

2002-2003-2004

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**US Free Trade Agreement
Implementation Bill 2004**

No. , 2004

(Trade)

**A Bill for an Act to implement the Australia-United
States Free Trade Agreement, and for other
purposes**

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1 **A Bill for an Act to implement the Australia-United**
2 **States Free Trade Agreement, and for other**
3 **purposes**

4 The Parliament of Australia enacts:

5 **1 Short title**

6 This Act may be cited as the *US Free Trade Agreement*
7 *Implementation Act 2004*.

8 **2 Commencement**

9 (1) Each provision of this Act specified in column 1 of the table
10 commences, or is taken to have commenced, in accordance with
11 column 2 of the table. Any other statement in column 2 has effect
12 according to its terms.
13

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1	The later of: (a) 1 January 2005; and (b) the day on which the Australia-United States Free Trade Agreement, done at Washington DC on 18 May 2004, comes into force for Australia. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur. The Minister for Trade must announce by notice in the <i>Gazette</i> the day on which the Agreement comes into force for Australia.	
3. Schedule 2, Parts 1 and 2	At the same time as the provisions covered by table item 2.	
4. Schedule 2, Part 3	The later of: (a) immediately after the commencement of Parts 1 and 2 of Schedule 2 to this Act; and (b) immediately after the commencement of item 1 of Schedule 1 to the <i>Agricultural and Veterinary Chemicals Legislation Amendment (Name Change) Act 2004</i> . However, the provision(s) do not commence at all unless both of the events mentioned in paragraphs (a) and (b) occur.	
5. Schedules 3 to 5	At the same time as the provisions covered by table item 2.	
6. Schedule 6	The day on which this Act receives the Royal Assent.	
7. Schedule 7	At the same time as the provisions covered by table item 2.	

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
8. Schedule 8	The day on which this Act receives the Royal Assent.	
9. Schedule 9, Part 1	1 January 2005.	1 January 2005
10. Schedule 9, Part 2	The day on which the WIPO Performances and Phonograms Treaty, done at Geneva on 26 December 1996, comes into force for Australia. The Minister administering the <i>Copyright Act 1968</i> must announce by notice in the <i>Gazette</i> the day on which the Treaty comes into force for Australia.	
11. Schedule 9, Parts 3 and 4	The earlier of the following times: (a) the time at which the provisions covered by table item 2 commence; (b) the time at which the provisions covered by table item 10 commence. (Parts 3 and 4 of Schedule 9 still commence even if one of the times mentioned in paragraph (a) or (b) does not occur.)	
12. Schedule 9, items 107 to 112	1 January 2005.	1 January 2005
13. Schedule 9, item 113	The day on which this Act receives the Royal Assent.	
14. Schedule 9, items 114 to 119	1 January 2005.	1 January 2005
15. Schedule 9, item 120	At the same time as the provisions covered by table item 2. However, if that time is the same time as the time at which the provisions covered by table item 12 commence, then item 120 commences immediately after those provisions commence.	
16. Schedule 9, item 121	At the same time as the provisions covered by table item 2.	

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Schedule 1—Customs amendments

Part 1—US originating goods

Customs Act 1901

1 After Division 1B of Part VIII

Insert:

Division 1C—US originating goods

Subdivision A—Preliminary

153Y Simplified outline

The following is a simplified outline of this Division:

- This Division defines *US originating goods*. Preferential rates of customs duty under the *Customs Tariff Act 1995* apply to US originating goods that are imported into Australia.
- Subdivision B provides that goods are US originating goods if they are wholly obtained or produced entirely in the US.
- Subdivision C provides that goods are US originating goods if they are produced entirely in the US, or in the US and Australia, exclusively from originating materials.
- Subdivision D sets out when goods (except clothing and textiles) that are produced entirely in the US, or in the US and Australia, from non-originating materials only, or from non-originating materials and originating materials, are US originating goods.
- Subdivision E sets out when goods that are clothing or textiles that are produced entirely in the US, or in the US and Australia, from non-originating materials only, or from non-originating materials and originating materials, are US originating goods.

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- Subdivision F sets out when accessories, spare parts or tools (imported with other goods) are US originating goods.
- Subdivision G deals with how the packaging materials or containers in which goods are packaged affects whether the goods are US originating goods.
- Subdivision H deals with how the consignment of goods affects whether the goods are US originating goods.

8

153YA Interpretation

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Definitions

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(1) In this Division:

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Agreement means the Australia-United States Free Trade Agreement done at Washington DC on 18 May 2004, as amended from time to time.

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Note: In 2004 the text of the Agreement was accessible on the Internet through the web site of the Department of Foreign Affairs and Trade.

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Australian originating goods means goods that are Australian originating goods under a law of the US that implements the Agreement.

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Convention means the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1983.

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Note: The text of the Convention is set out in Australian Treaty Series 1988 No. 30. In 2004 this was available in the Australian Treaties Library of the Department of Foreign Affairs and Trade, accessible on the Internet through that Department's world-wide web site.

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customs value, in relation to goods, has the meaning given by section 159.

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fuel has its ordinary meaning.

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Harmonized System means the Harmonized Commodity Description and Coding System (as in force from time to time) that is established by or under the Convention.

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1 **Harmonized US Tariff Schedule** means the Harmonized Tariff
2 Schedule of the United States (as in force from time to time).

3 **indirect materials** means:

4 (a) goods used in the production, testing or inspection of other
5 goods, but that are not physically incorporated in the other
6 goods; or

7 (b) goods used in the operation or maintenance of buildings or
8 equipment associated with the production of other goods;

9 including:

10 (c) fuel; and

11 (d) tools, dies and moulds; and

12 (e) lubricants, greases, compounding materials and other similar
13 goods; and

14 (f) gloves, glasses, footwear, clothing, safety equipment and
15 supplies for any of these things; and

16 (g) catalysts and solvents.

17 **Interpretation Rules** means the General Rules for the
18 Interpretation of the Harmonized System provided for by the
19 Convention.

20 **national** of the US has the meaning given by Annex 1-A to
21 Chapter 1 of the Agreement.

22 **non-originating materials** means goods that are not originating
23 materials.

24 **originating materials** means:

25 (a) goods that are used in the production of other goods and that
26 are US originating goods; or

27 (b) goods that are used in the production of other goods and that
28 are Australian originating goods; or

29 (c) indirect materials.

30 Example: This example illustrates goods produced from originating materials
31 and non-originating materials.

32 Pork sausages are produced in the US from US cereals, Hungarian
33 frozen pork meat and Brazilian spices.

34 The US cereals are originating materials since they are goods used in
35 the production of other goods (the sausages) and they are US
36 originating goods under Subdivision B.

1 ***US originating goods*** means goods that, under this Division, are
2 US originating goods.

3 *Value of goods*

4 (2) The ***value*** of goods for the purposes of this Division is to be
5 worked out in accordance with the regulations. The regulations
6 may prescribe different valuation rules for different kinds of goods.

7 *Tariff classifications*

8 (3) In specifying tariff classifications for the purposes of this Division,
9 the regulations may refer to the following:

- 10 (a) the Harmonized System;
11 (b) the Harmonized US Tariff Schedule.

12 (4) Subsection 4(3A) does not apply for the purposes of this Division.

13 *Regulations*

14 (5) For the purposes of this Division, the regulations may apply, adopt
15 or incorporate any matter contained in any instrument or other
16 writing as in force or existing from time to time.

17 **Subdivision B—Goods wholly obtained or produced entirely in**
18 **the US**

19 **153YB Goods wholly obtained or produced entirely in the US**

20 (1) Goods are ***US originating goods*** if they are wholly obtained or
21 produced entirely in the US.

22 (2) Goods are ***wholly obtained or produced entirely in the US*** if, and
23 only if, the goods are:

- 24 (a) minerals extracted in the US; or
25 (b) plants grown in the US, or in the US and Australia, or
26 products obtained from such plants; or
27 (c) live animals born and raised in the US, or in the US and
28 Australia, or products obtained from such animals; or
29 (d) goods obtained from hunting, trapping, fishing or aquaculture
30 conducted in the US; or

Schedule 1 Customs amendments
Part 1 US originating goods

- 1 (e) fish, shellfish or other marine life taken from the sea by ships
2 registered or recorded in the US and flying the flag of the
3 US; or
4 (f) goods produced exclusively from goods referred to in
5 paragraph (e) on board factory ships registered or recorded in
6 the US and flying the flag of the US; or
7 (g) goods taken from the seabed, or beneath the seabed, outside
8 the territorial waters of the US by the US or a national of the
9 US, but only if the US has the right to exploit that part of the
10 seabed; or
11 (h) goods taken from outer space by the US or a national of the
12 US; or
13 (i) waste and scrap that:
14 (i) has been derived from production operations in the US;
15 or
16 (ii) has been derived from used goods that are collected in
17 the US and that are fit only for the recovery of raw
18 materials; or
19 (j) recovered goods derived in the US and used in the US in the
20 production of remanufactured goods; or
21 (k) goods produced entirely in the US exclusively from goods
22 referred to in paragraphs (a) to (i) or from their derivatives.

23 **Subdivision C—Goods produced entirely in the US or in the US**
24 **and Australia exclusively from originating materials**

25 **153YC Goods produced entirely in the US or in the US and**
26 **Australia exclusively from originating materials**

27 Goods are *US originating goods* if they are produced entirely in
28 the US, or entirely in the US and Australia, exclusively from
29 originating materials.

30 **Subdivision D—Goods (except clothing and textiles) produced**
31 **entirely in the US or in the US and Australia from**
32 **non-originating materials**

33 **153YD Simplified outline**

34 The following is a simplified outline of this Subdivision:

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- This Subdivision sets out when goods (except clothing and textiles) that are produced entirely in the US, or in the US and Australia, from non-originating materials only, or from non-originating materials and originating materials, are US originating goods.
- The goods may be US originating goods under section 153YE (which applies to all goods except clothing and textiles).
- The goods may also be US originating goods under section 153YF (which applies only to goods that are chemicals, plastics or rubber).

153YE Goods (except clothing and textiles) produced entirely in the US or in the US and Australia from non-originating materials

- (1) Goods are *US originating goods* if:
- (a) a tariff classification (the *final classification*) that is specified in column 2 of the Schedule 1 tariff table applies to the goods; and
 - (b) they are produced entirely in the US, or entirely in the US and Australia, from non-originating materials only or from non-originating materials and originating materials; and
 - (c) if any of the following 3 requirements apply in relation to the goods—that requirement is satisfied.

First requirement

- (2) Subject to subsection (3), the first requirement applies only if a change in tariff classification is specified in column 3 of the Schedule 1 tariff table opposite the final classification for the goods. The first requirement is that:
- (a) each of the non-originating materials satisfies the transformation test (see subsection (8)); or
 - (b) the following are satisfied:
 - (i) the total value of all the non-originating materials does not exceed 10% of the customs value of the goods;
 - (ii) if one or more of the non-originating materials are prescribed for the purposes of this paragraph—each of

1 (b) it does not satisfy the change in tariff classification
2 mentioned in paragraph (a), but it was produced entirely in
3 the US, or entirely in the US and Australia, from other
4 non-originating materials, and each of those materials
5 satisfies the transformation test (including by one or more
6 applications of this subsection).

7 Note 1: Paragraph (8)(b) relates to paragraph 2 of Article 5.3 (Accumulation)
8 of the Agreement.

9 Note 2: Subsection (8) operates in a recursive manner: a non-originating
10 material may satisfy the transformation test in its own right, or it may
11 satisfy it because each non-originating material used to produce it
12 satisfies the transformation test (whether because each of those
13 materials does so in its own right, or because each non-originating
14 material used to produce the material does so), and so on.

15 **153YF Goods that are chemicals, plastics or rubber**

16 Goods are *US originating goods* if:

- 17 (a) they are produced entirely in the US, or entirely in the US
18 and Australia, from non-originating materials only or from
19 non-originating materials and originating materials; and
20 (b) they are goods that are classified to any of Chapters 28 to 40
21 of the Harmonized System; and
22 (c) a tariff classification (the *final classification*) that is
23 specified in column 2 of the Schedule 1 tariff table applies to
24 the goods; and
25 (d) before the tariff classifications in column 2 of that table in
26 relation to Chapter 28 or 39 of the Harmonized System, the
27 regulations specify particular rules in column 3 of that table;
28 and
29 (e) those rules apply in relation to the final classification for the
30 goods; and
31 (f) the goods satisfy those rules.

32 **Subdivision E—Goods that are clothing or textiles produced** 33 **entirely in the US or in the US and Australia from** 34 **non-originating materials**

35 **153YG Simplified outline**

36 The following is a simplified outline of this Subdivision:

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- This Subdivision sets out when goods that are clothing or textiles that are produced entirely in the US, or in the US and Australia, from non-originating materials only, or from non-originating materials and originating materials, are US originating goods.
- The goods may be US originating goods under section 153YH (which applies to all clothing and textiles).
- The goods may also be US originating goods under section 153YI (which applies only to clothing and textiles classified to Chapter 62 of the Harmonized System).

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153YH Goods that are clothing or textiles produced entirely in the US or in the US and Australia from non-originating materials

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- (1) Subject to subsection (5), goods are *US originating goods* if:
- (a) a tariff classification (the *final classification*) that is specified in column 2 of the Schedule 2 tariff table applies to the goods; and
 - (b) they are produced entirely in the US, or entirely in the US and Australia, from non-originating materials only or from non-originating materials and originating materials; and
 - (c) if any of the following 2 requirements apply in relation to the goods—that requirement is satisfied.

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Note: Subsection (5) sets out a qualification for goods put up in a set for retail sale.

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First requirement

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- (2) The first requirement applies only if a change in tariff classification is specified in column 3 of the Schedule 2 tariff table opposite the final classification for the goods. The first requirement is that:
- (a) subject to subsection (3), each of the non-originating materials satisfies the transformation test (see subsection (7)); or
 - (b) the following are satisfied:
 - (i) the total weight of all the non-originating materials does not exceed 7% of the total weight of the goods;

- 1 (ii) if one or more of the non-originating materials are
2 prescribed for the purposes of this paragraph—each of
3 those non-originating materials satisfies the
4 transformation test (see subsection (7)).

5 Note: Paragraph (2)(b) relates to paragraphs 6 and 7 (De Minimis) of Article
6 4.2 of the Agreement.

- 7 (3) In relation to goods classified to Chapter 61, 62 or 63 of the
8 Harmonized System, paragraph (2)(a) is to be applied by applying:
9 (a) for goods covered by Chapter 61 of the Harmonized
10 System—Chapter Rule 2 for Chapter 61 that is set out in the
11 Schedule 2 tariff table; and
12 (b) for goods covered by Chapter 62 of the Harmonized
13 System—Chapter Rule 3 for Chapter 62 that is set out in the
14 Schedule 2 tariff table; and
15 (c) for goods covered by Chapter 63 of the Harmonized
16 System—Chapter Rule 1 for Chapter 63 that is set out in the
17 Schedule 2 tariff table.

18 *Second requirement*

- 19 (4) The second requirement is that the goods satisfy any other
20 requirement that is specified in, or referred to in, column 3 of the
21 Schedule 2 tariff table opposite the final classification for the
22 goods.

23 *Goods put up in a set for retail sale*

- 24 (5) However, if:
25 (a) the goods are put up in a set for retail sale; and
26 (b) the goods are classified in accordance with Rule 3 of the
27 Interpretation Rules;
28 the goods are **US originating goods** only if:
29 (c) all of the goods in the set are US originating goods under this
30 Division; or
31 (d) the total value of the goods in the set that are not US
32 originating goods under this Division does not exceed 10% of
33 the customs value of the set of goods.

34 Note: The value of the goods in the set is to be worked out in accordance
35 with the regulations: see subsection 153YA(2).

Schedule 1 Customs amendments
Part 1 US originating goods

1 (6) In applying paragraph (5)(c), assume the goods were not part of a
2 set.

3 Example: A skirt and a belt are put up in a set for retail sale. The skirt and the
4 belt have been classified under Rule 3 of the Interpretation Rules
5 according to the tariff classification applicable to skirts.

6 The effect of subsection (6) is that the origin of the belt must now be
7 determined according to the tariff classification applicable to belts.

8 *Transformation test*

9 (7) A non-originating material satisfies the transformation test if:
10 (a) it satisfies the change in tariff classification that is specified
11 in column 3 of the Schedule 2 tariff table opposite the final
12 classification for the goods; or
13 (b) it does not satisfy the change in tariff classification
14 mentioned in paragraph (a), but it was produced entirely in
15 the US, or entirely in the US and Australia, from other
16 non-originating materials, and each of those materials
17 satisfies the transformation test (including by one or more
18 applications of this subsection).

19 Note 1: Paragraph (7)(b) relates to paragraph 2 of Article 5.3 (Accumulation)
20 of the Agreement.

21 Note 2: Subsection (7) operates in a recursive manner: a non-originating
22 material may satisfy the transformation test in its own right, or it may
23 satisfy it because each non-originating material used to produce it
24 satisfies the transformation test (whether because each of those
25 materials does so in its own right, or because each non-originating
26 material used to produce the material does so), and so on.

27 **153YI Goods that are clothing and textiles classified to Chapter 62**
28 **of the Harmonized System**

29 Goods are *US originating goods* if:

30 (a) they are produced entirely in the US, or entirely in the US
31 and Australia, from non-originating materials only or from
32 non-originating materials and originating materials; and
33 (b) they are goods that are classified to Chapter 62 of the
34 Harmonized System; and
35 (c) either:
36 (i) in any case—the goods satisfy Chapter Rule 2 for
37 Chapter 62 that is set out in the Schedule 2 tariff table;
38 or

- 1 (ii) in the case of goods that are classified to subheading
2 6205.20 or 6205.30 of Chapter 62 of the Harmonized
3 System—the goods satisfy the subheading rule for that
4 subheading that is set out in the Schedule 2 tariff table.

5 **Subdivision F—Other US originating goods**

6 **153YJ Standard accessories, spare parts and tools**

- 7 (1) If goods (the *underlying goods*) are imported into Australia with
8 standard accessories, standard spare parts or standard tools, then
9 the accessories, spare parts or tools are *US originating goods* if:
10 (a) the underlying goods are US originating goods; and
11 (b) the accessories, spare parts or tools are not invoiced
12 separately from the underlying goods; and
13 (c) the quantities and value of the accessories, spare parts or
14 tools are the usual quantities and value in relation to the
15 underlying goods.
- 16 (2) In working out if the underlying goods are US originating goods, if
17 the goods must satisfy a regional value content requirement under
18 Subdivision D, the regulations must require the value of the
19 accessories, spare parts or tools to be taken into account for the
20 purposes of that requirement.

21 Note: The value of the accessories, spare parts or tools is to be worked out
22 in accordance with the regulations: see subsection 153YA(2).

23 **Subdivision G—Packaging materials and containers**

24 **153YK Packaging materials and containers**

- 25 (1) If:
26 (a) goods are packaged for retail sale in packaging material or a
27 container; and
28 (b) the packaging material or container is classified with the
29 goods in accordance with Rule 5 of the Interpretation Rules;
30 then the packaging material or container is to be disregarded for
31 the purposes of this Division (with 1 exception).
- 32 (2) The exception is that in working out if the goods are US
33 originating goods, if the goods must satisfy a regional value
34 content requirement under Subdivision D, the regulations must

Schedule 1 Customs amendments

Part 1 US originating goods

1 require the value of the packaging material or container to be taken
2 into account for the purposes of that requirement.

3 Note: The value of the packaging material or container is to be worked out
4 in accordance with the regulations: see subsection 153YA(2).

5 **Subdivision H—Consignment**

6 **153YL Consignment**

- 7 (1) Goods are not US originating goods under this Division if:
- 8 (a) they are transported through a country or place other than the
9 US or Australia; and
- 10 (b) they undergo any process of production in that country or
11 place (other than unloading, reloading, any operation to
12 preserve them in good condition or any operation that is
13 necessary for them to be transported to Australia).
- 14 (2) This section applies despite any other provision of this Division.

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2 **Part 2—Verification powers**

3 *Customs Act 1901*

4 **2 At the end of subsection 4C(1)**

5 Add “or is a verification officer for the purposes of Subdivision JA of
6 Division 1 of Part XII”.

7 **3 Paragraph 4C(2)(b)**

8 Omit “or monitoring officer”, substitute “, monitoring officer or
9 verification officer”.

10 **4 Subsection 4C(3)**

11 Omit “or monitoring officer”, substitute “, monitoring officer or
12 verification officer”.

13 **5 Subsection 4C(5)**

14 Omit “or monitoring officer”, substitute “, monitoring officer or
15 verification officer”.

16 **6 After Division 4A of Part VI**

17 Insert:

18 **Division 4B—Exportation of textile and clothing goods to**
19 **the US**

20 **126AE Authorised officer may request records or ask questions**

21 (1) If textile and clothing goods are exported to the US, an authorised
22 officer may request a person who:

23 (a) is the exporter or producer of the goods; or

24 (b) is involved in the transportation of the goods from Australia
25 to the US;

26 to produce particular records, or to answer questions put by the
27 officer, in relation to the export, production or transportation of the
28 goods.

29 (2) The person is not obliged to comply with the request.

1 *Disclosing records or answers to US*

2 (3) An authorised officer may disclose any records so produced, or
3 disclose any answers to such questions, to a US customs official
4 for the purpose of a matter covered by Article 4.3 of the
5 Agreement.

6 *Definitions*

7 (4) In this section:

8 ***Agreement*** means the Australia-United States Free Trade
9 Agreement done at Washington DC on 18 May 2004, as amended
10 from time to time.

11 Note: In 2004 the text of the Agreement was accessible on the Internet
12 through the web site of the Department of Foreign Affairs and Trade.

13 ***Harmonized System*** has the same meaning as in section 153YA.

14 ***textile and clothing goods*** means goods that are classified to:

- 15 (a) subheading 4202.12, 4202.22, 4202.32 or 4202.92 of
16 Chapter 42 of the Harmonized System; or
17 (b) any of Chapters 50 to 63 of the Harmonized System; or
18 (c) heading 7019 of Chapter 70 of the Harmonized System; or
19 (d) subheading 9409.90 of Chapter 94 of the Harmonized
20 System.

21 ***US*** means the United States of America.

22 ***US customs official*** means a person representing the customs
23 administration of the US.

24 **7 Subdivision J of Division 1 of Part XII (heading)**

25 Repeal the heading, substitute:

26 **Subdivision J—General powers to monitor and audit**

27 **8 After Subdivision J of Division 1 of Part XII**

28 Insert:

1 **Subdivision JA—Powers to monitor and audit—**
2 **Australia-United States Free Trade Agreement**

3 **214BAA Simplified outline**

4 The following is a simplified outline of this Subdivision:

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- This Subdivision allows certain officers (*verification officers*) to enter premises, and to exercise certain powers (*AUSFTA verification powers*) in or on the premises, for the purpose of verifying information relating to the export, production or transportation of textile and clothing goods that are exported to the US.
 - However, verification officers may only enter premises under this Subdivision with the occupier's consent.
 - In entering premises and exercising AUSFTA verification powers, verification officers may be accompanied by US customs officials, but only with the occupier's consent.

16 **214BAB Definitions**

17 In this Subdivision:

18 **Agreement** means the Australia-United States Free Trade
19 Agreement done at Washington DC on 18 May 2004, as amended
20 from time to time.

21 Note: In 2004 the text of the Agreement was accessible on the Internet
22 through the web site of the Department of Foreign Affairs and Trade.

23 **AUSFTA verification powers** has the meaning given by
24 section 214BAC.

25 **Harmonized System** has the same meaning as in section 153YA.

26 **occupier** of premises includes a person who is apparently in charge
27 of the premises.

28 **textile and clothing goods** means goods that are classified to:

- 29 (a) subheading 4202.12, 4202.22, 4202.32 or 4202.92 of
30 Chapter 42 of the Harmonized System; or

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- 1 (b) any of Chapters 50 to 63 of the Harmonized System; or
2 (c) heading 7019 of Chapter 70 of the Harmonized System; or
3 (d) subheading 9409.90 of Chapter 94 of the Harmonized
4 System.

5 *US* means the United States of America.

6 *US customs official* means a person representing the customs
7 administration of the US.

8 *verification officer* means a person authorised under
9 section 214BAD to enter premises and to exercise AUSFTA
10 verification powers.

11 **214BAC AUSFTA verification powers**

- 12 (1) For the purposes of this Subdivision, the following are the
13 *AUSFTA verification powers*:
- 14 (a) the power to search premises;
 - 15 (b) the power to take photographs (including a video recording),
16 or make sketches, of premises or anything at premises;
 - 17 (c) the power to inspect, examine, count, measure, weigh, gauge,
18 test or analyse, and take samples of, anything in or on
19 premises;
 - 20 (d) the power to inspect any document or record in or on
21 premises;
 - 22 (e) the power to take extracts from, or make copies of, any
23 document or record in or on premises;
 - 24 (f) the power to take into or onto premises any equipment or
25 material reasonably necessary for the purpose of exercising a
26 power under paragraph (a), (b), (c), (d) or (e);
 - 27 (g) the power to test and operate record-keeping, accounting,
28 computing or other operating systems of any kind that are at
29 premises and may be used to generate or record information
30 or documents of a kind that may be communicated to
31 Customs;
 - 32 (h) the powers in subsections (2) and (3).

1 *Operation of equipment*

2 (2) For the purposes of this Subdivision, the **AUSFTA verification**
3 **powers** include the power to operate equipment at premises to see
4 whether:

5 (a) the equipment; or

6 (b) a disk, tape or other storage device that:

7 (i) is at the premises; and

8 (ii) can be used with the equipment or is associated with it;

9 contains information that is relevant to the verification of
10 information relating to the export, production or transportation of
11 textile and clothing goods that are exported to the US.

12 *Removing documents and disks etc.*

13 (3) For the purposes of this Subdivision, the **AUSFTA verification**
14 **powers** include the following powers in relation to information
15 described in subsection (2) that is found in the exercise of the
16 power under that subsection:

17 (a) the power to operate equipment or other facilities at the
18 premises to put the information in documentary form and
19 remove the documents so produced;

20 (b) the power to operate equipment or other facilities at the
21 premises to transfer the information to a disk, tape or other
22 storage device:

23 (i) that is brought to the premises for the exercise of the
24 power; or

25 (ii) that is at the premises and the use of which for the
26 purpose has been agreed in writing by the occupier of
27 the premises;

28 and to remove the disk, tape or other storage device from the
29 premises.

30 **214BAD Appointment of verification officers**

31 (1) The CEO may, by writing, authorise an officer to enter premises,
32 and to exercise AUSFTA verification powers in or on premises, for
33 the purposes of this Subdivision.

1 *Who may be authorised to be a verification officer*

- 2 (2) The CEO must not do so unless the CEO is satisfied that the officer
3 is suitably qualified, because of the officer's abilities and
4 experience, to exercise AUSFTA verification powers.

5 *Form of authorisation*

- 6 (3) An authorisation may apply:
7 (a) generally; or
8 (b) during a specified period; or
9 (c) in or on specified premises; or
10 (d) during a specified period in or on specified premises.

11 *AUSFTA verification powers to be used only as authorised*

- 12 (4) This Subdivision does not allow:
13 (a) an officer who is authorised to enter premises and exercise
14 AUSFTA verification powers during a specified period to
15 enter the premises or exercise the powers at a time outside
16 that period; or
17 (b) an officer who is authorised to enter specified premises and
18 to exercise AUSFTA verification powers in or on the
19 premises to enter other premises or to exercise the powers in
20 or on the other premises.

21 **214BAE Verification officers may enter premises and exercise**
22 **AUSFTA verification powers with consent**

- 23 (1) A verification officer may enter premises, and exercise AUSFTA
24 verification powers in or on the premises, to the extent that it is
25 reasonably necessary for the purpose of verifying information
26 relating to the export, production or transportation of textile and
27 clothing goods that are exported to the US.

28 *Occupier's consent required*

- 29 (2) However, a verification officer must not enter premises under this
30 section unless the occupier of the premises consents to the officer
31 entering the premises and exercising AUSFTA verification powers
32 in or on the premises.

- 1 (3) Before obtaining a consent under subsection (2), a verification
2 officer must give to the occupier of the premises a written notice
3 stating:
4 (a) that the officer wishes to enter the premises and exercise
5 AUSFTA verification powers in or on the premises; and
6 (b) the period during which the officer wishes to exercise the
7 powers; and
8 (c) the name of any US customs official who the officer
9 proposes will accompany the officer.
- 10 (4) Before obtaining a consent under subsection (2), a verification
11 officer must tell the occupier of the premises that the occupier may
12 refuse consent.
- 13 (5) An occupier of premises may express a consent to be limited to
14 entry to the premises, and to the exercise of AUSFTA verification
15 powers in or on the premises, during a particular period unless the
16 occupier withdraws the consent before the end of that period.
- 17 (6) An occupier's consent that is not so limited has effect in relation to
18 any entry to the premises, and to any exercise of AUSFTA
19 verification powers in or on the premises, until the occupier
20 withdraws the consent.
- 21 *Verification officer must leave premises if consent withdrawn*
- 22 (7) A verification officer must leave the premises if the occupier
23 withdraws the consent.
- 24 *Consent to be voluntary*
- 25 (8) A consent of a person does not have effect for the purposes of this
26 section unless it is voluntary.
- 27 *Consent, or withdrawal of consent, to be in writing*
- 28 (9) A consent of a person, or a withdrawal of consent by a person,
29 does not have effect for the purposes of this section unless it is in
30 writing.
- 31 *Notice setting out the occupier's rights and obligations*
- 32 (10) Before exercising AUSFTA verification powers in respect of
33 premises, a verification officer must give to the occupier of the
-

1 premises a written notice setting out the occupier's rights and
2 obligations under this Subdivision.

3 *Production of identity card*

4 (11) Before a verification officer enters premises or exercises any
5 AUSFTA verification powers, he or she must produce his or her
6 identity card to the occupier.

7 **214BAF US customs officials may accompany verification officers**

8 *Occupier's consent required*

9 (1) In entering premises and exercising AUSFTA verification powers,
10 a verification officer may be accompanied by one or more US
11 customs officials, but only if the officer obtains the consent of the
12 occupier of the premises to those officials accompanying the
13 officer.

14 (2) Before obtaining such a consent, a verification officer must tell the
15 occupier of the premises that the occupier may refuse consent.

16 *US customs officials must leave premises if consent withdrawn*

17 (3) The US customs officials must leave the premises if the occupier
18 withdraws the consent.

19 *Consent to be voluntary*

20 (4) A consent of a person does not have effect for the purposes of this
21 section unless it is voluntary.

22 *Consent, or withdrawal of consent, to be in writing*

23 (5) A consent of a person, or a withdrawal of consent by a person,
24 does not have effect for the purposes of this section unless it is in
25 writing.

26 **214BAG Availability of assistance in exercising AUSFTA**
27 **verification powers**

28 In entering premises and exercising AUSFTA verification powers,
29 a verification officer may obtain such assistance as is necessary
30 and reasonable in the circumstances.

1 **214BAH Verification officer may ask questions**

- 2 (1) If a verification officer is in or on premises that he or she entered
3 under this Subdivision, the officer may request the occupier to
4 answer any questions put by the officer.
- 5 (2) The occupier is not obliged to comply with the request.

6 **214BAI Verification officer may ask for assistance**

- 7 (1) If a verification officer is in or on premises that he or she entered
8 under this Subdivision, then, while the officer is entitled to remain
9 in or on the premises, the officer may request the occupier to
10 provide reasonable assistance to the officer for the purpose of the
11 officer's exercise of AUSFTA verification powers in or on the
12 premises.
- 13 (2) The occupier is not obliged to comply with the request.

14 **214BAJ Verification officer may disclose information to US**

15 A verification officer may disclose any information obtained in
16 exercising AUSFTA verification powers to a US customs official
17 for the purpose of a matter covered by Article 4.3 of the
18 Agreement.

19 **214BAK Operation of electronic equipment at premises**

20 A person may operate electronic equipment at premises in order to
21 exercise a power under this Subdivision only if he or she believes
22 on reasonable grounds that the operation of the equipment can be
23 carried out without damage to the equipment.

24 **214BAL Compensation for damage to electronic equipment**

- 25 (1) This section applies if:
26 (a) as a result of equipment being operated as mentioned in
27 section 214BAC:
28 (i) damage is caused to the equipment; or
29 (ii) the data recorded on the equipment is damaged; or
30 (iii) programs associated with the use of the equipment, or
31 with the use of the data, are damaged or corrupted; and

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- 1 (b) the damage or corruption occurs because:
- 2 (i) insufficient care was exercised in selecting the person
- 3 who was to operate the equipment; or
- 4 (ii) insufficient care was exercised by the person operating
- 5 the equipment.
- 6 (2) The Commonwealth must pay the owner of the equipment, or the
- 7 user of the data or programs, such reasonable compensation for the
- 8 damage or corruption as the Commonwealth and the owner or user
- 9 agree on.
- 10 (3) However, if the owner or user and the Commonwealth fail to
- 11 agree, the owner or user may institute proceedings in the Federal
- 12 Court of Australia for such reasonable amount of compensation as
- 13 the Court determines.
- 14 (4) In determining the amount of compensation payable, regard is to
- 15 be had to whether the occupier of the premises, or the occupier's
- 16 employees and agents, if they were available at the time, provided
- 17 any appropriate warning or guidance on the operation of the
- 18 equipment.
- 19 (5) Compensation is payable out of money appropriated by the
- 20 Parliament.
- 21 (6) For the purposes of subsection (1):
- 22 *damage*, in relation to data, includes damage by erasure of data or
- 23 addition of other data.

1
2 **Schedule 2—Agricultural and veterinary**
3 **chemicals amendments**

4 **Part 1—Limits on use of information**

5 *Agricultural and Veterinary Chemicals Code Act 1994*

6 **1 After Division 4 of Part 2 of the Schedule**

7 Insert:

8 **Division 4A—Limits on use of information**

9 **Subdivision A—Preliminary**

10 **34B Explanation of Division**

- 11 (1) This Division limits for a period the use the NRA can make of
12 information given to it:
- 13 (a) in connection with an application under section 10 or 27
14 relating to:
- 15 (i) approval of an active constituent for a chemical product;
16 or
17 (ii) registration of a chemical product; or
18 (iii) approval of a label for a container for a chemical
19 product; or
20 (b) under section 161 in connection with a registered chemical
21 product.
- 22 (2) During the period, the NRA cannot use the information for
23 granting another application, or for a reconsideration of an
24 approval or registration, unless:
- 25 (a) the NRA is given a written statement made by a person who
26 can authorise the use of the information consenting to the
27 use; or
28 (b) certain other conditions are met.
- 29 (3) The object of limiting use of the information in this way is to
30 encourage innovation by making it easier for a person who made

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Part 1 Limits on use of information

1 an investment in finding out the information to get a return on that
 2 investment.

3 **Subdivision B—Limits on use of information**

4 **34C NRA must not use some information during some periods for**
 5 **some purposes**

6 (1) During the period described in an item of the table, the NRA must
 7 not use information described in the item for a purpose described
 8 in the item.
 9

Limits on use of information

The NRA must not use this information:	During this period:	For this purpose:
1 Information that the applicant or an approved person gives the NRA: (a) in connection with an application under section 10 or 27; and (b) before the NRA makes a preliminary assessment under section 11A or 28A of the application	The period: (a) starting when the information is given; and (b) ending when the NRA makes the preliminary assessment	Making a decision under section 14, 29 or 34 (except a decision on the application)
2 Information that the applicant or an approved person gives the NRA: (a) in connection with an application under section 10 or 27; and (b) as required by the NRA or section 160A	The period: (a) starting when the NRA makes a preliminary assessment under section 11A or 28A of the application; and (b) ending when the NRA treats the application as having been withdrawn or grants or refuses the application	Making a decision under section 14, 29 or 34 (except a decision on the application)

Limits on use of information

The NRA must not use this information:	During this period:	For this purpose:
<p>3 Information that:</p> <p>(a) was given to the NRA by the applicant or an approved person in connection with an application under section 10 or 27; and</p> <p>(b) was given as required by the NRA or section 160A; and</p> <p>(c) was relied on by the NRA to grant the application</p>	<p>The relevant period described in section 34F</p>	<p>Making a decision under section 14, 29 or 34</p>
<p>4 Information that the interested person for a registered chemical product gives the NRA under section 161 in connection with the product</p>	<p>The period:</p> <p>(a) starting when the person gives the NRA the information; and</p> <p>(b) ending 5 years later if the product is an agricultural chemical product or 3 years later if the product is a veterinary chemical product</p>	<p>Making a decision under section 14, 29 or 34</p>

1 Note 1: Section 34D sets out exceptions to this subsection.

2 Note 2: Section 161 may require an interested person for an approved active
3 constituent to give the NRA information in connection with the
4 constituent, even though this table does not deal with that
5 requirement.

6 (2) This section applies only to information given to the NRA:

7 (a) in connection with an application made after the
8 commencement of this section; or

9 (b) under section 161 in connection with a chemical product that
10 was registered as a result of an application made after the
11 commencement of this section.

12 (3) The use of information in contravention of subsection (1) for
13 making a decision does not affect the validity of the decision.

- 1 (4) An action or proceeding does not lie against any of the following
2 for any loss directly or indirectly sustained because of the use of
3 information in contravention of subsection (1):
4 (a) the Commonwealth;
5 (b) the NRA;
6 (c) a person who is or has been:
7 (i) a director of the NRA; or
8 (ii) the Chief Executive Officer of the NRA; or
9 (iii) a delegate of the NRA; or
10 (iv) a member of the staff of the NRA.

11 Subdivision C—Exceptions to limits on use of information

12 34D Exceptions

- 13 (1) Section 34C does not prevent the NRA from using information for
14 making a decision:
15 (a) under section 14 or 29 about an application; or
16 (b) under section 34 about a reconsideration of an approval or
17 registration;
18 if a condition in subsection (2), (3), (4), (5) or (6) of this section is
19 met.

20 *Evidence of consent for use*

- 21 (2) One condition is that the applicant, an approved person or the
22 interested person for the approval or registration gives the NRA a
23 written statement by the authorising party of that party's consent to
24 the NRA using the information for making the decision. This
25 condition is met even if the authorising party:
26 (a) later states that it has not consented; or
27 (b) withdraws the consent (whether before or after the NRA is
28 given the statement of consent).

29 Note: Chapter 7 of the *Criminal Code* creates offences relating to false and
30 misleading statements and forgery.

31 *Use in the public interest*

- 32 (3) Another condition is that the NRA is satisfied, having regard to the
33 criteria (if any) prescribed by the regulations, that the use of the
34 information is in the public interest.

1 Note: Section 34E sets out other rules that are relevant to the exception
2 based on this condition.

3 *Information does not favour the applicant or interested person*

4 (4) Another condition is that:

5 (a) the decision relates to:

6 (i) a proposed or existing approval of an active constituent
7 for a proposed or existing chemical product; or

8 (ii) a proposed or existing registration of a proposed or
9 existing chemical product; and

10 (b) the information meets a condition in paragraph 160A(4)(b) or
11 (c) or 161(2)(b) or (c) (which are about showing that use or
12 dealing with the product may have adverse effects or that the
13 product may be ineffective), whether or not the information
14 was given to the NRA under section 160A or 161.

15 *Identical information whose use is not limited*

16 (5) Another condition is that the NRA is satisfied that there is identical
17 information, or information to the same effect, whose use is not
18 prevented by section 14B or 34C or Part 3.

19 *Information given to NRA in connection with certain applications*

20 (6) Another condition is that the application mentioned in subsection
21 34C(1) was one of the following:

22 (a) an application for approval, as an active constituent for a
23 chemical product, of a substance that was a previously
24 endorsed active constituent on the commencement of this
25 Division;

26 (b) an application for the variation of the relevant particulars or
27 conditions of the approval of an active constituent for a
28 chemical product;

29 (c) an application for the registration of a companion animal
30 product each active constituent for which was a previously
31 endorsed active constituent at the time of the preliminary
32 assessment of the application under section 11A;

33 (d) an application for variation of the relevant particulars or
34 conditions of the registration of a companion animal product;

35 (e) an application for the approval of a label for a container for a
36 companion animal product each active constituent of which

- 1 was a previously endorsed active constituent at the time of
2 the preliminary assessment of the application under
3 section 11A;
4 (f) an application for variation of the relevant particulars or
5 conditions of the approval of a label for a container for a
6 companion animal product.

7 **34E Further rules about public interest exception**

- 8 (1) This section applies if the NRA is satisfied under subsection
9 34D(3) that it is in the public interest to use information that
10 section 34C would otherwise prohibit the NRA from using for
11 making a decision:
12 (a) under section 14 or 29 about an application; or
13 (b) under section 34 about a reconsideration of an approval or
14 registration.
- 15 (2) As soon as practicable after becoming satisfied, the NRA must
16 give written notice of its satisfaction to:
17 (a) the applicant, an approved person or the interested person for
18 the approval or registration; and
19 (b) the person whom the NRA believes is the authorising party
20 for the information.
- 21 (3) Section 168 provides for additional matters to be included in the
22 notice.
- 23 (4) The NRA must not make the decision using the information before
24 the end of 28 days after the day on which the notice is given.
- 25 (5) However, subsections (3) and (4) do not apply if:
26 (a) the NRA believes it is necessary to make the decision before
27 the end of 28 days after the notice is given, to prevent
28 imminent risk to public health or occupational health or
29 safety; and
30 (b) states that belief in the notice.

1 **Subdivision D—Period of limit on use of information**

2 **34F Period of limit on future use of information relied on in**
3 **granting application**

4 (1) Subsection 34C(1) prohibits the NRA from using, during the
5 period described in an item of the following table, information that:

6 (a) was given to the NRA by the applicant or an approved person
7 in connection with an application described in the item; and

8 (b) was given as required by the NRA or section 160A; and

9 (c) was relied on by the NRA to grant the application.

10 The period starts when the application was granted.
11

Period for which the NRA must not use the information

	Application	Period
1	Application made under section 10 for approval of an active constituent (for a proposed or existing chemical product) that was not a previously endorsed active constituent on the commencement of this Division	8 years
2	Application made under section 10 for: (a) registration of a chemical product at least one of whose active constituents was not a previously endorsed active constituent when the application was acknowledged; or (b) approval of a label for a container for a chemical product at least one of whose active constituents was not a previously endorsed active constituent when the application was acknowledged	8 years
3	Application (except one covered by item 2) made under section 10 for: (a) registration of an agricultural chemical product; or (b) approval of a label for a container for an agricultural chemical product	5 years
4	Application (except one covered by item 2) made under section 10 for: (a) registration of a veterinary chemical product; or (b) approval of a label for a container for a veterinary chemical product	3 years

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Period for which the NRA must not use the information		
	Application	Period
5	Application made under section 27 for variation of the relevant particulars or conditions of: (a) the registration of an agricultural chemical product; or (b) the approval of a label for a container for an agricultural chemical product	5 years
6	Application made under section 27 for variation of the relevant particulars or conditions of: (a) the registration of a veterinary chemical product; or (b) the approval of a label for a container for a veterinary chemical product	3 years

- 1 Note 1: This section has effect for the purposes of item 3 of the table in
2 subsection 34C(1) (and not for any of the other items in that table).
- 3 Note 2: This section is not relevant to information if section 34D provides an
4 exception to the prohibition in subsection 34C(1) on the NRA using
5 the information.

6 *Extension of 8-year limits*

- 7 (2) The period mentioned in item 1 or 2 of the table in subsection (1)
8 in relation to:
9 (a) an application for an approval of an active constituent (a *key*
10 *constituent*); or
11 (b) an application for registration of a chemical product
12 containing an active constituent (also a *key constituent*) that
13 had not been approved when the application was
14 acknowledged; or
15 (c) an application for approval of a label for a container for a
16 chemical product containing an active constituent (also a *key*
17 *constituent*) that had not been approved when the application
18 was acknowledged;
19 is extended by 1 year for each 5 distinct uses that meet the
20 requirements in subsections (3), (4) and (5).
- 21 (3) The first requirement is that the uses are uses of a chemical product
22 (an *extension product*) for which the following conditions are met:
23 (a) the key constituent is an active constituent for the product;
24 (b) the product was registered as a result of an application that:

- 1 (i) was made by the applicant mentioned in subsection (1);
2 and
3 (ii) was acknowledged before the approval of the key
4 constituent.
- 5 (4) The second requirement is that each of the uses is included in an
6 approved label for a container for an extension product as a result
7 of an application that:
8 (a) is for:
9 (i) the approval of the label; or
10 (ii) the variation of the relevant particulars or conditions of
11 approval of the label; and
12 (b) was made by the applicant mentioned in subsection (1) or by
13 the interested person in relation to the approval of the key
14 constituent; and
15 (c) was acknowledged before the end of 6 years after the date of
16 the approval of the key constituent as a result of an
17 application by the applicant mentioned in subsection (1).
- 18 (5) The third requirement is that all 5 of the uses are prescribed by the
19 regulations at the latest time an application described in
20 subsection (4) is granted.
- 21 (6) However, the period mentioned in item 1 or 2 of the table in
22 subsection (1) cannot be extended so that it exceeds 11 years.

23 **Subdivision E—Ancillary provisions**

24 **34G Identifying information relied on in advice NRA relied on**

- 25 (1) This section has effect if:
26 (a) the NRA made a decision under subsection 14(1) or 29(1) to
27 grant an application made after the commencement of this
28 section; and
29 (b) in making the decision, the NRA relied on advice given by a
30 person, body or Government the NRA consulted under
31 section 8 or 8A of the *Agricultural and Veterinary Chemicals*
32 *(Administration) Act 1992*.
- 33 (2) The NRA must cause to be published a summary of the advice.
- 34 (3) The summary must:

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- 1 (a) identify the information that the person, body or Government
2 relied on in giving the advice; and
3 (b) include the matters (if any) prescribed by the regulations.

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Part 2—Provisions relating to limits on use of information

Agricultural and Veterinary Chemicals (Administration) Act 1992

2 Paragraph 69EX(a)

After “Part”, insert “or after the commencement of Division 4A of Part 2 of the Code set out in the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*”.

Agricultural and Veterinary Chemicals Code Act 1994

3 Section 3 of the Schedule

Insert:

acknowledge an application made under section 10 or 27 has the meaning given in the table:

Acknowledgment of an application	
If:	The application is acknowledged when:
1 The NRA gives notice under subsection 11A(2) (applying of its own force or because of section 28A) that the application has passed a preliminary assessment and will be given a full evaluation in due course	The NRA gives the notice
2 The NRA is satisfied that defects in the application have been rectified as required by a notice given under paragraph 11A(3)(a) (applying of its own force or because of section 28A)	The NRA becomes satisfied
3 The NRA starts to consider the application after deferring the consideration under subparagraph 11A(3)(b)(i) (applying of its own force or because of section 28A)	The NRA starts to consider the application

1 **4 Section 3 of the Schedule**

2 Insert:

3 *authorising party* for information means a person who would be
4 entitled to bring an action for breach of an obligation of confidence
5 if the information were disclosed by someone else to the NRA for
6 the purposes of this Code without the person's permission.

7 **5 Section 3 of the Schedule**

8 Insert:

9 *companion animal product* means a veterinary chemical product
10 solely for administration or application to animals that:
11 (a) are not food-producing species; and
12 (b) are not prescribed by the regulations.

13 **6 Section 3 of the Schedule**

14 Insert:

15 *previously endorsed active constituent* for a chemical product at a
16 particular time means a substance that:
17 (a) before that time, had been approved or registered (however
18 described) under a law of the Commonwealth or a State or
19 Territory as an active constituent for a chemical product; or
20 (b) was an active constituent for a chemical product that, before
21 that time, had been approved or registered (however
22 described) under a law of the Commonwealth or a State or
23 Territory as a chemical product;
24 whether or not the approval or registration was a result of an
25 application by a particular person.

26 **7 After section 11A of the Schedule**

27 Insert:

28 **11B NRA to publish summary of application**

- 29 (1) As soon as practicable after an application is acknowledged, the
30 NRA must cause to be published a summary of the application.
- 31 (2) The summary must include the details relating to the application
32 that are prescribed by the regulations (if any).

1 **8 After section 14A of the Schedule**

2 Insert:

3 **14B NRA not to use information for registration of new agricultural**
4 **chemical product to approve a similar product after**
5 **disclosure**

6 (1) This section applies if:

7 (a) information was given to the NRA in connection with an
8 application made after the commencement of this section for
9 registration of an agricultural chemical product (the *first*
10 *product*) containing an active constituent that was not a
11 previously endorsed active constituent at the time of
12 registration of the first product; and

13 (b) the information related to the first product or the active
14 constituent and a matter that:

15 (i) is described in paragraph 14(3)(e) (except subparagraph
16 14(3)(e)(iv)) or paragraph 14(3)(f); or

17 (ii) is prescribed by the regulations; and

18 (c) the information was disclosed:

19 (i) by the Commonwealth, a State or a Territory; or

20 (ii) by an authority of the Commonwealth, a State or a
21 Territory (including the NRA); or

22 (iii) by anyone acting on behalf of the Commonwealth, a
23 State, a Territory or an authority of the Commonwealth,
24 a State or a Territory; and

25 (d) the information was not publicly available before the
26 disclosure; and

27 (e) as a result of the disclosure, the interested person, or an
28 approved person, for an application for registration of an
29 agricultural chemical product (the *second product*) that is the
30 same as, or similar to, the first product, seeks to have the
31 NRA use the information in granting the application.

32 (2) For 10 years after the first day on which the first product was
33 registered, the NRA must not use the information to grant the
34 application for registration of the second product if:

35 (a) the registration of the second product would be commercially
36 unfair; and

- 1 (b) the authorising party for the information does not consent to
2 the use.
- 3 (3) The use of information in contravention of subsection (2) for
4 granting the application for registration of the second product does
5 not affect the validity of the grant or of the registration of the
6 second product.
- 7 (4) An action or proceeding does not lie against any of the following
8 for any loss directly or indirectly sustained because of the use of
9 information in contravention of subsection (2):
- 10 (a) the Commonwealth;
11 (b) the NRA;
12 (c) a person who is or has been:
13 (i) a director of the NRA; or
14 (ii) the Chief Executive Officer of the NRA; or
15 (iii) a delegate of the NRA; or
16 (iv) a member of the staff of the NRA.
- 17 (5) This section has effect in addition to Division 4A.

18 **9 Subparagraph 15(1)(a)(i) of the Schedule**

19 Repeal the subparagraph, substitute:

- 20 (i) the NRA also grants or has granted an application for
21 approval of each active constituent for the product; and

22 **10 After section 28 of the Schedule**

23 Insert:

24 **28A Preliminary assessment of application**

25 Section 11A applies to an application lodged under section 28 and
26 compliance with subsection 28(1) in the same way as it applies to
27 an application lodged under section 11 and compliance with
28 subsection 11(1).

29 **28B NRA to publish summary of application**

- 30 (1) As soon as practicable after an application is acknowledged, the
31 NRA must cause to be published a summary of the application,

1 unless satisfied that the variation applied for does not relate to use
2 of or dealing with a proposed or existing chemical product.

3 (2) The summary must include the details relating to the application
4 that are prescribed by the regulations (if any).

5 **11 Subsection 58(1) of the Schedule**

6 After “in”, insert “section 14B, Division 4A of Part 2 and”.

7 **12 After paragraph 167(1)(b) of the Schedule**

8 Insert:

- 9 (ba) a decision under section 28A that the application does not
10 comply with subsection 28(1);
11 (bb) a decision under section 28A:
12 (i) to defer consideration of an application to vary the
13 relevant particulars, or the conditions, of an approval or
14 registration; or
15 (ii) to treat such an application as having been withdrawn;
16 or
17 (iii) to reject such an application;
18 (bc) a decision under section 28A refusing to extend a period;

19 **13 After paragraph 167(1)(e) of the Schedule**

20 Insert:

- 21 (ea) a decision (the *information decision*) under subsection
22 34D(3) that the NRA is satisfied that it is in the public
23 interest to use information that section 34C would otherwise
24 prohibit the NRA from using for making a decision (the
25 *substantive decision*):
26 (a) under section 14 or 29 about an application; or
27 (b) under section 34 about a reconsideration of an approval
28 or registration;

29 **14 After subsection 167(2) of the Schedule**

30 Insert:

- 31 (2A) Despite paragraph (1)(ea), an application may not be made to the
32 Administrative Appeals Tribunal for review of the information
33 decision if the NRA stated in the notice of that decision given
34 under section 34E that the NRA believed it was necessary to make

Schedule 2 Agricultural and veterinary chemicals amendments

Part 2 Provisions relating to limits on use of information

1 the substantive decision before the end of 28 days after giving the
2 notice, to prevent imminent risk to public health or occupational
3 health or safety.

1

2 **Part 3—Change of name from NRA to APVMA**

3 *Agricultural and Veterinary Chemicals Code Act 1994*

4 **15 Section 3 of the Schedule (definition of *acknowledge*)**

5 Omit “NRA” (wherever occurring), substitute “APVMA”.

6 **16 Section 3 of the Schedule (definition of *authorising party*)**

7 Omit “NRA”, substitute “APVMA”.

8 **17 Sections 11B and 14B of the Schedule**

9 Omit “NRA” (wherever occurring), substitute “APVMA”.

10 Note: The headings to sections 11B and 14B of the Schedule are altered by omitting “NRA”
11 and substituting “APVMA”.

12 **18 Subparagraph 15(1)(a)(i) of the Schedule**

13 Omit “NRA”, substitute “APVMA”.

14 **19 Subsection 28B(1) of the Schedule**

15 Omit “NRA”, substitute “APVMA”.

16 Note: The heading to section 28B of the Schedule is altered by omitting “NRA” and
17 substituting “APVMA”.

18 **20 Division 4A of Part 2 of the Schedule**

19 Omit “NRA” (wherever occurring), substitute “APVMA”.

20 Note: The headings to sections 34C and 34G of the Schedule are altered by omitting “NRA”
21 and substituting “APVMA”.

22 **21 Section 167 of the Schedule**

23 Omit “NRA” (wherever occurring), substitute “APVMA”.

1
2 **Schedule 3—Australian geographical**
3 **indications for wine amendments**
4

5 *Australian Wine and Brandy Corporation Act 1980*

6 **1 Subsection 4(1)**

7 Insert:

8 *Federal Court* means the Federal Court of Australia.

9 **2 Subsection 4(1)**

10 Insert:

11 *pending*, in relation to an application for the registration of a trade
12 mark under the *Trade Marks Act 1995*, has the meaning given in
13 that Act.

14 **3 Subsection 4(1)**

15 Insert:

16 *registered owner*, in relation to a trade mark, means the person in
17 whose name the trade mark is registered under the *Trade Marks*
18 *Act 1995*.

19 **4 Subsection 4(1)**

20 Insert:

21 *registered trade mark* means a trade mark whose particulars are
22 entered in the Register of Trade Marks under the *Trade Marks Act*
23 *1995*.

24 **5 Subsection 4(1)**

25 Insert:

26 *Register of Trade Marks* means the register kept under section 207
27 of the *Trade Marks Act 1995*.

28 **6 Subsection 4(1)**

29 Insert:

1 *trade mark* has the meaning given in the *Trade Marks Act 1995*.

2 **7 Subsection 40P(1)**

3 Repeal the subsection, substitute:

- 4 (1) The functions of the Committee are:
- 5 (a) to deal with applications for the determination of
 - 6 geographical indications for wine in relation to regions and
 - 7 localities in Australia (*Australian GIs*) in accordance with
 - 8 this Part; and
 - 9 (b) to make determinations of Australian GIs in accordance with
 - 10 this Part; and
 - 11 (c) to make determinations for the omission of Australian GIs in
 - 12 accordance with this Part; and
 - 13 (d) any other functions conferred on the Committee under this
 - 14 Part.

15 **8 Subsection 40P(2)**

16 Omit “function”, substitute “functions”.

17 **9 Before section 40Q in Division 4 of Part VIB**

18 Insert:

19 **Subdivision A—What this Division is about**

20 **40PA What this Division is about**

- 21 (1) This Division deals with the determining of geographical
- 22 indications (*GIs*) in relation to a region or locality in Australia.

23 Note: Geographical indications in relation to wine manufactured in an

24 agreement country are not determined under this Division. They are

25 determined in the agreement between Australia and the agreement

26 country.

- 27 (2) Subdivisions B and C deal with the powers of the Committee and
- 28 applications for the determination of GIs. Subdivision D deals with
- 29 objections to the determination of a GI on the basis of pre-existing
- 30 trade mark rights. GIs are determined under Subdivision E.

1 **Subdivision B—Powers of Committee to determine**
2 **geographical indications**

3 **10 After section 40Q**

4 Insert:

5 **40QA Committee must await decisions under Subdivision D**

6 The Committee must not do a thing under Subdivision E in respect
7 of a proposed GI unless the requirements of Subdivision D have
8 been complied with.

9 **Subdivision C—Applications for determinations of**
10 **geographical indications**

11 **11 After section 40R**

12 Insert:

13 **Subdivision D—Objections to determination of geographical**
14 **indications based on pre-existing trade mark rights**

15 **40RA Notice to be given of proposed geographical indication**

- 16 (1) The Presiding Member of the Committee must cause a notice under
17 subsection (2) to be published if:
- 18 (a) an application under section 40R has been made for the
19 determination of a geographical indication (the *proposed GI*);
20 or
 - 21 (b) the Committee is considering determining a geographical
22 indication (the *proposed GI*) on its own initiative under
23 section 40Q; or
 - 24 (c) after an application under section 40R has been made, the
25 Committee is considering, under paragraph 40T(3)(b),
26 determining a geographical indication (the *proposed GI*) that
27 is different from the GI proposed in the application.
- 28 (2) The notice must:
- 29 (a) set out the proposed GI; and

- 1 (b) invite persons to make written objections to the Registrar of
2 Trade Marks in relation to the proposed GI on a ground set
3 out in section 40RB; and
4 (c) invite those objections to be made within the period of not
5 less than one month stated in the notice.

6 **40RB Grounds of objection to the determination of a geographical**
7 **indication**

8 *Registered owner of a registered trade mark*

- 9 (1) The registered owner of a registered trade mark may object to the
10 determination of a proposed GI on one of the following grounds:
11 (a) that the trade mark consists of a word or expression that is
12 identical to the proposed GI;
13 (b) that:
14 (i) the trade mark consists of a word or expression; and
15 (ii) the proposed GI is likely to cause confusion with that
16 word or expression;
17 (c) that:
18 (i) the trade mark contains a word or expression; and
19 (ii) the proposed GI is likely to cause confusion with that
20 word or expression; and
21 (iii) the owner has trade mark rights in that word or
22 expression.
- 23 (2) The owner may object on the ground specified in paragraph (1)(c)
24 even if there are conditions or limitations entered on the Register
25 of Trade Marks suggesting that the owner does not have trade mark
26 rights to that word or expression.

27 *Trade mark pending*

- 28 (3) If a person has an application pending for the registration of a trade
29 mark under the *Trade Marks Act 1995*, the person may object to
30 the determination of a proposed GI on one of the following
31 grounds:
32 (a) that:
33 (i) the application was made in good faith; and
34 (ii) the trade mark consists of a word or expression that is
35 identical to the proposed GI; and
-

- 1 (iii) prima facie, the requirements under the *Trade Marks*
2 *Act 1995* for accepting an application for registration of
3 a trade mark would be satisfied in respect of the trade
4 mark applied for;
- 5 (b) that:
- 6 (i) the application was made in good faith; and
7 (ii) the trade mark consists of a word or expression; and
8 (iii) the proposed GI is likely to cause confusion with that
9 word or expression; and
10 (iv) prima facie, the requirements under the *Trade Marks*
11 *Act 1995* for accepting an application for registration of
12 a trade mark would be satisfied in respect of the trade
13 mark applied for;
- 14 (c) that:
- 15 (i) the application was made in good faith; and
16 (ii) the trade mark contains a word or expression; and
17 (iii) the proposed GI is likely to cause confusion with that
18 word or expression; and
19 (iv) prima facie, the requirements under the *Trade Marks*
20 *Act 1995* for accepting an application for registration of
21 a trade mark would be satisfied in respect of the trade
22 mark applied for; and
23 (v) after registration, the applicant would have trade mark
24 rights in the word or expression.

25 *Trade mark not registered*

- 26 (4) If a person claims to have trade mark rights in a trade mark that is
27 not registered, the person may object to the determination of a
28 proposed GI on one of the following grounds:
- 29 (a) that:
- 30 (i) the trade mark consists of a word or expression that is
31 identical to the proposed GI; and
32 (ii) the person has trade mark rights in that word or
33 expression; and
34 (iii) the rights were acquired through use in good faith;
- 35 (b) that:
- 36 (i) the trade mark consists of or contains a word or
37 expression; and

- 1 (ii) the proposed GI is likely to cause confusion with that
- 2 word or expression; and
- 3 (iii) the person has trade mark rights in that word or
- 4 expression; and
- 5 (iv) the rights were acquired through use in good faith.

6 **40RC Consideration of objections**

7 *Notice of objection to be given to Committee*

8 (1) If:

- 9 (a) the Registrar of Trade Marks receives an objection in relation
- 10 to the proposed GI on a ground set out in section 40RB; and
- 11 (b) the objection is received within the period stated in the notice
- 12 under section 40RA;

13 the Registrar of Trade Marks must in writing notify the Committee

14 of the receipt and terms of the objection.

15 *Registrar of Trade Marks to make decision on whether ground*

16 *made out or not*

- 17 (2) If an objection is notified to the Committee under subsection (1),
- 18 the Registrar of Trade Marks must decide in writing whether the
- 19 ground of objection is or is not made out.

20 *Registrar may make recommendation to Committee to determine a*

21 *GI*

22 (3) If:

- 23 (a) the Registrar of Trade Marks decides that the ground of
- 24 objection is made out; and
- 25 (b) the Registrar of Trade Marks is satisfied that it is reasonable
- 26 in the circumstances to recommend to the Committee that the
- 27 proposed GI be determined despite the objection having been
- 28 made out;

29 the Registrar of Trade Marks may make the recommendation. The

30 recommendation must be in writing.

31 Note 1: For example, it may be reasonable for the Registrar of Trade Marks to

32 make such a recommendation if the Registrar of Trade Marks is

33 satisfied that the proposed GI was in use before the trade mark rights

34 arose.

1 Note 2: If a recommendation is made under subsection (3), the Committee
2 may determine the GI (see subsection 40SA(4)).

3 (4) In determining under paragraph (3)(b) whether it is reasonable in
4 the circumstances to make the recommendation to the Committee,
5 the Registrar of Trade Marks must have regard to Australia's
6 international obligations.

7 *Regulations*

8 (5) Regulations may set out the procedure to be followed in making a
9 decision under subsection (2) or (3). The procedures may include
10 the charging of fees, the holding of hearings and the taking of
11 evidence.

12 **40RD Notice to be given of decision**

13 *Notice to be given by Registrar of Trade Marks*

14 (1) After the Registrar of Trade Marks has made a decision under
15 section 40RC in relation to the proposed GI, the Registrar of Trade
16 Marks must, in writing, inform the following of the outcome of the
17 decision and of any recommendation that has been made under
18 subsection 40RC(3):

- 19 (a) the person who proposed the GI, if there was an application
20 under section 40R for the GI;
21 (b) the person who objected to the determination of the proposed
22 GI;
23 (c) the Committee.

24 *Notice to be given by Committee*

25 (2) After receiving notice of a decision under subsection (1), the
26 Presiding Member must cause a notice to be published:

- 27 (a) setting out the proposed GI; and
28 (b) stating that a decision of the Registrar of Trade Marks has
29 been made in relation to the proposed GI; and
30 (c) setting out the terms of the decision and any recommendation
31 made under subsection 40RC(3) in relation to the proposed
32 GI.

33 (3) The notice under subsection (2) is to be published in the manner
34 that the Committee thinks appropriate.

1 **40RE Decision that ground of objection no longer exists**

2 (1) If:

3 (a) a decision has been made that a ground of objection to a
4 proposed GI has been made out; and

5 (b) a person applies in writing to the Registrar of Trade Marks
6 for a decision that circumstances have changed since that
7 decision was made such that the ground of objection no
8 longer exists;

9 the Registrar of Trade Marks may, in writing, make a decision that
10 the ground of objection no longer exists.

11 Note: If the Registrar of Trade Marks makes a decision under this section,
12 the Committee may determine the GI (see subsection 40SA(5)).

13 (2) Regulations may set out the procedure to be followed in making a
14 decision under subsection (1). The procedures may include the
15 charging of fees, the holding of hearings and the taking of
16 evidence.

17 **40RF Appeals**

18 (1) An appeal lies to the Federal Court against a decision of the
19 Registrar of Trade Marks, made under:

20 (a) subsection 40RC(2) (a decision that a ground of objection is
21 or is not made out); and

22 (b) subsection 40RC(3) (a recommendation that a proposed GI
23 be determined or a refusal to make such a recommendation);
24 and

25 (c) section 40RE (a decision that a ground of objection no longer
26 exists or a refusal to make such a decision).

27 (2) The jurisdiction of the Federal Court to hear and determine appeals
28 against decisions of the Registrar of Trade Marks under this Act is
29 exclusive of the jurisdiction of any other court except the
30 jurisdiction of the High Court under section 75 of the Constitution.

31 (3) On hearing an appeal against a decision of the Registrar of Trade
32 Marks under this Act, the Federal Court may do any one or more of
33 the following:

34 (a) admit further evidence orally, or on affidavit or otherwise;

- 1 (b) permit the examination and cross-examination of witnesses,
2 including witnesses who gave evidence before the Registrar
3 of Trade Marks;
4 (c) order an issue of fact to be tried as it directs;
5 (d) affirm, reverse or vary the Registrar of Trade Marks's
6 decision;
7 (e) give any judgment, or make any order, that, in all the
8 circumstances, it thinks fit;
9 (f) order a party to pay costs to another party.
- 10 (4) The Registrar of Trade Marks may appear and be heard at the
11 hearing of an appeal to the Federal Court against a decision of the
12 Registrar of Trade Marks.
- 13 (5) Except with the leave of the Federal Court, an appeal does not lie
14 to the Full Court of the Federal Court against a decision of a single
15 judge of the Federal Court in the exercise of its jurisdiction to hear
16 and determine appeals from decisions of the Registrar of Trade
17 Marks.
- 18 (6) The regulations may make provision about the practice and
19 procedure of the Federal Court in a proceeding under this section,
20 including provision:
21 (a) prescribing the time for starting the action or proceeding or
22 for doing any other act or thing; or
23 (b) for an extension of that time.

24 **40RG Decisions made under this Division not to affect rights under**
25 **Trade Marks Act**

26 A decision made under this Division does not:

- 27 (a) create or affect a right under the *Trade Marks Act 1995* or at
28 common law in respect of a trade mark; or
29 (b) in any way pre-empt or affect a decision of the Registrar of
30 Trade Marks under the *Trade Marks Act 1995* in respect of a
31 pending application for the registration of a trade mark.

32 **Subdivision E—Determinations of geographical indications**

33 **12 Before section 40S**

34 Insert:

1 **40SA When may a determination be made under this Subdivision?**

- 2 (1) If an objection was made to a proposed geographical indication
3 (**GI**) under section 40RB, the Committee may only determine the
4 GI in the circumstances set out in this section.

5 *Grounds of objection not made out*

- 6 (2) The Committee may determine a GI that was the subject of a
7 decision under subsection 40RC(2), if:
8 (a) all appeals against, or reviews of, the decision (if any) in
9 relation to the GI have been finalised; and
10 (b) the decision standing after the appeals and reviews have been
11 finalised is that a ground of objection has not been made out
12 in relation to the GI.

13 *If grounds for objection made out and person agrees to*
14 *determination of GI*

- 15 (3) The Committee may determine a GI that is the subject of a decision
16 that a ground of objection has been made out, if the person who
17 objected to the determination of the GI has agreed, by notice in
18 writing given to the Committee, to the determination of the GI.

19 *If grounds for objection made out and a recommendation is made*
20 *under subsection 40RC(3)*

- 21 (4) The Committee may determine a GI that is the subject of a decision
22 that a ground of objection has been made out, if:
23 (a) a recommendation has been made to the Committee under
24 subsection 40RC(3) that the GI should be determined despite
25 the ground of objection having been made out; and
26 (b) all appeals against, or reviews of, the decision that the GI
27 should be determined (if any) have been finalised; and
28 (c) the decision standing after the appeals and reviews have been
29 finalised is that the GI should be determined.

30 *If grounds for objection made out and a decision is made under*
31 *section 40RE*

- 32 (5) The Committee may determine a GI that is the subject of a decision
33 that a ground of objection has been made out, if:
-

- 1 (a) a decision has been made under section 40RE that the ground
2 of objection no longer exists; and
3 (b) all appeals against, or reviews of, the decision that the ground
4 no longer exists (if any) have been finalised; and
5 (c) the decision standing after the appeals and reviews have been
6 finalised is that the ground no longer exists.

7 **13 At the end of section 40T**

8 Add:

- 9 (4) In determining a geographical indication, the Committee must not
10 consider any submission to the extent that the submission asserts a
11 trade mark right in respect of the proposed geographical indication.

12 **14 At the end of subsection 40X(2)**

13 Add:

- 14 ; and (c) if a decision has been made under section 40RC before the
15 final determination, no application to the Administrative
16 Appeals Tribunal may be made in respect of that decision
17 under section 40RC. An appeal lies to the Federal Court
18 under section 40RF from a decision under section 40RC.

19 **15 At the end of subsection 40Y(1)**

20 Add:

- 21 Note: Under section 40RF, an appeal lies to the Federal Court from a
22 decision under section 40RC.

23 **16 Application**

24 The amendments made by items 1 to 15 of this Schedule apply to
25 applications for determination of geographical indications that have not
26 been finally determined under section 40W of the *Australian Wine and*
27 *Brandy Corporation Act 1980* on the day this item commences.

28 **17 After Division 4 of Part VIB**

29 Insert:

1 **Division 4A—Omission of registered geographical**
2 **indications**

3 **Subdivision A—What this Division is about**

4 **40ZAA What this Division is about**

- 5 (1) This Division deals with determining the omission from the
6 Register of geographical indications (*Australian GIs*) determined
7 under Division 4.
- 8 (2) The grounds for omission are that an Australian GI is not in use
9 (see Subdivision B) or is no longer required (see Subdivision C).

10 Note: Subsection 40ZD(3) also deals with changes to the Register.

11 **Subdivision B—Omission of Australian GIs for non-use**

12 **40ZAB Power of Committee to determine that an Australian GI**
13 **should be omitted from the Register**

14 The Committee may, either on its own initiative or on an
15 application made in accordance with section 40ZAC, determine
16 that an Australian GI is to be omitted from the Register on the
17 ground that the GI is not in use.

18 **40ZAC Application**

- 19 (1) A person (the *applicant*) may apply in the prescribed form to the
20 Committee to omit an Australian GI from the Register on the
21 ground that the GI is not in use.
- 22 (2) The application must be accompanied by such fee (if any) charged
23 by the Corporation for the making of such an application.
- 24 (3) The Corporation may waive the fee.
- 25 (4) If the application is not accompanied by the fee, and the fee is not
26 waived by the Corporation, the application is treated as having
27 never been made.

1 **40ZAD Further information concerning an application**

- 2 (1) For the purposes of determining the application, the Committee
3 may, by notice in writing, require the applicant to provide such
4 further information as the Committee directs, within the period
5 specified in the notice.
- 6 (2) If the applicant does not comply with this requirement, the
7 application is taken to have been withdrawn.
- 8 (3) A notice must include a statement about the effect of the above.

9 **40ZAE Notice by Committee**

- 10 If the Committee:
- 11 (a) receives an application under section 40ZAC; or
12 (b) proposes on its own initiative that an Australian GI should be
13 omitted from the Register on the ground that the GI is not in
14 use;
- 15 the Presiding Member of the Committee must cause a notice to be
16 published in the manner that the Committee thinks appropriate:
- 17 (c) setting out the Australian GI; and
18 (d) stating that an application under section 40ZAC has been
19 made, or that the Committee is proposing to make a
20 determination to omit the GI on its own initiative; and
21 (e) inviting persons to make written submissions to the
22 Committee in relation to the application or proposal within
23 the period of not less than one month that is stated in the
24 notice.

25 **40ZAF Determination by Committee**

- 26 (1) After considering any submissions made to it in response to a
27 notice under section 40ZAE, the Committee must determine
28 whether to omit the Australian GI on the ground that the GI is not
29 in use.
- 30 (2) The Committee may, in writing, make a determination to omit the
31 GI on that ground if the Committee is satisfied of the following
32 matters:
- 33 (a) that the GI has been registered for a period of more than 5
34 years before the date of the notice under section 40ZAE;

- 1 (b) that the GI has not been used during the period of 3 years
2 before the date of the notice under section 40ZAE (see
3 subsection (3));
4 (c) that no special circumstances exist in relation to the region or
5 locality indicated by the GI that would preclude the making
6 of a determination to omit the GI from the Register (see
7 subsection (4)).

8 *Meaning of GI not been used*

- 9 (3) For the purposes of paragraph (2)(b), an Australian GI has not been
10 used if:
11 (a) there has not been a production of wine for commercial use
12 originating in the region or locality indicated by the GI; and
13 (b) wine originating in the region or locality indicated by the GI
14 has not been described and presented for sale within
15 Australia, or for export, using that GI.

16 *Meaning of special circumstances*

- 17 (4) For the purposes of paragraph (2)(c), special circumstances exist if:
18 (a) the region or locality indicated by the GI has been affected by
19 fire, drought or some other disaster; and
20 (b) as a result of being so affected, there has not been a
21 production of wine for commercial use originating in the
22 region or locality indicated by the GI during the period of 3
23 years immediately before the date of the notice under
24 section 40ZAE.

25 **40ZAG Notice of determination**

- 26 The Presiding Member of the Committee must cause:
27 (a) a notice to be given of the Committee's determination to the
28 applicant (if any); and
29 (b) if the determination made is to omit the Australian GI from
30 the Register—a notice setting out the terms of the
31 determination to be published in the manner that the
32 Committee thinks appropriate.

1 **40ZAH AAT review of a determination**

- 2 (1) Application may be made to the Administrative Appeals Tribunal
3 for review of the determination made under section 40ZAF.
- 4 (2) Despite paragraph 29(1)(d) and subsection 29(2) of the
5 *Administrative Appeals Tribunal Act 1975*, an application to the
6 Tribunal for review of a determination under section 40ZAF must
7 be made within 28 days after notice of the determination is
8 published in accordance with section 40ZAG.
- 9 (3) Despite subsection 29(8) of the *Administrative Appeals Tribunal*
10 *Act 1975*, an application under subsection 29(7) of that Act in
11 respect of a determination under section 40ZAF must be made
12 before the time fixed by subsection (2) of this section ends.

13 **40ZAI Date of effect of determination to omit GI**

- 14 (1) If the determination made by the Committee under section 40ZAF
15 is a determination to omit the Australian GI from the Register, the
16 Presiding Member must give a copy of the determination to the
17 Registrar so that particulars of the determination can be omitted
18 from the Register:
- 19 (a) if an application is made to the Administrative Appeals
20 Tribunal under section 40ZAH for review of the
21 determination—as soon as practicable after the decision of
22 the Tribunal on the review is given; or
- 23 (b) otherwise—as soon as practicable after the 28th day after
24 notice of the determination is published in accordance with
25 section 40ZAG.
- 26 (2) When the Presiding Member gives a copy of the determination to
27 the Registrar, the Presiding Member must also give a copy to the
28 Chairperson of the Corporation.
- 29 (3) The determination of the Committee takes effect on the day on
30 which particulars of the GI are omitted from the Register.

1 **Subdivision C—Omission of Australian GIs because no longer**
2 **required**

3 **40ZAJ Application**

- 4 (1) A person (the *applicant*) may apply in the prescribed form to the
5 Committee to omit an Australian GI from the Register on the
6 ground that the GI is no longer required.
- 7 (2) The application must be accompanied by a written statement from
8 each of the following organisations supporting the application:
9 (a) a declared winemakers' organisation (if any);
10 (b) a declared wine grape growers' organisation (if any);
11 (c) the organisation or organisations representing winemakers in
12 a State or Territory wholly or partly covered by the region or
13 locality in Australia indicated by the GI;
14 (d) the organisation or organisations representing growers of
15 wine grapes in a State or Territory wholly or partly covered
16 by the region or locality in Australia indicated by the GI.
- 17 (3) The application must also be accompanied by such fee (if any)
18 charged by the Corporation for the making of such an application.
- 19 (4) The Corporation may waive the fee.
- 20 (5) If:
21 (a) the application is not accompanied by the fee, and the fee is
22 not waived by the Corporation; or
23 (b) the application is not accompanied by the statements referred
24 to in subsection (2);
25 then the application is taken never to have been made.

26 **40ZAK Further information concerning an application**

- 27 (1) For the purposes of determining the application, the Committee
28 may, by notice in writing, require the applicant to provide such
29 further information as the Committee directs, within the period
30 specified in the notice.
- 31 (2) If the applicant does not comply with this requirement, the
32 application is taken to have been withdrawn.

- 1 (3) A notice must include a statement about the effect of
2 subsection (2).

3 **40ZAL Notice by Committee**

4 After receiving an application under section 40ZAJ, the Presiding
5 Member of the Committee must cause a notice to be published in
6 the manner that the Committee thinks appropriate:

- 7 (a) stating that an application under section 40ZAJ has been
8 made and setting out the Australian GI; and
9 (b) inviting:
10 (i) interested persons in relation to the GI (see
11 section 40ZAM); and
12 (ii) members of the organisations referred to in subsection
13 40ZAJ(2); and
14 (iii) the organisations referred to in subsection 40ZAJ(2);
15 to object to the omission of the GI from the Register by
16 making written submissions to the Committee within the
17 period of not less than one month that is stated in the notice.

18 **40ZAM Meaning of interested person**

19 For the purposes of subparagraph 40ZAL(b)(i), an interested
20 person in relation to an Australian GI is a person who the
21 Committee is satisfied is:

- 22 (a) a winemaker who makes wine for commercial purposes from
23 grapes grown in the region or locality indicated by the GI; or
24 (b) a grower of grapes who grows wine grapes in the region or
25 locality indicated by the GI; or
26 (c) a person who owns or leases a tract of land that is:
27 (i) 5 hectares or more in size and situated in the region or
28 locality indicated by the GI; and
29 (ii) capable of being used to grow grapes for commercial
30 wine production; or
31 (d) a person who:
32 (i) has a mortgage, lien or other commercial interest over,
33 or in relation to, a vineyard or other property used in the
34 production of wine that is situated in the region or
35 locality indicated by the GI; and

- 1 (ii) has the agreement of the owner of the property to that
2 person making a submission to the Committee under
3 section 40ZAL.

4 **40ZAN Determination by Committee**

5 *No submission made*

- 6 (1) If no submissions have been made to the Committee in response to
7 the notice under section 40ZAL, the Committee must make a
8 determination in writing to omit the Australian GI from the
9 Register on the grounds that the GI is no longer required.

10 *Submission made*

- 11 (2) If a submission has been made to the Committee, the Committee
12 must make a determination in writing not to omit the GI from the
13 Register.

14 **40ZAO Notice of determination**

15 The Presiding Member of the Committee must cause:

- 16 (a) notice to be given of the Committee's determination to the
17 applicant; and
18 (b) a notice setting out the terms of the determination to be
19 published in any manner that the Committee thinks
20 appropriate.

21 **40ZAP Date of effect of determination to omit Australian GI**

- 22 (1) If the determination made by the Committee under section 40ZAN
23 is a determination to omit the Australian GI from the Register, the
24 Presiding Member must give a copy of the determination to the
25 Registrar so that particulars of the determination can be omitted
26 from the Register as soon as is practicable.
- 27 (2) When the Presiding Member gives a copy of the determination to
28 the Registrar, the Presiding Member must also give a copy to the
29 Chairperson of the Corporation.
- 30 (3) The determination of the Committee takes effect on the day on
31 which particulars of the GI are omitted from the Register.

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Schedule 4—Life insurance amendments

Life Insurance Act 1995

1 After Part 2A

Insert:

Part 2B—Special provisions relating to Australian branches of foreign life insurance companies

16ZD Eligible foreign life insurance company

- (1) A body corporate is an *eligible foreign life insurance company* if:
- (a) it is a foreign corporation within the meaning of paragraph 51(xx) of the Constitution; and
 - (b) it is authorised in a foreign country, or part of a foreign country, to carry on life insurance business; and
 - (c) it has established, or proposes to establish, an Australian branch; and
 - (d) it is not an existing life company that is registered under this Act; and
 - (e) the conditions specified in the regulations are satisfied in relation to the body corporate.
- (2) The conditions specified in the regulations for the purposes of paragraph (1)(e) may include either or both of the following kinds of conditions:
- (a) a condition that the body corporate be authorised to carry on life insurance business in a specified country, or a specified part of a foreign country;
 - (b) a condition that the body corporate be incorporated in a specified country, or a specified part of a foreign country.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

1 (3) Subsection (2) does not limit the regulations that may be made for
2 the purposes of paragraph (1)(e).

3 (4) In this section:

4 *Australian branch*, in relation to a body corporate, means a
5 permanent establishment (as defined in subsection 6(1) of the
6 *Income Tax Assessment Act 1936*) in Australia through which the
7 body corporate carries on or proposes to carry on life insurance
8 business.

9 **16ZE Act does not apply to foreign life insurance business of eligible**
10 **foreign life insurance company**

11 This Act does not apply in relation to life insurance business
12 carried on outside Australia by an eligible foreign life insurance
13 company.

14 **16ZF Compliance Committee of eligible foreign life insurance**
15 **company**

16 (1) A committee is the *Compliance Committee* of an eligible foreign
17 life insurance company if:

- 18 (a) the members of the committee have powers of management
19 in relation to the Australian branch of the company that
20 carries out life insurance business in Australia; and
21 (b) those powers of management are sufficient to enable those
22 members to ensure that the company complies with this Act;
23 and
24 (c) the committee is established and operated in accordance with
25 requirements set out in the prudential standards.

26 (2) The prudential standards may set out the following requirements in
27 relation to the establishment and operation of Compliance
28 Committees:

- 29 (a) requirements relating to the composition of Compliance
30 Committees;
31 (b) requirements relating to the resignation of members of
32 Compliance Committees;
33 (c) requirements relating to the disclosure of interests of
34 members of Compliance Committees;

- 1 (d) requirements relating to the termination of appointment of
2 members of Compliance Committees;
3 (e) requirements relating to the residency in Australia of
4 members of Compliance Committees.
- 5 (3) Subsection (2) does not limit the requirements that may be set out
6 in the prudential standards for the purposes of paragraph (1)(c).
- 7 (4) An eligible foreign life insurance company that is a life company
8 must establish and operate a Compliance Committee.

9 **16ZG Address for service of eligible foreign life insurance**
10 **companies**

- 11 (1) A document or notice required or permitted to be served on, or
12 given to, an eligible foreign life insurance company for the
13 purposes of this Act may be served or given by:
14 (a) leaving it at its address for service (see subsection (2)); or
15 (b) sending it by registered post to that address.
- 16 (2) An address becomes the address for service for the eligible foreign
17 life insurance company when written notice of the address is given
18 to APRA. (The address continues to be the address for service until
19 APRA is given written notice of another address.)

20 **2 Paragraph 31(c)**

21 After “outside Australia”, insert “(other than an eligible foreign life
22 insurance company)”.

23 **3 Subparagraph 31(d)(ii)**

24 Omit “this Act.”, substitute “this Act; and”.

25 **4 At the end of paragraph 31(d)**

26 Add:

- 27 (iii) the company is not an eligible foreign life insurance
28 company.

29 **5 At the end of section 76**

30 Add:

1 (3) This section does not apply in relation to an eligible foreign life
2 insurance company.

3 **6 At the end of section 92**

4 Add:

5 (5) In this section:

6 *director*, in relation to a life company that is an eligible foreign life
7 insurance company, means a member of the Compliance
8 Committee of the company.

9 **7 At the end of section 113**

10 Add:

11 (3) To avoid doubt, if the life company is an eligible foreign life
12 insurance company, the investigation need not cover the financial
13 condition of the company to the extent that the financial condition
14 relates to life insurance business carried on outside Australia by the
15 company (see section 16ZE).

16 **8 At the end of section 165**

17 Add:

18 (3) To avoid doubt, if the life company is an eligible foreign life
19 insurance company, paragraphs (1)(c) and (d) do not apply to the
20 extent that the management of the company, or of the business,
21 relates to life insurance business carried on outside Australia by the
22 company (see section 16ZE).

23 **9 At the end of section 230B**

24 Add:

25 (10) In this section:

26 *director*, in relation to a life company that is an eligible foreign life
27 insurance company, means a member of the Compliance
28 Committee of the company.

29 **10 At the end of subsection 230F(5)**

30 Add:

1 Note: *Officer* would include a member of the Compliance Committee of an
2 eligible foreign life insurance company.

3 **11 After subsection 235(1)**

4 Insert:

5 (1A) If a life company that is an eligible foreign life insurance company
6 has engaged, is engaging, or proposes to engage, in any conduct in
7 contravention of this Act, of a direction given under this Act or of a
8 condition imposed on the registration of the company, the Court
9 may grant an injunction:

- 10 (a) restraining a member or members of the Compliance
11 Committee of the company from doing anything that would
12 result in the company engaging in the conduct; or
13 (b) if the Court thinks it desirable to do so, requiring a member
14 or members of the Compliance Committee of the company to
15 do a particular act.

16 **12 After subsection 235(2)**

17 Insert:

18 (2A) If a life company that is an eligible foreign life insurance company
19 has refused or failed, or is proposing to refuse or fail, to do an act
20 that the company is required by this Act to do, the Court may grant
21 an injunction requiring a member or members of the Compliance
22 Committee of the company to take action to ensure that the
23 company does the act.

24 **13 Subsection 235(3)**

25 Omit “(1) or (2)”, substitute “(1), (1A), (2) or (2A)”.

26 **14 Subsection 235(5)**

27 Omit “(1) or (2)”, substitute “(1), (1A), (2) or (2A)”.

28 **15 Subsection 235(7)**

29 After “life company”, insert “or other person”.

30 **16 Paragraph 235(7)(a)**

31 After “the company”, insert “or person”.

32 **17 Paragraph 235(7)(b)**

1 After “the company”, insert “or person”.

2 **18 Subsection 235(8)**

3 Omit “person” (wherever occurring), substitute “company or person”.

4 **19 After subsection 242(1)**

5 Insert:

6 (1A) This section does not apply in relation to an eligible foreign life
7 insurance company.

8 **20 At the end of section 245**

9 Add:

10 (8) In this section:

11 *director*, in relation to a life company that is an eligible foreign life
12 insurance company, means a member of the Compliance
13 Committee of the company.

14 **21 Schedule (paragraph (b) of the definition of *company*)**

15 Omit “Territory.”, substitute “Territory; or”.

16 **22 Schedule (at the end of the definition of *company*)**

17 Add:

18 (c) an eligible foreign life insurance company.

19 **23 Schedule**

20 Insert:

21 *Compliance Committee*, in relation to an eligible foreign life
22 insurance company, has the meaning given by subsection 16ZF(1).

23 **24 Schedule**

24 Insert:

25 *director*, in relation to an eligible foreign life insurance company,
26 includes a member of the Compliance Committee of the company.

27 **25 Schedule**

28 Insert:

Schedule 4 Life insurance amendments

1 *eligible foreign life insurance company* has the meaning given by
2 section 16ZD.

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Schedule 5—Foreign acquisitions and takeovers amendments

Foreign Acquisitions and Takeovers Act 1975

1 Subsection 5(1)

Insert:

foreign government investor has the meaning given by section 17F.

2 Subsection 5(1)

Insert:

prescribed foreign government investor has the meaning given by section 17G.

3 Subsection 5(1)

Insert:

prescribed foreign investor has the meaning given by section 17E.

4 Subsection 5(1)

Insert:

prescribed sensitive sector has the meaning given by section 17H.

5 Subsection 13B(1)

Omit “In determining whether a corporation is an exempt corporation in relation to the application of section 18 or 26, the value of its total assets”, substitute “For the purposes of Part IA, or in determining whether a corporation is an exempt corporation, in relation to the application of section 18 or 26, the value of a corporation’s total assets”.

6 Subsection 13B(4)

1 Omit “In determining whether a business is an exempt business in
2 relation to the application of section 19, the value of its total assets”,
3 substitute “For the purposes of Part IA, or in determining whether a
4 business is an exempt business, in relation to the application of
5 section 19, the value of a business’ total assets”.

6 **7 Subsection 13B(5)**

7 Omit “In determining whether a corporation is an exempt corporation in
8 relation to the application of section 20, the value of its total assets”,
9 substitute “For the purposes of Part IA, or in determining whether a
10 corporation is an exempt corporation, in relation to the application of
11 section 20, the value of a corporation’s total assets”.

12 **8 Subsection 13B(6)**

13 Omit “In determining whether a business is an exempt business in
14 relation to the application of section 21, the value of its total assets”,
15 substitute “For the purposes of Part IA, or in determining whether a
16 business is an exempt business, in relation to the application of
17 section 21, the value of a business’ total assets”.

18 **9 After Part I**

19 Insert:

20 **Part IA—Exempt foreign investments**
21

22 **17A Exempt foreign investments in prescribed corporations etc.**

23 (1) Section 18 applies in relation to a prescribed corporation as if
24 neither of the following were a foreign person for the purposes of
25 that section:

- 26 (a) a prescribed foreign investor that is covered by subsection
27 17B(1) or (2) in relation to the corporation;
28 (b) a prescribed foreign government investor that is covered by
29 subsection 17C(1) in relation to the corporation.

30 (2) Section 20 applies in relation to an Australian corporation as if
31 neither of the following were a foreign person for the purposes of
32 that section:

- 33 (a) a prescribed foreign investor that is covered by subsection
34 17B(1) or (2) in relation to the corporation;
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- 1 (b) a prescribed foreign government investor that is covered by
2 subsection 17C(1) in relation to the corporation.
- 3 (3) Sections 19 and 21 apply in relation to a business as if neither of
4 the following were a foreign person for the purposes of those
5 sections:
- 6 (a) a prescribed foreign investor that is covered by subsection
7 17B(3) in relation to the business;
- 8 (b) a prescribed foreign government investor that is covered by
9 subsection 17C(2) in relation to the business.
- 10 (4) Section 26 applies in relation to an Australian corporation as if
11 neither of the following were a person covered by that section:
- 12 (a) a prescribed foreign investor that is covered by subsection
13 17B(1) or (2) in relation to the corporation;
- 14 (b) a prescribed foreign government investor that is covered by
15 subsection 17C(1) in relation to the corporation.
- 16 (5) In applying section 18, 19, 20, 21 or 26 in relation to an entity that
17 is neither a prescribed foreign investor nor a prescribed foreign
18 government investor, do not apply subsection (1), (2), (3) or (4) for
19 the purposes of:
- 20 (a) determining whether 2 or more persons (whether or not those
21 persons are associates) hold an aggregate controlling interest
22 in a corporation; or
- 23 (b) determining whether 2 or more persons (whether or not those
24 persons are associates) together are in a position to control an
25 amount of the voting power in a corporation; or
- 26 (c) determining whether 2 or more persons (whether or not those
27 persons are associates) together hold interests in the issued
28 shares in a corporation; or
- 29 (d) determining whether 2 or more persons (whether or not those
30 persons are associates) together are in a position to determine
31 the policy of a business or corporation.

32 **17B Asset thresholds for exempt foreign investments in prescribed**
33 **corporations etc.—prescribed foreign investors**

- 34 (1) A prescribed foreign investor is covered by this subsection in
35 relation to a corporation if:

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- (a) the corporation, or a subsidiary of the corporation, carries on a business wholly or partly in a prescribed sensitive sector in relation to the prescribed foreign investor; and
 - (b) for a corporation covered by paragraph 13(1)(a), (b), (c), (g) or (h)—the value of the corporation’s total assets, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph; and
 - (c) for a corporation covered by paragraph 13(1)(d), (e) or (f) because the corporation, or another corporation or other corporations, held certain assets on a particular date—the value of those assets on that date, determined in accordance with section 13, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph.
- (2) A prescribed foreign investor is covered by this subsection in relation to a corporation if:
- (a) neither the corporation, nor a subsidiary of the corporation, carries on a business wholly or partly in a prescribed sensitive sector in relation to the prescribed foreign investor; and
 - (b) for a corporation covered by paragraph 13(1)(a), (b), (c), (g) or (h)—the value of the corporation’s total assets, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph; and
 - (c) for a corporation covered by paragraph 13(1)(d), (e) or (f) because the corporation, or another corporation or other corporations, held certain assets on a particular date—the value of those assets on that date, determined in accordance with section 13, does not exceed the amount ascertained in accordance with regulations made for the purposes of this paragraph.
- (3) A prescribed foreign investor is covered by this subsection in relation to a business if:
- (a) both of the following conditions are satisfied:
 - (i) the business is wholly or partly in a prescribed sensitive sector in relation to the prescribed foreign investor;

- 1 (ii) the value of the total assets of the business, determined
2 under section 13B, does not exceed the amount
3 ascertained in accordance with regulations made for the
4 purposes of this subparagraph; or
5 (b) both of the following conditions are satisfied:
6 (i) the business is neither wholly nor partly in a prescribed
7 sensitive sector in relation to the prescribed foreign
8 investor;
9 (ii) the value of the total assets of the business, determined
10 under section 13B, does not exceed the amount
11 ascertained in accordance with regulations made for the
12 purposes of this subparagraph.
- 13 (4) Regulations made for the purposes of a particular provision of this
14 section may provide for different amounts for different prescribed
15 foreign investors, depending on all or any of the following:
16 (a) the kind of prescribed foreign investor concerned;
17 (b) in relation to subsection (1) or paragraph (3)(a)—the kind of
18 prescribed sensitive sector concerned;
19 (c) in relation to subsection (1) or (2)—the kind of corporation
20 concerned;
21 (d) in relation to subsection (3)—the kind of business concerned;
22 (e) any other matter.
- 23 (5) Regulations made for the purposes of a particular provision of this
24 section may provide for a method for indexing an amount.
- 25 (6) Subsections (4) and (5) do not limit the regulations that may be
26 made for the purposes of this section.

27 **17C Asset thresholds for exempt foreign investments in prescribed**
28 **corporations etc.—prescribed foreign government**
29 **investors**

- 30 (1) A prescribed foreign government investor is covered by this
31 subsection in relation to a corporation if:
32 (a) for a corporation covered by paragraph 13(1)(a), (b), (c), (g)
33 or (h)—the value of the corporation's total assets, determined
34 under section 13B, does not exceed the amount ascertained in
35 accordance with regulations made for the purposes of this
36 paragraph; and
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- 1 (b) for a corporation covered by paragraph 13(1)(d), (e) or (f)
2 because the corporation, or another corporation or other
3 corporations, held certain assets on a particular date—the
4 value of those assets on that date, determined in accordance
5 with section 13, does not exceed the amount ascertained in
6 accordance with regulations made for the purposes of this
7 paragraph.
- 8 (2) A prescribed foreign government investor is covered by this
9 subsection in relation to a business if the value of the total assets of
10 the business, determined under section 13B, does not exceed the
11 amount ascertained in accordance with regulations made for the
12 purposes of this subsection.
- 13 (3) Regulations made for the purposes of a particular provision of this
14 section may provide for different amounts for different prescribed
15 foreign government investors, depending on all or any of the
16 following:
- 17 (a) the kind of prescribed foreign government investor
18 concerned;
- 19 (b) in relation to subsection (1)—the kind of corporation
20 concerned;
- 21 (c) in relation to subsection (2)—the kind of business concerned;
- 22 (d) any other matter.
- 23 (4) Regulations made for the purposes of a particular provision of this
24 section may provide for a method for indexing an amount.
- 25 (5) Subsections (3) and (4) do not limit the regulations that may be
26 made for the purposes of this section.

27 **17D Exempt foreign investments in financial sector companies etc.**

- 28 (1) Section 18 applies in relation to a financial sector company as if a
29 prescribed foreign investor covered by subsection (3) were not a
30 foreign person for the purposes of that section.
- 31 (2) Section 26 applies in relation to a financial sector company as if a
32 prescribed foreign investor covered by subsection (3) were not a
33 person covered by that section.

- 1 (3) A prescribed foreign investor is covered by this subsection if the
2 conditions specified in the regulations are satisfied in relation to
3 the prescribed foreign investor.
- 4 (4) In applying section 18 or 26 in relation to an entity that is not a
5 prescribed foreign investor covered by subsection (3), do not apply
6 subsection (1) or (2) for the purposes of:
- 7 (a) determining whether 2 or more persons (whether or not those
8 persons are associates) hold an aggregate controlling interest
9 in a corporation; or
- 10 (b) determining whether 2 or more persons (whether or not those
11 persons are associates) together are in a position to control an
12 amount of the voting power in a corporation; or
- 13 (c) determining whether 2 or more persons (whether or not those
14 persons are associates) together hold interests in the issued
15 shares in a corporation; or
- 16 (d) determining whether 2 or more persons (whether or not those
17 persons are associates) together are in a position to determine
18 the policy of a business or corporation.
- 19 (5) In this section:
- 20 *financial sector company* has the same meaning as in the
21 *Financial Sector (Shareholdings) Act 1998*.

22 **17E Prescribed foreign investor**

- 23 (1) An entity is a *prescribed foreign investor* if:
- 24 (a) the conditions specified in the regulations are satisfied in
25 relation to the entity; and
- 26 (b) the entity is not a foreign government investor.
- 27 (2) The conditions specified in the regulations for the purposes of
28 subsection (1) may include any or all of the following kinds of
29 conditions:
- 30 (a) a condition that the entity be a national of a specified foreign
31 country;
- 32 (b) a condition that the entity be incorporated under the law of a
33 specified foreign country, or a specified part of a foreign
34 country;

1 (c) a condition that the entity be constituted or organised under
2 the law of a specified foreign country, or a specified part of a
3 foreign country.

4 Note: For specification by class, see subsection 13(3) of the *Legislative*
5 *Instruments Act 2003*.

6 (3) Subsection (2) does not limit the regulations that may be made for
7 the purposes of subsection (1).

8 (4) In this section:

9 *entity* includes an individual.

10 **17F Foreign government investor**

11 An entity is a *foreign government investor* if:

12 (a) the entity is:

13 (i) a body politic of a foreign country; or

14 (ii) a body politic of part of a foreign country; or

15 (iii) a part of a body politic mentioned in subparagraph (i) or
16 (ii); or

17 (b) the entity is controlled by an entity mentioned in
18 paragraph (a); or

19 (c) an entity mentioned in paragraph (a) holds an interest in the
20 entity that satisfies the conditions specified in the regulations.

21 **17G Prescribed foreign government investor**

22 An entity is a *prescribed foreign government investor* if:

23 (a) the entity is a foreign government investor; and

24 (b) the conditions specified in the regulations are satisfied in
25 relation to the entity.

26 **17H Prescribed sensitive sector**

27 A kind of business activity is a *prescribed sensitive sector* in
28 relation to a prescribed foreign investor if:

29 (a) the conditions specified in the regulations are satisfied in
30 relation to the prescribed foreign investor; and

31 (b) the conditions specified in the regulations are satisfied in
32 relation to the kind of business activity.

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2 **Schedule 6—Commonwealth authorities and**
3 **companies amendments**
4

5 *Commonwealth Authorities and Companies Act 1997*

6 **1 After section 47**

7 Insert:

8 **47A Compliance with government procurement requirements**

- 9 (1) This section applies to Commonwealth authorities, and
10 wholly-owned Commonwealth companies, specified in the
11 regulations for the purposes of this section.
- 12 (2) Subject to subsection (3), the Finance Minister may, in writing,
13 give directions to the directors of an authority or a company to
14 which this section applies on matters related to the procurement of
15 property or services.
- 16 (3) The Finance Minister must not give a direction that is inconsistent
17 with Australia's obligations under any international agreement that
18 deals with government procurement (whether or not the agreement
19 also deals with other matters).
- 20 (4) Without limiting the generality of subsection (2), directions
21 permitted by subsection (2) may apply, adopt or incorporate, with
22 or without modifications, all or any of the Commonwealth
23 Procurement Guidelines, as in force from time to time.
- 24 (5) The directors must ensure that the directions are complied with by
25 the authority or company.
- 26 (6) The directors must also ensure, as far as practicable, that the
27 directions are complied with by the subsidiaries of the authority or
28 company.
- 29 (7) In this section:

30 *Commonwealth Procurement Guidelines* means the guidelines
31 relating to procurement issued under the *Financial Management*
32 *and Accountability Regulations 1997*.

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Schedule 7—Therapeutic goods amendments

Therapeutic Goods Act 1989

1 Subsection 25(3)

Repeal the subsection, substitute:

(3) If:

- (a) the therapeutic goods are therapeutic devices; and
- (b) the evaluation of the goods for registration has been completed;

the Secretary must:

- (c) notify the applicant in writing of his or her decision on the evaluation within 28 days of the making of the decision and, in the case of a decision not to register the goods, of the reasons for the decision; and
- (d) if the decision is to register the goods—include the goods in the Register and give the applicant a certificate of registration.

(4) If:

- (a) the therapeutic goods are not therapeutic devices; and
- (b) the evaluation of the goods for registration has been completed;

the Secretary must:

- (c) notify the applicant in writing of his or her decision on the evaluation within 28 days of the making of the decision and, in the case of a decision not to register the goods, of the reasons for the decision; and
- (d) if the decision is to register the goods:
 - (i) notify the applicant in writing that the goods will be included in the Register if the applicant gives the Secretary the certificate required under subsection 26B(1); and
 - (ii) include the goods in the Register and give the applicant a certificate of registration if the applicant gives the Secretary the certificate required under subsection 26B(1).

1 To avoid doubt, if the applicant gives the Secretary the certificate
2 required under subsection 26B(1), the Secretary must include the
3 goods in the Register under subparagraph (d)(ii) without inquiring
4 into the correctness of the certificate.

5 (4A) Civil proceedings do not lie against the Secretary (or a delegate of
6 the Secretary) in respect of loss, damage or injury of any kind
7 suffered by another person as a result of the Secretary (or the
8 delegate) including therapeutic goods in the Register in reliance on
9 a certificate required under subsection 26B(1).

10 **2 After paragraph 26(1)(a)**

11 Insert:

12 (a) if goods are not therapeutic devices—the application is
13 accompanied by the certificate required under subsection
14 26B(1); and

15 **3 After subsection 26(1)**

16 Insert:

17 (1A) To avoid doubt, if:
18 (a) an application is made for the listing of therapeutic goods in
19 relation to a person in accordance with section 23; and
20 (b) the application is accompanied by the certificate required
21 under subsection 26B(1); and
22 (c) the other requirements in subsection (1) are met;
23 the Secretary must list the goods under subsection (1) without
24 inquiring into the correctness of the certificate.

25 (1B) Civil proceedings do not lie against the Secretary (or a delegate of
26 the Secretary) in respect of loss, damage or injury of any kind
27 suffered by another person as a result of the Secretary (or the
28 delegate) listing therapeutic goods in relation to a person in
29 reliance on a certificate required under subsection 26B(1).

30 **4 After paragraph 26A(1)(a)**

31 Insert:

32 (b) the application is accompanied by the certificate required
33 under subsection 26B(1); and

34 **5 After subsection 26A(1)**

1 Insert:

2 (1A) To avoid doubt, if:

3 (a) an application is made for the listing of a medicine in relation
4 to a person in accordance with section 23; and

5 (b) the application is accompanied by the certificate required
6 under subsection 26B(1); and

7 (c) the other requirements in subsection (1) are met;
8 the Secretary must list the medicine under subsection (1) without
9 inquiring into the correctness of the certificate.

10 (1B) Civil proceedings do not lie against the Secretary (or a delegate of
11 the Secretary) in respect of loss, damage or injury of any kind
12 suffered by another person as a result of the Secretary (or the
13 delegate) listing a medicine in relation to a person in reliance on a
14 certificate required under subsection 26B(1).

15 **6 After section 26A**

16 Insert:

17 **26B Certificates required in relation to patents**

18 (1) The certificate required by this subsection is either:

19 (a) a certificate to the effect that the applicant is not marketing,
20 and does not propose to market, the therapeutic goods in a
21 manner, or in circumstances, that would infringe a patent that
22 has been granted in relation to the therapeutic goods; or

23 (b) a certificate to the effect that:

24 (i) a patent has been granted in relation to the therapeutic
25 goods; and

26 (ii) the applicant proposes to market the therapeutic goods
27 before the end of the term of the patent; and

28 (iii) the applicant has given the patentee notice of the
29 application for registration or listing of the therapeutic
30 goods under section 23.

31 The certificate must be signed by, or on behalf of, the applicant and
32 must be in a form approved by the Secretary.

33 (2) A person is guilty of an offence if:

34 (a) the person gives a certificate required under subsection (1);
35 and

1 (b) the certificate is false or misleading in a material particular.

2 Maximum penalty: 1,000 penalty units.

3 (3) For the purposes of this section, a patent is taken to have been
4 granted in relation to therapeutic goods if marketing the goods
5 without the authority of the patentee would constitute an
6 infringement of the patent.

7 (4) In this section:

8 *patent* has the same meaning as in the *Patents Act 1990*.

9 **7 Application of amendments**

10 The amendments made by this Schedule apply to applications for
11 registration or listing under section 23 of the *Therapeutic Goods Act*
12 *1989* made on or after the day on which this Schedule commences.

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Schedule 8—Patents amendments

Patents Act 1990

1 Paragraph 59(b)

Omit all the words after “patentable invention”.

2 Paragraph 59(d)

Repeal the paragraph.

3 Application of amendments of section 59 of the *Patents Act 1990*

The amendments of section 59 of the *Patents Act 1990* made by this Schedule apply in relation to each patent application for a standard patent:

- (a) made after the commencement of this Schedule; or
- (b) made before the commencement of this Schedule, but for which a patent has not been granted by the commencement of this Schedule.

4 Subsection 104(3)

Repeal the subsection.

5 Paragraph 138(3)(c)

Repeal the paragraph.

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Schedule 9—Copyright amendments

Part 1—Performers' rights in sound recordings

Copyright Act 1968

1 Paragraph 22(3)(a)

After “sound recording”, insert “, other than a sound recording of a live performance,”.

Note 1: The following heading to subsection 22(1) is inserted “*Literary, dramatic, musical or artistic works*”.

Note 2: The following heading to subsection 22(3) is inserted “*Sound recordings*”.

2 After subsection 22(3)

Insert:

(3A) For the purposes of this Act, the makers of a sound recording of a live performance are:

- (a) the person or persons who, at the time of the recording, own the record on which the recording is made; and
- (b) the performer or performers who performed in the performance (other than a performer who is already covered by paragraph (a)).

Note: A performer might be liable to pay compensation under section 116AAA to a person who owns the record on which the recording is made.

(3B) If:

- (a) a sound recording of a live performance is made; and
- (b) a performer performs in that performance under the terms of his or her employment by another person (the ***employer***) under a contract of service or apprenticeship;

then, for the purposes of paragraph (3A)(b), the employer is taken to be a maker instead of that performer.

(3C) Subsection (3B) may be excluded or modified by agreement between the performer and the employer.

Note 1: The following heading to subsection 22(4) is inserted “*Cinematograph films*”.

1 Note 2: The following heading to subsection 22(5) is inserted "*Broadcasts and other*
2 *communications*".

3 **3 At the end of section 22**

4 Add:

5 *Definitions*

6 (7) In this section:

7 *live performance* means:

- 8 (a) a performance (including an improvisation) of a dramatic
9 work, or part of such a work, including such a performance
10 given with the use of puppets; or
11 (b) a performance (including an improvisation) of a musical
12 work or part of such a work; or
13 (c) the reading, recitation or delivery of a literary work, or part
14 of such a work, or the recitation or delivery of an improvised
15 literary work; or
16 (d) a performance of a dance; or
17 (e) a performance of a circus act or a variety act or any similar
18 presentation or show; or
19 (f) a performance of an expression of folklore;
20 being a live performance, whether in the presence of an audience
21 or otherwise.

22 *performer* in a live performance:

- 23 (a) means each person who contributed to the sounds of the
24 performance; and
25 (b) if the performance includes a performance of a musical
26 work—includes the conductor.

27 *sound recording of a live performance* means a sound recording,
28 made at the time of the live performance, consisting of, or
29 including, the sounds of the performance.

30 **4 Section 84**

31 Repeal the section, substitute:

32 **84 Definitions**

33 In this Part:

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live performance means:

- (a) a performance (including an improvisation) of a dramatic work, or part of such a work, including such a performance given with the use of puppets; or
- (b) a performance (including an improvisation) of a musical work or part of such a work; or
- (c) the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work; or
- (d) a performance of a dance; or
- (e) a performance of a circus act or a variety act or any similar presentation or show; or
- (f) a performance of an expression of folklore;

being a live performance, whether in the presence of an audience or otherwise.

performer in a live performance:

- (a) means each person who contributed to the sounds of the performance; and
- (b) if the performance includes a performance of a musical work—includes the conductor.

qualified person means:

- (a) an Australian citizen, an Australian protected person or a person (other than a body corporate) resident in Australia; or
- (b) a body corporate incorporated under a law of the Commonwealth or of a State.

sound recording of a live performance means a sound recording, made at the time of the live performance, consisting of, or including, the sounds of the performance.

5 Before section 97

Insert:

Subdivision A—Ownership of copyright in subject-matter other than works

6 Subsection 97(2)

Omit “the next succeeding subsection”, substitute “subsection (3)”.

1 **7 After subsection 97(2)**

2 Insert:

3 (2A) If there is more than one owner of the copyright in a sound
4 recording of a live performance, the owners own the copyright as
5 tenants in common in equal shares.

6 **8 At the end of Division 5 of Part IV**

7 Add:

8 **Subdivision B—Specific provisions relating to the ownership of**
9 **copyright in pre-commencement sound recordings of**
10 **live performances**

11 **100AA Application**

12 This Subdivision applies to a sound recording of a live
13 performance if:

- 14 (a) copyright subsists in the recording on the day on which this
15 section commences; and
16 (b) at least one person would become a maker of the recording
17 under paragraph 100AD(1)(b) or subsection 100AD(2).

18 **100AB Definitions**

19 In this Subdivision:

20 *former owner* of the copyright in a sound recording of a live
21 performance means a person mentioned in paragraph 100AD(1)(a).

22 *new owner* of the copyright in a sound recording of a live
23 performance means the following people:

- 24 (a) a person who becomes a maker of a sound recording under
25 paragraph 100AD(1)(b);
26 (b) if subsection 100AD(2) applies—an employer who becomes
27 a maker of a sound recording under that subsection.

28 Note: Other expressions used in this Subdivision are defined in section 84.

29 **100AC Application of sections 100AD and 100AE**

30 Sections 100AD and 100AE have effect subject to Parts VII and X.

1 **100AD Makers of pre-commencement sound recordings of live**
2 **performances**

- 3 (1) For the purpose of section 100AE, the makers of a sound recording
4 of a live performance are:
5 (a) the person or persons who, immediately before the
6 commencement of this section, owned the copyright
7 subsisting in the recording; and
8 (b) the performer or performers who performed in the
9 performance (other than a performer who is already covered
10 by paragraph (a)).

11 *Employer may be a maker of the sound recording*

- 12 (2) If:
13 (a) a sound recording of a live performance was made; and
14 (b) a performer performed in that performance under the terms of
15 his or her employment by another person (the *employer*)
16 under a contract of service or apprenticeship;
17 then, for the purposes of paragraph (1)(b), the employer is taken to
18 be a maker instead of that performer.
19 (3) Subsection (2) may be excluded or modified by an agreement
20 (whether made before or after the live performance) between the
21 performer and the employer.

22 **100AE Ownership of pre-commencement copyright in sound**
23 **recordings of live performances**

24 *Ownership of the copyright*

- 25 (1) On and after the day on which this section commences, all makers
26 of a sound recording of a live performance are owners of any
27 copyright subsisting in the recording by virtue of this Part.

28 *Division of the ownership of the copyright*

- 29 (2) The former owners of the copyright and the new owners of the
30 copyright each own half of the copyright as tenants in common in 2
31 equal shares.

1 (3) The former owners own their half of the copyright in the same
2 proportions as the whole copyright was owned by them
3 immediately before the commencement of this section.

4 (4) The new owners own their half of the copyright as tenants in
5 common in equal shares.

6 (5) Subsections (3) and (4) do not limit section 196.

7 (6) Subsection (3) does not otherwise affect the terms on which the
8 former owners own their half of the copyright.

9 *Copyright to devolve if a new owner is not alive*

10 (7) If a new owner is not alive on the day on which this section
11 commences, then, for the purposes of subsections (2) and (4), that
12 owner is replaced by the person to whom the copyright would have
13 devolved if the new owner had owned the copyright immediately
14 before his or her death. If the copyright would have devolved to
15 more than one person, those persons are to be treated as a single
16 new owner for the purposes of subsections (2) and (4).

17 **100AF Former owners may continue to do any act in relation to the**
18 **copyright**

19 (1) On and after the day on which this section commences, a former
20 owner of the copyright in a sound recording of a live performance
21 may:

22 (a) do an act comprised in the copyright; or

23 (b) do any other act in relation to the copyright;

24 as if each new owner of the copyright had granted a licence or
25 permission (however described) to the former owner to do the act.

26 Note: However, the former owner may still need to obtain the consent of
27 other former owners of the copyright before doing the act.

28 (2) Subsection (1) applies to:

29 (a) the former owner's licensees and successors in title; and

30 (b) any persons who are authorised by the former owner; and

31 (c) any persons who are authorised by the former owner's
32 licensees or successors in title;

33 in the same way as it applies to the former owner.

1 (3) Subsections (1) and (2) may be excluded or modified by an
2 agreement (whether made before or after this section commences)
3 between the former owner and a new owner.

4 **100AG Actions by new owners of copyright**

5 If a new owner of the copyright in a sound recording of a live
6 performance brings an action under this Act in respect of the
7 copyright, the new owner is not entitled to the remedies listed in
8 the table.

9

Actions under this Act

Item	In this case...	the new owner is not entitled to:
1	the action is for an infringement of the copyright under section 115	(a) damages (other than additional damages); or (b) an account of profits
2	the action is for conversion or detention under section 116	(a) damages (other than additional damages); or (b) an account of profits; or (c) any other pecuniary remedy (other than costs); or (d) delivery up of an infringing copy
3	the action is brought under section 116A, 116B or 116C	(a) damages (other than additional damages); or (b) an account of profits

10 **100AH References to the owner of the copyright in a sound**
11 **recording**

12 A new owner of the copyright in a sound recording of a live
13 performance is taken not to be the owner of the copyright for the
14 purposes of the following provisions:
15 (a) sections 107, 108 and 109 (in Part IV);
16 (b) sections 119 and 133 (in Part V);
17 (c) the definitions of *licence* and *licensor* in subsection 136(1),
18 and sections 150, 151, 152, 153E, 153F, 153G, 159 and 163A
19 (in Part VI);
20 (d) section 183 (in Part VII).

1 Note: A new owner of the copyright in a sound recording of a live
2 performance is not a *relevant right holder* under section 135A, nor a
3 *relevant copyright owner* under section 135ZB or 135ZZI.

4 **9 At the end of Division 7 of Part IV**

5 Add:

6 **113A Agents may act on behalf of groups of performers**

- 7 (1) This section applies in respect of all members of a group of
8 performers who have an interest in the copyright in a sound
9 recording of a live performance.
- 10 (2) All members of the group are taken to have granted a licence or
11 permission (however described) to a person:
12 (a) to do an act comprised in the copyright; or
13 (b) to do any other act in relation to the copyright;
14 if an agent of the group, acting within the scope of his or her actual
15 or apparent authority, has granted a licence or permission to the
16 person to do the act.

17 Note: The person may still need to obtain the licence or permission of other
18 owners of the copyright before doing the act.

19 **113B Consent to the use of a sound recording of a live performance**

20 A person is taken to have been granted a licence or permission
21 (however described) by a performer to use a sound recording of a
22 live performance if:

- 23 (a) the performer has given his or her consent to recording the
24 performance for a particular purpose; and
25 (b) the recording is used for that purpose in accordance with the
26 terms of the consent.

27 Note: The person may still need to obtain the consent of the other owners of
28 the copyright in the sound recording of the live performance before
29 using the sound recording.

30 **113C Use of published sound recordings when owners cannot be
31 found etc.**

- 32 (1) An owner (the *first owner*) of the copyright in a sound recording of
33 a live performance that is a published sound recording is taken to
34 have been granted a licence or permission (however described) by

1 another owner of the copyright to do an act comprised in the
2 copyright, or to do any other act in relation to the copyright, if:

- 3 (a) the first owner has entered into an agreement with another
4 person to do the act; and
5 (b) the first owner, after making reasonable inquiries, cannot
6 discover the identity or location of the other owner or a
7 person representing the other owner.

8 Note: The first owner may still need to obtain a licence or permission from
9 any other owners of the copyright in the sound recording of the live
10 performance.

- 11 (2) If the first owner does the act, then the first owner must hold the
12 other owner's share of any amount received in respect of it on trust
13 for 4 years after the day on which the agreement is entered into
14 (unless the amount is distributed to, or on behalf of, the other
15 owner before then).
- 16 (3) If during the 4 year period, the other owner is identified and
17 located, the first owner must distribute the amount held on trust to,
18 or on behalf of, the other owner. If at the end of the 4 year period,
19 the other owner remains unidentified or is not located, the first
20 owner may retain the amount.
- 21 (4) After initially making reasonable inquiries, the first owner is not
22 required to continue making reasonable inquiries during the 4 year
23 period.
- 24 (5) The other owner cannot prevent the first owner doing the act
25 comprised in the copyright during the term of the agreement if the
26 other owner is identified or located.

27 **10 At the end of Division 2 of Part V**

28 Add:

29 **116AAA Compensation for acquisition of property**

- 30 (1) This section applies if, apart from this section, subsections 22(3A)
31 and 97(2) and (2A) would result in the acquisition of property from
32 a maker of a sound recording of a live performance by a performer
33 in the performance otherwise than on just terms.

- 1 (2) There is payable to the maker by the performer such amount of
2 compensation as is agreed on between those persons, or, failing
3 agreement, as is determined by a court of competent jurisdiction.
- 4 (3) Any damages or compensation recovered or other remedy given in
5 a proceeding that is commenced otherwise than under this section
6 is to be taken into account in assessing compensation payable in a
7 proceeding that is commenced under this section and that arises out
8 of the same event or transaction.
- 9 (4) Any compensation payable in a proceeding that is commenced
10 under this section is to be taken into account in assessing any
11 damages or compensation or other remedy to be awarded in a
12 proceeding that is commenced otherwise than under this section
13 and that arises out of the same event or transaction.
- 14 (5) In this section:
- 15 *acquisition of property* has the same meaning as in paragraph
16 51(xxxi) of the Constitution.
- 17 *just terms* has the same meaning as in paragraph 51(xxxi) of the
18 Constitution.
- 19 *maker* of a sound recording of a live performance means a person
20 mentioned in paragraph 22(3A)(a).
- 21 *performer* in a live performance means the following people:
- 22 (a) a person who becomes a maker of a sound recording under
23 paragraph 22(3A)(b);
- 24 (b) if subsection 22(3B) applies—an employer who becomes a
25 maker of a sound recording under that subsection.

26 **11 At the end of section 123**

27 Add:

28 Note: However, not all owners of the copyright are entitled to an account of
29 profits: see section 100AG.

30 **12 At the end of section 124**

31 Add:

32 Note: However, not all owners of the copyright are entitled to damages
33 (other than additional damages) or an account of profits: see
34 section 100AG.

1 **13 Section 135ZB (at the end of the definition of *relevant***
2 ***copyright owner*)**

3 Add “, but does not include a new owner of the copyright in a sound
4 recording of a live performance within the meaning of Subdivision B of
5 Division 5 of Part IV”.

6 **14 Section 135ZZI (at the end of the definition of *relevant***
7 ***copyright owner*)**

8 Add “, but does not include a new owner of the copyright in a sound
9 recording of a live performance within the meaning of Subdivision B of
10 Division 5 of Part IV”.

11 **15 Application**

12 The amendments made by items 1 to 7, 9 and 10 of this Part apply to a
13 sound recording made on or after the day on which this item
14 commences.

15 Note: The amendments made by the other items of this Part apply to a sound recording of a
16 live performance in which copyright subsists on the day on which this item commences.

1

2 **Part 2—Performers' moral rights**

3 *Copyright Act 1968*

4 **16 Part IX (heading)**

5 Repeal the heading, substitute:

6 **Part IX—Moral rights of performers and of**
7 **authors of literary, dramatic, musical or**
8 **artistic works and cinematograph films**

9 **17 Section 189 (definition of *act of false attribution*)**

10 Repeal the definition, substitute:

11 *act of false attribution:*

- 12 (a) in relation to an author's moral rights—has the meaning
13 given by subsection 195AC(2); and
14 (b) in relation to a performer's moral rights—has the meaning
15 given by subsection 195AHA(2).

16 **18 Section 189 (definition of *attributable act*)**

17 Repeal the definition, substitute:

18 *attributable act:*

- 19 (a) in relation to an author's moral rights—has the meaning
20 given by subsection 193(2); and
21 (b) in relation to a performer's moral rights—has the meaning
22 given by subsection 195ABA(2).

23 **19 Section 189 (definition of *attributor*)**

24 Repeal the definition, substitute:

25 *attributor:*

- 26 (a) in relation to an author's moral rights—has the meaning
27 given by subsection 195AC(2); and
28 (b) in relation to a performer's moral rights—has the meaning
29 given by subsection 195AHA(2).

1 **20 Section 189**

2 Insert:

3 *copy record* means a record so far as it embodies:

4 (a) a recorded performance; or

5 (b) a substantial part of a recorded performance;

6 being a record derived directly or indirectly from an original record
7 of the performance.

8 **21 Section 189 (definition of *deal*)**

9 Omit “Division 3”, substitute “Divisions 3 and 3A”.

10 **22 Section 189 (definition of *derogatory treatment*)**

11 Repeal the definition, substitute:

12 *derogatory treatment*:

13 (a) in relation to an author’s moral rights—has the relevant
14 meaning given by Division 4; and

15 (b) in relation to a performer’s moral rights—has the meaning
16 given by section 195ALB.

17 **23 Section 189 (definition of *infringing article*)**

18 Repeal the definition, substitute:

19 *infringing article* means:

20 (a) in relation to an author’s moral rights:

21 (i) an article that embodies a literary, dramatic, musical or
22 artistic work, or a cinematograph film, whether or not
23 the article bears or contains other material; or

24 (ii) a reproduction of, or of an adaptation of, a literary,
25 dramatic or musical work; or

26 (iii) a reproduction of an artistic work; or

27 (iv) a copy of a cinematograph film;

28 being a work or film in respect of which a moral right of the
29 author has been infringed, other than by derogatory treatment
30 not involving the material distortion or alteration of, or the
31 mutilation of, the work or film; and

32 (b) in relation to the moral rights of a performer in a live
33 performance:

- 1 (i) a copy record of the live performance, where the
2 making of the copy record has infringed the performer's
3 right of attribution of performership; or
4 (ii) a record embodying the live performance, where a
5 person's name is inserted or affixed on the record and
6 the inserting or affixing has infringed the performer's
7 right not to have performership falsely attributed; or
8 (iii) a record embodying the live performance, where the
9 record also embodies sounds the making of which have
10 infringed the performer's right not to have
11 performership falsely attributed; or
12 (iv) a record embodying the live performance, being the live
13 performance as affected by derogatory treatment that
14 has infringed the performer's right of integrity of
15 performership; and
16 (c) in relation to the moral rights of a performer in a recorded
17 performance:
18 (i) a copy record of the recorded performance, where the
19 making of the copy record has infringed the performer's
20 right of attribution of performership; or
21 (ii) a record embodying the recorded performance, where a
22 person's name is inserted or affixed on the record and
23 the inserting or affixing has infringed the performer's
24 right not to have performership falsely attributed; or
25 (iii) a copy record of the recorded performance, where
26 dealings with the copy as a copy of an unaltered
27 recorded performance have infringed the performer's
28 right not to have performership falsely attributed; or
29 (iv) a record embodying the recorded performance, being a
30 record that incorporates derogatory treatment that has
31 infringed the performer's right of integrity of
32 performership.

33 **24 Section 189 (definition of *moral right*)**

34 Repeal the definition, substitute:

35 ***moral right*** means:

- 36 (a) in relation to an author:
37 (i) a right of attribution of authorship; or
38 (ii) a right not to have authorship falsely attributed; or
-

- 1 (iii) a right of integrity of authorship; and
2 (b) in relation to a performer:
3 (i) a right of attribution of performership; or
4 (ii) a right not to have performership falsely attributed; or
5 (iii) a right of integrity of performership.

6 **25 Section 189 (definition of *name*)**

7 Omit "Division 3", substitute "Divisions 3 and 3A".

8 **26 Section 189**

9 Insert:

10 *original record* means a record produced upon the making of a
11 sound recording of a live performance.

12 Note: The sound track of a cinematograph film is treated as not being a
13 sound recording: see section 23.

14 **27 Section 189**

15 Insert:

16 *performance* means a performance within the meaning of
17 Part XIA, so far as the performance consists of sounds.

18 **28 Section 189**

19 Insert:

20 *performer* in a performance:

- 21 (a) means each person who contributed to the sounds of the
22 performance; and
23 (b) in relation to a performance that occurs outside Australia,
24 does not include a person who is not a qualified person at the
25 time of the performance.

26 Note: See also section 191B, which deals with the conductor of a musical
27 performance.

28 **29 Section 189**

29 Insert:

30 *performership* means participation in a performance, as the
31 performer or one of the performers.

1 **30 Section 189**

2 Insert:

3 *person representing the performer* means a person who, under
4 subsection 195ANB(1) or (2), is entitled to exercise and enforce a
5 performer's moral right.

6 **31 Section 189**

7 Insert:

8 *qualified person* has the same meaning as in Part XIA.

9 **32 Section 189**

10 Insert:

11 *recorded performance* means a performance embodied in a record
12 so as to constitute a sound recording.

13 **33 Section 189**

14 Insert:

15 *record embodying a performance* means:
16 (a) an original record of a performance; or
17 (b) a copy record of a performance.

18 **34 Section 189**

19 Insert:

20 *right not to have performership falsely attributed* has the meaning
21 given by Division 3A.

22 **35 Section 189**

23 Insert:

24 *right of attribution of performership* has the meaning given by
25 Division 2A.

26 **36 Section 189**

27 Insert:

1 *right of integrity of performership* has the meaning given by
2 Division 4A.

3 **37 Section 189**

4 Insert:

5 *sound recording* means a sound recording in which copyright
6 subsists.

7 **38 Section 189**

8 Insert:

9 *staged*, in relation to a live performance, has the meaning given by
10 section 191A.

11 **39 After section 191**

12 Insert:

13 **191A Staging a performance**

14 For the purposes of this Part, a live performance is *staged* by the
15 person who makes the arrangements necessary for the performance
16 (including elements of the performance not consisting of sounds)
17 to take place.

18 **191B Conductor to be treated as a performer**

19 If a performance of a musical work is conducted by a conductor,
20 then the sounds of the performance are to be treated as having been
21 made by the conductor (as well as by the persons who actually
22 made those sounds).

23 Note: As a consequence, the conductor will be able to be treated as being
24 one of the performers. Note, however, the qualified person
25 requirement in the definition of *performer* in section 189.

26 **40 At the end of section 192**

27 Add:

28 (2) The moral rights of a performer in a live performance or recorded
29 performance are in addition to any other rights in relation to the
30 performance that the performer or anyone else has under this Act.

1 **41 After Division 2 of Part IX**

2 Insert:

3 **Division 2A—Right of attribution of performership**

4 **195ABA Performer's right of attribution of performership**

5 (1) A performer in a live performance or recorded performance has a
6 right of attribution of performership in respect of the performance.

7 (2) The performer's right is the right to be identified in accordance
8 with this Division as a performer in the performance if any of the
9 acts (the *attributable acts*) mentioned in section 195ABB are done
10 in respect of the performance.

11 Note: If there is more than one performer in a performance, then each
12 performer has a right of attribution of performership: see subsection
13 195AZQ(2).

14 **195ABB Acts giving rise to right of attribution of performership**

15 (1) The *attributable acts* for a live performance are the following:
16 (a) communicating the live performance to the public;
17 (b) staging the live performance in public.

18 Note: For the definition of *staged*, see section 191A.

19 (2) The *attributable acts* for a recorded performance are the following:
20 (a) making a copy record of the recorded performance;
21 (b) communicating the recorded performance to the public.

22 **195ABC Nature of the identification of performer**

23 (1) Subject to this section, a performer may be identified by any
24 reasonable form of identification.

25 (2) If:

26 (a) a performer has made known, either generally or to a person
27 who is required under this Part to identify the performer, that
28 the performer wishes to be identified in a particular way; and

29 (b) the identification of the performer in that way is reasonable
30 in the circumstances;

31 the identification is to be made in that way.

- 1 (3) If a performance is presented by performers who use a group name,
2 then identification by using the group name is sufficient
3 identification of the performers in the group.

4 **195ABD Identification of performer to be clear and reasonably**
5 **prominent or audible**

6 An identification of a performer must be clear and reasonably
7 prominent or reasonably audible.

8 **195ABE What is a reasonably prominent identification**

9 When a copy record is made of a recorded performance, an
10 identification of a performer or group of performers is taken to be
11 reasonably prominent if it is included on each copy record of the
12 recorded performance in such a way that a person acquiring the
13 copy record will have notice of the identity of the performer or
14 group.

15 **42 After Division 3 of Part IX**

16 Insert:

17 **Division 3A—Right not to have performership falsely**
18 **attributed**

19 **195AHA Performer's right not to have performership falsely**
20 **attributed**

- 21 (1) A performer in a live performance or recorded performance has a
22 right not to have performership falsely attributed.
- 23 (2) A performer's right is the right not to have a person (the *attributor*)
24 do, in respect of the live performance or recorded performance (as
25 the case may be), any of the acts (the *acts of false attribution*)
26 mentioned in sections 195AHB and 195AHC.

27 Note: If there is more than one performer in a performance, then each
28 performer has a right not to have performership falsely attributed: see
29 subsection 195AZQ(3).

1 **195AHB Acts of false attribution of performership**

2 *Acts of false attribution for live performances*

3 (1) For a live performance, it is an act of false attribution for the stager
4 of the performance, or a person authorised by the stager, to state
5 falsely, or imply falsely, to the audience or intended audience
6 immediately before the performance that:

- 7 (a) a person is, or will be, a performer in the performance; or
8 (b) the performance is being, or will be, presented by a particular
9 group of performers.

10 Note: For the definition of *staged*, see section 191A.

11 Example 1: The stager of a live performance given by X and Y attributes the
12 performance to A and B. This is an act of false attribution in
13 relation to both X and Y.

14 Example 2: The stager of a live performance given by X and Y attributes the
15 performance to X and A. This is an act of false attribution in
16 relation to both X and Y (even though X is mentioned in the
17 attribution).

18 (2) For a live performance, it is an act of false attribution for the stager
19 of the performance, or a person authorised by the stager, to state
20 falsely, or imply falsely, to the audience during the performance
21 that:

- 22 (a) a person is, was, or will be a performer in the performance;
23 or
24 (b) the performance is being, was, or will be, presented by a
25 particular group of performers.

26 (3) For a live performance, it is an act of false attribution for the stager
27 of the performance, or a person authorised by the stager, to state
28 falsely, or imply falsely, to the audience immediately after the
29 performance that:

- 30 (a) a person was a performer in the performance; or
31 (b) a particular group of performers presented the performance.

32 (4) However, doing an act mentioned in subsection (1), (2) or (3) is
33 only an act of false attribution if the performance is in public or is
34 communicated to the public. For this purpose, any unauthorised
35 communication to the public is to be disregarded.

1 *Acts of false attribution for recorded performances—individual*
2 *performers*

- 3 (5) For a recorded performance, each of the following acts is an act of
4 false attribution:
- 5 (a) to insert or affix, or authorise the inserting or affixing of, a
6 person's name in or on a record embodying the performance
7 in such a way as to imply falsely that the person is a
8 performer in the performance;
 - 9 (b) to deal with a record embodying the performance if:
 - 10 (i) a person's name has been inserted or affixed in or on the
11 record as mentioned in paragraph (a); and
 - 12 (ii) the attributor knows that the person is not a performer in
13 the performance;
 - 14 (c) to communicate the recorded performance to the public as
15 being a performance in which a person is a performer, if the
16 attributor knows that the person is not a performer in the
17 performance.

18 *Acts of false attribution for recorded performances—groups of*
19 *performers*

- 20 (6) For a recorded performance, each of the following acts is an act of
21 false attribution:
- 22 (a) to insert or affix, or authorise the inserting or affixing of, a
23 group name in or on a record embodying the performance in
24 such a way as to imply falsely that the group are performers
25 in the performance;
 - 26 (b) to deal with a record embodying the performance if:
 - 27 (i) a group name has been inserted or affixed in or on the
28 record as mentioned in paragraph (a); and
 - 29 (ii) the attributor knows that the group are not performers in
30 the performance;
 - 31 (c) to communicate the recorded performance to the public as
32 being a performance in which a group are performers, if the
33 attributor knows that the group are not performers in the
34 performance.

1 *Silent performers*

- 2 (7) It is not an act of false attribution of performership to state that a
3 performer who participated silently in a performance performed in
4 the performance.

5 Example: X and Y together present a cabaret act in which X sings and Y dances
6 silently. The "performance" for the purposes of this Part consists only
7 of the sounds made by X. It is not an act of false attribution in respect
8 of the performance to state or imply that Y was also a performer.

9 **195AHC Act of false attribution of performership of altered**
10 **recorded performance**

- 11 (1) If the work is a recorded performance that has been altered by a
12 person other than a performer in the performance, it is an act of
13 false attribution of performership in relation to the performer to
14 deal with a copy of the recorded performance as so altered, as
15 being a copy of the unaltered recorded performance, if, to the
16 knowledge of the attributor, the copy of the recorded performance
17 is not a copy of the unaltered recorded performance.

- 18 (2) Subsection (1) does not apply if:
19 (a) the effect of the alteration is insubstantial; or
20 (b) the alteration was required by law to be made, or was
21 otherwise necessary to avoid a breach of any law.

22 **43 After Division 4 of Part IX**

23 Insert:

24 **Division 4A—Right of integrity of performership**

25 **195ALA Performer's right of integrity of performership**

- 26 (1) A performer in a live performance or recorded performance has a
27 right of integrity of performership in respect of the performance.
28 (2) The performer's right is the right not to have the performance
29 subjected to derogatory treatment.

30 Note: If there is more than one performer in a performance, then each
31 performer has a right of integrity of performership: see subsection
32 195AZQ(4).

1 **195ALB Derogatory treatment of performance**

2 In this Part:

3 *derogatory treatment*, in relation to a performer in a live
4 performance or recorded performance, means the doing, in relation
5 to the performance, of anything that results in a material distortion
6 of, the mutilation of, or a material alteration to, the performance
7 that is prejudicial to the performer's reputation.

8 **44 Before section 195AM**

9 Insert:

10 **Subdivision A—Duration and exercise of moral rights of**
11 **authors**

12 Note 1: The heading to section 195AM is altered by inserting "author's" after "Duration of".

13 Note 2: The heading to section 195AN is altered by inserting "author's" after "Exercise of".

14 **45 At the end of Division 5 of Part IX**

15 Add:

16 **Subdivision B—Duration and exercise of moral rights of**
17 **performers**

18 **195ANA Duration of performer's moral rights for recorded**
19 **performances**

- 20 (1) A performer's right of attribution of performership in respect of a
21 recorded performance continues in force until copyright ceases to
22 subsist in the recorded performance.
- 23 (2) A performer's right not to have performership falsely attributed in
24 respect of a recorded performance continues in force until
25 copyright ceases to subsist in the recorded performance.
- 26 (3) A performer's right of integrity of performership in respect of a
27 recorded performance continues in force until the performer dies.

1 **195ANB Exercise of performer's moral rights**

2 (1) If a performer in a live performance or recorded performance dies,
3 the performer's moral rights in respect of the performance may be
4 exercised and enforced by his or her legal personal representative.

5 (2) If the affairs of a performer in a live performance or recorded
6 performance are lawfully administered by another person (except
7 under a law for the relief of bankrupt or insolvent debtors), the
8 performer's moral rights may be exercised and enforced by the
9 person administering his or her affairs.

10 (3) Subject to this section, a moral right in respect of a live
11 performance or recorded performance is not transmissible by
12 assignment, by will, or by devolution by operation of law.

13 (4) If there are 2 or more performers in a live performance or recorded
14 performance, then the performers may enter into a written
15 co-performership agreement by which each of them agrees not to
16 exercise his or her right of integrity of performership in respect of
17 the live performance or recorded performance, as the case may be,
18 except jointly with the other performer or performers.

19 (5) A co-performership agreement has effect according to its terms.

20 **46 Before section 195AO**

21 Insert:

22 **Subdivision A—Infringement of moral rights of authors**

23 **47 Section 195AO**

24 Omit "Division" (first occurring), substitute "Subdivision".

25 **48 Section 195AP**

26 Omit "Division", substitute "Subdivision".

27 **49 Subsection 195AQ(1)**

28 Omit "Division", substitute "Subdivision".

29 **50 Section 195AVA**

30 After "moral rights", insert "in respect of a work".

1 **51 Section 195AVB**

2 After "moral rights", insert "in respect of a work".

3 **52 At the end of Division 6 of Part IX**

4 Add:

5 **Subdivision B—Infringement of moral rights of performers**

6 **195AXA Infringement of right of attribution of performership**

7 Subject to this Subdivision, a person infringes a performer's right
8 of attribution of performership in respect of a live performance or
9 recorded performance if the person does, or authorises the doing
10 of, an attributable act in respect of the performance without the
11 identification of the performer in accordance with Division 2A as a
12 performer in the performance.

13 **195AXB Infringement of right not to have performership falsely**
14 **attributed**

15 Subject to this Subdivision, a person infringes a performer's right
16 not to have performership falsely attributed if the person does an
17 act of false attribution in respect of the performance.

18 **195AXC Infringement of right of integrity of performership**

- 19 (1) This section has effect subject to this Subdivision.
- 20 (2) A person infringes a performer's right of integrity of performership
21 in respect of a live performance or recorded performance if the
22 person subjects the performance, or authorises the performance to
23 be subjected, to derogatory treatment.
- 24 (3) If a live performance, as affected by derogatory treatment, has
25 become a recorded performance, then a person infringes a
26 performer's right of integrity of performership in respect of the live
27 performance if the person does any of the following in respect of
28 the recorded performance:
- 29 (a) makes a copy record of the recorded performance;
 - 30 (b) communicates the recorded performance to the public;
 - 31 (c) causes the recorded performance to be heard in public.

- 1 (4) If a recorded performance has been subjected to derogatory
2 treatment, then a person infringes a performer's right of integrity of
3 performership in respect of the recorded performance if the person
4 does any of the following in respect of the recorded performance
5 (as affected by the derogatory treatment):
6 (a) makes a copy record of the recorded performance;
7 (b) communicates the recorded performance to the public;
8 (c) causes the recorded performance to be heard in public.

9 **195AXD No infringement of right of attribution of performership if**
10 **it was reasonable not to identify the performer**

- 11 (1) A person who does, or authorises the doing of, an attributable act
12 in respect of a live performance or recorded performance does not,
13 because a performer in the performance is not identified, infringe
14 the performer's right of attribution of performership in respect of
15 the performance if the person establishes that it was reasonable in
16 all the circumstances not to identify the performer.
- 17 (2) The matters to be taken into account in determining for the
18 purposes of subsection (1) whether it was reasonable in particular
19 circumstances not to identify a performer in a live performance or
20 recorded performance include the following:
21 (a) the nature of the performance;
22 (b) the purpose for which the performance is used;
23 (c) the manner in which the performance is used;
24 (d) the context in which the performance is used;
25 (e) any practice, in the industry in which the performance is
26 used, that is relevant to the performance or to the use of the
27 performance;
28 (f) any practice contained in a voluntary code of practice, in the
29 industry in which the performance is used, that is relevant to
30 the performance or to the use of the performance;
31 (g) any difficulty or expense that would have been incurred as a
32 result of identifying the performer;
33 (h) whether the performer participated in the performance in the
34 course of the employment of the performer.

35 Note: For example, a performance may be used to attract custom in a hotel
36 or restaurant.

1 **195AXE No infringement of right of integrity of performership if**
2 **derogatory treatment or other action was reasonable**

- 3 (1) A person does not, by subjecting a live performance or recorded
4 performance to derogatory treatment, or by authorising a live
5 performance or recorded performance to be subjected to derogatory
6 treatment, infringe a performer's right of integrity of performership
7 in respect of the performance if the person establishes that it was
8 reasonable in all the circumstances to subject the performance to
9 the treatment.
- 10 (2) The matters to be taken into account in determining for the
11 purposes of subsection (1) whether it was reasonable in particular
12 circumstances to subject a live performance or recorded
13 performance to derogatory treatment include the following:
- 14 (a) the nature of the performance;
 - 15 (b) the purpose for which the performance is used;
 - 16 (c) the manner in which the performance is used;
 - 17 (d) any practice, in the industry in which the performance is
18 used, that is relevant to the performance or to the use of the
19 performance;
 - 20 (e) any practice contained in a voluntary code of practice, in the
21 industry in which the performance is used, that is relevant to
22 the performance or to the use of the performance;
 - 23 (f) whether the performer who alleges that the treatment was
24 derogatory participated in the performance in the course of
25 the employment of the performer;
 - 26 (g) whether the treatment was required by law or was otherwise
27 necessary to avoid a breach of any law.

28 Note: For example, a performance may be used to attract custom in a hotel
29 or restaurant.

- 30 (3) A person who:
- 31 (a) does an act referred to in subsection 195AXC(3) in respect of
32 a live performance that has been subjected to derogatory
33 treatment; or
 - 34 (b) does an act referred to in subsection 195AXC(4) in respect of
35 a recorded performance that has been subjected to derogatory
36 treatment;
- 37 does not, by doing that act, infringe a performer's right of integrity
38 of performership in respect of the performance if the person

1 establishes that it was reasonable in all the circumstances to do that
2 act.

3 **195AXF Infringement by importation for sale or other dealing**

4 (1) A performer's moral right in respect of a live performance or
5 recorded performance is infringed by a person who imports an
6 article into Australia for the purpose of dealing with the article if
7 the importer knew, or ought reasonably to have known, that, if the
8 article had been made in Australia, it would have been an
9 infringing article.

10 (2) In subsection (1):

11 *dealing with* does not include distributing except where the
12 proposed distribution is for the purposes of sale.

13 **195AXG Infringement by sale and other dealings**

14 (1) A performer's moral right in respect of a live performance or
15 recorded performance is infringed by a person who, in Australia,
16 deals with an article if the person knew, or ought reasonably to
17 have known, that the article was an infringing article or, in respect
18 of an imported article, would, if it had been made in Australia,
19 have been an infringing article.

20 (2) In subsection (1):

21 *deals with* does not include:

- 22 (a) distributes, except where the distribution is for the purposes
23 of sale; or
24 (b) deals with by means of a dealing covered by paragraph
25 195AHB(5)(b) or (6)(b).

26 **195AXH Matters to be taken into account**

27 In determining whether a person has authorised the doing of an act
28 that is an infringement of moral rights in a live performance or
29 recorded performance, the matters that must be taken into account
30 include the following:

- 31 (a) the extent (if any) of the person's power to prevent the doing
32 of the act concerned;

- 1 (b) the nature of any relationship existing between the person
2 and the person who did the act concerned;
3 (c) whether the person took any reasonable steps to prevent or
4 avoid the doing of the act, including whether the person
5 complied with any relevant industry codes of practice.

6 **195AXI Communication by use of certain facilities**

7 A person (including a carrier or carriage service provider) who
8 provides facilities for making, or facilitating the making of, a
9 communication is not taken to have authorised the doing of an act
10 that is an infringement of moral rights in a live performance or
11 recorded performance merely because another person uses the
12 facilities so provided to do such an act.

13 **195AXJ Performer's consent to act or omission**

- 14 (1) It is not an infringement of a performer's moral right in respect of a
15 live performance or recorded performance to do, or omit to do,
16 something if the act or omission is within the scope of a written
17 consent given by the performer or a person representing the
18 performer.

19 Note: The consent of one performer does not affect the moral rights of any
20 other performer: see subsection 195AZQ(5).

- 21 (2) A consent may be given in relation to all or any acts or omissions
22 occurring before or after the consent is given.
- 23 (3) A consent may be given in relation to:
24 (a) a specified performance or specified performances occurring
25 before the consent is given; or
26 (b) a performance or performances of a particular description:
27 (i) that have not yet occurred; or
28 (ii) that are in the course of occurring.
- 29 (4) A consent may be given by an employee for the benefit of his or
30 her employer in relation to all performances in which the employee
31 is to be a performer in the course of his or her employment.
- 32 (5) A consent given for the benefit of the owner or prospective owner
33 of copyright in the recorded performance or recorded performances
34 to which the consent relates is presumed, unless the contrary

1 intention appears in the consent instrument, to extend to his or her
2 licensees and successors in title, and to any persons who are
3 authorised by the owner or prospective owner, or by such a
4 licensee or successor in title, to do acts comprised in the copyright.

5 (6) Subsections (2) to (5), inclusive, do not limit the operation of
6 subsection (1).

7 **195AXK Consent invalidated by duress or false or misleading**
8 **statements**

9 (1) If a person applies duress to a performer or, if a performer is
10 represented by a person, to the person representing the performer,
11 in connection with the giving of a consent for the purposes of
12 section 195AXJ, the consent does not have any effect.

13 (2) If:

14 (a) a person makes a statement to another person; and

15 (b) the person makes the statement knowing:

16 (i) that the statement is false or misleading in a material
17 particular; or

18 (ii) that a matter or thing has been omitted from the
19 statement without which the statement is false or
20 misleading in a material particular; and

21 (c) the person makes the statement with the intention of
22 persuading the other person to give, or not to give, a consent
23 for the purposes of section 195AXJ;

24 the consent does not have any effect.

25 **195AXL Acts or omissions outside Australia**

26 It is not an infringement of a performer's moral right in respect of a
27 live performance or recorded performance to do, or omit to do,
28 something outside Australia.

29 **53 Before section 195AY**

30 Insert:

1 **Subdivision A—Remedies for infringement of moral rights of**
2 **authors**

3 **54 Section 195AY**

4 Omit “Division” (wherever occurring), substitute “Subdivision”.

5 **55 Sections 195AZB and 195AZC**

6 Repeal the sections.

7 Note 1: The heading to section 195AZ is altered by inserting “**author’s**” after “**infringement**
8 **of**”.

9 Note 2: The heading to section 195AZA is altered by inserting “**author’s**” after “**infringement**
10 **of**”.

11 Note 3: The heading to section 195AZE is altered by inserting “**author’s**” after “**subsistence**
12 **of**”.

13 **56 At the end of Division 7 of Part IX**

14 Add:

15 **Subdivision B—Remedies for infringement of moral rights of**
16 **performers**

17 **195AZGA Definition etc.**

18 (1) In this Subdivision:

19 **action** means a proceeding of a civil nature between parties, and
20 includes a counterclaim.

21 (2) In the application of this Subdivision in relation to a counterclaim,
22 references to the defendant are taken to be references to the
23 plaintiff.

24 **195AZGB Actions for infringement of performer’s moral rights**

25 If a person infringes any of the moral rights of a performer in
26 respect of a live performance or recorded performance, then the
27 performer or a person representing the performer may bring an
28 action in respect of the infringement, subject to any
29 co-performership agreement in force under section 195ANB to
30 which the performer is a party.

1 **195AZGC Remedies for infringements of performer's moral rights**

- 2 (1) Subject to section 203, the relief that a court may grant in an action
3 for an infringement of any of a performer's moral rights in respect
4 of a live performance or recorded performance includes any one or
5 more of the following:
6 (a) an injunction (subject to any terms that the court thinks fit);
7 (b) damages for loss resulting from the infringement;
8 (c) a declaration that a moral right of the performer has been
9 infringed;
10 (d) an order that the defendant make a public apology for the
11 infringement;
12 (e) an order that any false attribution of performership, or
13 derogatory treatment, of the performance be removed or
14 reversed.
- 15 (2) In exercising its discretion as to the appropriate relief to be granted,
16 the court may take into account any of the following:
17 (a) whether the defendant was aware, or ought reasonably to
18 have been aware, of the performer's moral rights;
19 (b) the effect on the performer's reputation resulting from any
20 damage to the performance;
21 (c) the number, and categories, of people who have heard the
22 performance;
23 (d) anything done by the defendant to mitigate the effects of the
24 infringement;
25 (e) if the moral right that was infringed was a right of attribution
26 of performership—any cost or difficulty that would have
27 been associated with identifying the performer;
28 (f) any cost or difficulty in removing or reversing any false
29 attribution of performership, or derogatory treatment, of the
30 performance.
- 31 (3) In deciding whether or not to grant an injunction under
32 subsection (1), the court must consider whether the parties have
33 made any attempt to negotiate a settlement of the action and
34 whether it should adjourn the hearing or further hearing of the
35 action for the purpose of giving the parties an appropriate
36 opportunity to negotiate a settlement, whether through a process of
37 mediation or otherwise.

- 1 (4) If, after the death of a performer, in respect of an act done in a live
2 performance or recorded performance, damages are recovered
3 under this section by the legal personal representative of the
4 performer, those damages devolve as if they formed part of the
5 performer's estate and as if the right of action in respect of the
6 doing of the act had subsisted, and had been vested in the
7 performer, immediately before his or her death.

8 Note: Subsection (4) does not apply in relation to the right of integrity of
9 performership, which ends on the performer's death: see
10 section 195ANA.

11 **195AZGD Presumption as to subsistence of copyright**

12 In an action brought under this Part for an infringement of a moral
13 right in respect of a recorded performance, copyright is presumed
14 to subsist in the recorded performance if the defendant does not put
15 in issue the question whether copyright subsists in the recorded
16 performance.

17 **195AZGE Presumption as to subsistence of performer's moral** 18 **rights**

19 (1) In an action brought under this Part for an infringement of a moral
20 right in respect of a recorded performance, if copyright is presumed
21 or proved to have subsisted in the recorded performance when the
22 infringement is alleged to have occurred, then the moral right is
23 presumed to have subsisted in the recorded performance at that
24 time.

25 (2) This section has effect subject to subsection 195ANA(3).

26 **195AZGF Presumptions in relation to performership**

27 (1) If a name purporting to be the name of a performer appears on a
28 record embodying a performance so as to indicate that the person
29 was a performer in the performance, then, in an action brought
30 under this Part, the person whose name so appeared is, if it was his
31 or her true name or a name by which he or she was commonly
32 known, presumed, unless the contrary is established, to be a
33 performer in the performance.

34 (2) If a name purporting to be the name of a group of performers
35 appears on a record embodying a performance so as to indicate that

1 the group performed in the performance, then, in an action brought
2 under this Part, the group whose name so appeared is, if it was a
3 name by which the group was commonly known, presumed, unless
4 the contrary is established, to have performed in the performance.

5 **Subdivision C—Miscellaneous**

6 **195AZGG Saving of other rights and remedies**

- 7 (1) Subject to this section, this Part does not affect any right of action
8 or other remedy, whether civil or criminal, in proceedings brought
9 otherwise than under this Part.
- 10 (2) Any damages recovered in proceedings brought under this Part are
11 to be taken into account in assessing damages in proceedings
12 brought otherwise than under this Part and arising out of the same
13 event or transaction.
- 14 (3) Any damages recovered in proceedings brought otherwise than
15 under this Part are to be taken into account in proceedings brought
16 under this Part and arising out of the same event or transaction.

17 **195AZGH Jurisdiction of courts**

- 18 (1) The jurisdiction of the Supreme Court of a State or Territory in a
19 matter arising under this Part is to be exercised by a single Judge of
20 the Court.
- 21 (2) Subject to subsection (3), a decision of a court of a State or
22 Territory (however constituted) under this Part is final.
- 23 (3) An appeal lies from a decision of a court of a State or Territory
24 under this Part:
25 (a) to the Federal Court of Australia; or
26 (b) by special leave of the High Court, to the High Court.
- 27 (4) The Federal Court of Australia has jurisdiction with respect to
28 matters arising under this Part.
- 29 (5) The Federal Magistrates Court has jurisdiction with respect to
30 matters arising under this Part.

31 **57 Before section 195AZH**

1 Insert:

2 **Subdivision A—Miscellaneous provisions about moral rights of**
3 **authors**

4 **58 At the end of Division 8 of Part IX**

5 Add:

6 **Subdivision B—Miscellaneous provisions about moral rights of**
7 **performers**

8 **195AZP Parts of performances**

9 Moral rights in respect of a live performance or recorded
10 performance apply in relation to the whole or a substantial part of
11 the performance.

12 **195AZQ Performances that have more than one performer**

13 (1) This section applies to a live performance or recorded performance
14 that has more than one performer.

15 (2) A performer's right of attribution of performership in respect of the
16 performance is a right of the performer to be identified as a
17 performer.

18 Example: If X and Y are the performers in a performance, then each of them has
19 the right to be identified. However, there is no infringement of X's
20 moral right if Y is not identified (and vice versa).

21 Note: See also subsection 195ABC(3), which relates to the use of group
22 names.

23 (3) An act of false attribution of performership in respect of the
24 performance infringes each performer's right not to have
25 performership falsely attributed.

26 Example: X and Y are the performers in a performance that is falsely attributed
27 to X and Z. This false attribution infringes X's moral right and Y's
28 moral right.

29 (4) The right of integrity of performership in respect of the
30 performance is a right of each performer.

31 Example: X and Y are the performers in a performance. The performance is
32 subjected to derogatory treatment that is prejudicial to X's reputation
33 but not to Y's reputation. The result is an infringement of X's right of

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Part 2 Performers' moral rights

1 integrity of performership but not an infringement of Y's right of
2 integrity of performership.

3 (5) The consent of one performer to any act or omission affecting his
4 or her moral rights in respect of the performance does not affect the
5 moral rights of any other performer in respect of the performance.

6 **195AZR Application**

7 (1) Moral rights in respect of a live performance only subsist in a live
8 performance that occurs after the commencement of this section.

9 (2) Moral rights in respect of a recorded performance only subsist if
10 the live performance concerned occurs after the commencement of
11 this section.

1

2 **Part 3—Performers' protection**

3 *Copyright Act 1968*

4 **59 Subsection 10(1) (at the end of the definition of**
5 ***communicate*)**

6 Add “, including a performance or live performance within the meaning
7 of this Act”.

8 **60 Subsection 248A(1) (paragraphs (a) and (b) of the**
9 **definition of *exempt recording*)**

10 Repeal the paragraphs, substitute:

- 11 (a) an indirect cinematograph film of a performance, being a
12 film made solely for the purpose of the private and domestic
13 use of the person who made it;
- 14 (aa) an indirect sound recording of a performance, being a
15 recording that is a fair dealing with the performance for the
16 purpose of research or study;
- 17 (b) an indirect cinematograph film of a performance, being a
18 film made solely for the purpose of use in scientific research;

19 **61 Subsection 248A(1) (paragraphs (c), (d) and (e) of the**
20 **definition of *exempt recording*)**

21 Omit “an indirect sound recording or an indirect cinematograph film of
22 a performance, being a sound recording or film”, substitute “an indirect
23 cinematograph film of a performance, being a film”.

24 **62 Subsection 248A(1) (paragraph (f) of the definition of**
25 ***exempt recording*)**

26 Omit “sound recording or”.

27 **63 Subsection 248A(1) (after paragraph (f) of the definition of**
28 ***exempt recording*)**

29 Insert:

- 30 (fa) a direct or indirect sound recording of a performance, being a
31 recording that is a fair dealing with the performance:

- 1 (i) for the purpose of criticism or review, whether of that
2 performance or another performance; or
3 (ii) for the purpose of, or associated with, the reporting of
4 news in a newspaper, magazine or similar periodical; or
5 (iii) for the purpose of, or associated with, the reporting of
6 news by means of a communication or in a
7 cinematograph film;

8 **64 Subsection 248A(1) (after paragraph (j) of the definition of**
9 ***exempt recording*)**

10 Insert:

- 11 (ja) a copy of a sound recording referred to in paragraph (aa), (fa)
12 or (g), being a copy made solely for a purpose referred to in
13 any of those paragraphs;

14 **65 Subsection 248A(1) (paragraph (k) of the definition of**
15 ***exempt recording*)**

16 Omit “sound recording or”.

17 **66 Subsection 248A(1) (after subparagraph (n)(i) of the**
18 **definition of *exempt recording*)**

19 Insert:

- 20 (ia) if the copy is of a sound recording—solely for a purpose
21 referred to in paragraph (aa), (fa) or (g); or

22 **67 Subsection 248A(1) (subparagraph (n)(ii) of the definition**
23 **of *exempt recording*)**

24 Before “solely”, insert “if the copy is of a cinematograph film—”.

25 **68 Subsection 248A(1) (definition of *indirect*)**

26 Omit “broadcast, or a re-broadcast,” substitute “communication”.

27 **69 Subsection 248A(1) (definition of *performance*)**

28 Repeal the definition, substitute:

29 ***performance*** means:

- 30 (a) a performance (including an improvisation) of a dramatic
31 work, or part of such a work, including such a performance
32 given with the use of puppets; or

- 1 (b) a performance (including an improvisation) of a musical
2 work or part of such a work; or
3 (c) the reading, recitation or delivery of a literary work, or part
4 of such a work, or the recitation or delivery of an improvised
5 literary work; or
6 (d) a performance of a dance; or
7 (e) a performance of a circus act or a variety act or any similar
8 presentation or show; or
9 (f) a performance of an expression of folklore;
10 being a live performance:
11 (g) that is given in Australia, whether in the presence of an
12 audience or otherwise; or
13 (h) that is given by one or more qualified persons (even if it is
14 also given by one or more persons who are not qualified
15 persons), whether in the presence of an audience or
16 otherwise.

17 **70 Subsection 248A(1)**

18 Insert:

19 *performer*, in relation to a performance that is given outside
20 Australia, does not include a person who is not a qualified person
21 at the time of the performance.

22 **71 After subsection 248A(1)**

23 Insert:

- 24 (1A) For the purposes of paragraph (aa) of the definition of *exempt*
25 *recording*, in determining whether a recording is a fair dealing
26 with a performance for the purpose of research or study, regard
27 must be had to the following matters:
28 (a) the purpose and character of the recording;
29 (b) the nature of the performance;
30 (c) the possibility of obtaining an authorised recording of the
31 performance within a reasonable time at an ordinary
32 commercial price;
33 (d) the effect of the recording upon the potential market for, or
34 the value of, authorised recordings of the performance;

1 (e) if only part of the performance is recorded—the amount and
2 substantiality of the part recorded when compared to the
3 whole performance.

4 **72 Section 248B**

5 Omit “sound recording or”.

6 **73 After subsection 248C(1)**

7 Insert:

8 (1A) A sound recording, or a copy of a sound recording, that is an
9 exempt recording because it was made for a purpose referred to in
10 paragraph (aa) or (fa) of the definition of *exempt recording* in
11 subsection 248A(1) ceases to be an exempt recording if it is used
12 for any other purpose without the authority of the performer.

13 **74 Subsection 248C(2)**

14 Omit “A sound recording or cinematograph film, or a copy of such a
15 recording or film,”, substitute “A cinematograph film, or a copy of a
16 cinematograph film,”.

17 **75 Section 248D**

18 Repeal the section, substitute:

19 **248D Private and domestic use**

20 For the purposes of this Part, a cinematograph film is taken not to
21 have been made for the private and domestic use of the person who
22 made it if it is made for the purpose of:

- 23 (a) selling it, letting it for hire, or by way of trade offering or
24 exposing it for sale or hire; or
25 (b) distributing it, whether for the purpose of trade or otherwise;
26 or
27 (c) by way of trade exhibiting it in public; or
28 (d) broadcasting the film; or
29 (e) causing the film to be seen or heard in public.

30 **76 Paragraph 248G(1)(b)**

31 Omit “broadcasts or re-broadcasts the performance”, substitute
32 “communicates the performance to the public”.

1 **77 Subsection 248G(3)**

2 Omit "broadcasts or re-broadcasts an authorised recording of a
3 performance", substitute "communicates an authorised recording of a
4 performance to the public".

5 **78 At the end of section 248J**

6 Add:

7 (4) If:

- 8 (a) a performer brings an action under this section that relates to
9 a recording of a performance; and
10 (b) the relief granted in the action consists of or includes
11 damages; and
12 (c) the performer has already been granted damages in an action
13 under another section of this Act in relation to an
14 infringement of his or her copyright in the recording; and
15 (d) the action referred to in paragraph (c) arose out of the same
16 event or transaction as the action referred to in paragraph (a);
17 the amount of any damages referred to in paragraph (b) that, apart
18 from this subsection, would be awarded to the performer is to be
19 reduced by the amount of the damages referred to in paragraph (c).

20 (5) If:

- 21 (a) a performer brings an action under another section of this Act
22 that relates to an infringement of his or her copyright in a
23 recording of a performance; and
24 (b) the relief granted in the action consists of or includes
25 damages; and
26 (c) the performer has already been granted damages in an action
27 under this section in relation to the performance; and
28 (d) the action referred to in paragraph (c) arose out of the same
29 event or transaction as the action referred to in paragraph (a);
30 the amount of any damages referred to in paragraph (b) that, apart
31 from this subsection, would be awarded to the performer is to be
32 reduced by the amount of the damages referred to in paragraph (c).

33 **79 Subsection 248P(3)**

34 Omit "broadcast or re-broadcast the performance", substitute
35 "communicate the performance to the public".

1 **80 After subsection 248P(7A)**

2 Insert:

3 (7B) A person who makes an indirect recording solely for the purpose of
4 his or her private and domestic use without the authority of the
5 performer does not, by doing so, contravene subsection (2).

6 Note: A defendant bears an evidential burden in relation to the matter in
7 subsection (7B) (see subsection 13.3(3) of the *Criminal Code*).

8 **81 Subsection 248P(8)**

9 Omit “broadcasts or re-broadcasts an authorised recording of a
10 performance”, substitute “communicates an authorised recording of a
11 performance to the public”.

12 **82 After paragraph 248U(1)(a)**

13 Insert:

14 (aa) so that the provisions apply in relation to recordings, made in
15 that country, of performances in like manner as those
16 provisions apply in relation to recordings of performances
17 given in Australia;

18 (ab) so that the provisions apply in relation to broadcasts, made in
19 that country, of performances in like manner as those
20 provisions apply in relation to broadcasts of performances
21 given in Australia;

22 (ac) so that the provisions apply in relation to recordings, made by
23 persons who are citizens, nationals or residents of that
24 country, of performances in like manner as those provisions
25 apply in relation to recordings of performances given in
26 Australia;

27 **83 Subsection 248V(1)**

28 Omit “(whether the lack of protection relates to the nature of the
29 performance or the nationality, citizenship or country of residence of its
30 performer, or all of those matters)”, substitute “(whether the lack of
31 protection relates to all or any of the ways that the provisions may be
32 applied by the regulations under subsection 248U(1))”.

33 **84 Application**

1 The amendments made by this Part apply to acts done, in respect of a
2 performance, within the protection period of the performance after the
3 day on which this item commences (even if the performance was given
4 before that day).

1

2 **Part 4—Copying and communicating broadcasts of**
3 **performances**

4 ***Copyright Act 1968***

5 **85 Section 135A**

6 Insert:

7 *performance* has the same meaning as in Part XIA.

8 **86 Section 135A**

9 Insert:

10 *performer* has the same meaning as in Part XIA.

11 **87 Section 135A (definition of *relevant copyright owner*)**

12 Repeal the definition.

13 **88 Section 135A**

14 Insert:

15 *relevant right holder* means:

- 16 (a) the owner of the copyright in a work, a sound recording or a
17 cinematograph film (other than a new owner of the copyright
18 in a sound recording of a live performance as defined in
19 section 100AB); or
20 (b) a performer in a performance.

21 **89 After subsection 135E(1)**

22 Insert:

23 (1A) For the purposes of Part XIA, each performer of a performance is
24 taken to have authorised an administering body, or a person on
25 behalf of an administering body, to make or communicate a copy
26 of a broadcast of the performance if the following paragraphs are
27 satisfied:

- 28 (a) a remuneration notice, given by or on behalf of the
29 administering body to the collecting society, is in force;

- 1 (b) if the copy or communication is made by, or on behalf of, a
2 body administering an educational institution—the copy or
3 communication is made solely for the educational purposes
4 of the institution or of another educational institution;
- 5 (c) if the copy or communication is made by, or on behalf of, a
6 body administering an institution assisting persons with an
7 intellectual disability—the copy or communication is made
8 solely for the purposes of use in the provision of assistance to
9 persons with an intellectual disability by the institution or by
10 another similar institution;
- 11 (d) the administering body complies with subsection 135K(1) or
12 (3), or section 135KA, as the case requires, in relation to the
13 copy or communication.

14 Note: The effect of this subsection is that no right of action and no offence
15 occurs in respect of the copy or communication under Part XIA
16 (performers' protection).

17 **90 Subsection 135E(2)**

18 After “subsection (1)” (first occurring), insert “or (1A)”.

19 **91 Paragraph 135E(2)(a)**

20 After “paragraph (1)(b) or (c)”, insert “or (1A)(b) or (c)”.

21 **92 Subsection 135E(2)**

22 After “subsection (1)” (second occurring), insert “or (1A)”.

23 **93 After subsection 135F(1)**

24 Insert:

25 (1A) For the purposes of Part XIA, each performer of a performance is
26 taken to have authorised the making of a preview copy of a
27 broadcast of the performance.

28 Note: The effect of this subsection is that no right of action and no offence
29 occurs in respect of the preview copy under Part XIA (performers'
30 protection).

31 **94 Subsection 135F(5)**

32 After “subsection 135E(1)”, insert “or (1A)”.

33 **95 Subsection 135F(5)**

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Part 4 Copying and communicating broadcasts of performances

1 After “paragraph 135E(1)(b) or (c)”, insert “or (1A)(b) or (c), as the
2 case requires”.

3 **96 Subsection 135F(6)**

4 Omit “subsection (1) does”, insert “subsections (1) and (1A) do”.

5 **97 At the end of section 135F**

6 Add:

7 (8) For the purposes of Part XIA, each performer in a performance is
8 taken to have authorised a communication of a preview copy of a
9 broadcast of the performance if:

10 (a) the communication is made solely to enable an administering
11 body to decide whether or not that copy should be retained:

12 (i) for the educational purposes of the institution
13 administered by it; or

14 (ii) for use in the provision of assistance to persons with an
15 intellectual disability by the institution administered by
16 it; and

17 (b) the communication is made only to the extent necessary for
18 the purpose mentioned in paragraph (a); and

19 (c) the communication is made within the preview period.

20 Note: The effect of this subsection is that no right of action and no offence
21 occurs in respect of the communication of the preview copy under
22 Part XIA (performers’ protection).

23 **98 Paragraph 135H(2)(a)**

24 After “works,”, insert “performances,”.

25 **99 Subsections 135J(5) and 135JA(7)**

26 Omit “subsections 135E(1) and 135F(1)”, substitute “sections 135E and
27 135F”.

28 **100 Subparagraph 135KA(a)(i)**

29 After “copyright”, insert “or performers”.

30 **101 Subsection 135P(3)**

31 Omit “relevant copyright owners” (wherever occurring), substitute
32 “relevant right holders”.

1 **102 Paragraph 135Q(b)**

2 Omit “relevant copyright owners”, substitute “relevant right holders”.

3 **103 At the end of section 135Z**

4 Add:

5 (2) Nothing in this Part affects the right of a performer in a
6 performance included in a broadcast to authorise an administering
7 body:

8 (a) to make, or cause to be made, a sound recording or a
9 cinematograph film of the performance; and

10 (b) to communicate, or cause to be communicated, that recording
11 or film.

12 Note: The heading to section 135Z is altered by omitting “**Relevant copyright owner**” and
13 substituting “**Relevant right holder**”.

14 **104 At the end of subsection 248G(1)**

15 Add:

16 Note: An educational or other institution can copy and communicate a
17 broadcast of a performance without the authority of the performer in
18 some circumstances: see sections 135E and 135F.

19 **105 At the end of subsection 248P(8)**

20 Add:

21 Note 1: A defendant bears an evidential burden in relation to the matter in
22 subsection (8) (see subsection 13.3(3) of the *Criminal Code*).

23 Note 2: An educational or other institution can also copy and communicate a
24 broadcast of a performance without contravening this section in some
25 circumstances: see sections 135E and 135F.

26 **106 Application**

27 The amendments made by this Part apply in respect of copies of
28 broadcasts, or communications of broadcasts, made after the day on
29 which this item commences (even if the performance concerned was
30 given before that day).

1

2 **Part 5—Duration of copyright in photographs**

3 *Copyright Act 1968*

4 **107 Subsection 33(2)**

5 Repeal the subsection, substitute:

6 (2) Subject to this section, copyright that subsists in a literary,
7 dramatic, musical or artistic work by virtue of this Part continues to
8 subsist until the end of 50 years after the end of the calendar year
9 in which the author of the work died.

10 **108 Subsection 33(6)**

11 Repeal the subsection.

12 **109 Subsection 34(1)**

13 Repeal the subsection, substitute:

14 (1) Subject to subsection (2), if the first publication of a literary,
15 dramatic, musical or artistic work is anonymous or pseudonymous,
16 any copyright subsisting in the work by virtue of this Part
17 continues to subsist until the end of the period of 50 years after the
18 end of the calendar year in which the work was first published.

19 **110 Subsection 34(2)**

20 Omit “The last preceding subsection”, substitute “Subsection (1)”.

21 **111 Subsection 34(2)**

22 Omit “the expiration”, substitute “the end”.

23 **112 Subsection 51(1)**

24 Omit “the expiration of the calendar year in which the author of a
25 literary, dramatic or musical work, or of an artistic work being a
26 photograph or engraving,”, substitute “the end of the calendar year in
27 which the author of a literary, dramatic, musical or artistic work”.

28 **113 Subsection 81(3)**

29 Omit “sections 33 and 51”, substitute “section 33”.

1 Note: This item omits an incorrect reference to a section.

2 **114 At the end of section 127**

3 Add:

4 (4) However, if the owner of the material or apparatus was a body
5 corporate, then paragraph (3)(a) only applies if the presumption is
6 required to determine the ownership of the copyright in the
7 photograph.

8 Note: For example, the presumption does not apply if it is required to
9 determine the duration of the copyright in the photograph.

10 **115 At the end of section 208**

11 Add:

12 (2) However, if the owner of the material on which the photograph
13 was taken was a body corporate, then subsection (1) only applies in
14 respect of references to the author of the photograph that relate to
15 the ownership of the copyright in the photograph.

16 Note: For example, subsection (1) does not apply in relation to references to
17 the author of the photograph that relate to the duration of the
18 copyright in the photograph.

19 **116 Section 212**

20 Repeal the section.

21 **117 Application**

22 The amendments made by this Part apply to copyright in photographs
23 that subsists on or after the day on which this item commences.

24 **118 Compensation scheme for agreements made before
25 Royal Assent**

26 *Application of item*

27 (1) This item applies if:

28 (a) the copyright in a photograph is owned by a person (the
29 *owner*); and

30 (b) before the day on which this Act receives the Royal Assent,
31 another person made a written and lawful agreement with a
32 third party; and

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Part 5 Duration of copyright in photographs

- 1 (c) the agreement was entered into for the purposes of doing an
2 act at a particular time that would, apart from this item,
3 infringe the copyright; and
4 (d) the agreement was made in reliance on the copyright having
5 ceased to subsist before that time; and
6 (e) because of the amendments made by this Part the copyright
7 continues to subsist past that time.

8 *Owner may notify person that owner objects to person doing the*
9 *act*

- 10 (2) Before the person does the act, the owner of the copyright may notify
11 the person in writing that the owner objects to the person doing the act.

12 *Owner may provide reasonable compensation to person*

- 13 (3) If the owner does so, then the owner and the person may agree on:
14 (a) compensation that is reasonable in all of the circumstances
15 that the owner is to provide to the person; and
16 (b) the day by which the owner is to provide the compensation.
17 (4) If the owner and the person cannot agree, either of them may apply to
18 the Copyright Tribunal for the Tribunal to determine:
19 (a) compensation that is reasonable in all of the circumstances
20 that the owner is to provide to the person; and
21 (b) the day by which the owner is to provide the compensation.
22 (5) When the Copyright Tribunal has determined an amount of reasonable
23 compensation, the owner is liable to pay that amount to the person by
24 the day determined by the Tribunal. The person may recover that
25 amount in a court of competent jurisdiction from the owner as a debt
26 due to the person.

27 *Person may do act if not notified by owner or if not paid*
28 *reasonable compensation*

- 29 (6) If the owner does not notify the person, or pay reasonable compensation
30 to the person, in accordance with this item, then:
31 (a) the person may do the act mentioned in paragraph (1)(c) at
32 any time after the copyright would, apart from the
33 amendments made by this Part, have ceased to subsist; and
34 (b) for the purposes of the *Copyright Act 1968*:
-

- 1 (i) the owner is not entitled to bring an action under that
2 Act against the person in respect of the act; and
3 (ii) the person does not contravene a section of, or commit
4 an offence under, that Act by doing the act.

5 (7) To avoid doubt, subitem (6) is an exception that a defendant may rely
6 on for the purposes of section 13.3 of the *Criminal Code*.

7 Note: A defendant bears an evidential burden in relation to the matter in subitem (6) (see
8 subsection 13.3(3) of the *Criminal Code*).

9 (8) In this item:
10 *owner*, in relation to the copyright in a photograph at a particular time
11 in respect of a particular act, includes an exclusive licensee of the
12 copyright in the photograph at that time in respect of that act.

13 **119 Applications to Copyright Tribunal for determination of**
14 **reasonable compensation payable**

15 (1) This item applies if an application is made to the Copyright Tribunal
16 under item 118 for the determination of reasonable compensation to be
17 paid by the owner of the copyright in a photograph to a person
18 mentioned in paragraph 118(1)(b).

19 (2) The parties to the application are:
20 (a) the owner of the copyright; and
21 (b) the person mentioned in that paragraph.

22 (3) The Tribunal must consider the application and, after giving to the
23 parties an opportunity of presenting their cases, must make an order
24 determining the amount of compensation that it considers to be
25 reasonable in all of the circumstances.

26 (4) In this item:
27 *owner*, in relation to the copyright in a photograph at a particular time
28 in respect of a particular act, includes an exclusive licensee of the
29 copyright in the photograph at that time in respect of that act.

1

2 **Part 6—Duration of copyright in works and other**
3 **subject-matter**

4 ***Copyright Act 1968***

5 **120 Subsection 33(2)**

6 Omit “50 years”, substitute “70 years”.

7 **121 Subsections 33(3) and (5)**

8 Omit “the expiration of 50 years after the expiration”, substitute “the
9 end of 70 years after the end”.

10 **122 Subsection 34(1)**

11 Omit “50 years”, substitute “70 years”.

12 **123 Subsection 81(2)**

13 Omit “50 years after the expiration”, substitute “70 years after the end”.

14 **124 Section 93**

15 Omit “the expiration of 50 years after the expiration”, substitute “the
16 end of 70 years after the end”.

17 **125 Section 94**

18 Omit “the expiration of 50 years after the expiration” (wherever
19 occurring), substitute “the end of 70 years after the end”.

20 **126 Paragraph 128(a)**

21 Omit “50 years”, substitute “70 years”.

22 **127 At the end of subsection 132(1)**

23 Add:

24 Note: A person who makes an agreement before the *US Free Trade*
25 *Agreement Implementation Act 2004* receives the Royal Assent might
26 not commit an offence under this section: see items 118 and 132 of
27 Schedule 9 to that Act.

28 **128 Paragraphs 187(2)(b) and 188(2)(b)**

1 Omit “the expiration of 50 years after the expiration”, substitute “the
2 end of 70 years after the end”.

3 **129 Paragraph 188(3)(b)**

4 Omit “expiration” (wherever occurring), substitute “end”.

5 **130 Subsection 220(3)**

6 Repeal the subsection.

7 **131 Application**

8 The amendments made by this Part apply to copyright in works and
9 other subject-matter that subsists on or after the day on which this item
10 commences.

11 **132 Compensation scheme for agreements made before**
12 **Royal Assent**

13 *Application of item*

- 14 (1) This item applies if:
- 15 (a) the copyright in a work or other subject-matter is owned by a
16 person (the *owner*); and
 - 17 (b) before the day on which this Act receives the Royal Assent,
18 another person made a written and lawful agreement with a
19 third party; and
 - 20 (c) the agreement was entered into for the purposes of doing an
21 act at a particular time that would, apart from this item,
22 infringe the copyright; and
 - 23 (d) the agreement was made in reliance on the copyright having
24 ceased to subsist before that time; and
 - 25 (e) because of the amendments made by this Part the copyright
26 continues to subsist past that time.

27 *Owner may notify person that owner objects to person doing the*
28 *act*

- 29 (2) Before the person does the act, the owner of the copyright may notify
30 the person in writing that the owner objects to the person doing the act.

- 1 *Owner may provide reasonable compensation to person*
- 2 (3) If the owner does so, then the owner and the person may agree on:
- 3 (a) compensation that is reasonable in all of the circumstances
- 4 that the owner is to provide to the person; and
- 5 (b) the day by which the owner is to provide the compensation.
- 6 (4) If the owner and the person cannot agree, either of them may apply to
- 7 the Copyright Tribunal for the Tribunal to determine:
- 8 (a) compensation that is reasonable in all of the circumstances
- 9 that the owner is to provide to the person; and
- 10 (b) the day by which the owner is to provide the compensation.
- 11 (5) When the Copyright Tribunal has determined an amount of reasonable
- 12 compensation, the owner is liable to pay that amount to the person by
- 13 the day determined by the Tribunal. The person may recover that
- 14 amount in a court of competent jurisdiction from the owner as a debt
- 15 due to the person.

16 *Person may do act if not notified by owner or if not paid*

17 *reasonable compensation*

- 18 (6) If the owner does not notify the person, or pay reasonable compensation
- 19 to the person, in accordance with this item, then:
- 20 (a) the person may do the act mentioned in paragraph (1)(c) at
- 21 any time after the copyright would, apart from the
- 22 amendments made by this Part, have ceased to subsist; and
- 23 (b) for the purposes of the *Copyright Act 1968*:
- 24 (i) the owner is not entitled to bring an action under that
- 25 Act against the person in respect of the act; and
- 26 (ii) the person does not contravene a section of, or commit
- 27 an offence under, that Act by doing the act.
- 28 (7) To avoid doubt, subitem (6) is an exception that a defendant may rely
- 29 on for the purposes of section 13.3 of the *Criminal Code*.
- 30 Note: A defendant bears an evidential burden in relation to the matter in subitem (6) (see
- 31 subsection 13.3(3) of the *Criminal Code*).
- 32 (8) In this item:

1 *owner*, in relation to the copyright in a work or other subject-matter at a
2 particular time in respect of a particular act, includes an exclusive
3 licensee of the copyright in the work or subject-matter at that time in
4 respect of that act.

5 **133 Applications to Copyright Tribunal for determination of**
6 **reasonable compensation payable**

7 (1) This item applies if an application is made to the Copyright Tribunal
8 under item 132 for the determination of reasonable compensation to be
9 paid by the owner of the copyright in a work or other subject-matter to a
10 person mentioned in paragraph 132(1)(b).

11 (2) The parties to the application are:
12 (a) the owner of the copyright; and
13 (b) the person mentioned in that paragraph.

14 (3) The Tribunal must consider the application and, after giving to the
15 parties an opportunity of presenting their cases, must make an order
16 determining the amount of compensation that it considers to be
17 reasonable in all of the circumstances.

18 (4) In this item:
19 *owner*, in relation to the copyright in a work or other subject-matter at a
20 particular time in respect of a particular act, includes an exclusive
21 licensee of the copyright in the work or subject-matter at that time in
22 respect of that act.

1

2 **Part 7—Electronic rights management information**

3 *Copyright Act 1968*

4 **134 Subsection 10(1) (definition of *electronic rights***
5 ***management information*)**

6 Repeal the definition, substitute:

7 *electronic rights management information*, in relation to a work
8 or other subject-matter, means information that:

- 9 (a) is electronic; and
10 (b) either:
11 (i) is or was attached to, or is or was embodied in, a copy
12 of the work or subject-matter; or
13 (ii) appears or appeared in connection with a
14 communication, or the making available, of the work or
15 subject-matter; and
16 (c) either:
17 (i) identifies the work or subject-matter, and its author or
18 copyright owner (including such information
19 represented as numbers or codes); or
20 (ii) identifies or indicates some or all of the terms and
21 conditions on which the work or subject-matter may be
22 used, or indicates that the use of the work or
23 subject-matter is subject to terms or conditions
24 (including such information represented as numbers or
25 codes).

26 **135 Paragraph 116B(1)(a)**

27 Repeal the paragraph, substitute:

- 28 (a) either:
29 (i) a person removes, from a copy of a work or other
30 subject-matter in which copyright subsists, any
31 electronic rights management information that relates to
32 the work or other subject-matter; or
33 (ii) a person alters any electronic rights management
34 information that relates to a work or other
35 subject-matter in which copyright subsists; and

1 **136 Subparagraph 116C(1)(a)(i)**

2 Repeal the subparagraph, substitute:

- 3 (i) distributes a copy of the work or other subject-matter to
4 the public;

5 Note: The heading to section 116C is replaced by the heading “**Distribution to the public**
6 **etc. of works whose electronic rights management information has been removed**
7 **or altered**”.

8 **137 Subparagraph 116C(1)(a)(ii)**

9 Omit “for the purpose of trade”, substitute “for distribution to the
10 public”.

11 **138 Paragraph 116C(1)(b)**

12 Repeal the paragraph, substitute:

13 (b) either:

- 14 (i) any electronic rights management information that
15 relates to the work or other subject-matter has been
16 removed from the copy of the work or subject-matter; or
17 (ii) any electronic rights management information that
18 relates to the work or other subject-matter has been
19 altered; and

20 **139 After section 116C**

21 Insert:

22 **116CA Distribution and importation of electronic rights**
23 **management information that has been removed or**
24 **altered**

25 (1) This section applies if:

- 26 (a) a person does either of the following acts in relation to
27 electronic rights management information that relates to a
28 work or other subject-matter in which copyright subsists:
29 (i) distributes the electronic rights management
30 information;
31 (ii) imports into Australia the electronic rights management
32 information for distribution; and
33 (b) the person does so without the permission of the owner or
34 exclusive licensee of the copyright; and

- 1 (c) either:
2 (i) the information has been removed from a copy of the
3 work or subject-matter without the permission of the
4 owner or exclusive licensee of the copyright; or
5 (ii) the information has been removed from a copy of the
6 work or subject-matter with the permission of the owner
7 or exclusive licensee of the copyright but the
8 information has been altered without that permission;
9 and
10 (d) the person knew that the information had been removed or
11 altered without that permission; and
12 (e) the person knew, or ought reasonably to have known, that the
13 act referred to in paragraph (a) that was done by the person
14 would induce, enable, facilitate or conceal an infringement of
15 the copyright.
- 16 (2) If this section applies, the owner or exclusive licensee of the
17 copyright may bring an action against the person.
- 18 (3) In an action under subsection (2), it must be presumed that the
19 defendant:
20 (a) had the knowledge referred to in paragraph (1)(d); and
21 (b) knew, or ought reasonably to have known, that the doing of
22 the act to which the action relates would have the effect
23 referred to in paragraph (1)(e);
24 unless the defendant proves otherwise.

25 **116CB Exception relating to national security and law enforcement**

26 Sections 116B to 116CA do not apply in respect of anything
27 lawfully done for the purposes of law enforcement or national
28 security by or on behalf of:

- 29 (a) the Commonwealth or a State or Territory; or
30 (b) an authority of the Commonwealth or of a State or Territory.

31 **140 Subsections 116D(1) and (2)**

32 Omit “or 116C”, substitute “, 116C or 116CA”.

33 Note: The heading to section 116D is altered by omitting “and 116C” and substituting “,
34 116C and 116CA”.

35 **141 Subsections 132(5C) and (5D)**

1 Repeal the subsections, substitute:

2 *Offences relating to electronic rights management information*

3 (5C) A person commits an offence if:

- 4 (a) copyright subsists in a work or other subject-matter; and
5 (b) either:
6 (i) the person removes, from a copy of the work or
7 subject-matter, any electronic rights management
8 information that relates to the work or subject-matter; or
9 (ii) the person alters any electronic rights management
10 information that relates to the work or subject-matter;
11 and
12 (c) the person does so without the permission of the owner or
13 exclusive licensee of the copyright; and
14 (d) the person is reckless as to whether the removal or alteration
15 will induce, enable, facilitate or conceal an infringement of
16 the copyright.

17 (5D) A person commits an offence if:

- 18 (a) copyright subsists in a work or other subject-matter; and
19 (b) the person does any of the following acts in relation to the
20 work or subject-matter:
21 (i) distributes a copy of the work or subject-matter with the
22 intention of trading and obtaining a commercial
23 advantage or profit;
24 (ii) imports a copy of the work or subject-matter into
25 Australia with the intention of trading and obtaining a
26 commercial advantage or profit;
27 (iii) communicates a copy of the work or subject-matter to
28 the public; and
29 (c) the person does so without the permission of the owner or
30 exclusive licensee of the copyright; and
31 (d) either:
32 (i) any electronic rights management information that
33 relates to the work or subject-matter has been removed
34 from the copy of the work or subject-matter; or
35 (ii) any electronic rights management information that
36 relates to the work or subject-matter has been altered;

- 1 without the permission of the owner or exclusive licensee of
2 the copyright; and
- 3 (e) the person knows that the information has been removed or
4 altered without that permission; and
- 5 (f) the person is reckless as to whether the act referred to in
6 paragraph (b) will induce, enable, facilitate or conceal an
7 infringement of the copyright.
- 8 (5DA) A person commits an offence if:
- 9 (a) copyright subsists in a work or other subject-matter; and
- 10 (b) the person does either of the following acts in relation to
11 electronic rights management information that relates to the
12 work or subject-matter:
- 13 (i) distributes the electronic rights management
14 information with the intention of trading and obtaining a
15 commercial advantage or profit;
- 16 (ii) imports the electronic rights management information
17 into Australia with the intention of trading and obtaining
18 a commercial advantage or profit; and
- 19 (c) the person does so without the permission of the owner or
20 exclusive licensee of the copyright; and
- 21 (d) either:
- 22 (i) the information has been removed from a copy of the
23 work or subject-matter without the permission of the
24 owner or exclusive licensee of the copyright; or
- 25 (ii) the information has been removed from a copy of the
26 work or subject-matter with the permission of the owner
27 or exclusive licensee of the copyright but the
28 information has been altered without that permission;
29 and
- 30 (e) the person knows that the information has been removed or
31 altered without that permission; and
- 32 (f) the person is reckless as to whether the act referred to in
33 paragraph (b) will induce, enable, facilitate or conceal an
34 infringement of the copyright.

35 **142 After subsection 132(5E)**

36 Insert:

1 *Defence for certain public institutions etc.*

2 (5EA) Subsections (5C) to (5DB) do not apply in respect of anything
3 lawfully done by the following bodies in performing their
4 functions:

5 (a) a library (other than a library that is conducted for the profit,
6 direct or indirect, of an individual or individuals);

7 (b) a body mentioned in paragraph (a) of the definition of
8 *archives* or in subsection 10(4);

9 (c) an educational institution;

10 (d) a public non-commercial broadcaster, including:

11 (i) a body that provides a national broadcasting service
12 within the meaning of the *Broadcasting Services Act*
13 *1992*; and

14 (ii) a body that holds a community broadcasting licence
15 within the meaning of that Act.

16 Note: A library that is owned by a person conducting a business for profit
17 might not itself be conducted for profit: see section 18.

18 **143 Subsection 132(5J)**

19 After “(5E),” insert “(5EA),”.

20 **144 Subsection 134(2)**

21 Omit “or 116C”, substitute “, 116C or 116CA”.

22 **145 Application**

23 The amendments made by this Part apply in respect of acts done after
24 the day on which this item commences.

1

2 **Part 8—Criminal offences**

3 *Copyright Act 1968*

4 **146 Paragraphs 132(1)(b) and (c)**

5 After “by way of trade”, insert “, and with the intention of obtaining a
6 commercial advantage or profit,”.

7 Note: The following heading to subsection 132(1) is inserted “*Offences relating to infringing*
8 *copies*”.

9 **147 Subparagraph 132(1)(d)(i)**

10 After “by way of trade”, insert “, and with the intention of obtaining a
11 commercial advantage or profit,”.

12 **148 Subparagraph 132(1)(d)(ii)**

13 After “for the purpose of trade,”, insert “and with the intention of
14 obtaining a commercial advantage or profit,”.

15 **149 Subparagraph 132(1)(d)(iii)**

16 After “by way of trade”, insert “, and with the intention of obtaining a
17 commercial advantage or profit,”.

18 **150 Paragraph 132(2)(a)**

19 After “for the purpose of trade”, insert “and with the intention of
20 obtaining a commercial advantage or profit”.

21 **151 Paragraph 132(2A)(a)**

22 After “by way of trade”, insert “, and with the intention of obtaining a
23 commercial advantage or profit,”.

24 **152 Paragraph 132(2A)(b)**

25 After “for the purpose of trade,”, insert “and with the intention of
26 obtaining a commercial advantage or profit,”.

27 **153 Paragraph 132(2A)(c)**

28 After “by way of trade”, insert “, and with the intention of obtaining a
29 commercial advantage or profit,”.

- 1 Note 1: The following heading to subsection 132(5) is inserted “*Offence relating to infringing*
2 *public performances of literary, dramatic or musical works*”.
- 3 Note 2: The following heading to subsection 132(5AA) is inserted “*Offences relating to sound*
4 *recordings or films heard or seen in public*”.
- 5 Note 3: The following heading to subsection 132(5A) is inserted “*Offences relating to*
6 *circumvention services and devices*”.

7 **154 Before subsection 132(5E)**

8 Insert:

9 *Offence relating to significant infringement of copyright*

10 (5DB) A person commits an offence if:

- 11 (a) the person engages in conduct; and
12 (b) the conduct results in one or more infringements of the
13 copyright in a work or other subject-matter; and
14 (c) the infringement or infringements have a substantial
15 prejudicial impact on the owner of the copyright; and
16 (d) the infringement or infringements occur on a commercial
17 scale.

18 (5DC) In determining whether one or more infringements occur on a
19 commercial scale for the purposes of paragraph (5DB)(d), the
20 following matters are to be taken into account:

- 21 (a) the volume of any articles that are infringing copies that
22 constitute the infringement or infringements;
23 (b) the value of any articles that are infringing copies that
24 constitute the infringement or infringements;
25 (c) any other relevant matter.

26 **155 Subsection 132(5E)**

27 Omit “and (5B)”, substitute “to (5DB)”.

28 Note 1: The following heading to subsection 132(5E) is inserted “*Defence relating to law*
29 *enforcement and national security*”.

30 Note 2: The following heading to subsection 132(5F) is inserted “*Permitted purpose*
31 *exceptions*”.

32 Note 3: The following heading to subsection 132(6) is inserted “*Section applies only in respect*
33 *of acts done in Australia*”.

34 Note 4: The following heading to subsection 132(6AA) is inserted “*Penalties*”.

35 **156 Subsection 132(6A)**

1 Omit “or (5D)”, substitute “, (5D), (5DA) or (5DB)”.

2 Note: The following heading to subsection 132(7) is inserted “*Proceedings may be brought in*
3 *Federal Court etc.*”.

4 **157 Subsection 132(9)**

5 Insert:

6 *copyright material* means:

7 (a) a work; or

8 (b) a published edition of a work; or

9 (c) a sound recording; or

10 (d) a cinematograph film; or

11 (e) a television or sound broadcast; or

12 (f) a work that is included in a sound recording, a cinematograph
13 film or a television or sound broadcast.

14 Note: The following heading to subsection 132(9) is inserted “*Definitions*”.

15 **158 Subsection 132(9)**

16 Insert:

17 *profit* does not include any advantage, benefit or gain resulting
18 from, or associated with, any private or domestic use of any
19 copyright material.

20 **159 At the end of section 132**

21 Add:

22 *Burden of proof relating to profit*

23 (11) In a prosecution for an offence against this section, the burden of
24 proving that any advantage, benefit or gain does not result from, or
25 is not associated with, any private or domestic use of any copyright
26 material is on the prosecution.

27 **160 Application**

28 The amendments made by this Part apply in respect of acts done after
29 the day on which this item commences.

1

2 **Part 9—Encoded broadcasts**

3 *Copyright Act 1968*

4 **161 Section 135AL**

5 Insert:

6 *channel provider* means a person who:

- 7 (a) packages a channel (which might include programs produced
8 by the person); and
9 (b) supplies a broadcaster with the channel; and
10 (c) carries on a business that involves the supply of the channel;
11 where, apart from any breaks for the purposes of the transmission
12 of incidental matter, the channel is broadcast as part of an encoded
13 broadcast service.

14 **162 Section 135AL**

15 Insert:

16 *copyright material* means:

- 17 (a) a work; or
18 (b) a published edition of a work; or
19 (c) a sound recording; or
20 (d) a cinematograph film; or
21 (e) a television or sound broadcast; or
22 (f) a work that is included in a sound recording, a cinematograph
23 film or a television or sound broadcast.

24 **163 Section 135AL**

25 Insert:

26 *profit* does not include any advantage, benefit or gain resulting
27 from, or associated with, any private or domestic use of any
28 copyright material.

29 **164 Subparagraph 135AN(1)(b)(iii)**

30 After “distributes”, insert “(including by exporting from Australia)”.

Schedule 9 Copyright amendments
Part 9 Encoded broadcasts

1 Note 1: The following heading to subsection 135AN(1) is inserted “*Actions in relation to the*
2 *manufacture of and dealing with broadcast decoding devices*”.

3 Note 2: The following heading to subsection 135AN(2) is inserted “*Exception relating to law*
4 *enforcement and national security*”.

5 **165 Subsection 135AN(3)**

6 Repeal the subsection, substitute:

7 *Who may bring an action*

8 (3) Subject to subsection (8), if this section applies, the following
9 persons may bring an action against the person mentioned in
10 subsection (1):

11 (a) any person who has an interest in the copyright in the
12 broadcast;

13 (b) any person who has an interest in the copyright in any
14 content of the broadcast;

15 (c) the channel provider who supplies the broadcaster with the
16 channel for the broadcast.

17 Note: See section 135AL for the definition of *channel provider*.

18 Note 1: The following heading to subsection 135AN(4) is inserted “*Relief etc.*”.

19 Note 2: The following heading to subsection 135AN(7) is inserted “*Presumption relating to*
20 *defendant’s knowledge*”.

21 Note 3: The following heading to subsection 135AN(8) is inserted “*Limitation on bringing*
22 *actions*”.

23 **166 Subsection 135ANA(1)**

24 Omit “this section”, substitute “this subsection”.

25 Note 1: The heading to section 135ANA is altered by omitting “**for commercial purposes**”.

26 Note 2: The following heading to subsection 135ANA(1) is inserted “*Actions in relation to the*
27 *use of broadcast decoding devices*”.

28 **167 Paragraph 135ANA(1)(b)**

29 Omit “an encoded broadcast”, substitute “the encoded broadcast”.

30 **168 Paragraph 135ANA(1)(c)**

31 Repeal the paragraph.

32 **169 After subsection 135ANA(1)**

33 Insert:

1 (1A) Subject to subsection (2), this subsection applies if:

- 2 (a) a broadcaster makes an encoded broadcast; and
3 (b) a broadcast decoding device is used to gain access to the
4 encoded broadcast without the authorisation of the
5 broadcaster; and
6 (c) a person distributes (including by communicating), or
7 authorises the distribution of, the broadcast that has been
8 accessed by the device; and
9 (d) the distribution affects prejudicially a person who may bring
10 an action under subsection (3); and
11 (e) the person knew that the broadcaster had not authorised the
12 access to the encoded broadcast.

13 (1B) Subject to subsection (2), this subsection applies if:

- 14 (a) a broadcaster makes an encoded broadcast; and
15 (b) a broadcast decoding device is used to gain access to the
16 encoded broadcast without the authorisation of the
17 broadcaster; and
18 (c) a person receives the broadcast that has been accessed by the
19 device; and
20 (d) the person knew that the broadcaster had not authorised the
21 access to the encoded broadcast.

22 Note: The following heading to subsection 135ANA(2) is inserted “*Exception relating to law*
23 *enforcement and national security*”.

24 **170 Subsection 135ANA(3)**

25 Repeal the subsection, substitute:

26 *Who may bring an action*

- 27 (3) Subject to subsection (7), if subsection (1), (1A) or (1B) applies,
28 the following persons may bring an action against the person
29 mentioned in that subsection:
30 (a) any person who has an interest in the copyright in the
31 broadcast;
32 (b) any person who has an interest in the copyright in any
33 content of the broadcast;
34 (c) the channel provider who supplies the broadcaster with the
35 channel for the broadcast.

36 Note: See section 135AL for the definition of *channel provider*.

1 Note: The following heading to subsection 135ANA(4) is inserted “*Relief etc.*”.

2 **171 Paragraph 135ANA(5)(a)**

3 After “paragraph (1)(b)”, insert “, (1A)(c) or (1B)(c)”.

4 **172 Paragraph 135ANA(5)(b)**

5 Omit “the trade”, substitute “any trade”.

6 **173 Subsection 135ANA(7)**

7 After “paragraph (1)(b)”, insert “, (1A)(c) or (1B)(c)”.

8 Note: The following heading to subsection 135ANA(7) is inserted “*Limitation on bringing*
9 *actions*”.

10 **174 Paragraph 135AS(1)(b)**

11 After “by way of trade”, insert “, and with the intention of obtaining a
12 commercial advantage or profit,”.

13 Note: The following heading to subsection 135AS(1) is inserted “*Offences in relation to*
14 *manufacture of or dealing with broadcast decoding devices*”.

15 **175 Paragraph 135AS(1)(c)**

16 Repeal the paragraph, substitute:

17 (c) distribute (including by exporting from Australia) a broadcast
18 decoding device with the intention of trading and obtaining a
19 commercial advantage or profit, or with the intention of
20 engaging in any other activity that will affect prejudicially a
21 broadcaster; or

22 **176 Paragraph 135AS(1)(d)**

23 After “by way of trade”, insert “and with the intention of obtaining a
24 commercial advantage or profit”.

25 **177 Subparagraph 135AS(1)(e)(i)**

26 After “by way of trade,”, insert “and with the intention of obtaining a
27 commercial advantage or profit,”.

28 **178 Subparagraph 135AS(1)(e)(ii)**

29 Omit “for trading,”, substitute “for trading with the intention of
30 obtaining a commercial advantage or profit,”.

31 **179 Subparagraph 135AS(1)(e)(iii)**

1 After “by way of trade”, insert “and with the intention of obtaining a
2 commercial advantage or profit”.

3 **180 At the end of subsection 135AS(1)**

4 Add:

5 Note: See section 135AL for the definition of *profit*.

6 **181 After subsection 135AS(1)**

7 Insert:

8 *Offence in relation to use of broadcast decoding devices for*
9 *commercial advantage etc.*

10 (1A) A person commits an offence if:

- 11 (a) a broadcaster makes an encoded broadcast; and
- 12 (b) the person uses, or authorises the use of, a broadcast
13 decoding device to gain access to the encoded broadcast; and
- 14 (c) the access is gained without the authorisation of the
15 broadcaster; and
- 16 (d) the person uses, or authorises the use of, the device by way of
17 trade and with the intention of obtaining a commercial
18 advantage or profit.

19 Note: See section 135AL for the definition of *profit*.

20 *Offence in relation to distribution of encoded broadcast that has*
21 *been accessed without authorisation*

22 (1B) A person commits an offence if:

- 23 (a) a broadcaster makes an encoded broadcast; and
- 24 (b) a broadcast decoding device is used to gain access to the
25 encoded broadcast; and
- 26 (c) the access is gained without the authorisation of the
27 broadcaster; and
- 28 (d) the person distributes (including by communicating), or
29 authorises the distribution of, the broadcast that has been
30 accessed by the device; and
- 31 (e) the person knows the broadcaster had not authorised the
32 access to the broadcast; and
- 33 (f) the distribution affects prejudicially the following persons:

- 1 (i) any person who has an interest in the copyright in the
2 broadcast;
3 (ii) any person who has an interest in the copyright in any
4 content of the broadcast;
5 (iii) the channel provider who supplies the broadcaster with
6 the channel for the broadcast.

7 Note: See section 135AL for the definition of *channel provider*.

8 **182 Subsection 135AS(2)**

9 Omit “Subsection (1)”, substitute “This section”.

10 Note: The following heading to subsection 135AS(2) is inserted “*Defence relating to law*
11 *enforcement and national security*”.

12 **183 After subsection 135AS(3)**

13 Insert:

14 (3A) In a prosecution for an offence against this section, the burden of
15 proving that any advantage, benefit or gain does not result from, or
16 is not associated with, any private or domestic use of any copyright
17 material is on the prosecution.

18 Note: The following heading to subsection 135AS(3) is inserted “*Burdens of proof*”.

19 **184 Subsection 135AS(4)**

20 After “subsection (1)”, insert “, (1A) or (1B)”.

21 Note: The following heading to subsection 135AS(4) is inserted “*Penalty for contravening*
22 *section*”.

23 **185 Application**

24 The amendments made by this Part apply in respect of encoded
25 broadcasts made after the day on which this item commences.

1

2 **Part 10—Reproductions**

3 *Copyright Act 1968*

4 **186 Subsection 10(1) (definition of *material form*)**

5 Repeal the definition, substitute:

6 *material form*, in relation to a work or an adaptation of a work,
7 includes any form (whether visible or not) of storage of the work or
8 adaptation, or a substantial part of the work or adaptation, (whether
9 or not the work or adaptation, or a substantial part of the work or
10 adaptation, can be reproduced).

11 **187 At the end of section 10**

12 Add:

13 (5) For the purposes of the definition of *copy* in subsection (1), such a
14 copy includes any form (whether visible or not) of storage of a
15 cinematograph film, or a substantial part of a cinematograph film,
16 (whether or not the copy of the film, or a substantial part of the
17 film, can be reproduced).

18 (6) For the purposes of paragraph 10(3)(c), a reference to a copy of a
19 sound recording includes any form (whether visible or not) of
20 storage of the sound recording, or a substantial part of the sound
21 recording, (whether or not the copy of the recording, or a
22 substantial part of the recording, can be reproduced).

23 **188 After section 43A**

24 Insert:

25 **43B Reproduction of works as part of a technical process of use**

26 (1) Subject to subsection (2), the copyright in a work is not infringed
27 by the making of a reproduction of the work if the reproduction is
28 incidentally made as part of a technical process of using a copy of
29 the work.

- 1 (2) Subsection (1) does not apply to the making of a reproduction of a
2 work if the reproduction is made from an infringing copy of the
3 work.

4 **189 After section 111A**

5 Insert:

6 **111B Reproduction of subject-matter as part of a technical process**
7 **of use**

- 8 (1) Subject to subsection (2), the copyright in a subject-matter is not
9 infringed by the making of a reproduction of the subject-matter if
10 the reproduction is incidentally made as part of a technical process
11 of using a copy of the subject-matter.

- 12 (2) Subsection (1) does not apply to the making of a reproduction of a
13 subject-matter if the reproduction is made from an infringing copy
14 of the subject-matter.

15 **190 Application**

16 The amendments made by this Part apply in respect of acts done after
17 the day on which this item commences.

1

2 **Part 11—Limitation on remedies available against**
3 **carriage service providers**

4 *Copyright Act 1968*

5 **191 After Division 2 of Part V**

6 Insert:

7 **Division 2AA—Limitation on remedies available against**
8 **carriage service providers**

9 **Subdivision A—Preliminary**

10 **116AA Purpose of this Division**

11 (1) The purpose of this Division is to limit the remedies that are
12 available against carriage service providers for infringements of
13 copyright that relate to the carrying out of certain online activities
14 by carriage service providers. A carriage service provider must
15 satisfy certain conditions to take advantage of the limitations.

16 Note 1: Subdivision B contains a description of the relevant activities.

17 Note 2: Subdivision C contains details of the limitations on remedies.

18 Note 3: Subdivision D sets out the conditions that must be satisfied for a
19 carriage service provider to take advantage of the limitations. The
20 limitations are automatic if a carriage service provider complies with
21 the relevant conditions.

22 (2) This Division does not limit the operation of provisions of this Act
23 outside this Division in relation to determining whether copyright
24 has been infringed.

25 **116AB Definitions**

26 In this Division:

27 *caching* means the reproduction of copyright material on a system
28 or network controlled or operated by or for a carriage service
29 provider in response to an action by a user in order to facilitate
30 efficient access to that material by that user or other users.

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copyright material means:

- (a) a work; or
- (b) a published edition of a work; or
- (c) a sound recording; or
- (d) a cinematograph film; or
- (e) a television or sound broadcast; or
- (f) a work that is included in a sound recording, a cinematograph film or a television or sound broadcast.

financial benefit, in relation to a carriage service provider, does not include a benefit that merely results from the level of activity on the carriage service provider's system or network.

industry code means:

- (a) an industry code that:
 - (i) meets any prescribed requirements; and
 - (i) is registered under Part 6 of the *Telecommunications Act 1997*; or
- (b) an industry code developed in accordance with the regulations.

Subdivision B—Relevant activities

116AC Category A activity

A carriage service provider carries out a **Category A activity** by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.

116AD Category B activity

A carriage service provider carries out a **Category B activity** by caching copyright material through an automatic process. The carriage service provider must not manually select the copyright material for caching.

1 **116AE Category C activity**

2 A carriage service provider carries out a *Category C activity* by
3 storing, at the direction of a user, copyright material on a system or
4 network controlled or operated by or for the carriage service
5 provider.

6 **116AF Category D activity**

7 A carriage service provider carries out a *Category D activity* by
8 referring users to an online location using information location
9 tools or technology.

10 **Subdivision C—Limitations on remedies**

11 **116AG Limitations on remedies**

12 *Relevant conditions must be satisfied*

13 (1) A carriage service provider must satisfy the relevant conditions set
14 out in Subdivision D before the limitations in this section apply.

15 *General limitations*

16 (2) For infringements of copyright that occur in the course of carrying
17 out any of the categories of activities set out in Subdivision B, a
18 court must not grant relief against a carriage service provider that
19 consists of:

- 20 (a) damages or an account of profits; or
21 (b) additional damages; or
22 (c) other monetary relief.

23 *Category specific limitations*

24 (3) For an infringement of copyright that occurs in the course of the
25 carrying out of a Category A activity, the relief that a court may
26 grant against a carriage service provider is limited to one or more
27 of the following orders:

- 28 (a) an order requiring the carriage service provider to take
29 reasonable steps to disable access to an online location
30 outside Australia;

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1 (b) an order requiring the carriage service provider to terminate a
2 specified account.

3 (4) For an infringement of copyright that occurs in the course of the
4 carrying out of a Category B, C or D activity, the relief that a court
5 may grant against a carriage service provider is limited to one or
6 more of the following orders:

7 (a) an order requiring the carriage service provider to remove or
8 disable access to infringing copyright material, or to a
9 reference to infringing copyright material;

10 (b) an order requiring the carriage service provider to terminate a
11 specified account;

12 (c) some other less burdensome but comparably effective
13 non-monetary order if necessary.

14 *Relevant matters*

15 (5) In deciding whether to make an order of a kind referred to in
16 subsection (3) or (4), a court must have regard to:

17 (a) the harm that has been caused to the owner or exclusive
18 licensee of the copyright; and

19 (b) the burden that the making of the order will place on the
20 carriage service provider; and

21 (c) the technical feasibility of complying with the order; and

22 (d) the effectiveness of the order; and

23 (e) whether some other comparably effective order would be less
24 burdensome.

25 The court may have regard to other matters it considers relevant.

26 **Subdivision D—Conditions**

27 **116AH Conditions**

28 (1) This table sets out the conditions for each of the categories of
29 activities.
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Conditions		
Item	Activity	Conditions
1	All categories	<ol style="list-style-type: none"> 1. The carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers. 2. If there is a relevant industry code in force—the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material.
2	Category A	<ol style="list-style-type: none"> 1. Any transmission of copyright material in carrying out this activity must be initiated by or at the direction of a person other than the carriage service provider. 2. The carriage service provider must not make substantive modifications to copyright material transmitted. This does not apply to modifications made as part of a technical process.
3	Category B	<ol style="list-style-type: none"> 1. If the copyright material that is cached is subject to conditions on user access at the originating site, the carriage service provider must ensure that access to a significant part of the cached copyright material is permitted only to users who have met those conditions. 2. If there is a relevant industry code in force—the carriage service provider must comply with the relevant provisions of that code relating to: <ol style="list-style-type: none"> (a) updating the cached copyright material; and (b) not interfering with technology used at the originating site to obtain information about the use of the copyright material. 3. The service provider must expeditiously remove or disable access to cached copyright material upon notification in the prescribed form that the material has been removed or access to it has been disabled at the originating site. 4. The carriage service provider must not make substantive modifications to the cached copyright material as it is transmitted to subsequent users. This does not apply to modifications made as part of a technical process.

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Conditions		
Item	Activity	Conditions
4	Category C	<ol style="list-style-type: none">1. The carriage service provider must not receive a financial benefit that is directly attributable to the infringing activity if the carriage service provider has the right and ability to control the activity. A financial benefit is to be regarded as directly attributable to the infringing activity only if the carriage service provider knew or ought reasonably to have known that an infringement of copyright was involved.2. The carriage service provider must expeditiously remove or disable access to copyright material residing on its system or network upon receipt of a notice in the prescribed form that the material has been found to be infringing by a court.3. The carriage service provider must comply with the prescribed procedure in relation to removing or disabling access to copyright material residing on its system or network.
5	Category D	<ol style="list-style-type: none">1. The carriage service provider must not receive a financial benefit that is directly attributable to the infringing activity if the carriage service provider has the right and ability to control the activity. A financial benefit is to be regarded as directly attributable to the infringing activity only if the carriage service provider knew or ought reasonably to have known that an infringement of copyright was involved.2. The carriage service provider must expeditiously remove or disable access to a reference residing on its system or network upon receipt of a notice in the prescribed form that the copyright material to which it refers has been found to be infringing by a court.3. The carriage service provider must comply with the prescribed procedure in relation to removing or disabling a reference residing on its system or network.

- 1 (2) Nothing in the conditions is to be taken to require a carriage
2 service provider to monitor its service or to seek facts to indicate
3 infringing activity except to the extent required by a standard
4 technical measure mentioned in condition 2 in table item 1 in the
5 table in subsection (1).

1 **116AI Evidence of compliance with conditions**

2 If a carriage service provider, in an action relating to this Division,
3 points to evidence, as prescribed, that suggests that the carriage
4 service provider has complied with a condition, the court must
5 presume, in the absence of evidence to the contrary, that the
6 carriage service provider has complied with the condition.

7 **Subdivision E—Regulations**

8 **116AJ Regulations**

- 9 (1) The regulations may provide that a carriage service provider is not
10 liable for damages or any other civil remedy as a result of action
11 taken in good faith to comply with a condition.
- 12 (2) The regulations may provide civil remedies for conduct by relevant
13 parties in relation to conditions.
- 14 (3) The regulations may prescribe offences for conduct by persons
15 issuing notices under the regulations, and prescribe penalties for
16 offences against those regulations. The penalties must not exceed
17 50 penalty units.

18 Note: If a body corporate is convicted of an offence against regulations
19 made under this section, subsection 4B(3) of the *Crimes Act 1914*
20 allows a court to impose fines of up to 5 times the penalty stated
21 above.

22 ***Telecommunications Act 1997***

23 **192 At the end of section 115**

24 Add:

- 25 (4) The rule in subsection (1) does not apply to an industry code made
26 for the purposes of Division 2AA of Part V of the *Copyright Act*
27 *1968*.