

2013-2014

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**REGULATORY POWERS (STANDARD PROVISIONS) BILL 2014**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,  
Senator the Hon George Brandis QC)

# **REGULATORY POWERS (STANDARD PROVISIONS) BILL 2014**

## **OUTLINE**

The Regulatory Powers (Standard Provisions) Bill 2014 provides for a framework of standard regulatory powers exercised by agencies across the Commonwealth. The Bill will only apply to regulatory schemes that trigger its provisions through primary legislation. The key features of the Bill include monitoring and investigation powers as well as enforcement provisions through use of civil penalty, infringement notices, enforceable undertakings and injunctions.

The monitoring powers in the Bill are based on standard powers that can already be found across Commonwealth laws. The Bill provides for monitoring whether legislation is being complied with, or whether information given to the Commonwealth in compliance, or purported compliance, is correct.

The investigation powers contained in the Bill are also commonly found across the statute book. The powers allow investigation of suspected contraventions of offences and civil penalty provisions. Investigation powers provided in the Bill include powers to search and seize evidential material as well as inspect, examine, measure and test anything on the premises. The Bill also provides for the use of civil penalty provisions, infringement notices and injunctions to enforce provisions, and the acceptance and enforcement of undertakings relating to compliance with provisions.

Once enacted, the powers provided by the Bill will be rolled out progressively. New Acts that require monitoring, investigation or enforcement powers of the kind available under the Regulatory Powers Bill will be drafted to trigger the relevant provisions of this Bill.

Overtime, where substantial amendment is required to existing monitoring, investigation and enforcement regimes in Acts, those regimes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the Regulatory Powers Bill.

For the regulatory provisions in this Bill to be activated, new or existing legislation would need to be amended to remove existing regulatory powers and trigger the provisions of this Bill. This will mean that any future legislation that proposes to trigger provisions in this Bill will be introduced and scrutinised by Parliament. An assessment of human rights engagement and compatibility will need to be undertaken in the context of each regulatory scheme and the particular provisions of this Bill that have been triggered. The Explanatory Memorandum to each Bill should clearly set out the relevant agency's current regulatory powers, a comparison with the powers in the Regulatory Powers Bill that will be triggered, and in the case of any expansion of the agency's powers, a detailed explanation of the reasons for the expansion of powers.

In some cases the powers contained in this Bill will not be appropriate or sufficient for the requirements of particular regulatory agencies. For example, law enforcement agencies that deal with national security will still require their own specialised powers. Similarly, some regulatory agencies may have specific requirements not met in this Bill and consequently may decide to not trigger the Bill's provisions. Alternatively, agencies may choose to only trigger certain provisions that are relevant to carrying out their regulatory functions.

The provisions of the Bill deal with:

- (a) general introductory provisions (Part 1)
- (b) monitoring powers for an agency to monitor whether provisions of an Act have been, or are being complied with, and to monitor whether information given in compliance, or purported compliance, with provisions of an Act is correct (Part 2)
- (c) investigation powers for an agency to gather evidence that relates to offences and civil penalty provisions (Part 3)
- (d) the use of civil penalties to enforce provisions (Part 4)
- (e) the use of infringement notices to enforce provisions (Part 5)
- (f) the acceptance and enforcement of undertakings relating to compliance with provisions (Part 6)
- (g) the use of injunctions to enforce provisions (Part 7), and
- (h) general provisions relating to regulations (Part 8).

## **FINANCIAL IMPACT STATEMENT**

There is no financial impact associated with this Bill. However, this Bill will reduce drafting and scrutiny time for future Commonwealth laws that legislate for regulatory schemes.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Bill**

The Regulatory Powers (Standard Provisions) Bill 2014 (the Bill) provides a framework of standard regulatory powers which, when enacted, would be applied to Commonwealth Acts (if appropriate) in a staged approach. The Bill, in and of itself, will not grant agencies any powers. To trigger the Bill's provisions, new or existing Commonwealth Acts must expressly apply the relevant provisions and specify other requisite information such as persons who are authorised to exercise the applicable powers.

The Bill predominantly provides powers for monitoring and gathering evidence which are designed to be used by an agency to determine compliance with provisions of a triggering Act or legislative instrument. The Bill also provides for the use of civil penalties, infringement notices and injunctions to enforce provisions and the acceptance and enforcement of undertakings relating to compliance with provisions.

### **Human rights implications**

While the following statement considers the human rights implications of the Bill in the abstract, further consideration will need to be given to these implications each time a Bill proposes to apply parts of this Bill. The human rights implications will differ with each circumstance in which elements of the framework contained in this Bill are triggered. These must be considered specifically and in context.

That said, the Bill engages the following human rights:

- The protection against arbitrary interference with privacy; and
- The right to a fair trial.

#### *The right to privacy and reputation*

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

The Bill places obligations on participants in Commonwealth regulatory schemes that relate to:

- monitoring and investigation powers (including entry, search and seizure)
- civil penalty provisions
- infringement notices
- enforceable undertakings
- injunctions, and
- general provisions relating to regulations.

The Bill protects against arbitrary abuses of power as the entry, monitoring, search, seizure and information gathering powers provided in it are conditional upon consent being given by the occupier of the premises or prior judicial authorisation. Where entry is based on the consent of the occupier, consent must be informed and voluntary and the occupier of premises can restrict entry by authorised persons to a particular period. Additional safeguards are provided through provisions requiring authorised persons and any persons assisting them to leave the premises if the occupier withdraws their consent.

The Bill specifies that an issuing officer of a warrant to enter premises for the purpose of monitoring or investigation must be a judicial officer. The Bill also provides limits on the issuing of a monitoring or investigation warrant. In the case of an investigation warrant, for example, an issuing officer may issue an investigation warrant only when satisfied, by oath or affirmation, that there are reasonable grounds for suspecting that there is, or may be within the 72 hours, evidential material on the premises. An issuing officer must not issue a warrant unless the issuing officer has been provided, either orally or by affidavit, with such further information as they require concerning the grounds on which the issue of the warrant is being sought. Such constraints on this power ensure adequate safeguards against arbitrary limitations on the right to privacy in the issuing of warrants.

An authorised person cannot enter premises unless their identity card is shown to the occupier of the premises. If entry is authorised by warrant, the authorised person must also provide a copy of the warrant to the occupier of the premises. This provides for the transparent utilisation of the Bill's powers and mitigates arbitrariness and risk of abuse.

These powers are reasonable, necessary and proportionate to achieve a legitimate objective. Adequate safeguards and limitations on the use of regulatory powers in the Bill ensures that such lawful interferences are not arbitrary or at risk of abuse.

#### *The right to a fair and public hearing*

Article 14 of the ICCPR ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Bill engages the right to a fair and public hearing through the creation of an infringement notice scheme. An infringement notice can be issued by an infringement officer for

contraventions of a strict liability offence provision or a civil penalty provision that is enforceable under the Bill.

The right of a person to a fair and public hearing by a competent, independent and impartial tribunal is preserved by the Bill as its provisions allow a person to elect to have the matter heard by a court rather than pay the amount specified in the notice. Additionally, the Bill outlines that this right must be stated in an infringement notice issued to a person, ensuring that a person issued with an infringement notice is aware of their right to have the matter heard by a court.

The Bill also provides questioning powers to authorised officers in certain situations. These powers are expressed in clauses 24 and 54, which make it an offence to fail to answer questions of an authorised officer. While these powers are expressed to be subject only to very limited defences and exceptions, the Bill relies on the common law presumption against abrogation of core rights to preserve the privilege against self-incrimination and legal professional privilege. Clauses 17 and 47 are intended to make certain that the privilege against self-incrimination and legal professional privilege have not been abrogated by this Bill. These protections guarantee the fair trial rights protected in articles 14(3)(d) and (g) of the ICCPR by limiting the operation of the questioning powers provided by the Bill.

The Bill also creates a regime for the enforcement of civil penalty provisions. Because there are no substantive civil penalty clauses in the Bill, each Act that triggers these civil penalty enforcement mechanisms will need to be accompanied by a statement of compatibility considering the compatibility of these mechanisms with Australia's human rights obligations in their substantive context. This cannot be done in the abstract.

However, it is important to note that civil penalties add to the flexibility of regulatory law by allowing for the punishment of misconduct without the need to impose criminal liability.<sup>1</sup> They provide an alternative to the unnecessary extension of the criminal law into regulatory areas. This means that it is possible that civil penalties may in some circumstances be much greater in magnitude than a criminal fine because of the role they play in the pyramid of enforcement. That is, they must be sufficiently serious to act as a deterrent, without necessarily carrying the stigma of a criminal conviction.<sup>2</sup>

For the purpose of assessing their compatibility with Australia's human rights obligations, civil penalty provisions should only be considered to be criminal in nature where there is the possibility of a truly penal consequence, that is, imprisonment or, in the rare case, a pecuniary penalty of some magnitude which may impact on other rights such as the right to privacy.<sup>3</sup> The civil penalty orders provided for in the Bill are exclusively pecuniary and operate to

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<sup>1</sup> Australian Law Reform Commission Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 13 March 2003, Statement of Principle, paragraph 3.110.

<sup>2</sup> *Ibid*, paragraph 2.61.

<sup>3</sup> This is also the approach taken by the Canadian Courts in relation to section 11 of the Canadian Charter of Rights and Freedoms, see *R v Wigglesworth* [1987] 2 R.C.S. 541, *Matineau v M.N.R.* [2004] 3 R.C.S. 737, *Canada v Guindon* 2013 FCA 153.

create a debt to the Commonwealth. Therefore, while the purpose of any provision triggering the civil penalty mechanisms in this Bill is likely to be punitive or deterrent, this should not be the determinative factor in assessing the nature of the provisions for the purpose of Australia's international human rights obligations, though this must be carefully assessed each time a Bill seeks to trigger the provisions in this Bill.

Clause 96 of the Bill provides for a reverse onus of proof. This provision engages the right to be presumed innocent where it is triggered with regard to a provision creating a civil penalty. However, this represents a necessary, reasonable and proportionate engagement of the right for a number of reasons. The objective of the reversal is to ensure that all appropriate evidence is before a court. This is appropriate given that the knowledge as to the person's considerations and beliefs at the time of the conduct is peculiar to that person. However, the Senate Scrutiny of Bills Alert Digest No. 13 of 2012 recognised that the appropriateness of these provisions will depend upon the statutory context in which they are applied, as is true of all of the powers contemplated in this Bill.

Clauses 35 and 76 of the Bill also provide for a reverse onus of proof with regard to proving an exception to an offence of strict liability. It is appropriate that the prosecution does not need to prove fault for the elements of this offence, on the basis that the state of mind of the defendant is not relevant, the elements of the offence are objective, and the offence is minor and deterrent in nature. It is reasonable that the defendant bears an evidential burden given the context of the exception and the minor nature of the offence.

## **Conclusion**

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. Furthermore, as the Bill is a Bill of general application, it will not engage any limitations on human rights until the Bill's provisions are triggered. When this occurs, an individual assessment of the proposed legislation will be required to determine compatibility with human rights. This will provide additional protections to human rights and freedoms, and will ensure that those provisions of this Bill that are applied to new or existing legislation are necessary, reasonable and proportionate for the particular agency to carry out its functions.

# NOTES ON CLAUSES

## Part 1—Preliminary

### *Clause 1: Short title*

1. Clause 1 establishes the short title of the Act, the *Regulatory Powers (Standard Provisions) Act 2014*.

### *Clause 2: Commencement*

2. Clause 2 provides the commencement details of the Bill.

### *Clause 3: Simplified outline*

3. Clause 3 provides an overview of the Bill which creates a framework of regulatory powers, including monitoring and investigation powers, and the use of civil penalties, infringement notices, undertakings and injunctions to enforce provisions.

4. The monitoring, investigation and enforcement powers provided in the Bill only have force in relation to a provision of an Act or a legislative instrument when triggered by another Act.

### *Clause 4: Dictionary*

5. Clause 4 provides a dictionary to define the key terms used in the Bill, to assist in the interpretation and implementation of the Bill.

### *Clause 5: Binding the Crown*

6. Clause 5 provides that this Act binds the Crown in each of its capacities.

## Part 2—Monitoring

### *Division 1—Outline and operation of this Part*

#### *Clause 6: Simplified outline*

7. Clause 6 provides an outline of Part 2 of the Bill which creates a framework of monitoring powers.

8. Part 2 provides that another Act (a triggering Act) must make a provision or information subject to monitoring under this Part, for this Part to operate.

#### *Clause 7: Purpose and operation of this Part*

9. Clause 7 provides that the purpose of this Part is to create a framework for monitoring compliance with provisions of an Act or legislative instrument, and monitoring whether



information given in compliance, or purported compliance, with a provision of an Act or legislative instrument is correct.

10. Subclause 7(2) clarifies that the monitoring powers of this Part will only operate if a provision of an Act or legislative instrument, or information given in compliance, or purported compliance, with a provision of an Act or legislative instrument, is made subject to this Part.

***Clause 8: Provisions subject to monitoring***

11. Clause 8 provides that a provision of an Act or a legislative instrument is subject to monitoring under this Part if a triggering Act provides so.

***Clause 9: Information subject to monitoring***

12. Clause 9 provides that information given in compliance, or purported compliance, with a provision of an Act or a legislative instrument is subject to monitoring under this Part if a triggering Act provides so.

***Clause 10: Related provisions***

13. Clause 10 provides that a provision is related to a provision or to information that is subject to monitoring under this Part, if a triggering Act provides so.

***Clause 11: Authorised applicant***

14. Clause 11 provides that a person is an authorised applicant for the purposes of exercising monitoring powers under this Part, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

15. Subclause 11(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an authorised applicant in relation to a provision or information for the purposes of this Part.

***Clause 12: Authorised person***

16. Clause 12 provides that a person is an authorised person for the purposes of exercising monitoring powers under this Part, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

17. Subclause 12(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an authorised person in relation to a provision or information for the purposes of this Part.

***Clause 13: Identity card***

18. An authorised person must be able to identify themselves at all times when exercising monitoring powers under this Part, in relation to a provision or information. The authorised

person will be issued with an identity card under clause 35 by the relevant chief executive in relation to that provision or information.

***Clause 14: Issuing officer***

19. Clause 14 provides that a judicial officer is an issuing officer for the purposes of exercising powers under this Part, or performing other powers incidental to those powers, if a triggering Act provides so.

20. Subclause 14(3) provides that a triggering Act may nominate a judicial officer of a specified class, or authorise another person to specify a judicial officer or a judicial officer of a specified class, as an issuing officer in relation to a provision or information for the purposes of this Part.

***Clause 15: Relevant chief executive***

21. Clause 15 provides that a person is the relevant chief executive for the purposes of exercising powers under this Part, or performing other powers, functions or duties incidental to those powers, if a triggering Act provides so.

22. Subclause 15(3) provides that a triggering Act may nominate a person who holds a specified office, or authorise another person to specify a person or a person who holds a specified office, as the relevant chief executive in relation to a provision or information for the purposes of this Part.

***Clause 16: Relevant court***

23. Clause 16 provides that a relevant court in relation to a matter that arises because of the exercise of powers, functions or duties under this Part, is the court provided by the triggering Act.

***Clause 17: Privileges not abrogated***

24. Subclause 17(1) makes clear that the right to claim privilege against self-incrimination, as enshrined in common law, has not been abrogated under this Part. This means that a person has the right to refuse to answer a question or provide information or documents if that answer, information or document might incriminate that person or make them liable to a penalty.

25. The privilege against self-incrimination will not apply if the person voluntarily answers a question, or voluntarily provides information or documents that are incriminatory, when requested through the exercise of powers under this Part.

26. Subclause 17(2) makes clear that the right to claim legal professional privilege, as provided by the common law, has not been abrogated under this Part. This means that a person has the right to refuse to answer a question, give information, or produce a document on the ground that the answer, information or document would be subject to legal professional privilege.

27. A person may waive legal professional privilege, if they voluntarily answer a question or voluntarily provide information or documents when requested through the exercise of powers under this Part.

28. These privileges provide significant protections for individuals and should generally be available in the context of regulatory schemes. For this reason, subclauses 17(1) and (2) take the unusual approach for Commonwealth law by making clear that these privileges have not been abrogated under this Bill.

## ***Division 2—Powers of authorised persons***

### **Subdivision A—Monitoring powers**

#### ***Clause 18: Entering premises by consent or under warrant***

29. Clause 18 provides that an authorised person may enter the premises and exercise monitoring powers to determine compliance with a provision subject to monitoring, or to determine whether information subject to monitoring is correct.

30. The authorised person can only enter the premises if authorised. Authorisation to enter the premises is provided if either the occupier of the premises consents to the entry, or the entry is authorised by a monitoring warrant.

31. The explanatory note to this clause makes clear that an authorised person must leave the premises if entry to the premises was with the occupier's consent and that consent has been withdrawn (see clause 25).

#### ***Clause 19: General monitoring powers***

32. Clause 19 sets out the authorised person's monitoring powers in relation to entering premises by consent or under a warrant. The monitoring powers permit an authorised person to, among other things, search premises, bring equipment and materials onto the premises, measure or test any thing on the premises, photograph things or make copies of documents, or operate electronic equipment.

#### ***Clause 20: Operating electronic equipment***

33. Clause 20 provides the power for an authorised person to operate electronic equipment on the premises and to use a disk, tape or other storage device that is on the premises and can be used with the equipment or is associated with it. In this context, electronic equipment primarily refers to, but is not limited to, data storage equipment such as computers that may have information relevant to monitoring compliance. This power is necessary to ensure an authorised person can obtain access to electronic records that may indicate whether a provision of an Act or legislative instrument is being complied with or whether information provided in compliance or purported compliance with a provision of an Act or legislative instrument is correct.

34. An authorised person's power to operate electronic equipment extends to copying data from the electronic equipment onto storage devices. However, an authorised person may only operate electronic equipment if he or she reasonably believes this can occur without damaging the equipment. Nothing in clause 20 affects any liability or indemnity a court may find for damage to electronic equipment.

***Clause 21: Securing electronic equipment to obtain expert assistance***

35. An authorised person may not be accompanied by an expert assistant when exercising monitoring powers. Expert or specialised assistance may be required to operate electronic equipment to access relevant information. Clause 21 permits an authorised person to secure electronic equipment under a monitoring warrant for up to 24 hours to provide the authorised person time to engage expert assistance to operate electronic equipment.

36. An authorised person may only secure equipment if the authorised person has reasonable grounds to believe relevant data on the equipment may be destroyed, altered or otherwise interfered with, if the equipment is not secured. Under subclause 21(3), the authorised person must notify the occupier of the premises, or their apparent representative, of their intention to secure the equipment.

37. Subclause 21(5) enables an authorised person to apply to an issuing officer for an extension of the 24 hour period if the authorised person believes on reasonable grounds that the equipment needs to be secured for longer than that period. An extension may be sought and granted more than once (subclause 21(7)).

38. Subclause 21(6) requires the authorised person to notify the occupier of the premises, or their apparent representative, of their intention to apply for an extension. This provides a means by which an occupier can challenge an application for extension if they so choose.

***Clause 22: Securing evidence of the contravention of a related provision***

39. The powers of an authorised person under a monitoring warrant do not extend to seizing evidence. Monitoring powers are available for the purpose of determining compliance with a law, or whether information provided in compliance, or purported compliance, with a law is correct. Seizing evidence is a more coercive power and should be exercisable only where an issuing officer is satisfied that an authorised person has in fact located evidence of a breach of an Act or legislative instrument.

40. To ensure that evidence located during an inspection is not disposed of before an authorised person has the opportunity to authorise seizure, clause 22 grants an authorised person the power to secure any thing he or she reasonably believes provides evidence of a contravention of an Act or legislative instrument, for up to 24 hours. An issuing officer may extend the period beyond 24 hours (see subclauses 22(2) and (4)).

41. Subclause 22(3) requires the authorised person to notify the occupier of the premises, or their apparent representative, of their intention to apply for an extension. This provides a means by which an occupier can challenge an application for extension if they so choose.

***Clause 23: Persons assisting authorised persons***

42. Authorised persons may require assistance when exercising powers and carrying out their functions or duties under this Part. Clause 23 establishes clear legislative basis for such assistance, if that assistance is necessary and reasonable, and another Act empowers the authorised person to be assisted.

43. A person assisting an authorised person has the power to enter premises and assist the authorised person to exercise powers and perform functions and duties under this Part, in accordance with a direction given by the authorised person.

44. Any action validly taken in respect of this power is taken to be done by the authorised person (subclauses 23(3) and (4)).

45. Subclause 23(5) states that a direction given by the authorised person is not a legislative instrument. This is to assist readers to understand the status of these directions, which do not meet the meaning of legislative instrument under section 5 of the *Legislative Instruments Act 2003*, and is not intended as an exemption from that Act.

**Subdivision B—Powers to ask questions and seek production of documents**

***Clause 24: Asking questions and seeking production of documents***

46. Clause 24 provides the power for an authorised person to ask questions and seek documents.

47. If an authorised person enters premises with the consent of the occupier, subclause 24(2) provides that an authorised person may ask the occupier to answer any questions or produce documents relating to the operation of the provision or the information.

48. If entry is authorised by a monitoring warrant, subclause 24(3) provides that an authorised person may require any person on the premises to answer any questions or produce documents relating to the operation of the provision or the information.

49. Subclause 24(4) provides that a person is not subject to the requirement of subclause 24(3) if the person does not possess the information or document required, and has taken reasonable steps to obtain the required information or documents without success.

50. Subclause 24(5) provides that a person commits an offence for failing to comply with a requirement under subclause 24(3). This offence carries a penalty of 30 penalty units. This clause does not abrogate the privilege against self-incrimination or legal professional privilege (as per clause 17).

### ***Division 3—Obligations and incidental powers of authorised persons***

#### ***Clause 25: Consent***

51. Entry into premises to exercise monitoring powers under Part 2 Division 2 may be exercised with the consent of the occupier. Clause 25 sets out the parameters for valid consent, noting that consent must be informed and voluntary and that an occupier remains free to withdraw consent at any time or to consent to entry only during a certain time period.

52. An authorised person should present their identity card to the occupier before entering the premises. If the authorised person has not done so, subclause 25(6) provides that the authorised person must present their identity card upon entry, or as soon as is reasonably practical after entering the premises.

#### ***Clause 26: Announcement before entry under warrant***

53. Certain powers to inspect public premises may be exercised without announcement or identification. Where an authorised person has a monitoring warrant and the occupier of the premises or that person's apparent representative is present, clause 26 requires an authorised person to identify him or herself by presenting their identity card and announcing that he or she is authorised to enter the premises before entering. This ensures that an occupier of premises who is present is made aware and given the opportunity to allow entry before the authorised person exercises monitoring powers under warrant.

#### ***Clause 27: Authorised person to be in possession of warrant***

54. Clause 27 requires an authorised person to be in possession of the warrant or a copy of the warrant whilst executing a monitoring warrant.

#### ***Clause 28: Details of warrant etc. to be given to occupier***

55. Clause 28 requires an authorised person to provide a copy of the warrant to the occupier of premises, or an occupier's apparent representative, if either are present, and to inform that person of their rights and responsibilities under Division 4 of this Part. This obligation ensures that occupiers and representatives who are present when a warrant is executed, are granted an opportunity to examine the warrant and are explicitly informed about their rights and responsibilities (clauses 30 and 31 provide for the rights and responsibilities of an occupier).

***Clause 29: Compensation for damage to electronic equipment***

56. Clause 29 provides that a person is entitled to compensation for damage to electronic equipment operated during the course of an inspection, or for damage to data that is recorded or programs associated with the use of the equipment or data. This recognises the fact that powers to operate electronic equipment do not excuse damage caused by a lack of care.

***Division 4—Occupier’s rights and responsibilities***

***Clause 30: Right to observe execution of warrant***

57. Clause 30 provides the right for the occupier of premises or their apparent representative, who is present when a warrant is executed, to observe the execution of the warrant on their premises. This right does not limit how the warrant may be executed or require an occupier to witness all of an authorised person’s activities, but it does recognise that a person should not be excluded during the execution of a warrant unless they attempt to obstruct the inspection.

58. An occupier or representative who is present when a warrant is executed must be made aware of their rights under this clause.

***Clause 31: Responsibility to provide facilities and assistance***

59. Clause 31 imposes an obligation on an occupier of premises, or their apparent representative, to provide reasonable facilities and assistance to the authorised person and any person assisting, required to effectively carry out the warrant powers. This obligation recognises that monitoring powers are authorised by issuing officers for the purpose of determining whether laws are being complied with and should not be obstructed. The failure of an occupier or their representative to provide reasonable facilities and assistance carries a penalty of 30 penalty units.

60. An occupiers or representative who is present when a warrant is executed should be made aware of their responsibilities under this clause.

***Division 5—Monitoring warrants***

***Clause 32: Monitoring warrants***

61. Clause 32 provides for an authorised applicant to apply to an issuing officer for a monitoring warrant in relation to premises.

62. To ensure warrants are issued and exercised only in appropriate situations, this clause details the circumstances by which an issuing officer may issue a warrant. The issuing officer may issue a warrant if they are satisfied that it is reasonably necessary that one or more authorised persons access premises for the purposes of determining compliance with a law

that is subject to monitoring under this Part, or whether information subject to monitoring under this Part is correct.

63. Subclause 32(4) sets out the mandatory content of a monitoring warrant, which includes the purpose for which the warrant is issued, who is authorised to exercise the warrant, and when the warrant ceases to be in force.

## ***Division 6—Extension of periods in which things secured***

### ***Clause 33: Extension of periods in which things secured***

64. Clause 33 outlines the situations in which an issuing officer may grant an extension to the 24 hour period in which things can be secured by authorised persons. An extension of the period may, by order, be granted if further information is provided to the issuing officer demonstrating that an extension is necessary to avoid a thing being destroyed, altered, lost, concealed, altered or interfered with.

65. Clause 33(4) outlines what must be included in an order extending the period in which a thing is secured, including a description of the thing to which the order relates and the period for which the extension is granted.

## ***Division 7 – Powers of issuing officers***

### ***Clause 34: Powers of issuing officers***

66. Clause 34 provides that the power conferred on an issuing officer under this Part is conferred on the issuing officer in their personal capacity and not as a representative of the court. However, issuing officers are granted the protection and immunities of the court and members of the court when exercising these powers. This recognises that issuing a warrant is an executive function and not an exercise of judicial power.

## ***Division 8 – Identity cards***

### ***Clause 35: Identity Cards***

67. Clause 35 requires the relevant chief executive to issue an identity card to an authorised person, which is in the form prescribed by the Regulations and contains a photo of the authorised person that is no more than one year old.

68. Clause 35(3) requires a person to return their identity card when they cease their role as an authorised person. This obligation is supported by an offence of strict liability punishable by one penalty unit if the person fails to return their identity card within 14 days after ceasing that role. It is appropriate that the prosecution does not need to prove fault for the elements of this offence, on the basis that the state of mind of the defendant is not relevant, the elements of the offence are objective, and the offence is minor and deterrent in nature. Further, subclause 35(5) provides for an exception to the offence if the identity card



was lost or destroyed. The defendant bears an evidential burden and will need to show a reasonable possibility that the identity card was lost or destroyed. This reverse onus of proof is appropriate given the context and minor nature of the offence.

69. Subclause 35(6) requires an authorised person to carry his or her identity card at all times when acting in their capacity as an authorised person exercising monitoring powers.

## **Part 3—Investigation**

### ***Division 1—Outline and operation of this Part***

#### ***Clause 36: Simplified outline***

70. Clause 36 provides an outline of Part 3 of the Bill which creates a framework for gathering material relating to the contravention of offence and civil penalty provisions.

71. Part 3 provides that another Act (a triggering Act) must make an offence provision or a civil penalty provision subject to investigation under this Part, for this Part to operate.

#### ***Clause 37: Purpose and operation of this Part***

72. Clause 37 provides that the purpose of this Part is to create a framework for gathering material that relates to the contravention of offence provisions and civil penalty provisions.

73. Subclause 37(2) provides that an offence provision or civil penalty provision must be made subject to investigation under this Part for this Part to operate.

#### ***Clause 38: Provisions subject to investigation***

74. Clause 38 provides that an offence against, or a civil penalty provision under, an Act or legislative instrument, is subject to investigation under this Part if an Act (the triggering Act) provides so.

#### ***Clause 39: Evidential material***

75. Clause 39 defines what constitutes evidential material. This removes doubt about the nature of evidential material that may be searched for, or seized, when authorised persons enter premises.

#### ***Clause 40: Related provisions***

76. Clause 40 provides that a provision is related to evidential material for the purposes of this Part, if a triggering Act provides so.

***Clause 41: Authorised applicant***

77. Clause 41 provides that a person is an authorised applicant for the purposes of exercising powers under this Part in relation to evidential material, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

78. Subclause 41(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an authorised applicant in relation to evidential material for the purposes of this Part.

***Clause 42: Authorised person***

79. Clause 42 provides that a person is an authorised person for the purposes of exercising powers under this Part in relation to evidential material, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

80. Subclause 42(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an authorised person in relation to evidential material for the purposes of this Part.

***Clause 43: Identity card***

81. An authorised person must be able to identify themselves at all times when exercising powers in relation to evidential material under this Part. The authorised person will be issued with an identity card under clause 43 by the relevant chief executive in relation to that evidential material.

***Clause 44: Issuing officer***

82. Clause 44 provides that a judicial officer is an issuing officer for the purposes of exercising powers under this Part, or exercising other powers incidental to those powers, if a triggering Act provides so.

83. Subclause 44(3) provides that a triggering Act may nominate a judicial officer of a specified class, or authorise another person to specify a judicial officer or a judicial officer of a specified class, as an issuing officer in relation to evidential material for the purposes of this Part.

***Clause 45: Relevant chief executive***

84. Clause 45 provides that a person is the relevant chief executive for the purposes of exercising powers under this Part, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

85. Subclause 45(3) provides that a triggering Act may nominate a person who holds a specified office, or authorise another person to specify a person or a person who holds a specified office, as the relevant chief executive in relation to evidentiary material for the purposes of this Part.

### ***Clause 46: Relevant court***

86. Clause 46 provides that a relevant court in relation to a matter that arises because of the exercise of powers, functions or duties under this Part, is the court provided by the triggering Act.

### ***Clause 47: Privileges not abrogated***

87. Subclause 47(1) makes clear that the right to claim privilege against self-incrimination, as enshrined in common law, has not been abrogated under this Part. This means that a person has the right to refuse to answer a question or provide information or documents if that answer, information or document might incriminate that person or make them liable to a penalty.

88. The privilege against self-incrimination will not apply if the person voluntarily answers a question, or voluntarily provides information or documents that are incriminatory, when requested through the exercise of powers under this Part.

89. Subclause 47(2) makes clear that the right to claim legal professional privilege, as provided by the common law, has not been abrogated under this Part. This means that a person has the right to refuse to answer a question, give information, or produce a document on the ground that the answer, information or document would be subject to legal professional privilege.

90. A person may waive legal professional privilege, if they voluntarily answer a question or voluntarily provide information or documents when requested through the exercise of powers under this Part.

91. These privileges provide significant protections for individuals and should generally be available in the context of regulatory schemes. For this reason, subclauses 47(1) and (2) take the unusual approach for Commonwealth law by making clear that these privileges have not been abrogated under this Bill.

## ***Division 2—Powers of authorised persons***

### **Subdivision A—Investigation powers**

#### ***Clause 48: Entering premises by consent or under a warrant***

92. Clause 48 provides that an authorised person may enter the premises and exercise investigation powers if the authorised person suspects on reasonable grounds that there may be evidential material on the premises.

93. The authorised person can only enter the premises if authorised. Authorisation to enter the premises is provided if either the occupier of the premises consents to the entry, or the entry is made under an investigation warrant.

### ***Clause 49: General investigation powers***

94. Clause 49 sets out the investigation powers that an authorised person may exercise in relation to premises.

95. If an authorised person enters premises by way of an occupier's consent, the authorised person has the power to search the premises and any thing on the premises for the evidential material the authorised person suspects on reasonable grounds may be on the premises.

96. If an authorised person enters premises under an investigation warrant, the authorised person has the power to: search the premises and seize evidential material; inspect, test and copy evidential material; take necessary equipment onto the premises; or operate electronic equipment found on the premises. It is appropriate to limit the extended range of investigation powers to cases where a warrant is issued to ensure judicial oversight of these investigation powers.

### ***Clause 50: Operating electronic equipment***

97. To ensure an authorised person is able to obtain access to electronic records that may contain evidential material, clause 50 empowers an authorised person to operate any electronic equipment on premises that the authorised person suspects on reasonable grounds contains evidential material, including computers and other electronic storage devices. These powers are available whether the authorised person enters under consent or an investigation warrant.

98. In addition to the power to operate electronic equipment, an authorised person has the power to put the evidential material in documentary form (i.e. print the material) and to make electronic copies of the evidential material, and the power to remove the documents or copies from the premises. These powers are available whether the authorised person enters by consent or under an investigation warrant. If an authorised person enters the premises under a warrant, he or she may also seize electronic equipment and storage devices that are found to contain evidential material, but only if it is not practical to make electronic copies or put the evidence in documentary form or if possessing the electronic equipment or storage device would constitute an offence by the occupier of premises.

99. Electronic equipment and storage devices may only be operated if the authorised person reasonably believes this can be done without damaging the equipment or device.

### ***Clause 51: Securing electronic equipment to obtain expert assistance***

100. Clause 51 permits an authorised person to secure electronic equipment for up to 24 hours to provide the authorised person time to engage expert assistance to operate electronic equipment. This power only applies if the authorised person enters premises under an investigation warrant to search for evidential material.

101. Clause 51 permits an authorised person to secure electronic equipment in order to engage expert assistance to operate the electronic equipment – where he or she believes that expert assistance is required. As an authorised person may not be accompanied by an expert assistant when exercising monitoring powers, this clause permits an authorised person to secure equipment for up to 24 hours in order to engage expert assistance.

102. An authorised person may only secure equipment if the authorised person has reasonable grounds to believe that evidential material may be destroyed, altered or otherwise interfered with, if the equipment is not secured.

103. Subclause 51(3) requires the authorised person to give notice to the occupier of the premises or another person who apparently represents the occupier, of the intent to secure the equipment and the fact that the equipment may be secured for up to 24 hours.

104. Subclause 51(5) enables an authorised person to apply to an issuing officer for an extension of the 24 hour period if the authorised person believes on reasonable grounds that the equipment needs to be secured for longer than that period. An extension may be sought and granted more than once under subclause 51(7).

105. Subclause 51(6) requires the authorised person to notify the occupier of the premises, or their apparent representative, of their intention to apply for an extension. This provides a means by which an occupier can challenge an application for extension if they so choose.

#### ***Clause 52: Seizing evidence of related provisions***

106. Investigation warrants must specify the evidential material the authorised person reasonably suspects is located on premises. This is appropriate to ensure seizure powers are used in a targeted and considered manner.

107. Clause 52 permits an authorised person to seize evidential material, when entering premises under an investigation warrant, of a kind not specified in the warrant if it is found during a search and it provides evidence of a contravention of a related provision. The authorised person must believe on reasonable grounds that it is necessary to seize the thing in order to prevent its concealment, loss or destruction.

108. This is to ensure that the appropriate requirement to target search and seizure warrants does not unduly prevent the gathering of evidence of related offences that were not anticipated when the warrant was issued. Warrants should only be available where there are reasonable grounds to suspect an offence has been or will be committed but this requirement does not exclude evidence of other offences that is discovered during a search.

#### ***Clause 53: Persons assisting authorised persons***

109. Authorised persons may require assistance when exercising powers and carrying out their functions or duties under this Part. Clause 53 establishes a clear legislative basis for

such assistance, if that assistance is necessary and reasonable, and another Act empowers the authorised person to be assisted.

110. A person assisting an authorised person has the power to enter premises and assist the authorised person to exercise powers and perform functions and duties under this Part, in accordance with a direction given by the authorised person.

111. Any action validly taken in respect of this power is taken to be done by the authorised person (subclauses 53(3) and (4)).

112. Subclause 53(5) states that a direction given by the authorised person is not a legislative instrument. This is to assist readers to understand the status of these directions, which do not meet the meaning of legislative instrument under section 5 of the *Legislative Instruments Act 2003*, and is not intended as an exemption from that Act.

## **Subdivision B—Powers to ask questions and seek production of documents**

### ***Clause 54: Asking questions and seeking production of documents***

113. Clause 54 provides the power for an authorised person to ask questions and seek documents.

114. If an authorised person enters premises with the consent of the occupier, subclause 54(2) provides that an authorised person may ask the occupier to answer any questions or produce documents, relating to evidential material.

115. If entry is authorised by an investigation warrant, subclause 54(3) provides that an authorised person may require any person on the premises to answer any questions or produce documents relating to evidential material of the kind specified in the warrant.

116. Subclause 54(4) provides that a person is not subject to the requirement of subclause 54(3) if the person does not possess the information or document required, and has taken all reasonable steps to obtain the required information or documents without success.

117. Subclause 54(5) provides that a person commits an offence for a failing to comply with a requirement under subclause 54(3). This offence carries a penalty of 30 penalty units. This clause does not abrogate the privilege against self-incrimination or legal professional privilege (as per clause 47).

### ***Division 3—Obligations and incidental powers of authorised persons***

#### ***Clause 55: Consent***

118. Entry into premises to exercise investigation powers under Part 3 Division 2 may be exercised with the consent of the occupier. Clause 55 sets out the parameters for valid consent, noting that consent must be informed and voluntary and that an occupier remains free to withdraw consent at any time or to consent to entry only during a certain time period.

119. An authorised person should present their identity card to the occupier before entering the premises. If the authorised person has not done so, subclause 55(6) provides that the authorised person must present their identity card upon entry, or as soon as is reasonably practical after entering the premises.

#### ***Clause 56: Announcement before entry under warrant***

120. Certain powers to inspect public premises may be exercised without announcement or identification. Where an authorised person has an investigation warrant, clause 56 requires an authorised person to identify him or herself by presenting their identity card and announcing that he or she is authorised to enter the premises before entering if the occupier of the premises or that person's apparent representative is present. This ensures that an occupier of premises who is present is made aware and given the opportunity to allow entry before the authorised person exercises investigation powers under warrant.

121. In some situations, the requirement to identify and announce the purpose of the visit could result in serious detriment. Clause 56 therefore permits an authorised person to enter without identifying himself or herself or announcing their purpose where they believe on reasonable grounds that immediate entry is necessary to ensure human safety or effective execution of the warrant. This allows flexibility in serious situations but does not undermine the importance of identification. The authorised person is still obliged to provide identification as soon as practicable after entry, if an occupier or their representative is present.

#### ***Clause 57: Authorised person to be in possession of warrant***

122. Clause 57 requires an authorised person to be in possession of the warrant or a copy of the warrant issued by the issuing officer, or the form of warrant completed, or a copy of the form completed by the authorised person. An authorised person who does not possess one of these documents is not permitted to enter premises as authorised by the warrant, and is not permitted to exercise warrant powers.

#### ***Clause 58: Details of warrant etc. to be given to occupier***

123. Clause 58 requires an authorised person to provide a copy of the warrant to the occupier of premises, or an occupier's apparent representative, if either are present, and to

inform the person of their rights and responsibilities under Division 4 of this Part. This obligation ensures that occupiers and representatives who are present when a warrant is executed, are granted an opportunity to examine the warrant and are explicitly informed about their rights and responsibilities (clauses 62 and 63 provide for the rights and responsibilities of an occupier).

***Clause 59 Completing execution after temporary cessation***

124. An investigation warrant usually will cease to have effect if the authorised person and all persons assisting the execution of the warrant cease the execution and leave the premises. This ensures that a search is conducted in a timely fashion and that a warrant does not authorise an authorised person to search a premises on multiple occasions from time to time.

125. However, some flexibility is required to ensure that an authorised person can leave the premises if required, for example to fetch necessary equipment or avoid a dangerous situation. Clause 59 therefore provides that an investigation warrant, which is still in force according to the terms of the warrant, does not cease to have effect if the authorised person and all persons assisting are absent from the premises for:

- a. one hour or less in any situation other than an emergency
- b. not more than twelve hours in an emergency situation
- c. longer than 12 hours where the occupier consents in writing; or
- d. where an issuing officer considers there are exceptional circumstances that justify authorising a longer period than 12 hours (e.g. the emergency preventing the execution of the warrant continues for more than 12 hours).

***Clause 60: Completing execution of warrant stopped by court order***

126. Clause 60 provides that a warrant that is stopped by court order and if later revoked or reversed may be executed without a new warrant needing to be issued if still in force.

***Clause 61: Compensation for damage to electronic equipment***

127. Clause 61 provides that a person is entitled to compensation for damage to electronic equipment operated during the course of an inspection, or for damage to data that is recorded or programs associated with the use of the equipment or data. This recognises the fact that powers to operate electronic equipment do not excuse damage caused by a lack of care.



## ***Division 4—Occupier’s rights and responsibilities***

### ***Clause 62: Right to observe execution of warrant***

128. Clause 62 provides the right for the occupier of premises or their apparent representative, who is present when a warrant is executed, to observe the execution of the warrant on their premises. This right does not limit how the warrant may be executed or require an occupier to witness all of an authorised person’s activities, but it does recognise that a person should not be excluded during the execution of a warrant unless they attempt to obstruct the inspection.

129. An occupier or representative who is present when a warrant is executed must be made aware of their rights under this clause.

### ***Clause 63: Responsibility to provide facilities and assistance***

130. Clause 63 imposes an obligation on an occupier of premises, or their apparent representative, to provide reasonable facilities and assistance to the authorised person and any person assisting, required to effectively carry out the warrant powers. This obligation recognises that investigation powers are authorised by issuing officers for the purpose of determining whether laws are being complied with and should not be obstructed. The failure of an occupier or their representative to provide reasonable facilities and assistance carries a penalty of 30 penalty units.

131. An occupier or representative who is present when a warrant is executed must be made aware of their obligations under this clause.

## ***Division 5—General provisions relating to seizure***

### ***Clause 64: Copies of seized things to be provided***

132. If an authorised person seizes a storage device, document or other thing that can be readily copied while exercising investigation powers, clause 64 permits the occupier of premises, or a person who represents the occupier, to request a copy of the seized thing. The authorised person must provide a copy of the seized thing as soon as practicable after the seizure. Clause 64 ensures that a person can, for example, retain a copy of seized material for their own records or use.

### ***Clause 65: Receipts for seized things***

133. To ensure a record of seizure is maintained and available to the person from whom material is seized, clause 65 requires an authorised person to give a receipt for a thing that is seized when exercising investigation powers.

***Clause 66: Return of seized things***

134. The Bill authorises seizure of material only for specific reasons and does not permit material to be retained indefinitely. Clause 66 therefore requires the relevant chief executive to take reasonable steps to return to the owner, or the person from whom it was seized, any thing seized under the Bill. The relevant chief executive must act on this obligation within 60 days, or before 60 days if the seized thing is not required for evidence or the reason the thing was seized is no longer relevant.

135. The obligation to return seized material, or to return it within 60 days of seizure, may at times conflict with other priorities. The requirement to return seized material is subject to any contrary order of a court, and does not apply where seized material is subject to forfeiture or a dispute over ownership, or where the material is being used as evidence in unfinished legal proceedings.

***Clause 67: Issuing officer may permit a thing to be retained***

136. To ensure the 60 day limit for retaining seized items does not prejudice ongoing investigations or legal proceedings, clause 67 permits an issuing officer to issue an order extending the period a thing may be retained, up to a maximum period of three years. The relevant chief executive is required to make reasonable attempts to identify all persons with an interest in the items that may be retained, and notify them of the application wherever practicable, to ensure that persons with an interest in seized material have an opportunity to respond to the proposal to retain the item(s) for more than 60 days.

***Clause 68: Disposal of things***

137. If the relevant chief executive is unable to return seized items as required by clause 66 because return is refused or the person to whom the item should be returned cannot be located, clause 68 permits the relevant chief executive to dispose of the seized material.

***Clause 69: Compensation for acquisition of property***

138. To ensure constitutional validity of acquisition powers, and to protect people against unjust acquisitions under this Part, clause 69 requires the Commonwealth to pay reasonable compensation if the disposal of items would result in an acquisition of property otherwise than on just terms. Where the Commonwealth and a person disagree over the amount of the compensation, the person may take the matter to the Federal Court, or another court of competent jurisdiction, to determine reasonable compensation.

## ***Division 6—Investigation warrants***

### ***Clause 70: Investigation warrants***

139. While monitoring powers under Part 1 are available to determine whether a Commonwealth law is being complied with, investigation powers are available where an authorised person has reasonable grounds to suspect that premises contain evidence of contravention of a Commonwealth law. Clause 70 sets out the procedure for obtaining an investigation warrant and the mandatory content of such warrants.

### ***Clause 71: Investigation warrants by telephone, fax etc.***

140. In some circumstances an authorised person may urgently require an investigation warrant, for example, where the authorised person has secured material for 24 hours or where the time taken to obtain a warrant may result in evidential material being altered or disposed of. Clause 71 sets out the procedures by which an investigation warrant may be obtained from an issuing officer by means of electronic communication, and a number of controls to ensure this form of warrant is valid and not misused.

### ***Clause 72: Authority of warrant***

141. The copy of a warrant made in accordance with clause 71 is not physically the warrant made by an issuing officer. Clause 72 ensures that the form of warrant completed by an authorised person has the same authority as a warrant completed by the issuing officer (if all legal requirements are complied with). This is to prevent any argument over the validity of a form of warrant completed and presented by an authorised person. To further prevent arguments over validity, clause 72 directs a court to assume that a warrant completed by an authorised person is not authorised if the counterpart warrant signed by the issuing officer cannot be produced in legal proceedings.

### ***Clause 73: Offence relating to warrants by telephone, fax etc.***

142. To discourage and punish any misuse of warrants obtained by electronic communication, clause 73 establishes an offence punishable by two years' imprisonment for a range of conduct by an authorised applicant in respect of investigation warrants.

## ***Division 7—Extension of periods in which things secured***

### ***Clause 74: Extension of periods in which things secured***

143. Clause 74 provides for an issuing officer to grant an extension to the 24 hour period in which a thing can be secured by an authorised person. The issuing officer may require further information from the authorised person or some other person which demonstrates that the extension is necessary to prevent evidential material being destroyed, altered or interfered with.

144. Clause 74(4) outlines what must be included in an order for extending the period in which a thing is secured. This includes a description of the thing to which the order relates and the period for which the extension is granted.

## ***Division 8 – Powers of issuing officers***

### ***Clause 75: Powers of issuing officers***

145. Clause 75 provides that the power conferred on an issuing officer under this Part is conferred on the issuing officer in their personal capacity and not as a representative of the court. However, issuing officers are granted the protection and immunities of the court and members of the court when exercising these powers. This recognises that issuing a warrant is an executive function and not an exercise of judicial power.

## ***Division 9 – Identity Cards***

### ***Clause 76: Identity Cards***

146. Clause 76 requires the relevant chief executive officer to issue an identity card to an authorised person, which is in the form prescribed by the Regulations and contains a photo of the authorised person that is no more than one year old.

147. Clause 76(3) requires a person to return their identity card when they cease their role as an authorised person. This obligation is supported by an offence of strict liability punishable by one penalty unit if the person fails to return their identity card within 14 days after ceasing that role. It is appropriate that the prosecution does not need to prove fault for the elements of this offence, on the basis that the state of mind of the defendant is not relevant, the elements of the offence are objective, and the offence is minor and deterrent in nature. Further, subclause 76(5) provides for an exception to the offence if the identity card was lost or destroyed. The defendant bears an evidential burden and will need to show a reasonable possibility that the identity card has been lost or destroyed. This reverse onus of proof is appropriate given the context and minor nature of the offence.

148. Subclause 76(6) requires an authorised person to carry his or her identity card at all times when acting in their capacity as an authorised person exercising investigation powers.

## **Part 4—Civil Penalty Provisions**

### ***Division 1—Outline and operation of this Part***

#### ***Clause 77: Simplified outline***

149. Clause 77 provides an outline of Part 4 of Bill which creates a framework for the use of civil penalties to enforce civil penalty provisions.

150. Part 4 provides that another Act (a triggering Act) must make a civil penalty provision enforceable under this Part, for this Part to operate.

#### ***Clause 78: Purpose and operation of this Part***

151. Clause 78 provides that the purpose of this Part is to create a framework for the use of civil penalties to enforce civil penalty provisions.

152. Subclause 78(2) clarifies that a civil penalty provision must be made enforceable under this Part, for this Part to operate.

#### ***Clause 79: Enforceable civil penalty provisions***

153. Clause 79 provides that a provision is enforceable under this Part if it is a civil penalty provision and another Act (a triggering Act) provides that the civil penalty provision is enforceable under this Part.

154. Subclause 79(2) clarifies what constitutes a civil penalty provision in an Act or a legislative instrument.

#### ***Clause 80: Authorised applicant***

155. Clause 80 provides that a person is an authorised applicant for the purposes of exercising powers under this Part in relation to the contravention of a civil penalty provision, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

156. Subclause 80(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an authorised applicant in relation to a civil penalty provision for the purposes of this Part.

#### ***Clause 81: Relevant court***

157. Clause 81 provides that a relevant court for the purposes of exercising powers under this Part in relation to the contravention of a civil penalty provision, is the court provided by the triggering Act.

## ***Division 2—Obtaining a civil penalty order***

### ***Clause 82: Civil penalty orders***

158. Clause 82 provides for an authorised applicant to apply for a civil penalty order to remedy an alleged breach in a triggering Act's civil penalty provisions, and sets out the procedures for the authorised applicant applying for, and the court issuing, civil penalty orders.

### ***Clause 83: Civil enforcement of penalty***

159. Clause 83 provides that a civil penalty order is a debt owed to the Commonwealth, enforceable through civil debt proceedings and can be a judgment debt. Where a person fails to pay the amount specified in the order, the agency may commence legal proceedings against the person named in the order to recover the amount owed.

### ***Clause 84: Conduct contravening more than one civil penalty provision***

160. Clause 84 clarifies that a person's conduct may contravene more than one provision under the triggering Act. An authorised applicant may institute proceedings relating to any or all provisions allegedly contravened by a person's conduct, although a person may only be held liable for one pecuniary penalty for the same conduct.

### ***Clause 85: Multiple contraventions***

161. Clause 85 clarifies that a relevant court may make a single penalty order for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions for the same or similar conduct. This provision is intended to minimise court administration and consolidate legal proceedings. The penalty must not exceed the sum of the maximum penalties that could be ordered if there were separate proceedings for each contravention.

### ***Clause 86: Proceedings may be heard together***

162. Clause 86 clarifies that a court may hear two or more proceedings for civil penalty orders simultaneously. This will streamline the process for civil proceedings, remove the need for a person to be subject to multiple proceedings, and thereby reduce legal costs for the person and the Commonwealth.

### ***Clause 87: Civil evidence and procedure rules for civil penalty orders***

163. Clause 87 clarifies that civil rules of evidence and procedure apply when hearing proceedings for civil penalty orders. This clause ensures that criminal rules of evidence and procedure are not applied during proceedings for civil penalty orders.

### ***Division 3—Civil proceedings and criminal proceedings***

#### ***Clause 88: Civil proceedings after criminal proceedings***

164. Clause 88 provides that a court cannot make a civil penalty order against a person who has been convicted of a criminal offence for the same, or substantially the same, conduct.

#### ***Clause 89: Criminal proceedings during civil proceedings***

165. Clause 89 stays civil proceedings if criminal proceedings commence or have commenced and relate to the same, or substantially the same, conduct. This is to prevent any information that arises during criminal proceedings prejudicing civil proceedings. If the criminal proceedings result in a conviction, civil proceedings related to the same, or substantially the same, conduct will be dismissed and costs for the civil proceedings are not awarded. Civil proceedings may resume if the person is not convicted of the offence.

#### ***Clause 90: Criminal proceedings after civil proceedings***

166. Clause 90 clarifies that criminal proceedings may commence after civil proceedings, even in the event the civil proceedings result in a civil penalty order. This recognises the importance of criminal proceedings and criminal penalties in dissuading and sanctioning contraventions of the triggering Act and ensures that criminal remedies are not precluded by earlier civil action.

#### ***Clause 91: Evidence given in civil proceedings not admissible in criminal proceedings***

167. Clause 91 provides that evidence given by an individual during proceedings for a civil penalty order cannot be used in any criminal proceedings, against the same individual relating to the same conduct. This ensures that information or documents produced during civil proceedings are not relied upon to support subsequent criminal proceedings, unless they are criminal proceedings relating to falsifying evidence in civil proceedings. While it is appropriate to allow criminal proceedings after civil proceedings have ended, given the overriding importance of the criminal justice system, criminal proceedings not related to falsifying evidence must rely upon evidence gathered during independent investigations, not evidence from prior civil proceedings.

### ***Division 4—Miscellaneous***

#### ***Clause 92: Ancillary contravention of civil penalty provisions***

168. Clause 92 supports the enforcement regime by ensuring that conduct ancillary to the contravention of a civil penalty provision is considered to be a contravention of the provision itself. Ancillary conduct includes any attempt to contravene a provision that does not succeed, aiding or inducing a contravention of a civil penalty provision, and any conspiracy to contravene a civil penalty provision.

***Clause 93: Continuing contraventions of civil penalty provisions***

169. Clause 93 clarifies that certain actions are considered to be repeated contraventions. The clause ensures that a civil obligation to do something by a certain deadline continues until it is done, and is not discharged by failing to meet the deadline. The clause also provides that a separate contravention of the civil penalty provision is incurred for every day the obligation is not met. This is necessary to ensure that failure to comply with an obligation does not excuse a person from meeting that obligation.

***Clause 94: State of mind***

170. Clause 94 provides that it is not necessary to prove a person's state of mind in civil penalty proceedings under this Bill. This applies only to proceedings for contravention of civil penalty provisions, not for ancillary contravention of civil penalty provisions, nor where the civil penalty provision or a provision that relates to the civil penalty provisions expressly provides otherwise

171. It is appropriate that a person's state of mind does not need to be proven for civil penalty contraventions, on the basis civil penalties are deterrent in nature and do not constitute criminal liability.

***Clause 95: Mistake of fact***

172. Clause 95 provides that a person cannot be held liable for a civil penalty order if their actions arose from a legitimate mistake of fact. This clause is significant because of clause 94 stating that, in these types of proceedings, it is unnecessary to prove a person's state of mind. This has an effect on civil proceedings similar to the effect strict liability has on criminal proceedings. To ensure that clause 94 does not result in liability for simple errors of fact, this clause provides a 'defence' to civil penalty proceedings on the grounds that a person's conduct was the result of a considered but reasonable error of fact.

173. The person who asserts that a particular course of action resulted from a mistake of fact has the burden of proving the matter. This is appropriate on the basis that the knowledge of the person's state of mind at the time of the conduct is peculiar to that person.

***Clause 96: Exceptions etc. to civil penalty provisions – burden of proof***

174. Clause 96 provides that if a person wishes to rely on any exception, exemption, excuse, qualification or justification provided by the triggering Act, that person bears the evidential burden of proving that matter. This is appropriate on the basis that knowledge of the matter would be peculiar to that person.

***Clause 97: Civil penalty provisions contravened by employees, agents or officers***

175. Clause 97 provides that a body corporate is responsible for the actions of an employee, agent or officer of a body corporate, acting in the legitimate scope of their employment.



## **Part 5—Infringement notices**

### ***Division 1—Outline and operation of this Part***

#### ***Clause 98: Simplified outline***

176. Clause 98 provides an outline of Part 5 of the Bill which creates a framework for the use of infringement notices. Infringement notices can be issued in relation to a breach of an offence provision or a civil penalty provision.

177. An infringement notice is a notice of a pecuniary penalty imposed on a person by statute setting out particulars of an alleged contravention of a law. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice to expiate the offence or civil penalty contravention or electing to have the matter dealt with by a court. The notice also specifies the time and method for payment and the consequences if the person to whom the notice is issued fails to respond to the notice either by making payment or electing to contest the alleged contravention.

178. Infringement notices are administrative methods for dealing with certain breaches of the law and are typically used for low-level offences and where a high volume of uncontested contraventions is likely. Offences subject to infringement notices are generally of strict or absolute liability and with a clear physical element. Infringement notices are often used as a low cost and efficient means by which regulators can deal with minor contraventions and for wrongdoers to discharge their obligation without appearing before a court.

179. Part 5 provides that another Act (a triggering Act) must make a provision subject to an infringement notice under this Part, in order for the Part to operate.

#### ***Clause 99: Purpose and operation of this Part***

180. Clause 99 provides that the purpose of this Part is to create a framework for the use of infringement notices.

181. Subclause 99(2) provides that a provision of an Act or a legislative instrument must be made subject to an infringement notice under this Part, for this Part to operate.

#### ***Clause 100: Provisions subject to infringement notices***

182. Clause 100 provides that an offence of strict liability or a civil penalty provision in an Act or legislative instrument is subject to an infringement notice under this Part if a triggering Act provides so.

#### ***Clause 101: Infringement officer***

183. Clause 101 provides that a person is an infringement officer for the purposes of exercising powers under this Part in relation to a contravention of a provision, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

184. Subclause 101(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an infringement officer for the purposes of this Part.

***Clause 102: Relevant chief executive***

185. Clause 102 provides that a person is the relevant chief executive for the purposes of exercising powers under this Part, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

186. Subclause 102(3) provides that a triggering Act may nominate a person who holds a specified office, or authorise another person to specify a person or a person who holds a specified office, as the relevant chief executive, for the purposes of this Part.

***Division 2—Infringement notices***

***Clause 103: When an infringement notice may be given***

187. Subclause 103(1) empowers an infringement officer to issue an infringement notice where the infringement officer has reasonable grounds to believe a person has contravened a provision subject to an infringement notice under this Part. Infringement notices provide a simpler and faster remedy to a suspected contravention of a provision than formal civil or criminal proceedings.

188. An infringement notice must be issued within 12 months of an alleged contravention. An infringement notice issued later than this is invalid and cannot be enforced.

189. To ensure the reasons for each notice are clear, a separate infringement notice must be issued for each alleged contravention, unless the contravention relates to an action that should have been completed before a particular time and the ongoing failure to complete the action constitutes multiple contraventions (see subsection 4K(2) of the *Crimes Act 1914* for continuing offences and clause 93 of this Bill for continuing contraventions of civil penalty provisions).

190. Subclause 103(5) provides that where a provision constitutes both a civil penalty provision and an offence provision, the infringement notice must relate as an offence provision.

***Clause 104: Matters to be included in an infringement notice***

191. Clause 104 specifies a range of matters that must be included in each infringement notice. This includes a statement that if the infringement notice is paid within 28 days of it being issued, this does not constitute an admission of guilt but does preclude any further liability or proceedings related to the alleged contravention (unless the notice is subsequently withdrawn).

192. Subclause 104(2) limits the amount payable under an infringement notice to one-fifth of the penalty that a court could impose in relation to the alleged contravention. This ensures that infringement notices, which do not reflect a court sanction or constitute an admission of guilt, remain a lesser remedy to alleged contraventions of the Bill.

***Clause 105: Extension of time to pay amount***

193. To ensure that a person who wishes to pay an infringement notice is not prevented from doing so by financial hardship or other difficulties, clause 105 allows a person who has received an infringement notice to apply to the relevant chief executive for an extension of time to pay the infringement notice. The relevant chief executive may extend the period more than once.

***Clause 106: Withdrawal of an infringement notice***

194. A person who receives an infringement notice may elect to challenge the notice rather than pay it. Clause 106 therefore sets out processes for withdrawing infringement notices and provides guidance as to what information the relevant chief executive must and may take into account in considering whether to withdraw an infringement notice.

195. A person may apply for a notice to be withdrawn even if they have already paid the amount specified in the infringement notice. If the notice is withdrawn the amount paid must be refunded.

***Clause 107: Effect of payment of amount***

196. Clause 107 ensures that paying an infringement notice discharges all liability for the alleged contravention, without constituting an admission of fault. This is appropriate for an administrative remedy that may be discharged without legal advice or adjudication by the courts. However, payment does not discharge liability if the notice is subsequently withdrawn and the amount refunded. In this sense, withdrawing a notice acts as if the notice was never issued.

***Clause 108: Effect of this part***

197. Clause 108 clarifies that Part 5 Division 2 of the Bill, dealing with infringement notices, does not make infringement notices a mandatory response to a suspected contravention - they remain a discretionary remedy. Part 5 Division 2 also does not limit the option to take enforcement action in other ways, limit liability in any way unless an infringement notice is paid, and does not limit a court's ability to determine the amount of a penalty if a person is found to have contravened a civil penalty provision enforceable under Division 2 (except when an infringement has been paid).

## **Part 6—Enforceable Undertakings**

### ***Division 1—Outline and operation of this Part***

#### ***Clause 109: Simplified outline***

198. Clause 109 provides an outline of Part 6 of the Bill which creates a framework for accepting and enforcing undertakings relating to compliance with offence provisions and civil penalty provisions.

199. Part 6 provides that another Act (a triggering Act) must make a provision enforceable under this Part, for this Part to operate.

#### ***Clause 110: Purpose and operation of this Part***

200. Clause 110 provides that the purpose and operation of this Part is to create a framework for the acceptance and enforcement of undertakings relating to compliance with provisions.

201. Subclause 110(2) provides that a provision of an Act or a legislative instrument must be made enforceable under this Part, for this Part to operate.

#### ***Clause 111: Enforceable provisions***

202. Clause 111 provides that a provision of an Act or a legislative instrument is enforceable under this Part if a triggering Act provides so.

#### ***Clause 112: Authorised person***

203. Clause 112 provides that a person is an authorised person for the purposes of exercising powers under this Part, or exercising powers, functions or duties incidental to those powers, if a triggering Act provides so.

204. Subclause 112(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specific class, as an authorised person, for the purposes of this Part.

#### ***Clause 113: Relevant court***

205. Clause 113 provides that a relevant court for the purposes of exercising powers under this Part in relation to an undertaking given in relation to a provision enforceable under this Part, is the court provided by the triggering Act.

## ***Division 2—Accepting and enforcing undertakings***

### ***Clause 114: Acceptance of undertakings***

206. Clause 114 enables an authorised person to accept written undertakings committing a person to particular action (or inaction) in order to prevent or respond to a breach of an enforceable provision. Undertakings are enforceable in their own right (see clause 111) and they may be entered into instead of, or in addition to, the authorised person taking other disciplinary action.

207. Undertakings provide a remedy other than financial sanctions to past or prospective breaches of a provision.

208. Under clause 114(3), the person giving the undertaking may vary or withdraw it at any time, if the authorised person gives written consent to the variation or withdrawal.

209. Subclause 114(4) states that consent of an authorised person is not a legislative instrument. This is to assist readers to understand the status of consent given under this clause; it does not meet the meaning of legislative instrument under section 5 of the *Legislative Instruments Act 2003*, and is not intended as an exemption from that Act.

210. Subclause 114(5) provides that an authorised person may, by written notice given to the person, cancel the undertaking.

### ***Clause 115: Enforcement of undertakings***

211. Clause 115 enables the authorised person to apply to have undertakings given under clause 114 enforced in a relevant court. This clause lists the orders a court can impose to remedy a breach of an undertaking, including orders to comply with the undertaking, to pay a pecuniary penalty to the Commonwealth, to compensate other people, or any other order the court sees fit.

## **Part 7—Injunctions**

### ***Division 1—Outline and operation of this Part***

#### ***Clause 116: Simplified outline***

212. Clause 116 provides an outline of Part 7 of the Bill which creates a framework for using injunctions to enforce provisions.

213. Part 7 provides that another Act (a triggering Act) must make a provision enforceable under this Part, for this Part to operate.

214. Injunctions may be used to restrain a person from contravening a provision enforceable under this Part, or to compel compliance with such a provision.

***Clause 117: Purpose and operation of this Part***

215. Clause 117 provides that the purpose of this Part is to create a framework for the use of injunctions in the enforcement of provisions.

216. Subclause 117(2) clarifies that this Part will only operate if a provision of an Act or a legislative instrument is made enforceable under this Part.

***Clause 118: Enforceable provisions***

217. Clause 118 provides that a provision of an Act or a legislative instrument is enforceable under this Part if a triggering Act provides so.

***Clause 119: Authorised person***

218. Clause 119 provides that a person is an authorised person for the purposes of applying for an injunction in relation to a provision which is enforceable under this Part, or exercising other powers, functions or duties incidental to those powers, if a triggering Act provides so.

219. Subclause 119(3) provides that a triggering Act may nominate a person of a specified class, or authorise another person to specify a person or a person of a specified class, as an authorised person for the purposes of this Part.

***Clause 120: Relevant court***

220. Clause 120 provides that a relevant court for the purposes of exercising powers under this Part in relation to the contravention of a provision enforceable under this Part, is the court provided by the triggering Act.

***Division 2—Injunctions***

***Clause 121: Grant of injunctions***

221. Clause 121 empowers the court to grant injunctions on application by an authorised person. A court can issue injunctions to prevent a person engaging in particular conduct or issue injunctions to compel a person to engage in particular conduct if the court is satisfied an injunction is necessary or desirable to respond to, or prevent, a contravention of an enforceable provision.

***Clause 122: Interim injunctions***

222. In some cases, an interim injunction may be required to prevent or require certain action while injunction proceedings are carried out. Clause 122 enables the court to grant an interim injunction while it is considering an application for an injunction under Clause 121. A court cannot require the applicant to give an undertaking as to damages as a condition of the interim injunction. Refusing to give an undertaking in respect of damages is not grounds for refusing to grant an interim injunction.

***Clause 123: Discharging or varying injunctions***

223. Clause 123 provides that injunctions can be varied or discharged by a relevant court.

***Clause 124: Certain limits on granting injunctions not to apply***

224. Clause 124 provides that a court can issue an injunction to prevent conduct or require a person to engage in specified conduct whether or not the specific conduct is occurring, has occurred in the past, or is likely to give rise to an imminent danger of substantial damage to any other person. This ensures a court can prevent or require conduct to uphold the purposes of the Bill without having to wait for countervailing conduct to occur.

***Clause 125: Other powers of a relevant court unaffected***

225. Clause 125 clarifies that injunction powers under this Part are additional to, not in replacement of, any other powers of the court.

**Part 8—General provisions**

***Clause 126: Regulations***

226. Clause 126 provides a general regulation making power that will permit the Governor-General to make Regulations required or permitted to be prescribed by the Bill, or necessary or convenient to carry out or give effect to the Bill.