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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**PRODUCT EMISSIONS STANDARDS BILL 2017**

**PRODUCT EMISSIONS STANDARDS (EXCISE) CHARGES BILL 2017**

**PRODUCT EMISSIONS STANDARDS (CUSTOMS) CHARGES BILL 2017**

**PRODUCT EMISSIONS STANDARDS (CONSEQUENTIAL PROVISIONS) BILL 2017**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the

Minister for the Environment and Energy, the Hon Josh Frydenberg MP)

## **PRODUCT EMISSIONS STANDARDS BILL 2017**

### **PRODUCT EMISSIONS STANDARDS (EXCISE) CHARGES BILL 2017**

### **PRODUCT EMISSIONS STANDARDS (CUSTOMS) CHARGES BILL 2017**

### **PRODUCT EMISSIONS STANDARDS (CONSEQUENTIAL PROVISIONS) BILL 2017**

#### **GENERAL OUTLINE**

The Product Emissions Standards Bill 2017 establishes a national framework to enable Australia to address the adverse impacts of air pollution from certain products on human and environmental health.

The Bill implements a key aspect of the *National Clean Air Agreement*, established by Australia's Environment Ministers on 15 December 2015. Under that Agreement, a key initial action was the introduction of national emission standards for new non-road spark ignition engines and equipment (NRSIEE), which are a significant emission source. At peak times, NRSIEE are estimated to contribute up to 10 per cent of overall air pollutants in Australian urban environments.

The Bill will facilitate this by:

- (a) enabling the Minister to prescribe products as emissions-controlled products and make rules relating to those products;
- (b) providing mechanisms in the rules for emissions-controlled products to be certified to specified emissions standards;
- (c) providing a mechanism for the rules to exempt persons or products from the operation of one or more provisions of the Bill;
- (d) establishing offences and civil penalty provisions relating to the import of an emissions-controlled product to Australia, or supply of that product within Australia, if the product is not certified or marked in accordance with the rules for that product;
- (e) triggering the compliance and enforcement provisions of the *Regulatory Powers (Standard Provisions) Act 2014* and providing for additional compliance and enforcement powers to support the objectives of the Bill;
- (f) enabling the sharing of information obtained under the Bill with other agencies and the publication of certain information relating to an emissions-controlled product;
- (g) enabling the delegation of the Minister's and the Secretary's functions and powers under the Bill, or the Regulatory Powers Act (as the case may be); and
- (h) requiring a review of the operation of the Bill at regular intervals.

The Product Emissions Standards (Excise) Charges Bill 2017 and the Product Emissions Standards (Customs) Charges Bill 2017 complement the Bill by establishing a mechanism for imposing a charge on the import or domestic manufacture of emissions-controlled products to

recover the costs of implementing the product emissions standards framework where appropriate.

The Product Emissions Standards (Consequential Provisions) Bill 2017 makes a consequential amendment to the *Customs Act 1901* clarifying that emissions-controlled products imported or exported in contravention of the Bill are not forfeited to the Crown under section 229 of that Act.

Consistent with the *National Clean Air Agreement* it is anticipated that the first emissions-controlled products to be prescribed under the framework will be NRSIEE products. Rules made for NRSIEE will prescribe two broad categories of NRSIEE: new small non-road spark ignition engines (up to 19 kilowatts in power) and new marine spark ignition propulsion engines.

**FINANCIAL IMPACT STATEMENT**

The Bill provides a framework for regulating emissions-controlled products. The cost of implementation will depend on the type of emissions-controlled products that are prescribed in rules for the purposes of the Bill. The cost of regulating different types of emissions-controlled products will be considered on a case-by-case basis as part of the regulatory impact analysis process, the requirements of which will need to be met prior to the products being prescribed in rules made under the Bill. Costs associated with regulating emissions-controlled products will be offset by revenue from cost recovery activities where this is consistent with the Australian Government Charging Framework. This would be through a charge on the import and domestic manufacture of emissions-controlled products and fees for services provided in the performance of functions under the Bill. Consistent with Australian Government policy, the amount of any applicable charge for different types of emissions-controlled products, or fees for services provided under the Bill, will be determined on a case-by-case basis through a Cost Recovery Implementation Statement.

**LIST OF ABBREVIATIONS**

The following abbreviations and terms are used in this Explanatory Memorandum:

APS	Australian Public Service
Bill	Product Emissions Standards Bill 2017
Consequential Provisions Bill	Product Emissions Standards (Consequential Provisions) Bill 2017
Criminal Code	<i>Criminal Code Act 1995</i>
Customs Act	<i>Customs Act 1901</i>
Customs Charges Bill	Product Emissions Standards (Customs) Charges Bill 2017
Department	means the department responsible for the administration of the Bill, currently the Department of the Environment and Energy

Excise Charges Bill	Product Emissions Standards (Excise) Charges Bill 2017
ICCPR	International Covenant on Civil and Political Rights
Minister	means the Minister responsible for the administration of the Bill, currently the Minister for the Environment and Energy
NRSIIE	non-road spark ignition engines and equipment
POC Act	<i>Proceeds of Crime Act 2002</i>
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
SES	Senior Executive Service

# STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS – PART 3 HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011

## Statement of Compatibility with Human Rights

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

Product Emissions Standards Bill 2017  
Product Emissions Standards (Excise) Charges Bill 2017  
Product Emissions Standards (Customs) Charges Bill 2017  
Product Emissions Standards (Consequential Provisions) Bill 2017

These Bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### Overview of the Bills

The Bill establishes a national framework to enable Australia to address the adverse impacts of air pollution from certain products on human and environmental health.

The Bill will facilitate this by:

- (a) enabling the Minister to prescribe products as emissions-controlled products and make rules relating to those products;
- (b) providing mechanisms in the rules for emissions-controlled products to be certified to specified emissions standards;
- (c) providing a mechanism for the rules to exempt persons or products from the operation of one or more provisions of the Bill;
- (d) establishing offences and civil penalty provisions relating to the import of an emissions-controlled product to Australia, or supply of that product within Australia, if the product is not certified or marked in accordance with the rules for that product;
- (e) triggering the compliance and enforcement provisions of the Regulatory Powers Act and providing for additional compliance and enforcement powers to support the objectives of the Bill;
- (f) enabling the sharing of information obtained under the Bill with other agencies and the publication of certain information relating to an emissions-controlled product;
- (g) enabling the delegation of the Minister's and the Secretary's functions and powers under the Bill, or the Regulatory Powers Act (as the case may be); and
- (h) requiring a review of the operation of the Bill at regular intervals.

The Excise Charges Bill and the Customs Charges Bill complement the Bill by establishing a mechanism for imposing a charge on the import or domestic manufacture of emissions-controlled products to recover the costs of implementing the product emissions standards framework where appropriate.

The Consequential Provisions Bill makes a consequential amendment to the Customs Act clarifying that emissions-controlled products imported or exported in contravention of the Bill are not forfeited to the Crown under section 229 of that Act.

### **Human Rights Implications**

The Excise Charges Bill, the Customs Charges Bill and the Consequential Provisions Bill do not engage any human rights and therefore do not limit any rights.

The Bill engages the following human rights:

- (a) the right to an effective remedy in Article 2(3) of the ICCPR;
- (b) the right to a fair trial and fair hearing in Article 14(1) of the ICCPR;
- (c) the right to the presumption of innocence in Article 14(2) of the ICCPR; and
- (d) the right to privacy in Article 17 of the ICCPR.

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

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

Clause 51 of the Bill enables the Minister to make rules prescribing matters required or permitted by the Bill to be prescribed by the rules or necessary or convenient to be prescribed for carrying out or giving effect to the Bill. The rules may prescribe a product as an emissions-controlled product (clause 9), provide for an emissions-controlled product to be certified and specify any requirements associated with the certification of an emissions-controlled product (clause 10). The rules may also provide for the charging of fees for services provided in the performance of functions under the Bill (paragraph 51(2)(a)). A minimum requirement for certification is that the emissions-controlled product meets the emission standard set out in the rules for that product.

The rules may also exempt persons or emissions-controlled products from the operation of one or more of the provisions of the Bill (clause 11).

Paragraph 51(2)(b) of the Bill enables the rules to provide for the review of decisions made under this Act. The definition of *this Act* in clause 7 of the Bill will include any instruments, including rules, made under the Bill.

It is anticipated that the rules for emissions-controlled products would provide for the merits review of a range of decisions made under those rules. These decisions may include, but would not be limited to, the following types of decisions:

- (a) decisions to certify, or refuse to certify, emissions-controlled products;
- (b) decisions regarding the suspension or revocation of certification of an emissions-controlled product; and

(c) decisions to grant, or refuse to grant, an exemption, or decisions specifying circumstances in which the exemption applies.

It is appropriate that the mechanisms enabling the review of decisions be in the same document as the power to make the decision itself. As such, the rules will provide for the review of decisions rather than the Bill.

As the Bill enables the rules to provide for the review of decisions, the Bill promotes and protects the right to an effective remedy in Article 2(3) of the ICCPR by providing a mechanism by which affected persons are able to seek a review of these types of decisions.

### **Right to a fair trial**

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

### ***Criminal process rights***

Clauses 24 and 25 of the Bill trigger the monitoring powers in Part 2 (Monitoring) of the Regulatory Powers Act and the investigation powers in Part 3 (Investigation) of the Regulatory Powers Act, respectively, which causes offences in that Act to apply in relation to monitoring and investigation. The fair rights, minimum guarantees in the determination of a criminal charge and other criminal process rights contained in Article 14 of the ICCPR are engaged. Part 2 (Monitoring) and Part 3 (Investigation) of the Regulatory Powers Act provide questioning powers to authorised officers. Under subsection 24(3) of the Regulatory Powers Act, where entry is authorised by a monitoring warrant, the authorised person may require any person on the premises to answer questions or produce documents relating to information or provisions subject to monitoring. If the person fails to do so, this is an offence under subsection 24(5) of the Regulatory Powers Act, with a maximum penalty of 30 penalty units. Similarly, under section 54(3) of the Regulatory Powers Act, an authorised person who enters premises under an investigation warrant may require persons on the premises to answer questions or produce documents relating to evidential material of the kind specified in the warrant. If the person fails to do so, this is an offence under subsection 54(2) of the Regulatory Powers Act, with a maximum penalty of 30 penalty units.

These offence provisions do not limit the person's access to a fair trial or limit the other criminal process rights in any way. Sections 17 and 47 of the Regulatory Powers Act make it clear that the privileges against self-incrimination and legal professional privilege have not been abrogated by the monitoring and investigation powers provisions, including the offence provisions. These protections guarantee the criminal process rights protected in paragraphs 14(3)(d) and (g) of the ICCPR. The usual guarantees and criminal process rights will apply to these offences and are not abrogated by any provisions in the Bill or triggered provisions of the Regulatory Powers Act. Accordingly, sections 24 and 54 of the Regulatory Powers Act, as applied to the Bill by clauses 24 and 25, are compatible with human rights.

### *Article 14 and civil penalty provisions*

Clause 26 of the Bill triggers the civil penalty provisions in Part 4 of the Regulatory Powers Act. Civil penalty provisions contained in the Bill will be enforceable under that Part of the Regulatory Powers Act.

Under clause 26, an inspector appointed under the Bill may apply to a relevant court for a civil penalty order requiring a person to pay to the Commonwealth a pecuniary penalty for a contravention of a civil penalty provision.

The Bill creates a number of civil penalty provisions relating to the enforcement of product emission standards (see clauses 13(4), 14(3), 15(4), 16(3), 17(4) and 18(3) of Part 3), record-keeping (see clause 20(4), 21(6) and 22(7) of Part 4), and compliance audits (see clause 44(7) of Part 7).

Triggering the civil penalty provision of the Regulatory Powers Act could engage criminal process rights if the imposition of civil penalties is classified as ‘criminal’ under international human rights law. Article 14 of the ICCPR requires that, in the determination of criminal charges, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Determining whether penalties could be considered to be criminal under international human rights law requires consideration of the classification of the penalty provisions under Australian domestic law, the nature and purpose of the penalties, and the severity of the penalties.

The penalty provisions of the Bill expressly classify the penalties as civil penalties. Those provisions create solely pecuniary penalties in the form of a debt payable to the Commonwealth. The purpose of these penalties is to encourage compliance with the requirements for the import, supply and marking of emissions-controlled products, record-keeping and compliance audits. The civil penalty provisions of the Bill do not impose criminal liability, and do not lead to the creation of a criminal record. The penalties only apply to the regulatory regime of the Bill, rather than the public in general. Further, the imposition of the civil penalties is not dependent on a finding of guilt. These factors all suggest that the civil penalties imposed by the Bill are civil rather than criminal in nature.

The maximum penalties that may be imposed in civil penalty orders are 80 penalty units for some provisions and 120 penalty units for others. Where the penalties are higher, this reflects the more serious implications or results of the contravention. Under subsection 82(5) of the Regulatory Powers Act, as applied to the Bill by clause 26, the maximum penalties which apply to individuals are the same as those specified in the civil penalty provision of the Bill. For bodies corporate, the penalties will be no more than five times the penalty specified for the civil penalty provision; being 400 penalty units and 600 penalty units. The penalties do not carry the consequence of offences under the Bill, which would involve a criminal record and can result in imprisonment for contravention of some provisions.

These penalties are not so severe that they could be considered criminal in nature.

Accordingly, the criminal process rights provided for by Article 14 of the ICCPR are not engaged by the provisions of the Bill relating to civil penalty orders.



Clause 26 of the Bill, which triggers Part 4 of the Regulatory Powers Act, engages, but does not limit, the right to a fair and public hearing in civil proceedings provided for by Article 14(1) of the ICCPR. Under section 82 of the Regulatory Powers Act, civil penalty orders can only be granted by a relevant court, which must consider all relevant matters before determining the amount of the penalty. Accordingly, the right to a fair hearing is not limited.

#### ***Article 14 and infringement notices***

Clause 27 of the Bill triggers the infringement notice provisions in Part 5 of the Regulatory Powers Act. These provisions will enable an inspector appointed under the Bill to issue an infringement notice under Part 5 of the Regulatory Powers Act where the inspector believes, on reasonable grounds, that a civil penalty provision of the Bill has been contravened or an offence of strict liability has been committed.

An infringement notice issued under Part 5 of the Regulatory Powers Act is a notice of a pecuniary penalty imposed on a person. It sets out the particulars of an alleged contravention of a law. An infringement notice gives the person to whom the notice is issued the option of paying the penalty set out in the notice, or electing to have the matter dealt by a court. If the person does not pay the amount in the notice, they may be prosecuted if the notice relates to an offence provision, or proceedings for a civil penalty order may be brought against them if the notice relates to a civil penalty provision. This engages the right to a fair and public hearing and the other criminal process rights and minimum guarantees in Article 14 of the ICCPR. As the person may elect to have the matter heard by a court, rather than pay the penalty, the rights to a fair and public hearing, in both civil and criminal matters, are not limited. Clause 27 does not limit the minimum guarantees in criminal proceedings or other process rights provided for by Article 14 of the ICCPR.

Accordingly, the infringement notice provisions under clause 27 of the Bill are compatible with the right to a fair and public trial.

#### ***Article 14 and enforceable undertakings***

Clause 28 of the Bill triggers the enforceable undertakings provisions in Part 6 of the Regulatory Powers Act. This will enable an inspector appointed under the Bill to accept and enforce undertakings relating to compliance with an offence or civil penalty provision of the Bill. If an inspector is satisfied that the person has breached the undertaking, the inspector may apply to a relevant court for an order relating to the undertaking under section 115 of the Regulatory Powers Act.

Triggering the enforceable undertakings provisions of the Regulatory Powers Act in relation to the offences and civil penalty provisions under the Bill engages the right to a fair and public hearing and other criminal process rights and minimum guarantees in Article 14 of the ICCPR. Article 14(1) of the ICCPR ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Under Part 6 of the Regulatory Powers Act, an order enforcing an undertaking can only be made by a court. Accordingly, the right to a fair and public hearing is not limited.

Article 14(1) of the ICCPR also provides a right to a fair and public hearing in civil matters. As orders to enforce an undertaking can only be made by a relevant court under section 115 of the

Regulatory Powers Act, the right to a fair hearing in civil matters provided for by Article 14(1) of the ICCPR is not limited.

Accordingly, clause 28, which triggers the enforceable undertakings provisions of the Regulatory Powers Act, is compatible with human rights.

### ***Article 14 and injunctions***

Clause 29 of the Bill triggers the injunctions provisions in Part 7 of the Regulatory Powers Act. This will enable an inspector appointed under the Bill to apply to a relevant court for an injunction to restrain a person from engaging in conduct or requiring a person to do a thing. An inspector may apply to a relevant court for an interim injunction. The injunction provisions are triggered in relation to the offence and civil penalty provisions of the Bill.

Triggering the injunction provision of the Regulatory Powers Act in relation to the offences and civil penalty provisions of the Bill engages the rights to a fair trial and public hearing in both civil and criminal proceedings. Article 14(1) of the ICCPR ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Under Part 7 of the Regulatory Powers Act, an injunction can only be granted by a court. Thus, the right to a fair and public hearing by a competent, independent and impartial tribunal is not limited. Clause 29 does not limit any of the other criminal process rights or minimum guarantees in Article 14 of the ICCPR.

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

Article 14(2) of the ICCPR ensures that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty accordingly to law.

### ***Strict liability***

Strict liability offences engage and limit the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault. However, the defence of mistake of fact is still available to the defendant and the existence of strict liability does not make any other defence unavailable.

Part 3 of the Bill (Enforcing product emissions standards) applies strict liability to offences relating to the import and supply of uncertified emissions-controlled products, and to offences relating to the marking of emissions-controlled products as certified. These strict liability offences have a maximum penalty of 60 penalty units. The Bill also applies strict liability to the offences in Part 4 relating to record-keeping (which have a maximum penalties of 40 and 60 penalty units) and the offence in clause 44 relating to compliance audits (which has a maximum penalty of 40 penalty units).

Application of strict liability to these offences has been set with consideration given to the guidelines regarding the circumstance in which strict liability is appropriate as set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The strict liability offences have also been framed to comply with the principles set out in the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. The penalties for the strict liability offences

in the Bill do not include imprisonment, and do not exceed 60 penalty units for an individual. An infringement notice may also be issued for a contravention of a strict liability offence.

The use of strict liability offences in the product emissions standards framework are necessary to ensure the integrity of the regulatory regime to prevent the potential harm to the environment and human health resulting from emissions from non-compliant products.

### ***Reversal of the burden of proof***

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

Clause 33 of the Bill creates an offence for a person to engage in conduct that results in an emissions-controlled product that is the subject of a forfeiture notice under clause 32, to be moved, altered, or interfered with. Pursuant to clause 39, a forfeited emissions-controlled product must be dealt with and disposed of in accordance with the directions of the Minister. Subclause 33(2) clarifies that the offence does not apply if the person engages in the conduct in accordance with a direction given to the person by the Minister. A person seeking to rely on this defence will bear an evidential burden in relation to the matter. This is the reverse of the principle in criminal law that the prosecution must prove every element of the offence.

The reversal is justified in this instance, as the matter to be proved (namely that the person’s conduct was in accordance with a direction given to the person by the Minister) is a matter that would be in the particular knowledge of the defendant. It is expected that it would not be unreasonably difficult for the defendant to discharge the evidentiary burden in this circumstance.

The use of strict liability offences and the reversal of the burden of proof in the Bill are reasonable, necessary and proportionate responses which reflect the seriousness of the conduct, the potential harm to the environment and human health from the use of non-compliant emissions-controlled products. The use of strict liability offences and the reversal of the burden of proof is also proportionate given in some cases, the regulation of emissions from products will assist in giving effect to Australia’s obligations under one or more of the Climate Change Conventions. Accordingly, the Bill is consistent with the right to the presumption of innocence in Article 14(2) of the ICCPR.

### **Right to privacy**

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence. The United Nations Human Rights Committee has given a liberal interpretation to the term ‘home’, which includes a person’s workplace. The right to privacy can be limited to achieve a legitimate objective where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the circumstances.

The object of the Bill is to regulate emissions from certain products by setting emissions standards. In regulating those products, it is an object of the Bill to improve air quality in Australia in order to deliver associated health and environmental benefits. In some circumstances, the regulation of emission from products may also assist in giving effect to Australia's obligations under one or more of the Climate Change Conventions.

### ***Monitoring and investigation powers***

The entry, monitoring, search, seizure and information gathering powers in the triggered provisions of the Regulatory Powers Act are provided by law. The monitoring and investigation powers are necessary to enable the monitoring of compliance with the Bill and collection of evidential material relating to contraventions of the Bill. The use of these powers is constrained, ensuring that their use is not arbitrary, as follows:

- (a) the powers cannot be exercised without consent being given to the entry into the premises, or under warrant granted by a magistrate. Where entry is by the consent of the occupier, consent must be informed and voluntary, and can be withdrawn at any time.
- (b) Monitoring and investigation warrants can only be issued where the issuing officer is satisfied of certain matters, by oath or affirmation, of the inspector.
- (c) An inspector cannot enter premises under warrant unless their identify card is shown to the occupier of the premises, and they are provided with a copy of the warrant.

Accordingly, the monitoring and investigation powers are necessary, proportionate and reasonable in the pursuance of the legitimate objectives of the Bill.

### ***Forfeiture of products***

Part 6 of the Bill, which provides for the forfeiture of emissions-controlled products engages the right to privacy. Clause 32 of the Bill enables an inspector to seize an emissions-controlled product that has been forfeited under clause 31, and clause 34 enables an inspector to give a forfeiture notice to the owner of an emissions-controlled product, stating that the product has been seized. If the owner cannot be identified, the inspector may give the forfeiture notice to the person from whom the emissions-controlled product was seized. This could involve entry into a workplace or home.

The forfeiture provisions are provided by law. The forfeiture powers are necessary to pursue the legitimate objectives of the Bill by ensuring that non-compliant emissions-controlled products are not available for use. The use of these powers is constrained, ensuring that their use is not arbitrary, as follows:

- (a) Emissions-controlled products are only forfeited to the Commonwealth under clause 31 after a relevant court has found that a contravention of Part 3 of the Bill has occurred in relation to those products.
- (b) The forfeiture provisions of Division 3 only apply if an emissions-controlled product has been seized under the investigation powers of Part 3 of the Regulatory Powers Act and the inspector reasonably suspects a provision of Part 3 of the Bill has been contravened in relation to the product.

(c) Clause 37 of the Bill also provides a right of compensation in circumstances where an emissions-controlled product was forfeited under clause 36 and a relevant court is satisfied that the requirements of Part 3 of the Regulatory Powers Act relating to the exercise of investigation powers was not complied with, or the relevant court is satisfied that a provision of Part 3 of the Bill was not contravened.

Accordingly, the forfeiture powers are necessary, proportionate and reasonable in the pursuance of the legitimate objectives of the Bill.

### ***Publication of information***

Clause 42 of the Bill enables the Secretary to publish information relating to a certified emissions-controlled product. Information that may be published includes, but is not limited to, information that identifies the product and the manufacturer of the product, information about emissions from the product and information about the certification of the product.

Under clause 42, the Secretary may also publish information relating to an exemption of an emissions-controlled product or a person from one or more provisions of the Bill. The type of information that may be published includes, but is not limited to, the circumstances in which the exemption applies, the reasons for the exemption and the person who applied for the exemption.

Regardless of the type of emissions-controlled product, it is expected that the information that may be published under this clause presents little risk that personal information will be inappropriately used or disclosed. The amount of personal information collected and published is expected to be minimal, as most certification applicants will be companies which manufacture emissions-controlled products and applicants for exemptions are likely to be importers of emissions-controlled products.

Any personal information would be managed in an open and transparent way, consistent with the Department's Privacy Policy, and the Australian Privacy Principles contained in Schedule 1 of the *Privacy Act 1988*. Under the Department's Privacy Policy, appropriate controls exist in relation to the use and storage of personal information. For example, only information necessary to carry out the scheme will be collected and published.

Further, any risk can be minimised by alerting people through a privacy notice when they apply for a certification or exemption that certain information may be published at the completion of the process.

The publication of the information contemplated by clause 42 of the Bill, including the publication of an individual's personal information would be outweighed by the objects of the Bill. The publication of the information will also promote compliance and public confidence in the regulatory regime.

### ***Disclosure of Information***

Clause 43 of the Bill allows the Secretary to disclose information obtained under the Bill to the Australian Border Force and other agencies, bodies or persons prescribed by the rules. The Secretary may disclose information if the Secretary reasonably believes the information will assist or enable the agency to exercise its powers, or perform its functions or duties.

Subclause 51(6) contains a safeguard by requiring the Minister to consult with, and have regard to any submissions from, the Information Commissioner before making any rules prescribing agencies, persons or bodies with whom information may be shared. This will ensure that any rules made by the Minister concerning the disclosure of information comply with relevant privacy obligations, thus protecting the privacy rights of individuals.

The clauses discussed above, which limit the right to privacy are reasonably, necessary and proportionate to achieve the legitimate objective of regulating emissions from emissions-controlled products. Accordingly, these aspects of the Bill are consistent with the right to privacy in Article 17 of the ICCPR.

### **Conclusion**

The Bill is compatible with human rights because it promotes the right to an effective remedy under Article 2(3) of the ICCPR. To the extent that it engages and limits other human rights (including Article 14(1), Article 14(2) and Article 17), those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the Bill.

**Circulated by the authority of the Minister for the Environment and Energy,  
the Hon Josh Frydenberg MP**

# PRODUCT EMISSIONS STANDARDS BILL 2017

## PART 1 - PRELIMINARY

### GENERAL OUTLINE

1. Part 1 of the Bill sets out how the Bill is to be cited and when its provisions commence. It specifies the objects of the Bill and contains a dictionary listing key terms. This Part also sets out the Bill's application to the Crown and external territories and its relationship with State and Territory laws.

### NOTES ON INDIVIDUAL CLAUSES

#### Clause 1 – Short title

2. This clause provides that the short title by which the Bill may be cited is the *Product Emissions Standards Act 2017*.

#### Clause 2 – Commencement

3. This clause provides that the *Product Emissions Standards Act 2017* will commence on the day after the Act receives the Royal Assent.

#### Clause 3 – Objects of this Act

4. This clause sets out the objects of the Bill.
5. Paragraph 3(a) states that it is an object of the Bill to regulate emissions from certain products by setting emissions standards.
6. Subparagraph 3(b)(i) also makes it an object of the Bill, in regulating emissions from products, to improve air quality in Australia in order to deliver associated health and environmental benefits.
7. In some circumstances, the regulation of emissions from products may also assist in giving effect to Australia's obligations under one or more of the Climate Change Conventions (subparagraph 3(b)(ii)). *Climate Change Conventions* is defined in clause 7 to include the *United Nations Framework Convention on Climate Change*, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* and the *Paris Agreement*. For example, consistent with the *National Clean Air Agreement*, it is anticipated that the first emissions-controlled products to be prescribed under the product emissions standards framework will be NRSIEE products. Whilst the emissions from NRSIEE products to be regulated are not greenhouse gases, the regulation of emissions from those products would result in a reduction of emissions of carbon monoxide, hydrocarbons and oxides of nitrogen. This will be achieved through the setting of standards for emissions-controlled products. The emissions-controlled products must meet those standards in order to be certified, and only certified products can be imported into Australia and supplied in the domestic market. The reduction in these emissions will lead to greater engine efficiency, and therefore lower fuel consumption. This in turn would lead to a reduction in greenhouse gas emissions, thereby assisting Australia to

meet its obligations under the Climate Change Conventions; in this case, namely the *United Nations Framework Convention on Climate Change*.

8. The objects of the Bill, as stated in paragraph 3(b), are set out as ‘either or both’ as it may be the case that rules made for the purposes of the Act to regulate emissions from emissions-controlled products contribute to improving air quality in Australia to deliver the associated health and environmental benefits, but do not assist in giving effect to Australia’s obligations under the Climate Change Conventions. In this case, subparagraph (3)(b)(ii) would not be applicable, and clause 50 (Alternative constitutional bases) may be relied upon for the Constitutional basis for those particular rules.

#### **Clause 4 – Simplified outline of this Act**

9. This clause provides an outline to the Bill. The outline is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions of the Bill.

#### **Clause 5 – Extension to external Territories**

10. This clause provides that the Bill applies to every external Territory. The Regulatory Powers Act, as it applies in relation to the Bill, also extends to every external Territory.

#### **Clause 6 – Act binds the Crown**

11. This clause provides that the Bill binds the Crown in each of its capacities. However, in line with usual practice, clause 6 clarifies that the Crown is not liable to be prosecuted for an offence, subject to civil proceedings for a civil penalty order under Part 4 of the Regulatory Powers Act, or given an infringement notice under Part 5 of the Regulatory Powers Act. These protections do not extend to an authority of the Crown.

#### **Clause 7 – Definitions**

12. Clause 7 defines key terms used in the Bill. As the definition of *this Act* includes instruments made under this Act, the definitions outlined in clause 7 will apply in relation to instruments made under the Bill including, for example, rules made pursuant to clause 51 (Rules).
13. Clause 7 includes some ‘signpost’ definitions that refer readers to the clauses in which terms are substantively defined. For example, *emissions-controlled product* means a product that is prescribed by the rules for the purposes of clause 9 and *inspector* means a person appointed under clause 41.
14. A key concept for the regulatory framework established by the Bill is *certified for the purposes of this Act*. This term is defined in clause 7 to mean certified for the purposes of this Act in accordance with the rules. As the Bill provides a framework to prescribe different types of emissions-controlled products over time, this definition provides the necessary flexibility to prescribe different certification methods for different types of emissions-controlled products. Ultimately the method of certification that is prescribed in the rules will depend on the type of product and the domestic and/or international requirements that may exist in relation to the product.



15. Subclauses 7(2) and 7(3) define *supply*, being another key term of the Bill. This definition clarifies the scope of activities covered by the term *supply*. It explicitly lists matters which are included such as an offer to supply, re-supply, hire and lease, providing a gift, and supplying as part of the supply of another thing (for example the supply of a boat with an engine, in circumstances where the engine is prescribed in rules as an emissions-controlled product). Supply includes supply for consideration and wholesale or retail supply. *Offer to supply* includes making available, exposing, displaying or advertising the product. “Re-supply” is intended to encompass supply in a supply chain, where for instance the importer resupplies it to the wholesaler who then resupplies it to the retailer.

## **PART 2 – EMISSIONS-CONTROLLED PRODUCTS**

### **GENERAL OUTLINE**

16. Part 2 enables rules made under clause 51 (Rules) to prescribe emissions-controlled products and to specify a process by which an emissions-controlled product may be certified, or if the product is already certified by a regulatory authority, provide recognition of that certification. A minimum requirement for certification is that the emissions-controlled product meets an emissions standard as set out in the rules made for that type of emissions-controlled product.
17. Part 2 also enables rules made for a type of emissions-controlled product to exempt persons, products or both from the operation of one or more provisions of the Bill, either generally, or in the circumstances set out in the rules.

### **NOTES ON INDIVIDUAL CLAUSES**

#### **Clause 8 – Simplified outline of this Part**

18. This clause provides an outline to Part 2. This outline is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions in Part 2.

#### **Clause 9 – Emissions-controlled products**

19. Clause 9 would allow the Minister to prescribe a product as an emissions-controlled product in rules made pursuant to clause 51 (Rules). Prescribing a product as an emissions-controlled product has the effect of triggering the key requirements in the Bill including, for example, the requirement for the emissions-controlled product to be certified if required by the rules (see clause 10). Prescribing a product as an emissions-controlled product will also trigger the operation of the offence and civil penalty provisions set out in Part 3 (Enforcing product emissions standards) of the Bill.
20. Emissions-controlled products could be prescribed to refer to individually listed products or classes of products, and could include a specific engine as well as the equipment which contain these engines. For example, consistent with the *National Clean Air Agreement*, it is anticipated that the first emissions-controlled products to be prescribed will be NRSIEE. It is possible that the rules made for NRSIEE will prescribe two broad

categories of NRSIEE: new small non-road spark ignition engines (up to 19 kilowatts in power) and new marine spark ignition propulsion engines.

21. While it is anticipated that the first emissions-controlled products will be NRSIEE, clause 9 provides the appropriate flexibility for the Bill to prescribed different types of emissions-controlled products over time.

#### **Clause 10 – Certification**

22. Certification is a key concept in the Bill, and underpins its operation, including the offence and civil penalty provisions outlined in Part 3 (Enforcing product emissions standards) of the Bill. One of the objects of the Bill (see clause 3) is to regulate emissions from certain products by setting emissions standards. Certification of emissions-controlled products is the mechanism which provides a level of assurance that those standards are being met in practice.
23. Clause 51 (Rules) gives the Minister the power to make rules relating to emissions-controlled products. Subclause 10(1) enables the rules made in relation to an emissions-controlled product to set out a certification process for the product. Emissions-controlled products which are certified to one of the accepted emissions standards in the rules must be marked as such and can be imported or supplied without contravening the offence or civil penalty provisions outlined in Part 3 (Enforcing product emissions standards) of the Bill.
24. Subclause 10(2) imposes a restriction on the certification of products under the rules by requiring, as a minimum, an emissions-controlled product to either:
  - (a) comply with an emissions standard set out in the rules for the product; or
  - (b) be certified by a *regulatory authority* (defined in clause 7) and meet an emissions standard specified in the rules for the product. For example, this could include recognition of a product which has been certified by the United States Environment Protection Agency as being compliant with the relevant United States emissions standard for the product.
25. As stated above, it is anticipated that NRSIEE will be the first emissions-controlled products prescribed under this framework. The manufacturers and suppliers of NRSIEE operate in an international market and, currently, all NRSIEE engines supplied to the Australian market are imported from a range of countries (predominantly China, Japan and the USA). There is currently no Australian manufacture of engines for NRSIEE, although some Australian companies import engines and then install them in their locally manufactured equipment. Consistent with good regulatory practice, the rules may accept products certified as meeting international emissions standards where they provide the level of emission control desired in Australia. Adoption of suitable international standards also reduces the regulatory burden on Australian companies importing emissions-controlled products into the Australian market.
26. Not all NRSIEE, however, are certified overseas in a comparable market. To enable manufacturers to demonstrate that their emissions-controlled products can meet

requirements equivalent to that set by the international standards, the rules may also set out an Australian certification process (for both domestic and internationally manufactured products).

27. Subclauses 10(3) and 10(4) also enable the rules to set out administrative and other requirements in relation to the certification of emissions-controlled products including:
  - (a) applications for certification;
  - (b) processes and criteria for certification, including testing;
  - (c) processes for suspending or revoking certification; and
  - (d) the use of marks to indicate certification.
28. Allowing for the certification of emissions-controlled products to be set out in the rules, rather than the Bill, will provide the flexibility required to accommodate different products, standards and certification processes. This is necessary given the Bill sets out the framework for the potential regulation of different types of emissions-controlled products over time.
29. Clause 42 (Publication of information relating to certifications and exemptions) allows the Secretary to publish information relating to the certification of an emissions-controlled product. Paragraph 51(2)(b) enables the rules to provide for the review of decisions. It is anticipated that the rules would provide that decisions to certify, or refuse to certify, emissions-controlled products, and decisions associated with the suspension or revocation of certification, would be subject to merits review. It is appropriate that the rules, and not the Bill, contain the details regarding merits review as the decisions for which this will be available will be specified in the rules.

### **Clause 11 – Exemptions**

30. Subclause 11(1) enables the rules to provide for the exemption of:
  - (a) a specified emissions-controlled product from one or more provisions of the Bill (see paragraph 11(1)(a)); or
  - (b) a specified emissions-controlled product or person, or both, from one or more provisions of the Bill in the circumstances set out in the rules (see paragraph 11(1)(b)).
31. Paragraph 11(1)(a) could be used to delay the commencement of the offence and civil penalty provisions in Part 3 (Enforcing product emissions standards) of the Bill to enable the market to adjust to the introduction of new rules for emissions-controlled products. For example, it is anticipated that the import and supply prohibitions relating to NRSIEE emissions-controlled products, once prescribed, would not commence until 1 July 2018 and 1 July 2019, respectively.
32. Paragraph 11(1)(b) allows for exemptions for an emissions-controlled product, or a person, or both, in certain circumstances. This would address situations for which there are no existing compliant products available for important uses. For example, the

emissions-controlled product is associated with specialised emergency or rescue activities, national security operations, testing or research purposes and the available products are not able to meet the emissions standard required for certification. The rules could provide for an exemption to allow these emissions-controlled products to be imported or supplied. In this way, being able to specify these exemptions ensures that the scheme operates efficiently and unintended market impacts are reduced.

33. If an exemption specifies the circumstances in which the exemption is granted, and those circumstances are not satisfied, the emissions-controlled product or the person (as the case may be) will no longer be exempt from the specified provisions of the Bill.
34. Subclauses 11(3) and 11(4) enables the rules to set out processes relating to the application and granting of exemptions, as well as processing for varying, suspending or revoking exemptions. These processes ensure appropriate oversight of the exemptions, allow for adequate controls and criteria to be imposed on exemptions and would enable the Minister or Secretary to respond to any misuse of exemptions.
35. Clause 42 (Publication of information relating to certifications and exemptions) enables the Secretary to publish information relating to an exemption of an emissions-controlled product or a person from a provision of the Bill. The information that the Secretary may publish includes information relating to the circumstances in which the exemption applies, the reasons for the exemption and the person who applied for the exemption. Paragraph 51(2)(b) also enables the rules to provide for the review of decisions. It is anticipated that the rules would provide that decisions to grant, or refuse to grant, an exemption, or specify circumstances in which the exemption applies, would be subject to merits review. It is appropriate that the rules, and not the Bill, contain the details regarding merits review as the decisions for which this will be available will be specified in the rules.

## **PART 3 – ENFORCING PRODUCT EMISSIONS STANDARDS**

### **GENERAL OUTLINE**

36. Part 3 establishes the offence and civil penalty provisions associated with the import or supply of uncertified emissions-controlled products. Part 3 also establishes offence and civil penalty provisions associated with the marking of uncertified emissions-controlled products, and the incorrect marking of emissions-controlled products.

### **NOTES ON INDIVIDUAL CLAUSES**

#### **Division 1 – Simplified outline of this Part**

#### **Clause 12 – Simplified outline of this Part**

37. This clause provides an outline of Part 3. This outline is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions in Part 3.

## **Division 2 – Importing emissions-controlled products and Division 3 – Supplying emissions-controlled products**

### **Clause 13 – Import of product that is not certified**

### **Clause 15 – Supply of product that is not certified**

38. Subclauses 13(1) and 15(1) prohibit the import and supply of uncertified emissions-controlled products. For the avoidance of doubt, an emissions-controlled product is taken not to be certified if the certification for the product is suspended (see subclauses 13(2) and 15(2)). Together, these prohibitions will ensure that only certified emissions-controlled products can enter the Australian market. It is necessary to set out the certification requirements in the rules rather than the Bill as the requirements may vary depending on the type of emissions-controlled product being regulated.
39. Contravention of subclauses 13(1) and 15(1) are offences of strict liability with a maximum penalty of 60 penalty units for an individual or 300 penalty units for a body corporate (see subclauses 13(3) and 15(3)). Given the potential impacts to the environment and human health that can occur from the use of uncertified emissions-controlled products, it is considered that an offence of strict liability is necessary in the circumstances. This will ensure there is an adequate deterrent from undertaking conduct which has the potential to cause such harm.
40. Consistent with the *National Clean Air Agreement* it is anticipated that the first emissions-controlled products to be prescribed under the framework will be NRSIEE products. At peak times, NRSIEE are estimated to contribute up to 10 per cent of overall air pollutants in Australian urban environments. For example, a two-stroke leaf blower used for one hour can emit the same level of emissions of oxides of nitrogen as a car, and as much hydrocarbons as 150 cars, when operated over the same period. Without some form of intervention, NRSIEE emissions are expected to increase by 40 to 80 per cent (depending on the pollutant) by 2035, with a consequent rise in overall air pollution levels and incidence of associated health impacts.
41. Strict liability is proposed for these offences having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:
- (a) The offences are not punishable by imprisonment.
  - (b) The offences are subject to a maximum penalty of 60 penalty units for an individual.
  - (c) The actions which trigger the offences are simple, readily understood and easily defended. In both the import and supply offences, the offence is triggered if an uncertified emissions-controlled product is imported or supplied. It is intended that rules made for the purposes of clause 51 (Rules) will clearly set out which products are emissions-controlled products, which international certifications will be recognised for those products, and the process for domestic certification of those

products. In addition clause 42 (Publication of information relating to certifications and exemptions) will enable the Secretary to publish information relating to certified emissions-controlled products, including information that identifies the product and the manufacturer of the product, information about emissions from the product, and information about the certification of the product. The rules for emissions-controlled products will be a legislative instrument for the purposes of the *Legislation Act 2003* (see clause 51 (Rules)) and therefore available on the Federal Register of Legislation.

- (d) Offences relating to emissions-controlled products need to be dealt with expeditiously to ensure public confidence in the regulatory regime. Prompt action in relation to non-compliant emissions-controlled products is required to prevent their continued supply to the market (and adverse impacts on the environment and human health).
  - (e) The offences will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
  - (f) The absence of strict liability may adversely affect the capacity to prosecute offenders. The certification of emissions-controlled products is integral to regulating emissions from these products. As stated above, the Rules will clearly set out which products are emissions-controlled products, and the certification requirements for those products. The Secretary may also publish information relating to certified emissions-controlled products. Proving to a court that a defendant did not know or was reckless to the fact that that a product was an emissions-controlled product, or that they intentionally or negligently imported or supplied an uncertified emissions-controlled product is problematic. These matters are within the knowledge of the defendant alone, and proving the contrary beyond reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
42. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
43. Subclauses 13(4) and 15(4) establish mirror civil penalty provisions which are contravened in circumstances where a person imports or supplies an emissions-controlled product that is not certified. The maximum civil penalty which could be imposed is 120 penalty units.

**Clause 14 – Import of product that is not marked as required**

**Clause 16 – Supply of product that is not marked as required**

44. Subclauses 14(1) and 16(1) prohibit the import or supply of certified emissions-controlled products which are not marked as required in the rules. This prohibition will only operate where the rules for a type of emissions-controlled product impose requirements for the marking of the product, and the product is not marked in accordance with those requirements. For example, this may include a requirement to mark an emissions-controlled product to indicate that it is certified.

45. It is necessary to set out the requirements for the marking of an emissions-controlled product in the rules rather than the Bill because the requirements may vary depending on the type of product. The rules for an emissions-controlled product may require, for example, the product to be marked with specific information to identify the manufacturer, the engine identification number, the date of manufacture and the details of certification. The rules may also provide for other marking requirements including, for example, that markings are to be in the English language, legible, durable, permanent, visible and not placed on a component that might be replaced during the life of the emissions-controlled product.
46. If an emissions-controlled product is not marked in accordance with the requirements specified in the rules made for that product, it makes it difficult for suppliers and consumers to identify whether the product is certified at the point of purchase. The correct marking of products provides clarification for suppliers and consumers that they are supplying or purchasing emissions-controlled products that are compliant with the relevant standards.
47. Contravention of subclauses 14(1) and 16(1) are offences of strict liability with a maximum penalty of 60 penalty units for an individual or 300 penalty units for a body corporate (see subclauses 14(2) and 16(2)). Given the potential impacts to the environment and human health that can occur from the use of uncertified emissions-controlled products, it is considered that an offence of strict liability is necessary in the circumstances. This will ensure there is an adequate deterrent from undertaking conduct which has the potential to cause such harm.
48. Strict liability is proposed for these offences having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:
  - (a) The offences are not punishable by imprisonment.
  - (b) The offences are subject to a maximum penalty of 60 penalty units for an individual.
  - (c) The actions which trigger the offences are simple, readily understood and easily defended. In both the import and supply offences, the offence is triggered if a certified emissions-controlled product is marked in a way that is not consistent with the requirements in the rules for that product. The rules will clearly set out the requirements for the marking of products. The rules for emissions-controlled products will be a legislative instrument for the purposes of the *Legislation Act 2003* (see clause 51 (Rules)) and therefore available on the Federal Register of Legislation.
  - (d) Offences relating to emissions-controlled products need to be dealt with expeditiously to ensure public confidence in the regulatory regime.
  - (e) The offences will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).

- (f) The absence of strict liability may adversely affect the capacity to prosecute offenders. The certification of emissions-controlled products is integral to regulating emissions from emissions-controlled products and the rules will clearly set out the requirements in relation to the marking of those products. Proving to a court that a defendant intentionally or negligently marked a certified emissions-controlled product in a manner that is not consistent with the requirements for that product is problematic. These matters are within the knowledge of the defendant alone, and proving the contrary beyond reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
49. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
50. Subclauses 14(3) and 16(3) establish mirror civil penalty provisions which are contravened in circumstances where a person imports or supplies a certified emissions-controlled product that is not marked in accordance with the requirements specified in the rules for that product. The maximum civil penalty which could be imposed is 120 penalty units.

#### **Division 4 – Marking emissions-controlled products**

51. The prohibitions outlined in this Division relating to the marking of emissions-controlled products are designed to ensure that people buying or supplying emissions-controlled products can be confident that the product complies with the relevant emissions standards required for certification. The prohibitions also prevent the ‘passing off’ of uncertified emissions-controlled products as certified products.

#### **Clause 17 – Marking product that is not certified**

52. Subclause 17(1) prohibits the marking of an emissions-controlled product in circumstances where the rules for the product require certified products to be marked, and a person marks a product as certified when it is not. The prohibition applies to products that are to be imported into, or supplied in, Australia. For the avoidance of doubt, a product is taken to be not certified if the certification of the product is suspended (subclause 17(2)).
53. Contravention of subclause 17(1) is an offence of strict liability with a maximum penalty of 60 penalty units for an individual or 300 penalty units for a body corporate (see subclause 17(3)). Given the potential impacts to the environment and human health that can occur from the use of uncertified emissions-controlled products, it is considered that an offence of strict liability is necessary in the circumstances. This will ensure there is an adequate deterrent from undertaking conduct which has the potential to cause such harm.
54. Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:



- (a) The offence is not punishable by imprisonment.
  - (b) The offence is subject to a maximum penalty of 60 penalty units for an individual.
  - (c) The actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if an emissions-controlled product is marked in a way to indicate that it is certified when in fact it is not. The requirements for the marking of products will be specified in the rules for that product. The rules for emissions-controlled products will be a legislative instrument for the purposes of the *Legislation Act 2003* (see clause 51 (Rules)) and therefore available on the Federal Register of Legislation.
  - (d) Offences relating to emissions-controlled products need to be dealt with expeditiously to ensure public confidence in the regulatory regime.
  - (e) The offence will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
  - (f) The absence of strict liability may adversely affect the capacity to prosecute offenders. The certification of emissions-controlled products is integral to regulating emissions from emissions-controlled products and the rules will clearly set out the requirements in relation to the marking of emissions-controlled products. Proving to a court that a defendant intentionally or negligently marked an emissions-controlled product as being certified when the product is not certified may be problematic. These matters are within the knowledge of the defendant alone, and proving the contrary beyond reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
55. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
56. Subclause 17(4) establishes a mirror civil penalty provision which is contravened in circumstances where a person applies a mark to an uncertified emissions-controlled product that is to be imported into, or supplied in, Australia. The maximum civil penalty which could be imposed is 120 penalty units.

### **Clause 18 – Incorrect marking of product**

57. Subclause 18(1) establishes a prohibition on marking certified emissions-controlled products in a manner that is not in accordance with the requirements for marking the product as specified in the rules for that product. Marking an emissions-controlled product in a manner that is not in accordance with the requirements in the rules may include, but is not limited to, marking an emissions-controlled product in a manner that is not visible to consumers, or in a way that is not durable or permanent.
58. As stated above, the marking of an emissions-controlled product is a mechanism intended to provide suppliers and consumers with the confidence that they are supplying or purchasing an emissions-controlled product that complies with the relevant standard for that product. Marking an emissions-controlled product in a manner that is not in

accordance with the specified requirement for that product may undermine that confidence.

59. Contravention of subclause 18(1) is an offence of strict liability with a maximum penalty of 60 penalty units for an individual or 300 penalty units for a body corporate (see subclause 18(2)). This will ensure there is an adequate deterrent from undertaking conduct which has the potential to undermine the effective operation of the scheme.
60. Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:
  - (a) The offence is not punishable by imprisonment.
  - (b) The offence is subject to a maximum penalty of 60 penalty units for an individual.
  - (c) The actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if a certified emissions-controlled product is marked in a way that is not consistent with the requirements in the rules for that product. The rules will clearly set out the requirements for the marking of emissions-controlled products. The rules for emissions-controlled products will be a legislative instrument for the purposes of the *Legislation Act 2003* (see clause 51 (Rules)) and therefore available on the Federal Register of Legislation.
  - (d) Offences relating to emissions-controlled products need to be dealt with expeditiously to ensure public confidence in the regulatory regime.
  - (e) The offence will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
  - (f) The absence of strict liability may adversely affect the capacity to prosecute offenders. The certification of emissions-controlled products is integral to regulating emissions from emissions-controlled products and the rules will clearly set out the requirements in relation to the marking of emissions-controlled products. Proving to a court that a defendant intentionally or negligently marked a certified emissions-controlled product in a manner that is not consistent with the requirements for that product is problematic. These matters are within the knowledge of the defendant alone, and proving the contrary beyond reasonable doubt would require significant and difficult to obtain indirect and circumstantial evidence.
61. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
62. Subclause 18(3) establishes a mirror civil penalty provision which is contravened in circumstances where a person applies a mark to an emissions-controlled product to be imported into, or supplied in, Australia, and that mark is not in accordance with the

requirements specified in the rules for that product. The maximum civil penalty which could be imposed is 120 penalty units.

## **PART 4 – RECORD KEEPING**

### **GENERAL OUTLINE**

63. Part 4 enables the rules for an emissions-controlled product to specify the record keeping requirements for importers, suppliers and Australian manufacturers of those products. Part 4 also enables the Secretary to request information required to be kept in a record if the Secretary reasonably suspects there has been or there is a contravention of the Bill.

### **NOTES ON INDIVIDUAL CLAUSES**

#### **Clause 19 – Simplified outline of this Part**

64. This clause provides an outline of Part 4. This outline is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions of Part 4.

#### **Clause 20 – Rules may provide record-keeping requirements**

65. Subclause 20(1) allow the rules made for an emissions-controlled product to require importers or suppliers of that product to make and keep records of imports or supplies of emissions-controlled products. The rules may set out requirements regarding the type of information which must be recorded, how and in what form the records must be kept, and the time period in which the records must be retained.
66. Providing these details in rules rather than the Bill will allow flexibility as record keeping requirements may be specific to a particular class of emissions-controlled products. It is anticipated that the records would be of the type that are likely to be made or kept in the normal course of importing or supplying a product. The rules would also be flexible enough to allow these records to be kept in a variety of forms and specific requirements could be updated with changes in technology.
67. For example, an importer of an emissions-controlled product may be required to keep records relating to the type and number of products imported and information regarding the certification of the products.
68. Contravention of a requirement to make and keep records as required by the rules is an offence of strict liability with a maximum penalty of 40 penalty units.
69. Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:
- (a) The offence is not punishable by imprisonment.
  - (b) The offence is subject to a maximum of 40 penalty units for an individual.

- (c) The actions which trigger the offences are simple, readily understood and easily defended. The offence is triggered if a person who is required to make or keep a record fails to comply with the requirement to do so. The rules will specify the record-keeping requirements relating to the emissions-controlled product. The rules for emissions-controlled products will be a legislative instrument for the purposes of the *Legislation Act 2003* (see clause 51 (Rules) and therefore available on the Federal Register of Legislation).
  - (d) It is necessary to insure the integrity of the regulatory regime.
  - (e) The offence will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
70. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
71. Subclause 20(4) establishes a mirror civil penalty provision which is contravened in circumstances where the rules require the person to make or keep a record and the person fails to comply with the requirement. The maximum civil penalty which could be imposed is 80 penalty units.

#### **Clause 21 – Secretary may require recorded information**

72. Clause 21 allows the Secretary to request a person to provide information contained in the records the person is required to make or keep under the rules for an emissions-controlled product. The Secretary may only request the provision of such information if the Secretary reasonably suspects that a provision of the Bill has been, or is being, contravened and the information is relevant to the suspected contravention. A request to a person under clause 21 does not abrogate that person’s privilege against self-incrimination.
73. This clause would provide additional means, beyond the monitoring and investigation powers in Part 5 (Regulatory Powers) of the Bill, to obtain information in relation to a suspected breach of the Bill.
74. The Secretary’s request must be provided in a written notice which includes details of the information requested and the due date for the provision of that information (subclause 21(2)). The Secretary may extend the timeframe within which the information must be given on application by the person to whom the notice relates (subclause 21(3)).
75. Failure to comply with a requirement to give information under subclause 21(1) is an offence of strict liability with a maximum penalty of 40 penalty units (subclause 21(5)).
76. Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:

- (a) The offence is not punishable by imprisonment.
  - (b) The offence is subject to a maximum penalty of 40 penalty units for an individual.
  - (c) The actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if a person fails to provide information to the Secretary when requested to do so. The notice provided to the person must identify the information to be given to the Secretary and the day the information must be given (subclause 21(2)).
  - (d) It is necessary to insure the integrity of the regulatory regime.
  - (e) The offence will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
77. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
78. Subclause 21(6) establishes a mirror civil penalty provision which is contravened in circumstances where a person is required to give information to the Secretary under clause 21 and the person fails to comply with the requirement. The maximum civil penalty which could be imposed is 80 penalty units.

**Clause 22 – Reporting on supply of products manufactured in Australia**

79. Clause 22 requires a person who first supplies an emissions-controlled product that is manufactured in Australia to provide a report to the Secretary relating to the emissions-controlled products supplied in a reporting period. The definition of *supply* in clause 7 includes an offer to supply including making available, exposing, displaying or advertising the product (see paragraph 7(3)(a)). However, for the purposes of clause 22, the requirement to provide a report on the emissions-controlled products first supplied does not include where the products are offered for supply (subclause 22(4)).
80. The report would need to contain the information prescribed by the rules relating to the emissions-controlled products. It is necessary to provide the details of the report in the rules rather than the Bill as the reporting requirements may vary depending on the type of emissions-controlled product.
81. The reporting requirements in clause 22 are not intended to capture circumstances where an emissions-controlled product (such as an engine) is imported into Australia, and then assembled into another product. In this instance, the importer of the emissions-controlled product, which is a component of the finished product, would be required to keep records on the import under rules made pursuant to clause 20 (Rules may provide record-keeping requirements).
82. The rules for the emissions-controlled product would prescribe the relevant reporting period for the product (subclause 22(1)).

83. Reports would need to be provided to the Secretary no later than 60 days after the end of the reporting period (subclause 22(3)).
84. The information supplied in the reports will inform whether a person is liable to pay a charge in relation to the manufacture of the emissions-controlled product and the amount of any charge. Pursuant to clause 5 of the Excise Charges Bill, a charge is imposed on the manufacture of emissions-controlled products. Clause 7 of that Bill imposes liability to pay the charge on the manufacturer of the emissions-controlled product.
85. As the information used in the reports will inform whether a manufacturer is liable to pay a charge on the manufacture of the product, clause 22 provides for an offence of strict liability if a person fails to comply with a requirement to provide a report (subclause 22(6)). The maximum penalty for the strict liability offence is 60 penalty units.
86. Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:
- (a) The offence is not punishable by imprisonment.
  - (b) The offence is subject to a maximum penalty of 60 penalty units for an individual.
  - (c) The actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if a person is required to give a report to the Secretary for an emissions-controlled product for a reporting period, and the person does not provide that report within 60 days after the end of the reporting period. The rules will specify the record-keeping requirements relating to the emissions-controlled product. The rules for emissions-controlled products will be a legislative instrument for the purposes of the *Legislation Act 2003* (see clause 51 (Rules)) and therefore available on the Federal Register of Legislation.
  - (d) It is necessary to insure the integrity of the regulatory regime.
  - (e) The offence will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
87. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
88. Subclause 22(7) establishes a mirror civil penalty provision which is contravened in circumstances where a person is required to report to the Secretary for an emissions-controlled product, and the person does not provide the report within the time required. The maximum penalty for contravening the civil penalty provision is 120 penalty units.
89. These maximum penalties are higher than the record keeping requirements in clauses 20 and 21 as information provided under this clause would be the main basis for identifying

and determining the appropriate charge to be imposed on domestically manufactured emissions-controlled products under the Excise Charges Bill.

## **PART 5 – REGULATORY POWERS**

### **GENERAL OUTLINE**

90. Part 5 establishes a compliance and enforcement regime by adopting the standard suite of provisions under the Regulatory Powers Act. The new regulatory regime will consist of monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings and injunctions. A comprehensive compliance and enforcement framework will enable Australia to more effectively manage the environmental and health impacts of emissions from products that contribute to air pollution.
91. Triggering the standard provisions of the Regulatory Powers Act will provide a consistent framework, streamline Commonwealth regulatory powers and increase legal certainty for businesses and individuals who are subject to the Bill.

### **Relevant officers and courts**

92. Part 5 of the Bill defines the roles of certain people and bodies in relation to the corresponding provisions of the Regulatory Powers Act. This ensures that the functions and powers triggered in the Regulatory Powers Act are exercised by appropriate people and bodies that are easily identified in the Bill.
93. The Bill provides that an inspector (appointed by the Secretary under clause 41) is an authorised applicant, authorised person and infringement officer for the purpose of provisions triggered in the Regulatory Powers Act (subclauses 24(3), 25(2), 26(2), 27(2), 28(2) and 29(2)). That is, an inspector would be able to exercise the same powers and functions that an authorised applicant, authorised person and infringement officer have in Parts 2 to 7 of the Regulatory Powers Act. For example, inspectors would have the power to apply for monitoring and investigation warrants; exercise monitoring and investigation powers such as the power to secure or seize evidence; and issue infringement notices for alleged contraventions of the Bill.
94. Subclause 24(4) and 25(3) also provides that an authorised person (inspectors appointed under clause 41) exercising monitoring or investigation powers may be assisted by other persons in exercising their powers or performing functions or duties in relation to offences and civil penalty provisions of the Bill. As provided for by paragraph 23(1)(a) and paragraph 53(1)(a) of the Regulatory Powers Act, a person exercising monitoring or investigation powers may only be assisted by another person if it is necessary and reasonable to do so.
95. In addition to inspectors, subclauses 24(3), 25(2), 26(2), 27(2), 28(2) and 29(2) define other key roles for the purpose of powers and responsibilities triggered in the Regulatory Powers Act. Relevantly, a magistrate would have the role of an issuing officer and the Secretary would have the role of relevant chief executive. These subclauses also specify

which courts are relevant courts for the purpose of exercising functions and powers under Parts 2 to 7 of the Regulatory Powers Act.

## **NOTES ON INDIVIDUAL CLAUSES**

### **Clause 23 – Simplified outlined of this Part**

96. This clause provides an outline of Part 5. This outline is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions of Part 5.

### **Clause 24 - Monitoring Powers**

97. Clause 24 triggers the standard monitoring powers in Part 2 of the Regulatory Powers Act which creates a framework for monitoring compliance with the Bill. This would include powers of entry and inspection.
98. The monitoring powers triggered under Part 2 of the Regulatory Powers Act allows an inspector to enter a premises for the purpose of determining compliance with provisions in the Bill and determining whether information given in compliance, or purported compliance with the Bill, is correct (subsection 18(1) of the Regulatory Powers Act). Unlike the exercise of inspection powers, inspectors would not need to suspect on reasonable grounds that there may be material on the premises related to a contravention of an offence or civil penalty provision.
99. An inspector would need to have the consent of the occupier or a monitoring warrant to enter premises to exercise the monitoring powers under Part 2 of the Regulatory Powers Act (subsection 18(2) of the Regulatory Powers Act).
100. The general monitoring powers set out in Part 2 of the Regulatory Powers Act permit an inspector appointed under clause 41 of the Bill to, among other things, search premises, measure or test anything on the premises, photograph things or make copies of documents, take necessary equipment onto the premises, operate electronic equipment, secure electronic evidence for 24 hours in order to obtain expert assistance and secure evidence of a related provision for 24 hours.

### **Clause 25 - Investigation powers**

101. Clause 25 triggers the standard investigation powers in Part 3 of the Regulatory Powers Act. Part 3 of that Act creates a framework for investigating compliance with the offence and civil penalty provisions in the Bill or an offence against the *Crimes Act 1914* or the Criminal Code that relates to the Bill.
102. The investigation powers triggered under Part 3 of the Regulatory Powers Act allows an inspector to enter a premises to exercise investigation powers if they suspect on reasonable grounds that there is evidential material on the premises (subsection 48(1) of the Regulatory Powers Act). However, they can only do so with the consent of the occupier or an inspection warrant (subsection 48(2) of the Regulatory Powers Act).



103. The investigation powers set out in Part 3 of the Regulatory Powers Act permit an inspector appointed under clause 41 of the Bill) to, among other things, search the premises and seize evidential material; inspect, test and copy evidential material, take necessary equipment onto the premises; operate electronic equipment found of the premises, secure electronic evidence for 24 hours in order to obtain expert assistance, and seize evidence of related provisions.
104. These investigation powers would allow non-compliance to be more easily detected and ultimately reduced, leading to greater compliance with the Bill and the better management of the risks arising from non-compliant emissions-controlled products overall.

#### **Clause 26 – Civil penalty provisions**

105. Clause 26 triggers the standard provisions of Part 4 of the Regulatory Powers Act. This clause would create a framework for allowing the civil penalty provisions of the Bill to be enforced by obtaining an order for a person to pay a pecuniary penalty.

#### **Clause 27 – Infringement notices**

106. Clause 27 triggers the standard provisions of Part 5 of the Regulatory Powers Act. Under subclause 27(1) infringement notices will be able to be issued for strict liability offences and civil penalty provisions of the Bill. A person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against them for the contravention.

#### **Clause 28 – Enforceable undertakings**

107. Clause 28 triggers the standard provisions of Part 6 of the Regulatory Powers Act. Subclause 28(1) enables an enforceable undertaking to be sought in relation to the offence and civil penalty provisions of the Bill.

#### **Clause 29 – Injunctions**

108. Clause 29 triggers the standard provisions of Part 7 of the Regulatory Powers Act. Subclause 29(1) enables an injunction to be sought in relation to the offence and civil penalty provisions of the Bill. Injunctions (including interim injunctions) may be used to restrain a person from contravening a provision of the Bill, or to compel compliance with a provisions of the Bill.

## **PART 6 – FORFEITURE OF EMISSIONS-CONTROLLED PRODUCTS**

### **GENERAL OUTLINE**

109. Part 6 provides for emissions-controlled products to be seized and forfeited to the Commonwealth in certain circumstances. The provisions in Part 6 expand on the powers in Part 3 of the Regulatory Powers Act relating to the seizure of products.
110. Part 6 of the Bill makes provision for two separate processes by which emissions-controlled products may be forfeited to the Commonwealth:

- (a) Automatic forfeiture - where an emissions-controlled product is automatically forfeited when a person is convicted of an offence, or ordered to pay a civil penalty, for contravening a provision of Part 3 (Enforcing product emission standards) of the Bill (Division 2 of Part 6); and
  - (b) General forfeiture - where a forfeiture notice is issued after an inspector seizes an emissions-controlled product where the inspector suspects, on reasonable grounds, that a provision of Part 3 (Enforcing product emission standards) of the Bill has been contravened in relation to the product (Division 3 of Part 6). A court may order the return of the product or that compensation be paid in certain circumstances where a product has been forfeited to the Commonwealth under this process.
111. The ability for emissions-controlled products to be forfeited to the Commonwealth, either under the automatic forfeiture process, or through the general forfeiture process, maintains the integrity of the emissions standard framework. This is achieved by ensuring that those persons who have contravened the prohibitions in the Bill or are suspected of contravening the prohibitions in the Bill (including in circumstances where an infringement notice has been issued) are not able to retain possession of the offending emissions-controlled products. This in turn will ensure that the environmental and human health risks associated with the use of non-compliant emissions-controlled products are appropriately managed.
112. Divisions 2 and 3 of the Bill have been drafted with regard to the safeguards in the POC Act. For example, under Division 3, a forfeiture notice for an emissions-controlled product can only be issued in relation to an emissions-controlled product that has been seized under Part 3 of the Regulatory Powers Act (see clause 34). This ensures that the owner of the product can be compensated if those powers are not exercised appropriately.
113. The provisions also provide safeguards to protect a person's interests in the emissions-controlled products. For example, an inspector is required to provide a forfeiture notice to the owner of the emissions-controlled product, or if the owner cannot be found, the person from whom the emissions-controlled products were seized (see clause 34). A person who is issued with a forfeiture notice can apply to a relevant court that the emissions-controlled product be returned (clause 35). This will enable the person to appear before the relevant court and give evidence at a hearing, including evidence as to whether a contravention of Part 3 of the Bill (Enforcing product emissions standards) has occurred. A person may also apply to the Commonwealth for compensation in certain circumstances where the emissions-controlled product has been forfeited (clause 37).
114. Where considered reasonable and necessary, some of the provisions go beyond the model in the POC Act to enable the timely removal of non-compliant emissions-controlled products from the Australian market to prevent potentially serious environmental and human health impacts. For example, Division 2, which provides for automatic forfeiture of emissions-controlled products, is inconsistent with some aspects of the POC Act as the decision to forfeit the product would not be separately made, or ordered, by the court. However, emissions-controlled products are only forfeited under that Division following a determination by a relevant court that there has been an offence committed, or a contravention of a civil penalty provision has occurred, in relation to those products.

## **NOTES ON INDIVIDUAL CLAUSES**

### **Division 1 – Simplified outline of this Part**

#### **Clause 30 – Simplified outline of this Part**

115. This clause provides an outline of Part 6. This outlined is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions in Part 6.

#### **Division 2 – Forfeiture following conviction or making of civil penalty order**

116. Division 2 sets out a process whereby an emissions-controlled product is automatically forfeited to the Commonwealth if a person is convicted of an offence, or ordered to pay a civil penalty, for contravening a provision of Part 3 (Enforcing product emissions standards) of the Bill.

#### **Clause 31 – Product forfeited to Commonwealth**

117. Clause 31 provides that, if a person is convicted of an offence, or ordered to pay a civil penalty, for contravening a provision of Part 3 (Enforcing product emissions standards), the emissions-controlled product to which the offence or civil penalty relates is forfeited to the Commonwealth.
118. Part 3 of the Regulatory Powers Act enables an authorised person to seize evidential material (section 49 of the Regulatory Powers Act). Under that Act, seized items must be returned if the reason for the seizure no longer exists, the thing is not to be used in evidence, or the period of 60 days after the item's seizure ends (subsection 66(1) of the Regulatory Powers Act). However, the requirement to return the seized item does not apply if the item is forfeited or forfeitable to the Commonwealth (subsection 66(2) of the Regulatory Powers Act). The automatic forfeiture of emissions-controlled products following conviction or a civil penalty order are necessary to ensure that non-compliant emissions-controlled products cannot enter the Australian market.

#### **Clause 32 – Power to seize forfeited product**

119. If an emissions-controlled product is forfeited under clause 31 (Product forfeited to Commonwealth), subclause 32(1) provides an inspector with the power to seize that product. In order to seize the emissions-controlled product, the inspector must attach to that product, or to the container in which the emissions-controlled product is held, a notice in writing signed by the inspector (subclause 32(2)). The notice must identify the emissions-controlled product, state that the emissions-controlled product has been seized under clause 32 and specify the reason for the seizure. The inspector must give a copy of the notice to the owner of the emissions-controlled product or to the person from whom that product was seized as soon as practicable (subclause 32(3)).
120. It is reasonable and necessary to ensure that emissions-controlled products forfeited to the Commonwealth following conviction or an order to pay a civil penalty provision can be seized in a timely manner. This would allow the emissions-controlled products to be dealt with and disposed of appropriately in accordance with clause 39 (Disposal of forfeited

products), and prevents those products from re-entering the market and contributing to adverse impacts non-compliant products can cause to the environment and human health.

### **Clause 33 – Person must not interfere with seized product**

121. Subclause 33(1) makes it an offence for a person to engage in conduct which interferes with, moves or alters a seized emissions-controlled product. The maximum penalty for a contravention of subclause 33(1) is 6 months imprisonment.
122. Clause 39 (Disposal of forfeited products) requires emissions-controlled products forfeited to the Commonwealth under clause 31 (Product forfeited to Commonwealth) to be dealt with and disposed of in accordance with the direction of the Minister. The offence provision in subclause 33(1) does not apply where a person's conduct is in accordance with a direction given to the person by the Minister (subclause 33(2)). A person seeking to rely on subclause 33(2) bears the evidential burden in relation to this matter. Reversal of the burden of proof is considered appropriate as the manner of the person's conduct are within the knowledge of that person.
123. Subclause 33(3) also creates an offence where a person is given a forfeiture notice and the person does not take all reasonable precautions to prevent the emissions-controlled product being moved, altered or interfered with except in accordance with a direction given the Minister. The maximum penalty for a contravention of subclause 33(3) is 6 months imprisonment.
124. The penalties in clause 33 reflect the seriousness of the offences and ensure an adequate deterrent to maintain the integrity of the regulatory regime. The offence will apply in relation to an emissions-controlled product that has been automatically forfeited to the Commonwealth following a finding by a relevant court that the product relates to a contravention of Part 3 (Enforcing product emission standards) of the Bill; namely the import or supply of an uncertified emissions-controlled product, or the incorrect marking of an emissions-controlled product. The penalties are also reasonable and necessary given the potential impacts to the environment and human health that may result from emissions from non-compliant emissions-controlled products, and the fact that rules made under the Bill regulating emissions from products may assist Australia give effect to its international obligations under the Climate Change Conventions.

### **Division 3 – Forfeiture of seized products**

125. Division 3 establishes an administrative process whereby seized emissions-controlled products may be forfeited to the Commonwealth. Unlike Division 2 which provides for the automatic forfeiture of emissions-controlled products where a person is convicted of an offence or ordered to pay a civil penalty, the process under Division 3 will apply where an inspector reasonably suspects that a provision of Part 3 of the Bill (Enforcing product emission standards) has been contravened.
126. This process is designed primarily to deal with situations where forfeiture under clause 31 (Product forfeited to Commonwealth) is not available, such as where an infringement notice is issued for a contravention of a provision of Part 3 of the Bill (Enforcing product emission standards). As payment of an infringement notice is not an admission of guilt

and in other circumstances a court may not have determined whether an offence has been committed or civil penalty provision contravened, these provisions provide another means of forfeiting non-compliant emissions-controlled products to the Commonwealth. This is to ensure the person suspected of the contravention is not able retain the benefit associated with the relevant products.

127. The forfeiture provisions of Division 3 only apply if an inspector has seized an emissions-controlled product under Part 3 of the Regulatory Powers Act. The Regulatory Powers Act contain safeguards that ensure an inspector can only enter the premises to exercise their investigation powers if the inspector suspects on reasonable grounds that there may be evidential material on the premises and the occupier of the premises has consented to the entry or the entry is made under an investigation warrant (section 48 of the Regulatory Powers Act). Such constraints not only provide adequate safeguards against the arbitrary use or abuse of warrants and seizure of emissions-controlled products, ensuring that it is reasonable and proportionate in the circumstances, but also provide safeguards in relation to forfeiture under this Division.

#### **Clause 34 – Forfeiture notices**

128. Where an inspector seizes an emissions-controlled product under Part 3 of the Regulatory Powers Act, and the inspector reasonably suspects that a provision of Part 3 of the Bill (Enforcing product emissions standards) has been contravened in relation to that product, the inspector may issue a forfeiture notice to the owner of the emissions-controlled products, or if the owner cannot be identified, to the person from whom the emissions-controlled products were seized. The notice must be in writing and given within 7 days after the product is seized (subclauses 34(1), (2) and (3)).
129. The forfeiture notice must set out the information specified in subclause 34(4). This must include information that the emissions-controlled product will be forfeited to the Commonwealth, unless a court orders the emissions-controlled product be returned.

#### **Clause 35 – Claims for return of seized product**

130. Clause 35 enables the owner of the emissions-controlled product or the person from whom the emissions-controlled product was seized to apply to a court, within 60 days of receiving the forfeiture notice, for an order that the emissions-controlled product be returned. This provides the right to procedural fairness should the owner or person believe the emissions-controlled product in question was not in contravention of Part 3 of the Bill (Enforcing product emission standards).
131. Where such an application is made, the court must make an order for the emissions-controlled product to be returned if the court is satisfied that there was no contravention of Part 3 of the Bill.
132. If the court orders the return of the emissions-controlled product, the Commonwealth must take reasonable steps to return that product to the applicant unless one of the grounds set out in subclause 35(6) can be established. The circumstances where the Commonwealth is not required to return the emissions-controlled product includes where the product may provide evidence in proceedings commenced before the court order for

the return of the products has been made; where the return of the product could cause an imminent risk of death, serious illness, serious injury or serious damage to the environment; or where an inspector is otherwise authorised to retain, destroy or dispose of the product.

#### **Clause 36 – Forfeiture of seized product to the Commonwealth**

133. Clause 36 clarifies that an emissions-controlled product is forfeited to the Commonwealth if an application for the return of the emissions-controlled product is not made (under clause 35) or, if an application is made, the court decides not to order the return of the product.

#### **Clause 37 – Right of compensation in certain circumstances**

134. Clause 37 enables a person who owned the emissions-controlled product (immediately before it was forfeited under clause 36) to apply to a court for compensation. The court must make an order requiring the Commonwealth to pay compensation if the court is satisfied that Part 3 of the Regulatory Powers Act was not complied with.

135. The court must also make an order requiring the Commonwealth to pay compensation if satisfied that, even though the emissions-controlled product was forfeited because no application was made under clause 35 (Claim for return of seized product) for an order that the emissions-controlled product be returned, a provision of Part 3 (Enforcing product emission standards) was not contravened in relation to that product.

136. The amount of compensation which the Commonwealth may be ordered to pay is equal to the market value of the product at the time the product was forfeited under clause 36 (clause 37(3)).

### **Division 4 – General Provisions**

#### **Clause 38 – Forfeited products become property of Commonwealth**

137. Clause 38 clarifies that emissions-controlled products forfeited under clauses 31 or 36 become the property of the Commonwealth. This would ensure that the Commonwealth can deal with the goods in the most appropriate manner. Non-compliant emissions-controlled products pose a risk to the environment and human health and this would enable the Commonwealth to undertake measures to manage the risk to an acceptable level.

#### **Clause 39 – Disposal of forfeited products**

138. Subclause 39(1) allows the Minister to require an emissions-controlled product forfeited under clauses 31 or 36, be disposed of in a manner consistent with any directions of the Minister. Subclause 39(2) clarifies that forfeited emissions-controlled products must not be sold. This is consistent with the principle that the Commonwealth must not be seen to be profiting through the forfeiture of emissions-controlled products.

## PART 7 - MISCELLANEOUS

### GENERAL OUTLINE

139. Part 7 of the Bill deals with the appointment of inspectors, the publication and disclosure of information, and the conduct of audits to ensure compliance with this Bill. Part 7 also provides for the delegation of powers, requires periodic reviews of the operation of the Bill, and enables the Minister to make the rules for emissions-controlled products.

### NOTES ON INDIVIDUAL CLAUSES

#### Clause 40 – Simplified outline of this Part

140. Clause 40 provides an outline of Part 7. This outline is not intended to be comprehensive and has been included to assist readers to understand, rather than to replace, the substantive provisions of Part 7.

#### Clause 41 – Inspectors

141. Subclause 41(1) would allow the Secretary to appoint an APS employee as an inspector for the purposes of this Bill. As an APS employee is defined in the *Public Service Act 1999* to mean a person engaged under section 22 of that Act, or a person who is engaged as an APS employee under section 72 of that Act, it is possible that the Secretary may appoint an employee of any Commonwealth Department as an inspector for the purposes of the Bill.
142. As outlined in Part 5 (Regulatory Powers) of the Bill, an inspector appointed under the Bill is an authorised applicant, authorised person and infringement officer for the purpose exercising the powers under the triggered provisions of Parts 2 to 7 of the Regulatory Powers Act. Part 5 (Regulatory Powers) of the Bill allows an inspector to undertake a range of compliance and enforcement duties under the Bill.
143. Subclause 41(2) provides that the appointment of an inspector must be in writing and only where the Secretary is satisfied that the person has the knowledge or experience necessary to properly exercise the powers of an inspector. When performing the functions or exercising the powers of an inspector, the inspector must comply with any directions given by the Secretary (subclause 41(3)). Subclauses 41(2) and (3) ensure that inspectors are appointed in a considered, appropriate and measured way and that the people appointed as inspectors are able to carry out the relevant functions and exercise the relevant powers appropriately.
144. Subclause 41(4) clarifies that a written direction given by the Secretary under subclause 41(3) is not a legislative instrument for the purposes of the *Legislation Act 2003*. This subclause is included to assist readers, as the direction is not a legislative instrument within the meaning of that Act.

#### Clause 42 – Publication of information relating to certifications and exemptions

145. Subclause 42(1) enables the Secretary to publish information relating to a certified emissions-controlled product. This would include publishing information that identifies

the emissions-controlled product and the manufacturer of the product, information about emissions from the product and information about the certification.

146. For example, the Secretary may publish a list of emissions-controlled products which have been certified through a domestic certification process. This information could include the name of the manufacturer, the emissions-controlled products covered by the certification, the certification number, product descriptors and results of any emissions testing provide as part of the certification process.
147. Subclause 41(2) enables the Secretary to publish information relating to an exemption of an emissions-controlled product or a person from a provision of the Bill. This would include publishing information regarding the circumstances in which the exemption applies, the reasons for the exemption and the person who applied for the exemption.
148. The ability to publish certification and exemption information ensures the transparent and accountable operation of the Bill, educates and empowers consumers of emissions-controlled products, promotes compliance by importers and suppliers, and supports the operation of the offence and civil penalty provisions contained in Part 3 (Enforcing product emissions standards) of the Bill.
149. This transparency will promote compliance and public confidence in the regulatory regime by enabling persons to become aware of exemptions that apply to uncertified emissions-controlled products. Publication of this information would also help avoid the potential for stakeholders to wrongly assume an exemption was in place and so not report an incident where another person was importing supplying an uncertified emissions-controlled product without an exemption.

#### **Clause 43 – Disclosure of information**

150. Clause 43 enables the Secretary to disclose information obtained under the Bill where the Secretary reasonably believes that the information will enable or assist the agency, body or person to exercise its powers, or perform its functions or duties. The Secretary will be able to disclose information obtained under the Bill to the Australian Border Force and any other agency, body or person prescribed by the rules.
151. Before other agencies, bodies or persons are prescribed in the rules, subclause 51(6) requires the Minister to consult with the Information Commissioner in relation to any privacy matters and have regard to any submissions made by the Information Commissioner before making the rules. The prescription of agencies, bodies or persons in the rules would also be informed by a Privacy Impact Assessment to ensure adequate analysis of any privacy implications.

#### **Clause 44 – Compliance audits**

152. Clause 44 enables the Minister to require a person to conduct an audit and provide a report on their compliance with the Bill. Under subclause 44(1), the Minister may do this if the Minister suspects, on reasonable grounds, that a person has engaged, is engaging or is proposing to engage in conduct that constitutes an offence against the Bill or a contravention of a civil penalty provision. Before requiring a person to conduct an audit,



the Minister must also be satisfied that it would be in the public interest to give the person a notice under this clause.

153. The Minister may, by written notice given to the person, require the person to undertake, or arrange another person to undertake, an audit of either the person's compliance with the Bill or one or more specified aspects of the person's compliance with the Bill (this must be specified in the notice). The Minister may also require the person to give the Minister a written report setting out the results of the audit (subclause 44(2)). The information that must be included in a notice is set out in subclause 44(3). A notice given under subclause 44(2) is not a legislative instrument for the purposes of the *Legislation Act 2003* (see subclause 44(7)). Subclause 44(7) has been included to assist readers, as the notice is not a legislative instrument within the meaning of that Act.
154. A person who fails to comply with a requirement of a notice given to the person under subclause 44(2) commits an offence of strict liability (subclauses 44(5) and (6)) and contravenes a civil penalty provisions (subclauses 44(5) and (7)). The maximum penalty for a contravention of the strict liability offence is 40 penalty units for an individual. The maximum penalty for a contravention of the civil penalty provision is 80 penalty units.
155. Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the Senate Scrutiny of Bills Committee *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Having regard to these documents, the use of strict liability is considered appropriate as:
  - (a) The offence is not punishable by imprisonment.
  - (b) The offence is subject to a maximum of 40 penalty units for an individual.
  - (c) The actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if a person is required to undertake a compliance audit after being given a notice to do so by the Minister and the person fails to comply with the requirement.
  - (d) Offences relating to emissions-controlled products need to be dealt with expeditiously to ensure public confidence in the regulatory regime.
  - (e) The offence will be subject to an infringement notice scheme (see clause 27 (Infringement notices)).
156. The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).
157. The penalties for failing to comply with a requirement to undertake a compliance audit are equivalent to the penalties imposed under Part 4 (Record keeping) of the Bill.

## **Clause 45 and 46 – Delegations by the Minister and the Secretary**

158. Clauses 45 and 46 enable the Minister and the Secretary to delegate any or all of their functions and powers under the Bill, or in the case of the Secretary, under the Regulatory Powers Act as it applies to the Bill. As the definition of *this Act* includes any instruments under the Bill, the ability to delegate will extend to any functions and powers of the Minister and the Secretary set out in any such instruments, including rules made for emissions-controlled products.
159. Clause 45 would enable the Minister to delegate his or her functions or powers under the Bill to the Secretary or an SES, or acting SES employee in the Department. The ability for the Minister to delegate his or her function and powers does not extend to the power of the Minister to make rules for emissions-controlled products under clause 51 (Rules).
160. Clause 46 would enable the Secretary to delegate his or her functions or powers under the Bill, or under the Regulatory Powers Act as it applies in relation to the Bill, to SES employees or acting SES employees in the Department and APS employees who occupy, or perform the duties of a position not below Executive Level 2 (or equivalent) in the Department. Inclusion of the reference to APS employees who perform the duties of a position not below Executive Level 2 will enable persons who are acting in those positions to perform the functions and exercise the powers of the delegated position.
161. It is intended that the delegation of the Secretary's powers to APS employees would only occur where the employee has day-to-day responsibility for the administration of the Bill.
162. Delegating functions and powers to Executive Level 2 officers is consistent with other legislation, including for example, section 60 of the *Hazardous Waste (Regulations of Exports and Imports) Act 1989*. Delegating functions and powers to Executive Level 2 officers is also consistent with the *Australian Administrative Law Guide* which provides that it may be appropriate for junior officers to make decisions involving a limited exercise of discretion, or under provisions which will give rise to a high volume of decisions. This would not prevent significant decisions being made by persons of a higher classification.
163. In performing functions or exercising powers, delegates must comply with any directions of the Minister or the Secretary (as the case may be), to ensure that powers exercised by delegates are exercised appropriately and consistently (subclause 45(2) and 46(2)).
164. As an additional safeguard to ensure the appropriate and reasonable use of delegations, the giving of delegations and the exercise of delegated powers are also the subject to fraud control procedures, risk management processes and other protocols. These are designed to ensure delegated decision-making is made at the appropriate level and in a transparent and accountable manner.

## **Clause 47 – Review of operation of the Act**

165. Clause 47 ensures that the Act continues to achieve its objectives by requiring a review of the operation of the Act. The first review must be undertaken as soon as possible after the seventh anniversary of its commencement, and thereafter at intervals of not longer than

10 years. The initial period of seven years is intended to provide sufficient time for the Bill, and any rules made in relation to emissions-controlled products, to be implemented before reviewing its operation.

166. The person undertaking the review must provide the Minister with a written report (subclause 47(2)). The Minister is required to table a copy of the review report in each House of the Parliament within 15 sitting days of the relevant House after the Minister is given the report (subclause 47(3)).

#### **Clause 48 – Physical elements of offences**

167. Clause 48 clarifies the application of the Criminal Code to provisions of the Bill which provide that a person has contravened another provision of this Act.

#### **Clause 49 – Contravening offence and civil penalty provisions**

168. Clause 49 provides that for the purpose of this Bill, and the Regulatory Powers Act to the extent that it relates to this Bill, a reference to a contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the conduct provision.

#### **Clause 50 – Alternative constitutional bases**

169. Clause 50 provides the alternative constitutional bases for the Bill. Due to the definition of *this Act* in clause 7, this would include instruments made under the Bill, including rules made for emissions-controlled products. These alternative constitutional bases would also apply so that if there was a question whether the rules were supported by the primary source of Constitutional support (the external affairs power), they could be given a valid operation consistent with clause 50.

170. Clause 50 would ensure that:

- (a) references to import were read as references to import in the course of trade and commerce;
- (b) references to supply were read as references to supply in the course of international and interstate and territory trade and commerce; and
- (c) references to persons were read as references to constitutional corporations.

171. This provision is for the avoidance of doubt only; the Bill is valid to the maximum extent permitted by the Constitution generally (section 15A of the *Acts Interpretation Act 1901*).

#### **Clause 51 – Rules**

172. Subclause 51(1) enables the Minister to make rules prescribing matters required or permitted by the Bill to be prescribed by the rules or matters that are necessary or convenient to be prescribed for carrying out or giving effect to this Bill. Rules made under clause 51 are legislative instruments for the purposes of the *Legislation Act 2003* and will be available on the Federal Register of Legislation.

173. Because the Bill establishes a framework which enables different classes of emissions-controlled products to be prescribed in the future and the details applying to future products would vary, it is necessary and appropriate for the rules rather than the Bill to prescribe what products are emissions-controlled products and the processes that relate to their certification (including the emissions standards that must be satisfied), the fees associated with the certification process and what decisions are subject to review.

#### *Fees*

174. Paragraph 51(2)(a) would allow the Minister to prescribe fees for services provided in the performance of functions under the Bill. For example, a fee may be charged in relation to an application for certification or exemption.
175. Prescribing the fees in the rules for an emissions-controlled product would ensure that all relevant information regarding the amount of the fees, and the method for their calculation, is located in the same place. This also provides flexibility as the fees payable may be different depending on the type of emissions-controlled product being regulated. Fees may vary for different emissions-controlled products as the nature of the product may mean there are different costs to recover. The amount of the fee imposed would be set at a level that is designed to recover no more than the estimated cost of providing a service under the Bill relating to the type of emissions-controlled product.

#### *Review of decisions*

176. Paragraph 51(2)(b) would allow the rules for an emissions-controlled product to provide for the review of decisions made under the Bill. The definition of *this Act* in subclause 7(1) includes instruments made under the Bill, including rules for emissions-controlled products. As such, it is the rules which will prescribe the decisions made under the Bill or the rules that are subject to merits review.
177. It is appropriate that the rules, and not the Bill, contain the details regarding merits review as the decisions for which merits review will be available will be specified in the rules. This will include decisions made under the rules for the certification of an emissions-controlled product, the granting of exemptions relating to those products, and the imposition of fees for service.

#### *Incorporating standards from time to time*

178. Subclause 51(3) would provide that a rule setting out an emission standard for the purpose of paragraph 10(2)(a) may apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time, if produced by one of the following international organisations:
- (a) the International Electrotechnical Commission
  - (b) the International Organization for Standardization;
  - (c) the United Nations Economic Commission for Europe; or
  - (d) any other organisation that is specified in the rules.

179. The purpose of subclause 51(3) would be to allow an emissions standard to adopt existing standards that apply in international markets. By incorporating international standards, the Bill would allow the Australian market to keep pace with international industry developments. Incorporating international standards may also lower the cost of compliance for regulated entities as they do not need to manage compliance with multiple standards if manufacturing products for international markets.
180. Subclause 51(4) would allow for specifying a standard as in force from time. This will enable the rules to allow the import and supply of emissions-controlled products which are certified to subsequent versions of adopted overseas standards, without the need to amend the rules to reflect an update in those standards. This approach facilitates trade without compromising standards, as it enables products that produce lower emissions to be readily supplied to the Australian market.
181. In adopting existing standards from time to time consideration has been given to the fundamental principle of the *Legislation Act 2003*, and of access to justice, that people are easily able to understand their rights and obligations at law.
182. An example of standards to be adopted in rules include the following primary standards relating to NRSIEE:
- (a) the US Code of Federal Regulations Title 40 Parts 1045 and 1054; and
  - (b) the EU standard for non-road engines.
183. These standards are made available on the Internet at no charge. These standards specify all the key requirements that apply to regulated parties (such as the scope of the products covered and the detailed testing requirements) and also those matters that may be of interest to a wider audience (e.g. consumers and researchers), such as the emission limits and labelling for particular products.
184. While the primary standards are freely available, they may reference specific standards for particular technical aspects published by organisations such as the International Electrotechnical Commission and the International Organization for Standardization which may only be available for a fee. For example, the EU primary standards to be adopted in rules for NRSIEE make reference to a technical standard relating to the design and construction of chain saws (ISO 1168-1) which is available from the International Organization for Standardization website for a fee.
185. However, the standards where a fee applies are only likely to be relevant to those organisations deeply engaged in the commercial aspects of product design and emissions testing and such organisations would be expected to have a copy of these documents as part of conducting their normal business.

#### *Limitations on rules*

186. Subclause 51(5) would provide that the rules will not create an offence or civil penalty, provide powers of arrest or detention or powers of entry, search or seizure. Further, the rules will not impose a tax, set an amount to be appropriated from the Consolidated Revenue Fund or directly amend the text of the Bill.

*Consultation with the Information Commissioner*

187. Subclause 51(6) would provide that the Minister must consult with the Information Commissioner before prescribing additional agencies, bodies or persons in the rules for the purpose of information disclosure (clause 43). The consultation would be in relation to matters that relate to privacy and the Minister must have regard to any submissions made by the Information Commissioner because of that consultation.

*Collection of charges*

188. Subclause 51(7) would provide that the rules may provide for the collection and recovery of charges imposed under the Customs Charges Bill and the Customs Excise Bill.

## **PRODUCT EMISSIONS STANDARDS (CUSTOMS) CHARGES BILL 2017**

### **NOTES ON INDIVIDUAL CLAUSES**

#### **Clause 1 – Short title**

1. This clause provides the short title by which the Act may be cited is the *Product Emissions Standards (Customs) Charges Act 2017*.

#### **Clause 2 – Commencement**

2. This clause provides that the whole of the Customs Charges Act will commence at the same time as the Bill commences. However, if the Bill does not commence, the provisions of the Customs Charges Act will also not commence.

#### **Clause 3 – Act binds the Crown**

3. This clause provides that the Customs Charges Bill binds the Crown in each of its capacities.

#### **Clause 4 – Definitions**

4. This clause defines key terms used in the Customs Charges Bill. For example, the term *amount*, for the purposes of the Customs Charges Bill, is defined to include a nil amount.

#### **Clause 5 – Imposition of charge**

5. This clause imposes a charge on the importation of emissions-controlled products. The liability to pay the charge will arise at the time of importation.
6. The Customs Charges Bill, together with the Excise Charges Bill, would enable full cost recovery of the costs associated with regulating emissions-controlled products. This is done through the imposition of a charge on the import and manufacture of emissions-controlled products, as well as the imposition of fees for services in the performance of functions under the Bill.
7. Rules made under clause 51 (Rules) of the Bill for particular types or classes of emissions-controlled products may provide for the collection and recovery of charges imposed under the Customs Charges Bill. This would include details of when the charge must be paid. It is necessary that this detail be specified in the rules for an emissions-controlled product as the circumstances in which the collection and recovery of the charge associated with the import of the emissions-controlled product may change depending on the type of product and how often they are imported.

#### **Clause 6 – Amount of charge**

8. This clause would enable the amount of the charge to be imposed on the importation of an emissions-controlled product to be prescribed by the regulations or worked out in accordance with a method prescribed by the regulations. As the amount of the charge includes a nil amount (see the definitions at clause 4), the regulations may prescribe a

threshold below which the liability to pay the charge is waived. Alternatively, the regulations may also prescribe a cap on the amount of charge to be paid for a particular period. A method prescribed by the regulations may include, for example, the ability for the charge to increase in accordance with the Consumer Price Index, or some other specified formula.

9. It is necessary to have the flexibility to prescribe the detail of the amount of the charge, or the method for working out the amount of the charge, in the regulations as different charges may be prescribed for different emissions-controlled products. Consistent with Australian Government policy, the amount of any applicable charge for different types of emissions-controlled products will be determined on a case-by-case basis through a Cost Recovery Implementation Statement. The amount of the charge imposed would be set at a level that is designed to recover no more than the estimated cost of regulating the type of emissions-controlled product.

#### **Clause 7 – Liability for charge**

10. This clause imposes the liability to pay the charge on the importation of an emissions-controlled on the person who imported the emissions-controlled product.

#### **Clause 8 - Regulations**

11. This clause enables the Governor-General to make regulations prescribing matters that are either required or permitted by the Customs Charges Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Customs Charges Bill.



# PRODUCT EMISSIONS STANDARDS (EXCISE) CHARGES BILL 2017

## NOTES ON INDIVIDUAL CLAUSES

### Clause 1 – Short title

1. This clause provides the short title by which the Act may be cited is the *Product Emissions Standards (Excise) Charges Act 2017*.

### Clause 2 – Commencement

2. This clause provides that the whole of the Excise Charges Act will commence at the same time as the Bill commences. However, if the Bill does not commence, the provisions of the Excise Charges Act will also not commence.

### Clause 3 – Act binds the Crown

3. This clause provides that the Excise Charges Bill binds the Crown in each of its capacities.

### Clause 4 – Definitions

4. This clause defines key terms used in the Excise Charges Bill. For example, the term *amount*, for the purposes of the Excise Charges Bill, is defined to include a nil amount.

### Clause 5 – Imposition of charge

5. This clause imposes a charge on the manufacture of emissions-controlled products. The liability to pay the charge will arise at the time of manufacture. Although the Bill does not directly regulate manufacturers of emissions-controlled products, imposing a charge on the domestic manufacture of these products ensures that the imposition of the charge is applied consistently in relation to all emissions-controlled products that are supplied to the Australian market (clause 5 of the Customs Charges Bill imposes a charge on the importation of emissions-controlled products).
6. The Excise Charges Bill, together with the Customs Charges Bill, would enable full cost recovery of the costs associated with regulating emissions-controlled products. This is done through the imposition of a charge on the import and manufacture of emissions-controlled products, as well as the imposition of any fees under the Bill.

Rules made under clause 51 (Rules) of the Bill for particular types or classes of emissions-controlled products may provide for the collection and recovery of charges imposed under the Excise Charges Bill. This would include details of when the charge must be paid. It is necessary that this detail be specified in the rules for an emissions-controlled product as the circumstances in which the collection and recovery of the charge associated with the manufacture of the emissions-controlled product may change depending on the type of product.

### Clause 6 – Amount of charge

7. This clause would enable the amount of the charge to be imposed on the manufacture of an emissions-controlled product to be prescribed by the regulations or worked out in

accordance with a method prescribed by the regulations. As the amount of the charge includes a nil amount (see the definitions at clause 4), the regulations may prescribe a threshold below which the liability to pay the charge is waived. Alternatively, the regulations may also prescribe a cap on the amount of charge to be paid for a particular period. A method prescribed by the regulations may include, for example, the ability for the charge to increase in accordance with the Consumer Price Index, or some other specified formula.

8. It is necessary to have the flexibility to prescribe the detail of the amount of the charge, or the method for working out the amount of the charge, in the regulations as different charges may be prescribed for different emissions-controlled products. Consistent with Australian Government policy, the amount of any applicable charge for different types of emissions-controlled products will be determined on a case-by-case basis through a Cost Recovery Implementation Statement. The amount of the charge imposed would be set at a level that is designed to recover no more than the estimated cost of regulating the type of emissions-controlled product.

#### **Clause 7 – Liability for charge**

9. This clause imposes the liability to pay the charge on the manufacture of an emissions-controlled on the person who manufactures the emissions-controlled product.
10. Clause 22 of the Bill requires a person who makes the first supply of an emissions-controlled product that is manufactured in Australia to provide a report to the Secretary. The information contained in this report will assist in determining a manufacturer's liability to pay the charge on the manufacture of the emissions-controlled product.

#### **Clause 8 - Regulations**

11. This clause enables the Governor-General to make regulations prescribing matters that are either required or permitted by the Excise Charges Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Excise Charges Bill.

# **PRODUCT EMISSIONS STANDARDS (CONSEQUENTIAL PROVISIONS) BILL 2017**

## **NOTES ON INDIVIDUAL CLAUSES**

### **Clause 1 – Short title**

1. This clause provides the short title by which the Act may be cited is the *Product Emissions Standards (Consequential Provisions) Act 2017*.

### **Clause 2 – Commencement**

2. This clause provides that the whole of the Consequential Provisions Act will commence at the same time as the Bill commences. However, if the Bill does not commence, the provisions of the Consequential Provisions Act will also not commence.

### **Clause 3 – Schedules**

3. This clause provides that the amendments set out in the schedules to the Act have effect according to the terms of the schedules.

### **Schedule 1 – Amendments**

#### ***Customs Act 1901***

#### **Item 1 – At the end of section 229**

4. Section 229 of the Customs Act describes the types of goods that are forfeited to the Crown under that Act. Item 1 would amend section 229 of the Customs Act to clarify that goods are not forfeited to the Crown merely because they are imported or exported in contravention of the *Product Emissions Standards Act 2017*. Instead, Part 6 (Forfeiture of emissions-controlled products) of the Bill establishes a process by which emissions-controlled products may be forfeited to the Commonwealth through either of the following processes:
  - (a) Automatic forfeiture - where an emissions-controlled product is automatically forfeited when a person is convicted of an offence, or ordered to pay a civil penalty, for contravening a provision of Part 3 (Enforcing product emission standards) of the Bill (see Division 2 of Part 6 of the Bill); or
  - (b) General forfeiture - where a forfeiture notice is issued after an inspector seizes a emissions-controlled product where they suspect, on reasonable grounds, that a provision of Part 3 (Enforcing product emission standards) of the Bill was contravened in relation to the emissions-controlled product (see Division 3 of Part 6 of the Bill).
5. This consequential amendment streamlines the implementation of rules made under the Bill in relation to emissions-controlled products by ensuring that all action taken under the Bill will be done by inspectors appointed under clause 41 of the Bill.