

## **EXPLANATORY STATEMENT**

Select Legislative Instrument No. \_\_\_\_\_ of 2018

*Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*

*Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018*

Issued by authority of the Minister for the Environment

### **Purpose and operation**

The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) implements Australia's international obligations under the Vienna Convention for the Protection of the Ozone Layer and its associated Montreal Protocol on Substances that Deplete the Ozone Layer, as well as the United Nations Framework Convention on Climate Change and its Kyoto Protocol.

Section 70 of the Act provides that the Governor-General may make regulations required or permitted by the Act or that are necessary or convenient to be prescribed for carrying out of giving effect to the Act.

The *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018* (the Amendment Regulations) amend the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Principal Regulations) to implement recommendations made by the Review of the Ozone Protection and Synthetic Greenhouse Gas legislation completed in 2016 (the Review).

The Review identified a range of measures to improve the effectiveness and efficiency of the Program, which is administered under the Act and the Principal Regulations). The Review identified opportunities to further reduce emissions of ozone depleting substances and synthetic greenhouse gases (ODS & SGGs) and improve and streamline the operation of the legislation, including reducing regulatory compliance costs and burden on business. The Australian Government agreed to all 60 of the Review recommendations and measures on 5 May 2016.

The Amendment Regulations amend the Principal Regulations to:

- Remove inconsistencies between exemptions for criminal offences and civil penalties;
- Update references to nationally endorsed accredited vocational education and training relevant to the granting of a refrigerant or fire extinguishing agent handling licence;
- Update references to the Australian Standards that refrigerant handling licence holders are required to comply with;
- Allow for the discharge of gas from containers and equipment during the process of sampling and testing, including for compliance purposes;

- Create a new offence for a person who makes false representation in relation to a fire extinguishing agent permit or special circumstances exemption;
- Allow for infringement notices to be issued for contraventions of requirements in the refrigeration and air conditioning, and fire protection industry permit schemes;
- Allow the Minister to exercise powers to appoint more than one body as Fire Protection Industry (Ozone Depleting Substances & Synthetic Greenhouse Gas) Boards (Fire Boards) and clarify that the Minister may exercise relevant powers and functions even where they have been authorised to one or more Fire Boards.
- Allow the use of methyl bromide for laboratory and analytical purposes, including discharges of methyl bromide during such use.
- Remove requirements that are no longer necessary for record keeping and reporting on use and stockpiling of methyl bromide;
- Create a process for granting of permits to use methyl bromide for non-quarantine and pre-shipment (non-QPS) uses, where an exemption to the ban on the use of methyl bromide has been approved. This process replaces the annual Non-QPS Exemption List and Non-QPS Intermediate Supplier List which have been used to allow the use of methyl bromide for non-QPS uses since 2005;
- Repeal redundant items in the regulations and makes minor technical amendments to various regulations to clarify the intended meaning.

## **Consultation**

The Review involved analysis by the Department of the Environment and Energy (the Department) and independent experts, and extensive public consultation, as well as targeted consultation with relevant business stakeholders.

The proposed amendments update references to Australian Standards relevant to the refrigeration and air conditioning industry. Referring to the updated Standards is supported by refrigeration and air conditioning stakeholders as they represent industry best practice and provide consistency with the standards adopted internationally in 2014. New equipment imported to Australia will be designed and manufactured to the international Standards. Updating references to the Australian Standards removes ambiguity and ensures technicians installing and servicing equipment adhere to the updated requirements.

The amendments relating to the supply and use of non-QPS methyl bromide will directly affect strawberry runner growers in the Toolangi district of Victoria. The members of the Toolangi Certified Strawberry Runner Growers' Co-Op Limited (the Co-Op) are currently the only persons allowed to use methyl bromide for non-QPS uses in Australia, which, in this case, is for the fumigation of soil before planting. The Co-Op worked closely with the Department in 2017 to develop an exemption application and to consult with the Parties to the Montreal Protocol on the amount of methyl bromide to be approved for this non-QPS use in 2019.

## **Regulatory impact analysis**

At the time of the Review the Office of Best Practice Regulation agreed that a Regulatory Impact Statement was not required for the minor program changes covered by these Amendment Regulations.

The Office of Best Practice Regulation advised that regulatory amendments to reference the updated Australian Standards are likely to have a minor regulatory impact and that a Regulatory Impact Statement is not required.

## **Incorporation**

The Amendment Regulations incorporate by reference two updated Australian Standards - AS/NZS ISO 817:2016 Refrigerants – designation and safety classification and AS/NZS 5149:2016 Refrigerating systems and heat pumps - Safety and environmental requirements. The standards are incorporated as they are in force at the time the Regulations commence, on the day after registration. The standards are available for purchase through Standards Australia ([www.standards.org.au](http://www.standards.org.au)).

A fee is charged to purchase the standards in their entirety; licence holders who must carry out work to the required standard can also access key requirements applicable to their work practices through training courses and guidance materials provided by industry, training providers and other organisations.

The Australian and refrigeration and air conditioning industry has been working with the standards referenced in the Amendment Regulations since these standards were adopted in Australia in 2016 following an industry-led development process. Businesses absorb the cost of becoming familiar with new or revised standards into their operating costs, as manufacturing, installing and maintaining equipment according to relevant Australian and international standards is a customer expectation.

## **Details of the *Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018***

### Section 1 – Name

This section specifies that the name of the Regulations is the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018*.

### Section 2 – Commencement

The table in this section provides that the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018*, including all Schedules, commenced on the day after registration on the Federal Register of Legislation.

### Section 3 – Authority

This section sets out the provisions of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) under which the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018* is made.

### Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable terms in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

### **Schedule 1 – Amendments**

Schedule 1 makes a number of amendments to the Principal Regulations in relation to the supply and use of methyl bromide.

*Change of terminology from QPS and non-QPS ‘applications’ to QPS and non-QPS ‘uses’*

#### Items 1-4, 14 and 20-25, 27, 32-33

Division 6A.3 of the Principal Regulations (dealing with the use and supply of methyl bromide) used the concept of ‘QPS applications’ (quarantine and pre-shipment applications) and ‘non-QPS applications’ (non-quarantine and pre-shipment applications) in a number of regulations.

Items 1 to 4, 14, 20 to 25, 27 and 32 to 33, among other things, changes all references to ‘QPS applications’, ‘non-QPS applications’ and ‘applications’ to ‘QPS uses’, ‘non-QPS uses’ and ‘uses’ (as appropriate) in regulations 201 (uses of methyl bromide), 212 (offence of using methyl bromide for non-QPS uses), 213 (offence of supplying methyl bromide for non-QPS uses), and 230 (reports to be given by suppliers).

Item 1 also inserts a definition of both ‘QPS use’ and ‘non-QPS use’ into regulation 200. These definitions cross-refer to the definitions of the terms in regulations 201(2) and 201(3) respectively; however (other than expressly excluding laboratory and analytical uses from being non-QPS uses – see below), the definitions themselves remain unchanged.

Items 20 to 25, 27 and 32 to 33 change all references to ‘QPS applications’, ‘non-QPS applications’ and ‘applications’ to ‘QPS uses’, ‘non-QPS uses’ and ‘uses’ (as appropriate) in the following regulations that are otherwise not be amended by the Amendment Regulations:

- 216(a)
- 220(1)(e)(i) and (ii)
- heading for 221
- 221(1) and (2)
- 231(2)(b) and (c)

The purpose of these changes is to align more closely with the wording in decisions of the Montreal Protocol Meeting of the Parties in relation to the use and supply of methyl bromide.

#### *Laboratory and analytical uses of methyl bromide*

##### Items 1, 4, 5, 14 and 15

Regulation 201 of the Principal Regulations sets out the uses of methyl bromide for the purposes of Division 6A.3 of the Principal Regulations. Regulation 201(1) provided that the uses of methyl bromide are QPS, non-QPS and as a feedstock. These three uses are each regulated differently in Division 6A.3: a person can use methyl bromide for a QPS use without a permit or exemption, however they require a permit to use methyl bromide as a feedstock and (previously) needed to be an exempt person to use methyl bromide for a non-QPS purpose.

Item 1 has the effect of adding a new use for methyl bromide to the list in regulation 201, being laboratory and analytical uses. This allows the use of methyl bromide for laboratory and analytical uses without requiring either a permit or an exemption. This is consistent with the Montreal Protocol and its decisions on laboratory and analytical uses.

Item 1 also inserts a definition of ‘laboratory and analytical uses’ into regulation 200. This definition makes it clear that the term takes its meaning from the context of the Montreal Protocol and the decisions made by its parties.

Item 4, 5, 14 and 15 makes consequential amendments to (respectively) regulations 216, 220, 230 and 231 to accommodate laboratory and analytical uses being added as a use of methyl bromide for which no permit or exemption is required. The effect of these amendments is to:

- exempt discharges of methyl bromide resulting from laboratory or analytical uses from the offence in section 45B(1) of the Act (regulation 216);
- require suppliers who sell methyl bromide to another person to keep a record of how much is to be used for laboratory and analytical uses (regulation 22);
- require suppliers who sell methyl bromide to give the Minister a quarterly report setting out how much of the methyl bromide is to be used for laboratory or analytical uses (regulation 230);
- require non-QPS permit holders for a calendar year to give the Minister a report setting out each occasion on which methyl bromide was used for laboratory and analytical uses, the nature of the use and the amount used (regulation 231).

## *Simplifying reporting requirements*

### Items 11 and 16

Regulation 222 of the Principal Regulations required a person who uses methyl bromide (other than as feedstock) to keep a ‘summary record’ that summarises, in six-month periods, the information the person is required to keep in a record by regulation 221.

Item 11 repeals regulation 222 as this requirement is considered duplicative and no longer necessary. It is expected that removal of the requirement to keep a summary record will reduce the burden on business associated with record keeping.

Regulation 232 of the Principal Regulations required a person who buys methyl bromide to give the Minister a report that sets out how much methyl bromide the person possessed immediately prior to the purchase.

Item 16 repeals regulation 232 as this requirement is no longer considered necessary. Stockpile reports were implemented at an earlier stage of the methyl bromide phase out under the Montreal Protocol, and are now considered redundant.

*Replace the Non-QPS Exemption List and the Non-QPS Intermediate Supplier List with a non-QPS use permit*

### Item 17

Regulation 200 of the Principal Regulations defined the term *Non-QPS Exemption List* by reference to a list that has been published by the Department of the Environment and Energy each year since 2005. The annual list sets out the details of all individuals and corporations who are granted the status of ‘exempt persons’ for the non-QPS use of methyl bromide after approval of the use by the Montreal Protocol parties. The primary effect of a person being an ‘exempt person’ is that they are permitted to use the amount of methyl bromide that has been allocated to them for non-QPS purposes without committing the offence in regulation 212.

However, for transparency and administrative law-related reasons, it was no longer considered appropriate for the process for granting an ‘exemption’ from the offence in regulation 212 to occur wholly outside the regulations.

Item 17 therefore creates a process for a person to apply to the Minister to be granted a permit to use methyl bromide for non-QPS uses, to replace the annual Non-QPS Exemption List. Specifically, item 17 inserts regulations 234, 235, 236, 237 and 238.

Regulation 234 allows a person to apply in writing to the Minister for a permit to use methyl bromide for non-QPS uses for a specified calendar year. This application is generally required to be made at least 18 months before the start of the calendar year for which the person intends to use the methyl bromide. This is because, consistent with Australia’s international obligations under the Montreal Protocol, the Minister is required to obtain advice on the application from the parties to the Protocol; a process which generally takes in excess of 12 months. However, regulation 234(2)(a)(ii) provides for the 18-month timeframe to be shortened if the Minister allows it; this is intended to provide flexibility to accommodate

situations where a person has applied within 18 months of the calendar year of the intended use but the Montreal Protocol Parties have agreed to expedite providing their advice.

The information required from permit applicants will remain the same as that required for the previous process for granting an exemption.

Regulation 235 sets out the requirements that must be satisfied for the Minister to grant a non-QPS permit, the particulars that must be specified in a non-QPS permit, the conditions the permit is subject to and the period it is in force. In particular, regulations 235(1), (2) and (3) have the combined effect that the Minister is only able to grant a non-QPS permit if:

- the Minister has consulted the parties to the Montreal Protocol; and
- having regard to any advice provided by the Protocol parties, the Minister is satisfied that it is appropriate to grant the permit; and
- the Minister is satisfied that granting the permit would not be inconsistent with Australia's international obligations under the Montreal Protocol.

The requirement to consult Montreal Protocol parties prior to granting a non-QPS permit is consistent with Australia's obligations under the Montreal Protocol, and existing practice. Under the Montreal Protocol, non-QPS uses of methyl bromide were phased out from 1 January 2005, except where critical use exemptions are agreed by Parties to the Montreal Protocol or where an emergency use is allowed by the Minister and subsequently reported to the Montreal Protocol. The process in item 17 provides a mechanism to allow for and be granted a permit to use methyl bromide consistent with the critical use exemptions agreed by Montreal Protocol parties. This mechanism is not intended to cover emergency use of methyl bromide that is only reported to the Montreal Protocol parties subsequent to the use occurring.

In contrast, the Minister is able to refuse to grant a permit without consulting the Montreal Protocol parties.

Regulation 235(4) requires a non-QPS permit to specify the calendar year for which it is granted, the amount of methyl bromide allocated to the permit holder, and each supplier from whom the permit holder intends to purchase methyl bromide. Suppliers named in a non-QPS permit will be 'nominated suppliers' able to supply methyl bromide to the permit holder without committing the offence in regulation 213. This mechanism replaces the previous Non-QPS Intermediate Supplier List.

Regulation 235(5) sets out the conditions applying to a non-QPS permit. In particular, the permit holder is prohibited from using more than their allocated amount of methyl bromide, and from using methyl bromide for either a use not specified in the permit or in a different geographical location from that specified in the permit.

Regulation 235(6) provides that a non-QPS permit is in force from the start of the calendar year for which it is granted, or the day on which it is granted, until the end of that year.

Regulation 235(7) provides that if the Minister grants a non-QPS permit, the Minister must give a copy of the permit to the applicant.

Regulation 235(8) provides that if the Minister refuses to grant a non-QPS permit, the Minister must notify the applicant in writing of the decision, provide the applicant with the reasons for the refusal and inform them of their review rights.

Regulation 236 sets out when, and the manner in which, a non-QPS permit can be varied. There are two categories of variations. Under regulation 236(1) a non-QPS permit holder can apply to the Minister to vary their permit to change the nominated suppliers (or the details of the nominated suppliers) covered by the permit. Regulations 236(2)-(5) set out the process for such variations. In addition, under regulation 236(6), the Minister can unilaterally vary a non-QPS permit to either change the nominated suppliers (or the details of the nominated suppliers) covered by the permit, change the amount of methyl bromide that has been allocated to the permit holder, or change the conditions attached to the permit. The Minister can only exercise the power in regulation 236(6) if satisfied that the variation is appropriate in the circumstances and that it would not be inconsistent with Australia's international obligations under the Montreal Protocol.

Regulation 237 provides for a mechanism to allow for a non-QPS permit to be transferred from one person to another person. This is considered necessary in order to accommodate the situation where a person sells their business to another during a year for which they hold a non-QPS permit. Both parties will be required to jointly apply to the Minister for the transfer. The Minister can only exercise the power to transfer the permit if satisfied that it is appropriate in the circumstances and that it would not be inconsistent with Australia's international obligations under the Montreal Protocol. If these criteria are met, the Minister must transfer the permit.

Regulation 238 provides for a number of decisions concerning non-QPS permits to be reviewable by the Administrative Appeals Tribunal.

#### *Changing terminology from exempt persons to non-QPS permit holder*

##### Items 1-4, 26 and 28-33

As set out above, the Principal Regulations provided for the concept of an 'exempt person', being a person who is covered by either the Non-QPS exemption list or the Non-QPS Intermediate Supplier List for the relevant year. An exempt person was able to (respectively) use or supply an allocated amount of methyl bromide without committing an offence.

As also set out above, the amendment regulations replace the Non-QPS Exemption List and Non-QPS Intermediate Supplier List with a Non-QPS permit and associated process. Consequential to that, the concept of 'exempt person' is replaced by the concept of a 'Non-QPS permit holder'.

Items 1 to 4, among other things, change all references to 'exempt person', 'exempt persons' and 'an exempt person' to 'non-QPS permit holder', 'non-QPS permit holders', 'a non-QPS permit holder' and 'permit holder' (as appropriate) in regulations 212 (offence of using methyl bromide for non-QPS uses), 213 (offence of supplying methyl bromide for non-QPS uses) and 216 (discharge of methyl bromide).



Item 1 also inserts a definition of ‘allocated amount’, ‘nominated non-QPS supplier’ and ‘non-QPS permit holder’ into regulation 200. The definitions for ‘allocated amount’ and ‘nominated non-QPS supplier’ cross-refer to the definitions of the terms in regulations 235(4)(c) and 235(4)(b) respectively. The definition of ‘non-QPS permit holder’ means a person to which a non-QPS permit is granted for the relevant year under regulation 235.

Items 26 and 28 to 33 change all references to exempt person’, ‘exempt persons’ and ‘an exempt person’ to ‘non-QPS permit holder’, ‘non-QPS permit holders’, ‘a non-QPS permit holder’ and ‘permit holder’ (as appropriate) in the following regulations that are not otherwise amended by the Amendment Regulations

- 221(2)(d)(v)
- Heading to 231
- 231(1), (1)(c), (2)(a), (2)(b) and (2)(c).

*Other consequential amendments in relation to the introduction of non-QPS permits*

### Item 3

Item 3 also extends the offence in regulation 212 to prohibit a non-QPS permit holder (or a person acting on the permit holder’s behalf) from contravening a condition of their permit.

In addition, this item also, for consistency, makes an equivalent amendment to the offence in regulation 214 concerning using methyl bromide as a feedstock.

Item 3 also makes a consequential amendment to the offence in regulation 213 (concerning supplying methyl bromide for non-QPS uses) to remove the concept of intermediate suppliers.

*Other minor technical amendments*

### Items 3, 6-10, 12-13 and 18-19

Items 3, 6 to 10, 12, 13, 18 and 19 make minor technical amendments to the wording of regulations 213-215, 220-221, 223 and 242 for clarity. This includes clarifying that the offences in regulations 220, 221 and 223 are intended to be of strict liability. The application of strict liability is appropriate as these are minor regulatory offences with a low maximum penalty, similar in nature to the existing strict liability offences in the regulations to which they are added.

## **Schedule 2 – Amendments**

Schedule 2 amends the Principal Regulations to make a number of changes in relation to the administration of the fire protection industry permit scheme.

### Items 1-3

These items insert a number of new defined terms into regulation 301 both for clarity and for consistency with the other changes to the Principal Regulations.

In particular, new definitions of ‘Fire Board’, ‘relevant authority’ and ‘relevant Board’ are included as a consequence to the amendments that allow the Minister to appoint more than one body as a Fire Protection Industry (ODS & SGG) Board.

## Item 7

Item 7 inserts regulation 307A into the Principal Regulations.

Regulation 307A(1) allows the Minister to appoint one or more bodies that are incorporated under the *Corporations Act 2001* to be Fire Protection Industry (ODS & SGG) Boards (Fire Boards) and authorise those Boards to exercise the Minister's powers and functions as set out in regulations 307A(2) and 311(2).

The Minister's powers and functions in regulation 311(2) relate to the administration of the fire protection industry permit scheme, which is set out in Division 6A.4 of the Principal Regulations. Previously, regulation 311(1) allowed the Minister to appoint a single Fire Board and to authorise only that Board to exercise the functions in regulation 311(2). However, it is considered that, given the breadth of the Minister's fire protection industry permit powers and functions, it should be open to the Minister to be able to appoint different bodies to exercise different powers and functions according to their expertise so as to enable more efficient and effective administration of the scheme.

This change also makes the relevant fire protection industry scheme provisions consistent with the equivalent provisions for the refrigeration and air-conditioning industry permit scheme, as set out in Division 6A.2 of the Principal Regulations. The Minister is able to appoint more than one body to be a Refrigeration and Air-Conditioning Industry Board and to authorise those bodies to exercise the Minister's powers and functions under that scheme (see regulation 120 of the Principal Regulations). Regulation 307A ensures that the two schemes operate consistently in this respect.

Regulation 307A(2) sets the Minister's functions and powers in relation to other permits and exemptions that are regulated by Division 6A.4 of the Principal Regulations but do not fall within the more narrow definition of fire protection industry permit. These include a permit to discharge scheduled substances in the course of testing or calibrating fire protection systems or equipment (as provided for in regulation 305) and a special circumstances exemption from requiring a fire protection industry permit (as provided for in regulation 342). It is intended that the administration of powers and functions relating to these permits should also be able to be exercised by an appointed Fire Board, given their similarity to, and close relationship with, the fire protection industry permit scheme.

Regulation 307A(3) makes it clear that the Minister retains the ability to exercise the Minister's powers and functions in relation to discharge of scheduled substances permits and special circumstances exemptions even when an appointed Fire Board has been authorised to exercise those functions and powers. It is possible that there will be some circumstances where it is considered more appropriate for the Minister to exercise the particular power or function (particularly in relation to the granting of a permit or exemption) even though one or more Fire Boards are legally able to do so (similarly to how delegations work). Regulation 307A(3) ensures the Minister isn't prevented from exercising these powers and functions in such circumstances.

This change is also consistent with the administration of the Refrigeration and Air-Conditioning scheme in Division 6A.2 of the Principal Regulations, where the Minister

retains the ability to exercise the Minister's functions in relation to refrigeration and air-conditioning industry permits even when one or more RAC Industry Boards are authorised to do so.

#### Items 4-6 and 8-11

These items make minor consequential changes to other regulations as a result of regulation 307A.

#### Item 12

Item 12 substitutes a new regulation 312. Regulation 312 is an equivalent provision to regulation 307A(3) in respect of fire protection industry permits, and makes it clear that the Minister retains the ability to exercise the Minister's powers and functions in relation to fire protection industry permits (set out in regulation 311(2)) even when an appointed Fire Board has been authorised to exercise those functions and powers. As with the other permits and exemptions in Division 6A.4, it is possible that there will be some circumstances where it is considered more appropriate for the Minister to exercise the particular power or function (particularly in relation to the granting of a permit) even though one or more Fire Boards are legally able to do so. Regulation 312 ensures the Minister isn't prevented from exercising these powers and functions in such circumstances.

#### Items 13 and 15

Regulation 313 of the Principal Regulations sets out how applications for fire protection industry permits must be made and who they must be made to.

As a consequence to the change to allow more than one Fire Board, Item 13 replaces existing regulation 313(1)(a) with regulations 313(1)(aa) and (a). These regulations make it clear that applications for fire protection industry permits must be made to a Fire Board that is authorised to receive them, except where regulation 313(1AA) applies. If regulation 313(1AA) applies, applications must be made to the Minister.

Item 15 inserts regulation 313(1AA). This regulation sets out the circumstances in which applications for fire protection industry permits must be made to the Minister, rather than to a Fire Board. These circumstances include where no Fire Board is appointed, where a Fire Board is appointed but not is authorised to receive applications, and where the Minister has revoked or suspended either the appointment of all Fire Boards, or the authorisation of all Fire Boards to receive applications.

In addition, regulation 313(1AA)(d) allows the Minister to decide, in a particular circumstance, that it is appropriate for an application to be made to the Minister rather than a Fire Board, even though a Fire Board is authorised to receive the application. It is possible that there will be some circumstances where it is considered more appropriate for the Minister to receive an application for a fire protection industry permit even though one or more Fire Boards would otherwise be legally able to do so. Regulation 313(1AA) ensures the Minister isn't prevented from requiring that the application be made to the Minister in such circumstances.

### Items 14 and 15-18

Item 14 and items 15-18 make consequential changes to regulation 313 as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Board’ in regulation 313 with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulation 311(2) even when a Fire Board is authorised to do so.

### Items 19-28

Regulations 314, 314A and 315 of the Principal Regulations set out, respectively, the matters that must be satisfied before a fire protection industry permit is granted (regulation 314), the period for which a fire protection industry permit is in force (regulation 314A) and the Minister’s power to cancel or suspend a fire protection industry permit (regulation 315).

Items 19-28 make minor changes to each of these regulations so as to extend their coverage to other Division 6A.4 permits, namely discharge of scheduled substances permits granted under regulation 305 and special circumstances exemptions granted under regulation 342. In particular, this means that discharge of scheduled substances permits and special circumstances exemptions may only be granted if the relevant authority granting the permit is satisfied that to do so would not be contrary to Australia’s international obligations, or the Commonwealth’s policies, relating to the use or disposal of scheduled substances, and that the Minister has the power to cancel or suspend such permits if the specified criteria are met. It is considered appropriate that all Division 6A.4 permits are regulated in a consistent manner.

Items 19-28 also make consequential amendments to regulations 314, 314A and 315 as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Board’ in these regulations with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulations 311(2) and 307A(2) even when a Fire Board is authorised to do so.

### Items 29-35

Regulations 316 and 317 of the Principal Regulations provide for the internal reconsideration of certain decisions (regulation 316) and the external review of certain decisions (regulation 317) concerning fire protection industry permits.

Items 29-35 make minor changes to each of these regulations so as to extend their coverage to other Division 6A.4 permits, namely discharge of scheduled substances permits granted under regulation 305 and special circumstances exemptions granted under regulation 342. This means, among other things, that a person is able to apply for an internal reconsideration of a decision not to grant a discharge of scheduled substances permit or a special circumstances exemption, or a decision to suspend or cancel such a permit. If a reconsideration results in the decision being confirmed, the person is then able to apply to the Administrative Appeals Tribunal for an external review of the decision. It is considered appropriate that all Division 6A.4 permits are regulated in a consistent manner.

### Items 36 and 37

Regulation 318 of the Principal Regulations makes it clear that a fire protection industry permit is not in force while it is suspended.

Items 36 and 37 makes minor amendments to regulation 318 and its heading so that it applies to all Division 6A.4 permits.

### Item 38

Regulation 319 of the Principal Regulations allows inspectors appointed under the Act to exercise certain powers at premises used by a fire protection industry permit holder.

Item 38 makes minor amendments to regulation 319 so that it applies to all Division 6A.4 permits.

### Items 39-41

Regulation 321 of the Principal Regulations sets out some general requirements relating to the granting of extinguishing agent handling licences. Extinguishing agent handling licences are a type of fire protection industry permit.

Items 39 to 41 makes minor consequential changes to regulation 321 as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ in these regulations with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulations 311(2) even when a Fire Board is authorised to do so. Items 39 to 41 also make other minor technical amendments to regulation 312 for clarity.

### Items 42-46

Regulations 322 to 325 of the Principal Regulations set out (respectively) when an extinguishing agent handling licence, a special extinguishing agent handling licence, an extinguishing agent handling licence – experienced persons, and an extinguishing agent trainee licence can be granted. These regulations also set out what activities a holder of each of these licences are entitled to undertake.

Previously, these regulations only allowed ‘the Board’ or ‘the Fire Protection Industry (ODS & SGG) Board’ to grant these licences.

Items 42 to 46 make minor consequential changes to each of these regulations as a result of regulation 312 (see item 12). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ and ‘the Board’ in these regulations with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulation 311(2) even when a Fire Board is authorised to do so.

The effect is to remove the previous constraint that only one Fire Board can grant the licences covered by regulations 322, 323, 324 and 325.

### Items 47- 51

Regulation 326 of the Principal Regulations sets out the conditions that apply to extinguishing agent handling licences granted under regulations 322 to 325.

Items 47 to 51 make minor consequential changes to regulation 326 as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ and ‘the Board’ in regulation 326 with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulation 311(2) even when a Fire Board is authorised to do so.

### Items 52-53

Regulation 331 of the Principal Regulations sets out when an extinguishing agent trading authorisation can be granted and what the holder of such an authorisation is permitted to do. Previously, only ‘the Fire Protection Industry (ODS & SGG) Board’ could grant an extinguishing agent trading authorisation.

Items 52 to 53 make minor consequential changes to regulation 331 as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ and ‘the Board’ in regulation 331 with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulation 311(2) even when a Fire Board is authorised to do so

The effect is to remove the previous constraint that only one Fire Board can grant an extinguishing agent trading authorisation.

### Items 54-57

Regulation 332 of the Principal Regulations sets out the conditions that apply to extinguishing agent trading authorisations.

Items 54 to 57 make minor consequential changes to regulation 332 as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ and ‘the Board’ in regulation 332 with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulations 311(2) even when a Fire Board is authorised to do so.

### Items 58-60

Regulation 341 of the Principal Regulations sets out when a halon special permit can be granted and what that permit entitles a holder to do. Previously only ‘the Fire Protection Industry (ODS & SGG) Board’ could grant a halon special permit.

Items 58 to 60 make minor consequential changes to regulation 341 (and its heading) as a result of regulations 307A and 312 (see items 7 and 12). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ and ‘the Board’ in regulation 341 with the

‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulations 311(2) even when a Fire Board is authorised to do so.

The effect is to remove the previous constraint that only one Fire Board can grant a halon special permit.

#### Items 61-65

Regulation 342 of the Principal Regulations sets out the process for applying for, and granting, a special circumstances exemption. A special circumstances exemption is not a fire protection industry permit; however it entitles the holder to the privileges of the relevant fire protection industry permit (as specified in the exemption) in relation to the particular activities specified in the exemption.

Previously only ‘the Fire Protection Industry (ODS & SGG) Board’ could grant a special circumstances exemption.

Items 61 to 65 make minor consequential changes to regulation 342 as a result of regulation 307A (see item 7). These items replace references to ‘the Fire Protection Industry (ODS & SGG) Board’ and ‘the Board’ in regulation 342 with the ‘relevant authority’ so as to accommodate both the Minister being able to appoint more than one Fire Board and the Minister retaining the ability to exercise the powers and functions set out in regulation 307A(2) even when a Fire Board is authorised to do so.

The effect is to remove the previous constraint that only one Fire Board could grant a special circumstances exemption.

### **Schedule 3 – Amendments**

Schedule 3 amends the Principal Regulations to make a number of miscellaneous amendments.

#### *Repeal of redundant dates*

#### Items 1-3

Regulation 112(2) of the Principal Regulations made it an offence for a person to acquire, possess or dispose of bulk refrigerant in certain circumstances on or after 1 July 2005. Item 1 removes the reference to ‘on or after 1 July 2005’ because it is considered that this is no longer needed.

Regulation 113(1) of the Principal Regulations made it an offence for a person to possess halon for use in refrigeration and air conditioning equipment in certain circumstances on or after 1 July 2005. Item 2 removes the reference to ‘on or after 1 July 2005’ because it is considered that this no longer needed.

Regulation 302(1) of the Principal Regulations made it an offence for a person to handle an extinguishing agent for use in fire protection equipment in certain circumstances on or after 1 November 2005. Similarly, regulation 303(2) made it an offence for a person to acquire, possess or dispose of bulk extinguishing agent in certain circumstances on or after 1

November 2005, and regulation 304(1) made it an offence for a person to possess halon for use in fire protection equipment on or after 1 November 2005. Item 3 removes the references to ‘on or after 1 November 2005’ as it is considered that these are no longer needed.

#### *Infringement notices for domestic end-use*

##### Items 4-5

Section 65AA of the Act provides that the regulations may make provision enabling a person who is alleged to have committed (relevantly) a specified offence against the regulations to pay a specified penalty to the Commonwealth as an alternative to prosecution.

Previously, the Principal Regulations did not specify any offences against the regulations as offences for which a person can pay an infringement notice penalty. This meant that the infringement notice scheme in Part 8 of the Principal Regulations was limited to a number of offences against the Act (as specified in s 65AA(1)(a) of the Act) and the contravention of a civil penalty provision.

Items 4 and 5 specify a number of offences against the regulations for the purposes of section 65AA of the Act. This has the effect that the infringement notice scheme in Part 8 of the Principal Regulations applies to these offences. This allows for a person alleged to have committed one or more of these offences to be issued an infringement notice and pay the specified penalty. This is considered to be a more effective and efficient alternative to prosecution in appropriate circumstances, particularly for minor breaches.

The offences against the regulations that are specified for the purposes of section 65AA relate to the refrigeration and air-conditioning permit scheme and the fire protection industry permit scheme. The relevant offences are specified in the table in regulation 906A and primarily involve carrying out work with, or possessing and trading, refrigerant, extinguishing agent and halon otherwise than in accordance with the relevant permit, as well as making false representations.

#### *Updating Australian Standards*

##### Items 6-8, 14-16, 24-25

Regulation 135 of the Principal Regulations sets out the mandatory licence conditions imposed on refrigerant handling licences.

Regulation 135(1)(a) imposes a condition that the licensee carry out the work to which the licence relates in accordance with the relevant standard in Table 135. Table 135 lists standards set by Standards Australia that are relevant to the work of the holder of a refrigerant handling licence.

Regulation 135(1)(aa) imposes an equivalent condition in relation to work carried out under refrigeration and air-conditioning trainee licences. In that situation, the licensee that is supervising the trainee licensee must ensure that the work carried out by the trainee licensee is in accordance with the relevant standard in Table 135.



Item 7 replaces the standards listed in items 17, 17A, 18, 19 and 20 of Table 135 with updated standards. This item also insert a new item 20A into the table. The updated standards reflect the refrigeration safety standards adopted by Standards Australia in October 2016 as follows:

- i. AS/NZS ISO 817:2016 Refrigerants – designation and safety classification (this supersedes AS/NZS 1677.1:1998 Refrigerating systems – Refrigerant classification), and
- ii. AS/NZS 5149:2016 Refrigerating systems and heat pumps - Safety and environmental requirements (this supersedes AS/NZS 1677.2:1998 Refrigerating systems – Safety requirements for fixed applications).

These amendments are necessary because, due to the operation of section 14 of the *Legislation Act 2003*, the standards (not being legislative instruments) are incorporated into Table 135 as they exist at the time they are included in the Table. The standards that were previously listed in items 17, 17A, 18, 19 and 20 of Table 135 are no longer in force and have been replaced by the standards listed at new table items 17, 18, 19, 20 and 20A. It was therefore necessary to update the list of standards in Table 135 to reflect this change.

Updating the references to the most recently adopted standards will reduce confusion for licence holders who, without this change, are required to follow the outdated referenced standards as a condition of their licence. The updated standards are considered the current state of industry knowledge, they provide clarity on the current best practice requirements for safely handling ozone depleting substances and synthetic greenhouse gases used as refrigerants and reduce emissions through improved installation and maintenance practices. While a fee is charged to purchase the standards in their entirety, licence holders can access key requirements applicable to their work practices through training courses and guidance materials provided by industry and other organisations.

Item 6 clarifies that the list of standards in Table 135 are only incorporated into the regulations as they are in force at the time the relevant item in the table commences. This item is inserted for clarity only, as it simply restates the effect of section 14(2) of the *Legislation Act 2003*. Item 6 also clarifies that a standard listed in Table 135 is published by Standards Australia. Item 8 makes these same clarifications for the list of standards in Table 326 (relating to extinguishing agent handling licences).

Items 14 and 16 make minor technical amendments to the wording of regulation 135(1)(a), (aa) and the headings to Table 135 for clarity. Items 24 and 25 make equivalent minor technical amendments to the wording in regulation 326 and the heading to Table 326 (dealing with Australian Standards for extinguishing agent handling licences).

Item 15 repeals the condition at regulation 135(1)(d) as it is no longer considered necessary.

*Updating references to the qualifications required for refrigerant handling licences and extinguishing agent handling licences*

#### Items 9-21

Items 9 to 21 make a number of minor changes to regulations 131 and 134 of the Principal Regulations to update the qualifications a person must hold to be granted a refrigerant

handling licence, or that a person must be undertaking to be granted a refrigeration and air-conditioning trainee licence.

Regulation 131 of the Principal Regulations sets out the criteria that a relevant authority must be satisfied in order to grant an applicant a refrigerant handling licence. This includes that the applicant must hold a relevant qualification mentioned in the item in Table 131 that corresponds with the relevant refrigerant handling licence (see regulation 131(2)(a)), or that the applicant holds a certificate granted by a ‘registered training organisation’ that recognises the applicant’s prior learning and competencies are equivalent to a relevant qualification listed in Table 131 (see regulation 131(2)(b)). The purpose of this criteria is to ensure that these licences are only granted to persons who are considered to have appropriate skills, knowledge and expertise to safely and competently carry out the work covered by the licence.

The names of the relevant qualifications listed in Table 131 are correct for the purposes of the criteria at regulation 131(2)(a). However, these qualifications were listed in the Table as being endorsed by the National Quality Council. Since the commencement of the *National Vocational Education and Training Regulator Act 2011* (NVETR Act), this is no longer correct, as that Act introduced a new system where, rather than being ‘endorsed’ by a particular body, qualifications are instead entered on the National Register within the meaning of that Act. Items 19 and 20 amend regulation 131 to reflect these changes so that the qualifications listed in Table 131 are now ‘registered qualifications’ consistently with the NVETR Act. Item 21 also amends regulation 134(1) to make an equivalent change in relation to refrigeration and air-conditioning trainee licences.

In addition, certificates held by applicants for the purpose of the alternative criteria at regulation 131(2)(b) are now, since the commencement of the NVETR Act, granted only by registered training organisations within the meaning of that Act. Such certificates certify that the applicant has achieved learning outcomes and competencies that are equivalent to the learning outcomes and competencies that would satisfy the requirements of a relevant qualification. Items 16, 17 and 18 update regulation 131(2)(b) to reflect these changes. In addition, Item 12 repeals the previous definition of ‘registered training organisation’; a new definition of this term is incorporated into regulation 131(2)(b) by item 16.

Items 13 and 14 make some minor technical amendments to the wording of regulations 131(1) and (2) for clarity. Items 9 to 11 ensure that relevant terms for these measures are defined in regulation 2, which sets out defined terms applying to the Principal Regulations.

#### Items 10, 28-31

Items 28 to 31 make corresponding amendments to the references in regulations 322 (including Table 322) of the Principal Regulations to reflect the changes made by the NVETR Act. Regulation 322 sets out the units of competency that an applicant is required to have achieved before they can be granted an extinguishing agent handling licence. Items 28 to 31 amend regulation 322 to ensure that the references to ‘units of competency’ refer to units of competency entered into the National Register within the meaning of the NVETR Act.

Item 10 also makes a consequential amendment to regulation 2 to insert a definition of ‘registered unit of competency’ which cross-refers to regulation 322.

*Removing inconsistencies between exemptions from criminal offences and civil penalty provisions*

Items 25, 27, 34, 36 and 38

Section 45B(1) of the Act has the effect that a person commits an offence if they engage in conduct that results in the discharge of a scheduled substance in circumstances where it is likely the scheduled substance will enter the atmosphere, and where that discharge is not in accordance with the regulations. Strict liability applies to the offence in section 45B(1) (see section 45B(2)).

Section 45B(2A) provides an equivalent civil penalty provision to the offence in section 45B(1). Under section 45B(2A), a person must not engage in conduct that results in the discharge of a scheduled substance in circumstance where it is likely that the scheduled substance will enter the atmosphere, and where that discharge is not in accordance with the regulations.

Put more simply, sections 45B(1)(e) and 45B(2A)(c) allow the regulations to exempt certain discharges of scheduled substances from (respectively) the offence in section 45B(1) and the civil penalty provision in section 45B(2A).

There are five existing regulations in the Principal Regulations that exempted a particular discharge of a scheduled substance from the offence in section 45B(1). These are:

- regulation 216, which allows the discharge of methyl bromide in certain circumstances;
- regulation 305(1), which allows the discharge of a scheduled substance to test or calibrate fire protection equipment or systems, where the permit has been granted a permit to do so;
- regulations 400(1) and (2), which allow the discharge of scheduled substances in other listed circumstances;
- regulation 500, which allows the discharge of a scheduled substance other than methyl bromide if the substance is being used as a feedstock. The discharge of methyl bromide when being used as a feedstock is covered by regulation 216.

Previously these regulations only exempted the discharge of scheduled substances in these circumstances from the offence in section 45B(1). However, it is also considered appropriate that discharge of scheduled substances in these circumstances not be a contravention of a civil penalty provisions. This was an oversight in the previous regulations.

Items 25, 27, 34, 36 and 38 extend the exemption in regulations 216, 305(1), 400(1), 400(2) and 500 to the civil penalty provision in section 45(2A) of the Act. This ensures that the criminal offences and civil penalty provisions are consistent.

## *New offences – false representations*

### Item 26

Item 26 inserts two new strict liability offences into Division 6A.4 of the Principal Regulations. These are minor regulatory offences with a low maximum penalty, similar in nature to the existing strict liability offences in the Principal Regulations.

Regulation 304A(1) makes it an offence for a person to make a representation that the person can provide a service that involves the acquisition, disposal, storage, use or handling of an extinguishing agent in circumstances where, at the time of making the representation, the person does not hold a fire protection industry permit or special circumstances exemption that entitles the person to perform the service, and also does not employ or engage another person who does hold such a permit or exemption.

Regulation 304A(2) creates an exception to the offence at regulation 304A(1) if, at the time of making the representation, the person has entered into an agreement with another person to provide the service, where the agreement requires the service to be performed by a person holding a fire protection industry permit or special circumstances exemption that entitles them to perform the service. This offence-specific defence shifts the burden of proof from the prosecution having to prove that no such agreement existed beyond reasonable doubt to the defendant, who would only have to provide evidence that suggests a reasonable possibility that such an agreement existed. Once the defendant establishes this, the prosecution must show beyond reasonable doubt that there was in fact no agreement.

The creation of an offence-specific defence at Regulation 304A(2) is appropriate to address the harm that could be caused by the commission of the offence. An offence under Regulation 304A(1) poses a significant potential danger to public safety, arising from the risk of a malfunction of a fire suppression system which has not been serviced in the appropriate manner by a qualified person.

The transfer of the burden of proof is also appropriate because a significant information imbalance is likely to exist between the prosecution and potential offenders. The relevant matters (particularly the existence of any relevant agreements) are peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

Regulation 304A(3) makes it an offence for a person to represent themselves as being the holder of a fire protection industry permit or special circumstances exemption when they are not.

The addition of these offences, including the offence-specific defence in Regulation 304A(2), ensures consistency with the refrigeration and air-conditioning permit scheme, for which false representation offences already exist (see Regulation 113A).

Both new strict liability offences carry a relatively low penalty of 10 penalty units.

## *New exemption for discharge of scheduled substances*

### Items 35 and 37

Regulation 400 of the Principal Regulations sets out a number of circumstances in which the discharge of scheduled substances is permitted. A discharge of scheduled substances that is not in accordance with the regulations will, under the Act, be an offence and the contravention of a civil penalty provision.

Item 35 inserts regulation 400(1)(g) which provides an additional circumstance in which the discharge of a scheduled substance is permitted. This circumstance is where the substance is being tested to determine what the substance is, the composition of the substance or the physical or chemical properties of the substance, or where the substance is being sampled as a precursor to such testing. This exception is considered necessary because it has become apparent that it is not always possible to do necessary sampling and testing of gases, including for compliance purposes, without incurring an incidental discharge.

Item 37 inserts regulation 400(3), which defines the term ‘sampled’ for the purposes of regulation 400(1)(g).

## *Repeal of redundant regulations*

### Item 39

Item 39 repeals regulations 920, 921, 922, 950, 951, 953 and 955 on the basis that these regulations are no longer considered necessary.

Regulations 920, 921 and 922 were made for the purposes of section 69AA, 69AB and 69AC of the Act and related to the process for applying for a refund of the carbon charge component of the levy imposed on the import and manufacture of synthetic greenhouse gases and the import of synthetic greenhouse gases equipment. These sections of the Act have since been repealed, and the import and manufacture levies no longer include a carbon charge component. Accordingly, regulations 920, 921 and 922 no longer have any work to do and are repealed.

Regulation 950 was a transitional provision pertaining to the application of regulation 3C(5), which described the circumstances where the Minister might waive part of the application fee for equipment licences. Regulation 3C(5) was repealed in 2014. Accordingly, regulation 950 no longer has any work to do and is repealed.

Regulation 951 was a transitional provision pertaining to refrigerant handling licences and refrigeration and air-conditioning trainee licences granted prior to 2013 amendments to the Principal Regulations. No such licences remain in force, so this regulation no longer has any work to do and is repealed.

Regulation 953 was a transitional provision pertaining to the 2013 amendments to the Principal Regulations. It clarified that certain amendments apply in relation to permits granted as a result of applications made after the 2013 amendment regulations commenced, and to cancellation and suspensions of permits occurring after the 2013 amendment regulations

commenced (regardless of when the permit was granted). This provision is no longer necessary as there is no longer any need to distinguish between applications made and permits granted before and after the 2013 amendment regulations commenced. All applications, cancellations and suspensions will now be made after the 2013 amendment regulations commenced and will be subject to the amended regulations. This regulation was therefore redundant and is repealed.

Regulation 955 was a transitional provision that provided that the infringement notice scheme under Part 8 of the Principal Regulations applied in relation to contraventions occurring before on or after the commencement of that Part in 2013. As infringement notices must be given within 12 months of the alleged offence, all contraventions for which an infringement notice may be issued will now have occurred after the commencement of Part 8. This regulation therefore has no further work to do and is repealed.

#### **Schedule 4 – Transitional**

Item 1 provides for transitional regulations 962 to 967 in relation to the amendments made by Schedules 1 to 3.

Transitional regulation 962 sets out defined terms for the purposes of Schedule 4.

Transitional regulation 963(1) has the effect that the amendments in Schedule 1 (concerning methyl bromide) apply to applications for non-QPS permits made on or after the day the Amendment Regulations commence, except as provided by transitional regulation 963.

Transitional regulation 963(2) applies to the grant of a non-QPS permit for use of methyl bromide in either 2019 or 2020. It is necessary to provide a transitional provision for these years because persons who intend to use methyl bromide in 2019 or 2020 have generally already made a written request to the Department concerning their intended use, and the Montreal Protocol parties have already provided, or are currently in the process of providing, advice on the application.

Transitional regulation 963(2)(a) has the effect that a person who, prior to the commencement of the Amendment Regulations, had made a written request to the Department to use methyl bromide for non-QPS uses in either 2019 or 2020, is taken to have made an application under regulation 234 for a non-QPS permit for that non-QPS use. This means that those persons will be able to be granted a non-QPS permit, but will not have to make another application.

Transitional regulation 963(2)(b) has the effect that any consultation undertaken, or advice received, prior to the commencement of the Amendment Regulations from Montreal Protocol parties in relation to a person's use of methyl bromide, will be taken to satisfy the requirement in regulation 235(2). This means that the Minister will not be required to go back to the Montreal Protocol for consultation and advice that has already been provided or is in the process of being provided.

Transitional regulations 964-967 provide for transitional provisions setting out how the amendments in Schedule 2 apply to existing applications for and permits granted under Division 6A.4 of the Principal Regulations, as well how the amendments apply to the existing Board.

Transitional regulation 964(1) provides that where the Minister has, prior to the commencement of the Amendment Regulations, already appointed a body to be a Fire Protection Industry (ODS & SGG) Board and that appointment is still in force, that body is taken to have been appointed as a Fire Board under regulation 307A(1)(a). The effect is to save the appointment of the current Board, so the Minister does not need to make that appointment again.

Transitional regulation 964(2) provides that where the Minister has, prior to the commencement of the Amendment Regulations, already authorised an appointed Fire Protection Industry (ODS & SGG) Board to exercise the Minister's powers and functions in relation to fire protection industry permits, and that authorisation is still in force, that authorisation is taken to have been made under regulation 307A(1)(c)(ii). The effect is to save the authorisation of the currently appointed Board, so the Minister does not need to make that authorisation again. However, the Minister will still need to authorise the currently appointed Board to exercise the powers and functions in regulation 307A(2) (relating to discharge of scheduled substances permits and special circumstances exemptions), as the existing Board is not currently authorised to exercise these powers and functions.

Transitional regulation 965 has the effect that the amendments in Schedule 2 do not apply to existing applications for Division 6A.4 permits where no decision has been made whether to grant or refuse the relevant permit prior to the Amendment Regulations commencing. These applications will be assessed and determined in accordance with the previous regulations.

Transitional regulation 966 has the effect that the amendments in Schedule 2 apply to applications for Division 6A.4 permits made after the commencement of the Amendment Regulations.

Transitional regulation 967 has the effect that the amendments to regulation 316 do not apply to an application for a reconsideration of a decision that has already been made, but not finally decided, prior to the Amendment Regulations commencing. These applications will be assessed and determined in accordance with the previous regulation 316.

## Statement of Compatibility with Human Rights

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

### ***Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018***

This Disallowable Legislative Instrument 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 Legislative Instrument**

The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) implements Australia's international obligations under the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer and the United Nations Framework Convention on Climate Change and its Kyoto Protocol.

The *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018* amends the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Principal Regulations) to implement relevant recommendations of the review of the Ozone Protection and Synthetic Greenhouse Gas legislation completed in 2016 (the review).

The review identified a range of measures to improve the effectiveness and efficiency of the Ozone Protection and Synthetic Greenhouse Gas legislation, which is administered under the Act and the Principal Regulations. The review identified opportunities to further reduce emissions of ozone depleting substances and synthetic greenhouse gases and improve and streamline the operation of the legislation, including reducing regulatory compliance costs and burden on business. The Australian Government agreed to all 60 of the recommendations and measures on 5 May 2016.

The *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Methyl Bromide, Fire Protection and Other Measures) Regulations 2018* amends the Principal Regulations to:

- Remove inconsistencies between exemptions for criminal offences and civil penalties;
- Update references to nationally endorsed accredited vocational education and training relevant to the granting of a refrigerant or fire extinguishing agent handling licence;
- Update references to the Australian Standards that refrigerant handling licence holders are required to comply with;
- Allow for the discharge of gas from containers and equipment during the process of sampling and testing, including for compliance purposes;
- Create a new offence for a person who makes false representation in relation to a fire extinguishing agent permit or special circumstances exemption;



- Allow for infringement notices to be issued for contraventions of requirements in the refrigeration and air conditioning, and fire protection industry permit schemes;
- Allow the Minister to exercise powers to appoint more than one body as Fire Protection Industry (Ozone Depleting Substances & Synthetic Greenhouse Gas) Boards (Fire Boards).
- Allow the Minister to exercise powers and functions even where they have been authorised to one or more Fire Boards;
- Allow the use of methyl bromide for laboratory and analytical purposes, including discharges of methyl bromide during such use.
- Remove requirements that are no longer necessary for record keeping and reporting on use and stockpiling of methyl bromide;
- Create a process for granting of permits to use methyl bromide for non-quarantine and pre-shipment (non-QPS) uses, where an exemption to the ban on the use of methyl bromide has been approved. This process replaces the annual Non-QPS Exemption List and Non-QPS Intermediate Supplier List which have been used to allow the use of methyl bromide for non-QPS uses since 2005;
- Repeal redundant items in the regulations and makes minor technical amendments to various regulations to clarify the intended meaning.

### **Human rights implications**

The Instrument engages the following human rights:

- The right to an effective remedy in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR);
- The right to a fair trial in Article 14(1) of the ICCPR;
- The right to the presumption of innocence in Article 14(2) of the ICCPR.

### **Right to an effective remedy**

Article 2(3) of the ICCPR ensures that any person whose rights or freedoms are violated shall have an effective remedy, and that a person in claiming such a remedy shall have his rights determined by a competent judicial, administrative or legislative authority.

The Instrument inserts new regulations 235 (grant of non-QPS permits), 236 (Variation of non-QPS permits) and 237 (Transfer of non-QPS permits) into the Regulations. These regulations introduce new Ministerial decision-making powers into the Regulations.

Regulation 235 allows the Minister to grant, or refuse to grant, a permit. Regulation 236 allows the Minister to vary a permit in accordance with an application, refuse to vary a permit, or vary a permit without having received an application from the permit holder. Regulation 237 allows the Minister to transfer, or refuse to transfer, a permit.

The Instrument also inserts new regulation 238 (Non-QPS permits - review of decisions) of the Act to enable applications to be made to the AAT for review of decisions made under regulations 235, 236 and 237.

Therefore the Instrument promotes and protects the right to an effective remedy in Article 2(3) by providing affected persons the right to apply to the AAT for review of these new decisions.

## **Right to a fair trial**

Article 14(1) of the ICCPR guarantees the right to a fair trial and fair hearing in relation to both criminal and civil proceedings.

### Level of criminal penalties and civil penalties

The Instrument amends regulation 212 (Offence – using methyl bromide for non-QPS uses), to extend the offence to prohibit a non-QPS permit holder (or a person acting on the permit holder’s behalf) from contravening a condition of their permit. The Instrument amends, for consistency, regulation 214 (Offence – using methyl bromide as a feedstock), to extend the offence to prohibit a feedstock permit holder (or a person acting on the permit holder’s behalf) from contravening a condition of their permit. Contravention of these regulations attracts a penalty of 10 penalty units.

The Instrument amends regulations 220, 221 and 223 to clarify that the offences in these regulations are intended to be of strict liability. Contravention of these regulations attracts a penalty of 10 penalty units.

The Instrument inserts regulation 304A (Offence – false representations) to create two new strict liability offences in Division 6A.4 – Fire protection. Under 304A(1) an offence is committed if a person makes a representation that they can provide a service involving a fire extinguishing agent when they do not hold, or employ someone who holds, the required permit or exemption to provide this service. Under 304A(3) an offence is committed if a person makes a representation that they hold a fire protection industry permit or exemption when they do not. Contravention of these regulations attracts a penalty of 10 penalty units.

Section 65AA of the Act provides that the regulations may make provision enabling a person who is alleged to have committed (relevantly) a specified offence against the regulations to pay a specified penalty to the Commonwealth as an alternative to prosecution.

The Instrument inserts regulation 906A which specifies a number of offences against the regulations for the purposes of section 65AA of the Act. The specified offences relate to the refrigeration and air-conditioning permit scheme and the fire protection industry permit scheme. This new regulation has the effect that the infringement notice scheme in Part 8 of the Regulations applies to these offences. This allows a person alleged to have committed one or more of these offences to be issued an infringement notice and pay the specified penalty.

Subsection 65AC(4) sets limits on the pecuniary penalties payable in respect of civil penalty provisions of the Act. The effect of paragraph 65AC(4)(a) is that the maximum pecuniary penalty that can be imposed for a contravention of the civil penalty provision under section 65AA is 50 penalty units for an individual or 250 penalty units for a body corporate (being the maximum penalty that could have been imposed on the person if the person had been convicted of the offence).

Relevantly, section 65AC also incorporates appropriate safeguards including the requirement that in determining pecuniary penalties a court must take all relevant matters into account, including the nature and extent of the contravention, the nature and extent of any loss or damage suffered as a result of the contravention and whether the person has previously been found to have engaged in similar conduct.

### Application of both criminal and civil penalties

As stated above, new regulation 906A allows for the issuing of infringement notices for the listed offences. The intention of the regulation is that if an appointed inspector has reasonable grounds to believe that a person has contravened a relevant provision, the inspector may give

the person an infringement notice for the alleged contravention. If a single provision can constitute both a civil penalty provision and an offence provision, the infringement notice must relate to the offence provision.

Existing protections under the Act will apply to ensure that a person will not be subject to both criminal and civil penalties for the same conduct. For example, under existing section 65AH a person cannot be subject to a civil penalty if they have been convicted of an offence relating to conduct that is the same, or substantially the same, as the conduct that contravened the civil penalty provision. In addition, existing section 65AI provides that any proceedings for a civil penalty provision are automatically stayed if criminal proceedings are commenced or have already commenced against that person for an offence involving conduct that is the same, or substantially the same, as the conduct that contravened the civil penalty provision.

These provisions ensure that the imposition of both criminal and civil penalties for the same conduct will not result in a person being punished twice for the same conduct. The issuing of infringement notices is considered to be a more effective and efficient alternative to prosecution or civil penalty in appropriate circumstances, particularly for minor breaches.

Accordingly, the Instrument is consistent with the right to a fair trial in Article 14(1).

### **Right to the presumption of innocence**

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law.

#### Strict liability

Strict liability offences engage and limit the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault. However, the defence of mistake of fact is still available to the defendant. This ensures that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations.

The Instrument applies strict liability to the two new offence provisions in regulation 304A (Offence – false representations). Under 304A(1) an offence is committed if a person makes a representation that they can provide a service involving a fire extinguishing agent when they do not hold, or employ someone who holds, the required permit or exemption to provide this service. Under 304A(3) an offence is committed if a person makes a representation that they hold a fire protection industry permit or exemption when they do not. Contravention of these regulations attracts a penalty of 10 penalty units. Application of strict liability to these offences has been set with consideration given to the guidelines regarding the circumstances in which strict liability is appropriate set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Strict liability offences are used throughout the Act and Regulations and are necessary to ensure the integrity of the established regulatory regime to prevent environmental harm.

#### Reverse burden of proof

Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages the presumption of innocence.

The new regulation 304A would require that a defendant show that they held, or employed someone who held, the required permit or exemption to escape conviction for false representation. This is the reverse of the principle in criminal law that the prosecution must prove every element of the offence.

The reversal is justified in this instance, as the matters to be proved (namely that the defendant was the holder of the required permit exemption or employed someone who held the required permit or exemption) are matters that would be in the particular knowledge of the defendant. It is expected that it would not be unreasonably difficult for the defendant to discharge the evidentiary burden.

The application of strict liability and a reversed burden of proof to new regulation 304A is a reasonable, necessary and proportionate response and reflects the seriousness of the conduct and Australia's international commitment under the Montreal Protocol. Accordingly, the Instrument is consistent with the right to the presumption of innocence in Article 14(2).

### **Conclusion**

The Bill is compatible with human rights because it promotes the right to an effective remedy under Article 2(3) of the ICCPR. To the extent that it engages and limits other human rights (including Article 14(1) and 14(2)), those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the Bill and the ongoing efficient and effective operation of the Act.