

2010-2011-2012

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Greenhouse and Energy Minimum Standards Bill 2012

No. , 2012

(Climate Change and Energy Efficiency)

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

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1 **A Bill for an Act to promote the development and**
2 **adoption of products that use less energy and**
3 **produce fewer greenhouse gases, and for related**
4 **purposes**

5 The Parliament of Australia enacts:

6 **Part 1—Preliminary**

7 **Division 1—Preliminary**

8 **1 Short title**

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

Section 2

1 **2 Commencement**

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

6

Commencement information

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

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

10 (2) Any information in column 3 of the table is not part of this Act.
11 Information may be inserted in this column, or information in it
12 may be edited, in any published version of this Act.
13

1 **Division 2—Guide to this Act**

2 **3 Guide to this Act**

3 *Overview*

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

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

12 *Key concepts (Part 2)*

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

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

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

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

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

Section 3

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

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

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

Compliance and enforcement (Parts 7 and 8)

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

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

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

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

Introductory matters (Part 1)

Section 3

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

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

Part 1 Preliminary

Division 3 Objects of this Act

Section 4

1 **Division 3—Objects of this Act**

2 **4 Objects of this Act**

3 The objects of this Act are:

- 4 (a) to give effect to certain obligations that Australia has under
5 the Climate Change Convention; and
6 (b) to promote the development and adoption of products that:
7 (i) use less energy; or
8 (ii) produce fewer greenhouse gases; or
9 (iii) contribute to reducing the amount of energy used, or
10 greenhouse gases produced, by other products.
11

1 **Division 4—The Dictionary and other interpretive**
2 **provisions**

3 **5 The Dictionary**

4 In this Act:

5 *acquisition of property*: see section 174.

6 *affected*:

7 (a) for when a model's registration in relation to a product class
8 is *affected* by a replacement determination—see subsection
9 13(3); and

10 (b) for when a person is *affected* by a reviewable decision—see
11 section 164.

12 *agency* means:

13 (a) a Department of State; or

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

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

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

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

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

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

26 *civil penalty provision*: see section 129.

27 *Climate Change Convention* means the United Nations
28 Framework Convention on Climate Change, done at New York on
29 9 May 1992, as amended and in force for Australia from time to
30 time.

Part 1 Preliminary

Division 4 The Dictionary and other interpretive provisions

Section 5

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

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

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

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

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

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

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

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

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

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

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

27 ***enforceable***:

- 28 (a) for when a provision is ***enforceable*** under Division 3 of
29 Part 8 (infringement notices)—see section 145; and
30 (b) for when a provision is ***enforceable*** under Division 4 of
31 Part 8 (enforceable undertakings)—see section 153; and
32 (c) for when a provision is ***enforceable*** under Division 5 of
33 Part 8 (injunctions)—see section 156.

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

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

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

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

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

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

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

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

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

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

27 ***GEMS labelling requirements***: see section 26.

28 ***GEMS level requirements***: see section 25.

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

30 ***GEMS Register***: see section 39.

31 ***GEMS Regulator***: see section 70.

Section 5

- 1 **high efficiency level** for a product class: see paragraph 27(1)(a).
- 2 **import into Australia** includes bring into Australia.
- 3 **investigation powers**: see sections 96, 97 and 100.
- 4 **investigation warrant** means:
- 5 (a) a warrant issued by an issuing officer under section 107; or
- 6 (b) a warrant signed by an issuing officer under section 108.
- 7 **issuing officer** means:
- 8 (a) a magistrate; or
- 9 (b) a Federal Magistrate; or
- 10 (c) a Judge of the Federal Court of Australia.
- 11 **just terms**: see section 174.
- 12 **limited grandfathering period** for a product class: see section 31.
- 13 **manufacture**, in relation to a product, means the creation of a
- 14 product essentially different from the matters or substances that go
- 15 into that creation, but does not include the following activities
- 16 (whether performed alone or in combination with each other):
- 17 (a) restoration or renovation processes such as repairing,
- 18 reconditioning, overhauling or refurbishing;
- 19 (b) minimal operations of pressing, labelling, ticketing,
- 20 packaging and preparation for sale, whether conducted alone
- 21 or in combination with each other;
- 22 (c) quality control inspections.
- 23 **manufacturer** of a product means the person who performs, or has
- 24 had performed on the person's behalf, the last process of
- 25 manufacture of the product.
- 26 **model**: see subsection 12(2).
- 27 **model identifier**: see paragraph 12(2)(c).
- 28 **monitoring powers**: see sections 88, 89 and 92.
- 29 **monitoring warrant** means a warrant issued under section 94.

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

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

4 ***participating jurisdiction***: see section 33.

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

7 ***person assisting*** a GEMS inspector:

8 (a) in relation to Division 4 of Part 7 (monitoring powers)—see
9 section 93; and

10 (b) in relation to Division 5 of Part 7 (investigation powers)—see
11 section 101.

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

13 ***premises*** includes the following:

14 (a) a structure, building, vehicle, vessel or aircraft;

15 (b) a place (whether or not enclosed or built on);

16 (c) a part of a thing referred to in paragraph (a) or (b).

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

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

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

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

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

23 (a) unless paragraph (b) applies—the person who applied for the
24 model to be registered in relation to that product class; or

25 (b) if the GEMS Regulator, under section 47, has varied the
26 registration to specify another person as the registrant for the
27 registration—the person for the time being specified as the
28 registrant for the registration in accordance with that section.

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

30 (a) an offence against this Act;

Part 1 Preliminary

Division 4 The Dictionary and other interpretive provisions

Section 6

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

4 ***relevant court*** means:

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

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

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

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

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

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

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

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

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

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

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

24 **6 Contravening offence and civil penalty provisions**

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

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

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

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

2 **7 Act binds Crown**

3 (1) This Act binds the Crown in each of its capacities.

4 (2) However, this Act does not make the Crown liable to be prosecuted
5 for an offence.

6 (3) To avoid doubt, subsection (2) does not prevent the Crown from
7 being liable to pay a pecuniary penalty under section 130 or 146.

8 Note: Section 130 deals with civil penalty orders and section 146 deals with
9 infringement notices.

10 (4) The protection in subsection (2) does not apply to an authority of
11 the Crown.

12 **8 Extension to external Territories**

13 This Act extends to every external Territory.

14 **9 Concurrent operation of State and Territory laws**

15 (1) This Act is not intended to exclude or limit the operation of a law
16 of a State or Territory (the *State or Territory law*) to the extent
17 that:

18 (a) the State or Territory law applies minimum requirements
19 (however described) relating to greenhouse gas production or
20 energy use in association with the supply and commercial use
21 of a product that uses energy, or affects the energy used by
22 another product; and

23 (b) if the product is a GEMS product (in a product class covered
24 by a GEMS determination)—those requirements are more
25 stringent than the corresponding requirements applying to the
26 product class under the GEMS determination; and

27 (c) the State or Territory law is capable of operating concurrently
28 with this Act.

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- 1 (2) Subject to subsection (1), this Act is not intended to exclude or
2 limit the concurrent operation of a State or Territory law if such a
3 law makes:
4 (a) an act or omission that is an offence against a provision of
5 this Act; or
6 (b) a similar act or omission;
7 an offence against the State or Territory law.
- 8 (3) Subsection (2) applies even if the State or Territory law does any
9 one or more of the following:
10 (a) provides for a penalty for the offence that differs from the
11 penalty provided for in this Act;
12 (b) provides for a fault element in relation to the offence that
13 differs from the fault elements applicable to the offence
14 under this Act;
15 (c) provides for a defence in relation to the offence that differs
16 from the defences applicable to the offence under this Act.
17

1 **Part 2—Key concepts**
2 **Division 1—Guide to this Part**
3 **10 Guide to this Part**

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

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

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

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

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

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

1 **Division 2—Key concepts**

2 **11 GEMS products, GEMS determinations and product classes**

- 3 (1) A **GEMS product** is a product that:
4 (a) uses energy or affects the amount of energy used by another
5 product; and
6 (b) is in a product class covered by a GEMS determination.

- 7 (2) A **GEMS determination** is a determination made by the Minister
8 under section 23 that:
9 (a) specifies one or more classes of products (**product classes**)
10 that it covers; and
11 (b) specifies requirements for products in those product classes
12 in accordance with Part 4.

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

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

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

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

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

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

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

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

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

7 **12 Models of GEMS products to be registered in relation to product**
8 **classes**

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

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

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

18 (2) Two or more GEMS products are of the same **model** if, and only if:

19 (a) the products have the same technical specifications, in so far
20 as those specifications relate to the extent to which the
21 products comply with the requirements of this Act; and

22 (b) either:

23 (i) there is a single brand or trademark used in supplying or
24 offering to supply the products; or

25 (ii) if there is no such brand or trademark—the products
26 have the same manufacturer; and

27 (c) there is a single unique identifier (the **model identifier**) used
28 in supplying or offering to supply the products, or
29 manufacturing the products, to identify the products as being
30 of that model.

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

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

35 (3) A single registration may cover 2 or more models in relation to a
36 product class only if those models are in the same **family of models**

1 in accordance with the GEMS determination for that product class
2 (see section 28).

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

5 **13 Models to be registered against GEMS determinations**

6 (1) Under Part 5, a model of a GEMS product is *registered against* a
7 GEMS determination in relation to a product class.

8 (2) The GEMS determination against which the model is registered in
9 relation to the product class is either:

10 (a) the GEMS determination against which the model is
11 registered under section 43 (registration by the GEMS
12 Regulator); or

13 (b) a replacement determination against which the model is taken
14 to be registered because of subsection 36(2) (registration not
15 affected by replacement determination).

16 (3) A model's registration in relation to a product class is, or is not,
17 *affected* by a replacement determination as specified in the
18 replacement determination (see section 36).

19 Note: If a model's registration is affected by a replacement determination:
20 (a) the registration will cease to be in force under section 48 on the
21 day the replacement determination comes into force; and
22 (b) products of the model imported into, or manufactured in,
23 Australia after the replacement determination comes into force
24 might not be able to be supplied, or used for a commercial
25 purpose, unless the model is registered against the replacement
26 determination (see Part 3).

27 **14 Supplying and offering to supply GEMS products**

28 (1) A *supply* of a GEMS product includes a supply of the product by
29 way of sale, exchange, gift, lease, loan, hire or hire-purchase.

30 (2) For the purposes of subsection (1), it is irrelevant whether the
31 supply is:

32 (a) for consideration; or

33 (b) a wholesale or retail supply.

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

3 **Division 1—Guide to this Part**

4 **15 Guide to this Part**

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

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

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

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

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

26 A particular model of a GEMS product may be exempt (under
27 section 37) from particular requirements of GEMS determinations
28 on certain conditions. In addition, models of products in a
29 particular product class may be exempt (under section 30) from
30 registration requirements in relation to that product class.

Part 3 Requirements for suppliers and commercial users of GEMS products

Division 1 Guide to this Part

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

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

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

1 **Division 2—Supplying GEMS products**

2 **16 Supplying GEMS products—complying with GEMS**
3 **determinations**

- 4 (1) A person must not supply, or offer to supply, a GEMS product if:
5 (a) the product is in a product class covered by a GEMS
6 determination; and
7 (b) either or both of the following apply:
8 (i) the product does not comply with a requirement of the
9 GEMS determination;
10 (ii) a requirement of the GEMS determination is not
11 complied with in supplying, or offering to supply, the
12 product.
- 13 (2) Subsection (1) does not apply if:
14 (a) the product is a second-hand product at the time of the supply
15 or offer; or
16 (b) the following conditions are satisfied:
17 (i) the model of the product is exempt under section 37
18 from the requirement;
19 (ii) any conditions of the exemption (see subsection 37(2))
20 are complied with in connection with the supply or
21 offer; or
22 (c) the following conditions are satisfied:
23 (i) the product is imported into, or the product's last
24 process of manufacture is performed in, Australia at a
25 time (the *earlier time*) before the GEMS determination
26 comes into force;
27 (ii) if there is a limited grandfathering period under the
28 GEMS determination for the product class (see
29 section 31)—the supply or offer occurs before the end
30 of that period;
31 (iii) all transitional GEMS labelling requirements of the
32 GEMS determination are complied with in supplying or
33 offering to supply the product;

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

10 *Strict liability offence—category A products*

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

14 Penalty: 60 penalty units.

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

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

18 *Strict liability offence—category B products*

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

22 Penalty: 120 penalty units.

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

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

26 *Civil penalty provision—category A products*

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

30 Civil penalty: 60 penalty units.

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

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

5 *Civil penalty provision—category B products*

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

9 Civil penalty: 120 penalty units.

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

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

14 *Evidential burden for matters in subsection (2)*

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

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

22 (8) In proceedings for a civil penalty order for a contravention of
23 subsection (5) or (6):

24 (a) a person who wishes to rely on paragraph (2)(a) bears an
25 evidential burden in relation to a matter in that paragraph;
26 and

27 (b) the person applying for the order bears an evidential burden
28 in relation to the matters in paragraphs (2)(b) and (c).

29 **17 Supplying GEMS products—model not registered**

30 (1) A person must not supply, or offer to supply, a GEMS product if:

31 (a) the product is in a product class covered by a GEMS
32 determination; and

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1 (b) the model of the product is not registered against that GEMS
2 determination in relation to that product class.

3 (2) Subsection (1) does not apply if:

4 (a) the product is a second-hand product at the time of the supply
5 or offer; or

6 (b) the model of the product is exempt under section 30 from
7 registration in relation to that product class.

8 *Strict liability offence—category A products*

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

12 **Penalty:** 60 penalty units.

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

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

16 *Strict liability offence—category B products*

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

20 **Penalty:** 120 penalty units.

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

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

24 *Civil penalty provision—category A products*

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

28 **Civil penalty:** 60 penalty units.

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

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

2 *Civil penalty provision—category B products*

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

6 Civil penalty: 120 penalty units.

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

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

11 *Evidential burden for matters in subsection (2)*

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

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

18 (8) In proceedings for a civil penalty order for a contravention of
19 subsection (5) or (6):

20 (a) a person who wishes to rely on paragraph (2)(a) bears an
21 evidential burden in relation to a matter in that paragraph;
22 and

23 (b) the person applying for the order bears an evidential burden
24 in relation to a matter in paragraph (2)(b).
25

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1 **Division 3—Using GEMS products for commercial**
2 **purposes**

3 **18 Using GEMS products for commercial purposes—complying**
4 **with GEMS determinations**

5 (1) A person must not use a GEMS product for a commercial purpose
6 if:

- 7 (a) the GEMS product is in a product class covered by a GEMS
8 determination; and
9 (b) the GEMS product does not comply with a requirement of
10 the GEMS determination; and
11 (c) that is the person's first use of the GEMS product.

12 (2) Subsection (1) does not apply if:

- 13 (a) the product was supplied to the person in Australia; or
14 (b) the use of the product is exempt under section 20; or
15 (c) the following conditions are satisfied:
16 (i) the model of the product is exempt under section 37
17 from the requirement;
18 (ii) any conditions of the exemption (see subsection 37(2))
19 are complied with in connection with the use of the
20 product; or
21 (d) the following conditions are satisfied:
22 (i) the product is imported into, or the product's last
23 process of manufacture is performed in, Australia at a
24 time (the *earlier time*) before the GEMS determination
25 comes into force;
26 (ii) if there is a limited grandfathering period under the
27 GEMS determination for the product class (see
28 section 31)—the use of the product occurs before the
29 end of that period;
30 (iii) the product currently complies with any pre-existing
31 GEMS determination that was in force at the earlier
32 time;
33 (iv) if there was no such pre-existing GEMS
34 determination—the use of the product for a commercial
35 purpose in a State or Territory at the earlier time would

1 not have contravened a law of the State or Territory
2 relating to energy use by products, or greenhouse gases
3 resulting from operating products.

4 *Strict liability offence—category A products*

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

8 Penalty: 60 penalty units.

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

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

12 *Strict liability offence—category B products*

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

16 Penalty: 120 penalty units.

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

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

20 *Civil penalty provision—category A products*

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

24 Civil penalty: 60 penalty units.

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

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

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1 *Civil penalty provision—category B products*

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

5 Civil penalty: 120 penalty units.

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

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

10 *Evidential burden for matters in subsection (2)*

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

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

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

25 **19 Using GEMS products for commercial purposes—model not**
26 **registered**

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

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

6 *Strict liability offence—category A products*

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

10 Penalty: 60 penalty units.

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

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

14 *Strict liability offence—category B products*

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

18 Penalty: 120 penalty units.

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

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

22 *Civil penalty provision—category A products*

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

26 Civil penalty: 60 penalty units.

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

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

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Civil penalty provision—category B products

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

Civil penalty: 120 penalty units.

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

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

Evidential burden for matters in subsection (2)

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

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

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

20 Exempt uses of GEMS products

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

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

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

21 Constitutional limitation

References to supply

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

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

References to offer to supply

- (2) Without limiting its effect apart from this subsection, this Act also has the effect it would have if each reference to an offer to supply in relation to a product were, by express provision, confined to:
- (a) an offer to supply the product, being an offer whose regulation is reasonably appropriate and adapted to give effect to Australia's obligations under:

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- 1 (i) the Climate Change Convention; or
2 (ii) another agreement between Australia and one or more
3 other countries; or
4 (b) an offer to supply the product made by or to a constitutional
5 corporation; or
6 (c) an offer to supply the product made in the course of
7 constitutional trade or commerce; or
8 (d) an offer to supply the product made using a postal,
9 telegraphic, telephonic, or other like service (within the
10 meaning of paragraph 51(v) of the Constitution); or
11 (e) an offer to supply the product made by or to the
12 Commonwealth or a Territory, or by or to an authority or
13 instrumentality of the Commonwealth or a Territory; or
14 (f) an offer to supply the product occurring in a Commonwealth
15 place or a Territory.

16 *References to use for commercial purposes*

- 17 (3) Without limiting its effect apart from this subsection, this Act also
18 has the effect it would have if each reference to use of a product for
19 a commercial purpose were, by express provision, confined to:
20 (a) use of a product for a commercial purpose, being a use whose
21 regulation is reasonably appropriate and adapted to give
22 effect to Australia's obligations under:
23 (i) the Climate Change Convention; or
24 (ii) another agreement between Australia and one or more
25 other countries; or
26 (b) use of the product for a commercial purpose by a
27 constitutional corporation; or
28 (c) use of the product for a commercial purpose in the course of
29 constitutional trade or commerce; or
30 (d) use of the product for a commercial purpose in providing a
31 postal, telegraphic, telephonic, or other like service (within
32 the meaning of paragraph 51(v) of the Constitution); or
33 (e) use of the product for a commercial purpose by the
34 Commonwealth or a Territory, or by an authority or
35 instrumentality of the Commonwealth or a Territory; or

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(f) use of the product for a commercial purpose occurring in a
Commonwealth place or a Territory.

1 **Part 4—GEMS determinations**

2 **Division 1—Guide to this Part**

3 **22 Guide to this Part**

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

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

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

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

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

27 If a replacement determination does not affect a model's
28 registration, the model is taken to continue to be registered against
29 the replacement determination, and may continue to be supplied (or
30 offered for supply) and used for commercial purposes relying on
31 that registration.

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

1 **Division 2—Making GEMS determinations**

2 **23 Minister may make GEMS determinations**

3 (1) The Minister may, by legislative instrument, make a determination
4 that specifies one or more classes of products that it covers, if the
5 products in those classes:

- 6 (a) use energy; or
7 (b) affect the amount of energy used by other products.

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

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

13 **24 GEMS requirements—general**

14 (1) A GEMS determination must specify either or both of the
15 following for each product class covered by the determination:
16 (a) GEMS level requirements in accordance with section 25;
17 (b) GEMS labelling requirements in accordance with section 26.

18 (2) A GEMS determination may also specify other requirements, in
19 accordance with section 27, for a product class covered by the
20 determination.

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

24 **25 GEMS requirements—GEMS level requirements**

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

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

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

8 **26 GEMS requirements—GEMS labelling requirements**

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

- 21 Note: Requirements under paragraph (a) or (b) may relate, for example, to
22 one or more of the following:
23 (a) the characteristics, contents, placement and quality of labels or
24 marks attached or applied to products or displayed on packaging
25 for products;
26 (b) documents or other material used for, or provided in connection
27 with, the supply of products;
28 (c) advertising products.

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

Section 27

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

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

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

8 **27 GEMS requirements—other requirements**

- 9 (1) A GEMS determination may specify any or all of the following for
10 any one or more product classes covered by the determination:
- 11 (a) requirements for products in that product class to meet a
12 specified level (the *high efficiency level*) at a particular time
13 (see subsection (2));
 - 14 (b) requirements relating to the performance of products in that
15 product class (see subsection (3));
 - 16 (c) requirements relating to the impact of products in that
17 product class on the environment or the health of human
18 beings (see subsection (3));
 - 19 (d) requirements of a kind specified in the regulations for the
20 purposes of this paragraph;
 - 21 (e) requirements for conducting tests in relation to products in
22 that product class, using the methods specified in the
23 determination, in relation to a requirement mentioned in
24 paragraph (a), (b), (c) or (d).
- 25 (2) The requirements referred to in paragraph (1)(a) (high efficiency
26 level) must relate to one or more of the following:
- 27 (a) the amount of energy used by operating products in that
28 product class;
 - 29 (b) the amount of greenhouse gases resulting from operating
30 products in that product class;
 - 31 (c) the effect of those products on the amount of energy used by
32 operating other products that use energy.
- 33 (3) Requirements may only be specified in relation to a product class
34 under paragraph (1)(b) (product performance) or (c) (impact of
35 products on environment or human health) if the GEMS

1 determination also specifies GEMS level requirements for the
2 product class.

3 **28 GEMS determinations—families of models**

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

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

10 **29 GEMS determinations—category A and category B products**

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

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

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

20 **30 GEMS determinations—models exempt from registration**

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

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

27 **31 GEMS determinations—limited grandfathering period**

28 (1) A GEMS determination may specify, for a product class covered
29 by the determination, a *limited grandfathering period* for products
30 in the product class.

31 (2) The limited grandfathering period:

Part 4 GEMS determinations

Division 2 Making GEMS determinations

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

3 Note: The effect of specifying a limited grandfathering period is that a
4 product in the product class imported into, or whose last process of
5 manufacture is performed in, Australia before the GEMS
6 determination comes into force might not be able to be supplied or
7 used for a commercial purpose after the end of that period unless:
8 (a) the product complies with the GEMS determination; and
9 (b) the model of the product is registered against the GEMS
10 determination.

11 **32 GEMS determinations—not to give preference**

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

16 **33 GEMS determinations—consent of participating jurisdictions**

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

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

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

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

4 **34 GEMS determinations—when a GEMS determination comes into**
5 **force**

6 A GEMS determination comes into force:

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

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

13

1 **Division 3—Replacing GEMS determinations**

2 **35 Replacing GEMS determinations**

3 *Making replacement determinations*

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

11 Note: A GEMS determination made as referred to in paragraph (b) is

12 referred to in this Act as a **replacement determination** (see

13 section 11).

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

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

17 Note 2: Product classes specified in the revoked determination will cease to be

18 covered by it from the time it ceases to be in force.

19 *Revoking GEMS determination without making replacement*

20 *determination*

- 21 (3) The Minister may, by legislative instrument, revoke a GEMS
- 22 determination without making a replacement determination, but
- 23 only if the Minister has obtained consent to the revocation:
- 24 (a) if a method for obtaining the consent of participating
- 25 jurisdictions is set out in the agreement (or agreements)
- 26 referred to in paragraph 33(3)(a)—in accordance with that
- 27 method; or
- 28 (b) in any other case—from at least two-thirds of the
- 29 participating jurisdictions.

- 30 (4) A GEMS determination revoked under subsection (3) ceases to be
- 31 in force at the time specified in the instrument of revocation.

32 Note: Product classes specified in the GEMS determination will cease to be

33 covered by it from the time it ceases to be in force.

1 *No other power to vary or revoke GEMS determination*

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

5 **36 Whether registrations affected by replacement determination**

- 6 (1) A replacement determination must specify whichever of the
7 following applies in relation to the registrations of models in
8 product classes that were covered by the revoked determination:
9 (a) that the replacement determination affects the registration of
10 all models registered against the revoked determination in
11 relation to all of those product classes;
12 (b) that the replacement determination affects the registration of
13 specified models registered against the revoked
14 determination in relation to one or more of those product
15 classes;
16 (c) that the replacement determination does not affect the
17 registration of any model registered against the revoked
18 determination in relation to any of those product classes.
- 19 (2) If the replacement determination does not affect the registration of
20 a particular model in relation to a product class, the model is taken
21 to be registered against the replacement determination in relation to
22 that product class.

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

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

1 **Division 4—Exempting models from requirements of**
2 **GEMS determinations**

3 **37 Exempting models from requirements of GEMS determinations**

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

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

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

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

- 19 (3) A person must comply with a condition of an exemption to the
20 extent that it applies to the person.

- 21 (4) Regulations made for the purposes of subsection (1) may (without
22 limitation) provide for or in relation to the following:

- 23 (a) exemptions to be made only on application by specified
24 persons;
25 (b) the manner and form of such an application;
26 (c) the documentation or other information, and any fee, that
27 must accompany such an application;
28 (d) giving further documentation or information to the GEMS
29 Regulator for the purposes of determining such an
30 application;
31 (e) matters to which the GEMS Regulator may or must have
32 regard in exempting a model under subsection (1) or
33 specifying a condition under subsection (2).

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

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

2 **Division 1—Guide to this Part**

3 **38 Guide to this Part**

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

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

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

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

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

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

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

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

1 **Division 2—GEMS Register**

2 **39 Establishment of GEMS Register**

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

11 **40 Information to be entered in GEMS Register**

12 *Information that must be entered in GEMS Register*

- 13 (1) The following information must be entered in the GEMS Register
14 for each registration of a model or models of GEMS products in
15 relation to a product class:
- 16 (a) the product class;
- 17 (b) the day the registration comes into force;
- 18 (c) the day the registration ceases to be in force;
- 19 (d) a unique identifier for the registration;
- 20 (e) the model identifier for each model covered by the
21 registration;
- 22 (f) the brand or trademark (if any) used in connection with
23 supplies of those models;
- 24 (g) the names, with the contact details referred to in subsection
25 42(2), of the registrant and contact person (or persons) in
26 relation to the registration;
- 27 (h) whether the registration is suspended;
- 28 (i) details to identify the relevant GEMS determination against
29 which the model was registered as referred to in subsection
30 43(1), including the day the determination was made;

Part 5 Registering models of GEMS products

Division 2 GEMS Register

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- 1 (j) if the model is taken to be registered against a replacement
2 determination in accordance with subsection 36(2)—that fact
3 and details to identify the replacement determination,
4 including the day the replacement determination was made;
5 (k) if the model’s registration is affected by a replacement
6 determination—that fact and details to identify the
7 replacement determination, including the day the replacement
8 determination was made;
9 (l) any information specified in the regulations in relation to that
10 product class.

11 *Other information that may be entered in GEMS Register*

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

14 *Varying information in the GEMS Register*

- 15 (3) The GEMS Regulator must vary information contained in the
16 GEMS Register as soon as practicable after becoming aware that
17 the information is no longer correct.
18

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

2 **41 Registration on application**

3 (1) A person may apply to the GEMS Regulator to register in relation
4 to a product class:

5 (a) a single model of GEMS products, specified in the
6 application; or

7 (b) 2 or more models of GEMS products, specified in the
8 application, that are in the same family of models.

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

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

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

16 **42 Application requirements—contact persons and contact details**

17 *Contact persons*

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

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

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

25 (a) an individual;

26 (b) an officer or employee of the applicant;

27 (c) a person whom the GEMS Regulator is satisfied has an
28 appropriate connection to the supply of the model in Australia.

29 *Contact details*

30 (2) The application must contain the contact details specified in the
31 regulations for the applicant and contact person (or persons).

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

Section 43

1 **43 Registration by the GEMS Regulator**

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

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

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

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

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

- 21 (3) The GEMS Regulator must refuse to register a model in relation to
22 a product class if he or she is not satisfied that:

- 23 (a) at least one of the following applies:
24 (i) the applicant manufactures the model;
25 (ii) the applicant imports the model into Australia;
26 (iii) the applicant has an appropriate connection to the
27 supply of the model in Australia, determined in
28 accordance with regulations made for the purposes of
29 this paragraph (if any); or
30 (b) the applicant meets all other requirements specified in
31 regulations made for the purposes of this paragraph (if any).

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

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

4 **44 Relevant GEMS determination with which model must comply**

- 5 (1) For the purposes of section 43, the relevant GEMS determination is
6 the GEMS determination covering that product class that is in force
7 at the time of making the decision on the application, unless
8 subsection (2) or (3) applies.

- 9 (2) If the application is made:
10 (a) after a GEMS determination (the *new determination*) that
11 covers the product class is made; but
12 (b) before that determination comes into force;
13 then, unless subsection (3) applies, the relevant GEMS
14 determination is the new determination.

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

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

Section 45

1 **45 Conditions**

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

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

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

9 Note: The model's registration may be suspended or cancelled if the
10 registrant breaches a condition of the registration (see sections 49 and
11 54).
12

1 **Division 4—Varying registrations**

2 **46 Varying registration to cover additional models**

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

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

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

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

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

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

16 **47 Varying registration to change registrant**

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

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

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

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

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

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

Part 5 Registering models of GEMS products

Division 4 Varying registrations

Section 47

- 1 (5) The GEMS Regulator must refuse to vary the registration if he or
2 she is not satisfied that:
- 3 (a) at least one of the following applies:
- 4 (i) the new registrant manufactures the model;
- 5 (ii) the new registrant imports the model into Australia;
- 6 (iii) the new registrant has an appropriate connection to the
7 supply of the model in Australia, determined in
8 accordance with regulations made for the purposes of
9 this paragraph (if any); or
- 10 (b) the new registrant meets all other requirements specified in
11 regulations made for the purposes of this paragraph (if any).
- 12 Example: For paragraph (b), the regulations might require the person to be
13 registered under a law of the Commonwealth in connection with
14 carrying on business in Australia.
- 15 (6) The GEMS Regulator may refuse to vary the registration if he or
16 she is satisfied that there are grounds for refusing the application
17 under section 66.
18

Division 5—When is a registration in force**48 When is a registration in force***When registration comes into force*

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

When registration ceases to be in force

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

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

Registration period—generally 5 years

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

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1 *Shorter registration period specified by GEMS Regulator*

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

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

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

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

16 *Registration period—effect of suspension of registration*

17 (6) The registration period is extended by the number of days in any
18 period:
19 (a) beginning on a day a suspension of the registration comes
20 into force; and
21 (b) ending on the day that suspension ceases to be in force.
22

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

2 **Subdivision A—Suspending registrations**

3 **49 Suspending a model’s registration**

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

- 6 (a) the GEMS Regulator suspects, on reasonable grounds, that:
- 7 (i) the model does not comply with a requirement for that
8 product class of the GEMS determination against which
9 the model is registered; or
- 10 (ii) any of the documentation or other information given to
11 the GEMS Regulator at any time in connection with the
12 registration was not accurate at the time it was given; or
- 13 (iii) changes have been made to the model so that any test
14 results given in connection with the model’s registration
15 no longer accurately reflect the extent to which the
16 model complies with the requirements of the GEMS
17 determination against which the model was registered;
18 or
- 19 (iv) the registrant has breached a condition of the
20 registration or of an exemption under section 37 relating
21 to the model; or
- 22 (b) the GEMS Regulator is satisfied that the registrant has failed
23 to comply with one or more of the following in relation to the
24 model:
- 25 (i) section 55 (notifying GEMS Regulator of changes);
26 (ii) a notice under section 56 (giving information to GEMS
27 Regulator);
28 (iii) a notice under section 57 (giving product of model to
29 GEMS Regulator);
30 (iv) a notice under section 61 (requirement for registrant—
31 testing products or cancelling registration); or
- 32 (c) the GEMS Regulator has, despite reasonable attempts, been
33 unable to contact:
- 34 (i) any contact person for the registration; and
35 (ii) the registrant.

Section 50

1 **50 Effect of suspension**

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

5 **51 When is a suspension in force**

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

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

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

12 **52 Conditions on suspension**

13 (1) The GEMS Regulator may impose conditions on a suspension in
14 the suspension notice.

15 (2) The registrant must comply with a condition of a suspension.

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

18 **53 GEMS Regulator may vary suspension notice**

19 (1) The GEMS Regulator may, if he or she considers it appropriate in
20 the circumstances, vary the suspension notice to do either or both
21 of the following:

22 (a) specify a different day on which the suspension ceases to be
23 in force;

24 (b) impose different conditions on the suspension.

25 (2) The GEMS Regulator must give the registrant a copy of the
26 suspension notice as varied under subsection (1).

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

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

1 **Subdivision B—Cancelling registrations**

2 **54 Cancelling a model's registration**

3 (1) The GEMS Regulator may cancel a model's registration in relation
4 to a product class if the GEMS Regulator is satisfied that:

- 5 (a) the model does not comply with a requirement for that
6 product class of the GEMS determination against which the
7 model is registered; or
8 (b) the registrant has failed to comply with one or more of the
9 following in relation to the model:
10 (i) section 55 (notifying GEMS Regulator of changes);
11 (ii) a notice under section 56 (giving information to GEMS
12 Regulator);
13 (iii) a notice under section 57 (giving product of model to
14 GEMS Regulator);
15 (iv) a notice under section 61 (testing products or cancelling
16 registration—belief model non-compliant); or
17 (c) any of the documentation or other information given to the
18 GEMS Regulator at any time in connection with the
19 registration was not accurate at the time it was given; or
20 (d) changes have been made to the model so that any test results
21 given in connection with the model's registration no longer
22 accurately reflect the extent to which the model complies
23 with the requirements of the GEMS determination against
24 which the model was registered; or
25 (e) the registrant has breached a condition of:
26 (i) the registration; or
27 (ii) a suspension of the registration; or
28 (iii) an exemption under section 37 relating to the model; or
29 (f) the registration has been suspended, and the GEMS
30 Regulator has, despite reasonable attempts after the
31 suspension, been unable to contact:
32 (i) any contact person for the registration; and
33 (ii) the registrant.

Section 54

1 (2) The GEMS Regulator must, by written notice given to the
2 registrant, cancel a registration of a model in relation to a product
3 class if the registrant applies for the GEMS Regulator to do so.

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

6 (3) A cancellation comes into force at a time specified in the notice
7 given under section 165 or subsection (2) of this section that is
8 after the notice is given.

9 (4) To avoid doubt, if the registration covers more than one model, the
10 registration is cancelled in relation to each of those models.
11

1 **Division 7—Requirements for registrants**

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

3 **55 Requirement for registrant to notify GEMS Regulator of changes**

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

25 *Civil penalty provision*

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

28 Civil penalty: 60 penalty units.

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

Section 56

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

3 **56 Requirement for registrant to give information relating to**
4 **import, manufacture etc. of products**

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

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

11 Example: Information about:

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

20 *Matters to be included in notice*

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

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

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

8 **57 Requirement for registrant to give product—determining**
9 **whether model complies with GEMS determination**

10 *Giving product of registered model*

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

22 *Matters to be included in notice*

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

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1 (f) that the GEMS Regulator may suspend the registration under
2 section 49, or cancel the registration under section 54, if the
3 registrant does not comply with the notice.

4 (4) A notice under subsection (1) must set out the effect of
5 sections 137.1 and 137.2 of the *Criminal Code* (false or misleading
6 information or documents).

7 *Notice not a legislative instrument*

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

9 **58 Requirement for registrant to give product—retention and**
10 **return of product**

11 *Retention etc. of product*

12 (1) If a product is given to a GEMS inspector in accordance with a
13 requirement under subsection 57(1), the GEMS inspector:

- 14 (a) may take possession of the product; and
15 (b) may retain the product (but see subsection (2) of this
16 section); and
17 (c) must provide a receipt for the product.

18 Note: The product may be tested under section 126.

19 *Return of product*

20 (2) The GEMS Regulator must take reasonable steps to return the
21 product to the registrant or a contact person for the registration
22 when the earliest of the following happens:

- 23 (a) it is no longer necessary to retain the product for the purposes
24 of determining whether the model complies with the GEMS
25 determination against which it is registered;
26 (b) it is decided that the product is not to be used in evidence;
27 (c) the 6-month period after the product was given to the GEMS
28 Regulator ends.

29 *Exception to requirement to return product*

30 (3) Subsection (2):

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

18 **59 Requirement for registrant to give product—issuing officer may**
19 **permit product to be retained**

- 20 (1) The GEMS Regulator may apply to an issuing officer for an order
21 permitting the retention of a product given in accordance with
22 subsection 57(1) for a further period if proceedings in respect of
23 which the product may afford evidence have not commenced
24 before the end of:
25 (a) 6 months after the product was given; or
26 (b) a period previously specified in an order of an issuing officer
27 under this section.
- 28 Note: See section 127 for provisions relating to the powers of issuing
29 officers under this Act.
- 30 (2) Before making the application, the GEMS Regulator must:
31 (a) take reasonable steps to discover who has an interest in the
32 retention of the product; and
33 (b) if it is practicable to do so, give notice of the proposed
34 application to each person whom the GEMS Regulator
35 believes to have such an interest.

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Order to retain product

- 1
- 2 (3) The issuing officer may order that the product continue to be
- 3 retained for a period specified in the order if the issuing officer is
- 4 satisfied that it is necessary for the product to continue to be
- 5 retained:
- 6 (a) for the purposes of determining whether the model of the
- 7 product complies with the GEMS determination against
- 8 which it is registered; or
- 9 (b) for the purposes of an investigation as to whether a related
- 10 provision has been contravened; or
- 11 (c) to enable evidence of a contravention mentioned in
- 12 paragraph (b) to be secured for the purposes of a prosecution
- 13 or an action to obtain a civil penalty order.
- 14 (4) The period specified must not exceed 3 years.

15 **60 Requirement for registrant to give product—disposal of product**

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

30 Note: If the operation of this section would result in an acquisition of

31 property otherwise than on just terms, see section 174.

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

2 **61 Requirement for registrant—testing products or cancelling**
3 **registration**

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

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

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

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

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

12 **62 Requirement for registrant to notify other persons of suspension**
13 **or cancellation of registration**

- 14 (1) The registrant for a registration must take the action mentioned in
15 subsection (2) as soon as practicable after the registrant is given
16 notice of a suspension or cancellation of the registration under
17 subsection 54(2) or section 165.
- 18 (2) The registrant must take all reasonable steps to ensure that any
19 person the registrant is aware might supply products of the models
20 covered by the registration is informed of the suspension or
21 cancellation.
- 22 (3) The registrant is liable to a civil penalty if the registrant
23 contravenes subsection (1).
- 24 **Civil penalty:** 60 penalty units.
- 25 **Note:** It is generally not necessary to prove a person's state of mind in
26 proceedings for a contravention of a civil penalty provision (see
27 section 144).

1 **Division 8—Miscellaneous**

2 **63 Requirements for determining whether model complies with**
3 **GEMS determination**

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

16 **64 Applications—basic requirements**

17 *General requirements*

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

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

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

- 6 (a) test results for a model must accompany the application;
7 (b) such a test must be conducted by a person authorised to test
8 GEMS products in the relevant product class;
9 (c) sample labels must accompany the application;
10 (d) documentation or information (including any statement) supplied
11 with the application must be verified by statutory declaration.

- 12 (3) An approved form made for the purposes of paragraph (1)(a), or a
13 legislative instrument made for the purposes of paragraph (1)(c),
14 may specify different documentation or other information, or fees,
15 as the case requires, for different:

- 16 (a) product classes; and
17 (b) classes of applications; and
18 (c) classes of models.

19 *Additional provisions about fees*

- 20 (4) A fee in relation to an application under this Part is payable by the
21 applicant to the GEMS Regulator on behalf of the Commonwealth.

- 22 (5) The GEMS Regulator may, despite anything in this Act or the
23 *Greenhouse and Energy Minimum Standards (Registration Fees)*
24 *Act 2012*, in a particular case or in particular classes of cases:

- 25 (a) waive or reduce a fee that would otherwise be payable in
26 relation to an application under this Part; or
27 (b) refund the whole or a part of a fee that would otherwise be
28 payable in relation to an application under this Part.

- 29 (6) A fee that is payable in relation to an application under this Part
30 (other than an application under section 41 to register one or more
31 models) must not be such as to amount to taxation.

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

1 **65 Applications—GEMS Regulator may request further**
2 **information**

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

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

- 11 (2) Without limiting subsection (1), the GEMS Regulator may request
12 the applicant to give the GEMS Regulator results of testing, in
13 relation to a model or models to which the application relates, that
14 has been conducted by a person who is authorised to test GEMS
15 products in that product class.

- 16 (3) The GEMS Regulator may require the documentation or
17 information to be verified by statutory declaration.

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

20 **66 Grounds for refusing an application**

- 21 (1) The following are grounds for refusing an application under this
22 Part:

- 23 (a) the application does not comply with section 64 (basic
24 requirements for applications);
25 (b) the applicant has not given the GEMS Regulator further
26 documentation or information by the time specified in a
27 notice given under section 65 in relation to the application;
28 (c) the documentation or other information provided in the
29 application, or as requested by a notice under section 65, is
30 not accurate.

- 31 (2) It is also a ground for refusing an application to register a model
32 under section 41, or to vary a registration under section 47, that the
33 application does not comply with section 42 (including as that
34 section applies because of subsection 47(3)).

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

3 (3) It is also a ground for refusing an application to register a model
4 under section 41, or to vary a registration under section 47, that the
5 GEMS Regulator is satisfied a person covered by subsection (4)
6 has:

7 (a) contravened a provision of this Act; or

8 (b) breached a condition of a model's registration under this Act;
9 or

10 (c) been the registrant for a registration of a model under this Act
11 that has been:

12 (i) suspended; or

13 (ii) cancelled (other than on application by the registrant).

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

16 (4) The persons covered by this subsection are as follows:

17 (a) for an application under section 41—the applicant;

18 (b) for an application under section 47—the new registrant;

19 (c) in any case—a contact person nominated in the application;

20 (d) if the applicant or new registrant referred to in paragraph (a)
21 or (b) is a body corporate—any director, officer or
22 shareholder of the body corporate who participates, or is to
23 participate, in the management of the affairs of the body
24 corporate.

25 **67 Notice of decisions**

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

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

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

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

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

13 **68 Notice given to contact person taken to be given to applicant or**
14 **registrant**

15 If a notice that a person may or must give under this Act to the
16 applicant or registrant for a registration is given to a contact person
17 for the registration, it is taken to have been given to the applicant
18 or registrant.
19

1 **Part 6—The GEMS Regulator**

2 **Division 1—Guide to this Part**

3 **69 Guide to this Part**

4

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

5

6

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

7

8

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

9

10

11

12

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

13

14

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

15

16

17

18

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

2 **70 The GEMS Regulator**

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

5 Note: For creation of positions, see section 77 of the *Public Service Act*
6 *1999*.

- 7 (2) The position of GEMS Regulator can only be occupied by an SES
8 employee.

- 9 (3) The ***GEMS Regulator*** is the SES employee who occupies that
10 position.

- 11 (4) An instrument under subsection (1) is not a legislative instrument.
12

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

2 **71 Functions of the GEMS Regulator under this Act**

3 The GEMS Regulator has the following functions:

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

20 Note 1: The expression *this Act* has an extended meaning (see the Dictionary

21 in section 5).

22 Note 2: Other functions may be conferred on the GEMS Regulator by State or

23 Territory law (see Division 4).

24

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

3 **72 Commonwealth consent to conferral of functions etc. on GEMS**
4 **Regulator by State and Territory laws**

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

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

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

20 **73 How duty is imposed on GEMS Regulator by State and Territory**
21 **laws**

22 *Application*

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

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

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

- 28 (2) The duty is taken not to be imposed by this Act (or any other law
29 of the Commonwealth) to the extent to which:
30 (a) imposing the duty is within the legislative powers of the State
31 or Territory concerned; and
-

Section 74

1 (b) imposing the duty by the law of the State or Territory is
2 consistent with the constitutional doctrines restricting the
3 duties that may be imposed on the GEMS Regulator.

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

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

9 (3) If, to ensure the validity of the purported imposition of the duty, it
10 is necessary that the duty be imposed by a law of the
11 Commonwealth (rather than by the law of the State or Territory),
12 the duty is taken to be imposed by this Act to the extent necessary
13 to ensure that validity.

14 (4) If, because of subsection (3), this Act is taken to impose the duty, it
15 is the intention of the Parliament to rely on all powers available to
16 it under the Constitution to support the imposition of the duty by
17 this Act.

18 (5) The duty is taken to be imposed by this Act in accordance with
19 subsection (3) only to the extent to which imposing the duty:
20 (a) is within the legislative powers of the Commonwealth; and
21 (b) is consistent with the constitutional doctrines restricting the
22 duties that may be imposed on the GEMS Regulator.

23 (6) Subsections (1) to (5) do not limit section 72.

24 **74 When State and Territory laws impose a duty on GEMS**
25 **Regulator**

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

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

30 (b) the circumstances in which the power or function is conferred
31 give rise to an obligation on the GEMS Regulator to exercise
32 the power or to perform the function.
33

1 **Division 5—General provisions relating to GEMS**
2 **Regulator**

3 **75 Powers of the GEMS Regulator**

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

7 **76 GEMS Regulator has privileges and immunities of the Crown**

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

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

13 **77 GEMS Regulator may charge for services**

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

19 **78 Arrangements with other agencies**

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

25 **79 Consultants**

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

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1 **80 Delegation**

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

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

9 (2) However, the GEMS Regulator must not delegate a power or
10 function, under subsection (1), to an officer or employee of an
11 agency of a State or Territory without the agreement of the State or
12 Territory.

13 (3) A delegate of the GEMS Regulator is subject to the GEMS
14 Regulator's directions while exercising the delegate's delegated
15 powers and functions.
16

1 **Part 7—Monitoring and investigation**

2 **Division 1—Guide to this Part**

3 **81 Guide to this Part**

4 This Part is about ensuring compliance with this Act.

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

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

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

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

29 Division 6 contains rules relevant to both monitoring and
30 investigation, such as the obligations and other powers of GEMS

Part 7 Monitoring and investigation

Division 1 Guide to this Part

Section 81

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inspectors when entering premises, and the rights and responsibilities of occupiers.

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

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

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

1 **Division 2—GEMS inspectors**

2 **82 Appointment of GEMS inspectors**

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

7 *Prerequisites to appointment*

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

18 *GEMS inspector to comply with directions*

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

23 **83 GEMS Regulator is an inspector**

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

25 **84 Identity cards**

- 26 (1) The GEMS Regulator must issue an identity card to a GEMS
27 inspector appointed under section 82.
- 28 (2) The Secretary must issue an identity card to the GEMS Regulator.

Section 85

1 *Form of identity card*

2 (3) The identity card must:

3 (a) be in the form approved, in writing, by the GEMS Regulator;
4 and

5 (b) contain a recent photograph of the GEMS inspector.

6 *GEMS inspector must carry card*

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

9 **85 Offence for not returning identity card**

10 (1) A person commits an offence of strict liability if:

11 (a) the person has been issued with an identity card; and

12 (b) the person ceases to be a GEMS inspector; and

13 (c) the person does not return the identity card to the GEMS
14 Regulator within 14 days after ceasing to be a GEMS
15 inspector.

16 Penalty: 1 penalty unit.

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

18 *Defence: card lost or destroyed*

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

21 Note: A defendant bears an evidential burden in relation to the matters in
22 this subsection (see subsection 13.3(3) of the *Criminal Code*).
23

1 **Division 3—Inspecting public areas of GEMS business**
2 **premises**

3 **86 Inspection powers in public areas of GEMS business premises**

4 (1) A GEMS inspector may enter a public area of GEMS business
5 premises when the premises are open to the public and exercise the
6 following powers for a purpose referred to in subsection (2):

- 7 (a) the power to inspect GEMS products;
8 (b) the power to purchase any GEMS product that is available
9 for sale;
10 (c) the power to inspect or collect written information,
11 advertising or any other document that is available, or made
12 available, to the public in relation to GEMS products;
13 (d) the power to discuss product features of any GEMS products
14 with any person;
15 (e) the power to observe practices relating to the supply of
16 GEMS products.

17 (2) A GEMS inspector may only exercise a power under subsection (1)
18 for one or more of the following purposes:

- 19 (a) determining whether a provision of this Act has been, or is
20 being, complied with;
21 (b) determining whether information given in compliance or
22 purported compliance with a provision of this Act is correct;
23 (c) investigating a possible contravention of a related provision.

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

26 (3) Subsection (1) does not affect any right of the occupier of the
27 premises to refuse to allow a GEMS inspector to enter, or remain
28 on, the premises.

29 (4) Subsection (1) does not limit the powers of a GEMS inspector
30 under Division 4, 5 or 6 of this Part or any other power of a person
31 to enter a public area of GEMS business premises.
32

1 **Division 4—Monitoring**

2 **Subdivision A—Monitoring powers**

3 **87 GEMS inspector may enter premises by consent or under a**
4 **warrant**

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

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

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

- 14 (2) However, a GEMS inspector is not authorised to enter the premises
15 unless:

- 16 (a) the occupier of the premises has consented to the entry and
17 the GEMS inspector has shown his or her identity card if
18 required by the occupier; or
19 (b) the entry is made under a monitoring warrant.

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

23 Note 2: See Division 6 for general provisions relating to monitoring, such as:
24 (a) obligations of GEMS inspectors in entering premises; and
25 (b) other powers of GEMS inspectors; and
26 (c) occupier's rights and responsibilities on entry.

27 **88 Monitoring powers of GEMS inspectors**

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

- 30 (a) the power to search the premises and any thing on the
31 premises;
32 (b) the power to examine or observe any activity conducted on
33 the premises;

-
- 1 (c) the power to inspect, examine, take measurements of or
2 conduct tests on any thing on the premises (including by
3 operating a GEMS product);
4 (d) the power to make any still or moving image or any
5 recording of the premises or any thing on the premises;
6 (e) the power to inspect any document on the premises;
7 (f) the power to take extracts from, or make copies of, any such
8 document;
9 (g) the power to take onto the premises such equipment and
10 materials as the GEMS inspector requires for the purpose of
11 exercising powers in relation to the premises;
12 (h) the powers set out in sections 89 and 92.

13 **89 Operating electronic equipment**

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

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- 1 (b) the power to operate electronic equipment on the premises to
2 transfer the relevant data to a disk, tape or other storage
3 device that:
4 (i) is brought to the premises for the exercise of the power;
5 or
6 (ii) is on the premises and the use of which for that purpose
7 has been agreed in writing by the occupier of the
8 premises;
9 and remove the disk, tape or other storage device from the
10 premises.

- 11 (4) A GEMS inspector may operate electronic equipment as mentioned
12 in subsection (1) or (3) only if the GEMS inspector believes on
13 reasonable grounds that the operation of the equipment can be
14 carried out without damage to the equipment.

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

17 **90 Accessing information held on certain premises—notification to**
18 **occupier**

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

91 Expert assistance to operate electronic equipment

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

Securing equipment

- 4
5 (2) A GEMS inspector may do whatever is necessary to secure any
6 electronic equipment that is on the premises if the GEMS inspector
7 believes on reasonable grounds that:

8 (a) there is information (*relevant data*) on the premises relevant
9 to determining whether:

10 (i) a provision of this Act has been, or is being, complied
11 with; or

12 (ii) information given in compliance or purported
13 compliance with a provision of this Act is correct; and

14 (b) the relevant data may be accessible by operating the
15 equipment; and

16 (c) expert assistance is required to operate the equipment; and

17 (d) the relevant data may be destroyed, altered or otherwise
18 interfered with if the GEMS inspector does not take action
19 under this subsection.

- 20 (3) The GEMS inspector must give notice to the occupier of the
21 premises, or another person who apparently represents the
22 occupier, of:

23 (a) the GEMS inspector's intention to secure the equipment; and

24 (b) the fact that the equipment may be secured for up to 24
25 hours.

Period equipment may be secured

- 26
27 (4) The equipment may be secured until the earlier of the following
28 happens:

29 (a) the 24-hour period ends;

30 (b) the equipment has been operated by the expert.

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

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Extensions

- 1
- 2 (5) The GEMS inspector may apply to an issuing officer for an
- 3 extension of the 24-hour period if the GEMS inspector believes on
- 4 reasonable grounds that the equipment needs to be secured for
- 5 more than that period.
- 6 (6) Before making the application, the GEMS inspector must give
- 7 notice to the occupier of the premises, or another person who
- 8 apparently represents the occupier, of his or her intention to apply
- 9 for an extension. The occupier or other person is entitled to be
- 10 heard in relation to that application.
- 11 (7) The provisions of this Division relating to the issue of monitoring
- 12 warrants apply, with such modifications as are necessary, to the
- 13 issue of an extension.
- 14 (8) The 24-hour period may be extended more than once.

15 **92 Securing evidence of the contravention of a related provision**

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

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

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

19 **93 Persons assisting GEMS inspectors**

20 *GEMS inspectors may be assisted by other persons*

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

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

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

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

Subdivision C—Monitoring warrants

94 Monitoring warrants

Application for warrant

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

Issue of warrant

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

1 (b) information given in compliance or purported compliance
2 with a provision of this Act is correct.

3 (3) However, the issuing officer must not issue the warrant unless the
4 GEMS inspector or another person has given to the issuing officer,
5 either orally or by affidavit, such further information (if any) as the
6 issuing officer requires concerning the grounds on which the issue
7 of the warrant is being sought.

8 *Content of warrant*

9 (4) The warrant must:
10 (a) describe the premises to which the warrant relates; and
11 (b) state that the warrant is issued under this section; and
12 (c) state the purpose for which the warrant is issued; and
13 (d) authorise, on any one or more occasions while the warrant
14 remains in force, one or more GEMS inspectors (whether or
15 not named in the warrant):
16 (i) to enter the premises; and
17 (ii) to exercise the powers set out in this Division and
18 Division 6 in relation to the premises; and
19 (e) state whether entry is authorised to be made at any time of
20 the day or during specified hours of the day; and
21 (f) specify the day (not more than 6 months after the issue of the
22 warrant) on which the warrant ceases to be in force.
23

1 **Division 5—Investigation**

2 **Subdivision A—Investigation powers**

3 **95 GEMS inspector may enter premises by consent or under a**
4 **warrant**

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

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

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

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

20 Note 2: See Division 6 for general provisions relating to investigation, such
21 as:
22 (a) obligations of GEMS inspectors in entering premises; and
23 (b) other powers of GEMS inspectors; and
24 (c) occupier's rights and responsibilities on entry.

25 **96 Investigation powers of GEMS inspectors**

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

- 28 (a) if entry to the premises is with the occupier's consent—the
29 power to search the premises, and any thing on the premises,
30 for the evidential material the GEMS inspector has
31 reasonable grounds for suspecting may be on the premises;
32 (b) if entry to the premises is under an investigation warrant:

- 1 (i) the power to search the premises and any thing on the
2 premises for the kind of evidential material specified in
3 the warrant; and
4 (ii) the power to seize evidential material of that kind if the
5 GEMS inspector finds it on the premises;
6 (c) the power to inspect, examine, take measurements of or
7 conduct tests on evidential material referred to in
8 paragraph (a) or (b) (including by operating a GEMS product
9 constituting evidential material);
10 (d) the power to make any still or moving image or any
11 recording of the premises or evidential material referred to in
12 paragraph (a) or (b);
13 (e) the power to take onto the premises such equipment and
14 materials as the GEMS inspector requires for the purpose of
15 exercising powers in relation to the premises;
16 (f) the powers set out in sections 97 and 100.

17 **97 Operating electronic equipment**

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

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

29 **98 Accessing evidential material held on certain premises—**
30 **notification to occupier**

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

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

12 **99 Expert assistance to operate electronic equipment**

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

15 *Securing equipment*

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

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Period equipment may be secured

- 1
- 2 (4) The equipment may be secured until the earlier of the following
- 3 happens:
- 4 (a) the 24-hour period ends;
- 5 (b) the equipment has been operated by the expert.

6 Note: For compensation for damage to electronic equipment, see

7 section 121.

8 *Extensions*

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

22 **100 Seizing evidence of contravention of related provision**

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

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

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

9 **101 Persons assisting GEMS inspectors**

10 *GEMS inspectors may be assisted by other persons*

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

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

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

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

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

4 **102 Copies of seized things to be provided**

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

24 **103 Receipts for seized things**

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

1 **104 Return of seized things**

2 (1) The GEMS Regulator must take reasonable steps to return a thing
3 seized under this Division when the earliest of the following
4 happens:

- 5 (a) the reason for the thing's seizure no longer exists;
6 (b) it is decided that the thing is not to be used in evidence;
7 (c) the period of 60 days after the thing's seizure ends.

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

9 *Exceptions*

10 (2) Subsection (1):

- 11 (a) is subject to any contrary order of a court; and
12 (b) does not apply if the thing:
13 (i) is forfeited or forfeitable to the Commonwealth; or
14 (ii) is the subject of a dispute as to ownership.

15 (3) The GEMS Regulator is not required to take reasonable steps to
16 return a thing because of paragraph (1)(c) if:

- 17 (a) proceedings in respect of which the thing may afford
18 evidence were instituted before the end of the 60 days and
19 have not been completed (including an appeal to a court in
20 relation to those proceedings); or
21 (b) the thing may continue to be retained because of an order
22 under section 105; or
23 (c) the Commonwealth or the GEMS Regulator is otherwise
24 authorised (by a law, or an order of a court, of the
25 Commonwealth or of a State or Territory) to retain, destroy,
26 dispose of or otherwise deal with the thing.

27 *Return of thing*

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

Section 105

1 **105 Issuing officer may permit a thing to be retained**

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

15 *Order to retain thing*

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

28 **106 Disposal of things**

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

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

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

8 **Subdivision D—Investigation warrants**

9 **107 Investigation warrants**

10 *Application for warrant*

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

13 *Issue of warrant*

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

23 *Content of warrant*

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

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

16 **108 Investigation warrants by telephone, fax etc.**

17 *Application for warrant*

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

1 *Issuing officer may complete and sign warrant*

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

15 *Obligations on GEMS inspector*

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

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1 *Issuing officer to attach documents together*

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

4 **109 Authority of warrant**

5 (1) A form of warrant duly completed under subsection 108(6) is
6 authority for the same powers as are authorised by the warrant
7 signed by the issuing officer under subsection 108(4).

8 (2) In any proceedings, a court is to assume (unless the contrary is
9 proved) that an exercise of power was not authorised by a warrant
10 completed and signed under section 108 if:

11 (a) it is material, in those proceedings, for the court to be
12 satisfied that the exercise of power was authorised by that
13 section; and

14 (b) the warrant signed by the issuing officer authorising the
15 exercise of the power is not produced in evidence.

16 **110 Offence relating to warrants by telephone, fax etc.**

17 A GEMS inspector must not:

18 (a) state in a document that purports to be a form of warrant
19 under section 108 the name of an issuing officer unless that
20 issuing officer signed the warrant; or

21 (b) state on a form of warrant under that section a matter that, to
22 the GEMS inspector's knowledge, departs in a material
23 particular from the terms of the warrant signed by the issuing
24 officer under that section; or

25 (c) purport to execute, or present to another person, a document
26 that purports to be a form of warrant under that section that
27 the GEMS inspector knows departs in a material particular
28 from the terms of a warrant signed by an issuing officer
29 under that section; or

30 (d) purport to execute, or present to another person, a document
31 that purports to be a form of warrant under that section where
32 the GEMS inspector knows that no warrant in the terms of
33 the form of warrant has been completed and signed by an
34 issuing officer; or

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

4 Penalty: Imprisonment for 2 years.

5 **111 Completing execution of an investigation warrant after**
6 **temporary cessation**

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

21 *Application for extension in emergency situation*

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

Section 112

1 *Extension in emergency situation*

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

10 **112 Completing execution of warrant stopped by court order**

- 11 A GEMS inspector, and any persons assisting, may complete the
12 execution of a warrant that has been stopped by an order of a court
13 if:
14 (a) the order is later revoked or reversed on appeal; and
15 (b) the warrant is still in force when the order is revoked or
16 reversed.
17

1 **Division 6—General provisions relating to monitoring and**
2 **investigation**

3 **Subdivision A—Obligations of GEMS inspectors in entering**
4 **premises**

5 **113 Consent**

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

20 **114 Announcement before entry under warrant**

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

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

115 GEMS inspector to be in possession of warrant

- 15 (1) A GEMS inspector executing a monitoring warrant must be in
16 possession of the warrant issued by the issuing officer under
17 section 94, or a copy of the warrant as so issued.
18
- 19 (2) A GEMS inspector executing an investigation warrant must be in
20 possession of:
21 (a) the warrant issued by the issuing officer under section 107, or
22 a copy of the warrant as so issued; or
23 (b) the form of warrant completed under subsection 108(6), or a
24 copy of the form as so completed.

116 Details of warrant etc. to be given to occupier

- 25 (1) A GEMS inspector must comply with subsection (2) if:
26 (a) a monitoring warrant or an investigation warrant is being
27 executed in relation to premises; and
28 (b) the occupier of the premises, or another person who
29 apparently represents the occupier, is present at the premises.
30
- 31 (2) The GEMS inspector executing the warrant must, as soon as
32 practicable:

- 1 (a) if the warrant is a monitoring warrant issued under
2 section 94—make a copy of the warrant available to the
3 occupier or other person (which need not include the
4 signature of the issuing officer who issued it); and
5 (b) if the warrant is an investigation warrant—do one of the
6 following:
7 (i) if the warrant was issued under section 107—make a
8 copy of the warrant available to the occupier or other
9 person (which need not include the signature of the
10 issuing officer who issued it);
11 (ii) if the warrant was signed under section 108—make a
12 copy of the form of warrant completed under subsection
13 108(6) available to the occupier or other person; and
14 (c) inform the occupier or other person of the rights and
15 responsibilities of the occupier or other person under
16 Subdivision C.

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

18 **117 Use of force in executing a warrant**

- 19 In executing a monitoring warrant or an investigation warrant:
20 (a) a GEMS inspector may use such force against things as is
21 necessary and reasonable in the circumstances; and
22 (b) a person assisting the GEMS inspector may use such force
23 against things as is necessary and reasonable in the
24 circumstances.

25 **118 GEMS inspector may ask questions and seek production of**
26 **documents**

27 *Application*

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

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

5 *Entry with consent*

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

13 *Entry under a warrant*

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

24 *Offence*

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

29 Penalty for contravention of this subsection: 30 penalty units.

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

2 **119 Occupier entitled to observe execution of warrant**

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

12 **120 Occupier to provide GEMS inspector with facilities and**
13 **assistance**

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

24 Penalty for contravention of this subsection: 30 penalty units.

25 **Subdivision D—General provisions**

26 **121 Compensation for damage to electronic equipment**

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

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- 1 (i) damage is caused to the equipment; or
2 (ii) the data recorded on the equipment is damaged; or
3 (iii) programs associated with the use of the equipment, or
4 with the use of the data, are damaged or corrupted; and
5 (b) the damage or corruption occurs because:
6 (i) insufficient care was exercised in selecting the person
7 who was to operate the equipment; or
8 (ii) insufficient care was exercised by the person operating
9 the equipment.
- 10 (2) The Commonwealth must pay the owner of the equipment, or the
11 user of the data or programs, such reasonable compensation for the
12 damage or corruption as the Commonwealth and the owner or user
13 agree on.
- 14 (3) However, if the owner or user and the Commonwealth fail to
15 agree, the owner or user may institute proceedings in a relevant
16 court for such reasonable amount of compensation as the court
17 determines.
- 18 (4) In determining the amount of compensation payable, regard is to
19 be had to whether the occupier of the premises, or the occupier's
20 employees or agents, if they were available at the time, provided
21 any appropriate warning or guidance on the operation of the
22 equipment.
23

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

3 **122 Meaning of *person who has GEMS information***

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

- 8 (a) a possible contravention of a provision of this Act; or
9 (b) a possible offence against this Act, or against the *Crimes Act*
10 *1914* or the *Criminal Code* that relates to this Act.

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

13 **123 GEMS Regulator may require a person to provide information**

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

21 *Matters to be included in notice*

- 22 (2) The notice must also specify:
23 (a) the day on which the notice is given; and
24 (b) the person to whom the notice is given; and
25 (c) the manner in which the information is to be given or the
26 document produced; and
27 (d) that the information is to be given, or the document
28 produced, within 14 days after the notice is given, or within
29 such longer period as is specified in the notice; and
30 (e) that the person may commit an offence if the person does not
31 comply with the notice.

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- 1 (3) The notice must set out the effect of sections 137.1 and 137.2 of
2 the *Criminal Code* (false or misleading information or documents).

3 *Offence for failing to comply with a notice*

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

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

11 **124 GEMS Regulator may require a person to appear before a**
12 **GEMS inspector**

- 13 (1) The GEMS Regulator may give a written notice to a person who
14 has GEMS information requiring the person to appear before the
15 GEMS inspector specified in the notice:

- 16 (a) to answer any questions put by the GEMS inspector; and
17 (b) to produce to the GEMS inspector any documents that are
18 referred to in the notice.

- 19 (2) The notice must also specify:
20 (a) the day on which the notice is given; and
21 (b) the person to whom the notice is given; and
22 (c) the time and place at which the person is to appear; and
23 (d) that the person may commit an offence if the person does not
24 comply with the notice.

25 The time referred to in paragraph (c) must be more than 14 days
26 after the notice is given.

- 27 (3) The notice must set out the effect of sections 137.1 and 137.2 of
28 the *Criminal Code* (false or misleading information or documents).

29 *Offence for failing to appear*

- 30 (4) A person commits an offence if:
-

- 1 (a) the person is required to appear before a GEMS inspector
2 under subsection (1); and
3 (b) the person does not appear before the GEMS inspector.

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

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

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

15 Penalty for contravention of this subsection: Imprisonment for 6
16 months or 30 penalty units, or both.
17

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

2 **125 Authorising persons to test GEMS products**

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

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

11 **126 Testing GEMS products etc.**

12 (1) A person who is authorised to test GEMS products in a product
13 class may test, examine and sample any of the following GEMS
14 products in that product class for the purpose of determining
15 whether the product, or a model of the product, complies with a
16 provision of this Act:

- 17 (a) a GEMS product purchased by the person;
18 (b) a GEMS product given to the GEMS Regulator under
19 section 57 (requirement for registrant to give product—
20 determining whether model complies with GEMS
21 determination);
22 (c) a GEMS product purchased by a GEMS inspector under
23 section 86 (inspection powers in public areas of GEMS
24 business premises);
25 (d) a GEMS product seized under:
26 (i) section 96 (investigation powers of GEMS inspectors);
27 or
28 (ii) section 100 (seizing evidence of contravention of related
29 provision).

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

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

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- 1 (a) includes the power to test, examine and sample a GEMS
2 product in accordance with requirements specified under
3 section 63; and
4 (b) may be exercised in relation to a GEMS product even though
5 that might result in:
6 (i) damage to, or the destruction of, the product or a
7 package containing the product; or
8 (ii) the reduction in the value of the product or a package
9 containing the product.
- 10 (3) However, if the GEMS product is covered by paragraph (1)(b) or
11 (d), the person must not be more destructive in exercising the
12 power under subsection (1) in relation to the product than is
13 reasonable for the purpose of determining whether the product, or a
14 model of the product, complies with a provision of this Act.
- 15 Note: If the operation of this section would result in an acquisition of
16 property otherwise than on just terms, see section 174.
17

1 **Division 9—Issuing officers**

2 **127 Powers of issuing officers**

3 *Powers conferred personally*

4 (1) A power conferred on an issuing officer by this Act is conferred on
5 the issuing officer:

- 6 (a) in a personal capacity; and
7 (b) not as a court or a member of a court.

8 *Powers need not be accepted*

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

10 *Protection and immunity*

11 (3) An issuing officer exercising a power conferred by this Act has the
12 same protection and immunity as if the issuing officer were
13 exercising the power:

- 14 (a) as the court of which the issuing officer is a member; or
15 (b) as a member of the court of which the issuing officer is a
16 member.
17

1 **Part 8—Enforcement**

2 **Division 1—Guide to this Part**

3 **128 Guide to this Part**

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

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

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

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

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

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

25

1 **Division 2—Civil penalties**

2 **Subdivision A—Preliminary**

3 **129 Civil penalty provisions**

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

5 (a) either:

6 (i) the provision sets out at its foot a pecuniary penalty, or
7 penalties, indicated by the words “Civil penalty”; or

8 (ii) another provision of this Act provides that the provision
9 is a civil penalty provision, or that a person is liable to a
10 civil penalty if the person contravenes the provision;
11 and

12 (b) the provision is a subsection, or a section that is not divided
13 into subsections.

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

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

17 **130 Civil penalty orders**

18 *Application for order*

19 (1) The GEMS Regulator may apply to a relevant court for an order
20 that a person, who is alleged to have contravened a civil penalty
21 provision, pay the Commonwealth a pecuniary penalty.

22 (2) The GEMS Regulator must make the application within 6 years of
23 the alleged contravention.

24 *Court may order person to pay pecuniary penalty*

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

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

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

2 *Determining pecuniary penalty*

3 (5) The pecuniary penalty must not be more than:

4 (a) if the person is a body corporate—5 times the pecuniary
5 penalty specified for the civil penalty provision; and

6 (b) otherwise—the pecuniary penalty specified for the civil
7 penalty provision.

8 (6) In determining the pecuniary penalty, the court may take into
9 account all relevant matters, including:

10 (a) the nature and extent of the contravention; and

11 (b) the nature and extent of any loss or damage suffered because
12 of the contravention; and

13 (c) the circumstances in which the contravention took place; and

14 (d) whether the person has previously been found by a court to
15 have engaged in any similar conduct.

16 **131 Civil enforcement of penalty**

17 (1) A pecuniary penalty is a debt payable to the Commonwealth.

18 (2) The Commonwealth may enforce a civil penalty order as if it were
19 an order made in civil proceedings against the person to recover a
20 debt due by the person. The debt arising from the order is taken to
21 be a judgement debt.

22 **132 Conduct contravening more than one civil penalty provision**

23 (1) If conduct constitutes a contravention of 2 or more civil penalty
24 provisions, proceedings may be instituted under this Division
25 against a person in relation to the contravention of any one or more
26 of those provisions.

27 (2) However, the person is not liable to more than one pecuniary
28 penalty under this Division in relation to the same conduct.

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1 **133 Multiple contraventions**

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

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

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

12 **134 Proceedings may be heard together**

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

15 **135 Civil evidence and procedure rules for civil penalty orders**

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

19 **136 Contravening a civil penalty provision is not an offence**

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

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

22 **137 Civil proceedings after criminal proceedings**

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

1 **138 Criminal proceedings during civil proceedings**

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

13 **139 Criminal proceedings after civil proceedings**

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

19 **140 Evidence given in civil proceedings not admissible in criminal**
20 **proceedings**

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

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1 **Subdivision D—Miscellaneous**

2 **141 Ancillary contravention of civil penalty provisions**

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

13 Note: Section 144 (which provides that a person's state of mind does not

14 need to be proven in relation to a civil penalty provision) does not

15 apply to subsection (1) of this section.

16 *Civil penalty*

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

19 **142 Continuing contraventions of civil penalty provisions**

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

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

4 **143 Mistake of fact**

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

26 **144 State of mind**

- 27 (1) In proceedings for a civil penalty order against a person for a
28 contravention of a civil penalty provision (other than subsection
29 141(1)), it is not necessary to prove:
- 30 (a) the person's intention; or
31 (b) the person's knowledge; or
32 (c) the person's recklessness; or
33 (d) the person's negligence; or

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- 1 (e) any other state of mind of the person.
- 2 (2) Subsection (1) does not affect the operation of section 143 (which
- 3 is about mistake of fact).
- 4

1 **Division 3—Infringement notices**

2 **Subdivision A—Preliminary**

3 **145 Enforceable provisions**

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

5 **Subdivision B—Infringement notices**

6 **146 When an infringement notice may be given**

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

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

27 **147 Matters to be included in an infringement notice**

- 28 (1) An infringement notice must:
29 (a) be identified by a unique number; and

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- 1 (b) state the day on which it is given; and
2 (c) state the name of the person to whom the notice is given; and
3 (d) state the name of the person who gave the notice; and
4 (e) give brief details of the alleged contravention, including:
5 (i) the provision that was allegedly contravened; and
6 (ii) the maximum penalty that a court could impose for the
7 contravention; and
8 (iii) the time (if known) and day of, and the place of, the
9 alleged contravention; and
10 (f) state the amount that is payable under the notice (see
11 subsection (2)); and
12 (g) give an explanation of how payment of the amount is to be
13 made; and
14 (h) state that, if the person to whom the notice is given pays the
15 amount within 28 days after the day the notice is given, then
16 (unless the notice is withdrawn) neither criminal proceedings,
17 nor proceedings for a civil penalty order, will be brought in
18 relation to the conduct constituting the alleged contravention;
19 and
20 (i) state that payment of the amount is not an admission of guilt
21 or liability, but that the giving of the notice and the payment
22 of the amount may be publicised under section 162; and
23 (j) state that the person may apply to the GEMS Regulator to
24 have the period in which to pay the amount extended; and
25 (k) state that the person may choose not to pay the amount and, if
26 the person does so, that the following proceedings may be
27 brought against the person in relation to the conduct
28 constituting the alleged contravention:
29 (i) proceedings for a civil penalty order;
30 (ii) criminal proceedings, if the conduct also constitutes an
31 offence; and
32 (l) set out how the notice can be withdrawn; and
33 (m) state that if the notice is withdrawn any amount paid under
34 the notice must be refunded; and
35 (n) state that if the notice is withdrawn, the following
36 proceedings may be brought against the person in relation to
37 the conduct constituting the alleged contravention:
-

- 1 (i) proceedings for a civil penalty order;
2 (ii) criminal proceedings, if the conduct also constitutes an
3 offence; and
4 (o) state that the person may make written representations to the
5 GEMS Regulator seeking the withdrawal of the notice.
- 6 (2) For the purposes of paragraph (1)(f), the amount to be stated in the
7 notice for the alleged contravention of the provision must be equal
8 to one-fifth of the maximum penalty that a court could impose on
9 the person for that contravention.

10 **148 Extension of time to pay amount**

- 11 (1) A person to whom an infringement notice has been given may
12 apply to the GEMS Regulator for an extension of the period
13 referred to in paragraph 147(1)(h).
- 14 (2) If the application is made before the end of that period, the GEMS
15 Regulator may, in writing, extend that period. The GEMS
16 Regulator may do so before or after the end of that period.
- 17 (3) If the GEMS Regulator extends that period, a reference in this
18 Division, or in a notice or other instrument under this Division, to
19 the period referred to in paragraph 147(1)(h) is taken to be a
20 reference to that period so extended.
- 21 (4) If the GEMS Regulator does not extend that period, a reference in
22 this Division, or in a notice or other instrument under this Division,
23 to the period referred to in paragraph 147(1)(h) is taken to be a
24 reference to the period that ends on the later of the following days:
25 (a) the day that is the last day of the period referred to in
26 paragraph 147(1)(h);
27 (b) the day that is 7 days after the day the person was given
28 notice of the GEMS Regulator's decision not to extend.
- 29 (5) The GEMS Regulator may extend the period more than once under
30 subsection (2).

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1 **149 Withdrawal of an infringement notice**

2 *Representations seeking withdrawal of notice*

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

6 *Withdrawal of notice*

- 7 (2) The GEMS Regulator may withdraw an infringement notice given
8 to a person (whether or not the person has made written
9 representations seeking the withdrawal).
- 10 (3) When deciding whether or not to withdraw an infringement notice
11 (the ***relevant infringement notice***), the GEMS Regulator:
- 12 (a) must take into account any written representations seeking
13 the withdrawal that were given by the person to the GEMS
14 Regulator; and
- 15 (b) may take into account the following:
- 16 (i) whether a court has previously imposed a penalty on the
17 person for a contravention of a provision enforceable
18 under this Division;
- 19 (ii) the circumstances of the alleged contravention;
- 20 (iii) whether the person has paid an amount, stated in an
21 earlier infringement notice, for a contravention of a
22 provision enforceable under this Division if the
23 contravention is constituted by conduct that is the same,
24 or substantially the same, as the conduct alleged to
25 constitute the contravention in the relevant infringement
26 notice;
- 27 (iv) any other matter the GEMS Regulator considers
28 relevant.

29 *Notice of withdrawal*

- 30 (4) Notice of the withdrawal of the infringement notice must be given
31 to the person. The withdrawal notice must state:
- 32 (a) the person's name and address; and
33 (b) the day the infringement notice was given; and

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- 1 (c) the identifying number of the infringement notice; and
2 (d) that the infringement notice is withdrawn; and
3 (e) that proceedings seeking a civil penalty order may be brought
4 in relation to the alleged contravention.

5 *Refund of amount if infringement notice withdrawn*

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

11 **150 Effect of payment of amount**

- 12 (1) If the person to whom an infringement notice for an alleged
13 contravention of a provision is given pays the amount stated in the
14 notice before the end of the period referred to in paragraph
15 147(1)(h):
16 (a) any liability of the person for the alleged contravention is
17 discharged; and
18 (b) neither criminal proceedings, nor proceedings for a civil
19 penalty order, may be brought in relation to the conduct
20 constituting the alleged contravention; and
21 (c) the person is not regarded as having admitted guilt or liability
22 for the alleged contravention.
23 (2) Subsection (1) does not apply if the notice has been withdrawn.

24 **151 Effect of this Division**

- 25 This Division does not:
26 (a) require an infringement notice to be given to a person for an
27 alleged contravention of a provision enforceable under this
28 Division; or
29 (b) affect the liability of a person for an alleged contravention of
30 a provision enforceable under this Division if:
31 (i) the person does not comply with an infringement notice
32 given to the person for the contravention; or

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- 1 (ii) an infringement notice is not given to the person for the
2 contravention; or
3 (iii) an infringement notice is given to the person for the
4 contravention and is subsequently withdrawn; or
5 (c) prevent the giving of 2 or more infringement notices to a
6 person for an alleged contravention of a provision
7 enforceable under this Division; or
8 (d) limit a court's discretion to determine the amount of a
9 penalty to be imposed on a person who is found to have
10 contravened a provision enforceable under this Division.

11 **152 Further provision by regulation**

12 The regulations may make further provision in relation to
13 infringement notices given in relation to contraventions of
14 provisions enforceable under this Division.
15

1 **Division 4—Enforceable undertakings**

2 **Subdivision A—Preliminary**

3 **153 Enforceable provisions**

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

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

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

9 **154 Acceptance of undertakings**

10 (1) The GEMS Regulator may accept any of the following
11 undertakings:

12 (a) a written undertaking given by a person that the person will,
13 in order to comply with a provision enforceable under this
14 Division, take specified action;

15 (b) a written undertaking given by a person that the person will,
16 in order to comply with a provision enforceable under this
17 Division, refrain from taking specified action;

18 (c) a written undertaking given by a person that the person will
19 take specified action directed towards ensuring that the
20 person does not contravene a provision enforceable under
21 this Division, or is unlikely to contravene such a provision, in
22 the future;

23 (d) a written undertaking given by a person that the person will,
24 in order to provide compensation for loss or damage suffered
25 as a result of a contravention by the person of a provision
26 enforceable under this Division, pay another person an
27 amount worked out in accordance with the undertaking.

28 (2) The undertaking must be expressed to be an undertaking under this
29 section.

30 (3) The person may withdraw or vary the undertaking at any time, but
31 only with the written consent of the GEMS Regulator.

Part 8 Enforcement

Division 4 Enforceable undertakings

Section 155

1 (4) The consent of the GEMS Regulator is not a legislative instrument.

2 (5) The GEMS Regulator may, by written notice given to the person,
3 cancel the undertaking.

4 **155 Enforcement of undertakings**

5 (1) If:

- 6 (a) a person has given an undertaking under section 154; and
7 (b) the undertaking has not been withdrawn or cancelled; and
8 (c) the GEMS Regulator considers that the person has breached
9 the undertaking;

10 the GEMS Regulator may apply to a relevant court for an order
11 under subsection (2).

12 (2) If the relevant court is satisfied that the person has breached the
13 undertaking, the court may make any or all of the following orders:

- 14 (a) an order directing the person to comply with the undertaking;
15 (b) an order directing the person to pay to the Commonwealth an
16 amount up to the amount of any financial benefit that the
17 person has obtained directly or indirectly and that is
18 reasonably attributable to the breach;
19 (c) any order that the court considers appropriate directing the
20 person to compensate any other person who has suffered loss
21 or damage as a result of the breach;
22 (d) any other order that the court considers appropriate.
23

1 **Division 5—Injunctions**

2 **Subdivision A—Preliminary**

3 **156 Enforceable provisions**

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

6 **Subdivision B—Injunctions**

7 **157 Grant of injunctions**

8 *Restraining injunctions*

9 (1) If a person has engaged, is engaging or is proposing to engage, in
10 conduct in contravention of a provision enforceable under this
11 Division, a relevant court may, on application by the GEMS
12 Regulator, grant an injunction:

- 13 (a) restraining the person from engaging in the conduct; and
14 (b) if, in the court's opinion, it is desirable to do so—requiring
15 the person to do a thing.

16 *Performance injunctions*

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

24 *Consent injunctions*

25 (3) A relevant court may grant an injunction by consent of all the
26 parties to proceedings under this section, whether or not the court
27 is satisfied that the person has contravened, or will contravene, a
28 provision enforceable under this Division.

Section 158

1 **158 Interim injunctions**

2 *Grant of interim injunctions*

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

7 *No undertakings as to damages*

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

11 **159 Discharging or varying injunctions**

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

14 **160 Certain limits on granting injunctions not to apply**

15 *Restraining injunctions*

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

27 *Performance injunctions*

- 28 (2) The power of a relevant court under this Division to grant an
29 injunction requiring a person to do a thing may be exercised:

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- 1 (a) whether or not it appears to the court that the person intends
2 to refuse or fail again, or to continue to refuse or fail, to do
3 that thing; and
4 (b) whether or not the person has previously refused or failed to
5 do that thing; and
6 (c) whether or not there is an imminent danger of substantial
7 damage to any other person if the person refuses or fails to do
8 that thing.

9 **161 Other powers of a relevant court unaffected**

10 The powers conferred on a relevant court under this Division are in
11 addition to, and not instead of, any other powers of the court,
12 whether conferred by this Act or otherwise.
13

1 **Division 6—Publicising offences, contraventions and**
2 **adverse decisions**

3 **162 GEMS Regulator may publicise certain offences, contraventions**
4 **and adverse decisions**

- 5 (1) The GEMS Regulator may publicise, in any way he or she thinks
6 appropriate, any or all of the following:
- 7 (a) that a person has been convicted of an offence against this
8 Act, the nature of the conduct constituting the offence, and
9 the person's name;
 - 10 (b) that a civil penalty order has been made against a person for
11 contravening a civil penalty provision, the nature of the
12 conduct constituting the contravention, and the person's
13 name;
 - 14 (c) that a person has been given an infringement notice under
15 section 146, the civil penalty provision that is believed to
16 have been contravened, the nature of the conduct constituting
17 the alleged contravention, and the person's name;
 - 18 (d) that a person has paid the amount stated in an infringement
19 notice given under section 146;
 - 20 (e) that an undertaking given under section 154 by a person has
21 been accepted, the terms of the undertaking, and the person's
22 name;
 - 23 (f) that an order has been made against a person under
24 subsection 155(2) in relation to a breach of an undertaking
25 given under section 154, the terms of the order and the
26 person's name;
 - 27 (g) that an injunction under section 157 restraining a person from
28 engaging in conduct, or requiring a person to do an act or
29 thing, has been granted or varied, the nature of the conduct,
30 act or thing, and the person's name;
 - 31 (h) that a decision has been made to do one or more of the
32 following:
 - 33 (i) impose or vary the conditions on a model's registration
34 in relation to a product class;
 - 35 (ii) suspend a model's registration in relation to a product
36 class under section 49;

- 1 (iii) impose or vary the conditions on a suspension of a
2 model's registration in relation to a product class under
3 section 52 or 53;
4 (iv) cancel a model's registration in relation to a product
5 class under section 54;
6 (i) the reasons for a decision referred to in paragraph (h);
7 (j) the name of the registrant for a registration referred to in
8 paragraph (h).

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

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

- 13 (2) This Division does not:
14 (a) limit the power of the GEMS Regulator or anyone else to
15 publicise a matter or a person's name; or
16 (b) prevent anyone else from publicising a matter or a person's
17 name; or
18 (c) affect any obligation (however imposed) on anyone to
19 publicise a matter or a person's name.
20

Part 9 Reviewing decisions

Division 1 Guide to this Part

Section 163

1 **Part 9—Reviewing decisions**

2 **Division 1—Guide to this Part**

3 **163 Guide to this Part**

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

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

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

Division 2—Reviewing decisions

164 Persons affected by reviewable decisions

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

Persons affected by reviewable decisions		
Item	Person <i>affected</i>	<i>Reviewable decision</i>
1	A person who applies to register a model of a GEMS product in relation to a product class.	A decision by the GEMS Regulator under section 43 to refuse to register the model
2	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 45 to impose conditions, or to vary the conditions imposed, on the registration
3	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 46 to refuse to vary the registration to cover one or more additional models of GEMS products
4	The following persons: (a) the registrant for a registration of a model in relation to a product class; (b) the new registrant referred to in section 47	A decision by the GEMS Regulator under section 47 to refuse to vary the registration to specify the new registrant as the registrant for the registration
5	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under subsection 48(4) to specify an earlier day on which the registration period for the registration ends
6	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 49 to suspend the registration
7	The registrant for a registration of a model in relation to a product class	A decision by the GEMS Regulator under section 52 to impose conditions on a suspension of the

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

1

2 **165 Notification of decisions and review rights**

3 (1) As soon as practicable after making a reviewable decision, the
4 person who made the decision must cause a written notice to be
5 given to the person affected by the decision, containing:

- 6 (a) the terms of the decision; and
7 (b) the reasons for the decision; and
8 (c) a statement setting out particulars of the person's review
9 rights.

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

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

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

18 **166 Internal review**

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

23 (2) An application for internal review must be made within:

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

12 **167 Review of decisions by Administrative Appeals Tribunal**

- 13 (1) Applications may be made to the Administrative Appeals Tribunal
14 for review of the following decisions:
15 (a) a reviewable decision made by the GEMS Regulator
16 personally;
17 (b) an internal review decision made by the GEMS Regulator
18 under subsection 166(4).
- 19 (2) An application under subsection (1) may be made only by, or on
20 behalf of, a person affected by the reviewable decision.
- 21 (3) Subsection (2) has effect despite subsection 27(1) of the
22 *Administrative Appeals Tribunal Act 1975*.
23

Part 10 Protecting information

Division 1 Guide to this Part

Section 168

1 **Part 10—Protecting information**

2 **Division 1—Guide to this Part**

3 **168 Guide to this Part**

4 This Part is about protecting information (protected information)
5 obtained by or disclosed to persons in connection with this Act.

6 Disclosing protected information is an offence if it might
7 substantially prejudice the commercial interests of a person, and
8 the disclosure is not authorised by this Part.

9 The ability of courts and tribunals to require the disclosure of
10 protected information is also limited by this Part.

11

1 **Division 2—Protecting information**

2 **169 Offence—Disclosing commercially sensitive information**

3 *Offence*

- 4 (1) A person commits an offence if:
- 5 (a) the person discloses information to another person; and
 - 6 (b) the information is protected information; and
 - 7 (c) there is a risk that the disclosure might substantially prejudice
 - 8 the commercial interests of a third person.

9 Penalty: Imprisonment for 2 years or 120 penalty units, or both.

10 *Exception—authorised disclosure*

- 11 (2) Subsection (1) does not apply if the disclosure referred to in
- 12 paragraph (1)(a) is authorised by section 170 (authorised
- 13 disclosures).

14 Note: A defendant bears an evidential burden in relation to a matter in this

15 subsection (see subsection 13.3(3) of the *Criminal Code*).

16 *Meaning of protected information*

- 17 (3) **Protected information** is information that has been disclosed to, or
- 18 obtained by, a person in the course of the person performing a
- 19 function or duty, or exercising a power, under or in relation to this
- 20 Act.

21 Note: The expression **this Act** has an extended meaning (see the Dictionary

22 in section 5).

23 **170 Authorised disclosures**

- 24 (1) A person may disclose protected information if:
- 25 (a) the disclosure is made for the purposes of:
 - 26 (i) performing a duty or function, or exercising a power,
 - 27 under or in relation to this Act; or
 - 28 (ii) enabling another person to perform duties or functions,
 - 29 or exercise powers, under or in relation to this Act; or

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- 1 (iii) assisting in the administration or enforcement of another
2 law of the Commonwealth, a State, a Territory or a
3 foreign jurisdiction relating to standards for products
4 that use energy, or affect the amount of energy used by
5 another product; or
6 (iv) assisting in the development of standards for products
7 that use energy, or affect the amount of energy used by
8 another product, or standards for testing such products
9 (whether or not those standards are to be requirements
10 of a law of the Commonwealth, a State, a Territory or a
11 foreign jurisdiction); or
12 (b) the disclosure is required or authorised by or under:
13 (i) a law of the Commonwealth (including this Act); or
14 (ii) a law, of a State or Territory, that is prescribed by the
15 regulations for the purposes of this subparagraph; or
16 (c) the disclosure is expressly or impliedly authorised by the
17 third person referred to in paragraph 169(1)(c); or
18 (d) at the time of the disclosure, the protected information is
19 already publicly available; or
20 (e) both:
21 (i) the disclosure is, or is a kind of disclosure that is,
22 certified in writing by the Minister to be in the public
23 interest; and
24 (ii) the disclosure is made in accordance with any
25 requirements specified in the regulations; or
26 (f) both:
27 (i) the person believes on reasonable grounds that the
28 disclosure is necessary to prevent or lessen a serious and
29 imminent threat to the life or health of a person; and
30 (ii) the disclosure is for the purposes of preventing or
31 lessening that threat; or
32 (g) both:
33 (i) the information disclosed is a summary of, or statistics
34 derived from, protected information; and
35 (ii) the information is not likely to enable the identification
36 of a person.

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

3 (2) An instrument made under subparagraph (1)(e)(i) certifying that a
4 particular disclosure is in the public interest is not a legislative
5 instrument.

6 (3) An instrument made under subparagraph (1)(e)(i) certifying that a
7 kind of disclosure is in the public interest is a legislative
8 instrument.

9 **171 Disclosing commercially sensitive information to courts and**
10 **tribunals etc.**

11 (1) This section applies if:

12 (a) information or a document is disclosed to, or obtained by, a
13 person (the *public official*) in the course of the person
14 performing a function or duty, or exercising a power, under
15 or in relation to this Act; and

16 (b) there is a risk that disclosure of the information or document
17 might substantially prejudice the commercial interests of a
18 person other than the public official.

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

21 *Information not to be disclosed to court or tribunal*

22 (2) The public official must not, except for the purposes of this Act, be
23 required to disclose the information to, or produce the document in
24 or to, a court, tribunal, authority or other person having power to
25 require the production of documents or the answering of questions.

26 (3) For the purposes of subsection (2), the purposes of this Act include
27 the purposes of another Act in relation to a requirement, power,
28 function or duty provided for by or under this Act.
29

1 **Part 11—Miscellaneous**
2 **Division 1—Guide to this Part**
3 **172 Guide to this Part**

4 This Part deals with a variety of miscellaneous matters.

5 These include the following:

- 6 (a) recovery of fees payable under this Act;
7 (b) compensation for the acquisition of property;
8 (c) the GEMS Regulator’s annual report;
9 (d) regular independent reviews of the operation of
10 this Act;
11 (e) the power to make regulations.
12

1 **Division 2—Miscellaneous**

2 **173 Recovery of fees**

3 The following amounts may be recovered in a court of competent
4 jurisdiction as debts due to the Commonwealth:

- 5 (a) an amount of a fee payable to the Commonwealth under this
6 Act;
7 (b) an amount of a fee payable to the Commonwealth in
8 connection with the performance of the GEMS Regulator’s
9 functions (see section 77).

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

12 **174 Compensation for acquisition of property**

- 13 (1) If the operation of this Act would result in an acquisition of
14 property from a person otherwise than on just terms, the
15 Commonwealth is liable to pay a reasonable amount of
16 compensation to the person.

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

- 19 (2) If the Commonwealth and the person do not agree on the amount
20 of the compensation, the person may institute proceedings in a
21 relevant court for the recovery from the Commonwealth of such
22 reasonable amount of compensation as the court determines.

- 23 (3) In this Act:

24 *acquisition of property* has the same meaning as in paragraph
25 51(xxxi) of the Constitution.

26 *just terms* has the same meaning as in paragraph 51(xxxi) of the
27 Constitution.

28 **175 Annual report**

- 29 (1) The GEMS Regulator must prepare and give to the Minister a
30 report on the operation of this Act during each financial year.

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- 1 (2) The GEMS Regulator must do so as soon as practicable after the
2 end of each financial year.
- 3 (3) The Minister must cause a copy of the report:
4 (a) to be tabled in each House of the Parliament within 15 sitting
5 days of the day on which the report is given to the Minister;
6 and
7 (b) to be given to each participating jurisdiction.

8 **176 Review of operation of this Act**

- 9 (1) The Minister must cause an independent review of the operation of
10 this Act to be undertaken as soon as possible after:
11 (a) the fifth anniversary of the commencement of this section;
12 and
13 (b) each tenth anniversary of the day referred to in paragraph (a).
- 14 (2) The review must be undertaken by persons who:
15 (a) in the Minister's opinion possess appropriate qualifications to
16 undertake the review; and
17 (b) include one or more persons who are not APS employees.
- 18 (3) The persons who undertake the review must give the Minister a
19 written report of the review.
- 20 (4) The Minister must cause a copy of the report of the review:
21 (a) to be tabled in each House of the Parliament within 15 sitting
22 days of the day on which the report is given to the Minister;
23 and
24 (b) to be given to each participating jurisdiction.

25 **177 Regulations**

- 26 The Governor-General may make regulations prescribing matters:
27 (a) required or permitted by this Act to be prescribed; or
28 (b) necessary or convenient to be prescribed for carrying out or
29 giving effect to this Act.