of the specific exception in the AUSFTA is narrower than the

interoperability exception in the repealed TPM scheme. The exception applies to a lawfully obtained non-infringing copy.

12.72 The new exception in sub-s 116AO(3) permits circumvention of an access control on a computer program for the *sole* purpose of achieving interoperability between computer programs. The exception does not apply where the circumvention is for purposes additional to the purpose of achieving interoperability between computer programs. The exception is further qualified in that it only applies where that information is not readily available from another source at the time of circumvention.

12.73 The interoperability exception applies to all three categories of liability (i) the act of circumvention (s 116AN), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 116AO and 116AP). The cumulative effect of ss 116AN, 116AO and 116AP means that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

*Exception—encryption research*

12.74 New sub-s 116AO(4) provides an exception from liability for manufacturing etc. a circumvention device for encryption research for the *sole* purpose of identifying and analysing flaws and vulnerabilities of encryption technology. This provision gives effect to Article 17.4.7(e)(ii) of the AUSFTA.

12.75 This exception will apply to a manufacturer etc. of a circumvention device, person X, where the circumvention device is used by another person, ‘the researcher’, to circumvent for encryption research purposes.

12.76 The exception applies to a lawfully obtained non-infringing copy. The exception does not apply where the circumvention is for purposes additional to the purpose of identifying and analysing flaws and vulnerabilities of encryption technology. Paragraph 116AO(4)(e) covers situations where a person has obtained permission, where they have made reasonable efforts to obtain permission but have received no response from the copyright owner or where the copyright owner is unable

to be located (eg, in the case of orphan works). It does not cover a situation where the copyright owner has refused permission.

12.77 The encryption research exception applies to two of the three categories of liability: (i) the act of circumvention (s 116AN) and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of encryption research. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—computer security testing*

12.78 New sub-s 116AO(5) provides an exception from liability for manufacturing etc., for testing, investigating, or correcting the security of a computer, computer system or computer network. This provision gives effect to Article 17.4.7(e)(iv) of the AUSFTA.

12.79 This exception will apply to a manufacturer etc. of a circumvention device, person X, where the circumvention device is used by another person, person Y, to circumvent for the purpose of computer security testing.

12.80 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously an exception to liability for dealings in circumvention devices for computer security testing covered by s 47F. Section 47F permits the reproduction or adaptation of a computer program for the purpose of testing security or correcting a security flaw in the program, computer system or network. The new exception in sub-s 116AO(5) permits manufacturing etc. for the *sole* purpose of testing, investigating or correcting the security of a computer, computer system or computer network. The exception would allow the manufacturing etc. to circumvent a TPM which creates a security vulnerability in a computer, computer system or computer network. Eg, the exception would allow circumvention of a computer program that protects against removal of a malicious program that affects the security of a computer, computer system, or computer network. The exception does not apply where the circumvention is for purposes additional to the

purpose of testing, investigating or correcting the security of a computer, computer system or computer network.

12.81 The computer security testing exception applies to two of the three categories of liability: (i) the act of circumvention (s 116AN) and (ii) the manufacture etc of devices and supply of services that circumvent access control TPMs (ss 116AO and 116AP). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of computer security testing. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—law enforcement and national security*

12.82 New sub-s 116AO(6) provides an exception from liability for the circumvention of TPMs for lawfully authorised activities of for law enforcement, intelligence, essential security and similar governmental purposes. Accordingly it also applies to anything done for the purposes of a statutory function, power or duty by or on behalf of the Commonwealth, a State or Territory or an authority of one of those.

12.83 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously an exception to liability for dealings in circumvention devices for government use of copyright material under s 183. Section 183 provides that the copyright in a work or other subject-matter is not infringed if the use is for the services of the Commonwealth, State or Territory. The scope of the specific exception in the AUSFTA is narrower than the exception in the repealed TPM scheme. As a result, the new exception in sub-s 116AO(6) permits manufacturing etc of a circumvention device of an access control in relation to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty. Law enforcement is intended to cover any activity for the purposes of enforcing laws, whether the laws are of a criminal or civil nature. Eg, activities undertaken by the Australian Taxation Office for the purposes of enforcing tax laws would be covered by this exception. Performing a statutory function or duty includes activities that a statutory body is required to perform as part of its statutory function. Eg, activities undertaken by the Office of

Film and Literature Classification in order to perform its statutory duty of classifying copyright material would be covered by this exception.

12.84 The law enforcement and national security exception applies to all three categories of liability (i) the act of circumvention (s 116AN), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 116AO and 116AP). The cumulative effect of ss 116AN, 116AO and 116AP means that all types of circumvention devices and services can be made available for the purpose of law enforcement and national security.

*Burden of proof*

12.85 New sub-s 116AO(7) places the burden of proof for establishing matters under sub-ss 116AO (2) to (6) inclusive on the defendant. This means that the defendant must establish those elements of the exception which are peculiar to the knowledge of the defendant.

*New s 116AP Providing etc. a circumvention service for a technological protection measure*

12.86 New sub-s 116AP(1) gives effect to Article 17.4.7 (a)(ii) of the AUSFTA in so far as it relates to the provision of circumvention services.

12.87 The reference to ‘another person’ clarifies that the services must be on a commercial or some other basis with the public.

*Exception—no promotion, advertising etc.*

12.88 New sub-s 116AP(2) provides an exception where the act of promoting, advertising or marketing is done by a person without any direction or request of the person who provides that service and the service is a circumvention service only because it has been advertised as such. This clarification is intended to address the situation where X and Y are competitors and person Y places an advertisement for vexatious purposes, with the effect that the service provided by X becomes a circumvention service despite the service not performing that function.

*Exception—interoperability*

12.89 New sub-s 116AP(3) provides an exception from liability for providing etc. a circumvention service for achieving interoperability of an independently created program. This gives effect to Article 17.4.7 (e)(i) of the AUSFTA which recognises the need for legitimate reverse engineering activities where information is not otherwise readily available to assist with the creation of an independently written interoperable program. The exception applies to a lawfully obtained non-infringing copy.

12.90 This exception will apply to the providing etc. of a circumvention service by person X, where the circumvention device is used by another person, person Y, to circumvent for achieving interoperability of an independently created program with the original program.

12.91 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was an exception to liability for dealings in circumvention devices for the purpose of undertaking acts allowed by s 47D. Section 47D permits the reproduction or adaptation of computer programs for the purpose of making interoperable computer programs or articles (computer products). The scope of the specific exception in the AUSFTA is narrower than the interoperability exception in the repealed TPM scheme. The exception applies to a lawfully obtained non-infringing copy.

12.92 The new exception in sub-s 116AP(3) permits circumvention of an access control on a computer program for the *sole* purpose of achieving interoperability between computer programs. The exception does not apply where the circumvention is for purposes additional to the purpose of achieving interoperability between computer programs. The exception is further qualified in that it only applies where that information is not readily available from another source at the time of circumvention.

12.93 The interoperability exception applies to all three categories of liability (i) the act of circumvention (s 116AN), 2) manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 116AO and 116AP). The cumulative effect of ss 116AN, 116AO and

116AP means that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

*Exception—encryption research*

12.94 New sub-s116AP(4) provides an exception from liability for providing etc. a circumvention service for encryption research for the sole purpose of identifying and analysing flaws and vulnerabilities of encryption technology. This provision gives effect to Article 17.4.7(e)(ii) of the AUSFTA.

12.95 This exception will apply to the providing etc. of a circumvention service by, person X, where the circumvention service is provided to another person, ‘the researcher’, to circumvent for encryption research purposes.

12.96 The exception applies to a lawfully obtained non-infringing copy. The new exception in sub-s 116AP(4) permits providing etc. of a circumvention service for the *sole* purpose of identifying and analysing flaws and vulnerabilities of encryption technology. The exception does not apply where the circumvention is for purposes additional to the purpose of identifying and analysing flaws and vulnerabilities of encryption technology. Paragraph 116AP(4)(e) covers situations where a person has obtained permission, where they have made reasonable efforts to obtain permission but have received no response from the copyright owner or where the copyright owner is unable to be located (eg in the case of orphan works). It does not cover a situation where the copyright owner has refused permission.

12.97 The encryption research exception applies to two of the three categories of liability (i) the act of circumvention (s 116AN) and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of encryption research. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—computer security testing*

12.98 New sub-s 116AP(5) provides an exception from liability for providing etc. a circumvention service for testing, investigating, or correcting the security of a computer, computer system or computer network. This provision gives effect to Article 17.4.7(e)(iv) of the AUSFTA.

12.99 This exception will apply to the providing etc. of a circumvention service by person X, where the circumvention device is used by another person, person Y, to circumvent for the purpose of computer security testing.

12.100 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously an exception to liability for dealings in circumvention devices for computer security testing covered by s 47F. Section 47F permits the reproduction or adaptation of a computer program for the purpose of testing security or correcting a security flaw in the program, computer system or network. The new exception in sub-s 116AP(5) permits providing etc. a circumvention service for the *sole* purpose of testing, investigating or correcting the security of a computer, computer system or computer network. The exception would allow the circumvention of a TPM which creates a security vulnerability in a computer, computer system, or computer network. Eg, the exception would allow circumvention of a TPM that protects against removal of a malicious program that affects the security of a computer, computer system, or computer network. The exception does not apply where the circumvention is for purposes additional to the purpose of testing, investigating or correcting the security of a computer, computer system or computer network.

12.101 The computer security testing exception applies to two of the three categories of liability (i) the act of circumvention (s 116AN) and (ii) the manufacture etc of devices and supply of services that circumvent access control TPMs (ss 116AO and 116AP). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of computer security testing. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

*Exception—law enforcement and national security*

12.102 New sub-s 116AP(6) provides an exception from liability for providing a circumvention service, the circumvention of TPMs for lawfully authorised activities for law enforcement, intelligence, essential security and similar governmental purposes. Accordingly, it also applies to anything done for the purposes of a statutory function, power or duty by or on behalf of the Commonwealth, a State or Territory or an authority of one of them.

12.103 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously an exception to liability for dealings in circumvention devices for government use of copyright material within the circumstances of s 183. Section s 183 provides that the copyright in a work or other subject-matter is not infringed if the use is for the services of the Commonwealth, a State or Territory. The scope of the specific exception in the AUSFTA is narrower than the exception in the repealed TPM scheme. As a result, the new exception in sub-s 116AP(6) permits the provision of a circumvention service etc. in relation to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty. Law enforcement is intended to cover any activity for the purposes of enforcing laws, whether the laws are of a criminal or civil nature. Eg, activities undertaken by the Australian Taxation Office for the purposes of enforcing tax laws would be covered by this exception. Performing a statutory function or duty includes activities that a statutory body is required to perform as part of its statutory function. Eg, activities undertaken by the Office of Film and Literature Classification in order to perform its statutory duty of classifying copyright material would be covered by this exception.

12.104 The law enforcement and national security exception applies to all three categories of liability: (i) the act of circumvention (s 116AN), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 116AO and 116AP) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 116AO and 116AP). The cumulative effect of ss 116AN, 116AO and 116AP means that all types of circumvention devices and services can be made available for the purpose of law enforcement and national security.

### *Burden of proof*

12.105 New sub-s 116AP(7) places the burden of proof on the defendant for establishing matters under sub-ss 116AP(2) to (6). This means that the defendant must establish those elements of the exception which are peculiar to the knowledge of the defendant.

### *New s 116AQ Remedies in actions under this Subdivision*

12.106 New sub-s 116AQ(1) clarifies that the relief that a court can grant may include an injunction and damages and an order for the destruction of circumvention devices that are the subject of the action.

12.107 New sub-s 116AQ(2) provides guidance to a court when awarding additional damages. It sets out a list of factors to which the court may have regard. The list of factors is not intended to be exhaustive.

12.108 New sub-s 116AQ(3) is intended to provide the court, where an action has been commenced, with the power to order the delivery up of circumvention devices to the court on such terms as it decides.

12.109 New sub-s 116AQ(4) ensures that s 116AQ does not affect the interpretation of any other provision of the Act. It is intended to ensure that there are no unintended consequences in relation to other provisions in the Act.

### **Subdivision B—Electronic rights management information**

#### **Item 10 Subsections 116D(1) and (2)**

12.110 This item amends sub-ss 116D(1) and (2) by omitting ‘116A, 116B, 116C or 116CA’ and substituting ‘this Subdivision’. Section 116D relates to the remedies available under the preceding subsections. For ease, the references can be shortened to refer to the Subdivision rather than each subsection.

## **Item 11      After Subdivision D of Division 5 of Part V**

### **Subdivision E—Technological protection measures**

12.111 This item inserts new Subdivision E of Division 5 of Part V. Subdivision E contains the criminal actions and defences for circumventing an access control TPM (s 132APC), manufacturing etc a circumvention device for a TPM (s 132APD) and providing etc a circumvention service for a TPM (s 132APE).

#### *New s 132APA Definitions*

12.112 New s 132APA defines ‘computer program’. The meaning of computer program in s 47AB is used in this subdivision because the exceptions to liability overlap with acts not constituting infringements of copyright in computer programs found in Part III Division 4A.

#### *New s 132APB Interaction of this Subdivision with Part VAA*

12.113 New s 132APB clarifies the relationship between the TPM liability scheme and the liability scheme for unauthorised access to encoded broadcasts in Part VAA. Although the TPM liability scheme applies to broadcasts generally, it will not apply to encoded broadcasts covered by the scheme in Part VAA.

#### *New s 132APC Circumventing an access control technological protection measure*

12.114 New s 132APC implements Article 17.4.7(a)(i) of the AUSFTA and introduces a new offence for the act of circumventing an access control TPM. Liability for the act of circumvention is limited to the circumvention of access control TPMs. The criminal provision only applies where circumvention is done for the purpose of commercial advantage or profit. There is no equivalent action for circumvention of non-access control TPMs. This is consistent with the obligations in the AUSFTA which do not require Australia to implement an action for circumvention of non-access control TPMs.

12.115 Under new sub-s 132APC(1) the prosecution will have to prove all the elements in s132APC. The criminal provisions have been drafted to comply with Commonwealth criminal law policy. As a result, the fault elements for the criminal

offences are not expressed in the legislation and, instead, are drawn from Chapter 2 in the Schedule to the *Criminal Code Act 1995* - General principles of criminal responsibility.

12.116 The penalty for the act of circumventing an access control TPM is 60 penalty units.

*Defence—permission*

12.117 New sub-s 132APC(2) creates a defence to liability for circumventing an access control TPM where the person has permission to circumvent. Such permission may be given expressly or by implication. Permission would not be implied, merely because an exception to copyright infringement allows an act to be done in relation to the copyright material. Permission may be implied, eg, where a copyright owner provides a copy of a work to a user and authorises the user to undertake specific activities. If the copyright owner does not expressly allow circumvention, but those specific activities cannot be undertaken without circumventing an access control technological protection measure then a copyright owner may be taken to have given implied permission to circumvent. It is intended that someone who has permission to circumvent should be entitled to do so without the risk of attracting liability.

12.118 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—interoperability*

12.119 New sub-s 132APC(3) creates a defence to liability for circumventing an access control TPM for the purpose of creating interoperable computer programs. The defence implements the specific exception in Article 17.4.7(e)(i) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was a defence to liability for dealings in circumvention devices for the purpose of undertaking acts allowed by s 47D. Section 47D permits the reproduction or adaptation of computer programs for the purpose of making interoperable computer programs or articles (computer products). The scope of the

specific exception in the AUSFTA is narrower than the interoperability exception in the repealed TPM scheme. The defence applies to a lawfully obtained non-infringing copy.

12.120 The new defence in sub-s 132APC(3) permits circumvention of an access control on a computer program for the *sole* purpose of achieving interoperability between computer programs. The defence does not apply where the circumvention is for purposes additional to the purpose of achieving interoperability between computer programs. The defence is further qualified in that it only applies where that information is not readily available from another source at the time of circumvention.

12.121 The interoperability defence applies to all three categories of liability: (i) the act of circumvention (s 132APC), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 132APD and 132APE) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 132APD and 132APE). The cumulative effect of ss 132APC, 132APD and 132APE means that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

12.122 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

#### *Defence—encryption research*

12.123 New sub-s 132APC(4) creates a defence to liability for circumventing an access control TPM for the purpose of encryption research. The defence applies to both a ‘person’ or and ‘if the person is a body corporate—an employee of the person’. The latter is intended to cover encryption researchers who are employed by a university or corporation so that the defence may be used where action is taken against the university or corporation.

12.124 The defence implements the specific exception in Article 17.4.7(e)(ii) of the AUSFTA. The defence applies to a lawfully obtained non-infringing copy. The new

defence in sub-s 132APC(4) permits circumvention of an access control for the *sole* purpose of identifying and analysing flaws and vulnerabilities of encryption technology. The defence does not apply where the circumvention is for purposes additional to the purpose of identifying and analysing flaws and vulnerabilities of encryption technology. Paragraph 132APC(4)(d) applies to situations where a person has obtained permission, where they have made reasonable efforts to obtain permission but have received no response from the copyright owner or where the copyright owner is unable to be located (eg, in the case of orphan works). It does not cover a situation where the copyright owner has refused permission.

12.125 The encryption research defence applies to two of the three categories of liability: (i) the act of circumvention (s 132APC) and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (s 132APD and s 132APE). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of encryption research. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

12.126 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

#### *Defence—computer security testing*

12.127 New sub-s 132APC(5) creates a defence to liability for circumventing an access control TPM for the purpose of computer security testing. The defence implements the specific exception in Article 17.4.7(e)(iv) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously a defence to liability for dealings in circumvention devices for computer security testing covered by s 47F. Section 47F permits the reproduction or adaptation of a computer program for the purpose of testing security or correcting a security flaw in the program, computer system or network. The new defence in sub-s 132APC(5) permits circumvention of an access

control for the *sole* purpose of testing, investigating or correcting the security of a computer, computer system or computer network. The defence would allow the circumvention of a TPM which creates a security vulnerability in a computer, computer system, or computer network. Eg, the exception would allow circumvention of a TPM that protects against removal of a malicious program that affects the security of a computer, computer system, or computer network. The defence does not apply where the circumvention is for purposes additional to the purpose of testing, investigating or correcting the security of a computer, computer system or computer network.

12.128 The computer security testing exception applies to two of the three categories of liability (i) the act of circumvention (s 132APC) and (ii) the manufacture etc of devices and supply of services that circumvent access control TPMs (ss 132APD and 132APE). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of computer security testing. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

12.129 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

#### *Defence—online privacy*

12.130 New sub-s 132APC(6) creates a defence to liability for circumventing an access control TPM for the purpose of online privacy. The defence implements the specific exception in Article 17.4.7(e)(v) of the AUSFTA. The new defence in sub-s 132APC(6) permits circumvention of an access control for the *sole* purpose of identifying and disabling an undisclosed capability to collect or disseminate personally identifying information about a natural person's online activities. The defence does not apply where the circumvention is for purposes additional to the purpose of identifying and disabling an undisclosed capability to collect or disseminate personally identifying information about a natural person's online activities.

12.131 The online privacy defence applies only to the act of circumvention (s 132APC). It does not apply to the manufacture etc of circumvention devices (s 132APD) or providing etc circumvention services (s 132APE). This means that circumvention devices and services cannot be made available for the purpose of online privacy. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

12.132 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—law enforcement and national security*

12.133 New sub-s 132APC(7) creates a defence to liability for circumventing an access control TPM for the purpose of law enforcement and national security. The defence implements the specific exception in Article 17.4.7(e)(vi) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously a defence to liability for dealings in circumvention devices for government use of copyright material within the circumstances of s 183. Section s 183 provides that the copyright in a work or other subject-matter is not infringed if the use is for the services of the Commonwealth, a State or Territory. The scope of the specific exception in the AUSFTA is narrower than the defence in the repealed TPM scheme. As a result, the new defence in sub-s 132APC(7) permits circumvention of an access control in relation to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty. Law enforcement is intended to cover any activity for the purposes of enforcing laws, whether the laws are of a criminal or civil nature. Eg, activities undertaken by the Australian Taxation Office for the purposes of enforcing tax laws would be covered by this exception. Performing a statutory function or duty includes activities that a statutory body is required to perform as part of its statutory function. Eg, activities undertaken by the Office of Film and Literature Classification in order to perform its statutory duty of classifying copyright material would be covered by this defence.

12.134 The law enforcement and national security defence applies to all three categories of liability (i) the act of circumvention (s 132APC), 2) manufacture of devices and provision of services that circumvent access control TPMs (s 132APD and s 132APE) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 132APD and 132APE). The cumulative effect of ss 132APC, 132APD and 132APE means that all types of circumvention devices and services can be made available for the purpose of law enforcement and national security.

12.135 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—libraries etc.*

12.136 New sub-s 132APC(8) creates a defence to liability for circumventing an access control TPM for anything lawfully done by a non-profit library, archive, educational institution or public non-commercial broadcaster. The defence implements the limitation of the application of criminal procedures and penalties to specific bodies contained in Article 17.4.7(a) of the AUSFTA.

12.137 This means that non-profit libraries, archives, educational institutions or public non-commercial broadcasters have a defence to all three categories of *criminal* liability: (i) the act of circumvention (s 132APC), (ii) the manufacture etc of circumvention devices (s 132APD) and (iii) the providing etc circumvention services (s 132APE). There is no equivalent exemption from civil liability, which is limited to acquisition decisions by libraries and other specified bodies, and as a result a body specified in this sub-s could still be civilly liable even though there is a defence to criminal liability.

12.138 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—prescribed acts*

12.139 New sub-s 132APC(9) creates a defence to liability for acts which are prescribed in the Copyright Regulations. This new sub-section implements Article 17.4.7(e)(viii) of the AUSFTA which provides for the creation of additional exceptions to liability for the act of circumventing an access control TPM. The process for making regulations is contained in new s 249.

12.140 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*New s 132APD Manufacturing etc. a circumvention device for a technological protection measure*

12.141 This provision gives effect to Article 17.4.7.4 (a)(ii) of the AUSFTA in so far as it relates to the manufacture, importation, distribution, provision, offering to the public or otherwise trafficking in circumvention devices. It creates offences for these activities.

12.142 The references to ‘for another person’ or ‘to another person’ clarify that the dealing in such devices must be on a commercial or some other basis with the public.

12.143 Sub-paragraph 132APD(1)(a)(iii) identifies the act of distribution, this is to be distinguished from sub-paragraph 132APD(1)(a)(v) which identifies the activity of providing to another person. The latter is to cover an active or deliberate transfer of a thing from one person to another while ‘distributes’ suggests that the person is acting more as a conduit or intermediary. Eg a transport company may not be providing devices by merely transporting them. However, it may be distributing the devices.

12.144 The reference to ‘communicates’ in sub-paragraph 132APD(1)(a)(vi) picks up the definition of ‘communicate’ in sub-s 10(1). This is intended to capture the distribution of circumvention devices in electronic form (such as computer programs).

12.145 The penalty for manufacturing etc. a circumvention device is 550 penalty units of imprisonment for five years, or both.

*Defence—no promotion, advertising etc*

12.146 New sub-s 132APD(2) provides a defence where the act of promoting, advertising or marketing is done by a person without any direction or request by the person who has manufactured, imported, distributed etc the circumvention device.

12.147 This clarification is intended to address the situation where X and Y are competitors and person Y places an advertisement for vexatious purposes, with the effect that the device manufactured by X becomes a circumvention device despite the device not having that function.

12.148 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—interoperability*

12.149 New sub-s 132APD(3) creates a defence for manufacturing etc. a circumvention device for achieving interoperability of an independently created program. The defence implements the specific defence in Article 17.4.7(e)(i) of the AUSFTA. Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was a defence to liability for dealings in circumvention devices for the purpose of undertaking acts allowed by s 47D. Section 47D permits the reproduction or adaptation of computer programs for the purpose of making interoperable computer programs or articles (computer products). The scope of the specific exception in the AUSFTA is narrower than the interoperability exception in the repealed TPM scheme. The defence applies to a lawfully obtained non-infringing copy.

12.150 This defence will apply to a manufacturer etc. of a circumvention device, person X, where the circumvention device is used by another person, person Y, to circumvent for achieving interoperability of an independently created program with the original program.

12.151 The new defence in sub-s 132APD(3) permits circumvention of an access control on a computer program for the *sole* purpose of achieving interoperability between computer programs. The defence does not apply where the circumvention is for purposes additional to the purpose of achieving interoperability between computer programs. The defence is further qualified in that it only applies where that information is not readily available from another source at the time of circumvention.

12.152 The interoperability defence applies to all three categories of liability: (i) the act of circumvention (s 132APC), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 132APD and 132APE) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 132APD and 132APE). The cumulative effect of ss 132APC, 132APD and 132APE means that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

12.153 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

#### *Defence—encryption research*

12.154 New sub-s 132APD(4) provides a defence for activities identified in sub-s 132APD(1) where the act of circumvention is for encryption research for the sole purpose of identifying and analysing flaws and vulnerabilities of encryption technology. This provision gives effect to Article 17.4.7(e)(ii) of the AUSFTA.

12.155 This defence will apply to a manufacturer etc. of a circumvention device, person X, where the circumvention device is used by another person, ‘the researcher’, to circumvent for encryption research purposes.

12.156 The defence applies to a lawfully obtained non-infringing copy. The defence does not apply where the circumvention is for purposes additional to the purpose of identifying and analysing flaws and vulnerabilities of encryption technology. Paragraph 132APD(4)(e) covers situations where the researcher has obtained

permission, where they have made reasonable efforts to obtain permission but have received no response from the copyright owner or where the copyright owner is unable to be located (eg, in the case of orphan works). It does not cover a situation where the copyright owner has refused permission.

12.157 The encryption research defence applies to two of the three categories of liability (i) the act of circumvention (s 132APC) and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (s 132APD and s 132APE). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of encryption research. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(i) and (ii) of the AUSFTA.

12.158 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—computer security testing*

12.159 New sub-s 132APD(5) provides a defence for activities identified in sub-s 132APD(1) where the act of circumvention is for testing, investigating, or correcting the security of a computer, computer system or computer network. This provision gives effect to Article 17.4.7(e)(iv) of the AUSFTA.

12.160 This defence will apply to a manufacturer etc. of a circumvention device, person X, where the circumvention device is used by another person, person Y, to circumvent for the purpose of computer security testing.

12.161 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously a defence to liability for dealings in circumvention devices for computer security testing covered by s 47F. Section 47F permits the reproduction or adaptation of a computer program for the purpose of testing security or correcting a security flaw in the program, computer system or network. The new defence in sub-s 132APD(5) permits manufacturing etc. for the *sole*

purpose of testing, investigating or correcting the security of a computer, computer system or computer network. The defence would allow the manufacturing etc. to circumvent a TPM which creates a security vulnerability in a computer, computer system or computer network. Eg, the defence would allow circumvention of a TPM that protects against removal of a malicious program that affects the security of a computer, computer system, or computer network. The defence does not apply where the circumvention is for purposes additional to the purpose of testing, investigating or correcting the security of a computer, computer system or computer network.

12.162 The computer security testing defence applies to two of the three categories of liability (i) the act of circumvention (s 132APC) and (ii) the manufacture etc of devices and supply of services that circumvent access control TPMs (s 132APD and s 132APE). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of computer security testing. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

12.163 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—law enforcement and national security*

12.164 New sub-s 132APD(6) provides a defence for activities identified in sub-s 132APD(1) where the act of circumvention is for lawfully authorised activities or for law enforcement, intelligence, essential security and similar governmental purposes. Accordingly it also applies to anything done for the purposes of a statutory function, power or duty by or on behalf of the Commonwealth, a State or Territory or an authority of one of those.

12.165 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously a defence to liability for dealings in circumvention devices for government use of copyright material within the circumstances of s 183. Section s 183 provides that the copyright in a work or other

subject-matter is not infringed if the use is for the services of the Commonwealth, a State or Territory. The scope of the specific exception in the AUSFTA is narrower than the defence in the repealed TPM scheme. As a result, the new defence in sub-s 132APD(6) permits circumvention of an access control in relation to anything lawfully done for the purposes of law enforcement, national security or performing a statutory function, power or duty. Law enforcement is intended to cover any activity for the purposes of enforcing laws, whether the laws are of a criminal or civil nature.

12.166 Eg, activities undertaken by the Australian Taxation Office for the purposes of enforcing tax laws would be covered by this defence. Performing a statutory function or duty includes activities that a statutory body is required to perform as part of its statutory function. Eg, activities undertaken by the Office of Film and Literature Classification in order to perform its statutory duty of classifying copyright material would be covered by this defence.

12.167 The law enforcement and national security defence applies to all three categories of liability: (i) the act of circumvention (s 132APC), (ii) manufacture of devices and provision of services that circumvent access control TPMs (s 132APD and s 132APE) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 132APD and 132APE). The cumulative effect of ss 132APC, 132APD and 132APE means that all types of circumvention devices and services can be made available for the purpose of law enforcement and national security.

12.168 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—libraries etc.*

12.169 New sub-s 132APD(7) creates a defence to liability for activities identified in sub-s 132APD(1) for anything lawfully done by a non-profit library, archive, educational institution or public non-commercial broadcaster. The defence implements the limitation of the application of criminal procedures and penalties to specific bodies contained in Article 17.4.7(a) of the AUSFTA.

12.170 This means that non-profit libraries, archives, educational institutions or public non-commercial broadcasters have a defence to all three categories of *criminal* liability: (i) the act of circumvention (s 132APC), (ii) the manufacture etc of circumvention devices (s 132APD) and (iii) the providing etc circumvention services (s 132APE). There is no equivalent exemption from civil liability, which is limited to acquisition decisions by libraries and other specified bodies, and as a result a body specified in this sub-s could still be civilly liable even though there is a defence to criminal liability.

12.171 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*New s 132APE Providing etc. a circumvention service for a technological protection measure*

12.172 New sub-s 132APE(1) this provision gives effect to Article 17.4.7 (a)(ii) of the AUSFTA in so far as it relates to the provision of circumvention services.

12.173 The reference to ‘another person’ clarifies that the services must be on a commercial or some other basis with the public.

12.174 The penalty for providing etc a circumvention service is 550 penalty units or imprisonment for five years, or both.

*Defence—no promotion, advertising etc.*

12.175 New sub-s 132APE(2) provides defence for activities identified in sub-s 132APE(1) where the act of promoting, advertising or marketing is done by a person without any direction or request from the person who provides that service and the service is a circumvention service only because it has been advertised as such.

12.176 This clarification is intended to address the situation where X and Y are competitors and person Y places an advertisement for vexatious purposes, with the effect that the service performed by X becomes a circumvention service despite the service not having that function.

12.177 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—interoperability*

12.178 New sub-s 132APE(3) creates a defence for manufacturing etc. a circumvention device for achieving interoperability of an independently created program. This gives effect to Article 17.4.7 (e)(i) of the AUSFTA which recognises the need for legitimate reverse engineering activities where information is not otherwise readily available to assist with the creation of an independently written interoperable program. The defence applies to a lawfully obtained non-infringing copy.

12.179 This defence will apply to the providing etc. of a circumvention service by person X, where the circumvention device is used by another person, person Y, to circumvent for achieving interoperability of an independently created program with the original program.

12.180 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was a defence to liability for dealings in circumvention devices for the purpose of undertaking acts allowed by s 47D. Section 47D permits the reproduction or adaptation of computer programs for the purpose of making interoperable computer programs or articles (computer products). The scope of the specific exception in the AUSFTA is narrower than the interoperability exception in the repealed TPM scheme. The defence applies to a lawfully obtained non-infringing copy.

12.181 The new defence in sub-s 132APE(3) permits circumvention of an access control on a computer program for the *sole* purpose of achieving interoperability between computer programs. The defence does not apply where the circumvention is for purposes additional to the purpose of achieving interoperability between computer programs. The defence is further qualified in that it only applies where that information is not readily available from another source at the time of circumvention.

12.182 The interoperability defence applies to all three categories of liability: (i) the act of circumvention (s 132APC), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 132APD and 132APE) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 132APD and 132APE). The cumulative effect of ss 132APC, 132APD and 132APE means that all types of circumvention devices and services can be made available for the purpose of achieving interoperability between computer programs.

12.183 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—encryption research*

12.184 New sub-s 132APE(4) provides defence for activities identified in sub-s 132APE(1) where a circumvention service is provided for circumvention for encryption research for the sole purpose of identifying and analysing flaws and vulnerabilities of encryption technology. This provision gives effect to Article 17.4.7(e)(ii) of the AUSFTA.

12.185 This defence will apply to the providing etc. of a circumvention service by person X, where the circumvention service is provided to another person, ‘the researcher’, to circumvent for encryption research purposes.

12.186 The defence applies to a lawfully obtained non-infringing copy. The new defence in sub-s 132APE(4) permits providing etc. of a circumvention service for the *sole* purpose of identifying and analysing flaws and vulnerabilities of encryption technology. The defence does not apply where the circumvention is for purposes additional to the purpose of identifying and analysing flaws and vulnerabilities of encryption technology. Paragraph 132APE(4)(e) covers situations where the researcher has obtained permission, where they have made reasonable efforts to obtain permission but have received no response from the copyright owner or where the copyright owner is unable to be located (eg in the case of orphan works). It does not cover a situation where the copyright owner has refused permission.

12.187 The encryption research defence applies to two of the three categories of liability: (i) the act of circumvention (s 132APC) and (ii) the manufacture of devices and provision of services that circumvent access control TPMs (s 132APD and s 132APE). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of encryption research. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

12.188 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—computer security testing*

12.189 New sub-s 132APE(5) provides defence for activities identified in sub-s 132APE(1) where a circumvention service is provided for testing, investigating, or correcting the security of a computer, computer system or computer network. This provision gives effect to Article 17.4.7(e)(iv) of the AUSFTA.

12.190 This defence will apply to the providing etc. of a circumvention service by person X, where the circumvention service is provided to person Y, to circumvent for the purpose of computer security testing.

12.191 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously a defence to liability for dealings in circumvention devices for computer security testing covered by s 47F. Section 47F permits the reproduction or adaptation of a computer program for the purpose of testing security or correcting a security flaw in the program, computer system or network. The new defence in sub-s 132APE(5) permits providing etc. a circumvention service for the *sole* purpose of testing, investigating or correcting the security of a computer, computer system or computer network. The defence would allow the circumvention of a TPM which creates a security vulnerability in a computer, computer system, or computer network. Eg, the exception would allow circumvention of a TPM that protects against removal of a malicious program that affects the security

of a computer, computer system, or computer network. The defence does not apply where the circumvention is for purposes additional to the purpose of testing, investigating or correcting the security of a computer, computer system or computer network.

12.192 The computer security testing defence applies to two of the three categories of liability (i) the act of circumvention (s 132APC) and (ii) the manufacture etc of devices and supply of services that circumvent access control TPMs (ss 132APD and 132APE). It does not apply to manufacture of devices and provision of services that circumvent TPMs other than access control TPMs. This means that devices and services used to circumvent access control TPMs can be made available for the purpose of computer security testing. This difference in treatment between types of TPMs is required by the application of Article 17.4.7(f)(ii) and (ii) of the AUSFTA.

12.193 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—law enforcement and national security*

12.194 New sub-s 132APE(6) provides defence for activities identified in sub-s 132APE(1) where a circumvention service is provided for lawfully authorised activities or for law enforcement, intelligence, essential security and similar governmental purposes. Accordingly, it also applies to anything done for the purposes of a statutory function, power or duty by or on behalf of the Commonwealth, a State or Territory or an authority of one of them.

12.195 Under the repealed TPM scheme (which only applied to dealings in devices not the act of circumvention), there was previously a defence to liability for dealings in circumvention devices for government use of copyright material under s 183. Section s 183 provides that the copyright in a work or other subject-matter is not infringed if the use is for the services of the Commonwealth, a State or Territory. The scope of the specific exception in the AUSFTA is narrower than the defence in the repealed TPM scheme. As a result, the new defence in sub-s 132APE(6) permits circumvention of an access control in relation to anything lawfully done for the purposes of law

enforcement, national security or performing a statutory function, power or duty. Law enforcement is intended to cover any activity for the purposes of enforcing laws, whether the laws are of a criminal or civil nature.

12.196 Eg, activities undertaken by the Australian Taxation Office for the purposes of enforcing tax laws would be covered by this defence. Performing a statutory function or duty includes activities that a statutory body is required to perform as part of its statutory function. Eg, activities undertaken by the Office of Film and Literature Classification in order to perform its statutory duty of classifying copyright material would be covered by this defence.

12.197 The law enforcement and national security defence applies to all three categories of liability: (i) the act of circumvention (s 132APC), (ii) manufacture of devices and provision of services that circumvent access control TPMs (ss 132APD and 132APE) and (iii) the manufacture of devices and provision of services that circumvent TPMs other than access control TPMs (ss 132APD and 132APE). The cumulative effect of ss 132APC, 132APD and 132APE means that all types of circumvention devices and services can be made available for the purpose of law enforcement and national security.

12.198 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

*Defence—libraries etc.*

12.199 New sub-s 132APE(7) creates a defence to liability for activities identified in sub-s 132APE(1) for anything lawfully done by a non-profit library, archive, educational institution or public non-commercial broadcaster. The defence implements the limitation of the application of criminal procedures and penalties to specific bodies contained in Article 17.4.7(a) of the AUSFTA.

12.200 This means that non-profit libraries, archives, educational institutions or public non-commercial broadcasters have a defence to all three categories of *criminal* liability (i) the act of circumvention (s 132APC), (ii) the manufacture etc of

circumvention devices (s 132APD) and (iii) the providing etc. circumvention services (s 132APE). There is no equivalent exemption from civil liability, which is limited to acquisition decisions by libraries and other specified bodies, and as a result a body specified in this sub-s could still be civilly liable even though there is a defence to criminal liability.

12.201 In relation to this matter, the defendant bears an evidential burden of proof. This means that the defendant needs to adduce, or point to, something that suggests a reasonable possibility that the defence is made out. Once this is done, the prosecution is required to refute this defence beyond a reasonable doubt.

**Item 12        Subsection 134(2)**

12.202 This item replaces the reference to repealed s 116A with references to new ss 116AN, 116AO, and 116AP.

**Item 13        After section 202**

12.203 This item inserts a new provision which enables a person to bring an action against anyone who makes groundless threats of legal proceedings in relation to an action under Subdivision A Division 2A of Part V. In such cases, the orders a court may make include an order declaring the threat is unjustifiable, an order granting an injunction restraining the person from continuing to make the threat, and an award of damages for any loss the person bringing the action may have suffered as a result of the threat.

**Item 14        Section 249**

12.204 This item amends s 249 by inserting a new sub-s number and the heading ‘General regulation-making power’ at the beginning of sub-s 249(1). This amendment is necessary as additional sub-ss providing for the making of regulations in relation to TPMs are to be included at the end of the general regulation making power in s 249.

**Item 15        At the end of section 249**

12.205 This item inserts new sub-ss 249(2)-(9). New sub-ss 249(2)-(9) provide for the making of regulations in order to prescribe the doing of an act by a person in

relation to new sub-ss 116AN(9) and 132APC(9). New sub-s 116AN(9) provides an exception to civil liability for the act of circumventing an access control TPM contained in new sub-s 116AN(1) where the act is prescribed by the Copyright Regulations. Similarly new sub-s 132APC(9) provides an exception to criminal liability for the act of circumventing an access control TPM contained in new sub-s 132 APC(1) where the act is prescribed by the Copyright Regulations.

12.206 New sub-ss 249(2)-(9) implement the process by which additional exceptions to the TPM scheme are created from Article 17.4.7(e)(viii) of the AUSFTA. Article 17.4.7(e)(viii) allows for the creation of additional exceptions to liability in relation to the circumvention of access control TPMs providing those exceptions comply with certain criteria and the case is credibly demonstrated in a legislative or administrative proceeding. The House of Representatives Standing Committee on Legal and Constitutional Affairs in its *Review of technological protection measures exceptions* (February 2006), recommended that any exceptions to the liability regime under Article 17.4.7(e)(viii) should be promulgated as subordinate legislation (recommendation 37). Including the exceptions in the Copyright Regulations provides greater flexibility and improves the responsiveness of the scheme to changes in technology. The Regulations will be subject to parliamentary scrutiny and are accessible to the public through the Federal Register of Legislative Instruments.

12.207 An additional exception can be created when a submission for an exception is made and the Minister makes a decision to grant an exception. In compliance with the AUSFTA, the Minister may only make a decision to grant an additional exception subject to the criteria in sub-s 249(4). Subsection 249(5) implements the AUSFTA requirement that a review is held at least once every four years while granting the Minister the flexibility to consider submissions outside this process on an ad hoc basis should the need arise. Equally, sub-ss 249(6)-(9) provide for the variation or revocation of Regulations. The Minister may only make a decision to vary or revoke an additional exception subject to the criteria in sub-s 249(8). Provisions for variation and revocation are included to provide the necessary flexibility for the scheme to respond to developments in the marketplace and technology.

## **Item 16      Application of amendments**

12.208 This item provides that the amendments made by this Part apply to acts done on or after its commencement.

**Part 2—Amendments contingent on the Archives Amendment Act  
2006**

*Copyright Act 1968*

**Item 17 Subparagraph 116AN(8)(b)(ii)**

12.209 This item repeals subparagraph 116AN(8)(b)(ii) and substitutes new subparagraph 116AN(8)(b)(ii).

12.210 The new subparagraph adds a reference to paragraph (aa) of the definition of archives in sub-s 10(1). This amendment is contingent on the passage of the Archives Amendment Bill 2006 which adds paragraph (aa) to the definition of archives in sub-s 10(1) and makes some minor changes to the existing definition.

**Item 18 Paragraphs 132APC(8)(b), 132APD(7)(b) and 132APE(7)(b)**

12.211 This item repeals paragraphs 132APC(8)(b), 132APD(7)(b) and 132APE(7)(b) and substitutes new paragraphs 132APC(8)(b), 132APD(7)(b) and 132APE(7)(b). The new paragraphs include a reference to paragraph (aa) of the definition of archives in sub-s 10(1). This amendment is contingent on the passage of the Archives Amendment Bill 2006 which adds paragraph (aa) to the definition of archives in sub-s 10(1) and makes some minor changes to the existing definition.