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**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

DANGEROUS GOODS (ROAD TRANSPORT) BILL 2009

EXPLANATORY STATEMENT

Circulated by authority of
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Background

The *Dangerous Goods (Road Transport) Bill 2009* is modelled on schedule 1 of the *National Transport Commission (Model Legislation — Transport of Dangerous Goods by Road or Rail) Regulations 2007* (Cwlth) ('the NTC model legislation') developed by the National Transport Commission. Schedule 1 of the NTC model legislation sets out the provisions for the model Act and schedule 2 sets out the model regulations to be made under the new Act. The Council of Australian Governments ('COAG') has agreed that the NTC model legislation will be implemented by each State and Territory to introduce nationally consistent regulatory and operational arrangements for the transport of dangerous goods.

The main categories of dangerous goods that are routinely transported into and within the ACT are fuels in the form of gases (Class 2 dangerous goods) and flammable liquids (Class 3 dangerous goods). The majority of these goods are transported into the ACT by road from NSW, with a smaller volume entering by rail. In general terms, the volume of dangerous goods brought into the Territory is not great as the ACT does not have a significant mining, chemical or heavy manufacturing industry profile.

The NTC model legislation relates to the transport of dangerous goods by road and rail. However, the bill is limited to the transport of dangerous goods by road. The rail aspects of the NTC model legislation will be implemented as a second stage in consultation with the NSW Government given that the ACT's rail infrastructure is operated by the Rail Corporation New South Wales as part of its NSW rail network. At present, the *Dangerous Substances Act 2004* (ACT), which imposes a range of safety duties on people transporting, or who are in the control of the transport of, dangerous goods, applies to the transport of dangerous goods by rail.

The transport of dangerous goods by road in the ACT is currently regulated by the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth) and regulations made under the Act. The Commonwealth legislation gives effect to the 9th edition of the United Nations *Model Regulations for the Transport of Dangerous Goods* and the 6th edition of the Australian Dangerous Goods Code. The NTC model legislation is a significant update and is based on the 14th edition of the United Nations model regulations and will give effect to the 7th edition of the Australian Dangerous Goods Code ('ADG Code 7') which is based on the later United Nations regulations. The bill will ensure that the road transport sector is no longer out-of-step with accepted international standards for transporting dangerous goods.

The NTC model legislation does not deal specifically with the transport of explosives (Class 1 dangerous goods) or radioactive material (Class 7 dangerous goods), nor does it address security requirements for products such as security sensitive ammonium nitrate ('SSAN'). The transport of explosives and SSAN's are dealt with under the *Dangerous Substances Act 2004* (ACT). Radioactive material is regulated under the *Radiation Protection Act 2006* (ACT).

Although the ADG Code 7 and the NTC model legislation apply generally to the transport of infectious substances and other toxic agents (Class 6 dangerous goods), any handling of these materials, including for transport purposes, may also be subject to laws dealing with public health and environmental protection.

Consequent on the COAG agreement, the *Road Transport Reform (Dangerous Goods) Repeal Bill 2009* (Cwlth) has been introduced into the Federal Parliament. The commencement of the Commonwealth's repeal Act and the new ACT Act will be co-ordinated by both jurisdictions.

Significant departures from the model provisions

It was recognised during the development of the NTC model legislation that jurisdictions, when implementing the national scheme, may need to modify provisions to satisfy their wider legal and policy requirements. The provisions in the bill have been fine-tuned to reflect ACT legal and human rights policy and to bring them more closely in line with current ACT drafting practice. The significant departures from the model provisions are as follows:

- Penalty levels in the model offence provisions have been brought more closely into line with ACT practice. For example, the maximum penalty for clause 180 (Offence—information not to be used for other purposes) and clause 190 (Offence—fail to comply with employment order) is 50 penalty units rather than the 100 penalty units under the model provisions.
- Fault elements for offences, or the exclusion of fault elements by making offences strict liability offences, also reflect ACT practice. For example, clause 30 (Offences—goods too dangerous to be transported), and clauses 180 and 190 mentioned in the preceding point, are not strict liability offences in the bill but are strict liability offences under the model provisions. For clause 30, the physical element of negligence is used.
- The enforcement provisions reflect the standard provisions for ACT legislation, particularly provisions about the issue of a search warrant and the powers that may be exercised under the warrant.
- The bill provides full derivative use immunity against selfincrimination as opposed to the use immunity in the model provisions.
- The time within which a prosecution may be commenced for an alleged offence is the period under section 192 of the Legislation Act.
- If the offence in relation to which a commercial benefits penalty order is made is a strict liability offence, the bill restricts the amount of the order to not more than 50 penalty units as against an uncapped amount available under the model provisions.
- The circumstances to which clause 45 (Direction to move pt 3.2 vehicle—dangerous situation, harm or obstruction) and clause 54 (Moving unattended and broken-down pt 3.2 vehicles—dangerous situation or obstruction) apply have been made more consistent. The model provision for clause 54 does not include the obstruction elements of clause 45 even though its heading includes the term 'obstruction'. Clause 54 differs from the model provision in that it incorporates the obstruction elements from clause 45.
- The model provision for the recovery of costs has not been included in the bill. The ACT's criminal law policy is that the Territory should bear its own costs for prosecutions.

- The model provision for the recovery of reasonable costs by a public authority because of an incident involving, or that involves the danger of, the escape of dangerous goods or an explosion or fire involving dangerous goods has not been included in the bill. This is because the ACT’s civil law policy is that common law remedies and procedures for the recovery of damages should be preferred unless there are compelling reasons to abrogate them by statute or create additional statutory remedies. Also, the model provision places the burden on the defendant to prove that the defendant acted reasonably.

Strict liability offences

A range of offences in the bill are strict liability offences or have a strict liability element to the offence.

Strict liability offences engage the presumption of innocence under the *Human Rights Act 2004*. All strict liability offences are assessed by the Human Rights and Criminal Law Units in the Department of Justice and Community Safety. When assessing whether an offence is suitable to be a strict liability offence, the Department has regard to a number of criteria, including:

- whether the defendant was “put on notice” of a requirement to do an act, and that a failure to do so will result in the commission of an offence;
- whether the defendant can be reasonably expected, because of their admission to a particular profession or because the requirements of a regulatory regime to which they are subject to, to know of their legal obligations under that regime;
- whether the commission of the conduct constituting the offence is technical in nature, or whether it the commission of the conduct is “morally blameworthy” or “repugnant”: see *Wholesale Travel Group Inc v R* [1991] 3 S.C.R. 154;
- whether the burden on the defendant to raise a mistake of fact is an evidential or legal one;
- whether requiring the prosecution to prove a subjective *mens rea* or higher level of fault would impose a difficult or impossible burden on it, thereby undermining the legitimate regulatory objectives of the state; and
- the severity of the penalty for the offence. A penalty of imprisonment is very serious, and requires exceptional justification.

In *Travel Group Inc* a majority Court drew a distinction between ‘true crimes’, and regulatory offences. The Court observed the earlier distinction it had drawn in *R v City of Sault Ste. Marie* [1978] 2 S.C.R. 1299. In that case Dickson J (as he then was), writing on behalf of a unanimous Court, recognised:

public welfare offences as a distinct class. ... such offences, although enforced as penal laws through the machinery of the criminal law, ‘are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.’

Cory J, writing for the majority in *Travel Group Inc*, observed that:

It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

The Court recognized that strict liability offences would be more readily justified when applied to regulatory offences which do not imply the same degree of moral blameworthiness as ‘true crimes’.

Having regard to the matters considered above, it is considered that the strict liability offences in the bill impose reasonable and proportionate limitations on the presumption of innocence in section 22 (1) of the of the Human Rights Act. The offences are essentially of a regulatory nature. The defence of mistake of fact is available to a defendant charged with a strict liability offence. The defence only imposes an evidential burden, as opposed to a legal or ‘persuasive’ burden, on the defendant: it is only incumbent on the defendant to present or point to evidence which suggests that there is a ‘reasonable possibility’ that they acted under a mistake of fact (see the Criminal Code, section 58 (4) and (7)). If the defendant discharges this onus, the burden is then put back on the prosecution to disprove beyond reasonable doubt that the defendant did not act under a mistake of fact (see the Criminal Code, section 56 (2)). The use of strict liability offences will substantially assist in protecting the efficiency and integrity of the regulatory regime under the bill.

Legal burdens

The imposition of a legal burden on a defendant engages the presumption of innocence in section 22 (1) of the *Human Rights Act 2004*. The following offence provisions include defences that place a legal burden on a defendant:

- clause 33 (Offences—transport of dangerous goods);
- clause 77 (Offence—failure to comply with direction to give assistance);
- clause 111 (Offence—fail to comply with improvement notice);
- clause 186 (Offence—victimisation of employees for reporting breaches or assisting with investigations).

The Human Rights and Criminal Law Units in the Department of Justice and Community Safety have regard to the following considerations when assessing the appropriateness of a provision imposing a burden on a defendant:

- the standard of proof placed on the defendant;
- the penalty which attaches to the offence;
- whether the offence is a ‘true crime’ involving ‘moral blameworthiness’, or whether it is a regulatory offence;
- the stigma attached to the offence;
- the stigma attaching to a conviction for the offence;
- whether the matter which the defendant is required to prove is peculiarly within their knowledge (making it difficult for the prosecution to prove, but comparatively straightforward for the accused to prove).¹

In *Wholesale Travel Group Inc v R* [1991] 3 S.C.R. 154 Cory J observed that placing a persuasive burden on the defendant to demonstrate that they have taken reasonable care was a proportionate limitation on the presumption of innocence. In particular, the court was cognisant of the fact that requiring the Crown to prove or disprove matters which were in the peculiar knowledge of the defendant would impose “insurmountable barriers” which would make the enforcement of regulatory regimes impossible.

Having regard to these principles, it is considered that the placing of a legal burden for the defence in the clauses mentioned above imposes a proportionate limit on the presumption of innocence given that the matters to be raised as part of that defence would be within the peculiar knowledge of the defendant and that the offences are regulatory offences.

¹ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary*, (Wellington, 2005), p 841.

Chapter 1 Preliminary

Part 1.1 Introduction

Clause 1 provides that the bill, when enacted, will be known as the *Dangerous Goods (Road Transport) Act 2009*.

Clause 2 provides that the bill commences on a day fixed by the Minister by written notice. Subclause (2) provides that if the Act has not commenced within 1 year beginning on its notification day, it automatically commences on the first day after that period. This displaces the operation of the Legislation Act, section 79 (Automatic commencement of postponed law) which provides a default commencement period of 6 months.

This commencement provision allows the commencement of the bill, when enacted, and the *Road Transport Reform (Dangerous Goods) Repeal Bill 2009* (Cwlth), when enacted, to be co-ordinated. If the new Act were to commence before the Commonwealth's repeal Act, the new Act would not operate to the extent that it is inconsistent with the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth) which currently regulates the transport of dangerous goods by road in the ACT.

Clauses 3 to 5 are standard provisions about the dictionary, the status of notes in the Act and the application of the Criminal Code.

Clause 6 sets out the purpose of the Act which is to regulate the transport of dangerous goods by road in order to promote public safety and protect property and the environment.

Clause 7 sets out the dangerous goods to which the Act does not apply. The model regulations to be made under the Act (see the NTC model legislation, schedule 2) also contain other exceptions.

Clause 8 sets out the Act's relationship with other laws. The following laws prevail over the Act in the event that they are inconsistent with the Act:

- a law that relates to the storage and handling of dangerous goods if it does not also relate to the transport of dangerous goods by road (a 'dangerous substances law');
- the *Radiation Protection Act 2006* (ACT).

The *Dangerous Substances Act 2004* ('DSA') is not a dangerous substances law within the meaning of clause 8 (3) because it deals with the storage and handling of dangerous goods and also with the transport of dangerous goods (see the definition of *handle* in section 11 of the DSA). In the event of an inconsistency between the new Act and the DSA, the new Act prevails over the DSA.

Part 1.2 Important concepts

This part (clauses 9 to 19) defines key terms for the Act.

In particular, clause 9 provides that a function is exercised for *compliance purposes* if it is exercised to find out whether the Act is being complied with or to investigate an offence, or suspected offence, against the Act. Apart from entry under a search warrant, an intrusive

power exercised under the Act by an authorised person must generally be exercised for compliance purposes.

Clause 11 defines *packaging*, in relation to goods. The term is defined in accordance with its ordinary meaning. Packaging is anything that contains, holds, protects or encloses the goods, whether directly or indirectly, to enable them to be received or held for transport, or to be transported, and includes anything declared by regulation to be packaging.

Other key terms defined for the Act include the following:

- who is a *consignor, packer* or *loader* (clauses 10, 12 and 13)
- when a person is the *operator* of a vehicle (clause 14);
- when a person is *qualified, fit* or *authorised* to drive a vehicle or run its engine (clauses 15 to 17);
- when a vehicle is *unattended* or *broken-down* (clauses 18 and 19).

Chapter 2 Competent authorities and authorised people

Part 2.1 Competent authorities

Clause 20 requires the Minister to declare an entity as a competent authority for the Act. The term entity includes an unincorporated body and a person (including a person occupying a position) (see the Legislation Act, dictionary, part 1). More than 1 competent authority may be declared.

Clause 21 provides for a competent authority to delegate the authority's functions (other than the power to appoint an authorised person) to an authorised person appointed by the authority, a police officer, a public employee or someone else prescribed by regulation.

Clause 22 provides that a competent authority may give information about any action taken by the authority under the Act, and any information obtained under the Act, to a competent authority under a corresponding law.

Part 2.2 Authorised people

Clause 23 provides that a competent authority, a police officer and a person appointed by a competent authority as an authorised person are authorised people for the Act.

Clause 24 requires the appointing competent authority to give an authorised person other than a police officer an identity card stating the authorised person's name and that the person is an authorised person.

Clause 25 requires an authorised person who is not a police officer to carry the person's identity card while exercising a function under the Act and, if practicable, produce the card before exercising a function under the Act. A police officer who is not in uniform must, if exercising a function as an authorised person under the Act, if practicable, comply with a request to identify himself or herself by producing evidence that he or she is a police officer or stating his or her name, rank and place of duty.

Chapter 3 Road transport

Part 3.1 Offences—licensing, safety and insurance obligations

This part (clauses 28 to 37) contains the principal offence provisions for the Act which underpin the licensing regime for vehicles and drivers in the model regulations (see the NTC model legislation, schedule 2). The offences have significant penalties because of the potential for death or serious injury to a person, or significant harm to the environment or significant damage to property, that can be caused by an incident involving dangerous goods or goods too dangerous to transport.

Clause 28 creates offences relating to the unlicensed transport of dangerous goods. The offences operate if a regulation requires a vehicle to be licensed to transport dangerous goods and an unlicensed vehicle is used for the transport of the dangerous goods. Offences may be committed by a prime contractor or a driver. Strict liability applies to these offences. (The dictionary defines a prime contractor as a person who, in conducting a business for or involving the transport of dangerous goods by road, has undertaken to be responsible for, or is responsible for, the transport of the goods.) A person who consigns dangerous goods for transport in a vehicle that the person knows, or ought reasonably to know, the vehicle is unlicensed also commits an offence under the clause.

Clause 29 (1) provides that a person commits an offence if the person employs, engages, causes or permits someone else to drive a vehicle transporting dangerous goods if the other person is required by regulation to be licensed to drive the vehicle and the other person is not licensed as required. Strict liability applies to the element of the offence that the other person is required by regulation to be licensed to drive the vehicle. Clause 29 (2) provides that a person must not drive a vehicle transporting dangerous goods if a regulation requires the person to be licensed to drive the vehicle and the person is not licensed to drive the vehicle. Strict liability applies to the offence.

Clause 30 provides that a person commits an offence if the person consigns goods for transport by road, or arranges for the transport of goods in a vehicle owned or controlled by the person, the goods are goods too dangerous to be transported and the person is negligent about whether the goods are goods too dangerous to be transported. The offence has a maximum penalty of 500 penalty units, imprisonment for 2 years or both. This is the penalty under the model legislation and reflects the nature of the goods to which it applies. Goods may be too dangerous to be transported because of their inherent instability (eg nitro-glycerine) or their potential to react violently when exposed to other things, including exploding or the dangerous emission of toxic, corrosive or flammable gases or vapours. People involved in the transport of dangerous goods can be expected to know which goods are goods too dangerous to be transported.

Clause 31 creates a more serious offence if the conduct to which clause 30 applies causes the death of, or serious injury to, someone else and the person intends to cause, or is reckless about causing, the death or serious injury.

Clause 32 provides for alternative verdicts against a person who is prosecuted for an offence against clause 31 if the trier of fact is not satisfied beyond reasonable doubt that the defendant committed the offence but is satisfied beyond reasonable doubt that the

defendant committed the offence against clause 30. The trier of fact may find the defendant guilty of the offence against clause 30, but only if the defendant has been given procedural fairness in relation to that finding of guilt.

Clause 33 (1) provides that a person commits an offence if the person is involved in the transport of dangerous goods by road and the person fails to ensure that the goods are transported in a safe way. However, subclause (3) creates a defence if the defendant proves either that the defendant, as far as practicable, ensured that the goods were transported in a safe way or that the offence is brought about by someone else over whom the defendant has no control or by a non-human act or event over which the defendant has no control and the defendant could not reasonably have been expected to guard against the bringing about of the offence. Under the Criminal Code, section 59, the defendant has a legal burden in relation to the defence.

Clause 33 (2) provides that a person commits an offence if the person is involved in the transport of dangerous goods, the person fails to comply with the Act and the person knows or ought reasonably know that the failure is likely to endanger the safety of people or property or the environment.

Clauses 34 and 35 are similar in effect to clauses 31 and 32 but apply in relation to an offence against clause 33.

Clauses 36 and 37 create offences relating to the owner of a vehicle or a prime contractor using a vehicle to transport a placard load and the use of the vehicle is not covered by the required amount of insurance cover. (The dictionary defines a placard load as a load of dangerous goods that must be placarded under a regulation and a placard as a label or emergency information panel that is required by regulation to be used in transporting dangerous goods.) These offences are in the model regulations to be made under the Act (see the NTC model legislation, schedule 2) but are included in the bill because of the penalty level for the offences.

Part 3.2 General powers—pt 3.2 vehicles and drivers

Division 3.2.1 Preliminary

The part applies in relation to what is termed under clause 38 to be a *part 3.2 vehicle*. An authorised person may give a range of directions to the driver of the vehicle or to other people. The powers are fundamental to monitoring compliance, ensuring timely enforcement and also ensuring a suspected danger to the public, the environment or property is dealt with immediately.

Clause 38 provides that the part applies to a vehicle if—

- (a) 1 or more of the following applies to the vehicle:
 - (i) it has a placard on it;
 - (ii) it is carrying a container that has a placard on it;
 - (iii) an authorised person believes on reasonable grounds that it is carrying dangerous goods or goods too dangerous to be transported;

- (iv) an authorised person believes on reasonable grounds that it is licensed under a regulation to carry dangerous goods, or that it is used to carry goods for commercial purposes; and
- (b) the vehicle is—
 - (i) on a road or road related area; or
 - (ii) at a public place; or
 - (iii) at premises occupied or owned by the Territory; or
 - (iv) at premises where an authorised person is lawfully present after entry under part 3.5 (Enforcement).

Division 3.2.2 Directions in relation to pt 3.2 vehicles

The following kinds of directions may be given for compliance purposes (see clause 9) in relation to a part 3.2 vehicle:

- a direction to the driver to stop the vehicle or a direction to the driver or anyone else not to move the vehicle or to interfere with the vehicle or its equipment or load (clause 39);
- a direction to the driver to move the vehicle, or cause it to be moved, to a stated location, within a maximum distance of 30 km, the authorised person believes on reasonable grounds to be suitable for complying with the direction to enable the exercise of other powers (clause 41);
- a direction to the driver to produce the driver's driver licence, a licence the driver is required to have under a regulation or any transport documentation that is required to be carried in the vehicle under a regulation (clause 43).

Other directions that an authorised person may give in relation to a part 3.2 vehicle are as follows:

- a direction to the driver to—
 - move the vehicle, or cause it to be moved, to the extent reasonably necessary to avoid a dangerous situation, serious harm or imminent risk of serious harm or an obstruction, or likely obstruction, to vehicles entering or leaving land adjacent to a road or road related area; or
 - to do, or cause to be done, anything else reasonably required by an authorised person to avoid the situation, harm or obstruction (clause 45);
- if the driver fails to comply with a direction under clauses 39, 41, 43 or 45, a direction to the driver or anyone else to leave or not enter the vehicle (clause 47);
- a direction about how a broken-down or otherwise immobilised vehicle and its load are to be dealt with (clause 49);
- if the vehicle is involved in an incident resulting in a dangerous situation, a direction to the driver or person apparently in charge of the vehicle about the transport of any goods in the vehicle from the place of the incident or how otherwise to deal with the goods (clause 51).

The dictionary defines a dangerous situation as a situation that is causing or likely to cause imminent risk of death or serious injury to a person, significant harm to the environment or significant damage to property.

A failure to comply with a direction given by an authorised person under clauses 39 to 51 is an offence. The relevant offence provision is in the clause of the bill that is immediately after the power to give the direction. In each case the offence is a strict liability offence. However, a failure to comply with a direction to move a part 3.2 vehicle under clause 41 (Direction to move pt 3.2 vehicle) or clause 45 (Direction to move pt 3.2 vehicle—dangerous situation, harm or obstruction) does not apply to a defendant (see clauses 42 (3) and 46 (3)) if—

- (a) it was not practicable for the defendant to move the vehicle because the vehicle was broken-down; and
- (b) the breakdown happened for a physical reason beyond the defendant's control; and
- (c) the breakdown could not be readily rectified in a way that would allow the direction to be complied with within a reasonable time.

Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offences do not apply to the defendant.

Division 3.2.3 Other powers in relation to part 3.2 vehicles

This division (clauses 53 to 56) empowers an authorised person, or an assistant authorised by the authorised person, to enter and move an unattended part 3.2 vehicle for the purpose of exercising other functions or to remove or prevent a dangerous situation or obstruction.

Clause 53 authorises an authorised person to move a part 3.2 vehicle, or authorise an assistant to move the vehicle, but only if the authorised person or assistant is qualified and fit to drive it. (See clauses 15 and 16 for definitions of qualified and fit to drive a vehicle). The authorised person or assistant may use reasonable force to open unlocked doors to enter the vehicle to gain access to mechanical components to allow the vehicle to be moved. However, only a police officer may use force against a person.

Clause 54 authorises an authorised person or authorised assistant to enter and move an unattended or broken-down part 3.2 vehicle that is causing a dangerous situation or obstruction. The power, which includes the use reasonable force to enter and move the vehicle, may be exercised by either driving the vehicle or causing the vehicle to be moved, eg, by towing. However, only a police officer may use force against a person. The registered operator of the vehicle must be advised by the authorised person or assistant of the location of the vehicle.

Clause 55 applies if an authorised person or authorised assistant may move a vehicle under clause 54. The authorised person or assistant may drive the vehicle even though the person is not qualified to do so if there is a belief on reasonable grounds that there is no other person in the immediate vicinity who is more capable of moving the unattended or broken-down vehicle than the authorised person or assistant who is fit and willing to drive it. The Act and the road transport legislation do not apply to the person or assistant to the

extent that they require the person or assistant to be licensed or otherwise authorised to drive the vehicle.

Clause 56 provides that it is immaterial for the purposes of clauses 53 to 55 whether the authorised person or authorised assistant has the authority of the vehicle's operator to drive the vehicle.

Part 3.3 Directions to give name, records and other things

Clause 57 gives an authorised person power, if the person believes on reasonable grounds that an offence against the Act has been or is about to be committed, to direct a person to state the person's name, date of birth, home address and, if different from the person's home address, the address of the place where the person is living. If the authorised person suspects on reasonable grounds that any of the details are false or misleading, the authorised person may direct the person to produce evidence immediately of the correctness of the detail. However, the authorised person must inform the person of the grounds giving rise to the reasonable suspicion on which the latter direction is based.

It is an offence under clause 58 to fail to comply with a direction under clause 57. However, clause 58 does not apply to a person if the authorised person did not, before giving the direction, warn the person that failure to comply with the direction is an offence. Also, it is a defence to a charge of failing to provide a business address that the person did not have a business address, or that the person's business address was not connected with the transport of dangerous goods. The offence is a strict liability offence.

Clause 59 provides that an authorised person may, for compliance purposes, direct a person to produce a record required to be kept under the Act by the person or required to be kept under the Act in the person's possession or control. A direction may also be given to produce a record, device or other thing that contains or may contain a record, in the person's possession or under the person's control, relating to or indicating an offence against the Act. The authorised person may inspect, make copies of, take extracts from, or seize and remove documents, records, devices or things produced that are reasonably believed by the person to provide evidence of an offence against the Act.

It is a strict liability offence under clause 60 if a person does not comply with a direction under clause 59. However, the offence provision does not apply if the person has a reasonable excuse for the failure to comply. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant.

Clause 61 provides that an authorised person may, for compliance purposes, direct a person involved in the transport of dangerous goods to give information about a vehicle or any load or equipment carried, or intended to be carried, by a vehicle. The information can include the current or intended journey information.

Clause 62 creates a strict liability offence of failing to comply with a direction under clause 61. However, the offence provision does not apply if the person did not know, and could not be reasonably expected to know or find out, the information required under the

direction. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant.

Part 3.4 Provisions about directions

This division (clauses 63 to 67) applies in relation to a direction given under division 3.2.2 (Directions in relation to pt 3.2 vehicles) or part 3.3 (Directions to give name, records and other things) ('a relevant direction').

Clause 63 sets out the ways in which a relevant direction may be given, including orally or in any other way. However, a direction under clause 43 (Direction to produce document etc) or clause 57 (Direction to give name and other personal details) may only be given orally or in writing. Also, the clause does not apply to a direction under clause 51 (Direction in relation to vehicle—dangerous situations).

Clause 64 requires a relevant direction to state the period for compliance. If given orally, the direction must state whether it is to be complied with immediately or within a stated period. If given in writing, the direction must state the period within which it is to be complied with.

Clause 65 provides that an authorised person may amend or revoke a relevant direction.

Clause 66 provides that a direction may be given under one or more provisions of division 3.2.2 and part 3.3.

Clause 66 makes it clear that an authorised person may, on the same occasion, give one or more relevant directions at the same time.

Clause 67 deals with the issue of selfincrimination. A person is not entitled to refuse to comply with a relevant direction on the grounds that to do so might incriminate the person or make the person liable to a penalty. However, except in proceedings for an offence against division 3.2.2 or part 3.3, the following are not admissible in evidence against the person in criminal proceedings:

- (a) a statement made or any information or answer given or provided by an individual in compliance with the relevant direction;
- (b) information directly or indirectly derived from a statement, information or answer mentioned in paragraph (a).

Any document produced by a person in compliance with a relevant direction is not inadmissible in evidence on the ground that the document might incriminate the person.

Part 3.5 Enforcement

This part authorises—

- (a) part 3.2 vehicles to be entered, inspected and searched; and
- (b) premises occupied or controlled by a person involved in the transport of dangerous goods to be entered, inspected and searched; and

- (c) vehicles at the premises to be entered, inspected and searched; and
- (d) other premises and vehicles (including part 3.2 vehicles) to be entered, inspected and searched.

Division 3.5.1 Definitions—pt 3.5

Clause 68 defines the following terms for part 3.5:

- *at* premises;
- *connected* with an offence;
- *occupier* of premises or a vehicle;
- *offence*;
- *warrant*.

Division 3.5.2 Powers of authorised people in relation to pt 3.2 vehicles

Clause 69 provides that the division applies in relation to a part 3.2 vehicle (see clause 38) and a driver to which part 3.2 applies.

Clause 70 authorises an authorised person, for compliance purposes (see clause 9), to enter and inspect a part 3.2 vehicle. This may be done at any time and with or without the consent of the driver or other person apparently in charge of the vehicle, or anyone else. The clause does not authorise the use of force but the authorised person may open unlocked doors, panels and objects, inspect anything that has been opened or accessed and move, but not take away, anything that is locked up or sealed.

Clause 71 authorises an authorised person, for compliance purposes, to enter and search a part 3.2 vehicle if the person believes on reasonable grounds that the vehicle has been used, is being used, or is likely to be used, to commit an offence against the Act or the vehicle has been or may have been involved in a dangerous situation. The power may be exercised at any time and with or without the consent of the driver or other person apparently in charge of the vehicle, or anyone else. The authorised person may seize and remove a record, device or other thing from the vehicle that the person believes on reasonable grounds provides, or may on further inspection provide, evidence of an offence against the Act. The authorised person may use reasonable force but only a police officer may use force against a person. The clause does not authorise the search of a person.

Division 3.5.3 General powers of authorised people

This division (clauses 72 to 84) provides power for authorised people to enter vehicles or premises for compliance purposes (see clause 9) or otherwise for the Act.

Clause 72 provides that an authorised person may—

- (a) at any reasonable time, enter premises (other than a part of premises used for residential purposes) or a vehicle that the public is entitled to use or that are open to the public (whether or not on payment); or

- (b) at any reasonable time, enter premises occupied or controlled by a person involved in the transport of dangerous goods (other than a part of premises used for residential purposes), and enter any vehicle at the premises; or
- (c) at any time, enter premises or a vehicle with the occupier's consent; or
- (d) enter premises or a vehicle in accordance with a warrant; or
- (e) at any time, enter premises or a vehicle if the authorised person suspects on reasonable grounds that the circumstances are so serious and urgent that immediate entry to the premises or vehicle without the authority of a warrant is necessary.

An authorised person may also, without the consent of the occupier of premises or a vehicle, enter the land around or that is part of the premises, or land that is around the vehicle, to ask for consent to enter the premises or vehicle.

Clause 73 provides that an authorised person cannot remain at premises or in a vehicle if the person does not produce his or her identity card when asked by the occupier of the premises or vehicle.

Clause 74 sets out the procedure for an authorised person to seek consent to enter premises or a vehicle under clause 72 (1) (c). A court must find that the occupier did not consent to the entry if the question arising in a court proceeding as to whether the occupier consented to entry, a written acknowledgement of consent to entry is not produced in evidence and it is not proved that the occupier consented to the entry.

Clause 75 sets out the general inspection and examination powers on entry to premises and vehicles, including inspecting, examining and measuring, taking samples, recording and requiring the occupier and other specified people to give the authorised person reasonable assistance.

Clause 76 provides that an authorised person may direct a person who is involved in the transport of dangerous goods to provide assistance to the authorised person to enable the person to effectively exercise a function in relation to goods with which the person is involved.

Clause 77 creates a strict liability offence of failing to comply with a direction under clause 76. The clause does not apply in several circumstances. First, if the direction was unreasonable, or the direction or its subject matter was outside the scope of the business or other activities of the person. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to these circumstances. Second, the defendant tried to comply with the direction, but for an act or event outside the defendant's control it was not possible to comply with the direction. Under the Criminal Code, section 59, the defendant has a legal burden in relation to the defence.

Clause 78 provides for an authorised person to exercise powers under part 3.5 (Enforcement) with the aid of assistants and equipment that the person considers reasonably necessary in the circumstances. The assistant must be supervised by the authorised person and powers of the authorised person may be exercised by the assistant only if the authorised person considers that it is reasonably necessary in the circumstances.

Clause 79 provides that, without limiting clause 78, an authorised person exercising a power under part 3.5 may bring to, or on to, premises or a vehicle any equipment reasonably necessary to examine or process things found at the premises or in the vehicle to decide whether they are things that may be seized. Equipment already at the premises or in the vehicle may be operated to decide whether a thing may be seized.

Clause 80 relates a thing found in, on or at the premises or vehicle is, or includes, a disk, tape or other device for the storage of information. The information may be accessed using equipment in, on or at the premises or vehicle. The information may be put in documentary form or transferred to another storage medium or, if it is not practicable to put it in documentary form or transfer the information, the disk etc may be seized.

Clause 81 provides a power to seize things depending on the circumstances of the entry. If premises or a vehicle are entered under a warrant, an authorised person may seize anything the authorised person is authorised to seize under the warrant. In other cases the thing seized must relate to an offence against the Act or the authorised person must believe on reasonable grounds that the things puts the health or safety of people at risk or may cause damage to property or the environment.

Clause 82 provides that an authorised person who seizes a thing under the division may remove it from where it was seized to another place.

Clause 83 provides a procedure for the receipting of seized things. A receipt must be given for anything seized under the division, other than for a sample taken in accordance with clause 104.

Clause 84 provides a power to destroy or otherwise dispose of unsafe things inspected or seized by an authorised person under part 3.5 (Enforcement) if the authorised person is satisfied on reasonable grounds that the things put the health or safety of people at risk or may cause damage to property or the environment. Alternatively, the authorised person may give a written direction to the occupier of the premises or vehicle to destroy or otherwise dispose of the thing.

Division 3.5.4 Embargo notices

This division (clauses 85 to 88) provides for the issue of embargo notices to prevent things seized by an authorised person from being interfered with.

Clause 85 provides that an embargo notice may be issued in respect of evidence seized under part 3.5 (Enforcement) that cannot, or cannot readily, be physically seized and removed. An embargo notice is a notice forbidding the movement, sale, leasing, transfer, deletion of information or other dealing with a thing, or any part of the thing, without the written permission of the authorised person or the responsible person for the authorised person. (The dictionary defines responsible person for an authorised person other than a police officer as the appointing competent authority or for a police officer as a senior police officer.)

Clause 86 creates an offence of a person knowing that an embargo notice is in force for a thing and the person does something, or instructs another person to do something,

forbidden by the notice. Strict liability applies to the latter physical element of the offence. The clause does not apply if a person moves, or instructs someone else to move, a thing to which an embargo notice applies to another location to protect or preserve it and the person tells the authorised person who issued the notice within 48 hours after the move. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant.

Clause 87 creates a strict liability offence of a person to whom an embargo has been given failing to take reasonable steps to prevent anyone else from doing anything forbidden by the notice.

Clause 88 provides that an embargo notice in force for a thing must be revoked if, had the thing been seized under part 3.5 (Enforcement), it would have to be returned to its owner, or reasonable compensation paid by the Territory to the owner for its loss, under clause 98 (Return of seized thing).

Division 3.5.5 Search warrants

Clause 89 provides for an authorised person to apply in person to a magistrate for a warrant to enter and search premises or a vehicle. A warrant may be issued if the magistrate is satisfied there are reasonable grounds for suspecting there is a particular thing or activity connected with an offence against the Act and the thing or activity either is, or is being engaged in, at the premises or in the vehicle or may be, or may be engaged in, at the premises or in the vehicle within the next 3 days. A warrant may also be issued if the magistrate is satisfied there are reasonable grounds for suspecting a vehicle has been, or may have been, involved in an offence against the Act or a dangerous situation and either the vehicle is, or has been, located at the premises or the premises are, or may be, connected (directly or indirectly) with the vehicle or part of the vehicle's equipment or load.

Clause 90 provides that in urgent or other special circumstances an application for a warrant may be made by phone, fax, email, radio or other form of communication.

Clause 91 provides the procedure for the issue of a warrant applied for under clause 90. If practicable, the magistrate must immediately fax a copy, or email a scanned copy, to the authorised person. If this is not practicable, the authorised person must be told the relevant details for the warrant and the authorised person is to complete a form of warrant with the details.

Clause 92 requires an authorised person, before anyone enters premises or a vehicle under a warrant, to announce that the person is authorised to enter the premises or vehicle, give anyone at the premises or in the vehicle an opportunity to allow entry and, if the occupier of the premises or vehicle, or someone else who apparently represents the occupier, is present at the premises or in the vehicle, identify himself or herself to the person. However, the announcement requirement does not apply if it would affect the safety of anyone in relation to the subject-matter of the warrant or the safety of the authorised person or anyone assisting the authorised person or if the effective execution of the warrant would be frustrated.

Clause 93 requires a copy of the warrant or warrant form to be given to the occupier of the premises or vehicle, or someone who apparently represents the occupier, if such a person is present when the warrant is executed. A copy of a document setting out the rights and obligations of the occupier or other person must also be given to them.

Clause 94 gives the occupier or a representative the right to be present at the premises or in the vehicle while the warrant is being executed if it would not impede the search or, if the person is under arrest, the person's presence would not interfere with the purpose of the search.

Clause 95 sets out the procedure for moving to another place a thing found at premises, or in a vehicle, entered under a warrant. A thing found at premises, or in a vehicle, entered under a warrant may be moved to another place for examination or processing to decide whether it may be seized under the warrant if either there are reasonable grounds for believing that the thing is or contains something to which the warrant relates and it is significantly more practicable to do or the occupier of the premises or vehicle agrees in writing.

Division 3.5.6 Dealing with seized things

This division (clauses 96 to 103) sets out provisions for providing access to a seized thing by the person who is entitled to possession of the thing, and the return of, or forfeiture of, seized things.

Clause 96 defines, for the division, the term *responsible person* in relation to a thing seized by an authorised person. The purpose of the definition is to provide for decisions in relation to things seized by an authorised person who is not a police officer to be made by the competent authority who appointed the authorised person and decisions for things seized by a police officer to be made by a more senior police officer.

Clause 97 gives a person who, apart from the seizure, is entitled to inspect a seized thing to inspect the thing and, if the thing is a document, to take extracts from it. The right of inspection does not apply to something seized on health or safety grounds or if possession of the thing by the person would be an offence.

Clause 98 requires a thing seized under part 3.5 to be returned, or reasonable compensation paid if it is lost, if a circumstance set out in clause 99 applies in relation to the thing. However, a thing is not required to be returned or compensation paid, if the thing is the subject of an application to a court, or a court order, in relation to the seizure or forfeiture of the thing and the application or order is made in relation to the thing under another law in force in the ACT, eg, an application for the forfeiture of the seized thing is made to a court under the *Confiscation of Criminal Assets Act 2003*. Also, a thing is not required to be returned, or reasonable compensation paid, if the thing was seized on health or safety grounds, the responsible person believes on reasonable grounds that the only practical use of the thing in relation to the premises where the thing was seized or vehicle from which it was seized would be an offence against the Act or another law in force in the ACT or possession of it by its owner would be an offence.

Clause 99 sets out a range of circumstances for the purposes of clause 98. These relate primarily to the issue and withdrawal of an infringement notice for an offence relating to the seized thing, the responsible person becomes satisfied that there is no offence against the Act with which the thing is connected, the responsible person decides not to have an infringement notice served for the offence and the responsible person or prosecutor decides not to prosecute.

Clause 100 provides that a person claiming to be entitled to anything seized under part 3.5 (Enforcement) may apply to the Magistrates Court for an order disallowing the seizure within 10 days after the day the thing was seized. However, the clause does not apply to a thing seized on health or safety grounds.

Clause 101 requires the Magistrates Court to make an order disallowing the seizure of a thing if satisfied that the applicant would, apart from the seizure, be entitled to the return of the seized thing, the thing is not connected with an offence against the Act and possession of the thing by the person would not be an offence. The Magistrates Court may also make an order disallowing the seizure if satisfied there are exceptional circumstances justifying the making of the order.

Clause 102 provides for the forfeiture of anything seized under part 3.5 that is not destroyed or otherwise disposed of under clause 84 (Power to destroy unsafe thing) is not required to, or cannot, be returned under clause 98 (Return of seized thing) if no application for its return is made within 10 days after the day the thing was seized or, if such an application is made, it is withdrawn or refused.

Clause 103 provides that the costs of disposing of a thing are a debt due to the Territory and payable by a person if the person is convicted or found guilty of an offence against the Act in relation to the thing, the thing is connected with an offence against the Act, the person was the owner of the thing immediately before its forfeiture and the Territory disposes of the thing.

Division 3.5.7 Enforcement—miscellaneous

Clause 104 sets out the circumstances in which an authorised person may take a sample from premises or a vehicle under part 3.5 (Enforcement) and the procedure for taking the sample. In particular, a sample must be divided into 3 parts and 1 of them given to the person from whom the sample was taken.

Clause 105 requires authorised people and anyone assisting to take all reasonable steps to cause as little inconvenience, detriment and damage as practicable in exercising powers under part 3.5 (Enforcement). Where damage has occurred, a written notice detailing the damage must be provided to the owner or apparent owner of the item.

Clause 106 provides that where damage has occurred to premises or a vehicle or a vehicle's equipment or load by the unreasonable exercise of a function or the use of force that was not authorised under part 3.5 (Enforcement), the authorised person or person assisting must take reasonable steps to fully rectify the damage.

Clause 107 provides for a court to order reasonable compensation to be paid to a person who suffers loss or expense arising out of the exercise of a function under part 3.5 (Enforcement) by an authorised person.

Part 3.6 General administrative penalties

Division 3.6.1 Improvement notices

Clause 108 defines the term *due date and time* for an improvement notice.

Clause 109 empowers an authorised person to issue an improvement notice where the person has a belief on reasonable grounds that a person is contravening, has contravened or is likely to contravene a provision of the Act. An improvement notice may require the person to whom the notice is issued to remedy the contravention or likely contravention within the period specified in the notice. The notice may state the method to be used to remedy the situation.

Clause 110 provides for an extension of time to be given to assist a person to comply with an improvement notice, provided the due date and time for the notice has not passed.

Clause 111 creates an offence of a person failing to comply with a requirement of an improvement notice. Two defences are provided for a failure to comply. First, the defendant has a reasonable excuse defence. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant. Second, it is a defence if the person proves that the alleged failure that resulted in the improvement notice being issued was remedied by a different method from that stated in the improvement notice not later than the due date and time under the notice. Under the Criminal Code, section 59, the defendant has a legal burden in relation to the defence.

Clauses 112 and 113 provide for the amendment or cancellation of an improvement notice by an authorised person. An amendment of an improvement notice is ineffective if it purports to deal with a failure to comply with a provision of the Act different from the provision dealt with in the improvement notice it purports to amend.

Clause 114 provides for an authorised person to issue a clearance certificate to the effect that all or any specified requirements of an improvement notice have been complied with.

Division 3.6.2 Formal warnings

This division (clauses 115 to 117) creates a formal warning procedure which provides an alternative to the issue of an infringement notice or taking court proceedings for minor breaches committed by people who do not have a significant history of similar offences.

Clause 115 defines the terms *action*, *formal warning* and *offender* for division 3.6.2.

Clause 116 provides for an authorised person to issue a written formal warning to a person for a failure to comply with the Act instead of taking other action for the failure. The formal warning may be issued if the authorised person believes on reasonable grounds that the offender took reasonable steps to prevent the failure and was unaware of the failure and

that it is appropriate to deal with the failure by way of a formal warning. The warning must be in writing.

Clause 117 provides that a formal warning may be withdrawn and action taken against the person for the failure to comply.

Part 3.7 Prohibition notices

Clause 118 defines the term *dangerous activity* for part 3.7. It means an activity that relates to the transport of dangerous goods by road, that is happening or may happen in relation to or in the immediate vicinity of the dangerous goods and that creates or could create a dangerous situation or a risk to the safety of anyone.

Clause 119 empowers an authorised person to give a person who has or appears to have control over a dangerous activity a written prohibition notice that prohibits the person for carrying on the activity or from carrying on the activity in a stated way.

Clause 120 provides that if an authorised person believes on reasonable grounds that it is not reasonable or immediately possible to give a prohibition notice, the authorised person may orally direct a person who has, or appears to have, control over the dangerous activity to do or not to do a stated act.

Clause 121 creates an offence of failing to comply with a requirement of an oral direction under clause 120. Two defences are provided for a failure to comply. First, the defendant has a reasonable excuse defence. Second, the clause does not apply to a person if the authorised person did not, before giving the direction, warn the person that failure to comply with the direction is an offence. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant.

Clause 122 provides for the contents of a prohibition notice. A notice may include a direction about the measures to be taken to minimise or eliminate the risk caused by the dangerous activity and offer a choice of ways to minimise or eliminate the risk caused by the dangerous activity.

Clause 123 creates an offence of failing to comply with a prohibition notice. The defendant has a reasonable excuse defence. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant.

Clauses 124 and 125 provide for the amendment or cancellation of an improvement notice by an authorised person. An amendment of an improvement notice is ineffective if it purports to deal with a failure to comply with a provision of the Act different from the provision dealt with in the improvement notice it purports to amend.

Clause 126 makes it clear that the service, amendment or withdrawal of a prohibition notice does not affect any proceeding for an offence against the Act (including regulations under the Act (see the Legislation Act, section 104)).

Part 3.8 General court-based sanctions

Division 3.8.1 Preliminary

Clause 127 sets out when a person is an *associate* of someone else for part 3.8 and includes a chain of relationships between people specified in the definition.

Clause 128 provides that if 1 or more courts make orders under part 3.8 (General court-based penalties) that result in both a supervisory intervention order (see division 3.8.4) and an exclusion order (see division 3.8.5) being in force at the same time in relation to the same person, the supervisory intervention order has no effect while the exclusion order has effect.

Division 3.8.2 Commercial benefits penalty orders

This division provides for commercial benefits penalty orders. It is based on the equitable principle that a person should not profit from his or her crime. As such, the penalty is directed against the financial incentives to commit breaches of the Act and is intended as a powerful specific deterrent.

Clause 129 provides that a court that convicts a person or finds the person guilty of an offence against the Act may make a commercial benefits penalty order against the offender. The order may require the offender to pay an amount up to 3 times the amount calculated to be the commercial benefit that was, or would have been derived, from the offence. However, if the offence in relation to which the commercial benefits penalty order is made is a strict liability offence, the amount of the order must not be more than an amount that is equivalent to 50 penalty units.

Clause 130 provides that in calculating the commercial benefit that was or would have been derived from the offence, the court may take into account benefits of any kind, whether monetary or otherwise and any other matters that the court considers relevant including, for example, the value of the goods involved in the offence and the distance over which the goods were carried, or were to be carried.

Division 3.8.3 Licensing and registration penalties

Clause 131 applies if a court convicts, or finds guilty, the driver of a vehicle of an offence against the Act. The court may order the cancellation, amendment or suspension of a licence the driver is required to have under a regulation and the disqualification of the driver from obtaining or holding such a licence for a stated period.

Clause 132 applies if the registered operator of a vehicle is convicted or found guilty of an offence against the Act in relation to a vehicle. The court may order that the registration of the vehicle is cancelled or suspended for a stated period. The court may also order that the registered operator, or an associate of the registered operator, is disqualified from registering the vehicle for a stated period.

Division 3.8.4 Supervisory intervention orders

This division provides for the making of supervisory intervention orders. In some circumstances, a systematic or persistent offender might require supervision and further

education to achieve compliance. Such an order is less onerous than other orders that might be made under the Act, eg, an exclusion order under division 3.8.5. It gives the offender an opportunity to remain in the industry and improve his or her operating performance.

Clause 133 enables a court, on application by the prosecutor or a competent authority, to impose a supervisory intervention order against a person who is convicted or found guilty of an offence against the Act if the court considers the person to be a systematic or persistent offender against the Act. An order may require the person to do specified things to improve compliance, to conduct monitoring and other practices and to appoint other people to assist the person in compliance. The court may make a supervisory intervention order only if it is satisfied that the order is capable of improving the person's compliance by having regard to previous offences that a person has been convicted or found guilty of committing, or for which an infringement notice has been issued and not withdrawn, and any other evidence considered relevant to the person's conduct in the transport of dangerous goods.

Clause 134 provides for the court to require the person against who a supervisory intervention order is made to provide reports to a competent authority, the court or both on how the person is complying with the Act or a provision of the Act stated in the order.

Clause 135 provides that a court with power to make a supervisory intervention order may amend or revoke a supervisory intervention order on application by a competent authority or the person who is subject to the order, if the court is satisfied that there has been a change of circumstances that warrant such action.

Clause 136 creates an offence of failing to comply with a supervisory intervention order.

Division 3.8.5 Exclusion orders

Clause 137 enables a court, on application by the prosecutor or a competent authority, to make an exclusion order against a person who is convicted or found guilty of an offence against the Act if the court considers the person to be a systematic or persistent offender against the Act. An order may prohibit the person, for a specified period, from having a stated role or responsibilities associated with the transport of dangerous goods. The order can only be made if the court is satisfied that the person should not be entitled to do the things which are the subject of the order and that a supervisory intervention order is not considered appropriate. The exclusion order may be in addition to any other penalty or sanction other than a supervisory intervention order.

This is intended to be an extreme penalty that will have grave implications for an offender's future and livelihood in the transport of dangerous goods. It is a penalty that a court would not be inclined to order in any but extreme cases involving elements of premeditation or scheming or habitual offending, and in which the court takes the view that the prime sentencing considerations are deterrence and public protection.

Clause 138 provides for the amendment or revocation of an exclusion order, on application by a competent authority or the person who is subject to the order, if the court is satisfied that there has been a change of circumstances that warrant such action.

Clause 139 creates an offence of failing to comply with an exclusion order.

Division 3.8.6 Forfeiture orders

Clause 140 enables a court, on application by the prosecutor or a competent authority, to make a forfeiture order against a person who is convicted or found guilty of an offence against the Act in relation to dangerous goods if the court is satisfied that the person owns the goods or that the owner cannot be identified. Under a forfeiture order, the dangerous goods and their packaging are forfeited to the Territory.

Part 3.9 Compensation orders

Division 3.9.1 Definitions—pt 3.9

Clause 141 defines the terms *compensation order*, *offender* and *roads compensation order* for part 3.9.

Division 3.9.2 Roads compensation orders for damage to road infrastructure

Clause 142 provides for a court that convicts or finds a person guilty of an offence against the Act may make a roads compensation order requiring the offender to pay to the Territory the amount of compensation that the court considers appropriate for damage to road infrastructure that the Territory has suffered, or is likely to suffer, because of the offence. The order may be made only if the court is satisfied on the balance of probabilities that the commission of the offence caused or contributed to the damage suffered or likely to be suffered.

Clause 143 provides that an application for a roads compensation order may be made by the prosecutor or a competent authority.

Clause 144 provides that in making a roads compensation order, the court may assess the amount of compensation in the way the court considers appropriate. The court may take into account the matters it considers relevant, including evidence not presented in relation to the prosecution of the offence or a certificate by the Territory about matters such as the estimated cost of remedying the damage or the offender's contribution to the damage.

Clause 145 provides that if the Territory is proposing to use a certificate, the Territory must serve a copy of the certificate on the offender at least 28 working days before the day on which the matter is set down for hearing. If the offender wishes to challenge a statement in the certificate, the offender must give written notice to the Territory at least 14 working days before the day on which the matter is set down for hearing.

Clause 146 provides that if the court is satisfied that the commission of the offence contributed to the damage but that there were also other factors, the amount of a roads compensation order cannot be more than the amount the court assesses as being the offender's contribution to the damage.

Division 3.9.3 Costs and recovery

This division applies to compensation orders. The term is defined in clause 141 to mean an order under part 3.9, ie a roads compensation order under division 3.9.2 or a costs compensation order under division 3.9.3.

Clause 147 provides that a court has the same power to award costs in relation to a proceeding for a compensation order as the court has in relation to a civil proceeding. The *Court Procedures Rules 2006*, part 2.17 (Costs) applies to costs in relation to a proceeding for such an order as if any necessary changes and any changes prescribed by regulation were made.

Clause 148 provides that a compensation order, and any award of costs, made by a court are enforceable as if they were a judgment of the court in a civil proceeding.

Clause 149 provides that a compensation order must not be made if another court or tribunal has awarded compensatory damages or compensation in a civil proceeding for the damage based on the same or similar facts. However, the making of a compensation order does not prevent another court or tribunal from later awarding damages or compensation in a civil proceeding for the damage based on the same or similar facts, but the other court or tribunal must take the compensation order into account when awarding damages or compensation.

Part 3.10 Exemptions

Clause 150 defines the term *exemption* for the Act as meaning an exemption under clause 151.

Clause 151 provides that a competent authority may exempt a person from compliance with a provision of a regulation in relation to the transport of stated dangerous goods by road on the application of the person or on the competent authority's own initiative. The competent authority must be satisfied that it is not reasonably practicable for the person to comply with the provision and that the granting of the exemption would not be likely to create a risk of death or injury to a person, or harm to the environment or property, greater than the risk would be if the person was required to comply and cause unnecessary administrative or enforcement difficulties, particularly in relation to maintaining national uniformity of road transport laws. An exemption may be conditional. An exemption given to a class of people or for longer than 6 months is a notifiable instrument.

Clause 152 creates an offence of a person failing to comply with a condition of a conditional exemption.

Clause 153 creates an offence where a person is given notice of an exemption, the exemption applies in relation to premises or a vehicle and the person fails to keep a copy of the notice in the premises or vehicle.

Clause 154 requires a competent authority to tell interstate competent authorities of an exemption given to a class of people or for longer than 6 months.

Clause 155 provides that a competent authority that gives an exemption may cancel the exemption or amend a condition of the exemption if it is a conditional exemption.

Clause 156 provides that the Minister may declare that the operation of a regulation, or a stated part of a regulation, is suspended for a stated period or is amended in a way stated by the Minister. A declaration is a disallowable instrument. No criteria are specified for the exercise of this power. However, being a disallowable instrument, it is reviewable and disallowable by the Legislative Assembly. The clause is based on section 34 of the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth) which will be repealed in conjunction with the commencement of the new Act (see the background section above). The provision in the Commonwealth Act relates to application orders and emergency orders in the agreements scheduled to the *National Road Transport Commission Act 1991* (Cwlth). That Act has been repealed and replaced by the *National Transport Commission Act 2003* (Cwlth). The agreements under the repealed Act are no longer in force and do not provide a basis for the exercise of the powers under the clause. However, the powers under the clause would be used only in the most serious cases where urgent action, in conjunction with other jurisdictions, needs to be taken. Otherwise the more usual process of amending the regulations is more appropriate.

Part 3.11 General liability and evidentiary provisions

Division 3.11.1 Liability for offences

Clauses 157 to 159 extend liability for offences under the Act to executive officers of corporations, partners in partnerships and managers of unincorporated associations where the contraventions are committed by these organisations. The extensions of liability do not apply if the person was not in a position to influence the conduct of the organisation in relation to the contravention and the person took reasonable steps to prevent the contravention.

Division 3.11.2 General exceptions to offences

Clause 160 creates exceptions for a person being prosecuted as an owner or operator of a vehicle transporting dangerous goods. The defendant does not commit the offence if the vehicle was being used by someone else as follows:

- (a) someone not entitled (whether by express or implied authority or otherwise) to use the vehicle, other than an employee or agent of the defendant;
- (b) an employee of the defendant who was acting at the relevant time outside the scope of the employment;
- (c) an agent (in any capacity) of the defendant who was acting at the relevant time outside the scope of the agency.

However, if the offence relates to a breach of the Act for an alleged deficiency concerning the vehicle or dangerous goods, the exception above is available to the defendant only if—

- (a) the vehicle or dangerous goods had not, before it or they stopped being under the defendant's control, been driven or transported in Australia in breach of the Act or a corresponding law that relates to any of the alleged deficiencies; and

- (b) 1 or more material changes, resulting in the alleged breach, were made after the vehicle or dangerous goods stopped being under the defendant's control.

Deficiency means a deficiency in anything required by regulation to be carried in a vehicle or to be met in relation to dangerous goods. Under the Criminal Code, section 58, the defendant has an evidential burden in relation to the circumstances in which the offence does not apply to the defendant.

Clause 161 provides that an offence against the Act is not committed if the conduct making up the offence was done in compliance with a direction given by an authorised person.

Division 3.11.3 General evidentiary provisions

Clause 162 extends criminal responsibility for an offence against the Act by an employee or agent of an individual to the individual unless the individual establishes that reasonable precautions were taken, and appropriate diligence was exercised, to avoid the act or omission that constituted the offence.

Clause 163 provides for an authorised person, in a prosecution for an offence against the Act, to give a certificate about any of the matters specified in the clause. The kinds of matters specified in the clause relate primarily to the dangerous goods being carried in a vehicle, whether goods are dangerous goods and markings on packaging, placards or vehicles used in relation to dangerous goods were or were not being used. The certificate is evidence of the matters stated in it.

Clause 164 provides for a competent authority to give a certificate about whether a person is exempt from certain requirements under clause 151 (Exemptions by competent authorities—general), a certificate relating to vehicles, equipment or other items required by regulation to be approved by the competent authority or a certificate relating to accreditation or licensing by the competent authority. The certificate is evidence of the matters stated in it.

Clause 165 applies to records of the mass of a vehicle transporting dangerous goods or packaging containing dangerous goods weighed at the weighbridge or weighing facility. A record of these things made by the operator, or an employee of an operator, of the weighbridge or weighing facility is admissible in a proceeding under the Act and is evidence of the mass of the vehicle or packaging at the time it was weighed.

Clause 166 provides that, for the Act, it is not necessary to prove the appointment of an authorised person.

Clause 167 provides that transport documentation is admissible in a proceeding under the Act and is evidence of the identity and status of the parties to the transaction to which the documentation relates and the destination or intended destination of the load to which the documentation relates. The status of a party includes the party's status in relation to the party's involvement in the transport of dangerous goods.

Clause 168 provides for the admissibility in criminal proceedings for an offence against the Act of a code of practice, guideline or other document approved by the Australian

Transport Council to give practical guidance to people involved in the transport of dangerous goods if the document states a way to comply with the provision or requirement of the Act to which the offence relates and the document is on the ACT legislation register or is readily available for purchase or inspection in the ACT. Also, the person is taken to have complied with the provision or requirement if the court is satisfied that, at the relevant time, the person acted in accordance with the relevant document.

Chapter 4 Notification and review of decisions

This chapter provides for review by the ACT Civil and Administrative Tribunal of decisions prescribed by regulation. A decision may be prescribed as an internally reviewable decision or as a decision that is not internally reviewable.

Clause 169 defines the following terms for the chapter:

- *decision-maker*;
- *internally reviewable decision*;
- *internal reviewer*;
- *reviewable decision*.

Clause 170 requires a decision-maker who makes an internally reviewable decision to give an internal review notice to each entity prescribed by regulation in relation to the decision. (The term entity is defined in the Legislation Act, dictionary, part 1 to include an unincorporated body and a person (including a person occupying a position).) An internal review notice is a written notice of the decision that complies with the requirements prescribed by regulation for the *ACT Civil and Administrative Tribunal Act 2008*, section 67B (1).

Clause 171 provides that applications for internal review may be made by an entity prescribed by regulation for the decision and any other person whose interests are affected by the decision. The application must be made within 28 days after the applicant is given the internal review notice or any longer period allowed.

Clause 172 provides that an application for the internal review of a decision does not affect the operation of the decision.

Clause 173 requires that an internally reviewable decision be reviewed by someone who did not make the decision being reviewed.

Clause 174 provides that the decision must be reviewed within 28 days after the day the application for internal review is received by the decision-maker. The internal reviewer must confirm or vary the decision or set it aside and substitute the reviewer's own decision. A failure to vary or set aside the decision with the 28-day period is taken to be a confirmation of the decision by the internal reviewer. As such, the applicant for internal review can then apply to the ACT Civil and Administrative Tribunal for review of the decision.

Clause 175 applies if an internal reviewer or decision-maker makes a reviewable decision. The reviewer or decision-maker must give a reviewable decision notice to each entity prescribed by regulation in relation to the decision.

Clause 176 gives a right to apply to the ACT Civil and Administrative Tribunal by an entity to whom an internal review notice is required to be given in relation to the decision, an entity prescribed by regulation in relation to the decision and any other person whose interests are affected by the decision.

Chapter 5 Miscellaneous

Part 5.1 Secrecy and information sharing

The purpose of this part is to protect information obtained in the exercise of functions under the Act.

Clause 177 defines the terms *divulge*, *protected information* and *relevant person* for part 5.1. Protected information is defined to mean information about a person that is disclosed to, or obtained by, a person to whom clause 178 applies because of the exercise of a function under the Act by the person or someone else. Relevant person is defined to mean a delegate of a competent authority, a person employed by, or engaged to provide services to or on behalf of, a competent authority, a person employed by, or engaged to provide services to, a person or body engaged to provide services to a competent authority or a person who exercises, or has exercised, a function under the Act.

Clause 178 creates an offence for the improper disclosure of protected information. The clause does not apply if the defendant divulged the protected information with the consent of the person to whom the information related or if the information is recorded or divulged in the circumstances specified in subclause (4) which includes information recorded or divulged for the purposes of the Act or a corresponding law, for a law enforcement purpose or in accordance with the information sharing guidelines made under clause 179.

Clause 179 provides that the Minister may make information sharing guidelines about the making of records of, or divulging, protected information.

Clause 180 creates an offence of a person using or divulging protected information recorded or divulged under an exception in clause 181 for a purpose other than the purpose for which the record was made or divulged.

Clause 181 authorises a competent authority, for law enforcement purposes, to give a record, device, thing or information seized or obtained under specified provisions of the Act to a public authority, including a public authority of another jurisdiction. The specified provisions are division 3.2.3 (Other powers in relation to vehicles), part 3.3 (Directions to give name, records and other things) and part 3.5 (Enforcement).

Part 5.2 Indemnities

Clause 182 provides that an authorised person, or a person authorised under the Act by an authorised person to do or not do a thing, is not civilly liable for an act or omission engaged in honestly and without recklessness in the exercise of a function under the Act or in the

reasonable belief that the conduct was in the exercise of a function under the Act. Any civil liability that would, apart from the clause, attach to the person attaches instead to the Territory.

Clause 183 provides that the indemnity under part 5.2 is not affected only because a vehicle was in fact not carrying dangerous goods or goods too dangerous to be transported or that goods were not in fact dangerous goods or goods too dangerous to be transported.

Clause 184 provides that the part does not affect any other indemnity under another law, if the other indemnity is not inconsistent with an indemnity under the part.

Part 5.3 Victimisation of people for reporting breaches and assisting with investigations

The purpose of this part is to protect the employment of employees and contractors who give information, or make complaints, about a breach of the Act or a corresponding law.

Clause 185 defines the following terms for the chapter:

- *contractor*;
- *employee*;
- *employment order*;
- *public agency*.

Clause 186 creates an offence for an employer to dismiss or injure or act to the detriment of an employee or contractor because the employee or contractor has complained about a breach of the Act or a corresponding law to the employer, another employee, a trade union or a public agency or assisted or given information in relation to a breach to a public agency.

Clause 187 is a similar offence relating to refusing or deliberately omitting to offer employment to a prospective employee or treating the prospective employee less favourably.

Clause 188 provides for a court to order that a person convicted or found guilty of an offence against clause 186 or clause 187 pay damages for compensating the employee or prospective employee. The damages are in addition to imposing a penalty on the offender.

Clause 189 provides that a court may also order that an employee be reinstated or re-employed, or the prospective employee be employed in the position applied for or, if the position is not available, a similar position.

Clause 190 creates an offence of a person failing to comply with an employment order made by a court under clause 189.

Part 5.4 Other miscellaneous provisions

Clause 191 provides that a term of a contract or agreement that purports to exclude, limit or modify the operation of the Act, or of any provision of the Act, is void to the extent that it would otherwise have that effect.

Clause 192 provides that a person who acts without expectation of payment or other consideration in a situation in which an emergency or accident involving dangerous goods happens or is likely to happen does not incur personal civil liability for an act done or omission made honestly and without recklessness in assisting, or attempting to assist. However, the protection under the clause does not apply to a person whose act or omission caused or partly caused the situation or to an authorised person.

Clause 193 provides that the Minister must not delegate the Minister's functions under clause 20 (1) (Competent authorities) or clause 156 (Declaration by Minister—amend or suspend regulation's operation).

Clause 194 provides that the Minister may determine fees for the Act.

Clause 195 provides that the Minister may approve forms for the Act.

Part 5.5 Regulations

This part provides for the Executive to make regulations for the Act. The regulations will give effect to schedule 2 of the NTC model legislation (see the background section above) which sets out the model regulations to be made under the new Act. The specific powers to make regulations under this part reflect the model regulations.

Clause 196 is a general regulation-making power for the Act. It also provides that the maximum penalty for an offence against a regulation is 40 penalty units. The usual maximum penalty level for regulations is 20 penalty units with 30 penalty units being used for some high-level schemes (eg, see the *Dangerous Substances Act 2004*, section 223 (2)). In this case 40 penalty units is considered warranted for 2 reasons. First, because of the kinds of substances being regulated and the damage that could flow from a failure to comply with a requirement of the regulations. Second, 40 penalty units is the amount provided for many of the offences under the model regulations and the maximum penalty level of 40 penalty units allows the ACT to be seen as being consistent with, and an effective participant in, the national scheme.

Clause 197 provides a range of specific matters about which regulations made be made including identifying and classifying goods as dangerous goods or goods too dangerous to transport, the analysis and testing of dangerous goods, procedures relating to the loading and transport of dangerous goods and the licensing of vehicles and people in relation to the transport of dangerous goods.

Clause 198 provides for the making of regulations about things used in the transport of dangerous goods.

Clause 199 provides for the making of regulations about matters relating to the powers of competent authorities and corresponding competent authorities.

Clause 200 provides for the making of regulations about matters relating to accreditation and training and a requirement about people involved in the transport of dangerous goods to hold insurance or some other form of indemnity.

Clause 201 provides that a regulation may require a matter affected by the regulation to be approved by or to the satisfaction of a stated entity or give a discretion to, or impose a duty on, a stated entity.

Clause 202 provides that a regulation may apply, adopt or incorporate a law of another jurisdiction or an instrument, or a provision of a law of another jurisdiction or instrument, as in force at a particular time or from time to time.

Part 5.6 Repeals and consequential amendments

Clause 203 repeals the legislative instruments on the ACT legislation register that are made for the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth).

Clause 204 provides that the Act amends the legislation mentioned in schedule 1.

Chapter 10 Transitional

Clause 500 defines the terms *commencement day* and *repealed Act* for the chapter. Repealed Act means the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth).

Clause 501 is based on the NTC model regulations, section 22.1.1 (1) which is more appropriate for inclusion in the Act. It provides that a person does not commit an offence against the Act within the period of 1 year after the commencement of the Act if the person transports dangerous goods by road in accordance with the law that regulated the transport of dangerous goods by road that was in force in the ACT immediately before the commencement of the Act. The relevant law is the repealed Act. This provides a reasonable period for people involved in the transport of dangerous goods to change things to bring them into line with the new Act.

Clause 502 provides that a notice mentioned in the repealed Act, section 28 (Notice to remedy contravention) that is in force under the repealed Act immediately before the commencement day is taken to be an improvement notice under the new Act.

Clause 503 provides that a notice mentioned in the repealed Act, section 29 (Notice to eliminate or minimise danger) that is in force under the repealed Act immediately before the commencement day is taken to be a prohibition notice under the new Act.

Clause 504 provides that a regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the new Act. A regulation may modify chapter 10 (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or

appropriately, dealt with in the chapter. A modifying regulation has effect despite anything elsewhere in the new Act or another territory law. This is a standard transitional provision which is designed to deal with unforeseen contingencies. This power is complemented by schedule 1, clause 5 of the *Road Transport Reform (Dangerous Goods) Repeal Bill 2009* (Cwlth) which provides that a law of the ACT may make provision in relation to transitional matters arising out of the repeal of the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth).

Clause 505 provides that the chapter (other than clause 504) is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies. This clause ensures that the transitional effect of chapter 6 continues despite its expiry.

Clause 506 provides that chapter 10 expires 2 years after the day the clause commences.

Schedule 1 Repeals and consequential amendments

The schedule contains consequential amendments of legislation resulting from the making of the new Act. Apart from 1 exception, the amendments are the updating of notes or definitions consequent on the new Act.

The exception is the repeal of section 59 of the *Road Transport (Safety and Traffic Management) Regulation 2000*. This section prohibits the carriage of an explosive or other dangerous substance in, directly above, or within 50m of either end of, the road tunnel on Parkes Way in Acton or the road tunnel on Capital Circle. Since the section was enacted, safety standards in relation to road tunnels have changed. Restrictions on the carriage of dangerous goods are now only applicable to long tunnels under the Australian Fire Authorities Council's publication *Fire Safety Guidelines for Road Tunnels* (10 September 2001). Neither of the tunnels to which section 59 applies are a long tunnel within the meaning of the publication.

Dictionary

The dictionary contains definitions for the Act.