DRAFT Drafting Direction 2012, No. 3.5A Regulatory powers

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Part 1—Preliminary issues

1 The purpose of the *Regulatory Powers (Standard Provisions) Act 2012* (the ***Regulatory Powers Act***) is to simplify the law by creating a standard set of provisions to deal with monitoring, investigation, civil penalties and the use of infringement notices, enforceable undertakings and injunctions.

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 or a regulation. If an instructing agency wishes to leave open the option of triggering a Part of the Regulatory Powers Act in a regulation, the Act under which that regulation is made must include a provision allowing this to be done.

3 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 or regulation triggering the Regulatory Powers Act need not be the Act or regulation in which the provision that is to be made subject to the relevant Part of the Regulatory Powers Act is housed.

4 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. Attachment A also sets out an example of a regulation-making power that could be included in an Act to allow the regulations themselves to trigger a Part of the Regulatory Powers Act.

5 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 First Parliamentary Counsel.

6 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.

7 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 the Criminal Law and Law Enforcement Branch within the Attorney-General's Department (***CLLEB***) if it 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, if that difference or variation represents a departure from fundamental criminal law principles (see Drafting Direction No. 4.2).

Part 2—Monitoring powers

8 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.

9 Sections 20, 21, 22 and 23 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.

Related provisions

10 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 23of the Regulatory Powers Act). You should discuss with instructors the sorts of material that may be found in the monitoring of premises and the purposes for which they may need to secure those things, in identifying the related provisions. You should also bear in mind that a definition of ***related*** provision that is too broad may attract criticism from the Senate Scrutiny of Bills Committee. A precedent is included for the definition of ***related*** provision in Attachment A.

Authorised person

11 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.

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

(a) APS employees;

(b) statutory office holders;

(c) members or employees of prescribed Agencies for the purposes of the *Financial Management and Accountability Act 1997* or of Commonwealth authorities for the purposes of the *Commonwealth Authorities and Companies Act 1997*;

(d) State or Territory officers.

13 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).

14 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 as an *[specify office, for example, inspector]* for the purposes of this Part.

(2) The *[appointer]* must not appoint a person as an *[specify office, for example, inspector]* unless the *[appointer]* is satisfied that the person has suitable training or experience 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

15 The Regulatory Powers Act allows 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.

16 However, there may be circumstances in which it is appropriate to have a judge of a State or Territory court, a Federal Magistrate or a judge of a federal court exercise the functions and powers of an issuing officer. This is currently the case in a number of Acts, such as the *Australian Crime Commission Act 2002*, the *Law Enforcement Integrity Commissioner Act 2006* and the *Tobacco Plain Packaging Act 2011*. 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, a Federal Magistrate 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, a Federal Magistrate 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) the complexity and sensitivity of the matters to be taken into account in deciding whether to issue a warrant.

Person assisting

17 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. Instructors should be advised to include in the Explanatory Memorandum for the triggering Act a statement that, under 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

18 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

19 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.

20 The Federal Courts Branch of the Attorney-General's Department (***FCB***) takes the view that, unless there are policy reasons to the contrary, it will generally be appropriate to confer jurisdiction on State and Territory courts as well as the Federal Court of Australia and the Federal Magistrates Court.

21 FCB 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

22 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.

External territories

23 At times, the provisions being monitored will apply in the external territories. 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 for such a provision in Attachment A.

Part 3—Investigation powers

24 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.

25 Sections 50, 51, 52 and 53 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 Customs and Border Protection Service;

(e) the Australian Security Intelligence Organisation.

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

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

28 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

29 The investigation powers are exercised primarily in relation to ***evidential material***. This term is defined 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 Act 1995* to the extent that they relate to those provisions. Those Acts include important provisions dealing with matters such as ancillary offences.

Related provisions

30 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 53 of the Regulatory Powers Act). You should discuss with your instructors the sorts of material that may be found in searching premises and the purposes for which they may need to seize those things, in identifying the related provisions. You should also bear in mind that a definition of ***related*** provision that is too broad may attract criticism from the Senate Scrutiny of Bills Committee. A precedent is included for the definition of ***related*** provision in Attachment A.

Authorised persons

31 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 11 to 14 for a discussion of the issues surrounding authorised persons and a precedent.

Issuing officer

32 The Regulatory Powers Act allows 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.

33 However, there may be circumstances in which it is appropriate to have a judge of a State or Territory court, a Federal Magistrate or a judge of a federal court exercise the functions and powers of an issuing officer. See the comments in paragraph 16 on this issue.

Relevant chief executive

34 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.

Person assisting

35 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. Instructors should be advised to include in the Explanatory Memorandum for the triggering Act a statement that, under 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

36 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

37 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 19 to 21 for issues related to the definition of ***relevant court***.

Electronic equipment

38 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

39 At times, the provisions compliance with which are the subject of investigation will apply in the external territories. 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 for such a provision in Attachment A.

Part 4—Civil penalty provisions

40 Part 4 of the Regulatory Powers Act:

(a) contains a definition of ***civil penalty provision***; and

(b) creates a framework for enforcing provisions using civil penalties.

41 The definition of ***civil penalty provision*** applies in relation to all Acts and legislative instruments, irrespective of whether a particular Act or legislative instrument applies Part 4 of the Regulatory Powers Act (see subsection 80(2) of the Act).

42 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.

43 The standard time limit that applies under subsection 85(2) of the Regulatory Powers Act for seeking orders for contraventions of civil penalty provisions is 4 years. If a different time limit is to apply, this should be provided for using the precedent in Attachment A.

44 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.

45 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.

46 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 below.

^xx Requirement for person to assist in 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.

Note: This subsection does not abrogate or affect the law relating to legal professional privilege, or any other immunity, privilege or restriction that applies to the disclosure of information, documents or other things.

(2) A request 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 request 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.

47 Under Part 4 of the Regulatory Powers Act, a ***relevant court*** has power to make civil penalty orders. See paragraphs 19 to 21 for issues related to the definition of ***relevant court***.

48 At times, civil penalty provisions will apply in the external territories. 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 for such a provision in Attachment A.

Part 5—Infringement notices

49 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.

50 The Regulatory Powers Act provides that infringement notices must be issued by an infringement officer, and is drafted on the basis that that officer should always be an APS employee or an officer of a State or Territory.

51 The standard time limit that applies under subsection 107(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.

52 Subsection 107(3) of the Regulatory Powers Act also 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.

53 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.

54 If regulations are to specify additional requirements to be included in the infringement notice, this should be provided for using the precedent in Attachment A.

55 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.

56 If the regulations are to make further provision in relation to infringement notices, this should be provided for using the precedent in Attachment A.

57 At times, provisions that are subject to an infringement notice will apply in the external territories. 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 for such a provision in Attachment A.

Part 6—Enforceable undertakings

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

59 Subsection 119(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.

60 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.

61 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 19 to 21 for issues related to the definition of ***relevant court***.

62 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.

63 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 for such a provision in Attachment A.

Part 7—Injunctions

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

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

66 Under Part 7 of the Regulatory Powers Act, a ***relevant court*** has power to issue injunctions in aid of enforcement. See paragraphs 19 to 21 for issues related to the definition of ***relevant court***.

67 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 127 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.

68 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 for such a provision in Attachment A.

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Attachment A—Provisions triggering regulatory powers

Example of provision to trigger monitoring powers

xx Monitoring powers

Provisions subject to monitoring

(1) This Act is ***subject to monitoring*** under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2012* (the ***Regulatory Powers 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

(1) The following provisions are ***subject to monitoring*** under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2012* (the ***Regulatory Powers Act***):

(a)

Note: Part 2 of the Regulatory Powers Act creates a framework for monitoring whether the provisions have 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 (Standard Provisions) Act 2012* (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

(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 (Standard Provisions) Act 2012* (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.

Related provisions

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

Authorised applicant

(4) 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 mentioned in subsection (1)/information mentioned in subsection (2)]*:

(a)

Authorised person

(5) 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 mentioned in subsection (1)/information mentioned in subsection (2)]*:

(a)

Issuing officer

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

Relevant chief executive

(7) 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 mentioned in subsection (1)/information mentioned in subsection (2)]*.

(8) The relevant chief executive may, in writing, delegate the powers and functions mentioned in subsection (9) to:

(a) *[an authorised person]*;

(b)

(9) The powers and functions that may be delegated are:

(a)

The following powers and functions might be delegated:

(a) powers under Part 2 of the Regulatory Powers Act in relation to *[the provisions mentioned in subsection (1)/information mentioned in subsection (2)]*; and

(b) powers and functions under the Regulatory Powers Act that are incidental to a power mentioned in paragraph (a).

(10) 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

(11) 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 mentioned in subsection (1)/information mentioned in subsection (2)]*:

(a) *[specify court]*;

[Additional monitoring powers

(x) For the purposes of Part 2 of the Regulatory Powers Act, the additional powers mentioned in subsection (y) are also taken to be ***monitoring powers*** 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).

(y) The additional ***monitoring powers*** are:

(a) *[substantiating information mentioned in subsection (2)]*; and

(b) *]*

[Person assisting]

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

[Use of force in executing a warrant

(x) In executing a monitoring warrant:
  (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 it applies in relation to *[the provisions mentioned in subsection (1)/information mentioned in subsection (2)]*, extends to every external Territory.*]*

Example 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 (Standard Provisions) Act 2012* (the ***Regulatory Powers Act***) if it is:
  (a) an offence against this Act; or
  (b) a civil penalty provision under this Act; or
  (c) an offence against the *Crimes Act 1914* or the *Criminal Code* that 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

(1) The following provisions are ***subject to investigation*** under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2012* (the ***Regulatory Powers Act***):
  (a) *[specify offence or civil penalty provision]*;
  (b) an offence against the *Crimes Act 1914* or the *Criminal Code* that 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):

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)

The following powers and functions might be delegated:

(a) powers 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 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) For the purposes of Part 3 of the Regulatory Powers Act, the additional powers mentioned in subsection (y) are also taken to be ***investigation powers*** in relation to evidential material that relates to a provision mentioned in subsection (1).

(y) The additional ***investigation powers*** are:

(a) *]*

[Person assisting]

(x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under this Part in relation to evidential material that relates to a provision mentioned in subsection (1).

[Use of force in executing a warrant

(x) In executing a monitoring warrant:
  (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 it applies in relation to a provision mentioned in subsection (1), extends to every external Territory.*]*

Example of provision triggering civil penalty regime

xx Civil penalty provisions

Enforceable *civil penalty provisions*

(1) A civil penalty provision in this Act is ***enforceable*** under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2012* (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.

OR

(1) The following civil penalty provisions are ***enforceable*** under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2012* (the ***Regulatory Powers Act***):
  (a) *[specify civil penalty provision]*;

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 mentioned in subsection (1):
  (a) *[specify office of person]*;

Relevant court

(3) 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 mentioned in subsection (1):
  (a) *[specify court]*;

[Time limit for making an application

(x) Despite subsection 85(2) of the Regulatory Powers Act, an application may be made under that subsection within *[x eg 2 or 6]* years (and not 4 years) of a person contravening a civil penalty provision mentioned in subsection (1).*]*

[Persons other than the Commonwealth who can be paid a pecuniary penalty

(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 85(3) and 86(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 85(1) of the Regulatory Powers Act.*]*

[Mistake of fact defence does not apply

(x) Section 98 (mistake of fact) of the Regulatory Powers Act does not apply in relation to the civil penalty provisions mentioned in subsection (1).

OR

(x) Section 98 (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 it applies in relation to the civil penalty provisions mentioned in subsection (1), extends to every external Territory.*]*

Example of provision triggering infringement notices

xx Infringement notices

Provisions subject to an infringement notice

(1) A *[civil penalty provision in this Act/strict liability offence against this Act]* is ***subject to an infringement notice*** under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2012* (the ***Regulatory Powers Act***).

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

OR

(1) The following provisions are ***subject to an infringement notice*** under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2012* (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 powers and functions mentioned in subsection (5) to:
(a) *[an infringement officer]*;
(b)

(5) The powers and functions that may be delegated are:
(a)

(6) 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 107(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 a person contravening a provision mentioned in subsection (1).*]*

[Single infringement notice may deal with more than one contravention

(x) Despite subsection 107(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 108(1) of the Regulatory Powers Act, an infringement notice given in relation to a contravention of a provision mentioned in subsection (1) must also include the following:
(a) *[specify additional requirement]]*

[Regulations may set out other matters to be included

(x) Regulations made under this Act may set out any other matters that are to be included in an infringement notice given in relation to a contravention of a provision mentioned in subsection (1).*]*

[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 110(1) of the Regulatory Powers Act, in relation to the withdrawal of an infringement notice given in relation to a 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).*]*

[Regulations

(x) Regulations made under this Act may make further provision in relation to infringement notices given in relation to contraventions of provisions mentioned in subsection (1).*]*

[Extension to external Territories

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

Example of provision triggering enforceable undertakings

xx Enforceable undertakings

Enforceable provisions

(1) The following provisions are ***enforceable*** under Part 6 of the *Regulatory Powers (Standard Provisions) Act 2012* (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)

Relevant court

(3) 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 powers of an authorised person under subsection 119(1) of the Regulatory Powers Act.

(z) Part 6 of the Regulatory Powers Act, other than subsection 119(1), applies to an undertaking accepted under subsection (x) of this section as if it were an undertaking accepted under subsection 119(1) of the Regulatory Powers Act.*]*

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

(x) Despite subsection 119(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 internet

(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 authorised person's website]]*

[Extension to external Territories

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

Example of provision triggering enforcement using injunctions

xx Injunctions

Enforceable provisions

(1) The following provisions are ***enforceable*** under Part 7 of the *Regulatory Powers (Standard Provisions) Act 2012* (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)

Relevant court

(3) 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 127 of that Act applies.*]*

[No interim injunctions

(x) Despite section 128 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 it applies in relation to the provisions mentioned in subsection (1), extends to every external Territory.*]*

Example of regulation-making power allowing Regulatory Powers Act to be triggered

xx Regulations—monitoring, investigation and enforcement

The regulations may:

(a) make a regulation subject to monitoring under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2012* (monitoring powers); and

(b) make information given in compliance, or purported compliance, with a regulation subject to monitoring under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2012* (monitoring powers); and

(c) make a regulation subject to investigation under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2012* (investigation powers); and

(d) make a regulation a civil penalty provision (Part 4 of the *Regulatory Powers (Standard Provisions) Act 2012*); and

(e) make a regulation subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2012* (infringement notices); and

(f) make a regulation enforceable under Part 6 of the *Regulatory Powers (Standard Provisions) Act 2012* (enforceable undertakings); and

(g) make a regulation enforceable under Part 7 of the *Regulatory Powers (Standard Provisions) Act 2012* (injunctions); and

(h) make provision in relation to monitoring, investigation and the use of infringement notices, enforceable undertakings and injunctions under the *Regulatory Powers (Standard Provisions) Act 2012* in relation to a regulation; and

(i) modify the *Regulatory Powers (Standard Provisions) Act 2012* as it applies in relation to a regulation.