



# **US Free Trade Agreement Implementation Act 2004**

**Act No. 120 of 2004 as amended**

This compilation was prepared on 1 January 2005

**[This Act was amended by Act No. 154 of 2004]**

## **Amendments from Act No. 154 of 2004**

[Schedule 1 (item 42) amended heading to Schedule 9 (item 118);  
Schedule 1 (items 43–48) amended Schedule 9 (item 118);  
Schedule 1 (items 49 and 50) amended Schedule 9 (item 119);  
Schedule 1 (item 51) added note to Schedule 9 (item 119(3));  
Schedule 1 (item 52) amended heading to Schedule 9 (item 132);  
Schedule 1 (items 53–58) amended Schedule 9 (item 132);  
Schedule 1 (items 59 and 60) amended Schedule 9 (item 133);  
Schedule 1 (item 61) added note to Schedule 9 (item 133(3))  
Schedule 1 (items 42 to 61) commenced immediately after 1 January 2005]

Prepared by the Office of Legislative Drafting and Publishing,  
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# **An Act to implement the Australia-United States Free Trade Agreement, and for other purposes**

[Assented to 16 August 2004]

The Parliament of Australia enacts:

## **1 Short title**

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

## **2 Commencement**

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

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
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.	16 August 2004

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
2. Schedule 1	<p>The later of:</p> <p>(a) 1 January 2005; and</p> <p>(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.</p> <p>However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.</p> <p>The Minister for Trade must announce by notice in the <i>Gazette</i> the day on which the Agreement comes into force for Australia.</p>	
3. Schedule 2, Parts 1 and 2	At the same time as the provisions covered by table item 2.	
4. Schedule 2, Part 3	<p>The later of:</p> <p>(a) immediately after the commencement of Parts 1 and 2 of Schedule 2 to this Act; and</p> <p>(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>.</p> <p>However, the provision(s) do not commence at all unless both of the events mentioned in paragraphs (a) and (b) occur.</p>	
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.	16 August 2004
7. Schedule 7	At the same time as the provisions covered by table item 2.	
8. Schedule 8	The day on which this Act receives the Royal Assent.	16 August 2004
9. Schedule 9, Part 1	1 January 2005.	1 January 2005



<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
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.	16 August 2004
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	
16. Schedule 9, item 121	At the same time as the provisions covered by table item 2.	
17. Schedule 9, item 122	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 122 commences immediately after those provisions	

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
18. Schedule 9, items 123 to 166	At the same time as the provisions covered by table item 2.	
19. Schedule 9, item 167	The day on which this Act receives the Royal Assent.	16 August 2004
20. Schedule 9, items 168 to 192	At the same time as the provisions covered by table item 2.	
21. Schedule 10	The day on which this Act receives the Royal Assent.	16 August 2004

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

### **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **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

**Schedule 1** Customs amendments

**Part 1** US originating goods

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non-originating materials and originating materials, are US originating goods.

- 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.

**153YA Interpretation**

*Definitions*

(1) In this Division:

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

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.

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

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

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.

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

***fuel*** has its ordinary meaning.

**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.

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

**indirect materials** means:

- (a) goods used in the production, testing or inspection of other goods, but that are not physically incorporated in the other goods; or
- (b) goods used in the operation or maintenance of buildings or equipment associated with the production of other goods;

including:

- (c) fuel; and
- (d) tools, dies and moulds; and
- (e) lubricants, greases, compounding materials and other similar goods; and
- (f) gloves, glasses, footwear, clothing, safety equipment and supplies for any of these things; and
- (g) catalysts and solvents.

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

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

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

**originating materials** means:

- (a) goods that are used in the production of other goods and that are US originating goods; or
- (b) goods that are used in the production of other goods and that are Australian originating goods; or
- (c) indirect materials.

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

## Schedule 1 Customs amendments

### Part 1 US originating goods

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

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

The Hungarian frozen pork meat and Brazilian spices are non-originating materials since they are produced in countries other than the US and Australia.

***produce*** means grow, raise, mine, harvest, fish, trap, hunt, manufacture, process, assemble or disassemble. ***Producer*** and ***production*** have corresponding meanings.

***recovered goods*** means goods in the form of individual parts that:

- (a) have resulted from the complete disassembly of goods which have passed their useful life or which are no longer useable due to defects; and
- (b) have been cleaned, inspected or tested (as necessary) to bring them into reliable working condition.

***remanufactured goods*** means goods that:

- (a) are produced entirely in the US; and
- (b) are classified to:
  - (i) Chapter 84, 85 or 87 (other than heading 8418, 8516 or 8701 to 8706), or to heading 9026, 9031 or 9032 of Chapter 90, of the Harmonized System; or
  - (ii) any other tariff classification prescribed by the regulations; and
- (c) are entirely or partially comprised of recovered goods; and
- (d) have a similar useful life, and meet the same performance standards, as new goods:
  - (i) that are so classified; and
  - (ii) that are not comprised of any recovered goods; and
- (e) have a producer's warranty similar to such new goods.

***Schedule 1 tariff table*** means the table in Schedule 1 to the *Customs (Australia-United States Free Trade Agreement) Regulations 2004*.

**Schedule 2 tariff table** means the table in Schedule 2 to the *Customs (Australia-United States Free Trade Agreement) Regulations 2004*.

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

**used** means used or consumed in the production of goods.

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

*Value of goods*

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

*Tariff classifications*

- (3) In specifying tariff classifications for the purposes of this Division, the regulations may refer to the following:
- (a) the Harmonized System;
  - (b) the Harmonized US Tariff Schedule.
- (4) Subsection 4(3A) does not apply for the purposes of this Division.

*Regulations*

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

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

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

- (1) Goods are **US originating goods** if they are wholly obtained or produced entirely in the US.
- (2) Goods are **wholly obtained or produced entirely in the US** if, and only if, the goods are:

**Schedule 1** Customs amendments

**Part 1** US originating goods

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- (a) minerals extracted in the US; or
- (b) plants grown in the US, or in the US and Australia, or products obtained from such plants; or
- (c) live animals born and raised in the US, or in the US and Australia, or products obtained from such animals; or
- (d) goods obtained from hunting, trapping, fishing or aquaculture conducted in the US; or
- (e) fish, shellfish or other marine life taken from the sea by ships registered or recorded in the US and flying the flag of the US; or
- (f) goods produced exclusively from goods referred to in paragraph (e) on board factory ships registered or recorded in the US and flying the flag of the US; or
- (g) goods taken from the seabed, or beneath the seabed, outside the territorial waters of the US by the US or a national of the US, but only if the US has the right to exploit that part of the seabed; or
- (h) goods taken from outer space by the US or a national of the US; or
- (i) waste and scrap that:
  - (i) has been derived from production operations in the US; or
  - (ii) has been derived from used goods that are collected in the US and that are fit only for the recovery of raw materials; or
- (j) recovered goods derived in the US and used in the US in the production of remanufactured goods; or
- (k) goods produced entirely in the US exclusively from goods referred to in paragraphs (a) to (i) or from their derivatives.



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

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

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

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

**153YD Simplified outline**

The following is a simplified outline of this Subdivision:

- 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 those non-originating materials satisfies the transformation test (see subsection (8)).

Note 1: Paragraph (2)(b) relates to Article 5.2 (De Minimis) of the Agreement.

Note 2: The value of the non-originating materials is to be worked out in accordance with the regulations: see subsection 153YA(2).

- (3) However, the first requirement does not apply if:
  - (a) an alternative requirement to the change in tariff classification is also specified in column 3 of the Schedule 1 tariff table opposite the final classification for the goods; and
  - (b) that alternative requirement is satisfied.

*Second requirement*

- (4) Subject to subsection (5), the second requirement applies only if a regional value content requirement is specified in column 3 of the Schedule 1 tariff table opposite the final classification for the goods.

The second requirement is that the goods satisfy that regional value content requirement.

- (5) However, the second requirement does not apply if:
- (a) an alternative requirement to the regional value content requirement is also specified in column 3 of the Schedule 1 tariff table opposite the final classification for the goods; and
  - (b) that alternative requirement is satisfied.
- (6) The regulations may prescribe different regional value content requirements for different kinds of goods.

*Third requirement*

- (7) The third requirement is that the goods satisfy any other requirement that is specified in, or referred to in, column 3 of the Schedule 1 tariff table opposite the final classification for the goods.

*Transformation test*

- (8) A non-originating material satisfies the transformation test if:
- (a) it satisfies the change in tariff classification that is specified in column 3 of the Schedule 1 tariff table opposite the final classification for the goods; or
  - (b) it does not satisfy the change in tariff classification mentioned in paragraph (a), but it was produced entirely in the US, or entirely in the US and Australia, from other non-originating materials, and each of those materials satisfies the transformation test (including by one or more applications of this subsection).

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

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

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

Goods are *US originating goods* if:

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- (a) 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
- (b) they are goods that are classified to any of Chapters 28 to 40 of the Harmonized System; and
- (c) a tariff classification (the *final classification*) that is specified in column 2 of the Schedule 1 tariff table applies to the goods; and
- (d) before the tariff classifications in column 2 of that table in relation to Chapter 28 or 39 of the Harmonized System, the regulations specify particular rules in column 3 of that table; and
- (e) those rules apply in relation to the final classification for the goods; and
- (f) the goods satisfy those rules.

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

**153YG Simplified outline**

The following is a simplified outline of this Subdivision:

- 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).

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

- (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.

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

*First requirement*

- (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;
    - (ii) if one or more of the non-originating materials are prescribed for the purposes of this paragraph—each of those non-originating materials satisfies the transformation test (see subsection (7)).
- Note: Paragraph (2)(b) relates to paragraphs 6 and 7 (De Minimis) of Article 4.2 of the Agreement.
- (3) In relation to goods classified to Chapter 61, 62 or 63 of the Harmonized System, paragraph (2)(a) is to be applied by applying:
- (a) for goods covered by Chapter 61 of the Harmonized System—Chapter Rule 2 for Chapter 61 that is set out in the Schedule 2 tariff table; and

**Schedule 1** Customs amendments

**Part 1** US originating goods

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- (b) for goods covered by Chapter 62 of the Harmonized System—Chapter Rule 3 for Chapter 62 that is set out in the Schedule 2 tariff table; and
- (c) for goods covered by Chapter 63 of the Harmonized System—Chapter Rule 1 for Chapter 63 that is set out in the Schedule 2 tariff table.

*Second requirement*

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

*Goods put up in a set for retail sale*

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

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

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

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

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

*Transformation test*

- (7) A non-originating material satisfies the transformation test if:

- (a) it satisfies the change in tariff classification that is specified in column 3 of the Schedule 2 tariff table opposite the final classification for the goods; or
- (b) it does not satisfy the change in tariff classification mentioned in paragraph (a), but it was produced entirely in the US, or entirely in the US and Australia, from other non-originating materials, and each of those materials satisfies the transformation test (including by one or more applications of this subsection).

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

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

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

Goods are *US originating goods* if:

- (a) 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
- (b) they are goods that are classified to Chapter 62 of the Harmonized System; and
- (c) either:
  - (i) in any case—the goods satisfy Chapter Rule 2 for Chapter 62 that is set out in the Schedule 2 tariff table; or
  - (ii) in the case of goods that are classified to subheading 6205.20 or 6205.30 of Chapter 62 of the Harmonized System—the goods satisfy the subheading rule for that subheading that is set out in the Schedule 2 tariff table.

## Subdivision F—Other US originating goods

### 153YJ Standard accessories, spare parts and tools

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

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

## Subdivision G—Packaging materials and containers

### 153YK Packaging materials and containers

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



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

## **Subdivision H—Consignment**

### **153YL Consignment**

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

## Part 2—Verification powers

### *Customs Act 1901*

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

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

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

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

#### **4 Subsection 4C(3)**

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

#### **5 Subsection 4C(5)**

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

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

Insert:

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

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

- (1) If textile and clothing goods are exported to the US, an authorised officer may request a person who:
  - (a) is the exporter or producer of the goods; or
  - (b) is involved in the transportation of the goods from Australia to the US;

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

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

*Disclosing records or answers to US*

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

*Definitions*

- (4) In this section:

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

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.

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

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

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

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

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

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

Repeal the heading, substitute:

## Subdivision J—General powers to monitor and audit

### 8 After Subdivision J of Division 1 of Part XII

Insert:

#### Subdivision JA—Powers to monitor and audit— Australia-United States Free Trade Agreement

##### 214BAA Simplified outline

The following is a simplified outline of this Subdivision:

- 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.

##### 214BAB Definitions

In this Subdivision:

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

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.

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

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

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

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

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

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

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

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

#### **214BAC AUSFTA verification powers**

- (1) For the purposes of this Subdivision, the following are the **AUSFTA verification powers**:
  - (a) the power to search premises;
  - (b) the power to take photographs (including a video recording), or make sketches, of premises or anything at premises;
  - (c) the power to inspect, examine, count, measure, weigh, gauge, test or analyse, and take samples of, anything in or on premises;
  - (d) the power to inspect any document or record in or on premises;
  - (e) the power to take extracts from, or make copies of, any document or record in or on premises;
  - (f) the power to take into or onto premises any equipment or material reasonably necessary for the purpose of exercising a power under paragraph (a), (b), (c), (d) or (e);

- (g) the power to test and operate record-keeping, accounting, computing or other operating systems of any kind that are at premises and may be used to generate or record information or documents of a kind that may be communicated to Customs;
- (h) the powers in subsections (2) and (3).

*Operation of equipment*

- (2) For the purposes of this Subdivision, the **AUSFTA verification powers** include the power to operate equipment at premises to see whether:
  - (a) the equipment; or
  - (b) a disk, tape or other storage device that:
    - (i) is at the premises; and
    - (ii) can be used with the equipment or is associated with it;contains information that is relevant to the verification of information relating to the export, production or transportation of textile and clothing goods that are exported to the US.

*Removing documents and disks etc.*

- (3) For the purposes of this Subdivision, the **AUSFTA verification powers** include the following powers in relation to information described in subsection (2) that is found in the exercise of the power under that subsection:
  - (a) the power to operate equipment or other facilities at the premises to put the information in documentary form and remove the documents so produced;
  - (b) the power to operate equipment or other facilities at the premises to transfer the information to a disk, tape or other storage device:
    - (i) that is brought to the premises for the exercise of the power; or
    - (ii) that is at the premises and the use of which for the purpose has been agreed in writing by the occupier of the premises;and to remove the disk, tape or other storage device from the premises.

### **214BAD Appointment of verification officers**

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

*Who may be authorised to be a verification officer*

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

*Form of authorisation*

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

*AUSFTA verification powers to be used only as authorised*

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

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

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

*Occupier's consent required*

- (2) However, a verification officer must not enter premises under this section unless the occupier of the premises consents to the officer entering the premises and exercising AUSFTA verification powers in or on the premises.
- (3) Before obtaining a consent under subsection (2), a verification officer must give to the occupier of the premises a written notice stating:
  - (a) that the officer wishes to enter the premises and exercise AUSFTA verification powers in or on the premises; and
  - (b) the period during which the officer wishes to exercise the powers; and
  - (c) the name of any US customs official who the officer proposes will accompany the officer.
- (4) Before obtaining a consent under subsection (2), a verification officer must tell the occupier of the premises that the occupier may refuse consent.
- (5) An occupier of premises may express a consent to be limited to entry to the premises, and to the exercise of AUSFTA verification powers in or on the premises, during a particular period unless the occupier withdraws the consent before the end of that period.
- (6) An occupier's consent that is not so limited has effect in relation to any entry to the premises, and to any exercise of AUSFTA verification powers in or on the premises, until the occupier withdraws the consent.

*Verification officer must leave premises if consent withdrawn*

- (7) A verification officer must leave the premises if the occupier withdraws the consent.

*Consent to be voluntary*

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



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

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

*Notice setting out the occupier's rights and obligations*

- (10) Before exercising AUSFTA verification powers in respect of premises, a verification officer must give to the occupier of the premises a written notice setting out the occupier's rights and obligations under this Subdivision.

*Production of identity card*

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

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

*Occupier's consent required*

- (1) In entering premises and exercising AUSFTA verification powers, a verification officer may be accompanied by one or more US customs officials, but only if the officer obtains the consent of the occupier of the premises to those officials accompanying the officer.
- (2) Before obtaining such a consent, a verification officer must tell the occupier of the premises that the occupier may refuse consent.

*US customs officials must leave premises if consent withdrawn*

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

*Consent to be voluntary*

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

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

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

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

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

**214BAH Verification officer may ask questions**

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

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

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

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

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

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

A person may operate electronic equipment at premises in order to exercise a power under this Subdivision only if he or she believes on

reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

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

- (1) This section applies if:
  - (a) as a result of equipment being operated as mentioned in section 214BAC:
    - (i) damage is caused to the equipment; or
    - (ii) the data recorded on the equipment is damaged; or
    - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
  - (b) the damage or corruption occurs because:
    - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
    - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees and agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):

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

## **Schedule 2—Agricultural and veterinary chemicals amendments**

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

#### *Agricultural and Veterinary Chemicals Code Act 1994*

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

Insert:

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

##### **Subdivision A—Preliminary**

#### **34B Explanation of Division**

- (1) This Division limits for a period the use the NRA can make of information given to it:
  - (a) in connection with an application under section 10 or 27 relating to:
    - (i) approval of an active constituent for a chemical product;  
or
    - (ii) registration of a chemical product; or
    - (iii) approval of a label for a container for a chemical product; or
  - (b) under section 161 in connection with a registered chemical product.
- (2) During the period, the NRA cannot use the information for granting another application, or for a reconsideration of an approval or registration, unless:
  - (a) the NRA is given a written statement made by a person who can authorise the use of the information consenting to the use;  
or
  - (b) certain other conditions are met.

- (3) The object of limiting use of the information in this way is to encourage innovation by making it easier for a person who made an investment in finding out the information to get a return on that investment.

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

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

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

<b>Limits on use of information</b>		
<b>The NRA must not use this information:</b>	<b>During this period:</b>	<b>For this purpose:</b>
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)

**Schedule 2** Agricultural and veterinary chemicals amendments  
**Part 1** Limits on use of information

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

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

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

- (2) This section applies only to information given to the NRA:
- (a) in connection with an application made after the commencement of this section; or
  - (b) under section 161 in connection with a chemical product that was registered as a result of an application made after the commencement of this section.
- (3) The use of information in contravention of subsection (1) for making a decision does not affect the validity of the decision.

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

### **Subdivision C—Exceptions to limits on use of information**

#### **34D Exceptions**

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

#### *Evidence of consent for use*

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

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

*Use in the public interest*

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

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

*Information does not favour the applicant or interested person*

- (4) Another condition is that:
- (a) the decision relates to:
    - (i) a proposed or existing approval of an active constituent for a proposed or existing chemical product; or
    - (ii) a proposed or existing registration of a proposed or existing chemical product; and
  - (b) the information meets a condition in paragraph 160A(4)(b) or (c) or 161(2)(b) or (c) (which are about showing that use or dealing with the product may have adverse effects or that the product may be ineffective), whether or not the information was given to the NRA under section 160A or 161.

*Identical information whose use is not limited*

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

*Information given to NRA in connection with certain applications*

- (6) Another condition is that the application mentioned in subsection 34C(1) was one of the following:
- (a) an application for approval, as an active constituent for a chemical product, of a substance that was a previously endorsed active constituent on the commencement of this Division;
  - (b) an application for the variation of the relevant particulars or conditions of the approval of an active constituent for a chemical product;
  - (c) an application for the registration of a companion animal product each active constituent for which was a previously



endorsed active constituent at the time of the preliminary assessment of the application under section 11A;

- (d) an application for variation of the relevant particulars or conditions of the registration of a companion animal product;
- (e) an application for the approval of a label for a container for a companion animal product each active constituent of which was a previously endorsed active constituent at the time of the preliminary assessment of the application under section 11A;
- (f) an application for variation of the relevant particulars or conditions of the approval of a label for a container for a companion animal product.

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

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

(b) states that belief in the notice.

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

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

- (1) Subsection 34C(1) prohibits the NRA from using, during the period described in an item of the following table, information that:
- (a) was given to the NRA by the applicant or an approved person in connection with an application described in the item; and
  - (b) was given as required by the NRA or section 160A; and
  - (c) was relied on by the NRA to grant the application.
- The period starts when the application was granted.

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<b>Period for which the NRA must not use the information</b>		
	<b>Application</b>	<b>Period</b>
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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<b>Period for which the NRA must not use the information</b>		
	<b>Application</b>	<b>Period</b>
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

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Note 1: This section has effect for the purposes of item 3 of the table in subsection 34C(1) (and not for any of the other items in that table).

Note 2: This section is not relevant to information if section 34D provides an exception to the prohibition in subsection 34C(1) on the NRA using the information.

*Extension of 8-year limits*

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

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

### **Subdivision E—Ancillary provisions**

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

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

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

## 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:

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<b>Acknowledgment of an application</b>	
<b>If:</b>	<b>The application is acknowledged when:</b>
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

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#### **4 Section 3 of the Schedule**

Insert:

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

#### **5 Section 3 of the Schedule**

Insert:

*companion animal product* means a veterinary chemical product solely for administration or application to animals that:

- (a) are not food-producing species; and
- (b) are not prescribed by the regulations.

#### **6 Section 3 of the Schedule**

Insert:

*previously endorsed active constituent* for a chemical product at a particular time means a substance that:

- (a) before that time, had been approved or registered (however described) under a law of the Commonwealth or a State or Territory as an active constituent for a chemical product; or
- (b) was an active constituent for a chemical product that, before that time, had been approved or registered (however described) under a law of the Commonwealth or a State or Territory as a chemical product;

whether or not the approval or registration was a result of an application by a particular person.

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

Insert:

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

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

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

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

Insert:

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

- (1) This section applies if:
- (a) information was given to the NRA in connection with an application made after the commencement of this section for registration of an agricultural chemical product (the *first product*) containing an active constituent that was not a previously endorsed active constituent at the time of registration of the first product; and
  - (b) the information related to the first product or the active constituent and a matter that:
    - (i) is described in paragraph 14(3)(e) (except subparagraph 14(3)(e)(iv)) or paragraph 14(3)(f); or
    - (ii) is prescribed by the regulations; and
  - (c) the information was disclosed:
    - (i) by the Commonwealth, a State or a Territory; or
    - (ii) by an authority of the Commonwealth, a State or a Territory (including the NRA); or
    - (iii) by anyone acting on behalf of the Commonwealth, a State, a Territory or an authority of the Commonwealth, a State or a Territory; and
  - (d) the information was not publicly available before the disclosure; and
  - (e) as a result of the disclosure, the interested person, or an approved person, for an application for registration of an agricultural chemical product (the *second product*) that is the same as, or similar to, the first product, seeks to have the NRA use the information in granting the application.



- (2) For 10 years after the first day on which the first product was registered, the NRA must not use the information to grant the application for registration of the second product if:
  - (a) the registration of the second product would be commercially unfair; and
  - (b) the authorising party for the information does not consent to the use.
- (3) The use of information in contravention of subsection (2) for granting the application for registration of the second product does not affect the validity of the grant or of the registration of the second product.
- (4) An action or proceeding does not lie against any of the following for any loss directly or indirectly sustained because of the use of information in contravention of subsection (2):
  - (a) the Commonwealth;
  - (b) the NRA;
  - (c) a person who is or has been:
    - (i) a director of the NRA; or
    - (ii) the Chief Executive Officer of the NRA; or
    - (iii) a delegate of the NRA; or
    - (iv) a member of the staff of the NRA.
- (5) This section has effect in addition to Division 4A.

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

Repeal the subparagraph, substitute:

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

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

Insert:

### **28A Preliminary assessment of application**

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

an application lodged under section 11 and compliance with subsection 11(1).

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

- (1) As soon as practicable after an application is acknowledged, the NRA must cause to be published a summary of the application, unless satisfied that the variation applied for does not relate to use of or dealing with a proposed or existing chemical product.
- (2) The summary must include the details relating to the application that are prescribed by the regulations (if any).

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

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

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

Insert:

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

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

Insert:

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

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

Insert:

- (2A) Despite paragraph (1)(ea), an application may not be made to the Administrative Appeals Tribunal for review of the information decision if the NRA stated in the notice of that decision given under section 34E that the NRA believed it was necessary to make the substantive decision before the end of 28 days after giving the notice, to prevent imminent risk to public health or occupational health or safety.

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

### *Agricultural and Veterinary Chemicals Code Act 1994*

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

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

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

Omit “NRA”, substitute “APVMA”.

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

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

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

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

Omit “NRA”, substitute “APVMA”.

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

Omit “NRA”, substitute “APVMA”.

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

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

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

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

#### **21 Section 167 of the Schedule**

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

## **Schedule 3—Australian geographical indications for wine amendments**

### *Australian Wine and Brandy Corporation Act 1980*

#### **1 Subsection 4(1)**

Insert:

*Federal Court* means the Federal Court of Australia.

#### **2 Subsection 4(1)**

Insert:

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

#### **3 Subsection 4(1)**

Insert:

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

#### **4 Subsection 4(1)**

Insert:

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

#### **5 Subsection 4(1)**

Insert:

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

## 6 Subsection 4(1)

Insert:

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

## 7 Subsection 40P(1)

Repeal the subsection, substitute:

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

## 8 Subsection 40P(2)

Omit “function”, substitute “functions”.

## 9 Before section 40Q in Division 4 of Part VIB

Insert:

### Subdivision A—What this Division is about

#### 40PA What this Division is about

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

Note: Geographical indications in relation to wine manufactured in an agreement country are not determined under this Division. They are determined in the agreement between Australia and the agreement country.

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

## **Subdivision B—Powers of Committee to determine geographical indications**

### **10 After section 40Q**

Insert:

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

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

## **Subdivision C—Applications for determinations of geographical indications**

### **11 After section 40R**

Insert:

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

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

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

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

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

*Registered owner of a registered trade mark*

- (1) The registered owner of a registered trade mark may object to the determination of a proposed GI on one of the following grounds:
  - (a) that the trade mark consists of a word or expression that is identical to the proposed GI;
  - (b) that:
    - (i) the trade mark consists of a word or expression; and
    - (ii) the proposed GI is likely to cause confusion with that word or expression;
  - (c) that:
    - (i) the trade mark contains a word or expression; and
    - (ii) the proposed GI is likely to cause confusion with that word or expression; and
    - (iii) the owner has trade mark rights in that word or expression.
- (2) The owner may object on the ground specified in paragraph (1)(c) even if there are conditions or limitations entered on the Register of Trade Marks suggesting that the owner does not have trade mark rights to that word or expression.

*Trade mark pending*

- (3) If a person has an application pending for the registration of a trade mark under the *Trade Marks Act 1995*, the person may object to the determination of a proposed GI on one of the following grounds:
  - (a) that:
    - (i) the application was made in good faith; and



- (ii) the trade mark consists of a word or expression that is identical to the proposed GI; and
  - (iii) prima facie, the requirements under the *Trade Marks Act 1995* for accepting an application for registration of a trade mark would be satisfied in respect of the trade mark applied for;
- (b) that:
- (i) the application was made in good faith; and
  - (ii) the trade mark consists of a word or expression; and
  - (iii) the proposed GI is likely to cause confusion with that word or expression; and
  - (iv) prima facie, the requirements under the *Trade Marks Act 1995* for accepting an application for registration of a trade mark would be satisfied in respect of the trade mark applied for;
- (c) that:
- (i) the application was made in good faith; and
  - (ii) the trade mark contains a word or expression; and
  - (iii) the proposed GI is likely to cause confusion with that word or expression; and
  - (iv) prima facie, the requirements under the *Trade Marks Act 1995* for accepting an application for registration of a trade mark would be satisfied in respect of the trade mark applied for; and
  - (v) after registration, the applicant would have trade mark rights in the word or expression.

*Trade mark not registered*

- (4) If a person claims to have trade mark rights in a trade mark that is not registered, the person may object to the determination of a proposed GI on one of the following grounds:
- (a) that:
- (i) the trade mark consists of a word or expression that is identical to the proposed GI; and
  - (ii) the person has trade mark rights in that word or expression; and
  - (iii) the rights were acquired through use in good faith;

- (b) that:
  - (i) the trade mark consists of or contains a word or expression; and
  - (ii) the proposed GI is likely to cause confusion with that word or expression; and
  - (iii) the person has trade mark rights in that word or expression; and
  - (iv) the rights were acquired through use in good faith.

#### **40RC Consideration of objections**

*Notice of objection to be given to Committee*

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

the Registrar of Trade Marks must in writing notify the Committee of the receipt and terms of the objection.

*Registrar of Trade Marks to make decision on whether ground made out or not*

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

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

- (3) If:
  - (a) the Registrar of Trade Marks decides that the ground of objection is made out; and
  - (b) the Registrar of Trade Marks is satisfied that it is reasonable in the circumstances to recommend to the Committee that the proposed GI be determined despite the objection having been made out;

the Registrar of Trade Marks may make the recommendation. The recommendation must be in writing.

Note 1: For example, it may be reasonable for the Registrar of Trade Marks to make such a recommendation if the Registrar of Trade Marks is satisfied that the proposed GI was in use before the trade mark rights arose.

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

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

*Regulations*

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

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

*Notice to be given by Registrar of Trade Marks*

- (1) After the Registrar of Trade Marks has made a decision under section 40RC in relation to the proposed GI, the Registrar of Trade Marks must, in writing, inform the following of the outcome of the decision and of any recommendation that has been made under subsection 40RC(3):
- (a) the person who proposed the GI, if there was an application under section 40R for the GI;
  - (b) the person who objected to the determination of the proposed GI;
  - (c) the Committee.

*Notice to be given by Committee*

- (2) After receiving notice of a decision under subsection (1), the Presiding Member must cause a notice to be published:
- (a) setting out the proposed GI; and

- (b) stating that a decision of the Registrar of Trade Marks has been made in relation to the proposed GI; and
  - (c) setting out the terms of the decision and any recommendation made under subsection 40RC(3) in relation to the proposed GI.
- (3) The notice under subsection (2) is to be published in the manner that the Committee thinks appropriate.

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

- (1) If:
- (a) a decision has been made that a ground of objection to a proposed GI has been made out; and
  - (b) a person applies in writing to the Registrar of Trade Marks for a decision that circumstances have changed since that decision was made such that the ground of objection no longer exists;
- the Registrar of Trade Marks may, in writing, make a decision that the ground of objection no longer exists.
- Note: If the Registrar of Trade Marks makes a decision under this section, the Committee may determine the GI (see subsection 40SA(5)).
- (2) Regulations may set out the procedure to be followed in making a decision under subsection (1). The procedures may include the charging of fees, the holding of hearings and the taking of evidence.

#### **40RF Appeals**

- (1) An appeal lies to the Federal Court against a decision of the Registrar of Trade Marks, made under:
- (a) subsection 40RC(2) (a decision that a ground of objection is or is not made out); and
  - (b) subsection 40RC(3) (a recommendation that a proposed GI be determined or a refusal to make such a recommendation); and
  - (c) section 40RE (a decision that a ground of objection no longer exists or a refusal to make such a decision).
- (2) The jurisdiction of the Federal Court to hear and determine appeals against decisions of the Registrar of Trade Marks under this Act is

exclusive of the jurisdiction of any other court except the jurisdiction of the High Court under section 75 of the Constitution.

- (3) On hearing an appeal against a decision of the Registrar of Trade Marks under this Act, the Federal Court may do any one or more of the following:
  - (a) admit further evidence orally, or on affidavit or otherwise;
  - (b) permit the examination and cross-examination of witnesses, including witnesses who gave evidence before the Registrar of Trade Marks;
  - (c) order an issue of fact to be tried as it directs;
  - (d) affirm, reverse or vary the Registrar of Trade Marks's decision;
  - (e) give any judgment, or make any order, that, in all the circumstances, it thinks fit;
  - (f) order a party to pay costs to another party.
- (4) The Registrar of Trade Marks may appear and be heard at the hearing of an appeal to the Federal Court against a decision of the Registrar of Trade Marks.
- (5) Except with the leave of the Federal Court, an appeal does not lie to the Full Court of the Federal Court against a decision of a single judge of the Federal Court in the exercise of its jurisdiction to hear and determine appeals from decisions of the Registrar of Trade Marks.
- (6) The regulations may make provision about the practice and procedure of the Federal Court in a proceeding under this section, including provision:
  - (a) prescribing the time for starting the action or proceeding or for doing any other act or thing; or
  - (b) for an extension of that time.

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

A decision made under this Division does not:

- (a) create or affect a right under the *Trade Marks Act 1995* or at common law in respect of a trade mark; or

- (b) in any way pre-empt or affect a decision of the Registrar of Trade Marks under the *Trade Marks Act 1995* in respect of a pending application for the registration of a trade mark.

## Subdivision E—Determinations of geographical indications

### 12 Before section 40S

Insert:

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

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

*Grounds of objection not made out*

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

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

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

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

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

- (a) a recommendation has been made to the Committee under subsection 40RC(3) that the GI should be determined despite the ground of objection having been made out; and
- (b) all appeals against, or reviews of, the decision that the GI should be determined (if any) have been finalised; and
- (c) the decision standing after the appeals and reviews have been finalised is that the GI should be determined.

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

- (5) The Committee may determine a GI that is the subject of a decision that a ground of objection has been made out, if:
  - (a) a decision has been made under section 40RE that the ground of objection no longer exists; and
  - (b) all appeals against, or reviews of, the decision that the ground no longer exists (if any) have been finalised; and
  - (c) the decision standing after the appeals and reviews have been finalised is that the ground no longer exists.

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

Add:

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

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

Add:

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

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

Add:

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

## 16 Application

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

## 17 After Division 4 of Part VIB

Insert:

### **Division 4A—Omission of registered geographical indications**

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

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

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

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

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

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

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



#### **40ZAC Application**

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

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

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

#### **40ZAE Notice by Committee**

If the Committee:

- (a) receives an application under section 40ZAC; or
- (b) proposes on its own initiative that an Australian GI should be omitted from the Register on the ground that the GI is not in use;

the Presiding Member of the Committee must cause a notice to be published in the manner that the Committee thinks appropriate:

- (c) setting out the Australian GI; and
- (d) stating that an application under section 40ZAC has been made, or that the Committee is proposing to make a determination to omit the GI on its own initiative; and

- (e) inviting persons to make written submissions to the Committee in relation to the application or proposal within the period of not less than one month that is stated in the notice.

#### **40ZAF Determination by Committee**

- (1) After considering any submissions made to it in response to a notice under section 40ZAE, the Committee must determine whether to omit the Australian GI on the ground that the GI is not in use.
- (2) The Committee may, in writing, make a determination to omit the GI on that ground if the Committee is satisfied of the following matters:
  - (a) that the GI has been registered for a period of more than 5 years before the date of the notice under section 40ZAE;
  - (b) that the GI has not been used during the period of 3 years before the date of the notice under section 40ZAE (see subsection (3));
  - (c) that no special circumstances exist in relation to the region or locality indicated by the GI that would preclude the making of a determination to omit the GI from the Register (see subsection (4)).

##### *Meaning of GI not been used*

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

##### *Meaning of special circumstances*

- (4) For the purposes of paragraph (2)(c), special circumstances exist if:
  - (a) the region or locality indicated by the GI has been affected by fire, drought or some other disaster; and
  - (b) as a result of being so affected, there has not been a production of wine for commercial use originating in the

region or locality indicated by the GI during the period of 3 years immediately before the date of the notice under section 40ZAE.

#### **40ZAG Notice of determination**

The Presiding Member of the Committee must cause:

- (a) a notice to be given of the Committee's determination to the applicant (if any); and
- (b) if the determination made is to omit the Australian GI from the Register—a notice setting out the terms of the determination to be published in the manner that the Committee thinks appropriate.

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

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

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

- (1) If the determination made by the Committee under section 40ZAF is a determination to omit the Australian GI from the Register, the Presiding Member must give a copy of the determination to the Registrar so that particulars of the determination can be omitted from the Register:
  - (a) if an application is made to the Administrative Appeals Tribunal under section 40ZAH for review of the

determination—as soon as practicable after the decision of the Tribunal on the review is given; or

- (b) otherwise—as soon as practicable after the 28th day after notice of the determination is published in accordance with section 40ZAG.
- (2) When the Presiding Member gives a copy of the determination to the Registrar, the Presiding Member must also give a copy to the Chairperson of the Corporation.
  - (3) The determination of the Committee takes effect on the day on which particulars of the GI are omitted from the Register.

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

#### **40ZAJ Application**

- (1) A person (the *applicant*) may apply in the prescribed form to the Committee to omit an Australian GI from the Register on the ground that the GI is no longer required.
- (2) The application must be accompanied by a written statement from each of the following organisations supporting the application:
  - (a) a declared winemakers' organisation (if any);
  - (b) a declared wine grape growers' organisation (if any);
  - (c) the organisation or organisations representing winemakers in a State or Territory wholly or partly covered by the region or locality in Australia indicated by the GI;
  - (d) the organisation or organisations representing growers of wine grapes in a State or Territory wholly or partly covered by the region or locality in Australia indicated by the GI.
- (3) The application must also be accompanied by such fee (if any) charged by the Corporation for the making of such an application.
- (4) The Corporation may waive the fee.
- (5) If:
  - (a) the application is not accompanied by the fee, and the fee is not waived by the Corporation; or

(b) the application is not accompanied by the statements referred to in subsection (2);  
then the application is taken never to have been made.

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

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

#### **40ZAL Notice by Committee**

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

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

#### **40ZAM Meaning of interested person**

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

- (a) a winemaker who makes wine for commercial purposes from grapes grown in the region or locality indicated by the GI; or
- (b) a grower of grapes who grows wine grapes in the region or locality indicated by the GI; or
- (c) a person who owns or leases a tract of land that is:
  - (i) 5 hectares or more in size and situated in the region or locality indicated by the GI; and
  - (ii) capable of being used to grow grapes for commercial wine production; or
- (d) a person who:
  - (i) has a mortgage, lien or other commercial interest over, or in relation to, a vineyard or other property used in the production of wine that is situated in the region or locality indicated by the GI; and
  - (ii) has the agreement of the owner of the property to that person making a submission to the Committee under section 40ZAL.

#### **40ZAN Determination by Committee**

*No submission made*

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

*Submission made*

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

#### **40ZAO Notice of determination**

The Presiding Member of the Committee must cause:

- (a) notice to be given of the Committee's determination to the applicant; and

- (b) a notice setting out the terms of the determination to be published in any manner that the Committee thinks appropriate.

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

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

## 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.



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

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

(4) In this section:

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

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

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

### **16ZF Compliance Committee of eligible foreign life insurance company**

- (1) A committee is the **Compliance Committee** of an eligible foreign life insurance company if:
- (a) the members of the committee have powers of management in relation to the Australian branch of the company that carries out life insurance business in Australia; and
  - (b) those powers of management are sufficient to enable those members to ensure that the company complies with this Act; and
  - (c) the committee is established and operated in accordance with requirements set out in the prudential standards.
- (2) The prudential standards may set out the following requirements in relation to the establishment and operation of Compliance Committees:
- (a) requirements relating to the composition of Compliance Committees;
  - (b) requirements relating to the resignation of members of Compliance Committees;

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

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

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

**2 Paragraph 31(c)**

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

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

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

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

Add:

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

**5 At the end of section 76**

Add:

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

**6 At the end of section 92**

Add:

- (5) In this section:

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

**7 At the end of section 113**

Add:

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

**8 At the end of section 165**

Add:

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

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

Add:

- (10) In this section:

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

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

Add:

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

**11 After subsection 235(1)**

Insert:

- (1A) If a life company that is an eligible foreign life insurance company has engaged, is engaging, or proposes to engage, in any conduct in contravention of this Act, of a direction given under this Act or of a condition imposed on the registration of the company, the Court may grant an injunction:
- (a) restraining a member or members of the Compliance Committee of the company from doing anything that would result in the company engaging in the conduct; or
  - (b) if the Court thinks it desirable to do so, requiring a member or members of the Compliance Committee of the company to do a particular act.

**12 After subsection 235(2)**

Insert:

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

**13 Subsection 235(3)**

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

**14 Subsection 235(5)**

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

**15 Subsection 235(7)**

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

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

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

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

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

**18 Subsection 235(8)**

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

**19 After subsection 242(1)**

Insert:

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

**20 At the end of section 245**

Add:

(8) In this section:

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

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

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

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

Add:

(c) an eligible foreign life insurance company.

**23 Schedule**

Insert:

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

**24 Schedule**

Insert:

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

## 25 Schedule

Insert:

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

## **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)**

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

**7 Subsection 13B(5)**

Omit “In determining whether a corporation is an exempt corporation in relation to the application of section 20, 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 20, the value of a corporation’s total assets”.

**8 Subsection 13B(6)**

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

**9 After Part I**

Insert:

**Part IA—Exempt foreign investments**

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

- (1) Section 18 applies in relation to a prescribed corporation as if neither of the following were a foreign person for the purposes of that section:
  - (a) a prescribed foreign investor that is covered by subsection 17B(1) or (2) in relation to the corporation;
  - (b) a prescribed foreign government investor that is covered by subsection 17C(1) in relation to the corporation.



- (2) Section 20 applies in relation to an Australian corporation as if neither of the following were a foreign person for the purposes of that section:
  - (a) a prescribed foreign investor that is covered by subsection 17B(1) or (2) in relation to the corporation;
  - (b) a prescribed foreign government investor that is covered by subsection 17C(1) in relation to the corporation.
- (3) Sections 19 and 21 apply in relation to a business as if neither of the following were a foreign person for the purposes of those sections:
  - (a) a prescribed foreign investor that is covered by subsection 17B(3) in relation to the business;
  - (b) a prescribed foreign government investor that is covered by subsection 17C(2) in relation to the business.
- (4) Section 26 applies in relation to an Australian corporation as if neither of the following were a person covered by that section:
  - (a) a prescribed foreign investor that is covered by subsection 17B(1) or (2) in relation to the corporation;
  - (b) a prescribed foreign government investor that is covered by subsection 17C(1) in relation to the corporation.
- (5) In applying section 18, 19, 20, 21 or 26 in relation to an entity that is neither a prescribed foreign investor nor a prescribed foreign government investor, do not apply subsection (1), (2), (3) or (4) for the purposes of:
  - (a) determining whether 2 or more persons (whether or not those persons are associates) hold an aggregate controlling interest in a corporation; or
  - (b) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to control an amount of the voting power in a corporation; or
  - (c) determining whether 2 or more persons (whether or not those persons are associates) together hold interests in the issued shares in a corporation; or
  - (d) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to determine the policy of a business or corporation.

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

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

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

- (1) A prescribed foreign government investor is covered by this subsection in relation to a corporation if:
  - (a) 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
  - (b) 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 government investor is covered by this subsection in relation to a business if the value of the total assets of the business, determined under section 13B, does not exceed the amount ascertained in accordance with regulations made for the purposes of this subsection.
- (3) Regulations made for the purposes of a particular provision of this section may provide for different amounts for different prescribed foreign government investors, depending on all or any of the following:
  - (a) the kind of prescribed foreign government investor concerned;
  - (b) in relation to subsection (1)—the kind of corporation concerned;
  - (c) in relation to subsection (2)—the kind of business concerned;
  - (d) any other matter.
- (4) Regulations made for the purposes of a particular provision of this section may provide for a method for indexing an amount.
- (5) Subsections (3) and (4) do not limit the regulations that may be made for the purposes of this section.

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

- (1) Section 18 applies in relation to a financial sector company as if a prescribed foreign investor covered by subsection (3) were not a foreign person for the purposes of that section.
- (2) Section 26 applies in relation to a financial sector company as if a prescribed foreign investor covered by subsection (3) were not a person covered by that section.
- (3) A prescribed foreign investor is covered by this subsection if the conditions specified in the regulations are satisfied in relation to the prescribed foreign investor.
- (4) In applying section 18 or 26 in relation to an entity that is not a prescribed foreign investor covered by subsection (3), do not apply subsection (1) or (2) for the purposes of:
  - (a) determining whether 2 or more persons (whether or not those persons are associates) hold an aggregate controlling interest in a corporation; or
  - (b) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to control an amount of the voting power in a corporation; or
  - (c) determining whether 2 or more persons (whether or not those persons are associates) together hold interests in the issued shares in a corporation; or
  - (d) determining whether 2 or more persons (whether or not those persons are associates) together are in a position to determine the policy of a business or corporation.
- (5) In this section:

*financial sector company* has the same meaning as in the *Financial Sector (Shareholdings) Act 1998*.

**17E Prescribed foreign investor**

- (1) An entity is a *prescribed foreign investor* if:
  - (a) the conditions specified in the regulations are satisfied in relation to the entity; and
  - (b) the entity is not a foreign government investor.

- (2) The conditions specified in the regulations for the purposes of subsection (1) may include any or all of the following kinds of conditions:
- (a) a condition that the entity be a national of a specified foreign country;
  - (b) a condition that the entity be incorporated under the law of a specified foreign country, or a specified part of a foreign country;
  - (c) a condition that the entity be constituted or organised under the law of a specified foreign country, or a specified part of a foreign country.

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

- (3) Subsection (2) does not limit the regulations that may be made for the purposes of subsection (1).
- (4) In this section:  
*entity* includes an individual.

#### **17F Foreign government investor**

An entity is a *foreign government investor* if:

- (a) the entity is:
  - (i) a body politic of a foreign country; or
  - (ii) a body politic of part of a foreign country; or
  - (iii) a part of a body politic mentioned in subparagraph (i) or (ii); or
- (b) the entity is controlled by an entity mentioned in paragraph (a); or
- (c) an entity mentioned in paragraph (a) holds an interest in the entity that satisfies the conditions specified in the regulations.

#### **17G Prescribed foreign government investor**

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

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

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

#### **17H Prescribed sensitive sector**

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

- (a) the conditions specified in the regulations are satisfied in relation to the prescribed foreign investor; and
- (b) the conditions specified in the regulations are satisfied in relation to the kind of business activity.

## Schedule 6—Commonwealth authorities and companies amendments

### *Commonwealth Authorities and Companies Act 1997*

#### **1 After section 47**

Insert:

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

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



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

## 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).

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

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

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

Insert:

- (aa) if goods are not therapeutic devices—the application is accompanied by the certificate required under subsection 26B(1); and

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

Insert:

- (1A) To avoid doubt, if:
- (a) an application is made for the listing of therapeutic goods in relation to a person in accordance with section 23; and
  - (b) the application is accompanied by the certificate required under subsection 26B(1); and
  - (c) the other requirements in subsection (1) are met;
- the Secretary must list the goods under subsection (1) without inquiring into the correctness of the certificate.
- (1B) Civil proceedings do not lie against the Secretary (or a delegate of the Secretary) in respect of loss, damage or injury of any kind suffered by another person as a result of the Secretary (or the delegate) listing therapeutic goods in relation to a person in reliance on a certificate required under subsection 26B(1).

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

Insert:

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

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

Insert:

- (1A) To avoid doubt, if:
  - (a) an application is made for the listing of a medicine in relation to a person in accordance with section 23; and
  - (b) the application is accompanied by the certificate required under subsection 26B(1); and
  - (c) the other requirements in subsection (1) are met;the Secretary must list the medicine under subsection (1) without inquiring into the correctness of the certificate.
- (1B) Civil proceedings do not lie against the Secretary (or a delegate of the Secretary) in respect of loss, damage or injury of any kind suffered by another person as a result of the Secretary (or the delegate) listing a medicine in relation to a person in reliance on a certificate required under subsection 26B(1).

## **6 After section 26A**

Insert:

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

- (1) The certificate required by this subsection is either:
  - (a) a certificate to the effect that the applicant, acting in good faith, believes on reasonable grounds that it is not marketing, and does not propose to market, the therapeutic goods in a manner, or in circumstances, that would infringe a valid claim of a patent that has been granted in relation to the therapeutic goods; or
  - (b) a certificate to the effect that:
    - (i) a patent has been granted in relation to the therapeutic goods; and
    - (ii) the applicant proposes to market the therapeutic goods before the end of the term of the patent; and

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

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

- (2) A person is guilty of an offence if:
- (a) the person gives a certificate required under subsection (1); and
  - (b) the certificate is false or misleading in a material particular.

Maximum penalty: 1,000 penalty units.

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

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

## **26C Certificates required in relation to patent infringement proceedings**

- (1) This section applies if:
- (a) a person gives a certificate required under subsection 26B(1) in relation to therapeutic goods; and
  - (b) another person (the *second person*) intends to commence proceedings under the *Patents Act 1990* against the person referred to in paragraph (1)(a) for infringement of a patent that has been granted in relation to the therapeutic goods (the *proceedings*).
- (2) The second person, before the date upon which the proceedings are commenced, must give to the Secretary and to the person referred to in paragraph (1)(a) the certificate required by subsection (3).
- (3) The certificate required by this subsection is a certificate to the effect that the proceedings:
- (a) are to be commenced in good faith; and

- (b) have reasonable prospects of success; and
- (c) will be conducted without unreasonable delay.

The certificate must be signed by, or on behalf of, the second person and must be in a form approved by the Secretary.

- (4) For the purpose of paragraph (3)(b), proceedings have reasonable prospects of success if:
  - (a) the second person had reasonable grounds in all the circumstances known to the second person, or which ought reasonably to have been known to the second person (in addition to the fact of grant of the patent), for believing that he or she would be entitled to be granted final relief by the court against the person referred to in paragraph (1)(a) for infringement by that person of the patent; and
  - (b) the second person had reasonable grounds in all the circumstances known to the second person, or which ought reasonably to have been known to the second person (in addition to the fact of grant of the patent), for believing that each of the claims, in respect of which infringement is alleged, is valid; and
  - (c) the proceedings are not otherwise vexatious or unreasonably pursued.
- (5) The person referred to in paragraph (1)(a), with leave of the court, or the Attorney-General, may apply to a prescribed court for an order that the second person pay to the Commonwealth a pecuniary penalty if the second person gives a certificate required under subsection (3) and:
  - (a) the certificate is false or misleading in a material particular; or
  - (b) the second person breaches an undertaking given in the certificate.

Maximum penalty: \$10,000,000.

- (6) When determining the extent of a pecuniary penalty to be ordered pursuant to subsection (5), the court must take into account:
  - (a) any profit obtained by the second person; and
  - (b) any loss or damage suffered by any person;by reason of the second person exploiting the patent during the proceedings.

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(7) For the avoidance of doubt, subsection (6) does not limit the matters the court may take into account when determining a pecuniary penalty ordered pursuant to subsection (5).

(8) If:

- (a) the second person has sought and obtained in the proceedings an interlocutory injunction restraining the person referred to in paragraph (1)(a) from infringing a patent; and
- (b) section 26D does not apply; and
- (c) a prescribed court declares that the second person has given a certificate required under subsection (3); and
- (d) a prescribed court declares that:
  - (i) the certificate is false or misleading in a material particular; or
  - (ii) the second person has breached an undertaking given in the certificate;

the prescribed court may, pursuant to this section, order that the second person pay to the Commonwealth, a State or a Territory compensation for any damages sustained or costs incurred by the Commonwealth, a State or a Territory as a result of the grant of the interlocutory injunction.

(9) In this section:

*prescribed court* has the same meaning as in the *Patents Act 1990*.

## **26D Requirements for interlocutory injunction**

(1) This section applies where:

- (a) an applicant gives notice to a patentee in accordance with subparagraph 26B(1)(b)(iii); and
- (b) the patentee and/or its exclusive licensee (in this section the party or parties is or are referred to as the *patentee*) applies to a prescribed court for an interlocutory injunction to restrain the applicant from marketing the therapeutic goods the subject of the application on the ground that such conduct will constitute an infringement of its patent.

(2) An application for interlocutory relief in accordance with subsection (1) may not be instituted unless the patentee has first notified the

Attorney-General of the Commonwealth, or of a State or of a Territory, in writing of the application.

- (3) The Attorney-General of the Commonwealth shall be deemed to be a party to any proceedings commenced in accordance with subsection (1) unless the Attorney-General gives written notice to the prescribed court that he or she does not desire to be a party.
- (4) If an interlocutory injunction is granted pursuant to an application made as described in subsection (1) and:
- (a) the patentee subsequently discontinues the principal proceedings without the consent of the other parties thereto; or
  - (b) the principal proceedings are dismissed; and
  - (c) in either case, the prescribed court declares that:
    - (i) the patentee did not have reasonable grounds, in all the circumstances known to the patentee or which ought reasonably have been known to the patentee:
      - (A) to believe that it would be granted final relief by the prescribed court against the applicant referred to in paragraph (1)(a) for infringement by that person of the patent; or
      - (B) (in addition to the fact of grant of the patent), for believing that each of the claims, in respect of which infringement is alleged in the proceedings, would have a reasonable prospect of being held to be valid if challenged by the applicant referred to in paragraph (1)(a); or
    - (ii) the application for the interlocutory injunction was otherwise vexatious or not reasonably made or pursued;
- the prescribed court may, in addition to any other relief which it believes should be granted to any person, make any of the orders described in subsection (5).
- (5) If the prescribed court makes a declaration pursuant to paragraph (4)(c), the prescribed court may, pursuant to the usual undertaking as to damages given by the patentee to the prescribed court to obtain the interlocutory injunction:
- (a) assess and award compensation to the applicant referred to in paragraph (1)(a) against whom the interlocutory injunction was made:



- (i) on the basis of an account of the gross profits of the patentee arising from the sale by it in Australia of the therapeutic goods the subject of the interlocutory injunction, during the period of the interlocutory injunction, without requiring the said applicant to establish or quantify its actual loss; or
  - (ii) on such other basis as the court determines to be appropriate; and
  - (b) award to the Commonwealth compensation for any damages sustained, or costs incurred, by it as a result of the grant of the interlocutory injunction; and
  - (c) award to a State or a Territory compensation for any damages sustained, or costs incurred, by it as a result of the grant of the interlocutory injunction.
- (6) In this section:

*prescribed court* has the same meaning as in the *Patents Act 1990*.

## **7 Application of amendments**

- (1) The amendments made by this Schedule apply to applications for registration or listing under section 23 of the *Therapeutic Goods Act 1989* made on or after the day on which this Schedule commences.
- (2) The amendments made by item 6 apply to legal proceedings commenced on or after the day on which this Schedule commences.

## 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.

## 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.

**Schedule 9** Copyright amendments  
**Part 1** Performers' rights in sound recordings

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

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

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

Add:

*Definitions*

(7) In this section:

***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.

***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.

### **4 Section 84**

Repeal the section, substitute:

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## 84 Definitions

In this Part:

**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)”.

**7 After subsection 97(2)**

Insert:

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

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

Add:

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

**100AA Application**

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

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

**100AB Definitions**

In this Subdivision:

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

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

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

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

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

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

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

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

*Employer may be a maker of the sound recording*

- (2) If:
  - (a) a sound recording of a live performance was made; and
  - (b) a performer performed 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 (1)(b), the employer is taken to be a maker instead of that performer.
- (3) Subsection (2) may be excluded or modified by an agreement (whether made before or after the live performance) between the performer and the employer.

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

*Ownership of the copyright*

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

*Division of the ownership of the copyright*

- (2) The former owners of the copyright and the new owners of the copyright each own half of the copyright as tenants in common in 2 equal shares.
- (3) The former owners own their half of the copyright in the same proportions as the whole copyright was owned by them immediately before the commencement of this section.
- (4) The new owners own their half of the copyright as tenants in common in equal shares.
- (5) Subsections (3) and (4) do not limit section 196.
- (6) Subsection (3) does not otherwise affect the terms on which the former owners own their half of the copyright.

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

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



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

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

- (a) do an act comprised in the copyright; or
- (b) do any other act in relation to the copyright;

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

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

(2) Subsection (1) applies to:

- (a) the former owner's licensees and successors in title; and
- (b) any persons who are authorised by the former owner; and
- (c) any persons who are authorised by the former owner's licensees or successors in title;

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

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

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

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

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<b>Actions under this Act</b>		
<b>Item</b>	<b>In this case...</b>	<b>the new owner is not entitled to:</b>
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

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**Schedule 9** Copyright amendments  
**Part 1** Performers' rights in sound recordings

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<b>Actions under this Act</b>		
<b>Item</b>	<b>In this case...</b>	<b>the new owner is not entitled to:</b>
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

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

A new owner of the copyright in a sound recording of a live performance is taken not to be the owner of the copyright for the purposes of the following provisions:

- (a) sections 107, 108 and 109 (in Part IV);
- (b) sections 119 and 133 (in Part V);
- (c) the definitions of *licence* and *licensor* in subsection 136(1), and sections 150, 151, 152, 153E, 153F, 153G, 159 and 163A (in Part VI);
- (d) section 183 (in Part VII).

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

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

Add:

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

- (1) This section applies in respect of all members of a group of performers who have an interest in the copyright in a sound recording of a live performance.
- (2) All members of the group are taken to have granted a licence or permission (however described) to a person:
  - (a) to do an act comprised in the copyright; or

(b) to do any other act in relation to the copyright;  
if an agent of the group, acting within the scope of his or her actual or apparent authority, has granted a licence or permission to the person to do the act.

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

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

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

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

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

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

- (1) An owner (the *first owner*) of the copyright in a sound recording of a live performance that is a published sound recording is taken to have been granted a licence or permission (however described) by another owner of the copyright to do an act comprised in the copyright, or to do any other act in relation to the copyright, if:
  - (a) the first owner has entered into an agreement with another person to do the act; and
  - (b) the first owner, after making reasonable inquiries, cannot discover the identity or location of the other owner or a person representing the other owner.

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

- (2) If the first owner does the act, then the first owner must hold the other owner's share of any amount received in respect of it on trust for 4 years after the day on which the agreement is entered into

(unless the amount is distributed to, or on behalf of, the other owner before then).

- (3) If during the 4 year period, the other owner is identified and located, the first owner must distribute the amount held on trust to, or on behalf of, the other owner. If at the end of the 4 year period, the other owner remains unidentified or is not located, the first owner may retain the amount.
- (4) After initially making reasonable inquiries, the first owner is not required to continue making reasonable inquiries during the 4 year period.
- (5) The other owner cannot prevent the first owner doing the act comprised in the copyright during the term of the agreement if the other owner is identified or located.

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

Add:

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

- (1) This section applies if, apart from this section, subsections 22(3A) and 97(2) and (2A) would result in the acquisition of property from a maker of a sound recording of a live performance by a performer in the performance otherwise than on just terms.
- (2) There is payable to the maker by the performer such amount of compensation as is agreed on between those persons, or, failing agreement, as is determined by a court of competent jurisdiction.
- (3) Any damages or compensation recovered or other remedy given in a proceeding that is commenced otherwise than under this section is to be taken into account in assessing compensation payable in a proceeding that is commenced under this section and that arises out of the same event or transaction.
- (4) Any compensation payable in a proceeding that is commenced under this section is to be taken into account in assessing any damages or compensation or other remedy to be awarded in a proceeding that is commenced otherwise than under this section and that arises out of the same event or transaction.

(5) In this section:

*acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.

*just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution.

*maker* of a sound recording of a live performance means a person mentioned in paragraph 22(3A)(a).

*performer* in a live performance means the following people:

- (a) a person who becomes a maker of a sound recording under paragraph 22(3A)(b);
- (b) if subsection 22(3B) applies—an employer who becomes a maker of a sound recording under that subsection.

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

Add:

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

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

Add:

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

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

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

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

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

**Schedule 9** Copyright amendments

**Part 1** Performers' rights in sound recordings

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**15 Application**

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

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

## **Part 2—Performers' moral rights**

### *Copyright Act 1968*

#### **16 Part IX (heading)**

Repeal the heading, substitute:

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

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

Repeal the definition, substitute:

*act of false attribution:*

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

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

Repeal the definition, substitute:

*attributable act:*

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

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

Repeal the definition, substitute:

*attributor:*

- (a) in relation to an author's moral rights—has the meaning given by subsection 195AC(2); and

- (b) in relation to a performer's moral rights—has the meaning given by subsection 195AHA(2).

## 20 Section 189

Insert:

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

- (a) a recorded performance; or
  - (b) a substantial part of a recorded performance;
- being a record derived directly or indirectly from an original record of the performance.

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

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

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

Repeal the definition, substitute:

*derogatory treatment*:

- (a) in relation to an author's moral rights—has the relevant meaning given by Division 4; and
- (b) in relation to a performer's moral rights—has the meaning given by section 195ALB.

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

Repeal the definition, substitute:

*infringing article* means:

- (a) in relation to an author's moral rights:
    - (i) an article that embodies a literary, dramatic, musical or artistic work, or a cinematograph film, whether or not the article bears or contains other material; or
    - (ii) a reproduction of, or of an adaptation of, a literary, dramatic or musical work; or
    - (iii) a reproduction of an artistic work; or
    - (iv) a copy of a cinematograph film;
- being a work or film in respect of which a moral right of the author has been infringed, other than by derogatory treatment



not involving the material distortion or alteration of, or the mutilation of, the work or film; and

- (b) in relation to the moral rights of a performer in a live performance:
  - (i) a copy record of the live performance, where the making of the copy record has infringed the performer's right of attribution of performership; or
  - (ii) a record embodying the live performance, where a person's name is inserted or affixed on the record and the inserting or affixing has infringed the performer's right not to have performership falsely attributed; or
  - (iii) a record embodying the live performance, where the record also embodies sounds the making of which have infringed the performer's right not to have performership falsely attributed; or
  - (iv) a record embodying the live performance, being the live performance as affected by derogatory treatment that has infringed the performer's right of integrity of performership; and
- (c) in relation to the moral rights of a performer in a recorded performance:
  - (i) a copy record of the recorded performance, where the making of the copy record has infringed the performer's right of attribution of performership; or
  - (ii) a record embodying the recorded performance, where a person's name is inserted or affixed on the record and the inserting or affixing has infringed the performer's right not to have performership falsely attributed; or
  - (iii) a copy record of the recorded performance, where dealings with the copy as a copy of an unaltered recorded performance have infringed the performer's right not to have performership falsely attributed; or
  - (iv) a record embodying the recorded performance, being a record that incorporates derogatory treatment that has infringed the performer's right of integrity of performership.

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

Repeal the definition, substitute:

*moral right* means:

- (a) in relation to an author:
  - (i) a right of attribution of authorship; or
  - (ii) a right not to have authorship falsely attributed; or
  - (iii) a right of integrity of authorship; and
- (b) in relation to a performer:
  - (i) a right of attribution of performership; or
  - (ii) a right not to have performership falsely attributed; or
  - (iii) a right of integrity of performership.

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

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

**26 Section 189**

Insert:

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

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

**27 Section 189**

Insert:

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

**28 Section 189**

Insert:

*performer* in a performance:

- (a) means each person who contributed to the sounds of the performance; and

- (b) in relation to a performance that occurs outside Australia, does not include a person who is not a qualified person at the time of the performance.

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

### **29 Section 189**

Insert:

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

### **30 Section 189**

Insert:

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

### **31 Section 189**

Insert:

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

### **32 Section 189**

Insert:

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

### **33 Section 189**

Insert:

*record embodying a performance* means:

- (a) an original record of a performance; or
- (b) a copy record of a performance.

### **34 Section 189**

Insert:

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

**35 Section 189**

Insert:

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

**36 Section 189**

Insert:

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

**37 Section 189**

Insert:

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

**38 Section 189**

Insert:

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

**39 After section 191**

Insert:

**191A Staging a performance**

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

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

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

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

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

Add:

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

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

Insert:

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

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

- (1) A performer in a live performance or recorded performance has a right of attribution of performership in respect of the performance.
- (2) The performer's right is the right to be identified in accordance with this Division as a performer in the performance if any of the acts (the *attributable acts*) mentioned in section 195ABB are done in respect of the performance.

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

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

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

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

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

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

- (1) Subject to this section, a performer may be identified by any reasonable form of identification.
- (2) If:
- (a) a performer has made known, either generally or to a person who is required under this Part to identify the performer, that the performer wishes to be identified in a particular way; and
  - (b) the identification of the performer in that way is reasonable in the circumstances;
- the identification is to be made in that way.
- (3) If a performance is presented by performers who use a group name, then identification by using the group name is sufficient identification of the performers in the group.

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

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

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

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

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

Insert:

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

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

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

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

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

#### *Acts of false attribution for live performances*

- (1) For a live performance, it is an act of false attribution for the stager of the performance, or a person authorised by the stager, to state falsely, or imply falsely, to the audience or intended audience immediately before the performance that:
  - (a) a person is, or will be, a performer in the performance; or
  - (b) the performance is being, or will be, presented by a particular group of performers.

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

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

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

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

- (a) a person is, was, or will be a performer in the performance; or
  - (b) the performance is being, was, or will be, presented by a particular group of performers.
- (3) For a live performance, it is an act of false attribution for the stager of the performance, or a person authorised by the stager, to state falsely, or imply falsely, to the audience immediately after the performance that:
- (a) a person was a performer in the performance; or
  - (b) a particular group of performers presented the performance.
- (4) However, doing an act mentioned in subsection (1), (2) or (3) is only an act of false attribution if the performance is in public or is communicated to the public. For this purpose, any unauthorised communication to the public is to be disregarded.

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

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

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

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

*Silent performers*

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

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

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

- (1) If the work is a recorded performance that has been altered by a person other than a performer in the performance, it is an act of false attribution of performership in relation to the performer to deal with a copy of the recorded performance as so altered, as being a copy of the unaltered recorded performance, if, to the knowledge of the attributor, the copy of the recorded performance is not a copy of the unaltered recorded performance.
- (2) Subsection (1) does not apply if:
  - (a) the effect of the alteration is insubstantial; or
  - (b) the alteration was required by law to be made, or was otherwise necessary to avoid a breach of any law.

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

Insert:

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

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

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

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

##### **195ALB Derogatory treatment of performance**

In this Part:

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

### **44 Before section 195AM**

Insert:

#### **Subdivision A—Duration and exercise of moral rights of authors**

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

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

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

Add:

## **Subdivision B—Duration and exercise of moral rights of performers**

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

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

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

- (1) If a performer in a live performance or recorded performance dies, the performer's moral rights in respect of the performance may be exercised and enforced by his or her legal personal representative.
- (2) If the affairs of a performer in a live performance or recorded performance are lawfully administered by another person (except under a law for the relief of bankrupt or insolvent debtors), the performer's moral rights may be exercised and enforced by the person administering his or her affairs.
- (3) Subject to this section, a moral right in respect of a live performance or recorded performance is not transmissible by assignment, by will, or by devolution by operation of law.
- (4) If there are 2 or more performers in a live performance or recorded performance, then the performers may enter into a written co-performership agreement by which each of them agrees not to exercise his or her right of integrity of performership in respect of the live performance or recorded performance, as the case may be, except jointly with the other performer or performers.
- (5) A co-performership agreement has effect according to its terms.

**46 Before section 195AO**

Insert:

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

**47 Section 195AO**

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

**48 Section 195AP**

Omit "Division", substitute "Subdivision".

**49 Subsection 195AQ(1)**

Omit "Division", substitute "Subdivision".

**50 Section 195AVA**

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

**51 Section 195AVB**

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

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

Add:

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

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

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

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

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

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

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

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

- (1) A person who does, or authorises the doing of, an attributable act in respect of a live performance or recorded performance does not, because a performer in the performance is not identified, infringe the

performer's right of attribution of performership in respect of the performance if the person establishes that it was reasonable in all the circumstances not to identify the performer.

- (2) The matters to be taken into account in determining for the purposes of subsection (1) whether it was reasonable in particular circumstances not to identify a performer in a live performance or recorded performance include the following:
- (a) the nature of the performance;
  - (b) the purpose for which the performance is used;
  - (c) the manner in which the performance is used;
  - (d) the context in which the performance is used;
  - (e) any practice, in the industry in which the performance is used, that is relevant to the performance or to the use of the performance;
  - (f) any practice contained in a voluntary code of practice, in the industry in which the performance is used, that is relevant to the performance or to the use of the performance;
  - (g) any difficulty or expense that would have been incurred as a result of identifying the performer;
  - (h) whether the performer participated in the performance in the course of the employment of the performer.

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

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

- (1) A person does not, by subjecting a live performance or recorded performance to derogatory treatment, or by authorising a live performance or recorded performance to be subjected to derogatory treatment, infringe a performer's right of integrity of performership in respect of the performance if the person establishes that it was reasonable in all the circumstances to subject the performance to the treatment.
- (2) The matters to be taken into account in determining for the purposes of subsection (1) whether it was reasonable in particular

circumstances to subject a live performance or recorded performance to derogatory treatment include the following:

- (a) the nature of the performance;
- (b) the purpose for which the performance is used;
- (c) the manner in which the performance is used;
- (d) any practice, in the industry in which the performance is used, that is relevant to the performance or to the use of the performance;
- (e) any practice contained in a voluntary code of practice, in the industry in which the performance is used, that is relevant to the performance or to the use of the performance;
- (f) whether the performer who alleges that the treatment was derogatory participated in the performance in the course of the employment of the performer;
- (g) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law.

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

- (3) A person who:
  - (a) does an act referred to in subsection 195AXC(3) in respect of a live performance that has been subjected to derogatory treatment; or
  - (b) does an act referred to in subsection 195AXC(4) in respect of a recorded performance that has been subjected to derogatory treatment;

does not, by doing that act, infringe a performer's right of integrity of performership in respect of the performance if the person establishes that it was reasonable in all the circumstances to do that act.

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

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

(2) In subsection (1):

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

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

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

(2) In subsection (1):

*deals with* does not include:

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

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

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

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

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

A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a



communication is not taken to have authorised the doing of an act that is an infringement of moral rights in a live performance or recorded performance merely because another person uses the facilities so provided to do such an act.

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

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

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

- (2) A consent may be given in relation to all or any acts or omissions occurring before or after the consent is given.
- (3) A consent may be given in relation to:
- (a) a specified performance or specified performances occurring before the consent is given; or
  - (b) a performance or performances of a particular description:
    - (i) that have not yet occurred; or
    - (ii) that are in the course of occurring.
- (4) A consent may be given by an employee for the benefit of his or her employer in relation to all performances in which the employee is to be a performer in the course of his or her employment.
- (5) A consent given for the benefit of the owner or prospective owner of copyright in the recorded performance or recorded performances to which the consent relates is presumed, unless the contrary intention appears in the consent instrument, to extend to his or her licensees and successors in title, and to any persons who are authorised by the owner or prospective owner, or by such a licensee or successor in title, to do acts comprised in the copyright.
- (6) Subsections (2) to (5), inclusive, do not limit the operation of subsection (1).

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

- (1) If a person applies duress to a performer or, if a performer is represented by a person, to the person representing the performer, in connection with the giving of a consent for the purposes of section 195AXJ, the consent does not have any effect.
- (2) If:
  - (a) a person makes a statement to another person; and
  - (b) the person makes the statement knowing:
    - (i) that the statement is false or misleading in a material particular; or
    - (ii) that a matter or thing has been omitted from the statement without which the statement is false or misleading in a material particular; and
  - (c) the person makes the statement with the intention of persuading the other person to give, or not to give, a consent for the purposes of section 195AXJ;the consent does not have any effect.

**195AXL Acts or omissions outside Australia**

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

**53 Before section 195AY**

Insert:

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

**54 Section 195AY**

Omit "Division" (wherever occurring), substitute "Subdivision".

**55 Sections 195AZB and 195AZC**

Repeal the sections.

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

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

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

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

Add:

### **Subdivision B—Remedies for infringement of moral rights of performers**

#### **195AZGA Definition etc.**

(1) In this Subdivision:

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

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

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

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

#### **195AZGC Remedies for infringements of performer’s moral rights**

- (1) Subject to section 203, the relief that a court may grant in an action for an infringement of any of a performer’s moral rights in respect of a live performance or recorded performance includes any one or more of the following:
- (a) an injunction (subject to any terms that the court thinks fit);
  - (b) damages for loss resulting from the infringement;

- (c) a declaration that a moral right of the performer has been infringed;
  - (d) an order that the defendant make a public apology for the infringement;
  - (e) an order that any false attribution of performership, or derogatory treatment, of the performance be removed or reversed.
- (2) In exercising its discretion as to the appropriate relief to be granted, the court may take into account any of the following:
- (a) whether the defendant was aware, or ought reasonably to have been aware, of the performer's moral rights;
  - (b) the effect on the performer's reputation resulting from any damage to the performance;
  - (c) the number, and categories, of people who have heard the performance;
  - (d) anything done by the defendant to mitigate the effects of the infringement;
  - (e) if the moral right that was infringed was a right of attribution of performership—any cost or difficulty that would have been associated with identifying the performer;
  - (f) any cost or difficulty in removing or reversing any false attribution of performership, or derogatory treatment, of the performance.
- (3) In deciding whether or not to grant an injunction under subsection (1), the court must consider whether the parties have made any attempt to negotiate a settlement of the action and whether it should adjourn the hearing or further hearing of the action for the purpose of giving the parties an appropriate opportunity to negotiate a settlement, whether through a process of mediation or otherwise.
- (4) If, after the death of a performer, in respect of an act done in a live performance or recorded performance, damages are recovered under this section by the legal personal representative of the performer, those damages devolve as if they formed part of the performer's estate and as if the right of action in respect of the doing of the act had subsisted, and had been vested in the performer, immediately before his or her death.

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

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

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

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

- (1) In an action brought under this Part for an infringement of a moral right in respect of a recorded performance, if copyright is presumed or proved to have subsisted in the recorded performance when the infringement is alleged to have occurred, then the moral right is presumed to have subsisted in the recorded performance at that time.
- (2) This section has effect subject to subsection 195ANA(3).

### **195AZGF Presumptions in relation to performership**

- (1) If a name purporting to be the name of a performer appears on a record embodying a performance so as to indicate that the person was a performer in the performance, then, in an action brought under this Part, the person whose name so appeared is, if it was his or her true name or a name by which he or she was commonly known, presumed, unless the contrary is established, to be a performer in the performance.
- (2) If a name purporting to be the name of a group of performers appears on a record embodying a performance so as to indicate that the group performed in the performance, then, in an action brought under this Part, the group whose name so appeared is, if it was a name by which the group was commonly known, presumed, unless the contrary is established, to have performed in the performance.

## **Subdivision C—Miscellaneous**

### **195AZGG Saving of other rights and remedies**

- (1) Subject to this section, this Part does not affect any right of action or other remedy, whether civil or criminal, in proceedings brought otherwise than under this Part.
- (2) Any damages recovered in proceedings brought under this Part are to be taken into account in assessing damages in proceedings brought otherwise than under this Part and arising out of the same event or transaction.
- (3) Any damages recovered in proceedings brought otherwise than under this Part are to be taken into account in proceedings brought under this Part and arising out of the same event or transaction.

### **195AZGH Jurisdiction of courts**

- (1) The jurisdiction of the Supreme Court of a State or Territory in a matter arising under this Part is to be exercised by a single Judge of the Court.
- (2) Subject to subsection (3), a decision of a court of a State or Territory (however constituted) under this Part is final.
- (3) An appeal lies from a decision of a court of a State or Territory under this Part:
  - (a) to the Federal Court of Australia; or
  - (b) by special leave of the High Court, to the High Court.
- (4) The Federal Court of Australia has jurisdiction with respect to matters arising under this Part.
- (5) The Federal Magistrates Court has jurisdiction with respect to matters arising under this Part.

### **57 Before section 195AZH**

Insert:

**Subdivision A—Miscellaneous provisions about moral rights of authors**

**58 At the end of Division 8 of Part IX**

Add:

**Subdivision B—Miscellaneous provisions about moral rights of performers**

**195AZP Parts of performances**

Moral rights in respect of a live performance or recorded performance apply in relation to the whole or a substantial part of the performance.

**195AZQ Performances that have more than one performer**

- (1) This section applies to a live performance or recorded performance that has more than one performer.
- (2) A performer's right of attribution of performership in respect of the performance is a right of the performer to be identified as a performer.

Example: If X and Y are the performers in a performance, then each of them has the right to be identified. However, there is no infringement of X's moral right if Y is not identified (and vice versa).

Note: See also subsection 195ABC(3), which relates to the use of group names.

- (3) An act of false attribution of performership in respect of the performance infringes each performer's right not to have performership falsely attributed.

Example: X and Y are the performers in a performance that is falsely attributed to X and Z. This false attribution infringes X's moral right and Y's moral right.

- (4) The right of integrity of performership in respect of the performance is a right of each performer.

Example: X and Y are the performers in a performance. The performance is subjected to derogatory treatment that is prejudicial to X's reputation but not to Y's reputation. The result is an infringement of X's right

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of integrity of performership but not an infringement of Y's right of integrity of performership.

- (5) The consent of one performer to any act or omission affecting his or her moral rights in respect of the performance does not affect the moral rights of any other performer in respect of the performance.

**195AZR Application**

- (1) Moral rights in respect of a live performance only subsist in a live performance that occurs after the commencement of this section.
- (2) Moral rights in respect of a recorded performance only subsist if the live performance concerned occurs after the commencement of this section.



## **Part 3—Performers' protection**

### *Copyright Act 1968*

#### **59 Subsection 10(1) (at the end of the definition of *communicate*)**

Add “, including a performance or live performance within the meaning of this Act”.

#### **60 Subsection 248A(1) (paragraphs (a) and (b) of the definition of *exempt recording*)**

Repeal the paragraphs, substitute:

- (a) an indirect cinematograph film of a performance, being a film made solely for the purpose of the private and domestic use of the person who made it;
- (aa) an indirect sound recording of a performance, being a recording that is a fair dealing with the performance for the purpose of research or study;
- (b) an indirect cinematograph film of a performance, being a film made solely for the purpose of use in scientific research;

#### **61 Subsection 248A(1) (paragraphs (c), (d) and (e) of the definition of *exempt recording*)**

Omit “an indirect sound recording or an indirect cinematograph film of a performance, being a sound recording or film”, substitute “an indirect cinematograph film of a performance, being a film”.

#### **62 Subsection 248A(1) (paragraph (f) of the definition of *exempt recording*)**

Omit “sound recording or”.

#### **63 Subsection 248A(1) (after paragraph (f) of the definition of *exempt recording*)**

Insert:

- (fa) a direct or indirect sound recording of a performance, being a recording that is a fair dealing with the performance:
- (i) for the purpose of criticism or review, whether of that performance or another performance; or
  - (ii) for the purpose of, or associated with, the reporting of news in a newspaper, magazine or similar periodical; or
  - (iii) for the purpose of, or associated with, the reporting of news by means of a communication or in a cinematograph film;

**64 Subsection 248A(1) (after paragraph (j) of the definition of *exempt recording*)**

Insert:

- (ja) a copy of a sound recording referred to in paragraph (aa), (fa) or (g), being a copy made solely for a purpose referred to in any of those paragraphs;

**65 Subsection 248A(1) (paragraph (k) of the definition of *exempt recording*)**

Omit “sound recording or”.

**66 Subsection 248A(1) (after subparagraph (n)(i) of the definition of *exempt recording*)**

Insert:

- (ia) if the copy is of a sound recording—solely for a purpose referred to in paragraph (aa), (fa) or (g); or

**67 Subsection 248A(1) (subparagraph (n)(ii) of the definition of *exempt recording*)**

Before “solely”, insert “if the copy is of a cinematograph film—”.

**68 Subsection 248A(1) (definition of *indirect*)**

Omit “broadcast, or a re-broadcast,”, substitute “communication”.

**69 Subsection 248A(1) (definition of *performance*)**

Repeal the definition, substitute:

*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:
- (g) that is given in Australia, whether in the presence of an audience or otherwise; or
- (h) that is given by one or more qualified persons (even if it is also given by one or more persons who are not qualified persons), whether in the presence of an audience or otherwise.

#### **70 Subsection 248A(1)**

Insert:

*performer*, in relation to a performance that is given outside Australia, does not include a person who is not a qualified person at the time of the performance.

#### **71 After subsection 248A(1)**

Insert:

- (1A) For the purposes of paragraph (aa) of the definition of *exempt recording*, in determining whether a recording is a fair dealing with a performance for the purpose of research or study, regard must be had to the following matters:
  - (a) the purpose and character of the recording;
  - (b) the nature of the performance;
  - (c) the possibility of obtaining an authorised recording of the performance within a reasonable time at an ordinary commercial price;

- (d) the effect of the recording upon the potential market for, or the value of, authorised recordings of the performance;
- (e) if only part of the performance is recorded—the amount and substantiality of the part recorded when compared to the whole performance.

## **72 Section 248B**

Omit “sound recording or”.

## **73 After subsection 248C(1)**

Insert:

- (1A) A sound recording, or a copy of a sound recording, that is an exempt recording because it was made for a purpose referred to in paragraph (aa) or (fa) of the definition of *exempt recording* in subsection 248A(1) ceases to be an exempt recording if it is used for any other purpose without the authority of the performer.

## **74 Subsection 248C(2)**

Omit “A sound recording or cinematograph film, or a copy of such a recording or film,”, substitute “A cinematograph film, or a copy of a cinematograph film,”.

## **75 Section 248D**

Repeal the section, substitute:

### **248D Private and domestic use**

For the purposes of this Part, a cinematograph film is taken not to have been made for the private and domestic use of the person who made it if it is made for the purpose of:

- (a) selling it, letting it for hire, or by way of trade offering or exposing it for sale or hire; or
- (b) distributing it, whether for the purpose of trade or otherwise; or
- (c) by way of trade exhibiting it in public; or
- (d) broadcasting the film; or
- (e) causing the film to be seen or heard in public.

**76 Paragraph 248G(1)(b)**

Omit “broadcasts or re-broadcasts the performance”, substitute “communicates the performance to the public”.

**77 Subsection 248G(3)**

Omit “broadcasts or re-broadcasts an authorised recording of a performance”, substitute “communicates an authorised recording of a performance to the public”.

**78 At the end of section 248J**

Add:

(4) If:

- (a) a performer brings an action under this section that relates to a recording of a performance; and
  - (b) the relief granted in the action consists of or includes damages; and
  - (c) the performer has already been granted damages in an action under another section of this Act in relation to an infringement of his or her copyright in the recording; and
  - (d) the action referred to in paragraph (c) arose out of the same event or transaction as the action referred to in paragraph (a);
- the amount of any damages referred to in paragraph (b) that, apart from this subsection, would be awarded to the performer is to be reduced by the amount of the damages referred to in paragraph (c).

(5) If:

- (a) a performer brings an action under another section of this Act that relates to an infringement of his or her copyright in a recording of a performance; and
- (b) the relief granted in the action consists of or includes damages; and
- (c) the performer has already been granted damages in an action under this section in relation to the performance; and
- (d) the action referred to in paragraph (c) arose out of the same event or transaction as the action referred to in paragraph (a);

the amount of any damages referred to in paragraph (b) that, apart from this subsection, would be awarded to the performer is to be reduced by the amount of the damages referred to in paragraph (c).

**79 Subsection 248P(3)**

Omit "broadcast or re-broadcast the performance", substitute "communicate the performance to the public".

**80 After subsection 248P(7A)**

Insert:

(7B) A person who makes an indirect recording solely for the purpose of his or her private and domestic use without the authority of the performer does not, by doing so, contravene subsection (2).

Note: A defendant bears an evidential burden in relation to the matter in subsection (7B) (see subsection 13.3(3) of the *Criminal Code*).

**81 Subsection 248P(8)**

Omit "broadcasts or re-broadcasts an authorised recording of a performance", substitute "communicates an authorised recording of a performance to the public".

**82 After paragraph 248U(1)(a)**

Insert:

- (aa) so that the provisions apply in relation to recordings, made in that country, of performances in like manner as those provisions apply in relation to recordings of performances given in Australia;
- (ab) so that the provisions apply in relation to broadcasts, made in that country, of performances in like manner as those provisions apply in relation to broadcasts of performances given in Australia;
- (ac) so that the provisions apply in relation to recordings, made by persons who are citizens, nationals or residents of that country, of performances in like manner as those provisions apply in relation to recordings of performances given in Australia;

### **83 Subsection 248V(1)**

Omit “(whether the lack of protection relates to the nature of the performance or the nationality, citizenship or country of residence of its performer, or all of those matters)”, substitute “(whether the lack of protection relates to all or any of the ways that the provisions may be applied by the regulations under subsection 248U(1))”.

### **84 Application**

The amendments made by this Part apply to acts done, in respect of a performance, within the protection period of the performance after the day on which this item commences (even if the performance was given before that day).

## **Part 4—Copying and communicating broadcasts of performances**

### ***Copyright Act 1968***

#### **85 Section 135A**

Insert:

*performance* has the same meaning as in Part XIA.

#### **86 Section 135A**

Insert:

*performer* has the same meaning as in Part XIA.

#### **87 Section 135A (definition of *relevant copyright owner*)**

Repeal the definition.

#### **88 Section 135A**

Insert:

*relevant right holder* means:

- (a) the owner of the copyright in a work, a sound recording or a cinematograph film (other than a new owner of the copyright in a sound recording of a live performance as defined in section 100AB); or
- (b) a performer in a performance.

#### **89 After subsection 135E(1)**

Insert:

- (1A) For the purposes of Part XIA, each performer of a performance is taken to have authorised an administering body, or a person on behalf of an administering body, to make or communicate a copy of a broadcast of the performance if the following paragraphs are satisfied:



- (a) a remuneration notice, given by or on behalf of the administering body to the collecting society, is in force;
- (b) if the copy or communication is made by, or on behalf of, a body administering an educational institution—the copy or communication is made solely for the educational purposes of the institution or of another educational institution;
- (c) if the copy or communication is made by, or on behalf of, a body administering an institution assisting persons with an intellectual disability—the copy or communication is made solely for the purposes of use in the provision of assistance to persons with an intellectual disability by the institution or by another similar institution;
- (d) the administering body complies with subsection 135K(1) or (3), or section 135KA, as the case requires, in relation to the copy or communication.

Note: The effect of this subsection is that no right of action and no offence occurs in respect of the copy or communication under Part XIA (performers' protection).

#### **90 Subsection 135E(2)**

After “subsection (1)” (first occurring), insert “or (1A)”.

#### **91 Paragraph 135E(2)(a)**

After “paragraph (1)(b) or (c)”, insert “or (1A)(b) or (c)”.

#### **92 Subsection 135E(2)**

After “subsection (1)” (second occurring), insert “or (1A)”.

#### **93 After subsection 135F(1)**

Insert:

- (1A) For the purposes of Part XIA, each performer of a performance is taken to have authorised the making of a preview copy of a broadcast of the performance.

Note: The effect of this subsection is that no right of action and no offence occurs in respect of the preview copy under Part XIA (performers' protection).

**94 Subsection 135F(5)**

After “subsection 135E(1)”, insert “or (1A)”.

**95 Subsection 135F(5)**

After “paragraph 135E(1)(b) or (c)”, insert “or (1A)(b) or (c), as the case requires”.

**96 Subsection 135F(6)**

Omit “subsection (1) does”, insert “subsections (1) and (1A) do”.

**97 At the end of section 135F**

Add:

- (8) For the purposes of Part XIA, each performer in a performance is taken to have authorised a communication of a preview copy of a broadcast of the performance if:
- (a) the communication is made solely to enable an administering body to decide whether or not that copy should be retained:
    - (i) for the educational purposes of the institution administered by it; or
    - (ii) for use in the provision of assistance to persons with an intellectual disability by the institution administered by it; and
  - (b) the communication is made only to the extent necessary for the purpose mentioned in paragraph (a); and
  - (c) the communication is made within the preview period.

Note: The effect of this subsection is that no right of action and no offence occurs in respect of the communication of the preview copy under Part XIA (performers’ protection).

**98 Paragraph 135H(2)(a)**

After “works,”, insert “performances,”.

**99 Subsections 135J(5) and 135JA(7)**

Omit “subsections 135E(1) and 135F(1)”, substitute “sections 135E and 135F”.

**100 Subparagraph 135KA(a)(i)**

After “copyright”, insert “or performers”.

**101 Subsection 135P(3)**

Omit “relevant copyright owners” (wherever occurring), substitute “relevant right holders”.

**102 Paragraph 135Q(b)**

Omit “relevant copyright owners”, substitute “relevant right holders”.

**103 At the end of section 135Z**

Add:

- (2) Nothing in this Part affects the right of a performer in a performance included in a broadcast to authorise an administering body:
- (a) to make, or cause to be made, a sound recording or a cinematograph film of the performance; and
  - (b) to communicate, or cause to be communicated, that recording or film.

Note: The heading to section 135Z is altered by omitting “**Relevant copyright owner**” and substituting “**Relevant right holder**”.

**104 At the end of subsection 248G(1)**

Add:

Note: An educational or other institution can copy and communicate a broadcast of a performance without the authority of the performer in some circumstances: see sections 135E and 135F.

**105 At the end of subsection 248P(8)**

Add:

- Note 1: A defendant bears an evidential burden in relation to the matter in subsection (8) (see subsection 13.3(3) of the *Criminal Code*).
- Note 2: An educational or other institution can also copy and communicate a broadcast of a performance without contravening this section in some circumstances: see sections 135E and 135F.

**106 Application**

The amendments made by this Part apply in respect of copies of broadcasts, or communications of broadcasts, made after the day on which this item commences (even if the performance concerned was given before that day).

## **Part 5—Duration of copyright in photographs**

### *Copyright Act 1968*

#### **107 Subsection 33(2)**

Repeal the subsection, substitute:

- (2) Subject to this section, copyright that subsists in a literary, dramatic, musical or artistic work by virtue of this Part continues to subsist until the end of 50 years after the end of the calendar year in which the author of the work died.

#### **108 Subsection 33(6)**

Repeal the subsection.

#### **109 Subsection 34(1)**

Repeal the subsection, substitute:

- (1) Subject to subsection (2), if the first publication of a literary, dramatic, musical or artistic work is anonymous or pseudonymous, any copyright subsisting in the work by virtue of this Part continues to subsist until the end of the period of 50 years after the end of the calendar year in which the work was first published.

#### **110 Subsection 34(2)**

Omit “The last preceding subsection”, substitute “Subsection (1)”.

#### **111 Subsection 34(2)**

Omit “the expiration”, substitute “the end”.

#### **112 Subsection 51(1)**

Omit “the expiration of the calendar year in which the author of a literary, dramatic or musical work, or of an artistic work being a photograph or engraving,”, substitute “the end of the calendar year in which the author of a literary, dramatic, musical or artistic work”.

### **113 Subsection 81(3)**

Omit “sections 33 and 51”, substitute “section 33”.

Note: This item omits an incorrect reference to a section.

### **114 At the end of section 127**

Add:

- (4) However, if the owner of the material or apparatus was a body corporate, then paragraph (3)(a) only applies if the presumption is required to determine the ownership of the copyright in the photograph.

Note: For example, the presumption does not apply if it is required to determine the duration of the copyright in the photograph.

### **115 At the end of section 208**

Add:

- (2) However, if the owner of the material on which the photograph was taken was a body corporate, then subsection (1) only applies in respect of references to the author of the photograph that relate to the ownership of the copyright in the photograph.

Note: For example, subsection (1) does not apply in relation to references to the author of the photograph that relate to the duration of the copyright in the photograph.

### **116 Section 212**

Repeal the section.

### **117 Application**

The amendments made by this Part apply to copyright in photographs that subsists on or after the day on which this item commences.

### **118 Compensation scheme for certain agreements made before Royal Assent**

*Application of item*

- (1) This item applies if:
- (a) the copyright in a photograph is owned by a person (the *owner*); and

- (b) before the day on which this Act receives the Royal Assent, another person made a written and lawful agreement with a third party; and
- (c) the agreement was entered into for the purposes of doing an act at a particular time that would, apart from this item, infringe the copyright; and
- (ca) that time is no later than 2 years from the US FTA commencement day; and
- (d) the agreement was made in reliance on the copyright having ceased to subsist before that time; and
- (e) because of the amendments made by this Part the copyright continues to subsist past that time.

*Owner may notify person that owner objects to person doing the act*

- (2) Before the person does the act, the owner of the copyright may notify the person in writing that the owner objects to the person doing the act.

*Owner may provide reasonable compensation to person*

- (3) If the owner does so, then the owner and the person may agree on:
  - (a) an amount of reasonable compensation that the owner is to provide to the person; and
  - (b) the day by which the owner is to provide the compensation.
- (4) If the owner and the person cannot agree, either of them may apply to the Copyright Tribunal for the Tribunal to determine:
  - (a) an amount of reasonable compensation that the owner is to provide to the person; and
  - (b) the day by which the owner is to provide the compensation.
- (4A) An amount of compensation agreed on or determined under this item or item 119 of this Schedule may only include compensation in respect of:
  - (a) costs incurred by the person for the purposes of doing the act mentioned in paragraph (1)(c); and
  - (b) costs incurred, or that may be incurred, by the person as a result of not being able to do that act.
- (5) When the Copyright Tribunal has determined an amount of reasonable compensation, the owner is liable to pay that amount to the person by the

day determined by the Tribunal. The person may recover that amount in a court of competent jurisdiction from the owner as a debt due to the person.

*Person may do act if not notified by owner or if not paid reasonable compensation*

- (6) If the owner does not notify the person, or pay an amount of reasonable compensation to the person, in accordance with this item, then:
- (a) the person may do the act mentioned in paragraph (1)(c) at any time after the copyright would, apart from the amendments made by this Part, have ceased to subsist and before the end of 2 years from the US FTA commencement day; and
  - (b) for the purposes of the *Copyright Act 1968*:
    - (i) the owner is not entitled to bring an action under that Act against the person in respect of the act; and
    - (ii) the person does not contravene a section of, or commit an offence under, that Act by doing the act.
- (7) To avoid doubt, subitem (6) is an exception that a defendant may rely on for the purposes of section 13.3 of the *Criminal Code*.

Note: A defendant bears an evidential burden in relation to the matter in subitem (6) (see subsection 13.3(3) of the *Criminal Code*).

- (8) In this item:
- owner*, in relation to the copyright in a photograph at a particular time in respect of a particular act, includes an exclusive licensee of the copyright in the photograph at that time in respect of that act.
- US FTA commencement day* means the day on which the Australia-United States Free Trade Agreement, done at Washington DC on 18 May 2004, comes into force for Australia.

### **119 Applications to Copyright Tribunal for determination of reasonable compensation payable**

- (1) This item applies if an application is made to the Copyright Tribunal under item 118 of this Schedule for the determination of an amount of reasonable compensation to be paid by the owner of the copyright in a photograph to a person mentioned in paragraph 118(1)(b).



- (2) The parties to the application are:
- (a) the owner of the copyright; and
  - (b) the person mentioned in that paragraph.
- (3) The Tribunal must consider the application and, after giving to the parties an opportunity of presenting their cases, must make an order determining an amount of reasonable compensation.

Note: The amount of compensation may only include compensation in respect of certain costs: see subitem 118(4A) of this Schedule.

- (4) In this item:
- owner*, in relation to the copyright in a photograph at a particular time in respect of a particular act, includes an exclusive licensee of the copyright in the photograph at that time in respect of that act.

## **Part 6—Duration of copyright in works and other subject-matter**

### ***Copyright Act 1968***

#### **120 Subsection 33(2)**

Omit “50 years”, substitute “70 years”.

#### **121 Subsections 33(3) and (5)**

Omit “the expiration of 50 years after the expiration”, substitute “the end of 70 years after the end”.

#### **122 Subsection 34(1)**

Omit “50 years”, substitute “70 years”.

#### **123 Subsection 81(2)**

Omit “50 years after the expiration”, substitute “70 years after the end”.

#### **124 Section 93**

Omit “the expiration of 50 years after the expiration”, substitute “the end of 70 years after the end”.

#### **125 Section 94**

Omit “the expiration of 50 years after the expiration” (wherever occurring), substitute “the end of 70 years after the end”.

#### **126 Paragraph 128(a)**

Omit “50 years”, substitute “70 years”.

#### **127 At the end of subsection 132(1)**

Add:

Note: A person who makes an agreement before the *US Free Trade Agreement Implementation Act 2004* receives the Royal Assent might not commit an offence under this section: see items 118 and 132 of Schedule 9 to that Act.

**128 Paragraphs 187(2)(b) and 188(2)(b)**

Omit “the expiration of 50 years after the expiration”, substitute “the end of 70 years after the end”.

**129 Paragraph 188(3)(b)**

Omit “expiration” (wherever occurring), substitute “end”.

**130 Subsection 220(3)**

Repeal the subsection.

**131 Application**

The amendments made by this Part apply to copyright in works and other subject-matter that subsists on or after the day on which this item commences.

**132 Compensation scheme for certain agreements made before Royal Assent**

*Application of item*

- (1) This item applies if:
- (a) the copyright in a work or other subject-matter is owned by a person (the *owner*); and
  - (b) before the day on which this Act receives the Royal Assent, another person made a written and lawful agreement with a third party; and
  - (c) the agreement was entered into for the purposes of doing an act at a particular time that would, apart from this item, infringe the copyright; and
  - (ca) that time is no later than 2 years from the US FTA commencement day; and
  - (d) the agreement was made in reliance on the copyright having ceased to subsist before that time; and
  - (e) because of the amendments made by this Part the copyright continues to subsist past that time.

*Owner may notify person that owner objects to person doing the act*

- (2) Before the person does the act, the owner of the copyright may notify the person in writing that the owner objects to the person doing the act.

*Owner may provide reasonable compensation to person*

- (3) If the owner does so, then the owner and the person may agree on:
- (a) an amount of reasonable compensation that the owner is to provide to the person; and
  - (b) the day by which the owner is to provide the compensation.
- (4) If the owner and the person cannot agree, either of them may apply to the Copyright Tribunal for the Tribunal to determine:
- (a) an amount of reasonable compensation that the owner is to provide to the person; and
  - (b) the day by which the owner is to provide the compensation.
- (4A) An amount of compensation agreed on or determined under this item or item 133 of this Schedule may only include compensation in respect of:
- (a) costs incurred by the person for the purposes of doing the act mentioned in paragraph (1)(c); and
  - (b) costs incurred, or that may be incurred, by the person as a result of not being able to do that act.

- (5) When the Copyright Tribunal has determined an amount of reasonable compensation, the owner is liable to pay that amount to the person by the day determined by the Tribunal. The person may recover that amount in a court of competent jurisdiction from the owner as a debt due to the person.

*Person may do act if not notified by owner or if not paid reasonable compensation*

- (6) If the owner does not notify the person, or pay an amount of reasonable compensation to the person, in accordance with this item, then:
- (a) the person may do the act mentioned in paragraph (1)(c) at any time after the copyright would, apart from the amendments made by this Part, have ceased to subsist and

before the end of 2 years from the US FTA commencement day; and

(b) for the purposes of the *Copyright Act 1968*:

- (i) the owner is not entitled to bring an action under that Act against the person in respect of the act; and
- (ii) the person does not contravene a section of, or commit an offence under, that Act by doing the act.

(7) To avoid doubt, subitem (6) is an exception that a defendant may rely on for the purposes of section 13.3 of the *Criminal Code*.

Note: A defendant bears an evidential burden in relation to the matter in subitem (6) (see subsection 13.3(3) of the *Criminal Code*).

(8) In this item:

*owner*, in relation to the copyright in a work or other subject-matter at a particular time in respect of a particular act, includes an exclusive licensee of the copyright in the work or subject-matter at that time in respect of that act.

*US FTA commencement day* means the day on which the Australia-United States Free Trade Agreement, done at Washington DC on 18 May 2004, comes into force for Australia.

### **133 Applications to Copyright Tribunal for determination of reasonable compensation payable**

(1) This item applies if an application is made to the Copyright Tribunal under item 132 of this Schedule for the determination of an amount of reasonable compensation to be paid by the owner of the copyright in a work or other subject-matter to a person mentioned in paragraph 132(1)(b).

(2) The parties to the application are:

- (a) the owner of the copyright; and
- (b) the person mentioned in that paragraph.

(3) The Tribunal must consider the application and, after giving to the parties an opportunity of presenting their cases, must make an order determining an amount of reasonable compensation.

Note: The amount of compensation may only include compensation in respect of certain costs: see subitem 132(4A) of this Schedule.

**Schedule 9** Copyright amendments

**Part 6** Duration of copyright in works and other subject-matter

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(4) In this item:

*owner*, in relation to the copyright in a work or other subject-matter at a particular time in respect of a particular act, includes an exclusive licensee of the copyright in the work or subject-matter at that time in respect of that act.

## **Part 7—Electronic rights management information**

### *Copyright Act 1968*

#### **134 Subsection 10(1) (definition of *electronic rights management information*)**

Repeal the definition, substitute:

*electronic rights management information*, in relation to a work or other subject-matter, means information that:

- (a) is electronic; and
- (b) either:
  - (i) is or was attached to, or is or was embodied in, a copy of the work or subject-matter; or
  - (ii) appears or appeared in connection with a communication, or the making available, of the work or subject-matter; and
- (c) either:
  - (i) identifies the work or subject-matter, and its author or copyright owner (including such information represented as numbers or codes); or
  - (ii) identifies or indicates some or all of the terms and conditions on which the work or subject-matter may be used, or indicates that the use of the work or subject-matter is subject to terms or conditions (including such information represented as numbers or codes).

#### **135 Paragraph 116B(1)(a)**

Repeal the paragraph, substitute:

- (a) either:
  - (i) a person removes, from a copy of a work or other subject-matter in which copyright subsists, any electronic rights management information that relates to the work or other subject-matter; or

- (ii) a person alters any electronic rights management information that relates to a work or other subject-matter in which copyright subsists; and

### **136 Subparagraph 116C(1)(a)(i)**

Repeal the subparagraph, substitute:

- (i) distributes a copy of the work or other subject-matter to the public;

Note: The heading to section 116C is replaced by the heading “**Distribution to the public etc. of works whose electronic rights management information has been removed or altered**”.

### **137 Subparagraph 116C(1)(a)(ii)**

Omit “for the purpose of trade”, substitute “for distribution to the public”.

### **138 Paragraph 116C(1)(b)**

Repeal the paragraph, substitute:

- (b) either:
  - (i) any electronic rights management information that relates to the work or other subject-matter has been removed from the copy of the work or subject-matter; or
  - (ii) any electronic rights management information that relates to the work or other subject-matter has been altered; and

### **139 After section 116C**

Insert:

#### **116CA Distribution and importation of electronic rights management information that has been removed or altered**

- (1) This section applies if:
  - (a) a person does either of the following acts in relation to electronic rights management information that relates to a work or other subject-matter in which copyright subsists:
    - (i) distributes the electronic rights management information;



- (ii) imports into Australia the electronic rights management information for distribution; and
  - (b) the person does so without the permission of the owner or exclusive licensee of the copyright; and
  - (c) either:
    - (i) the information has been removed from a copy of the work or subject-matter without the permission of the owner or exclusive licensee of the copyright; or
    - (ii) the information has been removed from a copy of the work or subject-matter with the permission of the owner or exclusive licensee of the copyright but the information has been altered without that permission; and
  - (d) the person knew that the information had been removed or altered without that permission; and
  - (e) the person knew, or ought reasonably to have known, that the act referred to in paragraph (a) that was done by the person would induce, enable, facilitate or conceal an infringement of the copyright.
- (2) If this section applies, the owner or exclusive licensee of the copyright may bring an action against the person.
- (3) In an action under subsection (2), it must be presumed that the defendant:
- (a) had the knowledge referred to in paragraph (1)(d); and
  - (b) knew, or ought reasonably to have known, that the doing of the act to which the action relates would have the effect referred to in paragraph (1)(e);
- unless the defendant proves otherwise.

### **116CB Exception relating to national security and law enforcement**

Sections 116B to 116CA do not apply in respect of anything lawfully done for the purposes of law enforcement or national security by or on behalf of:

- (a) the Commonwealth or a State or Territory; or
- (b) an authority of the Commonwealth or of a State or Territory.

#### 140 Subsections 116D(1) and (2)

Omit “or 116C”, substitute “, 116C or 116CA”.

Note: The heading to section 116D is altered by omitting “**and 116C**” and substituting “, **116C and 116CA**”.

#### 141 Subsections 132(5C) and (5D)

Repeal the subsections, substitute:

*Offences relating to electronic rights management information*

(5C) A person commits an offence if:

- (a) copyright subsists in a work or other subject-matter; and
- (b) either:
  - (i) the person removes, from a copy of the work or subject-matter, any electronic rights management information that relates to the work or subject-matter; or
  - (ii) the person alters any electronic rights management information that relates to the work or subject-matter; and
- (c) the person does so without the permission of the owner or exclusive licensee of the copyright; and
- (d) the person is reckless as to whether the removal or alteration will induce, enable, facilitate or conceal an infringement of the copyright.

(5D) A person commits an offence if:

- (a) copyright subsists in a work or other subject-matter; and
- (b) the person does any of the following acts in relation to the work or subject-matter:
  - (i) distributes a copy of the work or subject-matter with the intention of trading and obtaining a commercial advantage or profit;
  - (ii) imports a copy of the work or subject-matter into Australia with the intention of trading and obtaining a commercial advantage or profit;
  - (iii) communicates a copy of the work or subject-matter to the public; and

- (c) the person does so without the permission of the owner or exclusive licensee of the copyright; and
  - (d) either:
    - (i) any electronic rights management information that relates to the work or subject-matter has been removed from the copy of the work or subject-matter; or
    - (ii) any electronic rights management information that relates to the work or subject-matter has been altered; without the permission of the owner or exclusive licensee of the copyright; and
  - (e) the person knows that the information has been removed or altered without that permission; and
  - (f) the person is reckless as to whether the act referred to in paragraph (b) will induce, enable, facilitate or conceal an infringement of the copyright.
- (5DA) A person commits an offence if:
- (a) copyright subsists in a work or other subject-matter; and
  - (b) the person does either of the following acts in relation to electronic rights management information that relates to the work or subject-matter:
    - (i) distributes the electronic rights management information with the intention of trading and obtaining a commercial advantage or profit;
    - (ii) imports the electronic rights management information into Australia with the intention of trading and obtaining a commercial advantage or profit; and
  - (c) the person does so without the permission of the owner or exclusive licensee of the copyright; and
  - (d) either:
    - (i) the information has been removed from a copy of the work or subject-matter without the permission of the owner or exclusive licensee of the copyright; or
    - (ii) the information has been removed from a copy of the work or subject-matter with the permission of the owner or exclusive licensee of the copyright but the information has been altered without that permission; and

- (e) the person knows that the information has been removed or altered without that permission; and
- (f) the person is reckless as to whether the act referred to in paragraph (b) will induce, enable, facilitate or conceal an infringement of the copyright.

#### **142 After subsection 132(5E)**

Insert:

*Defence for certain public institutions etc.*

(5EA) Subsections (5C) to (5DB) do not apply in respect of anything lawfully done by the following bodies in performing their functions:

- (a) a library (other than a library that is conducted for the profit, direct or indirect, of an individual or individuals);
- (b) a body mentioned in paragraph (a) of the definition of *archives* or in subsection 10(4);
- (c) an educational institution;
- (d) a public non-commercial broadcaster, including:
  - (i) a body that provides a national broadcasting service within the meaning of the *Broadcasting Services Act 1992*; and
  - (ii) a body that holds a community broadcasting licence within the meaning of that Act.

Note: A library that is owned by a person conducting a business for profit might not itself be conducted for profit: see section 18.

#### **143 Subsection 132(5J)**

After “(5E),”, insert “(5EA),”.

#### **144 Subsection 134(2)**

Omit “or 116C”, substitute “, 116C or 116CA”.

#### **145 Application**

The amendments made by this Part apply in respect of acts done after the day on which this item commences.

## **Part 8—Criminal offences**

### ***Copyright Act 1968***

#### **146 Paragraphs 132(1)(b) and (c)**

After “by way of trade”, insert “, and with the intention of obtaining a commercial advantage or profit,”.

Note: The following heading to subsection 132(1) is inserted “*Offences relating to infringing copies*”.

#### **147 Subparagraph 132(1)(d)(i)**

After “by way of trade”, insert “, and with the intention of obtaining a commercial advantage or profit,”.

#### **148 Subparagraph 132(1)(d)(ii)**

After “for the purpose of trade,”, insert “and with the intention of obtaining a commercial advantage or profit,”.

#### **149 Subparagraph 132(1)(d)(iii)**

After “by way of trade”, insert “, and with the intention of obtaining a commercial advantage or profit,”.

#### **150 Paragraph 132(2)(a)**

After “for the purpose of trade”, insert “and with the intention of obtaining a commercial advantage or profit”.

#### **151 Paragraph 132(2A)(a)**

After “by way of trade”, insert “, and with the intention of obtaining a commercial advantage or profit,”.

#### **152 Paragraph 132(2A)(b)**

After “for the purpose of trade,”, insert “and with the intention of obtaining a commercial advantage or profit,”.

### 153 Paragraph 132(2A)(c)

After “by way of trade”, insert “, and with the intention of obtaining a commercial advantage or profit,”.

Note 1: The following heading to subsection 132(5) is inserted “*Offence relating to infringing public performances of literary, dramatic or musical works*”.

Note 2: The following heading to subsection 132(5AA) is inserted “*Offences relating to sound recordings or films heard or seen in public*”.

Note 3: The following heading to subsection 132(5A) is inserted “*Offences relating to circumvention services and devices*”.

### 154 Before subsection 132(5E)

Insert:

*Offence relating to significant infringement of copyright*

(5DB) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the conduct results in one or more infringements of the copyright in a work or other subject-matter; and
- (c) the infringement or infringements have a substantial prejudicial impact on the owner of the copyright; and
- (d) the infringement or infringements occur on a commercial scale.

(5DC) In determining whether one or more infringements occur on a commercial scale for the purposes of paragraph (5DB)(d), the following matters are to be taken into account:

- (a) the volume of any articles that are infringing copies that constitute the infringement or infringements;
- (b) the value of any articles that are infringing copies that constitute the infringement or infringements;
- (c) any other relevant matter.

### 155 Subsection 132(5E)

Omit “and (5B)”, substitute “to (5DB)”.

Note 1: The following heading to subsection 132(5E) is inserted “*Defence relating to law enforcement and national security*”.

Note 2: The following heading to subsection 132(5F) is inserted “*Permitted purpose exceptions*”.

Note 3: The following heading to subsection 132(6) is inserted “*Section applies only in respect of acts done in Australia*”.

Note 4: The following heading to subsection 132(6AA) is inserted “*Penalties*”.

### **156 Subsection 132(6A)**

Omit “or (5D)”, substitute “, (5D), (5DA) or (5DB)”.

Note: The following heading to subsection 132(7) is inserted “*Proceedings may be brought in Federal Court etc.*”.

### **157 Subsection 132(9)**

Insert:

*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.

Note: The following heading to subsection 132(9) is inserted “*Definitions*”.

### **158 Subsection 132(9)**

Insert:

*profit* does not include any advantage, benefit or gain resulting from, or associated with, any private or domestic use of any copyright material.

### **159 At the end of section 132**

Add:

*Burden of proof relating to profit*

- (11) In a prosecution for an offence against this section, the burden of proving that any advantage, benefit or gain does not result from, or is not associated with, any private or domestic use of any copyright material is on the prosecution.

**160 Application**

The amendments made by this Part apply in respect of acts done after the day on which this item commences.



## **Part 9—Encoded broadcasts**

### *Copyright Act 1968*

#### **161 Section 135AL**

Insert:

*channel provider* means a person who:

- (a) packages a channel (which might include programs produced by the person); and
  - (b) supplies a broadcaster with the channel; and
  - (c) carries on a business that involves the supply of the channel;
- where, apart from any breaks for the purposes of the transmission of incidental matter, the channel is broadcast as part of an encoded broadcast service.

#### **162 Section 135AL**

Insert:

*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.

#### **163 Section 135AL**

Insert:

*profit* does not include any advantage, benefit or gain resulting from, or associated with, any private or domestic use of any copyright material.

### 164 Subparagraph 135AN(1)(b)(iii)

After “distributes”, insert “(including by exporting from Australia)”.

Note 1: The following heading to subsection 135AN(1) is inserted “*Actions in relation to the manufacture of and dealing with broadcast decoding devices*”.

Note 2: The following heading to subsection 135AN(2) is inserted “*Exception relating to law enforcement and national security*”.

### 165 Subsection 135AN(3)

Repeal the subsection, substitute:

*Who may bring an action*

(3) Subject to subsection (8), if this section applies, the following persons may bring an action against the person mentioned in subsection (1):

- (a) any person who has an interest in the copyright in the broadcast;
- (b) any person who has an interest in the copyright in any content of the broadcast;
- (c) the channel provider who supplies the broadcaster with the channel for the broadcast.

Note: See section 135AL for the definition of *channel provider*.

Note 1: The following heading to subsection 135AN(4) is inserted “*Relief etc.*”.

Note 2: The following heading to subsection 135AN(7) is inserted “*Presumption relating to defendant’s knowledge*”.

Note 3: The following heading to subsection 135AN(8) is inserted “*Limitation on bringing actions*”.

### 166 Subsection 135ANA(1)

Omit “this section”, substitute “this subsection”.

Note 1: The heading to section 135ANA is altered by omitting “**for commercial purposes**”.

Note 2: The following heading to subsection 135ANA(1) is inserted “*Actions in relation to the use of broadcast decoding devices*”.

### 167 Paragraph 135ANA(1)(b)

Omit “an encoded broadcast”, substitute “the encoded broadcast”.

**168 Paragraph 135ANA(1)(c)**

Repeal the paragraph.

**169 After subsection 135ANA(1)**

Insert:

- (1A) Subject to subsection (2), this subsection applies if:
- (a) a broadcaster makes an encoded broadcast; and
  - (b) a broadcast decoding device is used to gain access to the encoded broadcast without the authorisation of the broadcaster; and
  - (c) a person distributes (including by communicating), or authorises the distribution of, the broadcast that has been accessed by the device; and
  - (d) the distribution affects prejudicially a person who may bring an action under subsection (3); and
  - (e) the person knew that the broadcaster had not authorised the access to the encoded broadcast.
- (1B) Subject to subsection (2), this subsection applies if:
- (a) a broadcaster makes an encoded broadcast; and
  - (b) a broadcast decoding device is used to gain access to the encoded broadcast without the authorisation of the broadcaster; and
  - (c) a person receives the broadcast that has been accessed by the device; and
  - (d) the person knew that the broadcaster had not authorised the access to the encoded broadcast.

Note: The following heading to subsection 135ANA(2) is inserted “*Exception relating to law enforcement and national security*”.

**170 Subsection 135ANA(3)**

Repeal the subsection, substitute:

*Who may bring an action*

- (3) Subject to subsection (7), if subsection (1), (1A) or (1B) applies, the following persons may bring an action against the person mentioned in that subsection:

- (a) any person who has an interest in the copyright in the broadcast;
- (b) any person who has an interest in the copyright in any content of the broadcast;
- (c) the channel provider who supplies the broadcaster with the channel for the broadcast.

Note: See section 135AL for the definition of *channel provider*.

Note: The following heading to subsection 135ANA(4) is inserted “*Relief etc.*”.

**171 Paragraph 135ANA(5)(a)**

After “paragraph (1)(b)”, insert “, (1A)(c) or (1B)(c)”.

**172 Paragraph 135ANA(5)(b)**

Omit “the trade”, substitute “any trade”.

**173 Subsection 135ANA(7)**

After “paragraph (1)(b)”, insert “, (1A)(c) or (1B)(c)”.

Note: The following heading to subsection 135ANA(7) is inserted “*Limitation on bringing actions*”.

**174 Paragraph 135AS(1)(b)**

After “by way of trade”, insert “, and with the intention of obtaining a commercial advantage or profit”.

Note: The following heading to subsection 135AS(1) is inserted “*Offences in relation to manufacture of or dealing with broadcast decoding devices*”.

**175 Paragraph 135AS(1)(c)**

Repeal the paragraph, substitute:

- (c) distribute (including by exporting from Australia) a broadcast decoding device with the intention of trading and obtaining a commercial advantage or profit, or with the intention of engaging in any other activity that will affect prejudicially a broadcaster; or

**176 Paragraph 135AS(1)(d)**

After “by way of trade”, insert “and with the intention of obtaining a commercial advantage or profit”.

**177 Subparagraph 135AS(1)(e)(i)**

After “by way of trade,”, insert “and with the intention of obtaining a commercial advantage or profit,”.

**178 Subparagraph 135AS(1)(e)(ii)**

Omit “for trading,”, substitute “for trading with the intention of obtaining a commercial advantage or profit,”.

**179 Subparagraph 135AS(1)(e)(iii)**

After “by way of trade”, insert “and with the intention of obtaining a commercial advantage or profit”.

**180 At the end of subsection 135AS(1)**

Add:

Note: See section 135AL for the definition of *profit*.

**181 After subsection 135AS(1)**

Insert:

*Offence in relation to use of broadcast decoding devices for commercial advantage etc.*

(1A) A person commits an offence if:

- (a) a broadcaster makes an encoded broadcast; and
- (b) the person uses, or authorises the use of, a broadcast decoding device to gain access to the encoded broadcast; and
- (c) the access is gained without the authorisation of the broadcaster; and
- (d) the person uses, or authorises the use of, the device by way of trade and with the intention of obtaining a commercial advantage or profit.

Note: See section 135AL for the definition of *profit*.

*Offence in relation to distribution of encoded broadcast that has been accessed without authorisation*

(1B) A person commits an offence if:

- (a) a broadcaster makes an encoded broadcast; and

- (b) a broadcast decoding device is used to gain access to the encoded broadcast; and
- (c) the access is gained without the authorisation of the broadcaster; and
- (d) the person distributes (including by communicating), or authorises the distribution of, the broadcast that has been accessed by the device; and
- (e) the person knows the broadcaster had not authorised the access to the broadcast; and
- (f) the distribution affects prejudicially the following persons:
  - (i) any person who has an interest in the copyright in the broadcast;
  - (ii) any person who has an interest in the copyright in any content of the broadcast;
  - (iii) the channel provider who supplies the broadcaster with the channel for the broadcast.

Note: See section 135AL for the definition of *channel provider*.

### **182 Subsection 135AS(2)**

Omit “Subsection (1)”, substitute “This section”.

Note: The following heading to subsection 135AS(2) is inserted “*Defence relating to law enforcement and national security*”.

### **183 After subsection 135AS(3)**

Insert:

- (3A) In a prosecution for an offence against this section, the burden of proving that any advantage, benefit or gain does not result from, or is not associated with, any private or domestic use of any copyright material is on the prosecution.

Note: The following heading to subsection 135AS(3) is inserted “*Burdens of proof*”.

### **184 Subsection 135AS(4)**

After “subsection (1)”, insert “, (1A) or (1B)”.

Note: The following heading to subsection 135AS(4) is inserted “*Penalty for contravening section*”.

## **185 Application**

The amendments made by this Part apply in respect of encoded broadcasts made after the day on which this item commences.

## Part 10—Reproductions

### *Copyright Act 1968*

#### **186 Subsection 10(1) (definition of *material form*)**

Repeal the definition, substitute:

*material form*, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced).

#### **187 At the end of section 10**

Add:

- (5) For the purposes of the definition of *copy* in subsection (1), such a copy includes any form (whether visible or not) of storage of a cinematograph film, or a substantial part of a cinematograph film, (whether or not the copy of the film, or a substantial part of the film, can be reproduced).
- (6) For the purposes of paragraph 10(3)(c), a reference to a copy of a sound recording includes any form (whether visible or not) of storage of the sound recording, or a substantial part of the sound recording, (whether or not the copy of the recording, or a substantial part of the recording, can be reproduced).

#### **188 After section 43A**

Insert:

#### **43B Reproduction of works as part of a technical process of use**

- (1) Subject to subsection (2), the copyright in a work is not infringed by the making of a reproduction of the work if the reproduction is incidentally made as part of a technical process of using a copy of the work.



- (2) Subsection (1) does not apply to the making of a reproduction of a work if the reproduction is made from an infringing copy of the work.

### **189 After section 111A**

Insert:

### **111B Reproduction of subject-matter as part of a technical process of use**

- (1) Subject to subsection (2), the copyright in a subject-matter is not infringed by the making of a reproduction of the subject-matter if the reproduction is incidentally made as part of a technical process of using a copy of the subject-matter.
- (2) Subsection (1) does not apply to the making of a reproduction of a subject-matter if the reproduction is made from an infringing copy of the subject-matter.

### **190 Application**

The amendments made by this Part apply in respect of acts done after the day on which this item commences.

## **Part 11—Limitation on remedies available against carriage service providers**

### ***Copyright Act 1968***

#### **191 After Division 2 of Part V**

Insert:

### **Division 2AA—Limitation on remedies available against carriage service providers**

#### **Subdivision A—Preliminary**

##### **116AA Purpose of this Division**

- (1) The purpose of this Division is to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers. A carriage service provider must satisfy certain conditions to take advantage of the limitations.

Note 1: Subdivision B contains a description of the relevant activities.

Note 2: Subdivision C contains details of the limitations on remedies.

Note 3: Subdivision D sets out the conditions that must be satisfied for a carriage service provider to take advantage of the limitations. The limitations are automatic if a carriage service provider complies with the relevant conditions.

- (2) This Division does not limit the operation of provisions of this Act outside this Division in relation to determining whether copyright has been infringed.

##### **116AB Definitions**

In this Division:

***caching*** means the reproduction of copyright material on a system or network controlled or operated by or for a carriage service

provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users.

**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.

### **116AE Category C activity**

A carriage service provider carries out a *Category C activity* by storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider.

### **116AF Category D activity**

A carriage service provider carries out a *Category D activity* by referring users to an online location using information location tools or technology.

## **Subdivision C—Limitations on remedies**

### **116AG Limitations on remedies**

*Relevant conditions must be satisfied*

- (1) A carriage service provider must satisfy the relevant conditions set out in Subdivision D before the limitations in this section apply.

*General limitations*

- (2) For infringements of copyright that occur in the course of carrying out any of the categories of activities set out in Subdivision B, a court must not grant relief against a carriage service provider that consists of:
  - (a) damages or an account of profits; or
  - (b) additional damages; or
  - (c) other monetary relief.

*Category specific limitations*

- (3) For an infringement of copyright that occurs in the course of the carrying out of a Category A activity, the relief that a court may grant against a carriage service provider is limited to one or more of the following orders:

- (a) an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia;
  - (b) an order requiring the carriage service provider to terminate a specified account.
- (4) For an infringement of copyright that occurs in the course of the carrying out of a Category B, C or D activity, the relief that a court may grant against a carriage service provider is limited to one or more of the following orders:
- (a) an order requiring the carriage service provider to remove or disable access to infringing copyright material, or to a reference to infringing copyright material;
  - (b) an order requiring the carriage service provider to terminate a specified account;
  - (c) some other less burdensome but comparably effective non-monetary order if necessary.

*Relevant matters*

- (5) In deciding whether to make an order of a kind referred to in subsection (3) or (4), a court must have regard to:
- (a) the harm that has been caused to the owner or exclusive licensee of the copyright; and
  - (b) the burden that the making of the order will place on the carriage service provider; and
  - (c) the technical feasibility of complying with the order; and
  - (d) the effectiveness of the order; and
  - (e) whether some other comparably effective order would be less burdensome.

The court may have regard to other matters it considers relevant.

## **Subdivision D—Conditions**

### **116AH Conditions**

- (1) This table sets out the conditions for each of the categories of activities.

**Schedule 9** Copyright amendments

**Part 11** Limitation on remedies available against carriage service providers

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<b>Conditions</b>		
<b>Item</b>	<b>Activity</b>	<b>Conditions</b>
1	All categories	<ol style="list-style-type: none"><li>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.</li><li>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.</li></ol>
2	Category A	<ol style="list-style-type: none"><li>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.</li><li>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.</li></ol>
3	Category B	<ol style="list-style-type: none"><li>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.</li><li>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"><li>(a) updating the cached copyright material; and</li><li>(b) not interfering with technology used at the originating site to obtain information about the use of the copyright material.</li></ol></li><li>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.</li><li>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.</li></ol>

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**Conditions**

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<b>Item</b>	<b>Activity</b>	<b>Conditions</b>
4	Category C	<ol style="list-style-type: none"><li>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.</li><li>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.</li><li>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.</li></ol>
5	Category D	<ol style="list-style-type: none"><li>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.</li><li>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.</li><li>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.</li></ol>

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- (2) Nothing in the conditions is to be taken to require a carriage service provider to monitor its service or to seek facts to indicate infringing activity except to the extent required by a standard technical measure mentioned in condition 2 in table item 1 in the table in subsection (1).

### **116AI Evidence of compliance with conditions**

If a carriage service provider, in an action relating to this Division, points to evidence, as prescribed, that suggests that the carriage service provider has complied with a condition, the court must presume, in the absence of evidence to the contrary, that the carriage service provider has complied with the condition.

### **Subdivision E—Regulations**

#### **116AJ Regulations**

- (1) The regulations may provide that a carriage service provider is not liable for damages or any other civil remedy as a result of action taken in good faith to comply with a condition.
- (2) The regulations may provide civil remedies for conduct by relevant parties in relation to conditions.
- (3) The regulations may prescribe offences for conduct by persons issuing notices under the regulations, and prescribe penalties for offences against those regulations. The penalties must not exceed 50 penalty units.

Note: If a body corporate is convicted of an offence against regulations made under this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose fines of up to 5 times the penalty stated above.

### ***Telecommunications Act 1997***

#### **192 At the end of section 115**

Add:

- (4) The rule in subsection (1) does not apply to an industry code made for the purposes of Division 2AA of Part V of the *Copyright Act 1968*.



## **Schedule 10—Broadcasting amendments**

### ***Broadcasting Services Act 1992***

#### **1 At the end of section 122**

Add:

- (5) The ABA must ensure that, at all times after the commencement of this subsection, there is in force under subsection (1) a standard that is, or has the same effect as, the standard in section 9 of the *Broadcasting Services (Australian Content) Standard 1999* as in force on 4 August 2004.

Note: Section 9 of the *Broadcasting Services (Australian Content) Standard 1999* deals with quotas for Australian television programs.

- (6) The ABA must ensure that, at all times after the commencement of this subsection, there is in force under subsection (1) a standard that is, or has the same effect as, the standard in section 5 of *Television Program Standard 23—Australian Content in Advertising* as in force on 4 August 2004.

Note: Section 5 of *Television Program Standard 23—Australian Content in Advertising* deals with quotas for Australian television advertisements.



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*[Minister's second reading speech made in—  
House of Representatives on 23 June 2004  
Senate on 3 August 2004]*  
(110/04)

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2      *US Free Trade Agreement Implementation Act 2004      Amendments from Act No. 154  
of 2004*