

# Chapter 2

## Key provisions

### Introduction

2.1 This chapter summarises key provisions of the bill amending the ARPNS Act. The key provisions of the bill, contained in Part 1 of Schedule 1, are outlined below. Part 2 of Schedule 1 contains the bill's transitional provisions.

### Contractors

2.2 Items 1, 2, 3 of Part 1 are intended ensure that the ARPNS Act does not inadvertently regulate contractors who should be regulated under the relevant state or territory law. These items amend existing subsection 11(2) and insert a new subsection 11(3) to clarify that the ARPNS Act applies only when the controlled material or controlled apparatus is owned or controlled by a Commonwealth entity.<sup>1</sup> New section 11A is also added to clarify the application of the ARPNS Act in situations where a person is not a contractor to the Commonwealth but is nevertheless undertaking activities at facilities owned or controlled by the Commonwealth, or using controlled apparatus or material that is owned or operated by the Commonwealth.<sup>2</sup>

### Definitions

2.3 Existing section 13 contains a list of definitions of key terms in the ARPNS Act. Items 4, 6, 7 and 11 amend the existing definitions of 'controlled facility' and 'nuclear installation'. In particular, items 6 and 7 remove references to 'nuclear materials' and 'nuclear waste' in the definition of 'nuclear installation'. These terms are replaced by references to 'radioactive materials' and 'radioactive waste'.

2.4 Items 5, 9 and 11 add new definitions into section 13 to reflect the other amendments of the bill, including 'improvement notice', 'permitted person', 'prescribed legacy site' and 'remediate'.

2.5 Item 10 repeals the existing definition of 'person covered by licence' and substitutes a new definition which captures the new category of 'permitted person'.

### Delegation of powers

2.6 Existing section 18 outlines how, and to whom the CEO of ARPANSA may delegate powers and functions conferred by the ARPNS Act. Item 12 amend section 18 to reflect contemporary public service classifications. Item 13 inserts new subsection 18(1A) which addresses the new power given to the CEO to review improvement notice decisions. The CEO may delegate this power to persons holding, or performing, the duties of the Senior Executive Service departmental officers.<sup>3</sup>

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1 Explanatory Memorandum (EM), p. 3.

2 EM, p. 4.

3 EM, p. 6.

## Advisory committees

2.7 Existing sections 23 and 26 describe the functions of the Radiation Health Committee and the Nuclear Safety Committee which provide advice to the CEO and the Radiation Health and Safety Advisory Council. Subsection 23(2) and 26(2) currently provide that the committees' functions are to be performed only on the request of the CEO or the Council. Item 14 amends each of these subsections so that both the Radiation Health Committee and the Nuclear Safety Committee may only perform functions at the request of the CEO. The EM states:

This amendment has been necessary to ensure that the CEO has the capacity to manage the budget of ARPANSA and to prioritise requests for advice and development and review of policies, codes and standards. The Committees may still, however, provide advice to both the Council and the CEO.<sup>4</sup>

## Remediation

2.8 The EM notes that '[c]urrently there is no clear way to license activities associated with the remediation of sites that have been contaminated by radioactivity but where the contamination is unrelated to, or did not arise from, a licensed facility, material or apparatus'. It states:

This issue was also identified by the International Atomic Energy Agency (IAEA) Integrated Regulatory Review Service (IRRS) mission to ARPANSA in 2007 and the follow-up IRRS mission in 2011. The IAEA noted the lack of a clear legal basis for regulating existing exposure situations, remediation and clearance.<sup>5</sup>

2.9 Existing subsection 30(1) currently provides that unless a controlled person is authorised by an ARPANSA licence, or otherwise exempt, the controlled person must not undertake certain activities. Item 16 inserts a reference to remediating a prescribed legacy site to this list of activities (new paragraph 30(1)(ea)). The EM states:

The effect of this amendment is that a person (specifically a Commonwealth entity) cannot remediate a legacy site that has been prescribed in the *Australian Radiation Protection and Nuclear Safety Regulations 2000* (ARPANS Regulations), unless that person is licensed to do so by ARPANSA or exempt by the ARPANS Regulations.<sup>6</sup>

## Licensing

2.10 The bill makes a large number of amendments to the existing provisions for the licensing of activities undertaken by ARPANSA.

2.11 The EM notes that currently 'ARPANSA may issue facility licences in respect of activities described in section 30 and source licences in respect of dealings with controlled material and controlled apparatus described in section 31'. However, it

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4 EM, p. 7.

5 EM, p. 7.

6 EM, p. 7.

observes that there are circumstances 'where it may be contrary to best practice regulation for ARPANSA to separately licence the facility and the sources'. Similarly, the EM notes that 'there may be circumstances where there is more than one controlled facility on a site and the activity is best regulated through one comprehensive risk management plan and one ARPANSA licence rather than through separate facility licences for each controlled facility'.<sup>7</sup> Items 17 and 18 amend existing sections 31 and 32 to clarify that ARPANSA can issue licences covering multiple controlled facilities and/or sources.

2.12 Existing section 35 provides that licences are subject to a number of conditions. Item 19 amends this section so that licences are also subject to compliance with an improvement notice.

2.13 Items 22 and 23 amend existing section 35 to enable the CEO of ARPANSA, where appropriate, to limit the period of a licence at the time the licence is issued and also extend licences by written notice.

2.14 Currently, under existing section 40, an applicant for a licence or a licence holder may request reconsideration of certain licence decisions by the Minister. Similarly, under section 42, a controlled person to whom a direction is given by the CEO may also seek reconsideration of that decision by the Minister. In both cases the person has 90 days to request reconsideration by the Minister in writing.

2.15 Items 24 and 28 amend paragraphs 40(2)(b) and 42(2)(b) to require requests for reconsideration by the Minister to be made within 28 days, rather than within 90 days. The EM argues this proposed change:

- aligns the request for review period with that allowed by the Administrative Appeals Tribunal;
- better aligns the ARPNS Act with state and territory radiation legislation; and
- provides greater regulatory certainty by ensuring that a decision is final and is made within a reasonable period of time.<sup>8</sup>

## Directions

2.16 Under existing section 41 the CEO may give written directions to a licence holder requiring them to take certain steps if the CEO believes, on reasonable grounds, that they are not complying with the Act or Regulations and that it is necessary to exercise the power in order to protect the health and safety of people or to avoid damage to the environment.<sup>9</sup>

2.17 Item 27 inserts a new subsection 41(1A) that expands the operation of this provision so that the CEO can also issue directions if:

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7 EM, pp 8–9.

8 EM, p. 10.

9 EM, p. 11.

- (a) the CEO believes, on reasonable grounds, there is still a risk of death, serious illness, serious injury or serious damage to the environment arising from radiation in connection with a controlled facility or controlled material/apparatus; and
- (b) the CEO believes that there is an urgent need to exercise powers under this section in order to minimise risk.

2.18 The EM states:

This is intended to deal with the situation where a controlled person may be complying with the legislation but there may be, for example, an imminent weather event that means that action must be taken immediately, in order to minimise risk to people and the environment. In this circumstance, the CEO of ARPANSA should be able to issue such a direction without needing to first establish that the licence holder was non-compliant.<sup>10</sup>

2.19 Item 27 also revises existing subsection 42(2) allowing the CEO the power to make directions to a 'controlled person requiring the controlled person to take such steps in relation to the thing as the CEO considers appropriate' in similar circumstances.

2.20 The EM notes:

It is important to note that these amendments in no way shift responsibility or liability for safety – this continues to remain with the licence holders. The expanded directions power is not intended to undermine operator responsibility. The amendments simply expand the circumstances in which the CEO can issue directions to a licence holder where the CEO believes on reasonable grounds that there is a risk of death, serious illness, serious injury or serious damage to the environment arising from radiation in connection with a controlled facility, material or apparatus.<sup>11</sup>

### **Information-gathering power**

2.21 Item 29 inserts a new information-gathering power for the CEO of ARPANSA and creates an offence for a failure to comply. The EM notes:

Currently the CEO of ARPANSA has no power to compel controlled persons to appear before the CEO to answer the CEO's questions about possible non-compliance with the legislation or to provide documents to the CEO also regarding possible non-compliance.

This has been identified in recent reviews of ARPANSA as being a power that would be expected of like Regulators, but is absent from the suite of powers available to the CEO of ARPANSA.<sup>12</sup>

2.22 New section 44A would provide that the CEO may require (through written notice) controlled persons to provide information, produce documents or appear

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10 EM, p. 11.

11 EM, p. 11.

12 EM, p. 12.

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before the CEO, if the CEO believes on reasonable grounds that the person has information or a document relevant to whether the legislation, regulations or conditions of a licence have been complied with.

2.23 If the controlled person is an individual they are excused from these requirements if the information, the answer or the production of the document might tend to incriminate the individual or to expose the individual to a penalty (proposed subsection 44A(5)). The EM notes that this provision 'ensures that the privilege against self-incrimination is not abrogated'.<sup>13</sup>

2.24 A recipient of a notice under proposed section 44A is also excused from giving information, answering a question or producing a document in accordance with the notice if doing so would involve a contravention of an obligation under an international agreement (proposed subsection 44A(6)).

2.25 Proposed new section 44B creates an offence where a controlled person is given a notice by the CEO under section 44A and the person fails to comply with the notice. The penalty for the offence would be 30 penalty units.

## **Reports**

2.26 Items 30 and 31 amend existing sections 59 and 60 to require the CEO to include details of directions and improvement notices in annual and quarterly reports given to the Minister, tabled in Parliament and published on the ARPANSA website.

## **Improvement notices**

2.27 Item 36 inserts a new Division 2 (Improvement notices) to Part 7 of the ARPNS Act which deals with inspections. The new Division comprises three new sections which provide when inspectors may issue improvement notices, compliance with improvement notices and the review of improvement notice decisions.

2.28 The EM outlines the reasons for the proposed improvement notice framework:

A comparison of the ARPANS Act with other like Commonwealth and State/Territory legislation demonstrates that ARPANSA lacks a range of graduated enforcement powers that would be expected of a regulator charged with regulating radiation sources and nuclear facilities. Specifically, ARPANSA has limited capacity to identify non-compliance and require licence holders to address the non-compliance within a certain timeframe (with consequences for failure to do so).<sup>14</sup>

2.29 New subsection 80A provides that an inspector may give a licence holder an improvement notice if he/she reasonably believes that:

- a licence holder or a person covered by a licence is contravening, or is likely to contravene, a provision of the Act or the regulations; or
- a condition of a licence is being contravened or is likely to be contravened.

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13 EM, p. 13.

14 EM, p. 15.

2.30 New subsection 80B provides that a licence is subject to the condition that an improvement notice must be complied with by the time specified in the notice.

2.31 New subsection 80C provides the process for a licence holder to seek reconsideration of an improvement notice decision from the CEO or the review of the decision of the CEO to confirm, vary or set aside the improvement notice by the Administrative Appeals Tribunal.