



# **Energy Efficiency Opportunities Act 2006**

**No. 31, 2006**

**An Act to encourage more efficient use of energy by  
large energy using businesses, and for related  
purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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**No. 31, 2006**

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**An Act to encourage more efficient use of energy by  
large energy using businesses, and for related  
purposes**

*[Assented to 6 April 2006]*

The Parliament of Australia enacts:

## Part 1—Preliminary

### 1 Short title

This Act may be cited as the *Energy Efficiency Opportunities Act 2006*.

### 2 Commencement

This Act commences on the day on which it receives the Royal Assent.

### 3 Object

- (1) The object of this Act is to improve the identification and evaluation of energy efficiency opportunities by large energy using businesses and, as a result, to encourage implementation of cost effective energy efficiency opportunities.
- (2) In order to achieve its object, this Act requires large energy using businesses:
  - (a) to undertake an assessment of their energy efficiency opportunities to a minimum standard in order to improve the way in which those opportunities are identified and evaluated; and
  - (b) to report publicly on the outcomes of that assessment in order to demonstrate to the community that those businesses are effectively managing their energy.

### 4 Definitions

- (1) In this Act:

***approved assessment plan*** means an assessment plan that has been approved under section 16 or subsection 17(4).

***Australia*** does not include any external Territory. However, it includes an installation (within the meaning of the *Customs Act 1901*) that is deemed by section 5C of that Act to be part of Australia.



***civil penalty provision*** has the meaning given by clause 1 of Schedule 1.

***constitutional corporation*** means a corporation to which paragraph 51(xx) of the Constitution applies.

***controlling corporation*** has the meaning given by section 7.

***Court*** means the Federal Court of Australia.

***energy use threshold*** has the meaning given by section 10.

***group*** has the meaning given by subsection 8(1).

***holding company*** has the meaning given by section 6.

***joint venture*** means an enterprise carried on by 2 or more entities in common otherwise than in partnership.

***member*** has the meaning given by subsection 8(2).

***monitoring warrant*** means a warrant issued under section 38.

***penalty unit*** has the meaning given by section 4AA of the *Crimes Act 1914*.

***registered corporation*** means a controlling corporation that is registered under Part 4.

***Secretary*** means the Secretary of the Department.

***subsidiary*** has the meaning given by section 46 of the *Corporations Act 2001*.

***warrant premises***, in relation to a monitoring warrant, means the premises to which the warrant relates.

- (2) In this Act:
- (a) a reference to energy use is taken to be a reference to energy use in Australia; and
  - (b) a reference to energy efficiency is taken to be a reference to energy efficiency in Australia.

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**5 Schedule 1 (consequences of contravening civil penalty provisions)**

Schedule 1 has effect.

## Part 2—Definitions relating to groups

### 6 Holding company

A *holding company*, in relation to a body corporate, is a body corporate of which the first body corporate is a subsidiary.

### 7 Controlling corporation

- (1) A *controlling corporation* is a constitutional corporation that:
  - (a) does not have a holding company incorporated in Australia; and
  - (b) is covered by subsection (2).
- (2) A corporation is covered by this section unless:
  - (a) the corporation's activities are mainly in the electricity generation, electricity and gas transmission, or electricity and gas distribution sectors; and
  - (b) it is within a class of corporations (if any) specified in the regulations.

### 8 Group and members of a group

- (1) A controlling corporation's *group* consists of the following entities:
  - (a) the controlling corporation;
  - (b) the controlling corporation's subsidiaries covered by subsections (3) and (4) (if any);
  - (c) the joint ventures covered by subsection (5) (if any);
  - (d) the partnerships covered by subsection (6) (if any).
- (2) The *members* of the group are the entities mentioned in subsection (1).
- (3) A subsidiary of the controlling corporation is covered by this section unless:

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- (a) the subsidiary is also a subsidiary of another body corporate because the other body corporate meets the requirement in subparagraph 46(a)(i) or (ii) of the *Corporations Act 2001* in relation to the subsidiary; and
  - (b) the other body corporate is not a member of the group (including by reason of a previous operation of this subsection).
- (4) A subsidiary of the controlling corporation is covered by this section unless:
  - (a) the subsidiary's activities are mainly in the electricity generation, electricity and gas transmission, or electricity and gas distribution sectors; and
  - (b) it is within a class of entities (if any) specified in the regulations.
- (5) A joint venture is covered by this subsection if a member of the group (other than a joint venture or partnership) is a participant in the joint venture and the participants in the joint venture have either:
  - (a) nominated that member as the responsible entity for the joint venture in accordance with regulations made for the purposes of subsection (7); or
  - (b) not nominated an entity as the responsible entity for the joint venture in accordance with those regulations.
- (6) A partnership is covered by this subsection if a member of the group (other than a joint venture or partnership) is a partner in the partnership and the partners in the partnership have either:
  - (a) nominated that member as the responsible entity for the partnership in accordance with regulations made for the purposes of subsection (7); or
  - (b) not nominated an entity as the responsible entity for the partnership in accordance with those regulations.
- (7) The regulations may establish rules under which:
  - (a) participants in a joint venture may make, and revoke, nominations for the purposes of subsection (5); and
  - (b) partners in a partnership may make, and revoke, nominations for the purposes of subsection (6).

## Part 3—Corporations required to register

### 9 Obligation to apply to register

- (1) A controlling corporation must apply to be registered under Part 4, in accordance with this section, if its group meets the energy use threshold for a financial year (the *trigger year*) under section 10.

Note 1: Clause 3 of Schedule 1 provides for a civil penalty for failing to comply with this subsection.

Note 2: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

- (2) Subsection (1) does not apply if the corporation:
- (a) did not know; and
  - (b) could not, with reasonable diligence, have ascertained; that its group met the energy use threshold for the trigger year under section 10.
- (3) A corporation that wishes to rely on subsection (2) bears an evidential burden in relation to that matter.
- (4) The application must be made on or before 31 March in the financial year after the trigger year.
- (5) The application must:
- (a) identify the controlling corporation; and
  - (b) contain any other information required by the regulations; and
  - (c) be in the form (if any) specified in the regulations.
- (5A) Regulations made for the purposes of paragraph (5)(b) may only require the following information:
- (a) information that is reasonably necessary for assessing applications made under this section;

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- (b) information that would be required by subsection 12(4) to be entered on the Register if the controlling corporation were registered under Part 4.
- (6) This section applies only if the trigger year ends on or after 30 June 2006.

**10 Energy use threshold**

- (1) A controlling corporation's group meets the *energy use threshold* for a financial year if in that year the total energy used by the entities that are members of the group is more than 0.5 petajoules.
- (3) For the purposes of subsection (1), the *energy used* by an entity has the meaning given by the regulations.
- (4) Without limiting subsection (3), regulations made for the purposes of that subsection may determine that meaning:
  - (a) by reference to particular kinds and uses of energy; and
  - (b) in relation to particular periods during which an entity is a member of a controlling corporation's group during a financial year.
- (5) Without limiting subsection (3), regulations made for the purposes of that subsection may determine that meaning:
  - (a) in relation to activities of a member of a controlling corporation's group as the trustee of a trust; and
  - (b) in relation to activities under a franchise of which a member of a controlling corporation's group is a franchisor.

**11 Exemption from registration on application by corporation**

- (1) Subsection 9(1) does not apply to a controlling corporation in relation to a particular financial year if the corporation is covered by an exemption under subsection (5) for that year.
- (2) A controlling corporation may apply to the Secretary for an exemption from the requirement to be registered under Part 4 in relation to a particular financial year if:
  - (a) it is not already registered under Part 4; and

- (b) the controlling corporation's group met the energy use threshold for the previous financial year (the *trigger year*) under section 10.

Note: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

- (3) The application must be made on or before 31 December in the financial year after the trigger year.
- (4) The application must:
  - (a) contain information required by the regulations; and
  - (b) be in the form (if any) specified in the regulations.
- (4A) Regulations made for the purposes of paragraph (4)(a) may only require information that is reasonably necessary for assessing applications made under this section.
- (5) The Secretary must grant the exemption if:
  - (a) the application is in accordance with subsections (2), (3) and (4); and
  - (b) the Secretary is satisfied that the controlling corporation's group is not likely to meet the energy use threshold under section 10 for the financial year after the trigger year.
- (6) The Secretary is taken to have granted the exemption under subsection (5) if he or she has not given the controlling corporation notice in writing, within 60 days after receiving the application for exemption, of a decision not to grant the exemption.

## **Part 4—Registration**

### **12 The Register**

- (1A) The object of this section is to encourage compliance with this Act by providing for a register containing information about corporations registered under this Part and their compliance with this Act.
- (1) The Secretary must cause a Register to be kept for the purposes of this Act.
- (2) The Register is called the Register of Corporations for the Energy Efficiency Opportunities Scheme.
- (3) The Secretary may cause the contents of part or all of the Register to be made available to the public by electronic or other means.
- (4) The Secretary must cause the following information, and only that information, to be entered on the Register:
- (a) the name of each corporation that the Secretary must register under section 13;
  - (b) any other matters required by the regulations.
- (4A) Regulations made for the purposes of paragraph (4)(b) may only require information that is reasonably necessary to further the object of this section.
- (5) A corporation is registered under this Part when the Secretary has entered the name of the corporation on the Register.

### **13 Secretary must register corporation**

The Secretary must register a corporation under this Part if:

- (a) the Secretary is satisfied that the corporation must apply to be registered in accordance with sections 9 and 11; and
- (a) the corporation has applied for registration in accordance with section 9.



**14 Corporation may apply for deregistration**

- (1) A registered corporation may apply to the Secretary to be deregistered.

Note: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

- (2) The application must:
- (a) contain information required by the regulations; and
  - (b) be in the form (if any) specified in the regulations.
- (2A) Regulations made for the purposes of paragraph (2)(a) may only require information that is reasonably necessary for assessing applications made under this section.
- (3) The Secretary must remove the name of the corporation from the Register if the Secretary is satisfied that the registered corporation's group is not likely to meet the energy use threshold in section 10 for:
- (a) the financial year in which the application is made; and
  - (b) the next 2 financial years.
- (4) The corporation ceases to be registered under this Part when the Secretary has removed its name from the Register.

## Part 5—Assessment plan

### 15 Registered corporation must submit assessment plan every 5 years

- (1) A registered corporation must give the Secretary an assessment plan meeting the requirements in subsections 18(1), (2) and (3).

Note: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

- (2) An assessment plan must be given to the Secretary at a time during each period that:
- (a) begins 6 months before a day covered by subsection (3); and
  - (b) ends on that day.
- (3) The following days are covered by this subsection:
- (a) 31 December in the financial year following the financial year in which the corporation was first required to apply under sections 9 and 11 to be registered under Part 4; and
  - (b) every fifth anniversary of the day mentioned in paragraph (a).
- (4) To avoid doubt, a controlling corporation that has applied to be registered under Part 4, but is not yet registered, may give the Secretary an assessment plan for the purposes of complying with subsection (1).
- (5) A registered corporation contravenes this subsection if it fails to comply with subsections (1) and (2).

Note: Clause 3 of Schedule 1 provides for a civil penalty for failing to comply with this subsection.

### 16 Approval of assessment plan

- (1) This section applies if the Secretary has been given an assessment plan under section 15.

- (2) If the Secretary is satisfied that the assessment plan substantially meets the requirements in section 18, the Secretary must:
  - (a) approve the assessment plan; and
  - (b) give the controlling corporation written notice of the approval.
- (3) If the Secretary has not refused to approve the assessment plan within 6 months after receiving it, he or she:
  - (a) is taken to be satisfied that it substantially meets the requirements in section 18; and
  - (b) must deal with it under subsection (2) accordingly.

### **17 Refusal to approve assessment plan**

- (1) This section applies if:
  - (a) the Secretary has been given an assessment plan under section 15; and
  - (b) he or she is not satisfied that the assessment plan substantially meets the requirements in section 18.
- (2) The Secretary must:
  - (a) refuse to approve the assessment plan; and
  - (b) give the controlling corporation written notice of the refusal.
- (3) The Secretary must also:
  - (a) prepare a revised assessment plan for the controlling corporation that substantially meets the requirements in section 18, to the satisfaction of the Secretary; and
  - (b) give the controlling corporation a notice:
    - (i) setting out the revised assessment plan; and
    - (ii) inviting the controlling corporation to comment on the revised assessment plan within a specified period.
- (4) At the end of the period specified in the invitation, the Secretary may:
  - (a) approve the revised assessment plan; and
  - (b) give the controlling corporation written notice of the approval.

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- (5) In making a decision under subsection (4), the Secretary must consider any written comments received from the controlling corporation within the period specified in the invitation.
- (6) If the Secretary does not approve the revised assessment plan under subsection (4), this section applies in relation to that plan as if:
  - (a) it were an assessment plan that the Secretary had been given under section 15; and
  - (b) the Secretary were not satisfied that it substantially met the requirements in section 18.

Note: This means that the Secretary must prepare a new revised assessment plan, and send it to the controlling corporation for comment.

**18 Requirements for an assessment plan**

- (1) An assessment plan must set out a proposal for assessing the opportunities for improving the energy efficiency of the controlling corporation's group for the period mentioned in subsection (2).
- (2) The period is the period of 5 years ending on the latest day on which the controlling corporation is next required under section 15 to give the Secretary an assessment plan.
- (3) The assessment plan must be in the form (if any) specified in the regulations.
- (4) The proposal must set out particular actions that need to be done to assess those opportunities.
- (5) Those actions must be specified for the group:
  - (a) as a whole; or
  - (b) in terms of particular parts of the group.
- (6) The proposal must set out a deadline or deadlines for doing all of those actions.
- (7) The assessment plan must set out the manner in which the controlling corporation intends to comply with subsection 22(1).
- (7A) Without limiting the scope of subsection (7), the assessment plan must set out:

- (a) whether the controlling corporation intends to rely on section 22A in order to comply with its obligations under subsection 22(1); and
  - (b) if the controlling corporation intends to rely on section 22A in that way—the other members of the group that are intended to prepare a report in accordance with section 22A; and
  - (c) whether the controlling corporation intends to rely on section 22B in order to comply with its obligations under subsection 22(1); and
  - (d) if the controlling corporation intends to rely on section 22B in that way—the corporation that is intended to prepare a report in accordance with section 22B.
- (8) The regulations may:
- (a) set out requirements for a proposal in relation to the following:
    - (i) the types of actions mentioned in subsection (4);
    - (ii) the deadlines for doing those actions;
    - (iii) matters that must be set out for the purposes of subsections (7) and (7A); and
  - (b) require particular information to be set out in the assessment plan.
- (9) Regulations made for the purposes of paragraph (8)(b) may only require information that:
- (a) is reasonably necessary to assess the extent to which this Act achieves its objects; or
  - (b) is reasonably necessary for the administration of this Act.

## **19 Registered corporation may seek variation to approved assessment plan**

- (1) A registered corporation with an approved assessment plan may give the Secretary a proposed variation to the plan.

Note: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

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- (2) Section 16 and subsections 17(1) and (2) apply to the variation as if it (together with the approved assessment plan) were an assessment plan given to the Secretary.

## **Part 6—Energy efficiency opportunities assessments**

### **20 Requirement to carry out energy efficiency opportunities assessments**

- (1A) The object of this section is to require registered corporations to undertake assessments of a kind mentioned in paragraph 3(2)(a).
- (1) A registered corporation must ensure the carrying out of the proposal in its approved assessment plan for assessing the opportunities for improving the energy efficiency of its group.
- (2) A registered corporation must ensure the carrying out of that proposal in accordance with requirements (if any) set out in the regulations.
- (3) Regulations made for the purposes of subsection (2) may set out requirements relating to:
- (a) the communication of objectives about energy use; and
  - (b) the measurement and analysis of energy use, and of related business activity; and
  - (c) the identification and evaluation of opportunities for improving energy efficiency; and
  - (d) any other matter reasonably necessary to further the object of this section.
- (4) A registered corporation contravenes this subsection if it fails to comply with subsections (1) and (2).

Note: Clause 3 of Schedule 1 provides for a civil penalty for failing to comply with this subsection.

## **Part 7—Reporting about energy efficiency opportunities assessments**

### **21 Overview**

A registered corporation must:

- (a) prepare and make available to the public a report in accordance with section 22; and
- (b) prepare and give to the Secretary a report in accordance with section 23.

### **22 Reporting to the public**

(1A) The object of this section is to create public reporting requirements of a kind mentioned in paragraph 3(2)(b).

(1) A registered corporation must:

- (a) prepare a report in accordance with this section for each period mentioned in subsection (2); and
- (b) make the report available to the public in accordance with subsection (5).

Note: Clause 3 of Schedule 1 provides for a civil penalty for failing to comply with this subsection.

(2) The period is the period specified in the regulations.

(3) The report must contain:

- (a) a description of the way in which the corporation has carried out, during the period, the proposal in its approved assessment plan for assessing the opportunities for improving the energy efficiency of its group; and
- (b) the results of carrying out that proposal; and
- (c) the response of the corporation to those results; and
- (d) any other information required by the regulations.



- (3A) Regulations made for the purposes of paragraph (3)(d) may only require information that is reasonably necessary to further the object of this section.
- (4) The report must:
- (a) be in the form (if any) specified in the regulations; and
  - (b) be signed by a person who is the chair of the board of directors, the chief executive officer, the managing director, or an equivalent officer, of the registered corporation; and
  - (c) include a statement by that person that the board of directors of the registered corporation has reviewed and noted the report.
- (5) The report must be made available to the public:
- (a) at the time specified in the regulations; and
  - (b) in the manner (if any) specified in the regulations.
- (6) Despite subsection (5), the report need not be made available to the public at a time if, within the period of 12 months ending at that time, the registered corporation had made another report under this section available to the public.

### **22A Public reporting—decentralised reporting**

- (1) The registered corporation is taken to comply with subsection 22(1) in relation to a period mentioned in subsection 22(2) if:
- (a) the registered corporation's approved assessment plan sets out, in accordance with paragraph 18(7A)(a), its intention to rely on this section in order to comply with its obligations under subsection 22(1); and
  - (b) the registered corporation prepares a report that describes the way in which only part of the proposal mentioned in paragraph 22(3)(a) was carried out during the period; and
  - (c) one or more other members of the group prepared a report or reports describing the way in which the remaining part or parts of the proposal were carried out during the period; and
  - (d) each report mentioned in paragraphs (b) and (c):
    - (i) meets the requirements in subsection 22(3) for the part or parts of the proposal to which the report relates; and

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- (ii) meets the requirements in subsection 22(4); and
  - (iii) has been made available to the public in accordance with subsection 22(5).
- (2) For the purposes of applying subsection (1) in relation to a report prepared by a member of the group other than the registered corporation:
- (a) treat references in subsections 22(3) and (4) to the corporation, or the registered corporation, as references to the member of the group that prepared the report; and
  - (b) treat references in subsection 22(3) to the proposal in the approved assessment plan of the registered corporation as references to the part or parts of that proposal to which the report relates.

**22B Public reporting—reporting by manager of joint venture**

- (1) Subsection (2) applies if:
- (a) a joint venture is a member of the registered corporation's group; and
  - (b) the participants in the joint venture have nominated a member of the group (the *responsible entity*) as the responsible entity for the joint venture for the purposes of subsection 8(5); and
  - (c) a corporation (the *operator*) operates or manages the joint venture; and
  - (d) the registered corporation's approved assessment plan sets out, in accordance with paragraph 18(7A)(c), its intention to rely on this section in order to comply with its obligations under subsection 22(1); and
  - (e) the operator prepares a report that describes the way in which the part of the proposal mentioned in paragraph 22(3)(a) relating to the joint venture was carried out during the period; and
  - (f) the report is signed by the chief executive officer of the operator; and
  - (g) the report includes a statement by the chief executive officer of the operator that the board of directors of the responsible entity has reviewed and noted the report.

- (2) If this subsection applies:
- (a) subsection 22A(1) applies in relation to the report prepared by the operator as if the operator were a member of the group; and
  - (b) for the purposes of applying subsection 22A(1) in relation to the report prepared by the operator:
    - (i) treat the reference in subsection 22(3) to the corporation as a reference to the operator; and
    - (ii) treat references in subsection 22(3) to the proposal in the approved assessment plan of the registered corporation as references to the part or parts of that proposal to which the report relates; and
    - (iii) disregard paragraphs 22(4)(b) and (c).

### **23 Reporting to the Secretary**

- (1) A registered corporation must:
- (a) prepare a report in accordance with this section for each period mentioned in subsection (2); and
  - (b) give the report to the Secretary in accordance with subsection (5).

Note 1: Clause 3 of Schedule 1 provides for a civil penalty for failing to comply with this subsection.

Note 2: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

- (2) The period is the period specified in the regulations.
- (3) The report must contain:
- (a) the information required to be contained in a report made to the public under section 22; and
  - (b) any further information required by the regulations.
- (3A) Regulations made for the purposes of paragraph (3)(b) may only require information that is reasonably necessary to:
- (a) administer this Act; or
  - (b) assess the extent to which this Act achieves its objects; or

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- (c) assess the benefits and costs of complying with this Act.
- (4) The report must be in the form (if any) specified in the regulations.
- (5) The report must be given to the Secretary:
  - (a) at the time specified in the regulations; and
  - (b) in the manner (if any) specified in the regulations.
- (6) Despite subsection (5), the report need not be given to the Secretary at a time if, within the period of 12 months ending at that time, the registered corporation had given the Secretary another report under this section.

## **Part 8—Powers of inspection**

### **Division 1—Overview**

#### **24 Overview of Part**

- (1) This Part provides for powers of inspection in relation to obligations under this Act.
- (2) Division 2 provides for the appointment of authorised officers to undertake inspection functions and for the issue of identification for such persons.
- (3) Division 3 sets out the powers of authorised officers and Division 4 sets out the obligations imposed on authorised officers in the exercise of those powers.
- (4) Division 5 deals with an occupier's rights and responsibilities in circumstances where an authorised officer seeks to exercise inspection powers.
- (5) Division 6 deals with the procedure for obtaining and the nature of monitoring warrants.

## **Division 2—Appointment of authorised officers and identity cards**

### **25 Appointment of authorised officers**

- (1) The Secretary may, in writing, appoint:
  - (a) an officer or employee of the Department; or
  - (b) any other suitably qualified person;to be an authorised officer for the purposes of this Part.
- (2) In exercising powers or performing functions as an authorised officer, an authorised officer must comply with any directions of the Secretary.

Note: Section 70 of the *Crimes Act 1914* creates an offence where Commonwealth officers (including persons performing services for or on behalf of the Commonwealth) disclose information in breach of a duty of confidentiality.

### **26 Identity cards**

- (1) The Secretary must issue an identity card to an authorised officer in the form prescribed by the regulations. The identity card must contain a recent photograph of the authorised officer.
- (2) A person commits an offence if:
  - (a) the person has been issued with an identity card; and
  - (b) the person ceases to be an authorised officer; and
  - (c) the person does not, as soon as practicable after so ceasing, return the identity card to the Secretary.

Penalty: 1 penalty unit.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (3) An authorised officer must carry the identity card at all times when exercising powers or performing functions as an authorised officer.

## **Division 3—Powers of authorised officer**

### **Subdivision A—Monitoring powers**

#### **27 Authorised officer may enter premises by consent or under monitoring warrant**

- (1) For the purposes of substantiating information provided under this Act or of determining whether this Act has been complied with, an authorised officer may:
  - (a) enter any premises:
    - (i) during normal business hours; or
    - (ii) if the entry is made under a monitoring warrant—at any time specified in the warrant; and
  - (b) exercise the monitoring powers set out in section 28.
- (2) An authorised officer is not authorised to enter premises under subsection (1) unless:
  - (a) the premises are business premises, the occupier of the premises has consented to the entry and the officer has shown his or her identity card if required by the occupier; or
  - (b) the entry is made under a monitoring warrant.
- (3) If an authorised officer is on the premises with the consent of the occupier, the authorised officer must leave the premises if the occupier asks the authorised officer to do so.

#### **28 Monitoring powers of authorised officers**

- (1) For the purposes of this Part, the following are the monitoring powers that an authorised officer may exercise in relation to premises under section 27:
  - (a) the power to search the premises for any thing on the premises that may relate to compliance with this Act;
  - (b) the power to examine any activity conducted on the premises that may relate to information provided for the purposes of this Act;

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- (c) the power to examine any thing on the premises that may relate to information provided for the purposes of this Act;
  - (d) the power to take photographs or make video or audio recordings or sketches on the premises of any such activity or thing;
  - (e) the power to inspect any document on the premises that may relate to information provided for the purposes of this Act;
  - (f) the power to take extracts from, or make copies of, any such document;
  - (g) the power to take onto the premises such equipment and materials as the authorised officer requires for the purpose of exercising powers in relation to the premises;
  - (h) the power to secure a thing that:
    - (i) is found during the exercise of monitoring powers on the premises; and
    - (ii) an authorised officer believes on reasonable grounds affords evidence of a contravention of this Act or of the commission of an offence against the *Crimes Act 1914*;until a warrant is obtained to seize the thing;
  - (i) the powers in subsections (2) and (3).
- (2) For the purposes of this Part, **monitoring powers** includes the power to operate equipment at premises to see whether:
- (a) the equipment; or
  - (b) a disk, tape or other storage device that:
    - (i) is at the premises; and
    - (ii) can be used with the equipment or is associated with it;contains information that is relevant to assessing the correctness of information provided under this Act.
- (3) For the purposes of this Part, **monitoring powers** includes the following powers in relation to information described in subsection (2) found in the exercise of the power under that subsection:
- (a) the power to operate facilities at the premises to put the information in documentary form and copy the documents so produced;



- (b) the power to operate facilities at the premises to transfer the information to a disk, tape or other storage device that:
  - (i) is brought to the premises for the exercise of the power; or
  - (ii) is at the premises and the use of which for the purpose has been agreed in writing by the occupier of the premises;
- (c) the power to remove from the premises a disk, tape or other storage device to which the information has been transferred in exercise of the power under paragraph (b).

### **Subdivision B—Power of authorised officer to ask questions and seek production in certain circumstances**

#### **29 Authorised officer may request persons to answer questions**

- (1) If the authorised officer was only authorised to enter premises because the occupier of the premises consented to the entry, the authorised officer may ask the occupier to:
  - (a) answer any questions related to the operation of this Act that are put by the authorised officer; and
  - (b) produce any document requested by the authorised officer that is so related.
- (2) If the authorised officer was authorised to enter the premises by a monitoring warrant, the authorised officer has power to require the occupier (if the occupier is in or on the premises), or another person who apparently represents the occupier (if that person is in or on the premises), to:
  - (a) answer any questions related to the operation of this Act that are put by the authorised officer; and
  - (b) produce any document requested by the authorised officer that is so related.
- (3) A person commits an offence if the person refuses or fails to comply with a requirement under subsection (2).

Penalty: 10 penalty units.

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Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (4) An individual is excused from complying with a requirement of subsection (2) if the answer to the question or the production of the document might tend to incriminate the individual or expose the individual to a penalty.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4), see subsection 13.3(3) of the *Criminal Code*.

## **Division 4—Obligations and incidental powers of authorised officers**

### **30 Authorised officer must produce identity card on request**

An authorised officer is not entitled to exercise any powers under this Part in relation to premises if:

- (a) the occupier of the premises requires the authorised officer to produce his or her identity card for inspection by the occupier; and
- (b) the authorised officer fails to comply with the requirement.

### **31 Consent**

- (1) Before obtaining the consent of a person for the purposes of paragraph 27(2)(a), the authorised officer must inform the person that he or she may refuse consent.
- (2) An entry of an authorised officer because of the consent of a person is not lawful unless the person voluntarily consented to the entry.

### **32 Announcement before entry**

An authorised officer executing a monitoring warrant must, before entering premises under the warrant:

- (a) announce that he or she is authorised to enter the premises; and
- (b) give any person at the premises an opportunity to allow entry to the premises.

### **33 Details of monitoring warrant to be given to occupier etc. before entry**

- (1) If a monitoring warrant is being executed and the occupier of the premises in respect of which it is being executed or another person who apparently represents the occupier is present at the premises,

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the authorised officer must make available to that person a copy of the warrant.

- (2) The authorised officer must identify himself or herself to that person.
- (3) The copy of the warrant referred to in subsection (1) need not include the signature of the magistrate who issued the warrant.

Note: Monitoring warrants are issued under section 38.

**34 Use of electronic equipment in exercising monitoring powers**

- (1) An authorised officer or a person assisting that officer may operate electronic equipment already at premises in order to exercise monitoring powers if he or she believes, on reasonable grounds, that the operation of the equipment can be carried out without damage to the equipment.

- (2) If the authorised officer or a person assisting believes, on reasonable grounds, that:
  - (a) there is on the premises material relating to information supplied under this Act that may be accessible by operating electronic equipment on the premises; and
  - (b) expert assistance is required to operate the equipment; and
  - (c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;

he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard, or otherwise.

- (3) The authorised officer or a person assisting must give notice to the occupier of the premises of his or her intention to secure equipment and of the fact that the equipment may be secured for up to 24 hours.
- (4) The equipment may be secured:
  - (a) for a period not exceeding 24 hours; or
  - (b) until the equipment has been operated by the expert; whichever first happens.

- (5) If an authorised officer or a person assisting believes, on reasonable grounds, that the expert assistance will not be available within 24 hours, he or she may apply to a magistrate for an extension of the period.
- (6) The magistrate may extend the period of time, up to a maximum of a further 48 hours.
- (7) The authorised officer or a person assisting must give notice to the occupier of the premises of his or her intention to apply for an extension and the occupier is entitled to be heard in relation to that application.
- (8) The provisions of this Part relating to the issue of monitoring warrants apply, with such modifications as are necessary, to the issue of an extension.
- (9) In this section:  
*premises* means:
  - (a) premises that an authorised officer has entered, and remains on, with the consent of the occupier; and
  - (b) warrant premises.

### **35 Compensation for damage to electronic equipment**

- (1) This section applies if:
  - (a) as a result of equipment being operated as mentioned in section 34:
    - (i) damage is caused to the equipment; or
    - (ii) the data recorded on the equipment is damaged; or
    - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
  - (b) the damage or corruption occurs because:
    - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
    - (ii) insufficient care was exercised by the person operating the equipment.

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- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Court for such reasonable amount of compensation as the Court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the premises, or the occupier's employees or agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):

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

## **Division 5—Occupier's rights and responsibilities**

### **36 Occupier entitled to be present during execution of monitoring warrant**

- (1) If a monitoring warrant is being executed and the occupier of the warrant premises, or another person who apparently represents the occupier, is present at the premises, the person is entitled to observe the execution of the warrant.
- (2) The right to observe the execution of the warrant ceases if the person impedes that execution.
- (3) This section does not prevent the execution of the warrant in 2 or more areas of the premises at the same time.

### **37 Occupier to provide authorised officer with all facilities and assistance**

- (1) The occupier of warrant premises, or another person who apparently represents the occupier, must provide the officer executing the warrant and any person assisting that officer with all reasonable facilities and assistance for the effective exercise of their powers.
- (2) A person commits an offence if the person fails to comply with the obligation set out in subsection (1).

Penalty: 10 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

## **Division 6—Warrants**

### **38 Monitoring warrants**

- (1) An authorised officer may apply to a magistrate for a warrant under this section in relation to premises.
- (2) Subject to subsection (3), the magistrate may issue the warrant if the magistrate is satisfied, by information on oath or affirmation, that it is reasonably necessary that one or more authorised officers should have access to the premises for the purposes of substantiating information provided under this Act or of determining whether this Act has been complied with.
- (3) The magistrate must not issue the warrant unless the authorised officer or some other person has given to the magistrate, either orally or by affidavit, such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought.
- (4) The warrant must:
  - (a) authorise one or more authorised officers (whether or not named in the warrant), with such assistance and by such force as is necessary and reasonable:
    - (i) to enter the premises; and
    - (ii) to exercise the powers set out in section 28 in relation to the premises; and
  - (b) state whether the entry is authorised to be made at any time of the day or during specified hours of the day; and
  - (c) specify the day (not more than 6 months after the issue of the warrant) on which the warrant ceases to have effect; and
  - (d) state the purpose for which the warrant is issued.



## **Part 9—Miscellaneous**

### **39 Delegation**

The Secretary may, by signed instrument, delegate to an SES employee in the Department all or any of the Secretary's powers under this Act.

### **40 AAT review of decisions**

An application may be made to the Administrative Appeals Tribunal for the review of:

- (a) a decision of the Secretary not to grant an exemption under section 11; and
- (b) a decision of the Secretary not to register a corporation in accordance with section 13; and
- (c) a decision of the Secretary not to deregister a corporation in accordance with section 14; and
- (d) a decision of the Secretary not to approve an assessment plan, or a variation to an assessment plan, under subsections 17(1) and (2); and
- (e) a decision of the Secretary to approve an assessment plan under subsection 17(4).

### **41 Regulations**

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## Schedule 1—Consequences of contravening civil penalty provisions

Note: See section 5.

### 1 Declarations of contravention

- (1) If the Court is satisfied that a controlling corporation has contravened 1 of the following provisions, it must make a declaration of contravention:
  - (a) subsection 9(1);
  - (b) subsection 15(5);
  - (c) subsection 20(4);
  - (d) subsection 22(1);
  - (e) subsection 23(1).

These provisions are the *civil penalty provisions*.

Note: Once a declaration has been made, the Minister can then seek a pecuniary penalty order (see clause 3).

- (2) A declaration of contravention must specify the following:
  - (a) the Court that made the declaration;
  - (b) the civil penalty provision that was contravened;
  - (c) the controlling corporation who contravened the provision;
  - (d) the conduct that constituted the contravention.

### 2 Declaration of contravention is conclusive evidence

A declaration of contravention is conclusive evidence of the matters referred to in subclause 1(2).

### 3 Pecuniary penalty orders

- (1) The Court may order a controlling corporation to pay the Commonwealth a pecuniary penalty of up to 1000 penalty units if:
  - (a) a declaration of contravention by the controlling corporation has been made under clause 1; and
  - (b) the contravention is serious.

- (2) The penalty is a civil debt payable to the Commonwealth. The Commonwealth may enforce the order as if it were an order made in civil proceedings against the controlling corporation to recover a debt due by the controlling corporation. The debt arising from the order is taken to be a judgment debt.

#### **4 Who may apply for a declaration or order**

*Application by Minister*

- (1) The Minister, or some other person authorised in writing by the Minister under this subclause to make the application, may apply for a declaration of contravention or a pecuniary penalty order.

*No one else may apply*

- (2) No person may apply for a declaration of contravention or a pecuniary penalty order unless permitted by this clause.
- (3) Subclause (2) does not exclude the operation of the *Director of Public Prosecutions Act 1983*.

#### **5 Time limit for application for a declaration or order**

Proceedings for a declaration of contravention or a pecuniary penalty order may be started no later than 6 years after the contravention.

#### **6 Civil evidence and procedure rules for declarations of contravention and civil penalty orders**

The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for:

- (a) a declaration of contravention; or
- (b) a pecuniary penalty order.

#### **7 Civil proceedings after criminal proceedings**

The Court must not make a declaration of contravention or a pecuniary penalty order against a controlling corporation for a

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contravention if the controlling corporation has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

**8 Criminal proceedings during civil proceedings**

- (1) Proceedings for a declaration of contravention or pecuniary penalty order against a controlling corporation are stayed if:
  - (a) criminal proceedings are started or have already been started against the controlling corporation for an offence; and
  - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
- (2) The proceedings for the declaration or order may be resumed if the controlling corporation is not convicted of the offence. Otherwise, the proceedings for the declaration or order are dismissed.

**9 Criminal proceedings after civil proceedings**

Criminal proceedings may be started against a controlling corporation for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether:

- (a) a declaration of contravention has been made against the controlling corporation; or
- (b) a pecuniary penalty order has been made against the controlling corporation.

**10 Minister requiring person to assist**

- (1) The Minister may require a person to give all reasonable assistance in connection with:
  - (a) an application for a declaration of contravention or a pecuniary penalty order; or
  - (b) criminal proceedings for an offence against this Act.The person must comply with the request.

Penalty: 5 penalty units.

- (2) The Minister can require the person to assist in connection with an application for a declaration or order if, and only if:
  - (a) it appears to the Minister that:
    - (i) a controlling corporation may have contravened a civil penalty provision; and
    - (ii) the person required to assist is not that controlling corporation; and
  - (b) the Minister suspects or believes that the person required to assist can give information relevant to the application.
- (3) The Minister can require the person to assist in connection with criminal proceedings if, and only if:
  - (a) it appears to the Minister that the person required to assist is unlikely to be a defendant in the proceedings; and
  - (b) the person required to assist is, in relation to a person who is or should be a defendant in the proceedings:
    - (i) an employee or agent (including a banker or auditor) of the other person; or
    - (ii) if the other person is an individual—a partner of the other person.
- (4) The Minister can require the person to assist regardless of whether:
  - (a) an application for the declaration or penalty order has actually been made; or
  - (b) criminal proceedings for the offence have actually begun.
- (5) The person cannot be required to assist if they are or have been a lawyer for:
  - (a) in an application for a declaration or penalty order—the controlling corporation suspected of the contravention; or
  - (b) in criminal proceedings—a defendant or likely defendant in the proceedings.
- (6) The requirement to assist must be given in writing.
- (7) The Court may order the person to comply with the requirement in a specified way. Only the Minister may apply to the Court for an order under this subsection.

## **11 Relief from liability for contravention of civil penalty provision**

(1) In this section:

***eligible proceedings:***

- (a) means proceedings for a contravention of a civil penalty provision; and
- (b) does not include proceedings for an offence.

(2) If:

- (a) eligible proceedings are brought against a controlling corporation; and
- (b) in the proceedings it appears to the court that the controlling corporation has, or may have, contravened a civil penalty provision but that:
  - (i) the controlling corporation has acted honestly; and
  - (ii) having regard to all the circumstances of the case, the controlling corporation ought fairly to be excused for the contravention;

the court may relieve the controlling corporation either wholly or partly from a liability to which the controlling corporation would otherwise be subject, or that might otherwise be imposed on the controlling corporation, because of the contravention.

- (3) If a controlling corporation thinks that eligible proceedings will or may be begun against it, the controlling corporation may apply to the Court for relief.
- (4) On an application under subclause (3), the Court may grant relief under subclause (2) as if the eligible proceedings had been begun in the Court.
- (5) For the purposes of subclause (2) as applying for the purposes of a case tried by a judge with a jury:
  - (a) a reference in that subclause to the court is a reference to the judge; and
  - (b) the relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgment to be entered for the defendant on such terms as to costs as the judge thinks appropriate.

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*[Minister's second reading speech made in—  
House of Representatives on 14 September 2005  
Senate on 7 November 2005]*

(158/05)