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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**GREENHOUSE AND ENERGY MINIMUM STANDARDS BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Climate Change and Energy Efficiency,  
the Honourable Greg Combet AM MP)

# **GREENHOUSE AND ENERGY MINIMUM STANDARDS BILL 2012**

## **General Outline**

### **Purpose**

The Greenhouse and Energy Minimum Standards Bill 2012 (the Bill) implements the commitments of the Australian Government and the Council of Australian Governments (COAG) to establish national legislation to regulate energy efficiency and labelling standards for appliances and other products.

The Bill also gives effect to certain commitments under the United Nations Framework Convention on Climate Change (UNFCCC) to adopt national policies and measures to mitigate climate change and limit Australia's anthropogenic emissions of greenhouse gases, and to promote the development and application of technologies and practices that control anthropogenic emissions of greenhouse gases.

The Bill establishes a national framework for regulating the energy efficiency of products supplied or used within Australia. The national legislation permits the Australian Government to set mandatory minimum efficiency requirements for products, to drive greater energy efficiency for regulated products. The Bill also allows the Australian Government to set nationally-consistent labelling requirements, to increase Australians' awareness of options to improve energy efficiency and reduce energy consumption, energy costs and greenhouse gas emissions. The national framework will replace seven state and territory legislative frameworks, harmonising Australia's equipment energy efficiency regulations.

### **Background**

Scientific evidence conclusively demonstrates that generating energy from fossil fuel sources increases the concentration of carbon dioxide and other greenhouse gases in the atmosphere. One result is the increase in average global surface temperatures in recent decades, a warming trend that is forecast to continue and bring changing weather patterns and the potential for serious damage to Australia's environment, economy and way of life. The Australian Government, together with more than 190 other countries, has committed to action to address anthropogenic greenhouse gas emissions under the UNFCCC. In particular, the Australian Government committed, in Article 4(1)(b), to implement and update national programs containing measures to mitigate climate change by addressing anthropogenic emissions and, in Article 4(1)(c), to promote the development of technologies that reduce anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol (which controls ozone depleting gases).

When the UNFCCC was signed in 1992, Australia was already pioneering equipment energy efficiency regulation. Over the past two decades, the Equipment Energy Efficiency (E3) Program has developed into a popular and effective measure to help reduce the energy that Australians consume, and the associated greenhouse gas emissions. The E3 Program has proven so successful that in 2005, 83% of all Australian consumers surveyed reported referring to the Program's Energy Rating Labels when purchasing major household appliances. In 2010, the energy savings arising from the more efficient air conditioners and refrigerators required by the E3 Program was calculated at 6.6 terawatt hours, a benefit valued at over \$1 billion. Because Australia's electricity is generated predominantly from fossil fuels, the reduced energy consumption driven by the E3 Program helps to reduce Australia's greenhouse gas emissions.

Despite the successes of the E3 Program, the evolving expansion of the Program under separate state and territory laws has resulted in inconsistencies which increase the regulatory burden for businesses and government agencies.

Australian governments recognise the value of the E3 Program for improving energy efficiency and the potential to achieve greater efficiencies by moving the Program to a more consistent, national legislative footing. For these reasons, the Australian Government undertook to enhance the E3 Program as part of its *Solar Schools—Solar Homes* election commitment in 2007. In July 2009 this commitment was reinforced when COAG issued the National Strategy on Energy Efficiency with a commitment to establish national legislation for efficiency standards and labelling, and to expand the scope of the E3 Program.

The Greenhouse and Energy Minimum Standards Bill 2012 will address the inconsistencies that have arisen in the E3 Program while simultaneously enabling expansion of the Program to drive even greater energy efficiency, in line with Australia's commitments and environmental goals.

The Bill will deliver a national and expanded E3 Program that enables Australian governments to regulate:

- i. all electrical product types;
- ii. products that use forms of energy other than electricity (e.g. gas or diesel);
- iii. products that affect energy consumption of other products, such as insulation, window glass and air conditioner ducting;
- iv. the greenhouse gas intensity of products;
- v. minimum performance requirements for regulated products, such as the temperature at which refrigerators must operate; and
- vi. potentially negative environmental and health effects associated with regulated products.

The expanded E3 Program will ensure Australian governments can continue to encourage the development of energy efficient products that meet the needs of Australian households and businesses.

### **Financial Implications**

The Australian Government committed \$37.1 million over four years in the 2012—2013 Budget to fund the Australian Government's share of the cooperative E3 Program. This funding will be supported by contributions from New Zealand and Australian state and territory jurisdictions that participate in the E3 Program.

## **Regulation Impact Statement**

The Regulation Impact Statement entitled *National Legislation for Appliance and Equipment Minimum Energy Performance Standards (MEPS) and Energy Labelling* was published in June 2010 and approved by the Australian Government on 7 February 2011. Including the full 165-page statement would detract from the clarity of the Explanatory Memorandum so the Executive Summary has been included in the Explanatory Memorandum. A full copy of the Regulation Impact Statement can be obtained from the Australian Government's Energy Rating Website.

### **Executive Summary**

Australian governments have long supported policies that encourage more efficient use of energy for a range of reasons including energy security, economic efficiency, ecologically sustainable development and greenhouse gas reduction. The emphasis in the current policy setting is on greenhouse gas reduction and assisting households to transition to a low carbon future. Energy efficiency measures are a key element of the Government's approach, in addition to an emissions trading scheme and the renewable energy target. Energy labelling and Minimum Energy Performance Standards (MEPS) under the Equipment Energy Efficiency (E3) program seek to address problems relating to lack of information on the energy performance of appliances and equipment and incentives that may result in poor energy efficiency choices.

In Australia, the MEPS and labelling program is operated on a national basis through cooperative action by state and territory Governments. This approach recognises that the appliance and equipment market in Australia is a single unified market, with firms manufacturing and distributing products nationally.

### ***Options for expansion of the program's scope***

The rapid expansion of the program in response to policies to reduce greenhouse gas emissions has highlighted problems with the program in its current form. The problems relate to:

- the governance and administration of the program;
- the scope and effectiveness of the program and appropriate targeting of products,
- energy forms, greenhouse impacts and efficiencies;
- the risk of unintended environmental problems, which the program has no direct capacity to address;
- the monitoring of program impacts; and
- effective targeting of information so that it can be of use to product buyers, given changes in marketing, product selection and purchase channels.

Inconsistencies in process and application add considerable complexity and cost to the administration of the program relative to a single national approach. They also raise compliance costs for business and have the potential to create added uncertainty and risk. Delays to implementation of the energy efficiency measures under the program also reduce the benefits expected to flow to consumers of energy using appliances and equipment.

The current approach is also relatively inflexible. The efficiency and effectiveness of the program is limited by the fact that the current regulatory framework does not provide for coverage of products using energy forms other than electricity or non-energy-using products, even though such products impact on energy efficiency and greenhouse gas emissions.

Appliance buyers are increasingly concerned with the relative greenhouse emissions impacts of product choices, not just their energy efficiency, and the program cannot at present indicate greenhouse emission differences or set greenhouse intensity standards, should those be justified. Buyers are also researching and purchasing products via new channels such as the internet, and may not become aware of energy differences as they would if they saw physical labels in showrooms.

The regulatory measures under the program, which are designed to improve energy efficiency, can at times have unintended adverse impacts. Dangerous or toxic materials may be used to improve the energy efficiency of a product, such as mercury in energy efficient lighting. The capacity of the current regulatory framework to address such issues directly is limited.

Where alternative regulatory powers would need to be used to address issues that are beyond the scope of the current MEPS and labelling program, it may be more cost-effective to adopt a more comprehensive and streamlined approach such that all issues could be dealt with under a single regulatory framework, consistent with other environmental regulation.

### *The regulatory framework*

The regulatory framework most likely to ensure the effectiveness of the program and the necessary expansion of its scope is one in which:

- the risk to stakeholders is minimised because changes take effect with minimum lead time, take effect in all jurisdictions simultaneously, and no jurisdiction can implement different labelling or MEPS requirements;
- there is a unified administrative and data collection framework;
- the legislation enables and supports efficient and cost-effective operation of the program (with regard to coverage of products irrespective of their energy type, coverage of non-energy-using products, use of label data in other media, and greenhouse labelling and standards); and
- there is a unified compliance framework which makes use of Commonwealth powers in relation to border controls (e.g. where a class of products is declared a prohibited import, as is the case with conventional incandescent lamps).

Three broad options are available for improving the regulatory framework:

1. maintain the current regulatory framework, but address inconsistencies to the extent possible;
2. co-regulation, in which the states, territories and the Commonwealth all pass identical legislation and regulations. Co-regulation could be led by a territory (but legislated by the Commonwealth using the Territories constitutional power, Option 2A), state-led (2B), or Commonwealth-led (2C);

3. Commonwealth regulation, either through a referral of power (Option 3A) or use of the constitutional power of the Commonwealth, with the responsible Minister bound by decisions of an appropriate ministerial council (3B), or with the Minister not bound (3C).

In practice, expansion of the scope of the program could be achieved only through the development of new regulations, indicating that Options 1 and 2 would not achieve the objectives of the proposal, and that a new regulatory approach is needed. A simpler and more streamlined approach, based on Commonwealth regulation, offers the chance of delivering the greatest net benefit to the community.

A truly national approach would minimise the risks of unilateral action and inconsistency across jurisdictions. A single national regulator to oversee the program is more likely to result in a consistent approach to compliance and monitoring. It also means suppliers need only deal with one regulator rather than a number of regulators. Commonwealth involvement would also streamline the use of border controls, where these provide the simplest and most cost effective method for ensuring compliance and enforcement of the energy efficiency measures.

A formal referral of powers by all the states (Option 3A) would be difficult to achieve, and could be reversed, so reintroducing the inconsistencies which Commonwealth regulation is intended to eliminate. Either of Options 3B and 3C could provide the framework necessary to increase the efficiency of the energy labelling and MEPS program.

Use of Constitutional Commonwealth regulation with the Minister not bound by inter-jurisdictional committee (3C) offers the greatest consistency and the most streamlined regulatory, governance and enforcement arrangements, and the greatest certainty for business. Option 3B would have the advantage of formalising jurisdictional participation in the decision making process. It may also facilitate co-operative arrangements for delivery of services such as registration, within a unified regulatory structure in which the Commonwealth would be the sole regulator.

One possible disadvantage of Options 3A, 3B and 3C is that, as administration and governance shift over time to the Commonwealth, the experience, expertise and industry goodwill developed by state and territory government will be lost to the program. To guard against this, there would be advantages, whichever legislative model is selected, to allowing for continuing co-operation between jurisdictions in the overall governance of the labelling and MEPS program, in the development and implementation of specific measures and in administration.

### ***Trans-Tasman Issues***

The New Zealand and Australian governments collaborate in the energy labelling and MEPS program. In New Zealand the program is implemented through the *Energy Efficiency and Conservation Act 2001*, which does not have an exact Australian counterpart. Some of the proposals in this RIS align the Australian program more closely with the New Zealand program (e.g. reporting of national sales or supply of products), and some do not (e.g. extending the scope of MEPS to non-energy using products).

Ensuring standards on both sides of the Tasman remain closely aligned minimises business compliance costs and upholds the principles of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), and the Trans-Tasman Mutual Recognition Arrangement (TTMRA). To ensure the energy labelling and MEPS programme continues to reduce trans-Tasman business costs by ensuring regulatory alignment on both sides of the Tasman, the ongoing development of the national legislation will be developed with reference to the principles of the TTMRA and the ANZCERTA.

It is important to note that there would be no change in the current practice, in which any specific proposals for product coverage under a new Australian regulatory framework would be subject to regulatory impact assessment on a case-by-case basis, in which impacts on the Trans-Tasman market would need to be considered.

To ensure that current practices remain workable therefore it is important that administrative and institutional trans-Tasman arrangements for the MEPS and labelling programme are reviewed and adapted, as appropriate, to complement any changes to either country's legislative framework. This work will commence as soon as decisions on the shape and scope of the new national legislation are settled and New Zealand's revised and updated Energy Efficiency and Conservation Strategy is finalised.

### ***Consultations***

DEWHA published a *Discussion Paper* prior to the preparation of the Consultation RIS, held a series of six public forums in capital cities and received 25 written responses. These indicated that the regulatory and administrative problems identified in the RIS are indeed significant issues for stakeholders, particularly with regard to the need for national consistency. There was also broad support for the extension of the scope of the program to products using other energy forms and selected non-energy-using products. Opinion differed about the value or cost of requiring the disclosure of information in advertising, on whether local or international test standards should be used, and the value of greenhouse-related information.

The Consultation RIS was issued for public comment on 19 January 2010. Public consultation forums were held in Canberra, Sydney, Melbourne, Brisbane, Perth and Adelaide. A total of 67 people registered attendance and written submissions were received from 31 industry associations, companies, non-governmental organisations, consumer advocacy groups and individuals. Of these 31 submissions, 29 supported a transition to a new regulatory framework, and 25 agreed that the new framework should be based on Commonwealth regulation.

### ***Recommendations***

On the basis of the analysis in this RIS, it is recommended that:

1. There be a transition to a new national regulatory framework for the national energy labelling and MEPS program.
2. To ensure national consistency and efficiency of implementation, now and in the future, the preferred framework should be based on Commonwealth regulation (i.e. options 3A, 3B or 3C). The option that provides the greatest net benefit is Option 3B, however other options are likely to deliver a similar net benefit.

3. The new regulatory framework should retain the provisions to cover any product using electricity.
4. The new regulatory framework contain enabling provisions to implement each of the following measures:
  - A. coverage of products using energy forms other than electricity;
  - B. coverage of non-energy-using products which impact on energy use or efficiency;
  - C. labelling (or otherwise indicating) the greenhouse gas impacts of covered products;
  - D. setting greenhouse gas-intensity standards for covered products; and
  - E. minimising the (non-energy) environmental impacts of regulated products.
5. The inclusion of a specific measure under the provisions in 4 (above) should be subject to regulation impact assessment on a case by case basis.
6. The new regulatory framework should include requirements for suppliers of registered products to report annually on the national imports, sales or supplies and exports by the registration holder of each model of each product registered to them (Measure F):
  - a. the powers should be in a form that can be activated through regulation, on a product by product basis;
  - b. the requirement should be activated immediately for all categories of registered products;
  - c. the geographic scope of the reporting should be the whole of Australia only (recognising that smaller area breakdowns are difficult to obtain and unreliable);
  - d. the reporting should cover annual periods; and
  - e. there should be safeguards on confidentiality (e.g. with regard to Freedom of Information requests and in public reports and studies on efficiency trends) so that the sales of any individual firm cannot be disclosed or identified.
7. The new regulatory framework should not expand the circumstances under which the display of energy label images or key energy performance data is required (for example, in visual advertising where a specific model of a product is advertised, offered for sale or promoted in print, internet, television, or other relevant media - Measure G) until further research and analysis, in the form of a regulation impact statement, into the costs and benefits of the measure for specific product types and specific media is undertaken and approved. This recommendation reflects that, while this measure has in-principle benefits, limited information was submitted during the consultation period to allow for a conclusion to be drawn either for or against its immediate implementation. Should the measure be implemented, it is recommended that:
  - a. The regulatory and enforcement powers should to be based on those available to the ACCC for the regulation of advertising, rather than on the WELS Act; and
  - b. The regulations should be structured so that appliance categories or types of advertising can be exempted if not supported by cost-benefit analysis.
8. The new regulatory framework should define ‘sale’ and ‘supply’ in a way that:
  - a. is consistent in all jurisdictions;
  - b. covers all imports of products (other than previously owned household products for own use);



- c. covers all modes of transfer of ownership of new products to end users in Australia (whether retail sale, wholesale, hire, lease or other);
  - d. covers situations where the product is delivered to end users as part of a service without actual change of ownership; and
  - e. impacts on the initial purchase and period of use, but not on used, resold or refurbished product (unless offered as new).
9. Reflecting that the market for equipment and appliances in Australia is a national market, the new legislative framework should implement standards at a national level (with climatic variations and infrastructure issues considered as part of regulation impact analysis), with the aim that:
- a. agreed measures take effect in all jurisdictions at the same time;
  - b. no jurisdiction implements energy labelling or MEPS requirements that are different from those in other jurisdictions; and
  - c. ‘grandfathering’ provisions are harmonised across jurisdictions, and across programs (i.e. WELS, energy labelling and MEPS) in cases where a product type is subject to more than one mandatory program.
10. The new regulatory framework should provide for regulation of product imports as a means of enforcing compliance. Any import arrangements should be consistent and complementary to the Australia-New Zealand Closer Economic Agreement (ANZCERTA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA).
11. The new regulatory framework should ensure consistency across all jurisdictions with regard to:
- a. offences (whether civil, criminal or both); and
  - b. penalties (preferably as penalty points rather than fixed monetary amounts).
12. The new regulatory framework should allow for all enforcement options to be available to the program’s regulatory authority, irrespective of the jurisdiction in which non-compliance is detected.

## **Statement of Compatibility with Human Rights**

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

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

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 GEMS Bill**

The Greenhouse and Energy Minimum Standards (GEMS) Bill 2012 will establish national legislation to govern Australia's Equipment Energy Efficiency (E3) Program. The GEMS Bill will create a national framework to regulate energy efficiency and labelling standards, addressing inconsistencies that have arisen in the state- and territory-based legislation currently governing the E3 Program. The GEMS Bill will also allow the expansion of energy efficiency regulation in the future to cover a wider range of products.

The national legislative framework established by the GEMS Bill will implement Australia's commitments under Articles 4.1 and 4.2 of the United Nations Framework Convention on Climate Change to adopt national policies and measures to mitigate climate change and limit Australia's anthropogenic emissions of greenhouse gases, and to promote the development and application of technologies and practices that control anthropogenic emissions of greenhouse gases.

To support the national energy efficiency and product labelling regime, the GEMS Bill establishes various obligations for businesses that deal with regulated products, and creates a national Regulator that will oversee the E3 Program. To ensure the Regulator is able to administer the E3 Program effectively, the Bill grants various administrative powers, investigative powers and enforcement options to support the objectives of the E3 Program. Some of the provisions relating to monitoring and enforcement options engage with human rights.

Specifically, the GEMS Bill engages the right to the presumption of innocence; the right not to be compelled to confess guilt; and the right not to have one's privacy, family, home or correspondence arbitrarily or unlawfully interfered with.

#### **Right to the presumption of innocence—reverse onus provisions and strict liability offences**

Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) protects the right of every individual charged with a criminal offence to be presumed innocent until proved guilty according to law. The right to the presumption of innocence is also a fundamental principle of the common law. The United Nations Human Rights Committee has stated that the presumption of innocence "imposes on the prosecution the burden of proving

the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt”.<sup>1</sup>

### *Reverse onus provisions*

An offence-specific defence reverses the usual burden of proof by requiring the defendant to discharge the burden of proof for one or more matters specified as an element of the offence.

The question of whether a law that imposes a burden of proof on the defendant (often referred to as a “reverse-onus” provision) impermissibly limits the right to the presumption of innocence will depend on all the circumstances of the case, and in particular the justification for the reverse onus. For example, a provision may not impermissibly limit the right to the presumption of innocence if it relates to a matter that is peculiarly within the knowledge of the defendant. Provisions that merely place an evidential burden on the defendant (that is, the burden of showing that there is sufficient evidence to raise an issue) are more likely to be consistent with the rights protected by Article 14(2) of the ICCPR because the prosecution must still disprove those matters beyond reasonable doubt if the defendant discharges the evidential burden.

A number of clauses in the GEMS Bill engage the right to the presumption of innocence because they create offence-specific defences. Clauses 16 and 17, combined with section 13.3 of the *Criminal Code*, provide that a defendant who asserts that a product was second-hand bears an evidential burden in relation to this matter. This means that the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the product was in fact second hand. If the defendant discharges the evidential burden, the prosecution will be required to disprove those matters beyond reasonable doubt. This is relevant because the offences in clauses 16 and 17 do not apply if a product is second-hand. Requiring the defendant to prove that a product was second-hand (i.e. previously retailed in Australia) is considered appropriate because this matter is uniquely within the accused person’s knowledge.

Clauses 18 and 19, combined with section 13.3 of the *Criminal Code*, provide that a defendant who asserts that a product was supplied to the defendant in Australia will bear an evidential burden in relation to that matter. This is relevant because the offences in clauses 18 and 19 only apply to products imported into Australia for commercial use—they do not apply if the product was supplied in Australia. Requiring the defendant to prove these matters is also considered appropriate and necessary because the fact that a product previously was retailed, or supplied to the accused in Australia, is a matter uniquely within the accused person’s knowledge.

Chapter four of the Commonwealth *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered in the development of these clauses and is considered consistent with the proposed reverse onus of proof. For all these reasons the offence-specified defences included in the Bill are compatible with Article 14(2) of the ICCPR.

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<sup>1</sup> Human Rights Committee, General Comment No 32 Article 14: Right to equality before courts and tribunals and to a fair trial

### *Strict liability offences*

Part 3 of the GEMS Bill establishes obligations for people who supply regulated products or use regulated products for a commercial purpose (clauses 16-19). Regulated products must not be supplied, or used for a commercial purpose, unless they are registered with the E3 Regulator, and the products meet all applicable energy efficiency requirements. Regulated products that are supplied in Australia also must be labelled in accordance with any relevant labelling standards.

The obligations in clauses 16-19 are supported by a range of enforcement mechanisms, including the creation of strict liability criminal offences. A strict liability offence can be considered to engage Article 14(2) of the ICCPR because it removes the requirement for the prosecution to prove fault. This creates a risk that a person may be found guilty of an offence in circumstances where the person committed no intentional fault.

The inclusion of the strict liability offences referred to above are considered necessary and appropriate to ensure there is an effective deterrence to contraventions of the obligations under Part 3 of the GEMS Bill. The creation of strict liability offences is also reasonable because individuals supplying and using GEMS products will be placed on notice that they are required to take steps to guard against contravening the key obligations imposed by the Act.

The imposition of strict liability still allows a defendant to raise a defence of honest and reasonable mistake. This ensures that no person who supplies a GEMS product or uses a GEMS product for a commercial purpose can be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. For example, a person may not be liable if there were reasonable grounds to believe that a product model, and therefore all units of that model, complied with all requirements.

The application of strict liability is a proportionate limitation of the right to the presumption of innocence because of the high public interest in improving energy efficiency and reducing Australia's greenhouse gas emissions. A strong deterrence, in the form of an effective enforcement regime, is required because it often will be unfeasible to recall all non-compliant products that have been supplied into the Australian market, or installed for commercial use. If products cannot be recalled, inefficient products that contravene GEMS requirements are likely to have long-lasting adverse effects on energy consumption and energy costs for consumers, and on Australia's greenhouse gas emissions. The effectiveness of the GEMS enforcement regime would be greatly undermined if it were necessary for the prosecution to prove – in addition to proving that a person supplied, offered, or commercially used a GEMS product without complying with their obligations – that a person intended not to comply with those obligations.

The application of strict liability and the offences to which it relates have been developed with regard to the Senate Standing Committee for the Scrutiny of Acts *Sixth Report of 2002 on Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

## Right not to be subject to arbitrary or unlawful interference with one's privacy, family, home or correspondence

Article 17 of the ICCPR provides for the right of every individual to be protected against arbitrary or unlawful interference with the individual's privacy, family or correspondence. The term "privacy" has not been defined by international human rights law but it is generally accepted that it is very broad. An interference with an individual's privacy will not be considered "unlawful" if it is authorised by a law that complies with the provisions, aims and objective of the ICCPR and specifies in detail the precise circumstances in which such interferences may be permitted. An interference with an individual's privacy will not be considered "arbitrary" if it is reasonable in the particular circumstances and the law is in accordance with the provisions, aims and objectives of the ICCPR.<sup>2</sup>

Clause 170 of the GEMS Bill engages the right to privacy because it enables the GEMS Regulator to publicise, in any way he or she thinks appropriate, various matters. These matters could include that an individual has been convicted of an offence against the Act and that a civil penalty order has been made against an individual for contravening a civil penalty provision. However, this provision does not unlawfully interfere with a person's right to privacy because the clause specifies in detail the matters that the GEMS Regulator may publicise. Moreover, it is anticipated that giving the GEMS Regulator the power to publicise various matters about an individual will help to deter people from failing to comply with their obligations under the GEMS Bill. Given the importance of the objectives the Bill seeks to achieve the clause is reasonable in the circumstances, and does not arbitrarily interfere with an individual's right to privacy.

Clause 84 also engages the rights protected by Article 17 of the ICCPR because it would enable a GEMS inspector to enter any premises and exercise the monitoring powers conferred by the GEMS Bill. These powers could be exercised for the purposes of determining whether a provision of the Bill has or is being complied with or to determine whether information given in compliance or purported compliance with a provision of the Bill is correct. The term "premises" is broadly defined by clause 5 of the GEMS Bill, and includes any structure, building or place. A GEMS inspector could therefore enter an individual's home for the purposes set out in clause 84(1) (for example, if a GEMS inspector suspects that an individual is keeping their business records at home). However, the clause does not arbitrarily interfere with the rights protected by Article 17 because a GEMS inspector is not authorised to enter the premises unless the occupier of the premises has consented to the entry (and the GEMS inspector has shown his or her identity card if required by the occupier) or the entry is made under a monitoring warrant. Clause 99 of the GEMS Bill provides that a warrant may only be issued if the issuing officer is satisfied, by information on oath or affirmation, that it is reasonably necessary that one or more GEMS inspectors should have access to the premises for the purposes of determining whether a provision of the Act has been, or is being complied with, or information given in compliance or purported compliance with a provision of the Act is correct. Moreover, the warrant must state whether entry is authorised to be made at any time of the day or during specified hours of the day and specify the day (not more than 6 months after the issue of the warrant) on which the warrant ceases to be in force. As a result, clause 84 does not limit the rights

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<sup>2</sup> Human Rights Committee, General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)

protected by Article 17 of the ICCPR because any interferences with these rights are clearly authorised by law and are not arbitrary because they are necessary to ensure that the Act can be effectively enforced and appropriate safeguards have been put in place that will minimise the risk of the powers being misused.

### **Conclusion**

The GEMS Bill is compatible with human rights because, while it may limit certain human rights, those limitations are reasonable, necessary and proportionate, justified by the legitimate needs and objectives of the E3 Program and accompanied by appropriate safeguards.

**The Hon Greg Combet AM MP**  
**Minister for Climate Change and Energy Efficiency**  
**Minister for Industry and Innovation**

## Notes on Clauses

### **Part 1—Preliminary**

#### *Division 1—Preliminary*

##### **Clause 1 Short title**

1. Clause 1 establishes the short title of the Bill, the *Greenhouse and Energy Minimum Standards Act 2012*.

##### **Clause 2 Commencement**

2. Clause 2 sets the commencement dates for various sections of the Act. Clauses 1 and 2 will commence on the day the Act receives Royal Assent. Clause 17 will commence on 1 October 2013. All other clauses will commence on 1 October 2012.
3. The later commencement date for clause 17 is to allow people with existing registrations under the state-based Equipment Energy Efficiency (E3) Program one calendar year to transfer their registration to the national program, and provide any additional information required by the Greenhouse and Energy Minimum Standards (GEMS) legislation. Commencing clause 17 on 1 October 2013 ensures that people who are currently registered are not required to halt supplies until they have an opportunity to transfer an existing registration.

#### *Division 2—Guide to this Act*

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

4. Clause 3 provides an overview of the Act, broadly outlining the objects of the Act and the means by which they are achieved, as well as introducing the issues covered in each Part of the Act.

#### *Division 3—Objects of this Act*

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

5. Clause 4 outlines the objectives of the Act, which are to implement a number of Australia's obligations under the United Nations Framework Convention on Climate Change (UNFCCC), and to assist in promoting the development and adoption of technologies and products that will help to reduce Australia's energy consumption and associated greenhouse gas emissions.

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

##### **Clause 5 The Dictionary**

6. Clause 5 contains a dictionary to assist interpretation and implementation of the Act by defining the meaning of specific terms used in the Act.

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

7. Clause 6 clarifies that for various sections of the Act, such as section 16, 17, 18, and 19, a person is liable for civil or criminal penalties if the person contravenes the obligation set out in the section.
8. Clause 6 is required because of the style of drafting in various sections, which state an obligation such as ‘a person must not supply, or offer to supply, a GEMS product’ in certain circumstances. To remove any doubt, clause 6 clarifies that breaching these obligations constitutes a criminal offence, or gives rise to civil liability.

## ***Division 5—Application of this Act***

### **Clause 7 Act binds Crown**

9. Clause 7 ensures that this Act binds the Crown in its various capacities. Clause 7 does not make the Crown liable to prosecution for criminal offences established under the Act, although authorities of the Crown, including specific Government bodies and agencies, are liable for criminal prosecution. The Crown and its authorities also are liable to pay pecuniary penalties imposed under civil penalty provisions or infringement notices issued under the Act.

### **Clause 8 Extension to external Territories**

10. Clause 8 extends the operation of the Act to all of Australia’s external territories, ensuring that people and products in the territories are required to comply with the E3 Program.

### **Clause 9 Concurrent operation of state and territory laws**

11. Clause 9 clarifies that the Act does not exclude the concurrent operation of state and territory laws, to the extent those laws are consistent with the Act and able to operate concurrently with it.
12. This Act implements a 2009 commitment by the Council of Australian Governments to introduce national legislation to regulate appliance and product energy efficiency, in particular to ensure a nationally consistent compliance and enforcement scheme (measure 2.2.2 of the National Strategy on Energy Efficiency).
13. To ensure the national law established by this Act does provide a nationally consistent energy efficiency program and compliance scheme, state and territory laws relating to greenhouse gas production or energy use should be referred to in circumstances where those laws regulate matters not covered under this Act (i.e. non-GEMS products), or where those laws establish more stringent requirements than those established under this Act.
14. For example, if a determination made under this Act established a requirement that models of a certain product class cannot be supplied in Australia unless they operate at a ‘four star’ efficiency level or higher, a state or territory law would be inconsistent if it stated that products could legally be supplied if they met a minimum efficiency standard of ‘three stars’ or higher. A state or territory law that stated products could not



be supplied unless they met a minimum efficiency standard of ‘five stars’ or higher would not be inconsistent, as five star products would comply simultaneously with state and Commonwealth laws. It is appropriate to allow state and territory laws to set more stringent standards because this ensures jurisdictions have the ability to regulate energy efficiency to meet local variables without undermining the objectives of the national program.

15. Subclause 9(2) and 9(3) ensure that a state or territory law that is considered capable of operating concurrently under subclause 9(1) is not otherwise inconsistent with this Act simply because it creates offences for different conduct, or because the elements or penalties of offences differ from this Act. However, other issues may result in Constitutional inconsistency with this Act, for example, a law that required products to carry a different label than that required under this Act could be considered inconsistent.
16. Since clause 17 does not commence until 1 October 2013, to ensure existing registrants have time to update their registrations to comply with the Act, a state or territory law that provides penalties for supplying a product that is unregistered may not be considered ‘concurrent’ until clause 17 commences. This would permit penalties under state and territory laws in response to supplies of unregistered products.
17. These examples are not intended to provide an exhaustive list of issues that could affect whether a state or territory energy law is capable of operating concurrently with this Act.

## **Part 2—Key Concepts**

### ***Division 1—Guide to this Part***

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

18. Clause 10 provides a guide to Part 2 of the Act, which introduces key concepts including what products may be subject to regulation under the Act, the means by which these products will be categorised and regulated, and what kinds of supply will attract obligations under the Act.

### ***Division 2—Key concepts***

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

19. Clause 11 outlines some key concepts regarding the products regulated under the Act and the mechanisms by which these products are regulated.
20. Subclause 11(1) defines *GEMS products*, which are products that *use energy*, or *affect the amount of energy used* by a product, that are also in a *product class* covered by a GEMS determination.
21. Products that *use energy* may include products powered by gas or electricity or some other energy source, such as diesel. Products that *affect the amount of energy used* by another product model do not use energy themselves but will affect the energy consumption of other products, directly or indirectly. Examples might include

insulation, window glass or ducting as these products will affect the amount of energy used by heating and cooling systems.

22. Subclause 11(2) defines *GEMS determinations*, which are determinations made by the Minister under clause 23 of this Act that establish requirements for specified *product classes*. Product classes differentiate between products according to their functions and design, grouping products with other similar products to ensure that regulations can be appropriately tailored. For example, refrigerators may be regulated according to different *product classes* such as upright refrigerators, top-freezer refrigerators, bottom-freezer refrigerators, bar refrigerators, side-by-side refrigerator/freezer et cetera. Product classes also may be set according to functions and attributes that span different product types, for example, a single class for all products that have a stand-by power mode.
23. Subclause 11(3) clarifies that a single *product model* may fall within more than one product class, whether or not these product classes are covered by a single GEMS determination. For example, a combination clothes washing machine and clothes dryer may fall within ‘clothes washing machine’ and ‘clothes dryer’ product classes rather than a single ‘washer/dryer’ class. This ensures that manufacturers have the flexibility to create combination products without requiring individual determinations for combination products. A product model that falls within multiple product classes must comply with requirements for all those product classes (if any).
24. Subclause 11(4) introduces the concept of *category A* and *category B* GEMS products, (see clause 29). The category of a product class is relevant to penalties under the Act. In accordance with clause 29, the majority of GEMS products will be category A, with category B reserved for those products the Minister is satisfied will have high impact on energy use or greenhouse gas emissions, such that non-compliance with GEMS requirements would have a more serious negative impact on energy use and greenhouse gas emissions.
25. Subclause 11(5) introduces the concept of *replacement determination*, which is a GEMS determination that replaces an existing GEMS determination. Replacement determinations have some additional implications for registered products when compared to determinations that have no predecessor (see for example clauses 36 and 48).

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

26. Clause 12 establishes an obligation for *models* of GEMS products to be registered. This clause also defines the parameters for classifying products as a single *model* or a *family of models*.
27. Subclause 12(1) requires all *models* of GEMS products to be registered under the Act in relation to each product class that is covered by a determination, unless the determination exempts product models from the obligation to register in accordance with clause 30. In general, all product models in a class covered by a determination will need to be registered but in some specific cases, such as potential GEMS requirements for standby power, requirements may apply to such a broad range of product classes

that it would be undesirable to require registration of all product models covered by the determination.

28. Subclause 12(2) sets out the parameters for classifying two or more products in a product class as belonging to a single product *model*. A clear understanding of product model is required because, as indicated in paragraph 20, clause 12 requires product models to be registered rather than individual units.
29. To be considered units of a single model, products must have the same *technical specifications*, where those specifications are relevant to the product model complying with GEMS requirements. Examples of identical technical specifications may include factors like identical physical dimensions, identical modes of operation, the same power consumption per unit of output (e.g. X watts per degree of cooling per cubic metre) or the same level of greenhouse gas emissions per unit of power consumed. For the purposes of this Act, technical specifications do not include, for example, different cosmetic features that do not affect the product model's compliance with relevant GEMS requirements.
30. To be considered members of a single model, products also must have the same brand or trademark – or the same manufacturer if there is no brand or trademark – and an identifier (e.g. a number or code) that identifies products as being of the same model (known as a *model identifier*). The Act does not require a model identifier to be marked on the product itself, it may be an administrative item manufacturers or suppliers use to identify the model as separate to other models.
31. All the elements of the definition of model must be satisfied for products to be classified as units of the same model, meaning that a group of products becomes a different model for the purposes of the E3 Program if any of the elements changes. For example, if a business registers a product model under a particular brand name and/or model number, and a downstream supplier changes the brand name or model number, this constitutes a new product model and the downstream supplier must register the model to permit supply in Australia. The requirement to register products after a change in brand name or model number will replicate the process in the existing E3 Program. It is appropriate to do so because all registered products are recorded on the publicly available database according to their brand name (if any) and model number. If products are not registered after a change in brand name or model number, inspectors and prospective purchasers cannot identify product models on the database and determine whether they are registered. People who purchase GEMS products for retail sale have a particular interest in this information being clear and easily identifiable as, under part 3 of the Act, they can incur penalties for supplying products that are not registered.
32. Subclause 12(3) introduces the concept of a *family of models*, which is an administrative concept allowing different models to be registered under a single registration. In general, only different product models with identical technical specifications will qualify as a family of models. However, in accordance with clause 28, each determination will specify the exact circumstances in which two or more models of a particular class of products fall within the same family (if any). This ensures that determinations have the flexibility to specify different parameters for family of models, should cases arise where this is appropriate.

33. Subclause 12(4) provides that a single model cannot be covered by more than one registration per product class. Combined with the elements of the definition of product *model*, clause 12(4) ensures that a single registration permits supply or use of a product model by any person provided the details under which the product is registered are not changed. If details such as brand name and model number are changed, a product constitutes a new model that must be registered separately.
34. The parameters for product models, coupled with the concept of family of models, are intended to ensure that individual product models can be clearly identified and registered separately under the Act, without limiting a manufacturer or supplier's discretion to classify products with purely cosmetic differences as a single model or multiple models.

Example:

35. A manufacturer produces three refrigerators with performance that is identical in all ways (identical *technical specifications*). One is available with a door that opens on the left-hand side and two are available with a door that opens on the right-hand side—one in white finish and the other in silver. Because all refrigerators have identical technical specifications and are manufactured by the same person, if the manufacturer gives all three refrigerators the same *model identifier* they could be registered as a single *model* for the purposes of the Act. Alternatively, the manufacturer may elect to give each refrigerator a different *model identifier* to assist clients to differentiate between the different colours and doors. In this case the refrigerators could be registered as three different *models* of the same *family*, meaning the person registering the different models will require only one registration application and pay one registration fee.

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

36. Following from the obligation to register product models under clause 11, clause 13 provides guidance about the determination against which a product model must be registered.
37. Subclause 13(1) clarifies terminology used in the Act, stating that products registered under clause 13 are *registered against* a relevant GEMS determination.
38. Subclause 13(2) provides guidance as to which GEMS determination a model is registered against in various situations, and highlights the clauses that determine these matters.
39. Subclause 13(3) clarifies that a product model's registration may or may not be *affected by* a replacement determination. Each replacement determination will specify whether it affects some or all of the registrations against the revoked determination. If a model's registration is not affected by a determination, the Act will deem the model to be registered against the new determination without any action by the registrant (see clause 36).

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

40. Clause 14 defines the terms *supply* and *offer to supply*, which are central to certain obligations under the Act.

41. Subclauses 14(1) and 14(2) clarify that *supply* of a GEMS product is a broad term including all forms of supply, regardless of whether the supply is for consideration or a wholesale or retail supply. Without limiting the term, the Act is drafted with the understanding that *supply* is the act of physically providing an item to a person, not agreeing or contracting to provide an item to a person.
42. Subclause 14(3) clarifies that *offer to supply* is a broad term, intended to include making a product available for supply or any method of promoting a product for supply.
43. Whether an act constitutes an *offer to supply* is a question of evidence and may be established by matters beyond the immediate act itself. For example, exposing or advertising a product model with a disclaimer that the product model is not for sale may not be sufficient to preclude a court deciding the exposure or advertisement is an *offer to supply* if the product model is later supplied.

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

#### Application of strict liability to offences under Part 3

44. Clauses 16 and 18 establish obligations regarding the supply or commercial use of GEMS products that do not meet GEMS requirements. Clauses 17 and 19 establish obligations regarding the supply or commercial use of GEMS products that are not registered as required by clause 12. Each of these obligations is supported by offences of strict liability. The application of strict liability is considered necessary and appropriate to ensure an effective deterrence to contraventions of the obligations under clauses 16-19. The effectiveness of the enforcement regime would be greatly undermined if it were necessary to prove that, in addition to proving that a person did supply or commercially use a GEMS product without complying with legal obligations, a person intended not to comply with those legal obligations when supplying or using a product for a commercial purpose.
45. Strict liability recognises that people supplying and using GEMS products have an obligation to consider whether the product meets requirements and to deal only with those products that do meet legal requirements. The imposition of strict liability will not criminalise honest errors and no person who supplies a GEMS product or uses a GEMS product for a commercial purpose can be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. For example, a person may not be liable if there were reasonable grounds to believe that a product model, and therefore all units within that model, complied with all requirements.
46. The application of strict liability recognises the high public interest in improving Australia's energy efficiency and reducing Australia's greenhouse gas emissions and the responsibility of suppliers and commercial users of GEMS products to ascertain, prior to supply or use, whether the products they deal with are subject to GEMS requirements and meet the applicable GEMS requirements. A strong deterrence is required to encourage suppliers and commercial users to comply with their responsibilities because it often will be unfeasible to recall non-compliant products that have been supplied into the Australian market or installed for commercial use. This

means that contravention of GEMS requirements is likely to have a long-lasting adverse effect on Australia's energy consumption, Australia's greenhouse gas emissions and the energy costs of Australian consumers.

47. The application of strict liability and the offences to which it relates have been developed with regard to the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002 on *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

### ***Division 1—Guide to this Part***

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

48. Clause 15 provides a guide to Part 3 of the Act, which establishes the Act's principle obligations for suppliers and commercial users of GEMS products and outlines the Constitutional limitations of the Act in its capacity to regulate suppliers and commercial users of GEMS products.

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

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

49. Clause 16 prohibits the supply, or offer to supply, a GEMS product in certain circumstances and provides civil and criminal penalties for persons who contravene this prohibition.
50. Subclause 16(1) prohibits a person supplying, or offering to supply, a GEMS product that is subject to an existing GEMS determination unless the product and the act of supply, or the offer to supply, comply with all relevant GEMS requirements.
51. Paragraphs 16(2)(a) and 16(2)(b) provide that the prohibition under subclause 16(1) does not apply if the product is a second-hand product (defined in the dictionary under clause 5) or if the product model is exempt from GEMS requirements under clause 37 (and all exemption conditions are complied with).
52. Subparagraph 16(2)(c)(i) provides that the obligation under subclause 16(1) also does not apply if products were imported into Australia before the GEMS determination comes into force, or if the last stage of the product's manufacturing process was completed in Australia (subsequently referred to as 'manufactured in Australia') before the GEMS determination comes into force. However, in accordance with subparagraphs 16(2)(c)(ii)-16(2)(c)(v), to be supplied (or offered) legally any product imported into or manufactured in Australia before a GEMS determination comes into force must also be supplied (or offered) before the end of the limited grandfathering period imposed (if any – see clause 31), must be supplied (or offered) in a way that complies with all transitional GEMS labelling requirements (if any – see clause 26(3)(c)), and the product must comply with any relevant requirements existing before the GEMS determination comes into force. These include any applicable standards and requirements under state and territory laws that regulate product energy efficiency.

53. Paragraph 16(2)(c) ensures that, in most cases, businesses that imported or manufactured products at a time when it was lawful to supply those products can continue to supply those products. This reduces the risk that businesses which obtained products that were legal for supply or use at the time will be stuck with stock if requirements change. However, unrestrained permission to supply non-compliant products could provide an incentive to stockpile products that will not comply with prospective determinations, undermining the objectives of the E3 Program. The optional limited grandfathering period will allow the Minister to strike the correct balance between business impact and the objectives of the GEMS legislation, and ban supplies or uses of products where there is an anticipated stockpiling risk. While not all products are likely to exhibit the same stockpiling risk, if experience with the E3 Program discloses that products are regularly stockpiled prior to new determinations coming into force then the Minister could be expected to exercise the power more frequently.
54. Subclauses 16(3) and 16(4) provide criminal offences of strict liability for contraventions of the obligation under subclause 16(1). As described in paragraphs 40-43 of this explanatory memorandum, strict liability is considered appropriate and necessary to ensure an effective deterrence to contraventions of obligations under subclause 16(1).
55. Subclause 16(3) provides that contraventions relating to a *Category A* product model carry a criminal penalty of 60 penalty units. Subclause 16(4) provides that contravention relating to a *Category B* product model carries a criminal penalty of 120 penalty units. The grounds for differentiating products between Category A and Category B are set out in clause 30. In most cases, products will be classified as Category A products, unless the Minister determines a product model has a high impact on energy use or greenhouse gas emissions and should therefore be classified as Category B. A higher penalty is justified for such products because contraventions of the Act relating to such products have more serious implications for Australia's energy use and Australian greenhouse gas emissions, so that offences involving these products should be more heavily discouraged and punished than contraventions related to products with lesser impact on energy use and greenhouse gas emissions.
56. Subclauses 16(5) and 16(6) provide that contraventions of subclause 16(1) can be the subject of civil penalty proceedings. Subclause 16(5) provides a penalty of 60 penalty units for contraventions relating to category A products while subclause 16(6) provides a penalty of 120 penalty units for contraventions relating to category B products. Providing criminal and civil remedies allows flexibility to respond to contraventions of the Act, with remedies proportionate to the seriousness of the conduct.
57. Subclause 16(7) clarifies who has responsibility for proving certain matters in civil and criminal action. When prosecuting an offence against subclause 16(3) or 16(4), the prosecution bears the evidential burden of proving the matters in paragraph 16(2)(b) and 16(2)(c). This recognises the fact that, while the matters in subclauses 16(3) and 16(4) are phrased in the form of a defence (i.e. circumstances in which subclause 16(1) does not apply) for the sake of clarity in drafting, they are matters that the prosecution should establish.

58. A defendant bears the evidential burden of proving matters under paragraph 16(2)(a), that a product has been previously retailed in Australia (i.e. is second-hand – see clause 5). This is appropriate because proving no previous supply would be a difficult matter for prosecution while establishing some previous supply should be a comparatively easy matter for a defendant. Subclause 16(8) provides, in terms similar, that in civil penalty proceedings a person who wishes to rely on paragraph 16(2)(a) bears the evidential burden of proving a product is second-hand and the person applying for the order bears the burden of proving the matters in paragraphs 16(2)(b) and 16(2)(c).

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

59. Subclause 17(1) prohibits supplies, or offers to supply, of GEMS products of models that are not registered as required by clause 12.
60. Subclause 17(2) clarifies that subclause 17(1) does not apply if a product is second-hand or if the model is exempt from registration (see clause 30).
61. It is worth noting that products that can be supplied in accordance with paragraph 16(2)(c) may not be registrable under clauses 11 and 12, for example, because the product no longer meets GEMS requirements. Legislative permission for this situation, which would require complex drafting, need not be expressly included in subclause 17(2) because asserting liability where a product can be supplied in accordance with paragraph 16(2)(c), but cannot be registered, would create a conflict between clauses 16 and 17. If doubt arises whether liability arises for the supply of a product that can be supplied under paragraph 16(2)(c) but cannot be registered, the question should be resolved to allow supply under paragraph 16(2)(c) without liability under clause 17.
62. Subclauses 17(3)-17(6) establish strict liability criminal offences and civil liability provisions for contraventions of the obligations under subclause 17(1), in terms similar to the penalty provisions under subclauses 16(3)-16(6). Civil and criminal contraventions with regard to category A products carry penalties of 60 penalty units, while contraventions with regard to category B products carry penalties of 120 penalty units to reflect the more serious results of these contraventions (see clause 29). In accordance with subclauses 17(7) and 17(8), a person who asserts that subclause 17(1) does not apply because a product is second-hand bears the evidential burden for proving those matters (see clause 17(2)( a)). The prosecution, or person applying for a civil penalty order, bears the evidential burden of establishing that a product model is not exempt from registration (see clause 17(2)( b)).

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

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

63. In terms similar to clause 16, clause 18 prohibits the use of a GEMS product for commercial purposes in certain circumstances and provides civil and criminal penalties to support this prohibition.
64. *Using a product for a commercial purpose* refers to circumstances in which there is no supply event in Australia because a person imports a product into Australia, or manufactures a product in Australia, for some commercial use. For example, a



supermarket chain may import lighting or refrigerators for use in shops, or a person may import products to fit-out worker accommodation or investment accommodation.

65. It is appropriate and necessary to cover these circumstances to ensure the E3 Program covers situations where there is no supply event in Australia. Not covering these circumstances would result in a gap in coverage that would allow businesses to circumvent the objectives of the Act by purchasing less efficient products overseas, or manufacturing less efficient products domestically.
66. Subclause 18(1) prohibits a person using a GEMS product for a commercial purpose if, at the time the product is first used for a commercial purpose, the product does not comply with all relevant GEMS requirements.
67. The provisions relating to commercial use focus on the time of first use to ensure that GEMS requirements (if any) are complied with at that time but to ensure that subsequent changes in GEMS requirements do not give rise to liability for products in use or mandate replacement of potentially capital-intensive GEMS products.
68. Subclause 18(2) provides that subclause 18(1) does not apply in certain circumstances. Subclause 18(1) does not apply if the GEMS product was supplied in Australia (as clause 16 addresses this situation) or if the use is an *exempt use* (see clause 21). Similarly to subclause 16(2), paragraph 18(2)(d) provides that the obligation under subclause 18(1) does not apply if products were imported into Australia for commercial use before the GEMS determination comes into force, or were manufactured in Australia before the GEMS determination comes into force. However, in accordance with subparagraphs 18(2)(c)(ii)-16(2)(c)(iv), to be legally used for a commercial purpose a product imported into or manufactured in Australia before a GEMS determination comes into force must also be used for the first time before the end of the limited grandfathering period imposed (if any – see clause 31) and must comply with any relevant requirements existing before the GEMS determination comes into force. These include any applicable requirements under state and territory law.
69. Subclauses 18(3)-18(6) establish strict liability criminal offences and civil penalty provisions for contraventions of subclause 18(1). Civil and criminal contraventions with regard to category A products carry penalties of 60 penalty units, while contraventions with regard to category B product carry penalties of 120 penalty units to reflect the more serious results of these contraventions. In accordance with subclauses 18(7) and 18(8), a person who asserts that subclause 18(1) does not apply because a product is second-hand bears the evidential burden for proving those matters (see clause 18(2)( b)). The prosecution, or person applying for a civil penalty order, bears the evidential burden of establishing that a product model is not exempt from registration (see clause 18(2)( c)).

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

70. In terms similar to clause 17, clause 19 prohibits the commercial use of GEMS products of models that are not registered as required by clause 11.

71. Subclause 19(1) prohibits the commercial use of a GEMS product if, at the time of first use, the product is covered by a GEMS determination and the product is not registered against the relevant GEMS determination.
72. Subclause 19(2) provides that subclause 19(1) does not apply if the product was supplied in Australia (as clause 17 addresses this situation); if the product is used for an *exempt use*; or if the product model is exempt from registration in relation to a particular product class under clause 30.
73. In terms similar to subclauses 17(3)-17(6), subclauses 19(3)-19(6) establish strict liability criminal offences and civil penalty provisions for contraventions of subclause 19(1). Civil and criminal contraventions with regard to category A products carry penalties of 60 penalty units, while contraventions with regard to category B product carry penalties of 120 penalty units to reflect the more serious results of these contraventions. In accordance with subclauses 19(7) and 19(8), a person who asserts that subclause 19(1) does not apply because a product is second-hand bears the evidential burden for proving those matters (see clause 19(2)( b)). The prosecution, or person applying for a civil penalty order, bears the evidential burden of establishing that a product model is not exempt from registration (see clause 19(2)( c)).

#### **Clause 20 Exempt uses of GEMS products**

74. Clause 20 defines certain uses of GEMS products as falling outside the prohibitions against commercial use in clauses 18 and 19. Each of these uses is known as an *exempt use*.
75. As clauses 18 and 19 are focussed on the use of GEMS products for commercial purposes, personal use of GEMS products by individuals is an exempt use. Using a product in order to test that product before it is supplied to a consumer is also an exempt use, to ensure that businesses have the ability to test products in Australia before making a decision whether to supply a product model or use a product model for commercial purposes. Other exempt uses may be specified in Regulations.

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

#### **Clause 21 Constitutional limitation**

76. Clause 21 clarifies the effect of the Act as it relates to *supply* (subclause 21(1)), *offer to supply* (subclause 21(2)) and *use for a commercial purpose* (subclause 21(3)). Should any doubt arise about the scope of these terms, or associated provisions of the Act, each term should be understood as if each reference to these terms were expressly limited to specific heads of Commonwealth Constitutional power. This ensures that if doubt arises about the scope of a provision, the provision can be read down as limited to the appropriate Commonwealth heads of power and not be struck out for uncertainty.
77. The overarching Constitutional head of power for provisions relating to these terms is the external affairs power under paragraph 51(xxix) of the Australian Constitution, as the Act implements commitments under the United Nations Framework Convention on Climate Change and other international agreements. In situations of ambiguity, the terms also should be understood as referring to supply, offer to supply or commercial use by constitutional corporations (paragraph 51(xx)); by persons engaged in

Constitutional trade and commerce involving GEMS products (paragraph 51(i)); by business activities involving postal, telegraphic and other carriage services (paragraph 51(v)); by the Commonwealth or its Territories, authorities and instrumentalities; and supply, offer or commercial use occurring in a Commonwealth place or a territory (section 122, and section 61 supported by paragraph 51(xxxix)).

## **Part 4—GEMS determinations**

### ***Division 1—Guide to this Part***

#### **Clause 22 Guide to this Part**

78. Clause 22 provides a guide to Part 4 of the Act, which deals with making and replacing *GEMS determinations*, the instruments by which labelling, efficiency, or other product requirements will be set.

### ***Division 2—Making GEMS determinations***

#### **Clause 23 Minister may make GEMS determinations**

79. Clause 23 grants the Minister power to issue legislative instruments, known as *GEMS determinations*, to regulate one or more *classes* of products that use energy or affect the amount of energy used by another product. The type or source of energy is not limited and determinations may cover, for example, products that consume electricity or products powered directly by gas, diesel or other energy sources.
80. Examples of products that affect the amount of energy used by another product model include products such as insulation, window glass, or ducting, which affect the amount of energy used by air conditioners or heaters.
81. *Product classes* will be determined according to the features of the products (see also paragraph 10(2)(a) of the Act). The parameters of product classes are not defined in the Act due to the variety of products that may be regulated but will be clearly established in each determination. For example, refrigerators vary greatly in design and function, which may recommend differentiating between different product classes of upright refrigerators, top-freezer refrigerators, bottom-freezer refrigerators, bar refrigerators, side-by-side refrigerator freezers and other *product classes*. This approach, currently used in the existing E3 Program, ensures that determinations can set requirements that are appropriate and adapted to each product class.

#### **Clause 24 GEMS requirements—general**

82. Clause 24 specifies in general terms the matters that a GEMS determination issued by the Minister must or may include.
83. A GEMS determination must include *GEMS level requirements*, *GEMS labelling requirements*, or both, detailed in clauses 25 and 26. These requirements directly advance the principle objectives of the Act, using mandatory minimum efficiency requirements and labelling information to promote products that will assist to reduce Australia's energy consumption and related greenhouse gas emissions. A determination

that does not include either GEMS level requirements or GEMS labelling requirements is not valid.

84. A determination containing GEMS level requirements or GEMS labelling requirements also may include *other requirements* detailed in clause 27. These requirements assist to ensure that products promoted under the E3 Program do not sacrifice adequate performance, or impose human health or environmental costs. For example, compact fluorescent lamps, like other fluorescent lamps, contain mercury vapour. A GEMS determination may include a requirement that compact fluorescent lamps contain no more than a maximum quantity of mercury vapour.

#### **Clause 25 GEMS requirements—GEMS level requirements**

85. Clause 25 details the matters that can be the subject of GEMS level requirements established by GEMS determinations issued by the Minister.
86. *GEMS level requirements* may establish mandatory minimum standards relating to the amount of energy used by a product, or to the amount of greenhouse gas emissions a product produces while it operates, or to a product's effect on the energy use of another product. For example, GEMS level requirements might set a maximum amount of energy refrigerators can use to cool a given volume, might specify the maximum amount of greenhouse gas a diesel generator can produce per unit of energy output, or might specify a minimum thermal resistance of insulated ducting systems and other insulation products.
87. Greenhouse gases resulting from the operation of a product may include any greenhouse gases produced directly by the product's operation (e.g. by burning gas or diesel) and gases associated with the product's operation, such as greenhouse gas emissions arising from the product's consumption of electricity or another external power source. These direct and indirect greenhouse gas emissions are often termed 'Scope 1' and 'Scope 2' emissions, respectively. For the purposes of this legislation, greenhouse gases resulting from the operation of a product do not include 'Scope 3' emissions, which are indirect emissions arising from processes other than the product's operation – such as emissions arising from manufacturing or disposing of products.
88. It is appropriate to allow GEMS level requirements to regulate scope 1 and scope 2 emissions as these are the sources of greenhouse gas emissions arising from power consumption, which is the emissions factor most directly under manufacturers' control. While scope 3 emissions may be beyond a manufacturers direct influence, the amount of power a product consumes and the amount of greenhouse gas a product directly emits are factors that manufacturers can influence.
89. GEMS level requirements also may set requirements to test products, in any manner specified in the determination, to check whether the product model meets the GEMS level (requirements relating to energy use or greenhouse gas emissions).

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

90. Clause 26 details the matters that can be subject to *GEMS labelling requirements* established by determinations issued by the Minister.

91. GEMS labelling requirements are intended to ensure that products are labelled with accurate information to inform purchasers about the efficiency of products, to inform purchasing choices and encourage the market to move toward greater efficiency. These requirements may relate to the information that must be communicated when supplying or offering to supply products (26(1)(a)), requirements to conduct tests to ensure the information is accurate and can be compared across products (26(1)(c)), and requirements relating to the way information must be communicated, for example, to ensure information is clearly legible in each label (26(1)(b)).
92. A determination may establish GEMS labelling requirements only for the purposes of comparing products within a product class, to assist monitoring compliance with the Act (e.g. ensuring inspectors can easily identify a product's efficiency level), or for transitioning to a new GEMS determination. Requirements to allow for a transition to a new GEMS determination may include issues such as replacing older labels (e.g. a product considered '5 star' under an old determination is only '3 star' under a new determination) or applying labels in-store because they were not required to be labelled when they were manufactured.

### **Clause 27 GEMS requirements—other requirements**

93. Clause 27 lists *other requirements* that may be specified under GEMS determinations. The matters under clause 27 cannot stand alone in a determination but may only be included in a determination that specifies *GEMS level requirements* and/or *GEMS labelling requirements*.
94. Paragraph 27(1)(a) permits GEMS determinations to establish requirements for meeting the *high efficiency level* for a product class. A high efficiency level is a concept that will help to distinguish the most efficient product models in each product class, assisting businesses to promote highly efficient products. Products need not meet the high efficiency level but those which do will be entitled to use the more distinctive high efficiency label and claim – for as long as they meet the high efficiency level (which may change over time to encourage greater efficiency). High efficiency level requirements must relate to *GEMS level* matters, that is, the amount of energy used or greenhouse gases produced by a product, or the effect on the energy used by another product.
95. Paragraph 27(1)(b) permits GEMS determinations to establish performance requirements for products. For example, requirements for a washing machine to remove a certain amount of soil from clothes, or requirements for a refrigerator to cool food to a certain temperature. These performance requirements are intended to prevent products entering the Australian market that are designed to meet GEMS levels but are unfit for the product's intended purpose.
96. Paragraph 27(1)(c) permits GEMS determinations to establish requirements related to a product's impact on human health or the environment, for example, requirements relating to the permissible amount of mercury gas in fluorescent lamps. This will assist to prevent products entering the Australian market that are designed to meet efficiency standards but pose a health or environmental threat. Where impacts on human health or the environment are addressed in other legislation, GEMS determinations should only complement other legislation and not duplicate or contradict existing regulations.

97. Paragraph 27(1)(d) permits additional *other requirements* to be specified in regulations.
98. Paragraph 27(1)(e) permits GEMS determinations to establish testing requirements to verify a product model's performance against *other requirements* established under paragraphs 27(1)(a)-27(1)(d).

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

99. Clause 28 requires each determination to specify, for each product class it covers, the parameters for determining that two or more product models belong to the same 'family' of models. The concept of a family of models allows separate models to be covered by a single registration (see subclause 12(3)).
100. The parameters for a family of models is not limited by the Act but, in most cases, could be expected to group product models with identical performance but cosmetic differences (e.g. identical *technical specifications* but different *model identifiers*). The concept is primarily intended to allow registrants the flexibility to differentiate product models with identical performance without incurring an obligation to register each model separately, but the flexibility is available to group products according to other parameters.

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

101. Clause 29 requires each determination to classify products in each product class it covers as either category A or category B products.
102. The Minister may classify a product as category B if satisfied that products in that class have high energy consumption or result in high levels of greenhouse gas emissions, either through scope 1 or scope 2 emissions. Contravening the Act with regards to category B products carries higher penalties than contravening the Act with regards to category A products.
103. Since each individual category B product has the potential to create more greenhouse gas pollution and incur greater energy consumption costs than category A products, there is a correspondingly greater need to discourage people supplying or using category B products that do not meet requirements. Ensuring higher penalties for category B products will assist to discourage and sanction breaches of the Act.

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

104. Clause 30 allows a determination to exempt models of a specified product class from the obligation to register. This primarily is intended to address determinations that specify requirements for such a broad range of product classes that it would be undesirable to require registration of all models affected by the requirements. An example might be a determination setting requirements for standby power, which may not apply to individual product classes but may apply to all product classes with a standby power mode.

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

105. Clause 31 allows the Minister to specify a *limited grandfathering period* in a determination. This would have the effect of limiting the time in which product models may be supplied or used even if they do not meet the requirements of a determination. After the expiration of the period, it is not permitted to supply, offer to supply or use for a commercial purpose the product models subject to the grandfathering period.
106. In most cases, products that are imported into or manufactured in Australia before a determination comes into force can be supplied, offered or used for a commercial purpose indefinitely, provided the product model met any requirements existing when it was imported into or manufactured in Australia (see paragraphs 16(2)(c) and 18(2)(d)). However, in some cases permitting indefinite supply of products imported into or manufactured in Australia before a determination comes into force may create an incentive to stockpile goods and undermine the objectives of the E3 Program. Where a risk of stockpiling is considered to require management, the Minister has the capacity to impose a *limited grandfathering period*, after which existing stock could not be legally supplied or used. This option will assist the Minister to strike the correct balance between pursuing the objectives of the E3 Program by discouraging stockpiling while ensuring businesses seeking to comply with the objectives in good faith are not left with stock that cannot be supplied because the stock was not cleared before new requirements commenced.

### **Clause 32 GEMS determinations—not to give preference**

107. Clause 32 applies principles similar to those of section 99 of the Australian Constitution to GEMS determinations, prohibiting the Minister making a determination that grants preference to a state, or a part of a state, over any other state, or part of a state. This does not prohibit GEMS determinations giving appropriate recognition to objective differences between different areas of Australia, such as climate variables that affect the operation of products.

### **Clause 33 GEMS determinations—consent of participating jurisdictions**

108. Clause 33 recognises the cooperative nature of the national E3 Program and anticipates the participation of other Australian jurisdictions to develop GEMS determinations.
109. Subclause 33(1) requires the Minister to obtain the consent of participating jurisdictions to the terms of each GEMS determination before issuing a determination. Consent must be obtained in accordance with any written procedures that participating jurisdictions develop for obtaining consent, if any exist at the time of making a determination, or from a two-thirds majority of participating jurisdictions if no such written procedure exists. A determination is not valid if prior consent to the terms is not obtained from participating jurisdictions in accordance with subclause 32(1).
110. The Commonwealth is a participating jurisdiction for the purposes of obtaining consent, as is any Australian jurisdiction the Commonwealth has agreed is a participating jurisdiction, where the agreement remains in force at the time the determination is made.

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

111. Clause 34 establishes a default period of 12 months between a GEMS determination being made and a GEMS determination coming into force. It is appropriate to provide a lead time before the majority of new determinations come into effect to ensure that Australians are able to react to any new requirements.
112. A determination can specify a longer or shorter period before commencement in cases where the Minister considers it appropriate. A shorter period may be appropriate, for example, where a determination does not affect registrations or includes obligations relating only to labelling that must be displayed at the point of supply.
113. The day on which a determination comes into force is important to understanding various obligations under the Act. For example, in some circumstances products that are imported into or manufactured in Australia *before* the day on which a GEMS determination commences may be supplied after commencement, even if they do not satisfy the new requirements (see clause 16(2)(c)). Products imported or manufactured after the day on which a determination comes into force cannot be supplied lawfully if they do not satisfy relevant requirements, unless they are exempt from meeting requirements.

### ***Division 3—Replacing GEMS determinations***

#### **Clause 35 Replacing GEMS determinations**

114. Clause 35 sets out the Minister's powers to replace and revoke GEMS determinations. It specifies that, despite section 33(3) of the *Acts Interpretation Act 1901*, the Minister cannot vary a GEMS determination but may revoke a GEMS determination and issue a replacement GEMS determination.
115. This ensures that GEMS requirements cannot be altered by amending a determination but must be made anew so that all procedures required of, and flowing from, new determinations apply to a replacement determination. For example, a replacement determination may not be issued without the consent of participating jurisdictions, in accordance with clause 31, and will come into force on the day determined in accordance with clause 32.
116. To ensure the cooperative nature of the E3 Program anticipated in clause 33 is maintained in revoking and making determinations, subclause 35(3) requires the Minister to obtain the consent of participating jurisdictions to revoke a determination that will not be replaced.
117. Clause 35(4) clarifies that a replacement determination revokes the determination it replaces, effective immediately before the new determination commences (i.e. no separate instrument of revocation is required).

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

118. Clause 36(1) requires a determination that replaces a previous determination to specify whether it affects the registration of any or all of the product models to which the determination applies. If a product model's registration is affected by a determination,



that registration ceases (see clause 48) and must be re-registered to permit supply or use of the product model. This is to ensure that all product models are registered against the current determination, and that products which do not satisfy new requirements are deregistered.

119. If a product model's registration is not affected by a determination, clause 36(2) ensures the model is taken to be registered against the new determination, without any further action by the registrant. This avoids administrative processes for businesses whose registrations are unaffected by a determination.
120. A Determination could be expected to affect registrations when some material change to requirements has occurred, for example, the determination introduces new GEMS levels, which make it necessary for registrants to consider whether their product meets the requirements of the new determination.
121. Clause 36(3) states that the requirement to seek the consent of participating jurisdictions under clause 33 does not apply when a replacement determination does not affect the registration of any product models. This ensures a replacement determination that alters issues of less importance and does not affect any product models can be issued via an expedited process, without obliging Ministers of participating jurisdictions to vote formally on the terms of the determination.

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

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

122. Clause 37 sets out the processes by which the GEMS Regulator may exempt product models from obligations to meet GEMS requirements.
123. Subclause 37(1) grants the GEMS Regulator the power to issue legislative instruments to exempt specified models from one or more GEMS requirements. The exemption may apply to all supplies, offers to supply, or commercial uses of that model, or only some specified supplies or commercial uses. For example, the legislative instrument may exempt a certain model of motor from requirements for all supplies and uses, so any person can supply or use the product without meeting requirements. Alternatively, the exemption may permit a specific commercial purpose, or specific supply, because of special circumstances that recommend an exemption.
124. Subclause 37(2) permits the Minister to specify conditions that all persons affected by the exemption must comply with. Without limiting the issues to which conditions may relate, subclause 37(2) gives examples of the matters to which conditions may relate, including the way an exempt product model must be labelled, or conditions regarding the actual supply or commercial use of the exempt product model. Exemptions may be time limited if the Regulator considers it appropriate, or may be granted in perpetuity.
125. Subclause 37(3) requires all persons to comply with conditions specified in an exemption, to the extent those conditions apply to the person. Non-compliance with exemption conditions is grounds for suspending or cancelling a registration under clauses 49 and 54.

126. Subclause 37(4) lists a range of issues the Regulations may address to guide registration exemptions, including requirements for applications for exemptions or requirements to consider certain matters when considering an application for exemption. Subclause 37(4) is indicative only and is not intended to provide an exhaustive list of all matters the Regulations may address.
127. Subclause 37(5) applies principles similar to those of section 99 of the Australian Constitution to exemptions, prohibiting the Regulator making an exemption that grants preference to a state, or a part of a state, over any other state, or part of a state. This does not prohibit exemptions giving appropriate recognition to objective differences between different areas of Australia, for example, different climate variables that mean the reasons for prohibiting a certain product type or model are not applicable in a particular region.

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

### ***Division 1—Guide to this Part***

#### **Clause 38 Guide to this part**

128. Clause 38 provides a guide to Part 5 of the Act, which governs the registration of GEMS product models. The matters covered by Part 5 of the Act include the registration application process and obligations for registering entities, as well as the administration and public recording of registrations, and the processes by which registrations can cease.

### ***Division 2—GEMS Register***

#### **Clause 39 Establishment of GEMS Register**

129. Clause 39 requires the GEMS Regulator to establish and maintain a register, in any form the Regulator considers appropriate, to record registrations and other information relevant to the E3 Program. The register, or any part of it, may be published on the internet for public access, subject to limitations on the use of personal or commercially sensitive information that may exist from time to time. Regulations may be issued specifying information that must be published online.

#### **Clause 40 Information to be entered in GEMS Register**

130. Clause 40 lists the information that must be included in the GEMS register for each registered product model or family of models, including details that allow each registrant and registered model to be identified, and the determinations against which each model is registered. Subclause 40(1) also allows regulations to specify additional information that must be included in the register. Not all information that must be included in the register would necessarily be published on the internet under subclause 39(3). For example, information that is protected under privacy laws or other obligations to confidentiality would not be subject to online publication.
131. To ensure the flexibility to include other relevant information in the Register, subclause 40(2) permits the GEMS Regulator to include in the Register any information that he or she considers appropriate, in addition to information that must be included under

subclause 40(1). Subclause 40(3) acts to ensure the register remains up to date and obliges the GEMS Regulator to update information on the Register as soon as practicable.

### ***Division 3—Registering models of GEMS products***

#### **Clause 41 Registration on application**

132. Clause 41 clarifies that a single application for registration may cover one product model, or multiple models that are in the same family of models.

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

133. Clause 42 provides that an application to register a product model must include details for a contact person, to respond to questions related to the application or to other communications regarding the E3 Program. Requisite contact details will be detailed in regulations, to ensure the flexibility to alter the required details if experience with the E3 Program raises a need to do so.

#### **Clause 43 Registration by the GEMS Regulator**

134. Clause 43 outlines the GEMS Regulator's obligations regarding applications to register GEMS product models, and also specifies requirements for valid applicants.

135. Clause 43(1) obliges the GEMS Regulator to register product models against relevant GEMS determinations upon application, unless a ground for refusing an application specified in subclauses 43(2)-43(4) applies. This obligation recognises that all applications are entitled to be registered in the absence of reasons for refusal specified in law.

136. Subclause 43(2) requires the Regulator to refuse an application if the Regulator is not satisfied that a product model complies with GEMS requirements, or is not satisfied that all models in the application are in the same family of models.

137. Subclause 43(3) limits the people that can apply to register a product model under the Act to manufacturers of the product model, importers of the product model or people who have an appropriate connection to supplies of the model in Australia (i.e. a domestic retailer). This is to ensure that product models are registered by the people most familiar with the products, and the degree to which they meet GEMS requirements. A registration also may be refused under subclause 43(3) if the Regulator is satisfied of any of the grounds for refusing applications under clause 63.

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

138. Clause 44 determines which GEMS determination a product model must be registered against under clause 43.

139. Subclause 44(1) provides that, in most cases, the determination with which a product class must comply is the determination in force at the time the Regulator makes a decision on an application for registration. A different determination may cover the product class if subclauses 44(2) or 44(3) apply.

140. Under subclause 44(2), if an application for registration is made after a determination is made but before the determination commences, the product model must be registered against that determination unless an applicant chooses otherwise.
141. Where a replacement determination has been made but has not yet come into force, subclause 44(3) permits an applicant to choose for a product model to be registered against the old determination. A product model registered under an old determination will only remain registered until the replacement determination comes into force, unless the replacement determination does not affect the registration (see clause 36). Subclause 44(4) clarifies that a person may use an application under clause 41 to elect the determination under which the application should be determined.

### **Clause 45 Conditions**

142. Clause 45 permits the GEMS Regulator to impose written conditions on a product model's registration. Conditions must be reasonably adapted and appropriate to giving effect to the purposes or provisions of the Act to be valid. A product model's registration may be suspended or cancelled under clauses 49 or 54 if the registrant does not comply with a condition of registration.

### ***Division 4—Varying registrations***

#### **Clause 46 Varying registration to cover additional models**

143. Clause 46 sets out the processes for varying an existing registration to add additional product models in the same family. The Regulator must vary a registration to cover new models as requested in the absence of grounds to refuse the application specified under subclauses 46(3) or 46(4).

#### **Clause 47 Varying registration to change registrant**

144. Clause 47 sets out the process by which a registration may be transferred to a new registrant.
145. An existing registrant may, with the consent of a new registrant, apply to the GEMS Regulator to pass the registration to the new registrant provided that person meets the requirements for registrants under clause 42. Applications made without the consent of the new registrant, or applications where the new registrant does not meet the requirements, are not valid.
146. Subclause 47(4) requires the GEMS Regulator to vary a registration as requested in a valid application, unless there are grounds for refusing the application under subclauses 47(5) or 47(6).

### ***Division 5—When is a registration in force***

#### **Clause 48 When is a registration in force**

147. Clause 48 governs when a registration is in force, setting out provisions that determine when a registration commences or ceases, as well as the length of a registration period.

148. Subclause 48(1) clarifies that a registration comes into force the day after the GEMS Regulator grants registration under subclause 43(1). This ensures that a registration period commences as soon as possible after the decision is made to register a model or models. The effect of subclause 48(1) means a registration may commence before a registrant receives notice of the decision (see clause 67).
149. Subclause 48(2) sets out when a registration ceases to be in force. In most cases, a registration will cease to be in force on the day after the registration period ends (see subclause 48(3)) or the day after the registration is cancelled (see clause 54), whichever day is earlier.
150. However, if a replacement determination is issued that affects the registration (see clauses 35 and 36) before the day described above, the registration ceases on the day the replacement determination comes into force or the day the model is registered against the replacement determination (i.e. a person may anticipate the replacement determination coming into force and apply for a new registration before the determination commences, in accordance with subclause 44(2)).
151. Subclauses 48(3)-48(6) govern the length of registration periods. In most cases, registrations will be granted a five-year registration period beginning on the day after the GEMS Regulator approves an application to register a product model. Under subclause 48(4), the GEMS Regulator may grant a registration period shorter than five years in accordance with any regulations made to govern shorter registration periods. Circumstances in which a shorter registration period might be appropriate include where a registration exists before the E3 Program commences and must be transferred to the new national scheme for the remainder of its original term.
152. Since subclause 44(2) provides that a product model may be registered against a determination yet to commence, subclause 48(5) extends the usual five-year registration period by the number of days between the day the registration is granted and the day the new determination comes into effect. This provision ensures that people applying for registration before a determination commences receive a full five-year registration period under the new determination.
153. A registration period also will be extended beyond five years under subclause 48(6) if the registration is suspended under clause 49 but is reinstated at a later date. This ensures that a registration that is suspended but is later reinstated has a full five-year term that is not reduced by the period in which it was suspended.

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

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

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

154. Product models may only be registered under the E3 Program if the product and the registrant comply with statutory obligations and the requirements of relevant determinations. Clause 49 therefore permits the Regulator to suspend a model's registration in circumstances where requirements or obligations are not complied with. The power to suspend a registration provides a disincentive to breaching requirements and registrants' obligations and, combined with the power to cancel registrations, offers

a medium-level, administrative enforcement option without financial sanctions. Decisions to suspend a registration are reviewable under Part 9 of the Act and notice of a decision to suspend a registration must be given to the registrant in accordance with clause 165.

155. The circumstances in which the Regulator may suspend a registration are specified in clause 49. The Regulator may suspend a registration where the Regulator has reasonable grounds to suspect that:
- i) the model does not comply with determination requirements
  - ii) the information provided in connection with the application was not correct at the time
  - iii) that changes have been made to the model after it was registered such that test results provided at registration are no longer accurate
  - iv) or that the registrant has breached a condition of the registration or conditions of an exemption under clause 37.
156. Registration conditions apply only to the registrant and a registration cannot be suspended if a condition of an exemption is breached by a person other than the registrant.
157. The Regulator also may suspend a registration if he or she is satisfied that a registrant has failed to notify the GEMS Regulator of certain changes as required under clause 55 or has failed to comply with a notice issued under clauses 56, 57, or 61. This provides a disincentive to registrants who might otherwise elect not to comply with various obligations to provide information or items required by notices issued by the Regulator.
158. One final ground for suspending a registration is that the GEMS Regulator has been unable to contact the registrant or the registration contact person(s), despite reasonable efforts. This ensures that registrants are not able to avoid potential consequences under the Act by avoiding contact with the Regulator, a situation reported by state and territory authorities under the existing E3 Program.

#### **Clause 50 Effect of suspension**

159. Clause 50 clarifies that, if a registration is suspended, all products covered by that registration are considered not to be registered and therefore cannot be supplied, offered for supply, or used for a commercial purpose. The suspension affects all product models covered by the registration (e.g. the family of registered models). This recognises that a registration with multiple models is in fact a single registration, not multiple registrations that can be separated from each other.

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

160. Clause 51 governs the duration of a suspension, which comes into force when the suspension notice is given to the registrant or the registrant's contact person, and ceases on a day that must be specified in the suspension notice.

#### **Clause 52 Conditions on suspension**

161. Clause 52 permits the Regulator to impose reasonable conditions on a suspension, which must be communicated in the suspension notice and must be complied with by a

registrant. Non-compliance with conditions is grounds for cancelling a registration under clause 54.

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

162. Clause 53 permits the Regulator to vary a suspension to specify a different cessation date or to impose different conditions on the suspension. The Regulator must give the registrant notice of the varied suspension.

### *Subdivision B—Cancelling registrations*

### **Clause 54 Cancelling a model's registration**

163. Product models may only be registered under the E3 Program if the product and the registrant comply with statutory obligations and the requirements of relevant determinations. Clause 54 therefore permits the GEMS Regulator to cancel a model's registration in certain circumstances where obligations and requirements are not complied with. The power to cancel a registration, thereby preventing supply or use of product models within Australia, provides a disincentive to breaching requirements and registrants' obligations and offers an administrative enforcement option without financial sanctions. A decision to cancel a registration is reviewable under Part 9 of the Act and the Regulator must give a registrant notice of a decision to cancel a registration in accordance with clause 165.
164. Circumstances in which the Regulator may cancel a model's registration are specified in clause 54 and generally relate to failures to abide by certain obligations under the Act. These include circumstances where the Regulator is satisfied that:
- i) the model does not comply with requirements of relevant determinations
  - ii) the registrant fails to comply with notices provided under clauses 55, 56, 57, or 61
  - iii) that any documentation submitted in connection with a registration was not accurate when provided
  - iv) that changes have been made to the product so previous test results are no longer accurate
  - v) that the registrant has breached a condition of the registration, an exemption or a suspension of registration, or
  - vi) if the registration has been suspended and the Regulator cannot contact the registrant or the registrant's contact person(s) despite reasonable attempts to do so after the suspension.
165. A registration also must be cancelled if a registrant applies for the registration to be cancelled.
166. A decision to cancel a registration takes effect at a time specified in the notice given under clause 165, or the time specified under subclause 54(2) if a registrant requests a cancellation. Similarly to a registration suspension, a registration cancellation affects all models covered by the registration.

## ***Division 7—Requirements for registrants***

### ***Subdivision A—Notifying GEMS Regulator of changes***

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

167. Registering a product model under the E3 Program permits the supply or use of GEMS products in Australia but also carries some obligations for registrants, which are required to support the effective administration of the program.
168. To ensure the GEMS register is up to date and the GEMS Regulator has the information necessary to administer the program, clause 55 establishes an obligation for registrants to notify the GEMS Regulator of certain information, including any information or changes to product or contact details that indicate that information in the GEMS register is not correct, or that products no longer meet requirements.
169. To deter and sanction breaches of these obligations, contravening the obligation to notify the GEMS Regulator may attract a civil penalty of 60 penalty units. Failure to notify the GEMS Regulator of necessary information also is grounds for cancelling a registration under subparagraph 54(1)(b)(i).

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

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

170. Clause 56 enables the Regulator to issue written notices to corporate registrants requiring them to provide information regarding the supply, import, manufacture or export of GEMS products. This data is necessary to inform the GEMS Regulator in crucial functions under the E3 Program including:
  - i. identifying which areas of the market are progressing toward greater efficiency and those areas in which intervention is required to drive greater efficiency
  - ii. informing consideration of any extension/reduction of the statutory notice period before commencement of GEMS determinations
  - iii. assessing stockpiling risks
  - iv. evaluating the effectiveness of existing regulations, and the accuracy of past projections of energy use and savings, and
  - v. targeting compliance checks to product areas and industry sectors with the heaviest traffic.
171. It is appropriate to obtain this information directly from businesses as commercially available sales data is limited in coverage, and industry representatives have advised it may not always be up to date. The usefulness of import and export data supplied by Customs is also severely constrained by unhelpful product codes under which most imports and exports are declared. The power under clause 56 is modelled on a similar obligation under Regulation 9 of New Zealand's *Energy Efficiency (Energy Using Products) Regulations 2002*, which already applies to many Australian registrants. Unlike New Zealand's Regulation, the reporting obligation under clause 56 is not mandatory in all circumstances but only on receipt of notice from the Regulator. This



recognises that while data reporting is likely to be widespread or even universal in the years soon after the Act commences, it may be desirable to target data reporting to certain sectors in subsequent years. A notice from the Regulator may request data for one or more years.

172. The power to obtain information is limited to obtaining information from constitutional corporations. This is to ensure a Constitutional basis for this power, should any doubt arise that the power to obtain information is not reasonably adapted to giving effect to the commitments under the UNFCCC.

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

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

173. Clause 57 enables the GEMS Regulator to compel a registrant to provide a GEMS product for testing, to determine whether the model complies with relevant GEMS requirements. The power may only be used where the GEMS Regulator is satisfied that purchasing the product is not practical, for example, because the purchase is refused or because the GEMS Regulator has been unable to locate a product for sale.
174. This clause recognises that determining whether a product model complies with GEMS requirements often cannot be done onsite but requires more controlled testing conditions. Clause 57 ensures the Regulator is able to obtain products for testing and is not frustrated in this core duty by refusals to sell a product or limited public availability of stock. Clause 57 does not require the Regulator to require the registrant to provide a specific item of the product model but the section is intended to allow the Regulator to do so, if this will facilitate the testing process. It is appropriate to allow the Regulator to choose a specific item, rather than requesting the registrant to provide an item of their choice, because of demonstrated instances of persons selecting ‘golden samples’ for testing that do not reflect the performance of the majority of items within a product model.
175. Subclause 57(5) states that a notice under section 57 is not a legislative instrument. This is to assist readers understand the status of notices under section 57, 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.

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

176. Clause 58 governs the retention and return of products obtained under clause 57. This clause permits the Regulator to take possession of products obtained under clause 57 and obliges the Regulator to provide a receipt to record the trail of possession. To strike the balance between ensuring the Regulator can conduct vital testing functions and preventing hardship for affected businesses, clause 58 permits the GEMS Regulator to retain a product for a maximum six months. The product must be returned to the owner before six months if the product is no longer required to determine whether it meets relevant requirements or if a decision is made that the product is not required for evidence (whichever occurs first). The GEMS Regulator may dispose of a product if he

or she is unable to return the product to the registrant despite reasonable attempts (see clause 60).

177. The obligation to return seized material may at times conflict with other priorities, so subclauses 58(3) and 58(4) clarify that the requirement to return seized material does not apply in certain circumstances including where a court has ruled to the contrary, 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 59 Requirement for registrant to give product—issuing officer may permit product to be retained**

178. The six-month time limit for retaining products obtained under clause 57 is likely to be sufficient in the majority of cases. However, in the event that six months is insufficient time to commence proceedings or to determine compliance with relevant GEMS requirements, clause 59 permits the GEMS Regulator to apply for an order to retain the product for a longer time period. For example, a longer time period may be required for certain types of products, such as lamps that may require nine months testing time in order to determine compliance with performance requirements. Longer time also may be required in cases where test results are disputed and tests must be repeated. An officer issuing an order for an extended retention period may grant a maximum period of three years.
179. Before making an application to retain a product, the GEMS Regulator must take reasonable steps to identify and notify any person with an interest in the retention of the product (i.e. a person who may be affected by the retention) of the intention to make an application. This ensures that interested people have an opportunity to respond to an application to retain for more than six months.

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

180. Experience with the existing E3 Program demonstrates there are instances where a product cannot be returned to its owner, for example, because the registrant cannot be contacted or is unable or unwilling to accept the return of a product. Clause 60 recognises such instances and permits the GEMS Regulator to dispose of products if the GEMS Regulator has taken reasonable steps to return a product but cannot do so.

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

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

181. If the Regulator has reasonable grounds to believe that a product model does not comply with relevant GEMS requirements, clause 61 allows the GEMS Regulator to order a registrant to conduct further testing to determine whether a product model does comply. A registrant must either comply with the directions to test the product or apply to cancel registration of the product model.
182. As implied by the reference to ‘further’ testing in subclause 61(2), clause 61 is intended for use where the GEMS Regulator has tested a product model (generally referred to as ‘stage one testing’) and results (as advised to the registrant) indicate the model does not meet relevant requirements. The registrant may choose to act on these results and apply

to cancel the registration or the registrant may arrange additional testing (generally referred to as ‘stage two testing’) to determine whether the model does comply. While stage one testing is conducted at the Regulator’s expense, stage two testing must be conducted at the registrant’s expense, to ensure that initial results are not challenged frivolously or merely to delay a response to non-compliant product models.

183. A notice under clause 61 can nominate specific product items that must be tested, and can specify how tests must proceed. This is to ensure that the Regulator can direct the stage two testing process and a person who receives a notice under clause 61 cannot, for example, pick products for testing that do not reflect the performance of the model and cannot choose a test laboratory that might provide favourable results.
184. Subclause 58(4) states that a notice under section 58 is not a legislative instrument. This is to assist readers understand the status of notices under section 58, 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 E—Notifying other persons of suspension or cancellation of registration*

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

185. Clause 62 imposes an obligation on registrants to take reasonable steps to inform potential suppliers when the registration for a product model is suspended or cancelled. This obligation recognises the fact that while it is an offence for any person to supply an unregistered model of a GEMS product, the registrant is the person responsible for the suspension or cancellation. The registrant also is best placed to identify which downstream suppliers may be affected by the cancellation or suspension. Registrants are not obliged to identify and inform all potential downstream suppliers but must take reasonable steps to inform people they know might supply products of the models covered by the registration.
186. The reasonable steps expected to inform all suppliers the registrant is aware of are not defined in the Act, they will depend on the circumstances and the product models affected by suspension or cancellation. They may include steps such as notifying people the registrant supplied products to directly, public announcements, and notifying peak industry and consumer bodies.

*Division 8—Miscellaneous*

**Clause 63 Requirements for determining whether model complies with GEMS determination**

187. Individual products within a single product model may display some variation or fault, so that a single product could fail testing due to individual differences although the majority population of the model does comply with relevant requirements. Clause 63 therefore allows the GEMS Regulator to specify criteria that must be met for determining compliance with relevant requirements, such as acceptable variation or tolerance levels for measuring compliance with specific GEMS requirements.

### **Clause 64 Applications—basic requirements**

188. Clause 64 states that all applications under Part 5 of the Act must comply with the form and manner determined by the Regulator and be accompanied by any fees or information required. The amount of fees, and the type of information required, must be specified in legislative instruments but the manner and form of the application is an administrative matter to be determined by the Regulator.
189. Failure to include all required information in an application is grounds for refusing the application under clause 66.

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

190. Clause 65 allows the GEMS Regulator to request additional information from an applicant under Part 5, even in the event that this information is not required for an application by legislative instruments established under clause 64. Information that may be required includes test reports from persons authorised by the GEMS Regulator to test GEMS products, instead of or in addition to any test reports compiled by persons not authorised by the GEMS Regulator. The Regulator may require the additional information to be verified by a statutory declaration.

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

191. Clause 66 clarifies that all applications made under Part 5 of the Act may be refused if they fail to meet the requirements for applications, or fail to include requisite information.
192. Applications to register a model or vary a registration also may be refused if various people connected to the application have contravened the Act, have breached conditions of a registration or have in the past been a registrant for a registration that was suspended or cancelled. This provision allows the Regulator to refuse registrations to people with a history of poor compliance with various obligations, acting as a disincentive to breaches of the Act and assisting to manage the risk of non-compliance.

### **Clause 67 Notice of decisions**

193. Clause 67 requires the Regulator to give notice of decisions on applications to relevant people. To ensure applicants are kept aware of the progress of applications at reasonable intervals, clause 67 also obliges the Regulator to decide an application under clauses 41, 46 or 47 within 42 days of receiving a completed application or provide written advice to applicants that the application is still being considered. The period of 42 days is automatically extended if additional information is requested under clause 65, by the length of time taken to respond to a request for additional information.

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

194. Clause 68 clarifies that a notice issued under the Act is deemed to be given to the applicant or registrant if it is given to a contact person they nominate. Accepting communications is one of the chief functions of a contact person, enabling the Regulator to communicate easily and reliably regarding issues under the Act while allowing a registrant or applicant to delegate communication duties.

## **Part 6—The GEMS Regulator**

### ***Division 1—Guide to this Part***

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

195. Clause 69 provides a simplified outline of Part 6 of the Act, which establishes the GEMS Regulator and sets out the Regulator’s functions and powers to administer the E3 Program.

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

#### **Clause 70 The GEMS Regulator**

196. Clause 70 establishes the office of the GEMS Regulator, who is responsible for administering the Act and other associated duties.
197. The GEMS Regulator must be an officer within the Department responsible for the Greenhouse and Energy Minimum Standards Act 2012, designated in writing by the Minister. The written designation does not constitute a legislative instrument.
198. To ensure the GEMS Regulator is sufficiently qualified for this leadership position, the Regulator must be a Senior Executive Service employee of the Australian Public Service. A senior officer with the necessary skills and expertise is required to administer the Scheme, because the Regulator is central to the success and accountability of the E3 Program in regulating GEMS products and reducing Australia’s greenhouse gas emissions.
199. Subclause 66(4) states that an instrument under section 66 is not a legislative instrument. This is to assist readers understand the status of instruments under section 66, 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.

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

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

200. Clause 67 sets out the functions of the GEMS Regulator as the chief officer responsible for the E3 Program.
201. In addition to administering and enforcing the Act, the Regulator has a function assisting and advising participating jurisdictions to develop GEMS determinations, for example, by providing information obtained under the Act. The Regulator also has a function of reviewing and evaluating the operation of the Act from time to time, although this function does not extend to reviewing the operation of the Act as required under clause 176 of the Act, which must be conducted by an independent party.

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

##### **Clause 72 Commonwealth consent to conferral of functions etc. on GEMS Regulator by state and territory laws**

202. Clause 72 provides that the Regulator may be granted additional functions, powers or duties under state and territory laws and sets out some limitations on the conferral of additional functions. This clause emphasises that the Regulator cannot be granted powers, functions or duties without the written agreement of the responsible Commonwealth Minister, or any powers, functions or duties that would contravene Constitutional doctrine or exceed the Commonwealth's Constitutional powers.

##### **Clause 73 How duty is imposed on GEMS Regulator by state and territory laws**

203. Clause 73 sets out the processes by which duties, in contrast to functions, can be imposed on the GEMS Regulator by state and territory laws.
204. This clause is informed by Part 10 of Drafting Direction 31 by the Office of Parliamentary Counsel and is intended to overcome the limitations of *R v Hughes* (2000) 171 ALR 155, to ensure that states and Territories may confer duties on the GEMS Regulator as part of the cooperative E3 Program.
205. Clause 73 clarifies that duties can be imposed on the GEMS Regulator by state and territory laws to the extent that imposing the duty does not exceed the legislative power of the jurisdiction imposing the duty or any Constitutional restriction on duties that can be required of the GEMS Regulator.
206. While the imposition of a duty must be within the legislative power of the jurisdiction imposing the duty, subclause 69(3) provides that if a legal doctrine requires a duty to be imposed by Commonwealth law to ensure its validity then the duty should be deemed to be imposed by the GEMS Act and supported by all relevant Constitutional powers, to the fullest extent permitted by Commonwealth legislative powers and Constitutional doctrines.

##### **Clause 74 When state and territory laws impose a duty on GEMS Regulator**

207. Clause 74 clarifies that imposing a duty on the GEMS Regulator under state and territory laws does not require a particular form of words but can be achieved by any legislation that confers a function or power in a manner that gives rise to an obligation to exercise or perform the function or power conferred.

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

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

208. Clause 75 grants the GEMS Regulator, in general terms, power to take necessary or convenient steps to discharge his or her functions under the Act. This clause does not permit unreasonable actions by the GEMS Regulator but is intended to ensure that the GEMS Regulator has power to take action that is necessary or convenient to discharge functions but is not expressly permitted elsewhere in the Act.

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

209. Clause 76 clarifies that the GEMS Regulator is considered an extension of the Australian Government when conducting official functions, so has the privileges and immunities of the Crown.

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

210. Clause 77 provides legislative power for the GEMS Regulator to charge fees for services. Fees must be a reasonable reflection of costs incurred providing each service. Fees permitted under clause 77 should be differentiated from fees permitted by the *Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012* and examples may include fees to process an application to alter a registration or fees to provide aggregate reports of data held on the GEMS Register.

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

211. As the GEMS legislation builds on 25 years of experience with the state- and territory-based E3 Program, it is highly desirable to retain the skills and expertise of state and territory agencies in the future program. Other agencies, such as the Australian Competition and Consumer Commission, also have expertise to contribute to product regulation programs like the E3 Program. Clause 78 therefore empowers the GEMS Regulator to make arrangements with Commonwealth, state and territory agencies to provide officers and assistance to discharge the Regulator's functions, duties and powers under the E3 Program.

### **Clause 79 Consultants**

212. Recognising that private sector expertise may be useful for the E3 Program in addition to expertise of Commonwealth, state and territory agencies, clause 79 permits the Regulator to engage consultants to assist in carrying out the Regulator's functions.

### **Clause 80 Delegation**

213. Clause 80 sets out the Regulators powers to delegate functions and powers under the Act to Commonwealth, state or territory officers. The clause permits the Regulator to delegate powers or functions to officers or employees of the Commonwealth Government, or the governments of Australia's states and Territories.
214. It is appropriate to allow the Regulator to delegate functions to this broader range of public service officers instead of limiting it to, for example, Commonwealth Senior Executive Services (SES) officers, due to the work required to discharge certain functions and powers.
215. The Regulator's function in registering product models, for example, requires the approval of approximately 5,000 registration applications each year – and the consideration of an even larger number. The Regulator's functions of inspecting GEMS premises, and arranging for GEMS products to be tested, also will require large workloads in regional and central locations in each Australian jurisdiction.

216. Senior Executive Services officers are expected to manage major teams and policy issues within the Commonwealth Government and cannot be expected to have the time available to personally approve 5,000 registration applications each year, or inspect premises around Australia. Registering products would involve unreasonable costs if agencies were required to pay additional SES salaries for the sole purpose of approving applications to register GEMS products.
217. It also is appropriate to allow delegation beyond the Commonwealth public service due to the cooperative nature of the E3 Program. The national Regulator will administer the E3 Program but is likely to contract state and territory officers to provide certain services, such as product registration and store inspections. This will ensure the E3 Program retains the expertise of state and territory agencies and officers currently working in the E3 Program. Australian governments have worked cooperatively under the E3 Program and intend for this to continue under the enhanced national Program.
218. An alternative approach may be to restrict the Regulator's delegation power to Commonwealth SES officers, and state or territory equivalents, with a power to sub-delegate to a wider range of public service officers. However, given this option does not avoid the need to delegate to non-SES staff, would involve unnecessary administrative steps, and would provide a sub-delegation power broader than the initial delegation, this option is not favoured. Instead, the GEMS Regulator will have the power to delegate to any appropriate public service officer, and that delegate will have no power to sub-delegate functions or powers.

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

### ***Division 1—Guide to this Part***

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

219. Clause 81 provides an outline of Part 7 of the Act, which provides the powers and processes by which compliance with the Act may be investigated.

### ***Division 2—GEMS inspectors***

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

220. Clause 82 grants the GEMS Regulator power to appoint *GEMS inspectors*, who are the officers chiefly responsible for gathering information about compliance with the Act. In accordance with the principles in Chapter Seven of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, GEMS inspectors must be Australian public sector employees that the GEMS Regulator is satisfied have the experience or training necessary for the task. Inspectors cannot be appointed without the written agreement of the relevant agency or jurisdiction.
221. Inspectors are not limited to employees with a certain seniority, for example Executive Level or Special Executive Service employees, as this would unnecessarily limit the people available to be GEMS inspectors and impose unnecessary costs on government. It also would be unfeasible to expect such senior employees have the time available to



inspect goods and premises in each Australian jurisdiction. To comply with the principles in Chapter Seven of the Guide to Framing Offences, inspectors are limited to public sector employees with the appropriate skills and training.

222. Nothing about the requirements for inspectors would prevent the GEMS Regulator engaging people who do not meet these requirements for tasks that do not require the exercise of GEMS inspector powers, for example, conducting visual surveys of public premises to identify trends in product sales or identify products that do not carry labels.
223. Subclause 78(5) states that a direction under section 78 is not a legislative instrument. This is to assist readers understand the status of directions under section 78, 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.

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

224. Clause 83 clarifies that the GEMS Regulator is a GEMS inspector, with the functions, powers and obligations of a GEMS inspector.

#### **Clause 84 Identity cards**

225. GEMS inspectors must be able to identify themselves before carrying out various functions (see for example clause 87). Clause 84 therefore requires the GEMS Regulator to issue all inspectors with photo ID cards, which must be carried by inspectors at all times they are acting in that official capacity.

#### **Clause 85 Offence for not returning identity card**

226. GEMS inspectors are required to return identity cards when they cease their role as inspectors. Clause 85 supports this obligation with an offence punishable by one penalty unit for inspectors who fail to return identity cards as soon as practicable after ceasing that role.

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

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

227. Clause 86 outlines a GEMS inspector's powers to inspect public areas of *GEMS business premises* (defined in clause 5) to monitor and investigate compliance with the Act. These powers extend to purchasing, inspecting and collecting information and products that are publicly available but do not extend to searching the premises or obtaining evidence by photographing or testing items or activities on the premises.
228. A GEMS inspector is not required to provide identification before exercising powers to inspect public areas of GEMS business premises but an occupier of GEMS business premises retains all rights to refuse entry or refuse permission for a GEMS inspector to remain on the premises.

## ***Division 4—Monitoring***

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

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

229. In addition to inspection powers that may be freely exercised in public areas of GEMS business premises, GEMS inspectors have additional *monitoring powers* that may be exercised with consent or under a monitoring warrant. The occupier of GEMS business premises is not required to give consent to an inspector's entry or exercise of monitoring powers. If consent is granted, the occupier remains free to subsequently withdraw that consent at any time and an inspector must leave the premises if consent is withdrawn, or otherwise ceases to have effect (see paragraphs 236-238 of the explanatory memorandum to compare *monitoring powers* with *investigation powers*).

#### **Clause 88 Monitoring powers of GEMS inspectors**

230. Clause 88 sets out an inspector's *monitoring powers* under a warrant or consent, which go beyond the inspection powers available under clause 86 and permit an inspector to, among other things, search premises, operate GEMS products, measure or test any thing on the premises, photograph things or make copies of documents, or operate electronic equipment.

231. To remove any doubt, a GEMS product may be operated as a GEMS product – for example to test its operation - without any suspicion that it contains relevant data (see clause 89). However, if a GEMS product is intended to be operated for the purpose of retrieving or copying data, the caveats in clause 89 apply to that use.

#### **Clause 89 Operating electronic equipment**

232. Clause 89 provides detail about GEMS inspectors' power to operate electronic equipment when entering premises with consent or under warrant. 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 with the Act. This power is necessary to ensure a GEMS inspector can obtain access to electronic records that may indicate whether the Act is being complied with or whether information provided under the Act is correct.

233. Inspectors' power to operate electronic equipment extends to copying data from the electronic equipment onto storage devices. However, an inspector may only operate electronic equipment if he or she reasonably believes this can occur without damaging the equipment. Nothing in clause 89 affects any liability or indemnity a court may find for damage to electronic equipment.

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

234. Clause 90 requires a GEMS inspector to notify the occupiers of other premises (if practicable) whenever the inspector exercises the power under 89 (1) to use electronic equipment to access information that is held on other premises. This clause is a standard provision in Commonwealth warrant powers and ensures that inspectors can access electronic evidential material that is not physically present on the premises, for

example, via intranet links. It also ensures that the occupier of other premises from which evidential material is accessed is made aware of the access.

### **Clause 91 Expert assistance to operate electronic equipment**

235. Clause 91 supports GEMS inspectors' powers to operate electronic equipment under a monitoring warrant by permitting an inspector 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 a GEMS inspector may not be accompanied by an expert assistant when exercising monitoring powers, clause 91 permits a GEMS inspector to secure equipment for up to 24 hours (longer on application) in order to engage assistance.
236. An inspector may only secure equipment if the inspector has reasonable grounds to believe relevant data on the equipment may be destroyed or altered if the equipment is not secured.

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

237. The *monitoring powers* of a GEMS inspector under a *monitoring warrant* (see clause 94) do not extend to seizing evidence. Monitoring powers are available for the purpose of determining whether the Act is being complied with, whereas seizing evidence is a more coercive power and should be exercisable only where a issuing officer is satisfied that an inspector has in fact located evidence of a breach of the Act (see clause 107).
238. However, to ensure that evidence located during an inspection is not disposed of before an issuing officer has the opportunity to authorise seizure, clause 92 grants a GEMS inspector the power to secure any thing he or she reasonably believes provides evidence of a contravention of the Act for up to 24 hours. An issuing officer may extend the period beyond 24 hours.

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

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

239. GEMS inspectors may require assistance when carrying out their functions and clause 93 establishes clear legislative basis for such assistance. A *person assisting* a GEMS inspector has the power to enter premises and assist an inspector with any duties or powers to determine whether the Act is complied with. Any action validly taken in respect of this power is taken under clause 93 to be done by the GEMS inspector.
240. Subclause 88(5) states that a direction under paragraph 88(2)(c) is not a legislative instrument. This is to assist readers understand the status of directions under paragraph 88(2)(c), 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 C—Monitoring warrants*

#### **Clause 94 Monitoring warrants**

241. A GEMS inspectors *monitoring powers* are exercisable with consent or under a *monitoring warrant* obtainable under clause 94.
242. To ensure warrants are issued and warrant powers are exercised only in appropriate situations, clause 94 details the procedure by which a GEMS inspector may obtain a warrant from an issuing officer in order to determine whether the Act is complied with. Clause 94 also sets out the mandatory content of a monitoring warrant.

### ***Division 5—Investigation***

#### *Subdivision A—Investigation powers*

243. While *monitoring powers* under division 4 are available to determine whether the Act is being complied with, *investigation powers* are available where a GEMS inspector has reasonable grounds to suspect that premises contain evidence of contravention of the Act.
244. It is appropriate to separate *monitoring* and *investigation* powers and warrants due to the nature of the product regulation regime. Under the GEMS Act, all businesses in Australia have an obligation to consider the nature of regulated products and not supply or use products that do not meet requirements. These businesses accept a commercial benefit by dealing with GEMS products and, to permit an effective inspection regime, monitoring warrants and monitoring powers are necessary to check that the regulatory obligations are complied with.
245. However, more invasive powers such as seizing evidence should be subject to a higher standard, so it is appropriate to reserve such matters for investigation warrants that require reasonable suspicion of wrongdoing.

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

246. Similarly to *monitoring powers*, a GEMS inspector may enter GEMS premises to exercise *investigation powers* by consent or under a warrant. However, a GEMS inspector may only enter GEMS premises to exercise investigation powers if the inspector has reasonable grounds to suspect the premises contain evidence of a contravention of the Act (*evidential material*), even if the occupier of the premises consents to entry. A GEMS inspector generally must identify himself or herself to the occupier of the premises before entering premises under warrant (see clause 114).

#### **Clause 96 Investigation powers of GEMS inspectors**

247. If a GEMS inspector enters GEMS premises under consent, clause 96 permits the inspector to search the premises for the evidential material the inspector suspects is on the premises.
248. If an inspector enters GEMS premises under an investigation warrant, investigation powers extend to seizing evidential material; inspecting, testing and copying evidential

material; and the power to take equipment necessary to exercise investigation powers 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 the judiciary maintains oversight of these investigation powers.

### **Clause 97 Operating electronic equipment**

249. To ensure a GEMS inspector is able to obtain access to electronic records that may contain evidential material, clause 97 empowers a GEMS inspector to operate any electronic equipment on GEMS premises that the inspector suspects contains evidential material, including computers and other electronic storage devices. These powers are available whether the inspector enters under consent or an investigation warrant.
250. In addition to the power to operate electronic equipment, clause 97 grants GEMS inspectors 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 inspector enters under consent or an investigation warrant. If an inspector enters the premises under a warrant, he or she also may 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 or if possessing the electronic equipment or storage device would constitute an offence by the occupier of GEMS premises.
251. Electronic equipment and storage devices may only be operated if the GEMS inspector reasonably believes this can be done without damaging the equipment or device.

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

252. Clause 98 requires a GEMS inspector to notify the occupiers of other premises (if practicable) whenever the inspector exercises the monitoring power under 97 (1) to access evidential material held on those other premises. This clause is a standard provision in Commonwealth warrant powers and ensures that inspectors can access electronic evidential material that is not physically present on the premises, for example, via intranet links. It also ensures that the occupier of other premises from which evidential material is accessed is made aware of the access.

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

253. In terms similar to clause 91, and for similar reasons, clause 99 permits a GEMS inspector to secure electronic equipment for up to 24 hours, to provide the inspector time to engage expert assistance to operate electronic equipment.

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

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

255. However, clause 100 permits a GEMS inspector to seize evidential material, when entering premises under a 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 the Act. 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 should not force exclusion of evidence of other offences that is discovered during a search.

*Subdivision B—Persons assisting GEMS inspectors*

**Clause 101 Persons assisting GEMS inspectors**

256. Clause 101 provides, in terms similar to clause 93 and for similar reasons, that a GEMS inspector can exercise investigation powers with a *person assisting* him or her.
257. Subclause 106(5) states that a direction under paragraph 106(2)(c) is not a legislative instrument. This is to assist readers understand the status of directions under paragraph 106(2)(c), 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 C—General provisions relating to seizure*

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

258. If a GEMS inspector seizes a storage device, document or other thing that can be readily copied while exercising investigation powers, clause 102 permits the occupier of GEMS premises, or a person who represents the occupier, to request a copy of the seized thing. Clause 102 ensures that a person can, for example, retain a copy of seized material for their own records or use.

**Clause 103 Receipts for seized things**

259. To ensure a record of seizure is maintained and available to the person from whom material is seized, clause 103 requires a GEMS inspector to give a receipt for any thing that is seized when exercising investigation powers.

**Clause 104 Return of seized things**

260. The Act authorises seizure of material only for specific reasons and does not permit material to be retained indefinitely. Clause 104 therefore requires the GEMS Regulator to take reasonable steps to return to the owner, or the person from whom it was seized, any thing seized under the Act. The GEMS Regulator 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.
261. The obligation to return seized material may at times conflict with other priorities, so clause 104 clarifies that the requirement to return seized material does not apply in certain circumstances including where a court has ruled to the contrary, 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 105 Issuing officer may permit a thing to be retained**

262. To ensure the sixty-day limit for retaining seized material does not prejudice ongoing investigations or legal proceedings, clause 105 permits an *issuing officer* to issue an order extending the period a thing may be retained, up to a maximum period of three years. Clause 105 requires the GEMS Regulator 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 106 Disposal of things**

263. If the GEMS Regulator is unable to return seized material as required by clause 104, for example because return is refused or the person to whom the item should be returned cannot be located, clause 106 permits the Regulator to dispose of seized material.

#### *Subdivision D—Investigation warrants*

#### **Clause 107 Investigation warrants**

264. The investigation powers in Division 5 are exercisable under an *investigation warrant* issued under clause 107. Clause 107 sets out the procedure for obtaining an investigation warrant and the mandatory content of such warrants.

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

265. In some circumstances a GEMS inspector may urgently require an investigation warrant, for example, where the inspector has secured material for 24 hours under clause 92 or where the time take to obtain a warrant may result in evidential material being altered or disposed of. Clause 108 therefore sets out the procedures by which an investigation warrant may be obtained from an issuing officer by means of electronic communication, and various controls to ensure this form of warrant is valid and not misused.

#### **Clause 109 Authority of warrant**

266. The copy of a warrant made in accordance with clause 108(6) is not physically the warrant made by an issuing officer. Clause 109 ensures that the form of warrant completed by a GEMS investigator 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 inspector. Also to prevent arguments over validity, clause 109 directs a court to assume that a warrant completed by an inspector is not authorised if the counterpart warrant signed by the issuing officer cannot be produced in legal proceedings.

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

267. To discourage and punish any misuse of warrants obtained by electronic communication, clause 110 establishes an offence punishable by two-years imprisonment for a range of conduct by a GEMS inspector with regards to investigation warrants.

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

268. An investigation warrant usually will cease to have effect if the GEMS inspector 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 a GEMS inspector to search a premises multiple searches from time to time.

269. However, some flexibility is required to ensure that a GEMS inspector can leave the premises if required, for example to fetch necessary equipment or avoid a dangerous situation. Clause 111 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 inspector and all persons assisting are absent from the premises for one hour or less in any situation other than an emergency; for twelve hours in an emergency situation; or for longer than 12 hours where the occupier consents in writing, or 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 112 Completing execution of warrant stopped by a court order**

270. Clause 112 clarifies that a warrant that is stopped by court order and is later revoked or reversed may, if still in force, be executed without a new warrant needing to be issued.

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

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

#### **Clause 113 Consent**

271. Entry into GEMS premises to exercise various powers under Part 6 Division 4 may be exercised with the consent of the occupier. Clause 113 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.

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

272. While certain powers to inspect public premises may be exercised without announcement or identification, clause 114 requires a GEMS inspector to identify himself or herself in most circumstances and announce the purpose of the visit before entering under a warrant, if the occupier of the premises or that person's apparent representative is present. This ensures that an occupier of GEMS premises who is



present is made aware before a GEMS inspector exercises monitoring or investigation powers under warrant.

273. In some situations, the requirement to identify and announce the purpose of the visit could result in serious detriment. Clause 114 therefore permits a GEMS inspector to enter without identifying himself or herself or announcing their purpose in specific circumstances where 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 and the inspector still is obliged to provide identification as soon as practicable after entry, if an occupier or their representative is present.

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

274. Clause 115 requires a GEMS inspector to possess the warrant issued by the issuing officer, or the form of the warrant complete by the inspector, permitting entry to GEMS premises. A GEMS inspector who does not possess a warrant or copy of the warrant is not permitted to enter GEMS premises as authorised by the warrant, and is not permitted to exercise warrant powers.

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

275. Clause 116 requires a GEMS inspector to provide a copy of a warrant to the occupier of premises entered under warrant, or an occupier's apparent representative, if either are present, and to inform the person about their rights and obligations in relation to a warrant. This obligation ensures that occupiers and representatives that are present when a warrant is executed are granted an opportunity to examine the warrant and are explicitly informed about their rights and obligations (see clauses 119 and 120 for rights and obligations).

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

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

276. Clause 117 authorises a GEMS inspector and a person assisting a GEMS inspector to use force, against things, that is reasonably necessary to carry out monitoring and investigation powers under warrant. For example, it may be necessary to force a door to enter premises or forcibly open a cabinet to search for evidential material and it is appropriate to ensure the inspector can use such reasonable so the execution of the warrant is not frustrated. Clause 117 does not authorise the use of force against people in any circumstances.

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

277. Clause 118 provides GEMS inspectors with powers, additional to those previously described as monitoring or investigation powers, to request information or documents relevant to the GEMS inspectors' purposes for entering GEMS premises.
278. A GEMS inspector who enters premises with the consent of the occupier is entitled to request information or documents from the occupier, although there is no obligation for the occupier to grant the request.

279. A GEMS inspector who enters premises under a warrant may require any person on the premises to provide information or documents. Failure to comply with a requirement to provide information or documents without reasonable excuse (e.g. requested information or documents are not in the person's possession, or would tend to incriminate the person) is an offence that carries a penalty of 30 penalty units. Clause 108 does not impinge on the privilege against self-incrimination and a person is not required to answer questions or produce documents if the material would tend to incriminate them.

*Subdivision C—Occupier's rights and responsibilities on entry*

**Clause 119 Occupier entitled to observe the execution of warrant**

280. Clause 119 clarifies the right for occupiers of GEMS premises and their apparent representatives, who are present when a warrant is executed, to observe the execution of any warrant on their premises. This right does not limit how the warrant may be executed or require an occupier to witness all of an inspector's activities, but does recognise that a person should not be excluded during the execution of a warrant unless they attempt to obstruct the inspection.
281. Occupiers and representatives that are present when a warrant is executed must be made aware of their rights under clause 119 (see clause 116).

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

282. Clause 120 imposes an obligation on occupiers of GEMS premises, and their apparent representatives, to provide reasonable facilities and assistance required to effectively carry out warrant powers. This obligation recognises that monitoring and investigation powers are authorised by issuing officers for the purpose of determining whether laws are being complied with and should not be obstructed. Failure to provide reasonable assistance and facilities when requested carries a penalty of 30 penalty units.
283. Occupiers and representatives that are present when a warrant is executed must be made aware of their obligations under clause 120 (see clause 116).

*Subdivision D—General provisions*

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

284. Clause 121 clarifies that a person is entitled to compensation for damage to electronic equipment operated during the course of an inspection. It recognises the fact that powers to operate electronic equipment under Division 4 and 5 do not excuse damage caused by a lack of care.

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

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

285. Clause 122 defines which people may be subject to coercive information gathering powers the GEMS Regulator is provided under Division 7, being people reasonably believed to have information or documents relevant to investigating or preventing

contravention of the Act or a criminal offence relating to the Act (e.g. Division 136 of the *Criminal Code Act 1995* - false or misleading information in an application).

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

286. To ensure the GEMS Regulator is able to obtain information relevant to investigating or preventing breaches of the Act or related laws, clause 123 grants the Regulator power to issue a notice to a person who has GEMS information requiring them to provide specified information or documents.
287. This power is designed to compel evidence from people who are reasonably believed to have information relevant to breaches of the law, and failure to comply with a notice is an offence punishable by six months imprisonment and/or a fine of 30 penalty units.

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

288. Under clause 107, the GEMS Regulator's coercive information gathering powers extend to issuing a notice requiring a person who has GEMS information to appear before a GEMS inspector to answer questions or produce specified documents. Failure to appear as directed in the notice, or failure to answer questions or provide specified documents when a person is able to provide the answer or documents, is an offence punishable by six months imprisonment and/or 30 penalty units.

## ***Division 8—Testing compliance of GEMS products***

### **Clause 125 Authorising persons to test GEMS products**

289. In addition to the monitoring and investigation powers of GEMS inspectors, a key aspect of ensuring an effective E3 Program is testing products to determine whether the product model complies with requirements and labels. This will assist to deter products that are energy inefficient, or otherwise non-compliant, from entering the Australian market and assist to remove non-compliant products from the market. Products may be tested as part of checking details provided at the time of registration, or at a later time as part of the targeted 'check testing' regime.
290. Clause 125 therefore authorises people to test GEMS products if they satisfy the requirements specified by the GEMS Regulator. For example, the GEMS Regulator may specify that only people or laboratories accredited by National Association of Testing Authorities, Australia are permitted to test GEMS products to determine compliance with requirements. To clarify, the GEMS Regulator does not personally authorise a person to test GEMS products; clause 125 acts to authorise the person if they meet the requirements established by the Regulator.

### **Clause 126 Testing GEMS products etc.**

291. Clause 126 empowers authorised people to test GEMS products that are purchased, given or seized under the Act, even if the testing would result in damage or reducing the value of the tested product. Damage or reduction in value in testing is permitted under the Act where this is reasonably necessary for testing. For example a lamp (light bulb) may suffer reduction in value due to the thousands of hours of operation required by tests.

## *Division 9—Issuing Officers*

### **Clause 127 Powers of issuing officers**

292. Clause 127 clarifies that the officers empowered to issue warrants or exercise other powers under the Act, defined as ‘issuing officers’ in clause 5, are empowered in their personal capacity and do not represent the court in deciding applications under the Act. However, issuing officers are granted the immunities of the court and members of the court when deciding applications. This recognises that issuing a warrant is an executive function, not an exercise of judicial power, and that issuing officers are granted this executive function in their personal capacity and not as a judicial officer, maintaining a separation of powers.

## **Part 8—Enforcement**

### *Division 1— Guide to this Part*

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

293. Clause 128 provides a simplified outline of Part 8 of the Act, which governs enforcement of the Act via civil and criminal proceedings, infringement notices, publicising contraventions, enforceable undertakings, and injunctions.

### *Division 2—Civil penalty provisions*

#### *Subdivision A—Preliminary*

#### **Clause 129 Civil penalty orders**

294. Clause 129 describes which clauses of the Act are civil penalty provisions, enforceable by *civil penalty orders* and certain other remedies under the Act.

#### *Subdivision B—Obtaining a civil penalty order*

#### **Clause 130 Civil penalty orders**

295. Clause 131 empowers the GEMS Regulator to apply for a civil penalty order to remedy an alleged breach of the Act’s civil penalty provisions, and sets out the procedures for the Regulator applying for and the court issuing civil penalty orders.

#### **Clause 131 Civil enforcement of penalty**

296. Clause 131 clarifies that a civil penalty order is a debt owed to the Commonwealth, enforceable through civil debt proceedings and payable into consolidated revenue.

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

297. Clause 132 clarifies that a person’s conduct may contravene more than one provision under the Act. The GEMS Regulator 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 133 Multiple contraventions**

298. Clause 133 clarifies that the Court may issue a single penalty that incorporates penalties for multiple contraventions of the Act and is not required to issue separate penalty instruments. This will assist to minimise court administration and consolidate legal proceedings.

### **Clause 134 Proceedings may be heard together**

299. Clause 134 clarifies that a court may simultaneously hear two or more proceedings for civil penalty orders, streamlining the process for civil proceedings under this Act.

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

300. Clause 135 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.

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

301. This clause clarifies that breach of a civil penalty under the Act is not a criminal offence, ensuring a clear distinction between civil and criminal remedies to contraventions of the Act.

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

### **Clause 137 Civil proceedings after criminal proceedings**

302. Clause 137 provides that a court cannot issue a civil penalty order against a person that has previously been convicted of a criminal offence for the same conduct.

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

303. Clause 138 stays civil proceedings if criminal proceedings exist related to the same conduct, to prevent any information that arises during criminal proceedings prejudicing the civil proceedings. If the criminal proceedings result in a conviction, clause 137 will ensure that civil proceedings related to the same conduct are dismissed and costs for the civil proceedings are not awarded.

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

304. Clause 139 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 Act and ensures that criminal remedies are not precluded by earlier civil action.

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

305. Clause 140 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 investigation, not evidence from prior civil proceedings.

#### *Subdivision D—Miscellaneous*

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

306. Clause 141 supports the enforcement regime by ensuring that conduct ancillary to the contravention of a civil penalty provision is considered to be contravention of the provision itself. This 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 142 Continuing contraventions of civil penalty provisions**

307. Clause 142 clarifies that certain actions are considered to be repeated contraventions of the Act. The clause ensures that civil obligation under the Act to do something by a certain deadline continues until it is done, and is not discharged by mere failure to meet the deadline. The clause also clarifies that every day the obligation is not met constitutes a separate contravention of the civil penalty provision. This is necessary to ensure that failure to abide by obligations under the Act does not excuse a person from meeting those obligations.

#### **Clause 143 Mistake of fact**

308. Clause 143 ensures that in civil penalty order provision hearings, a person cannot be held liable if their actions arose from a legitimate mistake of fact. This clause is important because clause 144 states that, in civil penalty proceedings, it is not necessary to prove intention, knowledge or other fault elements, an effect on civil proceedings similar to the effect strict liability has on criminal proceedings. To ensure that clause 144 does not result in liability for simple errors of fact, clause 143 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.

309. The person who asserts that a particular course of action resulted from a mistake of fact has the burden of proving the matter.

#### **Clause 144 state of mind**

310. Clause 144 provides that it is not necessary to prove a person's intention, knowledge or other fault elements in civil penalty proceedings under this Act. This principle applies only to proceedings for contravention of civil penalty provisions, not for ancillary contravention of civil penalty provisions (i.e. proceedings for conduct listed in clause 141).

311. Clause 144 ensures that civil penalty proceedings operate similarly to proceedings for the strict liability criminal offences under the Act, for the reasons detailed in paragraphs 41-44 of this explanatory memorandum.

#### Example demonstrating the effect of clauses 143 and 144

312. Clause 16 provides a civil penalty for a person who supplies a GEMS product that do not comply with relevant *GEMS requirements*. In accordance with clause 144, it is not necessary to prove that a person intended to supply a non-compliant GEMS product to secure a civil penalty order; the act of supplying a non-compliant product itself is sufficient to give rise to a penalty (all other legal requirements being satisfied). However, if the person who supplied the GEMS product can show they had actively considered whether the GEMS product met relevant requirements (e.g. by obtaining the product model's technical specifications from the manufacturer or from the Australian Government Energy Rating website) and was under a reasonable belief the products did meet relevant requirements (e.g. the information provided by the manufacturer reported incorrect technical specifications), the person would not be liable for supplying a non-compliant GEMS product.
313. In the latter case, a manufacturer may be liable for providing false information in addition to any liability under this Act.

### ***Division 3—Infringement notices***

#### *Subdivision A—Preliminary*

#### **Clause 145 Enforceable provisions**

314. Clause 145 provides the basis for enforcing civil penalty provisions with infringement notices. Criminal penalties under the Act are not enforceable via infringement notices.

#### *Subdivision B—Infringement notices*

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

315. Subclause 146(1) empowers GEMS inspectors to issue an infringement notice where the inspector has reasonable grounds to believe a person has contravened a civil penalty provision under the Act. Infringement notices provide a simpler and faster remedy to suspected contravention of the Act than formal civil or criminal proceedings.
316. An infringement notice must be issued within 12 months of an alleged contravention being committed. An infringement issued later than this is invalid and cannot be enforced.
317. To ensure the reasons for each notice are clear, a separate infringement notice must be issued for each alleged contravention of the Act, 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 clause 142).

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

318. Clause 147 specifies a range of matters that must be included in each infringement notice, including 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).
319. Subclause 147(2) limits the amount payable under an infringement notice to one-fifth 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 Act.

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

320. To ensure that person who wishes to pay an infringement notice is not prevented from doing so by financial hardship or other difficulties, clause 148 allows a person who has received an infringement notice to apply to the Regulator for an extension of time to pay the infringement notice.

### **Clause 149 Withdrawal of an infringement notice**

321. A person who receives an infringement notice may elect to challenge the notice rather than pay it. Clause 149 therefore sets out processes for withdrawing infringement notices and provides guidance as to what information the Regulator must and may take into account in considering whether to withdraw an infringement notice.
322. 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. The Act does not limit the time in which an application to withdraw an infringement must be made but Regulations may provide for such matters (see clause 152). It is appropriate to allow the Regulations to specify time limits to ensure flexibility as experience with the E3 Program under GEMS legislation grows.

### **Clause 150 Effect of payment of amount**

323. Clause 150 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 151 Effect of this Division**

324. Clause 151 clarifies that Division 3, Part 8 of the Act, dealing with infringement notices, does not make infringement notices a mandatory response to a suspected contravention - they remain a discretionary remedy. Division 3 Part 8 also does not limit the option to take enforcement action in various 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 3 (except as specified in clause 150, when an infringement has been paid).

### **Clause 152 Further provision by regulation**

325. Clause 152 permits the Regulations to make further provisions related to infringement notices under Division 3, Part 8.

### ***Division 4—Enforceable undertakings***

#### ***Subdivision A—Preliminary***

### **Clause 153 Enforceable provisions**

326. Clause 161 permits offence provisions and civil penalty provisions to be enforced via undertakings under Division 4, Part 8 of the Act. This contrasts with infringement notices, which only may be used to enforce civil penalty provisions.

#### ***Subdivision B—Accepting and Enforcing Undertakings***

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

327. Clause 154 enables the Regulator 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 155) and they may be entered into instead of, or in addition to, the Regulator taking other disciplinary action.

328. Undertakings provide a remedy other than financial sanctions to past or prospective breaches of the Act. For example, if the Regulator becomes aware of a person offering to supply products that do not comply with GEMS requirements, the Regulator might notify the person of the possible contravention of the Act and accept an undertaking for the person not to supply the products. Alternatively, if a person is found to have supplied non-compliant models, the Regulator may accept an undertaking for the supplier to compensate purchasers and fund greenhouse gas offset measures to account for the difference between the products' reported energy consumption and their actual energy consumption.

329. Under 154(3), the person giving the undertaking may vary or withdraw it at any time, if the Regulator gives written consent to the variation or withdrawal. The Regulator's consent to vary or withdraw an undertaking may be cancelled by the Regulator at any time, with written notice to the person.

330. Subclause 154(4) states that consent given under section 154 is not a legislative instrument. This is to assist readers understand the status of consent given under section 154, which 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.

## **Clause 155 Enforcement of undertakings**

331. Clause 155 enables the Regulator to apply to have undertakings given under clause 154 enforced in court. Clause 155 also 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.

### ***Division 5—Injunctions***

#### ***Subdivision A—Preliminary***

## **Clause 156 Enforceable Provisions**

332. Clause 156 provides that both offence provisions and civil penalty provisions in Parts 3 and 5 of the Act are enforceable via injunctions.

#### ***Subdivision B—Injunctions***

## **Clause 157 Grant of injunctions**

333. Clause 157 empowers the court to grant injunctions on application by the Regulator. A court can issue injunctions to prevent a person engaging in particular conduct (e.g. supplying non-compliant products) and injunctions to compel a person to engage in particular conduct (e.g. display information in accordance with *GEMS labelling requirements*) if the court is satisfied an injunction is necessary or desirable to respond to, or prevent, a contravention of an enforceable provision. A court also may grant injunctions related to an action, whether or not it contravenes the Act, if all parties to the proceedings consent to the injunction.

## **Clause 158 Interim injunctions**

334. In some cases, an interim injunction may be required to prevent or require certain action while injunction proceedings are carried out. For example, if a person is using for a commercial purpose a product or products that are suspected to have serious environmental detriment forbidden by GEMS requirements, an *interim injunction* may stop the use of the product(s) until proceedings for an injunction under clause 157 are complete.

335. Clause 158 therefore enables the court to grant an interim injunction while it is considering an application for an injunction under Clause 157. A court cannot require the applicant to give an undertaking regarding damages as a condition of the interim injunction and refusing to give an undertaking regarding damages is not grounds for refusing to grant an interim injunction.

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

336. Clause 159 clarifies that injunctions can be varied or discharged by a relevant court.

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

337. Clause 160 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 damages. This ensures a court can prevent or require conduct to uphold the purposes of the Act without having to wait for countervailing conduct to occur.

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

338. Clause 161 clarifies that injunction powers under Division 5 Part 8 of the Act are additional to, not in replacement of, any other powers of the court.

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

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

339. Clause 162 allows the Regulator to publicise the details of certain matters of fact including proven civil and criminal contraventions of the Act, issuance of infringement notices, and injunctions. Clause 162 also permits the Regulator to publicise various decisions including decisions to impose conditions on, to suspend or to cancel a GEMS product model's registration.

340. Ensuring information is publicly available about these decisions and enforcement actions is important not only to provide transparency in the work of the Regulator but because they have important implications for consumers and people who may incur rights and responsibilities under the E3 Program. While upstream suppliers such as manufacturers or importers generally will register a product model, downstream suppliers accrue obligations to ensure products comply with GEMS requirements. If a product model's registration has been suspended or cancelled, or there are certain conditions relating to supply, this is directly relevant to downstream suppliers' obligations. Furthermore, if a particular business has a demonstrated record of supplying non-compliant products, this information is relevant to downstream suppliers or consumers considering the purchase of a GEMS product. It is appropriate for a government in possession of information of such relevance to the market to share the information with the market. Enabling the GEMS Regulator to publicise these decisions and enforcement actions ensures that Australian businesses and consumers are able to make better informed decisions about products that will affect their potential liabilities as well as their cash, energy and greenhouse gas budgets.

## **Part 9—Reviewing decisions**

### ***Division 1—Guide to this Part***

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

341. Clause 163 provides a guide to Part 9 of the Act, which governs the review of decisions under this Act.

## *Division 2—Review of decisions*

### **Clause 164 Persons affected by reviewable decisions**

342. Clause 164 sets out which decisions under the Act are reviewable and defines the people who are considered to be affected by the decision and able to exercise review rights.

### **Clause 165 Notification of decisions and review rights**

343. Clause 165 requires a person who is affected by a reviewable decision to be informed of their rights to apply for review of a decision. For certain decisions, this may occur when notice of the decision is provided under clause 67. Failure to provide notice of review rights does not affect the validity of a reviewable decision, ensuring that administrative mistakes do not affect the validity of a decision, but may justify some remedy such as an extension of time in which to apply for review.

### **Clause 166 Internal review**

344. Clause 166 establishes the right of a person affected by a reviewable decision to apply for internal review, by the Regulator. Applications for review must be made within 30 days of the person receiving notice, unless the Regulator grants a longer time upon request. The Regulator must review a decision if requested but is entitled to affirm, vary or revoke the decision as he or she sees fit based on the review.

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

345. Clause 167 establishes the right of a person affected by a reviewable decision made by the Regulator, either in the first instance or on review, to apply for review of a decision by the Administrative Appeals Tribunal. To limit the applications to the Tribunal and give the Regulator first opportunity to revise decisions where appropriate, decisions not made by the Regulator in the first instance are subject to review by the Regulator before they are eligible for review in the Tribunal. This limitation on review in the first instance applies despite subsection 27(1) of the *Administrative Appeals Tribunal Act 1975*. This is intended only to manage the number of appeals to the Tribunal, allowing the Regulator the opportunity to revise decisions so application to the Tribunal is not required, and is not intended to reduce rights to appeal to the Tribunal.

## **Part 10—Protecting information**

### *Division 1—Guide to this Part*

#### **Clause 168 Guide to this Part**

346. Clause 168 provides a simplified outline of Part 10, which governs the handling of protected information obtained under the Act. Protecting information is an important obligation due to the potentially sensitive nature of information that may be obtained under the Act.

## ***Division 2—Protecting information***

### **Clause 169 Offence—Disclosing commercially sensitive information**

347. Clause 169 prohibits any unauthorised disclosure of information obtained under the Act. Clause 169 establishes an offence for any person who discloses any information obtained under the Act if there is a risk that disclosing information might substantially prejudice another person's commercial interests. The offence does not apply if the disclosure is authorised under clause 170.

### **Clause 170 Authorised disclosures**

348. Clause 170 lists the purposes for which protected information may be disclosed. These include disclosures for the purposes of duties and functions under the Act and other laws dealing with similar product standards, certified public interest disclosures, disclosures specifically authorised by another law and disclosures to assist the development of product standards domestically or internationally.
349. The permission to share information obtained under the Act with international bodies, for law enforcement purposes or developing standards, has been queried by Australian businesses. Some businesses expressed concern that information shared for these purposes could allow competitors to identify market shares or other information that could substantially prejudice business interests.
350. The Australian government acknowledges these concerns but considers the permission to share information is important to align Australia's E3 Program with international standards. The power is intended to facilitate sharing of aggregate information, for example the number of products supplied in Australia at various energy efficiency levels over time, to indicate trends in efficiency and inform the consideration of international product standards. The power also is intended to facilitate sharing of test reports of product models, which increases the global knowledge base of product technical specifications and will encourage foreign agencies to reciprocate, reducing the need for duplicate testing. Keeping these purposes and the concerns of Australian businesses in mind at all times, the Australian Government considers the risk that sharing information in the manner intended is at low risk of prejudicing business interests.
351. Subclauses 170(2) and 170(3) state that instruments under section 170 are not legislative instruments. This is to assist readers understand the status of instruments under section 170, 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.

### **Clause 171 Disclosing commercially sensitive information to courts and tribunals etc**

352. To provide additional protection to commercially sensitive information, clause 171 prohibits any court or tribunal requiring a public official to disclose information obtained under the Act that might substantially prejudice a person's business affairs, for any purpose other than the purposes of this Act. Subclause 179(3) clarifies that proceedings under another Act, for example proceedings for false and misleading

information given in connection with GEMS products, can be considered ‘for the purposes’ of the GEMS Act.

## **Part 11—Miscellaneous**

### *Division 1—Guide to this Part*

#### **Clause 172 Guide to this Part**

353. This clause provides a simplified outline of Part 11 of the Act, which governs miscellaneous matters under this Act such as compensation, annual reporting, regulations for the E3 Program and reviewing the operation of the Act.

### *Division 2—Miscellaneous*

#### **Clause 173 Recovery of amounts**

354. To ensure that delinquent fees charged under the Act may be pursued, clause 173 provides that all fees are recoverable as debts owed to the Commonwealth.

#### **Clause 174 Compensation for acquisition of property**

355. To ensure constitutional validity of acquisition powers, and to protect people against unjust acquisitions under the Act, clause 174 requires the Commonwealth to pay reasonable compensation if the operation of the Act 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 has the option to take the matter to the Federal Court to determine reasonable compensation.

#### **Clause 175 Annual report**

356. Consistent with the reporting obligations expected of a public entity, clause 176 requires the GEMS Regulator to deliver an annual report to Parliament each year on the operation of the Act.

#### **Clause 176 Review of operation of this Act**

357. The establishment of the E3 Program under this Act marks a significant development in Australia’s energy efficiency program. To help ensure the systems and procedures established by this Act are achieving their purposes, and to identify any additional improvements that could be made, clause 176 requires the operation of the Act to be reviewed after five years of operation (judged from the date clause 176 commences). As a program that is expected to continue well into the future, and face changing requirements necessary to meet the significant challenge of reducing Australia’s energy consumption and greenhouse gas emissions, the operation of the Act also must be reviewed every ten years after the first review.

## **Clause 177 Regulations**

358. Clause 177 provides a general regulation making power, allowing the Governor-General to prescribe any matter permitted, necessary or convenient for the administration of the Act.