

Drafting Direction No. 3.5A

Regulatory powers

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC.

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Part 1—Preliminary issues

Purpose of the Regulatory Powers (Standard Provisions) Act 2014

1 The purpose of the *Regulatory Powers (Standard Provisions) Act 2014* (the *Regulatory Powers Act*) is to simplify the law by creating a standard set of provisions to deal with monitoring, investigation and the use of civil penalties, infringement notices, enforceable undertakings and injunctions in the enforcement of legal obligations.

Triggering the Act

2 To ensure that the implementation of the Regulatory Powers Act in relation to a particular legislative scheme is subject to scrutiny, a Part of the Act will only operate if it is triggered by a provision in another Act. The Regulatory Powers Act cannot be triggered by a legislative instrument. The whole of the Regulatory Powers Act need not be triggered in relation to a particular legislative scheme. It may be that, for example, only the investigation powers are triggered. The Act triggering the Regulatory Powers Act need not be the Act in which the provision that is to be made subject to the relevant Part of the Regulatory Powers Act is housed.

3 Attachment A sets out examples of provisions triggering each Part of the Regulatory Powers Act. It is anticipated that the triggering provisions would be grouped together within a Part or Division. However, this may not always be the case.

Explanatory Memorandum for triggering Acts

4 The Legal and Constitutional Affairs Legislation Committee, in considering the Regulatory Powers (Standard Provisions) Bill 2012, recommended that:

- (a) “each time a bill is introduced in the parliament that provides for the triggering of the provisions in the Regulatory Powers (Standard Provisions) Bill 2012, this must be explicitly articulated and explained in the Explanatory Memorandum to the relevant Bill”; and
- (b) “each time a bill is introduced into the parliament which seeks to trigger the provisions of the Regulatory Powers (Standard Provisions) Bill 2012, the Explanatory Memorandum to that bill must clearly set out the relevant agency’s current regulatory powers, a comparison with the powers in the Regulatory Powers (Standard Provisions) Bill 2012 that will be triggered, and, in the case of any expansion of the agency’s powers, a detailed explanation of the reasons for the expansion of powers”.

5 So, if the Regulatory Powers Act is to be triggered, the reasons for triggering the Regulatory Powers Act must be explained in the Explanatory Memorandum for the triggering Act. Further, if an agency wishes to trigger the Regulatory Powers Act, and that results in an expansion in the agency’s powers, that expansion must be justified in the Explanatory Memorandum for the triggering Act.

6 The Statement of Compatibility with Human Rights for the Regulatory Powers Act noted that the human rights implications will differ with each circumstance in which elements of the framework are triggered, and that these should be considered specifically and in

context. The Parliamentary Joint Committee on Human Rights expressed its support for an assessment to be made regarding the specific application of the standard provisions in the context of a particular Bill. An agency should ensure its statement of compatibility addresses this requirement.

7 Instructors may find the Explanatory Memoranda and the Statements of Compatibility with Human Rights for the following useful precedents:

- (a) *Regulatory Powers (Standardisation Reform) Act 2014*;
- (b) Regulatory Powers (Standardisation Reform) Bill 2020.

Regulatory Powers Act should be used

8 As the purpose of the Regulatory Powers Act is to create standard provisions to deal with monitoring, investigation and enforcement, those matters should not usually be dealt with by creating stand-alone schemes in new legislation. Instead, the Regulatory Powers Act should be triggered. Where you are asked to make significant amendments to an existing legislative scheme dealing with those matters, you should raise with instructors the possibility of instead triggering the Regulatory Powers Act. Not all existing legislative schemes will be suited to this treatment. If you are in doubt about whether an existing legislative scheme is suited, you should discuss the matter with the head drafter. You should also raise with the head drafter any proposal to include provisions attracting the operation of the provisions of the Regulatory Powers Act in Acts based on a referral of power as AGS advice needs to be sought.

9 If an instructing agency wishes to adopt a policy that differs from that set out in the Regulatory Powers Act, or add elements not currently in the Regulatory Powers Act, the appropriate course will be to include provisions to apply the Act with specified variations. Attachment A also includes precedents for the more common variations that may be requested.

10 The Attorney-General's Department (*AGD*) has administrative responsibility for the Regulatory Powers Act, including oversight of its implementation across Commonwealth regulatory frameworks.

11 A proposal to adopt a policy that is different from that set out in the Regulatory Powers Act, or adds elements not currently in the Regulatory Powers Act, should be discussed with the area within AGD to which Bills triggering the Regulatory Powers Act are referred under Drafting Direction No. 4.2. Instructors may wish to discuss substantive modifications to the application of the Regulatory Powers Act with the Administrative Law Section at AGD before the Bill is drafted for referral.

12 The Regulatory Powers Act conforms with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the *Guide*). An instructing agency should consult with AGD if it falls within both of the limbs below:

- (a) adopts a policy that is different from that set out in the Regulatory Powers Act, or adds elements not currently in the Regulatory Powers Act; and

- (b) that difference or addition raises a novel or complex issue that the Guide does not address or constitutes a significant departure from the Guide.

13 Examples of departures from the Regulatory Powers Act that may also constitute departures from the fundamental criminal law principles set out in the Guide include:

- (a) invasive personal searches (discussed in part 10.3 of the Guide);
- (b) entry, search and seizure without warrant or consent (discussed in part 8.6 of the Guide).

(See Drafting Direction No. 4.2 for further information about when departures from the Guide should be referred to Criminal Law Section at AGD.)

Part 2—Monitoring powers

14 Part 2 of the Regulatory Powers Act creates a framework for monitoring:

- (a) whether a provision has been, or is being, complied with; and
- (b) the correctness of information; and
- (c) another matter to which an Act or instrument relates.

15 The power to monitor another matter to which an Act or instrument relates is created under amendments of the Regulatory Powers Act under the Regulatory Powers (Standardisation Reform) Bill 2020, and so should not be relied upon unless that Bill passes, and is commenced.

16 Sections 19, 20, 21 and 22 of the Regulatory Powers Act set out the monitoring powers that are appropriate in most cases. If monitoring powers are required in addition to those already set out in Part 2, these should be provided for using the precedent in Attachment A.

Identifying the provisions subject to monitoring

17 To trigger Part 2 of the Regulatory Powers Act, it will be necessary to identify the provisions that are to be subject to monitoring. These provisions should generally include not only the relevant provisions of the Act in relation to which Part 2 is triggered, but also offence provisions of the *Crimes Act 1914* or the *Criminal Code* to the extent that they relate to the relevant Act. This is to ensure that the full range of monitoring powers can be used not only in relation to a contravention of those provisions, but also in relation to ancillary offences (such as attempts, aiding and abetting and conspiracy).

18 A precedent is included in Attachment A, identifying provisions that are subject to monitoring.

Defining related provisions

19 If a thing is found in the course of executing a monitoring warrant that may be evidence of the contravention of a ***related*** provision, it is possible to secure the thing in

serious or urgent circumstances to prevent it from being concealed or destroyed (see section 22 of the Regulatory Powers Act).

20 You should discuss with instructors the sorts of material that may be found in the monitoring of premises and the purposes for which that material may need to be secured, in identifying the related provisions. The most obvious example of a case in which provisions may need to be defined as *related* is where an authorised person exercises powers under a number of Acts within a single portfolio. The authorised person may enter premises to exercise monitoring powers in relation to one Act, but then wish to secure evidence of an offence against another. You should, however, bear in mind that a definition of *related* provision that is too broad may attract criticism from the Senate Scrutiny of Bills Committee. If you are unsure about the breadth of a *related* provision definition, or whether it is appropriate in the circumstances to identify provisions as *related*, you should discuss the question with the Administrative Law Section at AGD.

21 A precedent is included for the definition of *related* provision in Attachment A. There will often be cases in which an instructing agency does not need to identify any provisions as *related*. If that is the case, it should be made clear that there are no related provisions. There is also a precedent for this case included in Attachment A.

Authorised person

22 The Regulatory Powers Act assumes that the person nominated as an authorised person for the purposes of the exercise of monitoring powers will have been appointed to an office under another provision. The person may, for example, be an inspector for other purposes under the relevant legislative scheme. This means that the triggering Act will need to include a provision dealing with appointment.

23 Only the following persons should be nominated as authorised persons:

- (a) APS employees;
- (b) statutory office holders;
- (c) officials of Commonwealth entities for the purposes of the *Public Governance, Performance and Accountability Act 2013*;
- (d) State or Territory officers.

24 If a State officer is to be nominated as an authorised person, you should consider the issues raised by *O'Donoghue v Ireland*; *Zentai v Hungary*; *Williams v United States of America* (2008) 234 CLR 599 (the Zentai decision).

25 The appointment provision would usually be in the following form:

xx Appointment of [specify office, for example, inspector]

- (1) The [specify office of appointing officer, for example, the Secretary] may, in writing, appoint a person who is one of the following as an [specify office, for example, inspector] for the purposes of this [Act/Part]:
 - (a)

- (2) The *[appointer]* must not appoint a person as an *[specify office, for example, inspector]* unless the *[appointer]* is satisfied that the person has the knowledge or experience necessary to properly exercise the powers of an *[specify office, for example, inspector]*.
- (3) An *[specify office, for example, inspector]* must, in exercising powers as such, comply with any directions of the *[appointer]*.
- (4) If a direction is given under subsection (3) in writing, the direction is not a legislative instrument.

Issuing officer

26 The Regulatory Powers Act allows monitoring warrants to be issued by an **issuing officer**. This would usually be a magistrate of a State or Territory and this would be consistent with paragraph 8.4.1 of the Guide.

27 However, there may be circumstances in which it is appropriate to have a judge of a State or Territory court or a judge of a federal court exercise the functions and powers of an issuing officer in their personal capacity ('*persona designata*'). This is currently the case in a number of Acts, such as the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*. There are a number of matters that instructors will need to take into account in deciding who should be an issuing officer for the purposes of a particular legislative scheme. These include:

- (a) whether the persons against whom the warrants are to be issued have a particular connection with the Commonwealth or a State or Territory, or are officers of such a senior level within the Commonwealth or a State or Territory, that it would be appropriate for a judge of a State or Territory court or a judge of a federal court to issue the warrant;
- (b) whether the nature of the monitoring or investigation to be carried out under the warrant is such that it would be appropriate for a judge of a State or Territory court or a judge of a federal court to issue the warrant (an example of this would be warrants under the *Telecommunications (Interception and Access) Act 1979*);
- (c) in the case of federal judicial officers, whether the powers to be conferred would be compatible with their judicial office (this includes considerations such as whether the functions would be required to be performed under the instruction or advice of the legislature or the executive, and if undertaking the function would make the performance of judicial functions by a judge not possible for an indefinite period of time).

28 If your instructors wish to define **issuing officer** to include a judge of a State or Territory court or a judge of a federal court you should discuss the matter with the Administrative Law Section at AGD. Instructing agencies should consider seeking independent legal advice about potential incompatibility issues at an early stage.

Other concepts used in Part 2

29 In some cases, a term used in Part 2 of the Regulatory Powers Act may have a particular meaning under the provisions compliance with which is to be monitored. For

example, terms like *premises* and *occupier* are sometimes given extended meanings. In that case, it may be necessary to include a provision giving the terms in Part 2 the same meaning as in the provisions being monitored.

Person assisting

30 Where a person exercising monitoring powers is to be assisted by another person, a specific provision allowing this should be included in the triggering Act (a precedent is included in Attachment A). Instructors should be advised to include in the Explanatory Memorandum for the triggering Act a statement that, under paragraph 23(1)(a) of the Regulatory Powers Act, a person exercising monitoring powers may only be assisted by another person if it is necessary and reasonable to do so.

Use of force

31 The Regulatory Powers Act does not include a use of force provision. If a person executing a monitoring warrant is to use force against property, a provision allowing this will need to be included in the triggering Act and justified in the Explanatory Memorandum for that Act. The Senate Scrutiny of Bills Committee has commented adversely where that justification is missing. Use of force against persons would, of course, need convincing justification, particularly where the power is to be exercised by a regulatory agency. A precedent is included for a use of force provision in Attachment A.

Relevant court

32 Under Part 2 of the Regulatory Powers Act, a ***relevant court*** has power to make orders for compensation where electronic equipment is damaged in the course of exercising monitoring powers.

33 AGD takes the view that, unless there are policy reasons to the contrary, jurisdiction should generally be conferred as widely as appropriate, for example, on State and Territory courts as well as the Federal Court of Australia and the Federal Circuit Court of Australia. This ensures that disputes can be resolved in the lowest level of court appropriate, and allows the workload resulting from new jurisdiction to be distributed between courts.

34 It is particularly advisable to confer jurisdiction on State and Territory courts as well as the federal courts where there is a possibility that the same or similar sets of circumstances may give rise to both civil and criminal proceedings. Criminal proceedings will be heard in State and Territory courts, and it will often be advisable to ensure that civil proceedings for the same or related circumstances can be heard in the same court.

35 AGD takes the view that if jurisdiction is conferred on a court in relation to one suite of provisions under an Act, jurisdiction should usually be conferred on that court in relation to all other matters that may give rise to proceedings under the Act. This is to encourage efficiency in dealing with related matters.

Relevant chief executive

36 The relevant chief executive is required to issue authorised persons with identity cards. The relevant chief executive should, as the name suggests, usually be a Secretary or other head of agency.

37 A precedent is included in Attachment A for a provision identifying who will be the *relevant chief executive*.

38 That precedent also includes a delegation provision. AGD takes the view that it is appropriate that the functions and the powers of a relevant chief executive be delegated to an SES employee or acting SES employee. If instructors wish to delegate the functions and powers to officers below that level, this should be raised with the Administrative Law Section at AGD.

39 In some cases, an Act may already include a delegation provision. You should check the existing delegation provision, and any potential interaction between the existing delegation provision and the provision suggested in Attachment A, before including a delegation provision based on the precedent. For example, an existing delegation provision may refer to “functions and powers under this Act” and so may not deal with functions and powers exercised under the Regulatory Powers Act. An existing delegation provision might also allow functions and powers to be delegated to an officer below the appropriate level, and so not be appropriate for the delegation of the functions and powers under the Regulatory Powers Act. If you have any concerns, you should raise them with the Administrative Law Section at AGD.

Additional monitoring powers

40 One of the most common additional monitoring powers included in Acts triggering Part 2 of the Regulatory Powers Act is the power to take, test and analyse samples from premises entered into under the Part. A precedent is included in Attachment A to encourage greater consistency in the language used to create those additional monitoring powers.

External territories and offshore areas

41 At times, the provisions being monitored will apply in the external territories or in offshore areas. It may then be necessary to make it clear that the provisions of Part 2 of the Regulatory Powers Act also apply there. A precedent is included in Attachment A for a provision to extend the application of Part 2 to an external territory. The same precedent should be used for offshore areas. Of course, the term used to describe an offshore area, and the way in which that term is defined, will vary from case to case.

Part 3—Investigation powers

42 Part 3 of the Regulatory Powers Act creates a framework for gathering material that relates to the contravention of offence provisions and civil penalty provisions.

43 Sections 49, 50, 51 and 52 of the Regulatory Powers Act set out the investigation powers that are appropriate for use by regulatory agencies in most cases. They would not, however, be used for the following agencies under the Attorney-General’s portfolio:

- (a) the Australian Federal Police;
- (b) the Australian Crime Commission;
- (c) the Law Enforcement Integrity Commissioner;

(d) the Australian Security Intelligence Organisation.

44 There are already detailed provisions dealing with the investigation powers of these agencies.

45 The investigation powers in Part 3 of the Regulatory Powers Act may also not be appropriate in the case of other agencies, such as the Australian Securities and Investments Commission, that have powers tailored to deal with particular policy issues.

46 If investigation powers are required in addition to those already set out in Part 3 of the Regulatory Powers Act, these should be provided for using the precedent in Attachment A.

Evidential material

47 The investigation powers are exercised primarily in relation to ***evidential material***. This term is defined in section 39 of the Regulatory Powers Act by reference to the provisions that will be subject to investigation. In identifying the provisions that will be subject to investigation, it will usually be necessary to refer not only to the provisions of the particular Act in relation to which Part 3 of the Regulatory Powers Act is being triggered, but also the provisions of the *Crimes Act 1914* and the *Criminal Code* to the extent that they relate to those provisions. Those Acts include important provisions dealing with matters such as ancillary offences (attempts, aiding and abetting, conspiracy etc.), and it is important to ensure that the full range of investigation powers are available to investigate those offences.

Defining related provisions

48 If a thing is found in the course of executing an investigation warrant that is not evidence of the contravention of a provision that is subject to investigation but may be evidence of the contravention of a ***related*** provision, the thing may be seized to prevent its concealment, loss or destruction (see section 52 of the Regulatory Powers Act).

49 You should discuss with your instructors the sorts of material that may be found in searching premises and the purposes for which that material may need to be seized, in identifying the related provisions. The most obvious example of a case in which provisions may need to be defined as ***related*** is where an authorised person exercises powers under a number of Acts within a single portfolio. The authorised person may enter premises to exercise monitoring powers in relation to one Act, but then wish to seize evidence of an offence against another. You should, however, bear in mind that a definition of ***related*** provision that is too broad may attract criticism from the Senate Scrutiny of Bills Committee. If you are unsure about the breadth of a ***related*** provision definition, or whether it is appropriate in the circumstances to identify provisions as ***related***, you should discuss the question with the Administrative Law Section at AGD.

50 A precedent is included for the definition of ***related*** provision in Attachment A. There will often be cases in which an instructing agency does not need to identify any provisions as ***related***. If that is the case, it should be made clear that there are no related provisions. There is also a precedent for this case included in Attachment A.

Authorised persons

51 The Regulatory Powers Act assumes the person nominated as an authorised person for the purposes of the exercise of investigation powers will have been appointed to an office under another provision. This means that the triggering Act will need to include provisions dealing with appointment. See paragraphs 22 to 25 for a discussion of the issues surrounding authorised persons and a precedent.

Issuing officer

52 The Regulatory Powers Act allows investigation warrants to be issued by an ***issuing officer***. This would usually be a magistrate of a State or Territory and this would be consistent with paragraph 8.4.1 of the Guide.

53 However, there may be circumstances in which it is appropriate to have a judge of a State or Territory court or a judge of a federal court exercise the functions and powers of an issuing officer. See the comments in paragraph 27 on this issue.

Relevant chief executive

54 The relevant chief executive exercises a number of powers under Part 3 of the Regulatory Powers Act. The relevant chief executive should, as the name suggests, usually be a Secretary or other head of agency.

55 That precedent also includes a delegation provision. AGD takes the view that it is appropriate that the functions and the powers of a relevant chief executive be delegated to an SES employee or acting SES employee. If instructors wish to delegate the functions and powers to officers below that level, this should be raised with the Administrative Law Section at AGD.

56 In some cases, an Act may already include a delegation provision. You should check the existing delegation provision, and any potential interaction between the existing delegation provision and the provision suggested in Attachment A, before including a delegation provision based on the precedent. For example, an existing delegation provision may refer to “functions and powers under this Act” and so may not deal with functions and powers exercised under the Regulatory Powers Act. An existing delegation provision might also allow functions and powers to be delegated to an officer below the appropriate level, and so not be appropriate for the delegation of the functions and powers under the Regulatory Powers Act. If you have any questions about the appropriate delegation of functions and powers under the Regulatory Powers Act, you should raise them with the Administrative Law Section at AGD.

Additional investigation powers

57 One of the most common additional investigation powers included in Acts triggering Part 3 of the Regulatory Powers Act is the power to take, test and analyse samples from premises entered into under the Part. A precedent is included in Attachment A to encourage greater consistency in the language used to create those additional investigation powers.

Other concepts used in Part 3

58 In some cases, a term used in Part 3 of the Regulatory Powers Act may have a particular meaning under the provisions contravention of which is to be investigated. For example, terms like *premises* and *occupier* are sometimes given extended meanings. In that case, it may be necessary to include a provision giving the terms the same meaning as in the provisions being investigated.

Person assisting

59 Where a person exercising investigation powers is to be assisted by another person, a specific provision allowing this should be included in the triggering Act (a precedent is included in Attachment A). Instructors should be advised to include in the Explanatory Memorandum for the triggering Act a statement that, under paragraph 53(1)(a) of the Regulatory Powers Act, a person exercising investigation powers may only be assisted by another person if it is necessary and reasonable to do so.

Use of force

60 The Regulatory Powers Act does not include a use of force provision. If a person executing an investigation warrant is to use force against property, a provision allowing this will need to be included in the triggering Act and justified in the Explanatory Memorandum for that Act. The Senate Scrutiny of Bills Committee has commented adversely where that justification is missing. Use of force against persons would, of course, need convincing justification, particularly where the power is to be exercised by a regulatory agency. A precedent is included for a use of force provision in Attachment A.

Relevant court

61 Under Part 3 of the Regulatory Powers Act, a *relevant court* has power to make orders for compensation, for example where electronic equipment is damaged in the course of exercising investigation powers. See paragraphs 32 to 35 for issues related to the definition of *relevant court*.

Electronic equipment

62 The Regulatory Powers Act contains basic powers that may be exercised in relation to electronic equipment when searching premises under a warrant. It does not include the power to move electronic equipment to other premises and examine it there, or the power to seek an order to require expert assistance from a person at the premises being searched. If powers of this kind are required, they should be included in the triggering Act, and be based on sections 3K, 3LAA and 3LA of the *Crimes Act 1914*.

External territories and offshore areas

63 At times, investigation powers may relate to the contravention of a provision that applies in the external territories or in offshore areas. It may then be necessary to make it clear that the provisions of Part 3 of the Regulatory Powers Act also apply there. A precedent is included in Attachment A for a provision to extend the application of Part 3 to an external territory. The same precedent should be used for offshore areas. Of course, the term used to

describe an offshore area, and the way in which that term is defined, will vary from case to case.

Part 4—Civil penalty provisions

64 Part 4 of the Regulatory Powers Act creates a framework for enforcing provisions using civil penalties. It may be used to enforce a provision that is a civil penalty provision, as defined in subsection 79(2) of the Regulatory Powers Act.

65 In future, it will not be necessary to include the usual provisions supporting civil penalties in each Act in which a civil penalty provision is included. Instead, a civil penalty provision will be made *enforceable* under Part 4 of the Regulatory Powers Act.

Authorised applicants

66 Under Part 4 of the Regulatory Powers Act, civil penalty provisions may be enforced by an authorised applicant. A precedent is included in Attachment A for a provision identifying who will be the *authorised applicant*.

67 That precedent also includes a delegation provision. AGD takes the view that it is appropriate that the functions and the powers of an authorised applicant be delegated to a relatively senior APS employee with relevant training and expertise. If there is any uncertainty around the officers to whom functions and powers should be delegated, instructors should consult the Administrative Law Section at AGD.

68 In some cases, an Act may already include a delegation provision. You should check the existing delegation provision, and any potential interaction between the existing delegation provision and the provision suggested in Attachment A, before including a delegation provision based on the precedent. For example, an existing delegation provision may refer to “functions and powers under this Act” and so may not deal with functions and powers exercised under the Regulatory Powers Act. An existing delegation provision might also allow functions and powers to be delegated to an officer below the appropriate level, and so not be appropriate for the delegation of the functions and powers under the Regulatory Powers Act. If you have any questions about the appropriate delegation of functions and powers under the Regulatory Powers Act, you should raise them with the Administrative Law Section at AGD.

Time limits

69 The standard time limit that applies under subsection 82(2) of the Regulatory Powers Act for seeking orders for contraventions of civil penalty provisions is 6 years. If a different time limit is to apply, this should be provided for using the precedent in Attachment A.

Paying civil penalties to someone other than the Commonwealth

70 If someone other than the Commonwealth is to be entitled to be paid a pecuniary penalty in relation to a contravention of a civil penalty provision, then:

- (a) this should be provided for using the precedent in Attachment A; and
- (b) AGS advice should be sought.

Civil penalty infrastructure provisions

71 Division 4 of Part 4 of the Regulatory Powers Act contains some provisions of generic application (continuing civil penalty provisions, mistake of fact, and state of mind). If any of these provisions are to be turned off, this should be provided for using the precedent in Attachment A.

Person assisting

72 Sometimes a provision is included to allow a person (generally an agency head) to require another person to assist in connection with an application for a civil penalty order. Such a provision should be included only if there is clear policy justification for doing so. If such a provision is required, use the precedent in Attachment A.

Relevant court

73 Under Part 4 of the Regulatory Powers Act, a **relevant court** has power to make civil penalty orders. See paragraphs 32 to 35 for issues related to the definition of **relevant court**.

External territories and offshore areas

74 At times, civil penalty provisions will apply in the external territories and in offshore areas. It may then be necessary to make it clear that the provisions of Part 4 of the Regulatory Powers Act also apply there. A precedent is included in Attachment A for a provision to extend the application of Part 4 to an external territory. The same precedent should be used for offshore areas. Of course, the term used to describe an offshore area, and the way in which that term is defined, will vary from case to case.

Liability of the Commonwealth under civil penalty provisions

75 In some cases, it may be necessary to make clear whether the Commonwealth is, or is not, liable to a civil penalty. This would usually be done in the provision triggering Part 4 of the Regulatory Powers Act. A precedent is included in Attachment A.

Part 5—Infringement notices

76 Part 5 of the Regulatory Powers Act creates a framework for using infringement notices where an infringement officer reasonably believes that an offence or civil penalty provision has been contravened.

77 The Regulatory Powers Act provides that infringement notices must be issued by an infringement officer. An infringement officer should always be an APS employee or an officer of a State or Territory.

78 The Regulatory Powers Act anticipates that only strict liability offence provisions and civil penalty provisions would be made subject to an infringement notice. It would not be appropriate to make a provision that includes fault elements subject to an infringement notice. It would also not be appropriate to make a provision requiring the determination of complex matters subject to an infringement notice. It is for these reasons that, for example, ancillary offences in the *Crimes Act 1914* and the *Criminal Code* are not suitable for inclusion among

provisions subject to infringement notices. This is because of the complexity of some of the issues they raise.

79 The standard time limit that applies under subsection 103(2) of the Regulatory Powers Act for giving infringement notices is 12 months. If a different time limit is to apply, this should be provided for using the precedent in Attachment A.

80 Subsection 103(3) of the Regulatory Powers Act prohibits a single infringement notice from dealing with more than one contravention except in the case of continuing offences or continuing contraventions of civil penalty provisions. If this rule is not to apply, this should be provided for using the precedent in Attachment A.

81 Additional matters can be included in the infringement notice. If additional matters are to be included, this should be provided for using the precedent in Attachment A.

82 On occasion, an instructing agency may want to prevent evidence or information that is given in written representations in seeking a withdrawal of an infringement notice from being used in any later proceedings. If so, this should be provided for using the precedent in Attachment A.

83 At times, provisions that are subject to an infringement notice will apply in the external territories and in offshore areas. It may then be necessary to make it clear that the provisions of Part 5 of the Regulatory Powers Act also apply there. A precedent is included in Attachment A for a provision to extend the application of Part 5 to an external territory. The same precedent should be used for offshore areas. Of course, the term used to describe an offshore area, and the way in which that term is defined, will vary from case to case.

Part 6—Enforceable undertakings

84 Part 6 of the Regulatory Powers Act provides a framework for accepting and enforcing undertakings in relation to compliance with provisions.

85 Under Part 6 of the Regulatory Powers Act, an authorised person may accept and enforce an enforceable undertaking. A precedent is included in Attachment A for a provision identifying who will be the *authorised person*.

86 That precedent also includes a delegation provision. AGD takes the view that it is appropriate that the functions and the powers of an authorised person be delegated to a relatively senior APS employee with relevant training and expertise. If there is any uncertainty around the officers to whom functions and powers should be delegated, instructors should consult the Administrative Law Section at AGD.

87 In some cases, an Act may already include a delegation provision. You should check the existing delegation provision, and any potential interaction between the existing delegation provision and the provision suggested in Attachment A, before including a delegation provision based on the precedent. For example, an existing delegation provision may refer to “functions and powers under this Act” and so may not deal with functions and powers exercised under the Regulatory Powers Act. An existing delegation provision might also allow functions and powers to be delegated to an officer below the appropriate level, and so not be appropriate for the delegation of the functions and powers under the Regulatory Powers Act. If you have any questions about the appropriate delegation of functions and

powers under the Regulatory Powers Act, you should raise them with the Administrative Law Section at AGD.

88 Subsection 114(3) of the Regulatory Powers Act requires the consent of an authorised person to the withdrawal or variation of an enforceable undertaking to be in writing. If an instructing agency wishes to adopt a different position, this should be done using the precedent in Attachment A.

89 In some cases, a provision may be sought requiring the publication of an undertaking. Attachment A includes a precedent that may be used in that case.

90 Part 6 of the Regulatory Powers Act gives a *relevant court* power to make orders where there is a breach of an enforceable undertaking. See paragraphs 32 to 35 for issues related to the definition of *relevant court*.

91 In some cases, it may be appropriate to allow the authorised person to accept another kind of undertaking. In that case, see Attachment A for a precedent.

92 At times, provisions that are enforceable using undertakings apply in the external territories. It may then be necessary to make it clear that the provisions of Part 6 of the Regulatory Powers Act also apply there. A precedent is included in Attachment A for a provision to extend the application of Part 6 to an external territory. The same precedent should be used for offshore areas. Of course, the term used to describe an offshore area, and the way in which that term is defined, will vary from case to case.

Part 7—Injunctions

93 Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

94 Injunctions are often used in the enforcement of civil penalty provisions.

95 Under Part 7 of the Regulatory Powers Act, an authorised person may apply for an injunction. A precedent is included in Attachment A for a provision identifying who will be the *authorised person*.

96 That precedent also includes a delegation provision. AGD takes the view that it is appropriate that the functions and the powers of an authorised person be delegated to a relatively senior APS employee with relevant training and expertise. If there is any uncertainty around the officers to whom functions and powers should be delegated, instructors should consult the Administrative Law Section at AGD.

97 In some cases, an Act may already include a delegation provision. You should check the existing delegation provision, and any potential interaction between the existing delegation provision and the provision suggested in Attachment A, before including a delegation provision based on the precedent. For example, an existing delegation provision may refer to “functions and powers under this Act” and so may not deal with functions and powers exercised under the Regulatory Powers Act. An existing delegation provision might also allow functions and powers to be delegated to an officer below the appropriate level, and so not be appropriate for the delegation of the functions and powers under the Regulatory Powers Act. If you have any questions about the appropriate delegation of functions and

powers under the Regulatory Powers Act, you should raise them with the Administrative Law Section at AGD.

98 Under Part 7 of the Regulatory Powers Act, a *relevant court* has power to issue injunctions to assist in enforcement. See paragraphs 32 to 35 for issues related to the definition of *relevant court*.

99 In some cases, it may be appropriate for an injunction to be available with the consent of all parties to the proceedings, whether or not section 121 of the Regulatory Powers Act applies. This approach was taken in section 129D of the *Insurance Act 1973* and in section 235 of the *Life Insurance Act 1995*. If that position is adopted, see Attachment A for a precedent.

100 Section 122 of the Regulatory Powers Act allows interim injunctions to be made. There may be circumstances in which this would not be appropriate. A precedent is included in Attachment A for use in this situation.

101 At times, provisions that are enforceable using injunctions apply in the external territories. It may then be necessary to make it clear that the provisions of Part 7 of the Regulatory Powers Act also apply there. A precedent is included in Attachment A for a provision to extend the application of Part 7 to an external territory. The same precedent should be used for offshore areas. Of course, the term used to describe an offshore area, and the way in which that term is defined, will vary from case to case.

Using the Regulatory Powers Act for multiple consequences provisions

102 From time to time, offence and civil penalty provisions are created by setting out a rule that must not be contravened in the first subsection of a provision, then setting out the consequences of contravention in later subsections. The following are examples of this approach.

Example 1

103 This example is from the *Navigation Act 2012*:

34 False representations about seafarer certificates

- (1) A person must not represent that he or she holds a seafarer certificate of a particular kind if the representation is false.

Fault-based offence

- (2) A person commits an offence if the person contravenes subsection (1).

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

Civil penalty

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 3,000 penalty units.

Example 2

104 This example is from the *Tobacco Plain Packaging Act 2011*:

37 Selling or supplying non-compliant tobacco products

- (1) A person contravenes this subsection if:
 - (a) the person:
 - (i) sells a tobacco product; or
 - (ii) offers a tobacco product for sale; or
 - (iii) otherwise supplies (whether or not for consideration) a tobacco product; and
 - (b) the product does not comply with a tobacco product requirement.

Fault-based offence

- (2) A person commits an offence if the person contravenes subsection (1).

Penalty: 2,000 penalty units.

Note: See section 50 in relation to the physical elements of the offence.

Strict liability offence

- (3) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Civil penalty provision

- (4) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 2,000 penalty units.

Note: It is not necessary to prove a person's state of mind in proceedings for a contravention of a civil penalty provision, except in limited circumstances (see section 98).

105 There are a number of Parts of the Regulatory Powers Act that deal with the contravention of offences and civil penalty provisions. For example, Part 3 of the Act allows an authorised person to enter and search premises for the purpose of finding and seizing evidential material. **Evidential material** includes “a thing with respect to which an offence or a civil penalty provision subject to investigation under this Part has been contravened or is suspected, on reasonable grounds, to have been contravened”. Part 4 creates a framework for the use of civil penalties where a civil penalty provision has been contravened. Part 5 creates a framework for the use of infringement notices if a provision that is an offence of strict liability or a civil penalty provision has been contravened.

106 Section 4D of the *Crimes Act 1914* provides as follows:

4D Penalties

- (1) Except so far as the contrary intention appears, a penalty, whether pecuniary or otherwise, set out at the foot of any provision of an Act as described in a paragraph of subsection (1A) indicates:
 - (a) if the provision expressly creates an offence—that the offence is punishable on conviction by a penalty not exceeding the penalty so set out; or

- (b) in any other case—that contravention of the provision is an offence against the provision, punishable on conviction by a penalty not exceeding the penalty so set out.

(1A) Subsection (1) applies to a penalty set out:

- (a) at the foot of a section of an Act; or
- (b) at the foot of a subsection of an Act, but not at the foot of the section containing the subsection; or
- (c) at the foot of a clause of any Schedule to an Act; or
- (d) at the foot of a subclause of any Schedule to an Act, but not at the foot of the clause containing the subclause.

(1B) Subsection (1) does not affect the operation of subsection 4B(2), (2A) or (3).

- (2) Subsection (1) applies to any instrument made under an Act (including rules, regulations or by-laws but not including a law of a Territory) as if the instrument were an Act and as if each such rule, regulation or by-law were a section of an Act.

107 Under the multiple consequences model, subsection (2) in Example 1 and subsections (2) and (3) in Example 2 expressly create an offence. Yet, it is not possible to contravene those subsections. They merely state a consequence if subsection (1) in each of the examples is contravened.

108 Under subsection 79(2) of the Regulatory Powers Act, *civil penalty provision* is defined as follows:

- (2) A provision of an Act or a legislative instrument is a civil penalty provision if:
 - (a) either:
 - (i) the provision sets out at its foot a pecuniary penalty, or penalties, indicated by the words “Civil penalty”; or
 - (ii) another provision of an Act or a legislative instrument provides that the provision is a civil penalty provision, or that a person is liable to a civil penalty if the person contravenes the provision; and
 - (b) the provision is:
 - (i) a subsection, or a section that is not divided into subsections; or
 - (ii) a subregulation, or a regulation that is not divided into subregulations; or
 - (iii) a subclause (however described) of a Schedule to an Act or of a legislative instrument; or
 - (iv) a clause (however described) of a Schedule to an Act, or of a legislative instrument, that is not divided into subclauses.

109 Applying the definition to the multiple consequences model, both subsection (1) and (3) in Example 1 are civil penalty provisions: Subsection (3) because of subparagraph 79(2)(a)(i) and subsection (1) because of subparagraph 79(2)(a)(ii). The same problem arises in Example 2.

110 The issues arising in the use of the multiple consequences provisions should be dealt with in the Act in which they are housed (usually the triggering Act) using the following precedent:

xx Contravening an offence provision or a civil penalty provision

- (1) This section applies if a provision of this Act provides that a person contravening another provision of this Act (the *conduct provision*) commits an offence or is liable to a civil penalty.
- (2) For the purposes of this Act, and the *Regulatory Powers (Standard Provisions) Act 2014* to the extent that it relates to this Act, a reference to a contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the conduct provision.

Using identity cards issued under the Regulatory Powers Act for other purposes

111 Under Parts 2 and 3 of the Regulatory Powers Act, a person exercising monitoring powers or investigation powers will need to produce an identity card. The provisions outlining the content and use of identity cards are in sections 35 and 76 of the Regulatory Powers Act. During the development of the Regulatory Powers Act, agencies expressed concern that their officers currently need to carry a number of identity cards if they are exercising powers under a number of Acts. This occurs because there are currently differences between the identity card provisions across Acts. For this reason, AGD took the decision to include identity card provisions in the Regulatory Powers Act itself, to ensure that the same card is always used when an officer is exercising powers under the Regulatory Powers Act.

112 Some Acts which trigger the Regulatory Powers Act may also include other enforcement provisions that require the use of an identity card. Given that the policy objective behind the inclusion of an identity card provision in the Regulatory Powers Act is to avoid the need for an officer to carry more than one card, the most sensible approach in this case would be to use the card issued for the purposes of exercising powers under the Regulatory Powers Act when exercising other powers under the triggering Act. You should discuss with the head drafter any provision to be included in a triggering Act that deals with the issue of an identity card to a person for purposes other than monitoring or investigation under the Regulatory Powers Act.

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Attachment A—Provisions triggering regulatory powers

Creating a definition for the Regulatory Powers Act

You should include the following definition of ***Regulatory Powers Act*** in the appropriate definition section:

Regulatory Powers Act means the *Regulatory Powers (Standard Provisions) Act 2014*.

Examples of provision to trigger monitoring powers

xx Monitoring powers

Provisions subject to monitoring

- (1) A provision is subject to monitoring under Part 2 of the Regulatory Powers Act if it is:
 - (a) a provision of this Act; or
 - (b) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to this Act.

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether this Act has been complied with. It includes powers of entry and inspection.

OR

Provisions subject to monitoring

- (1) The following provisions are subject to monitoring under Part 2 of the Regulatory Powers Act:
 - (a) [section[s] x, y and z] of this Act;
 - (b) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to one or more of the provisions mentioned in paragraph (a).

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether this Act has been complied with. It includes powers of entry and inspection.

Information subject to monitoring

- (2) Information given in compliance or purported compliance with a provision of this Act is subject to monitoring under Part 2 of the Regulatory Powers Act.

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether the information is correct. It includes powers of entry and inspection.

OR

Information subject to monitoring

- (2) Information given in compliance or purported compliance with one or more of the following provisions is subject to monitoring under Part 2 of the Regulatory Powers Act:
 - (a)

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether the information is correct. It includes powers of entry and inspection.

Other matters subject to monitoring

- (3) Each of the following matters to which [this Act/instrument] relates is subject to monitoring under Part 2 of the Regulatory Powers Act:

(a)

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring a matter to which *[this Act/instrument]* relates. It includes powers of entry and inspection.

Related provisions

- (4) For the purposes of Part 2 of the Regulatory Powers Act, each of the following provisions is related to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
- (a)

OR

- (4) For the purposes of Part 2 of the Regulatory Powers Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*, there are no related provisions.

Authorised applicant

- (5) For the purposes of Part 2 of the Regulatory Powers Act, each of the following persons is an authorised applicant in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
- (a)

Authorised person

- (6) For the purposes of Part 2 of the Regulatory Powers Act, each of the following persons is an authorised person in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
- (a)

Issuing officer

- (7) For the purposes of Part 2 of the Regulatory Powers Act, a magistrate is an issuing officer in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*.

Relevant chief executive

- (8) For the purposes of Part 2 of the Regulatory Powers Act, *[specify office of person, for example, the Secretary]* is the relevant chief executive in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*.
- (9) The relevant chief executive may, in writing, delegate the powers and functions mentioned in subsection (10) to:
- (a) *[an authorised person]*;
- (b)
- (10) The powers and functions that may be delegated are:
- (a) powers and functions under Part 2 of the Regulatory Powers Act in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*; and

- (b) powers and functions under the Regulatory Powers Act that are incidental to a power or function mentioned in paragraph (a).
- (11) A person exercising powers or performing functions under a delegation under subsection (8) must comply with any directions of the relevant chief executive.

Relevant court

- (12) For the purposes of Part 2 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
 - (a) *[specify court]*;

[Additional monitoring powers

- (x) For the purposes of determining:
 - (a) whether a provision mentioned in subsection (1) has been, or is being, complied with; or
 - (b) the correctness of information mentioned in subsection (2); or
 - (c) a matter mentioned in subsection (3);the additional powers mentioned in subsection (y) are taken to be included in the monitoring powers under Part 2 of the Regulatory Powers Act.
- (y) The additional monitoring powers are:
 - (a) *[substantiating information mentioned in subsection (2)]*; and
 - (b) *[the power to take, test and analyse samples of any thing on premises entered under Part 2 of the Regulatory Powers in relation to [the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*; and

[Exception to subsection 35(3)—authorised person continues to exercise other powers

- (x) Subsection 35(3) of the Regulatory Powers Act does not apply if the person who ceases to be an authorised person for the purposes of Part 2 of that Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*, continues to be a person who exercises powers under this Act, or Part 3 of that Act as that Part applies in relation to this Act, for which the person is required to hold an identity card.]

[Person assisting

- (x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 2 of the Regulatory Powers Act in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*.]

[Use of force in executing a monitoring warrant

- (x) In executing a monitoring warrant under Part 2 of the Regulatory Powers Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
 - (a) an authorised person may use such force against *[persons and]* things as is necessary and reasonable in the circumstances; and

- (b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.]

[Extension to [external Territories]

- (x) Part 2 of the Regulatory Powers Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*, extends to *[every external Territory]*.]

Shorter alternative

In simple cases, some of the subsections in the example may be collapsed, for example:

xx Monitoring powers

Provisions subject to monitoring

- (1) A provision is subject to monitoring under Part 2 of the Regulatory Powers Act if it is:
- (a) a provision of this Act; or
 - (b) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to this Act.

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether this Act has been complied with. It includes powers of entry and inspection.

OR

Provisions subject to monitoring

- (1) The following provisions are subject to monitoring under Part 2 of the Regulatory Powers Act:
- (a) *[section[s] x, y and z]* of this Act;
 - (b) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to one or more of the provisions mentioned in paragraph (a).

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether this Act has been complied with. It includes powers of entry and inspection.

Information subject to monitoring

- (2) Information given in compliance or purported compliance with a provision of this Act is subject to monitoring under Part 2 of the Regulatory Powers Act.

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether the information is correct. It includes powers of entry and inspection.

OR

Information subject to monitoring

- (2) Information given in compliance or purported compliance with one or more of the following provisions is subject to monitoring under Part 2 of the Regulatory Powers Act:
- (a)

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether the information is correct. It includes powers of entry and inspection.

Other matters subject to monitoring

- (3) Each of the following matters to which *[this Act/instrument]* relates is subject to monitoring under Part 2 of the Regulatory Powers Act:

(a)

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring a matter to which *[this Act/instrument]* relates. It includes powers of entry and inspection.

Related provisions, authorised applicant, authorised person, issuing officer, relevant chief executive and relevant court

- (4) For the purposes of Part 2 of the Regulatory Powers Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
- (a) *[sections x, y and z are related to those provisions/that information] OR [there are no related provisions]*; and
 - (b) *[specify office of person, for example, an inspector]* is an authorised applicant; and
 - (c) *[specify office of person, for example, an inspector]* is an authorised person; and
 - (d) *[specify office of person, for example, a magistrate]* is an issuing officer; and
 - (e) *[specify office of person, for example, the Secretary]* is the relevant chief executive; and
 - (f) *[specify court, for example, the Federal Circuit Court of Australia]* is the relevant court.
- (5) The relevant chief executive may, in writing, delegate the powers and functions mentioned in subsection (6) to:
- (a) *[an authorised person]*;
 - (b)
- (6) The powers and functions that may be delegated are:
- (a) powers and functions under Part 2 of the Regulatory Powers Act in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*; and
 - (b) powers and functions under the Regulatory Powers Act that are incidental to a power or function mentioned in paragraph (a).
- (7) A person exercising powers or performing functions under a delegation under subsection (5) must comply with any directions of the relevant chief executive.

[Additional monitoring powers]

- (x) For the purposes of determining:
- (a) whether a provision mentioned in subsection (1) has been, or is being, complied with; or
 - (b) the correctness of information mentioned in subsection (2); or
 - (c) a matter mentioned in subsection (3);
- the additional powers mentioned in subsection (y) are taken to be included in the monitoring powers under Part 2 of the Regulatory Powers Act.
- (y) The additional monitoring powers are:
- (a) *[substantiating information mentioned in subsection (2)]*; and
 - (b) *[the power to take, test and analyse samples of any thing on premises entered under Part 2 of the Regulatory Powers in relation to [the provisions of this Act/the*

provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (2A)]]; and

[Exception to subsection 35(3)—authorised person continues to exercise other powers

- (x) Subsection 35(3) of the Regulatory Powers Act does not apply if the person who ceases to be an authorised person for the purposes of Part 2 of that Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*, continues to be a person who exercises powers under this Act, or Part 3 of that Act as that Part applies in relation to this Act, for which the person is required to hold an identity card.]

[Person assisting

- (x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 2 of the Regulatory Powers Act in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*.]

[Use of force in executing a monitoring warrant

- (x) In executing a monitoring warrant under Part 2 of the Regulatory Powers Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*:
- (a) an authorised person may use such force against *[persons and]* things as is necessary and reasonable in the circumstances; and
 - (b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.]

[Extension to [external Territories]

- (x) Part 2 of the Regulatory Powers Act, as that Part applies in relation to *[the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)/matters mentioned in subsection (3)]*, extends to *[every external Territory]*.]

Alternative for cases where there is a different authorised applicant or authorised person for different provisions

113 Where there are to be different authorised applicants or authorised persons for different provisions, a table can be used to set out who will be the authorised applicant or authorised person for each suite of provisions. For example:

Authorised [applicants/persons]

- (4) For the purposes of Part 2 of the Regulatory Powers Act, each person mentioned in column 1 of an item of the following table is an authorised *[applicant/person]* in relation to *[a provision/[matter]* mentioned in column 2 of the item:

| Authorised [applicants/persons] | | |
|----------------------------------------|--------------------------------------|-----------------------------|
| Item | Column 1 | Column 2 |
| | Authorised [applicant/person] | [Provisions/Matters] |
| 1 | | |

| Authorised [applicants/persons] | | |
|----------------------------------------|--------------------------------------|-----------------------------|
| Item | Column 1 | Column 2 |
| | Authorised [applicant/person] | [Provisions/Matters] |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |

Examples of provision triggering investigation powers

xx Investigation powers

Provisions subject to investigation

- (1) A provision is subject to investigation under Part 3 of the Regulatory Powers Act if it is:
- (a) an offence provision of this Act; or
 - (b) a civil penalty provision of this Act; or
 - (c) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to this Act.

Note: Part 3 of the Regulatory Powers Act creates a framework for investigating whether a provision has been contravened. It includes powers of entry, search and seizure.

OR

Provisions subject to investigation

- (1) The following provisions are subject to investigation under Part 3 of the Regulatory Powers Act:
- (a) *[specify offence or civil penalty provision]*;
 - (b) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to *[that offence or civil penalty provision]*.

Note: Part 3 of the Regulatory Powers Act creates a framework for investigating whether a provision has been contravened. It includes powers of entry, search and seizure.

Related provisions

- (2) For the purposes of Part 3 of the Regulatory Powers Act, each of the following provisions is related to evidential material that relates to a provision mentioned in subsection (1):
- (a)

OR

- (2) For the purposes of Part 3 of the Regulatory Powers Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1), there are no related provisions.

Authorised applicant

- (3) For the purposes of Part 3 of the Regulatory Powers Act, each of the following persons is an authorised applicant in relation to evidential material that relates to a provision mentioned in subsection (1):
- (a)

Authorised person

- (4) For the purposes of Part 3 of the Regulatory Powers Act, each of the following persons is an authorised person in relation to evidential material that relates to a provision mentioned in subsection (1):
- (a)

Issuing officer

- (5) For the purposes of Part 3 of the Regulatory Powers Act, a magistrate is an issuing officer in relation to evidential material that relates to a provision mentioned in subsection (1).

Relevant chief executive

- (6) For the purposes of Part 3 of the Regulatory Powers Act, *[specify office of person, for example, the Secretary]* is the relevant chief executive in relation to evidential material that relates to a provision mentioned in subsection (1).
- (7) The relevant chief executive may, in writing, delegate the powers and functions mentioned in subsection (8) to:
- (a) *[an authorised person]*;
- (b)
- (8) The powers and functions that may be delegated are:
- (a) powers and functions under Part 3 of the Regulatory Powers Act in relation to evidential material that relates to a provision mentioned in subsection (1); and
- (b) powers and functions under the Regulatory Powers Act that are incidental to a power or function mentioned in paragraph (a).
- (9) A person exercising powers or performing functions under a delegation under subsection (7) must comply with any directions of the relevant chief executive.

Relevant court

- (10) For the purposes of Part 3 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to evidential material that relates to a provision mentioned in subsection (1):
- (a) *[specify court]*;

[Additional investigation powers]

- (x) The additional powers mentioned in subsection (y) are taken to be included in the investigation powers under Part 3 of the Regulatory Powers Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1).
- (y) The additional investigation powers are:
- (a) *[the power to take, test and analyse samples of any thing on premises entered under Part 3 of the Regulatory Powers in relation to evidential material that relates to a provision mentioned in subsection (1)]*; and

[Exception to subsection 76(3)—authorised person continues to exercise other powers

- (x) Subsection 76(3) of the Regulatory Powers Act does not apply if the person who ceases to be an authorised person for the purposes of Part 3 of that Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1), continues to be a person who exercises powers under this Act, or Part 2 of that Act as that Part applies in relation to this Act, for which the person is required to hold an identity card.]

[Person assisting

- (x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 3 of the Regulatory Powers Act in relation to evidential material that relates to a provision mentioned in subsection (1).]

[Use of force in executing an investigation warrant

- (x) In executing an investigation warrant under Part 3 of the Regulatory Powers Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1):
- (a) an authorised person may use such force against *[persons and]* things as is necessary and reasonable in the circumstances; and
 - (b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.]

[Extension to [external Territories]

- (x) Part 3 of the Regulatory Powers Act, as that Part applies in relation to a provision mentioned in subsection (1), extends to *[every external Territory]*.]

Shorter alternative

In simple cases, some of the subsections in the example may be collapsed, for example:

xx Investigation powers

Provisions subject to investigation

- (1) A provision is subject to investigation under Part 3 of the Regulatory Powers Act if it is:
- (a) an offence provision of this Act; or
 - (b) a civil penalty provision of this Act; or
 - (c) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to this Act.

Note: Part 3 of the Regulatory Powers Act creates a framework for investigating whether a provision has been contravened. It includes powers of entry, search and seizure.

OR

Provisions subject to investigation

- (1) The following provisions are subject to investigation under Part 3 of the Regulatory Powers Act:
- (a) *[specify offence or civil penalty provision]*;
 - (b) an offence provision of the *Crimes Act 1914* or the *Criminal Code*, to the extent that it relates to *[that offence or civil penalty provision]*.

Note: Part 3 of the Regulatory Powers Act creates a framework for investigating whether a provision has been contravened. It includes powers of entry, search and seizure.

Related provisions, authorised applicant, authorised person, issuing officer, relevant chief executive and relevant court

- (2) For the purposes of Part 3 of the Regulatory Powers Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1):
 - (a) *[sections x, y and z are related to that evidential material] OR [there are no related provisions];* and
 - (b) *[specify office of person, for example, an inspector]* is an authorised applicant; and
 - (c) *[specify office of person, for example, an inspector]* is an authorised person; and
 - (d) *[specify office of person, for example, a magistrate]* is an issuing officer; and
 - (e) *[specify office of person, for example, the Secretary]* is the relevant chief executive; and
 - (f) *[specify court, for example, the Federal Circuit Court of Australia]* is the relevant court.
- (3) The relevant chief executive may, in writing, delegate the powers and functions mentioned in subsection (4) to:
 - (a) *[an authorised person];*
 - (b)
- (4) The powers and functions that may be delegated are:
 - (a) powers and functions under Part 3 of the Regulatory Powers Act in relation to evidential material that relates to a provision mentioned in subsection (1); and
 - (b) powers and functions under the Regulatory Powers Act that are incidental to a power or function mentioned in paragraph (a).
- (5) A person exercising powers or performing functions under a delegation under subsection (3) must comply with any directions of the relevant chief executive.

[Additional investigation powers]

- (x) The additional powers mentioned in subsection (y) are taken to be included in the investigation powers under Part 3 of the Regulatory Powers Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1).
- (y) The additional investigation powers are:
 - (a) *[the power to take, test and analyse samples of any thing on premises entered under Part 3 of the Regulatory Powers in relation to evidential material that relates to a provision mentioned in subsection (1)];* and

[Exception to subsection 76(3)—authorised person continues to exercise other powers]

- (x) Subsection 76(3) of the Regulatory Powers Act does not apply if the person who ceases to be an authorised person for the purposes of Part 3 of that Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1), continues to be a person who exercises powers under this Act, or Part 2 of that Act as that Part applies in relation to this Act, for which the person is required to hold an identity card.]

[Person assisting]

- (x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 3 of the Regulatory Powers Act in relation to evidential material that relates to a provision mentioned in subsection (1).]

[Use of force in executing an investigation warrant]

- (x) In executing an investigation warrant under Part 3 of the Regulatory Powers Act, as that Part applies in relation to evidential material that relates to a provision mentioned in subsection (1):
- (a) an authorised person may use such force against *[persons and]* things as is necessary and reasonable in the circumstances; and
 - (b) a person assisting the authorised person may use such force against things as is necessary and reasonable in the circumstances.]

[Extension to [external Territories]

- (x) Part 3 of the Regulatory Powers Act, as that Part applies in relation to a provision mentioned in subsection (1), extends to *[every external Territory].]*

Alternative for cases where there is a different authorised applicant or authorised person for different provisions

114 Where there are to be different authorised applicants or authorised persons for different provisions, a table can be used to set out who will be the authorised applicant or authorised person for each suite of provisions. For example:

Authorised [applicant/person]

- (4) For the purposes of Part 3 of the Regulatory Powers Act, each person mentioned in column 1 of an item of the following table is an authorised *[applicant/person]* in relation to a provision mentioned in column 2 of the item:

| Authorised <i>[applicants/persons]</i> | | |
|-----------------------------------------------|---------------------------------------------|-------------------|
| Item | Column 1 | Column 2 |
| | Authorised <i>[applicant/person]</i> | Provisions |
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |

Example of provisions triggering civil penalty regime

The following definition will need to be included in the triggering Act:

In this Act:

civil penalty provision has the same meaning as in the Regulatory Powers Act.

xx Civil penalty provisions

Enforceable civil penalty provisions

- (1) Each civil penalty provision of this Act is enforceable under Part 4 of the Regulatory Powers Act.

Note: Part 4 of the Regulatory Powers Act allows a civil penalty provision to be enforced by obtaining an order for a person to pay a pecuniary penalty for the contravention of the provision.

Authorised applicant

- (2) For the purposes of Part 4 of the Regulatory Powers Act, each of the following persons is an authorised applicant in relation to the civil penalty provisions of this Act:
- (a) *[specify office of person];*
- (3) An authorised applicant may, in writing, delegate the authorised applicant's powers and functions under Part 4 of the Regulatory Powers Act in relation to the civil penalty provisions of this Act to *[the following]*.

Relevant court

- (4) For the purposes of Part 4 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to the civil penalty provisions of this Act:
- (a) *[specify court];*

[Time limit for making an application]

- (x) Despite subsection 82(2) of the Regulatory Powers Act, an application may be made under section 82 of that Act within *[x eg 2 or 4]* years (and not 6 years) of a person contravening a civil penalty provision of this Act.]

[Where pecuniary penalty may be paid to the Commonwealth or another person]

- (x) An authorised applicant may apply to a relevant court for an order that a person pay *[specify organisation]* a pecuniary penalty.
- (y) If the authorised applicant does so, references to the Commonwealth in subsections 82(3) and 83(1) and (2) of the Regulatory Powers Act are taken to include references to *[specify organisation]* in relation to a contravention of that civil penalty provision.
- (z) Subsection (x) is in addition to, and not instead of, subsection 82(1) of the Regulatory Powers Act.]

[Mistake of fact defence does not apply]

- (x) Section 95 (mistake of fact) of the Regulatory Powers Act does not apply in relation to the civil penalty provisions of this Act.

OR

- (x) Section 95 (mistake of fact) of the Regulatory Powers Act does not apply in relation to the following civil penalty provisions:
- (a) *[specify civil penalty provision];*

[Extension to [external Territories]]

- (x) Part 4 of the Regulatory Powers Act, as that Part applies in relation to the civil penalty provisions of this Act, extends to *[every external Territory].]*

[Liability of Crown]

- (x) Part 4 of the Regulatory Powers Act, as that Part applies in relation to the civil penalty provisions of this Act, does not make the Crown liable to a pecuniary penalty.

The following provision should be used if a person (such as an agency head) is to have the power to require another person to assist in connection with an application for a civil penalty order:

xx Requirement for person to assist with applications for civil penalty orders

- (1) A person commits an offence if:
- (a) the *[relevant chief executive]* requires, in writing, the person to give all reasonable assistance in connection with an application for a civil penalty order; and
 - (b) the person fails to comply with the requirement.

Penalty: *[10]* penalty units.

- (2) A requirement under subsection (1) is not a legislative instrument.
- (3) The *[relevant chief executive]* may require a person to assist under subsection (1) only if:
- (a) it appears to the *[relevant chief executive]* that the person is unlikely to have:
 - (i) contravened the civil penalty provision to which the application relates; or
 - (ii) committed an offence constituted by the same, or substantially the same, conduct as the conduct to which the application relates; and
 - (b) the *[relevant chief executive]* suspects or believes that the person can give information relevant to the application.
- (4) The *[relevant chief executive]* cannot require a person to assist under subsection (1) if the person is or has been a lawyer for the person suspected of contravening the civil penalty provision to which the application relates.
- (5) A *[relevant court]* may order a person to comply with a requirement under subsection (1) in a specified way. Only the *[relevant chief executive]* may apply to the court for an order under this subsection.
- (6) For the purposes of this section, it does not matter whether the application for the civil penalty order has actually been made.

Note: Subsection (1) does not abrogate or affect the law relating to legal professional privilege or the privilege against self-incrimination.

Alternative for cases where there is a different authorised applicant for different provisions

115 Where there are to be different authorised applicants for different provisions, a table can be used to set out who will be the authorised applicant for each suite of provisions. For example:

Authorised applicant

- (4) For the purposes of Part 4 of the Regulatory Powers Act, each person mentioned in column 1 of an item of the following table is an authorised applicant in relation to a provision mentioned in column 2 of the item:

| Authorised applicants | | |
|------------------------------|------------------------------------------|--------------------------------|
| Item | Column 1 Authorised applicant | Column 2 Provisions |
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |

Example of provision triggering infringement notices

xx Infringement notices

Provisions subject to an infringement notice

- (1) A [civil penalty provision of this Act/provision of this Act contravention of which constitutes an offence of strict liability] is subject to an infringement notice under Part 5 of the Regulatory Powers Act.

Note: Part 5 of the Regulatory Powers Act creates a framework for using infringement notices in relation to provisions.

OR

Provisions subject to an infringement notice

- (1) The following provisions are subject to an infringement notice under Part 5 of the Regulatory Powers Act:
- (a)

Note: Part 5 of the Regulatory Powers Act creates a framework for using infringement notices in relation to provisions.

Infringement officer

- (2) For the purposes of Part 5 of the Regulatory Powers Act, each of the following persons is an infringement officer in relation to the provisions mentioned in subsection (1):
- (a)

Relevant chief executive

- (3) For the purposes of Part 5 of the Regulatory Powers Act, [specify office of person, for example, the Secretary] is the relevant chief executive in relation to the provisions mentioned in subsection (1).
- (4) The relevant chief executive may, in writing, delegate the relevant chief executive's powers and functions under Part 5 of the Regulatory Powers Act in relation to the provisions mentioned in subsection (1) to [the following]:
- (5) A person exercising powers or performing functions under a delegation under subsection (4) must comply with any directions of the relevant chief executive.

[Time limit for giving an infringement notice]

- (x) Despite subsection 103(2) of the Regulatory Powers Act, an infringement notice must be given under that subsection within *[x eg 2 years or 6 months]* (not 12 months) of the alleged contravention of a provision mentioned in subsection (1).]

[Single infringement notice may deal with more than one contravention]

- (x) Despite subsection 103(3) of the Regulatory Powers Act, a single infringement notice may be given to a person in respect of:
- (a) 2 or more alleged contraventions of a provision mentioned in subsection (1); or
 - (b) alleged contraventions of 2 or more provisions mentioned in subsection (1).
- However, the notice must not require the person to pay more than one amount in respect of the same conduct.]

[Additional matters to be included in infringement notices]

- (x) In addition to the matters included in subsection 104(1) of the Regulatory Powers Act, an infringement notice given in relation to an alleged contravention of a provision mentioned in subsection (1) must also include the following:
- (a) *[specify additional requirement];]*

[Certain evidence or information not admissible]

- (x) Evidence or information that the person, or a representative of the person, gives to *[the relevant chief executive/a delegate of the relevant chief executive]* in the course of making representations under subsection 106(1) of the Regulatory Powers Act, in relation to the withdrawal of an infringement notice given in relation to an alleged contravention of a provision mentioned in subsection (1), is not admissible in evidence against the person or representative in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).]

[Extension to [external Territories]

- (x) Part 5 of the Regulatory Powers Act, as that Part applies in relation to the provisions mentioned in subsection (1), extends to *[every external Territory].]*

Alternative for cases where there is a different infringement officer for different provisions

116 Where there are to be different infringement officers for different provisions, a table can be used to set out who will be the authorised applicant for each suite of provisions. For example:

Infringement officer

- (4) For the purposes of Part 5 of the Regulatory Powers Act, each person mentioned in column 1 of an item of the following table is an infringement officer in relation to a provision mentioned in column 2 of the item:

| Infringement officers | | |
|------------------------------|-----------------------------|-------------------|
| Item | Column 1 | Column 2 |
| | Infringement officer | Provisions |
| 1 | | |

| Infringement officers | | |
|------------------------------|-----------------------------|-------------------|
| Item | Column 1 | Column 2 |
| | Infringement officer | Provisions |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |

Example of provision triggering enforceable undertakings

xx Enforceable undertakings

Enforceable provisions

- (1) The following provisions are enforceable under Part 6 of the Regulatory Powers Act:
- (a)

Note: Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

Authorised person

- (2) For the purposes of Part 6 of the Regulatory Powers Act, each of the following persons is an authorised person in relation to the provisions mentioned in subsection (1):
- (a)
- (3) An authorised person may, in writing, delegate the authorised person's powers and functions under Part 6 of the Regulatory Powers Act in relation to the provisions mentioned in subsection (1) to *[the following]*.

Relevant court

- (4) For the purposes of Part 6 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to the provisions mentioned in subsection (1):
- (a) *[specify court]*;

[Other undertakings]

- (x) An authorised person may accept any of the following undertakings:
- (a) *[the undertaking will need to relate in some way to an enforceable provision]*;
The undertaking must be expressed to be an undertaking under this subsection.
- (y) The power in subsection (x) is in addition to the power of an authorised person under subsection 114(1) of the Regulatory Powers Act.
- (z) Part 6 of the Regulatory Powers Act, other than subsections 114(1) and (2), applies to an undertaking accepted under subsection (x) of this section as if it were an undertaking accepted under subsection 114(1) of the Regulatory Powers Act.]

[Consent to variation or withdrawal of undertaking need not be in writing]

- (x) Despite subsection 114(3) of the Regulatory Powers Act, an authorised person's consent to the variation or withdrawal of an undertaking in relation to an enforceable provision need not be in writing.]

[Enforceable undertaking [may/must] be published on the [agency's website]

- (x) An authorised person in relation to a provision mentioned in subsection (1) *[may/must]* publish an undertaking given in relation to the provision *[on the agency's website].*

[Extension to [external Territories]

- (x) Part 6 of the Regulatory Powers Act, as that Part applies in relation to the provisions mentioned in subsection (1), extends to *[every external Territory].*

Alternative for cases where there is a different authorised person for different provisions

117 Where there are to be different authorised persons for different provisions, a table can be used to set out who will be the authorised person for each suite of provisions. For example:

Authorised person

- (4) For the purposes of Part 6 of the Regulatory Powers Act, each person mentioned in column 1 of an item of the following table is an authorised person in relation to a provision mentioned in column 2 of the item:

| Authorised persons | | |
|---------------------------|--------------------------|-------------------|
| Item | Column 1 | Column 2 |
| | Authorised person | Provisions |
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |

Example of provision triggering enforcement using injunctions

xx Injunctions

Enforceable provisions

- (1) The following provisions are enforceable under Part 7 of the Regulatory Powers Act:
(a)

Note: Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

Authorised person

- (2) For the purposes of Part 7 of the Regulatory Powers Act, each of the following persons is an authorised person in relation to the provisions mentioned in subsection (1):
(a)
- (3) An authorised person may, in writing, delegate the authorised person's powers and functions under Part 7 of the Regulatory Powers Act in relation to the provisions mentioned in subsection (1) to *[the following]*.

Relevant court

- (4) For the purposes of Part 7 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to the provisions mentioned in subsection (1):
- (a) *[specify court]*;

[Consent injunctions]

- (x) A relevant court may grant an injunction under Part 7 of the Regulatory Powers Act in relation to a provision mentioned in subsection (1) by consent of all the parties to proceedings brought under that Part, whether or not the court is satisfied that section 121 of that Act applies.]

[No interim injunctions]

- (x) Despite section 122 of the Regulatory Powers Act, a relevant court may not grant an interim injunction:
- (a) restraining a person from engaging in conduct in contravention of *[specify provision]*; or
- (b) requiring a person to do a thing in compliance with *[specify provision]*.]

[Extension to [external Territories]

- (x) Part 7 of the Regulatory Powers Act, as that Part applies in relation to the provisions mentioned in subsection (1), extends to *[every external Territory]*.]

Alternative for cases where there is a different authorised person for different provisions

118 Where there are to be different authorised persons for different provisions, a table can be used to set out who will be the authorised person for each suite of provisions. For example:

Authorised person

- (4) For the purposes of Part 7 of the Regulatory Powers Act, each person mentioned in column 1 of an item of the following table is an authorised person in relation to a provision mentioned in column 2 of the item:

| Authorised persons | | |
|---------------------------|--------------------------|-------------------|
| Item | Column 1 | Column 2 |
| | Authorised person | Provisions |
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |