

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 227

Issued by the Minister for Resources and Energy

Energy Efficiency Opportunities Act 2006

*Energy Efficiency Opportunities Amendment
(Assessments and Reporting) Regulation 2013*

The *Energy Efficiency Opportunities Act 2006* (the Act) establishes the Energy Efficiency Opportunities Program (the EEO Program). The Act requires businesses using large amounts of energy to conduct assessments of their energy use to identify energy efficiency opportunities, and to publicly report on the outcomes of those assessments. The energy use threshold for corporations required to register for the Program is half a petajoule (PJ) over a financial year.

Section 41 of the Act provides that the Governor-General may make regulations prescribing matters that are required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

This Amendment Regulation amends the *Energy Efficiency Opportunities Regulations 2006* (the Regulations).

Background

The Department of Resources, Energy and Tourism (the Department) engaged third party expertise to undertake an independent evaluation of the EEO Program at the end of the EEO Program's first five-year cycle. This review was in accordance with the explanatory memorandum to the Energy Efficiency Opportunities Bill 2005.

The evaluation sought to examine the EEO Program's complementarity with a carbon price, as well as its overall effectiveness and efficiency. The evaluation concluded that the EEO Program:

- was complementary to a carbon price;
- had been effective in achieving its intended policy outcomes;
- had enabled significant additional energy savings beyond what would have been achieved in its absence;
- was cost efficient and had provided a strong net economic benefit; and
- would continue to facilitate improved energy productivity outcomes moving forward.

Based on these evaluation outcomes, the Full Cycle Evaluation recommended that the EEO Program be continued until the end of its second five-year cycle (30 June 2016), at which time another evaluation be undertaken.

The evaluation involved extensive consultation with industry. During that process, compliance and reporting obligations were highlighted as areas to be addressed moving forward. In response to the recommendations made by the evaluation, the Department undertook an examination of regulatory changes that would significantly reduce the compliance burden placed on corporations, whilst maintaining and improving the outcomes of the Program. The key areas where Regulatory change was examined were:

- a mechanism to recognise exemplary performance, with consequent reductions in compliance;
- reduction in the reporting obligations;
- a more outcomes based approach to the Assessment Framework, with clear guidance on what is mandatory and what is discretionary; and
- improved streamlining of data reporting through alignment with the National Greenhouse Energy Reporting Scheme (NGERS).

This amendment regulation contains new measures to address the evaluation recommendations. In summary, the regulation:

- introduces a more flexible approach to the application of the Assessment Framework, which allows for greater utilisation of a corporation's existing systems and processes to meet Program requirements, specifically where those systems and processes deliver the same outcomes as the Assessment Framework; and
- facilitates greater streamlining and flexibility in reporting by reducing the required content of public and Government reports, and providing alternative options for report content, including an option to utilise data already reported through NGERS to avoid duplication.

The increased flexibility of the Assessment Framework and assessment plan approval process provides opportunities for high performing corporations to reduce their compliance burden under the EEO Program.

The mechanism to recognise exemplary performance will be investigated through further industry engagement.

This amendment regulation also contains:

- amendments to restructure certain aspects of the regulations, to increase operational clarity; and
- amendments to harmonise the changes in this regulation with those recently made by the *Energy Efficiency Opportunities Amendment Regulation 2013 (No. 1)* (the NDE amendments). The NDE amendments prescribed new assessment and reporting obligations in relation to new developments and expansions of existing facilities (NDEs).

Amendments

Details of the Amendment Regulation are set out in the [Attachment](#).

Consultation

The public consultation period for this regulation was 10 – 23 July 2013.

During this period, a draft of the regulation was available on the Department's website, and a link to the draft was provided directly to industry stakeholders. While a number of stakeholders provided informal feedback, a total of 2 formal submissions were received and these were reviewed and considered by the Department.

Statement of Compatibility with Human Rights

Human rights implications

This Regulation does not engage any of the rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Conclusion

This Regulation is compatible with the applicable human rights and freedoms.

Financial Implications

These amendments do not have any financial implications.

Date of Effect

This regulation will commence the day after registration.

Details of the *Energy Efficiency Opportunities Amendment (Assessments and Reporting) Regulation 2013*

Section 1 – Name of regulation

Section 1 provides that the title of the regulation is the *Energy Efficiency Opportunities Amendment (Assessments and Reporting) Regulation 2013*.

Section 2 – Commencement

Section 2 provides that this regulation commences the day after it is registered.

Section 3 — Authority

This section provides that the regulation is made under the *Energy Efficiency Opportunities Act 2006*.

Section 4 — Schedule(s)

This section provides for the effect of the regulation. It provides that each instrument specified in a Schedule to the regulation is amended or repealed as set out in that Schedule, and that any other item in a schedule to the regulation has effect according to its terms.

The only instrument affected by the regulation is the *Energy Efficiency Opportunities Regulations 2006* (the Regulations), which is specified in the Schedule.

Schedule — Amendments

The Schedule provides for the following amendments to the Regulations.

Item 1 — Subregulation 1.3(1)

This item inserts a number of definitions into regulation 1.3. A number of these definitions are not new, but for reasons of drafting consistency have been moved to regulation 1.3 from other places in the EEO Regulations. New definitions are *approved form*, which is a procedural definition, and *Assessment Framework*, which clarifies that a reference to ‘Assessment Framework’ means, as relevant, a reference to the Assessment Framework for new developments and expansions (NDEs) in Schedule 2A, or for existing facilities in Schedule 3. The Assessment Frameworks were previously prescribed in Schedules 6 and 7, and have been moved to Schedules 2A and 3 to improve readability. See further items 25 and 28 below.

The following definitions were previously contained in Schedule 7 to the EEO Regulations, which prescribed the standard Assessment Framework for EEO assessments: *energy and material flows*, *energy efficiency opportunity* and *energy performance*.

The definition of *energy efficiency opportunity* has been amended by removing the 'payback period' limitation. This limitation was only relevant to the use of the term in the standard Assessment Framework relating to existing facilities, not the NDE Assessment Framework or the EEO Regulations more broadly. Where energy efficiency opportunities should be limited by payback period in relation to assessments, this is now specified in the Assessment Framework itself.

The following definitions were previously contained in Schedule 6 to the EEO Regulations, which also prescribed the Assessment Framework for new developments and expansions (NDEs): *aspirational target* and *energy productivity improvement*. (As noted above, the NDE Assessment Framework is now prescribed in Schedule 2A — see item 25 below.)

The term *whole-of-business evaluation* was previously defined in both Schedule 6 and Schedule 7, to give it a specific meaning in the context of standard and NDE assessments. The new definition of the term is an amalgamation of those definitions that is applicable across all EEO assessments.

Item 2 — Subregulation 1.3(3)

This amendment is consequential on the amendments in items 25 and 31.

Item 3 — Subregulation 1.3(5)

This amendment is consequential on the amendments in items 25 and 31.

Item 4 — Subregulation 1.6(1) (table items 2 and 3)

This amendment is consequential on the amendment in item 8.

Item 5 — At the end of Part 1

This amendment provides for the Secretary to approve forms for particular purposes. New subregulation 7.4 expressly contemplates that a form will be approved for the purposes of controlling corporations making an application for an extension of time for reporting (see item 16),

and it is envisaged that forms will facilitate ease of application for other matters in the future, in particular for the Recognised Participant scheme currently being developed.

Item 6 — Regulation 5.2

This regulation prescribes certain matters required to be included in an assessment plan for the purposes of s 18 of the Act. The regulation prescribes requirements for:

- Plans that relate only to NDEs;
- Plans that relate only to existing facilities; and
- Plans that relate to both NDEs and existing facilities.

Broadly, assessment plans relating to NDEs need to include the information set out in Schedule 2A of the Regulations (which relates to requirements for assessing NDEs, and contains the NDE Assessment Framework), while assessment plans relating to existing facilities need to include the information set out in Schedule 3 (which relates to requirements for assessing existing facilities and contains the standard Assessment Framework).

The regulation provides expressly for assessment plans that include a plan to assess both an NDE (or more than one NDE) and one or more existing facilities. In this situation the regulation operates so that:

- If the NDE does not affect existing facilities, the part of the plan that relates to the NDE needs to contain the Schedule 2A information, while the part of the plan that relates to the existing facilities needs to contain the Schedule 3 information. This means that the assessment planning and conduct of assessments is to be treated as two separate processes (one for the NDE and one for the existing facilities).
- However, if an NDE is likely to affect energy use at an existing facility, the participant can choose whether it wishes to assess the existing facility as usual, or to treat the affected existing facility as part of the NDE and conduct a single NDE assessment process that covers both of them.

If a corporation wishes to conduct a single NDE assessment process covering the NDE and the affected facility, then the NDE Assessment Framework (contained in Schedule 2A) would be used for the combined assessment. This means that the assessment plan would include Schedule 2A information for both the NDE and the affected facility (and no Schedule 3 information for the affected facility). However, any existing facilities that are not likely to be affected by the NDE

must be assessed under the standard Assessment Framework in Schedule 3, and so the assessment plan must contain Schedule 3 information for those facilities.

If a participant elects to assess an existing facility as part of an NDE, the participant will also be able to report on that existing facility as part of the NDE report. See new regulation 7.1A (item 9).

If a participant wishes to take the combined assessment option, it must state this in the assessment plan. If no statement to this effect is included, the assessment plan will be considered against the standard Assessment Framework for all existing facilities.

Item 7 — Subregulation 5.7(2)

This amendment reduces and simplifies the requirements for the timing of assessments.

Participants were previously required to plan to assess, in the first 2 years of an assessment cycle, at least one group member, business unit or key activity, *or* 40% of the group's (or part of the group's) baseline energy. To provide greater flexibility in assessment planning, participants are now only required to plan to undertake at least one assessment in the first 2 years.

Item 8 — Part 6

This item repeals Part 6 of the Regulations. Part 6 prescribed requirements for conducting assessments under s 20(2) of the Act, to the effect that assessments must be undertaken in accordance with the relevant Assessment Framework/s.

As a matter of policy, these requirements are unnecessary because they duplicate requirements already prescribed in relation to the content of assessment plans. Participants are required to prepare an assessment plan that includes a statement of how they will undertake assessments in order to meet the requirements of the Assessment Framework (see s 18 of the Act, Part 5 of the Regulations, and Schedules 2A and 3 to the Regulations). Subsection 20(1) of the Act requires assessments to be undertaken in accordance with the approved assessment plan. The effect of this is that participants are already required to undertake planned assessments that meet the requirements of the relevant Assessment Framework. Consequently, it is unnecessary to duplicate this requirement by prescribing compliance with the Assessment Framework/s under s 20(2).

Repealing these regulations also enables a more flexible approach to be taken to the requirements of the Assessment Framework, which is provided for in other amendments made in this regulation. See further items 27 and 28 below.

The repeal of Part 6 (along with the other amendments made in this regulation) will only apply in relation to participants who submit an assessment plan after these amendments commence. Participants whose assessment plans were submitted prior to the amendments will still need to comply with both their assessment plan and the relevant Assessment Framework when carrying out their assessments — see the transitional arrangements to be inserted by item 23. However, if a participant wishes to vary their assessment plan to take advantage of the more flexible arrangements for assessment plans, they may submit a variation under s 19 of the Act and have it considered by the Secretary under the new assessment plan arrangements. If the variation is approved, Part 6 will no longer apply to those assessments and the participant will just need to comply with its approved assessment plan.

Transitional arrangements have also been made so that a participant with an approved assessment plan that was approved against the previous Assessment Framework can elect to have proposed variations considered under the previous Assessment Framework (that is, the same arrangements that applied at the time the original plan was approved). This is intended to enable a corporation that wishes to make only a minor amendment to the plan to do so, without needing to substantially rewrite the plan in accordance with the new Assessment Framework. If a participant makes this election, the regulations will apply to the varied assessment plan in the same way that it had applied to the original approved assessment plan. See new regulation 10.6 in item 23.

Item 9 — Before Division 1 of Part 7

This item inserts new regulation 7.1A, which provides for certain existing facilities to be treated as part of an NDE for reporting purposes.

Relevantly, where a participant has chosen to assess an existing facility as part of an NDE assessment under subregulation 5.2(3) (see item 6 above), this regulation operates so that the affected existing facility is also treated as part of the NDE for the purposes of reporting. As a practical matter, therefore, references to ‘NDE’ in Part 7 can be read as ‘NDE and any affected existing facilities assessed as part of the NDE in accordance with the assessment plan’.

Item 10 — Subregulation 7.2(1)

This amendment is consequential on the amendments in items 11 and 31.

Item 11 — At the end of subregulation 7.2(1)

This item inserts the required content of public reports, as they relate to existing facilities, into a table in subregulation 7.2(1). Previously, the content requirements were contained in a separate Schedule to the Regulations (Schedule 4). They have been moved into the body of the regulation to improve readability.

Amendments have also been made to the content of the table, to reduce the reporting compliance burden and to improve flexibility. The effect of these amendments is that the substantive information now required in public reports is:

- A summary of relevant information for each assessment that has been undertaken during the reporting period, including information about the entities and energy use that has been assessed;
- The total energy use covered by the all assessments to which the report relates, including the energy use of each group member, business unit or key activity that has been assessed (which may be given in bandwidths, if approved in the assessment plan);
- The number of opportunities identified from the assessment, disaggregated on the basis of business response;
- The energy savings for the opportunities identified from the assessment, disaggregated on the basis of business response (i.e. under investigation, implemented, implementation commenced, to be implemented or not be implemented);
- A statement to the effect that potential opportunities identified through the assessments have been evaluated to an accuracy that is appropriate for the corporation's business response;
- At least one example of a significant opportunity (defined in regulation 1.3), either for the overall part of the group to which the report relates, or for each group member, business unit or key activity to which the report relates. The example must include a brief description of the opportunity using commonly understood terminology;
- Updates about information about assessments previously reported on (such as, for example, new opportunities that have been identified, improved energy estimates, or progress of business responses to assessments); and
- A declaration from the Chief Executive Officer (or equivalent) that the information included in the corporations' report is, to the best of their knowledge, correct and in accordance with the Act and Regulations.

The amendments also facilitate increased flexibility for participants in relation to the manner and timing of public reporting — see new regulation 7.4 (item 16).

Item 12 — After subregulation 7.2(1)

This item inserts, as substantive regulations, requirements that were previously prescribed in notes to Schedule 4 (specifically, the note to the table in Item 2 of Schedule 4, and note 1 following item 10 of Schedule 4). This item is consequential on the amendment in item 11.

Item 13 — Subregulation 7.2(2)

This amendment is consequential on the amendment in item 11.

Item 14 — Subregulation 7.2(3)

This amendment is consequential on the amendments in items 15 and 31.

Item 15 — At the end of subregulation 7.2(3)

This item inserts into subregulation 7.2(3) the required content of public reports, as they relate to NDEs. The requirements were previously contained in a separate Schedule (Schedule 4A) and have been moved into the body of the regulation to improve readability.

No changes have been made to the required content for NDE public reports

Item 16 — Regulation 7.4

This amendment repeals and replaces the existing regulation 7.4. The new regulation sets out the timeframes for making public reports that relate to existing facilities and NDEs, and confirms that where a participant needs to report on an NDE assessment as well as existing facility assessments, the participant may choose to either make a separate NDE report, or include the NDE report in whichever standard report meets the NDE reporting timeframe. If the NDE report is included in a standard report, it does not need to be ‘updated’ in the subsequent standard reports, but participants are able to provide updates if they wish.

The prescribed reporting timeframes are consistent with the previous version of the regulation, but provide increased flexibility by also allowing participants to seek a 6 month extension of time to report.

A power to grant an extension of time has been conferred on the Secretary (or delegate) to address concerns that the existing timeframes do not support participants that wish to make their reports available on the basis of calendar (rather than financial) years, consistently with their existing reporting practices. An extension of time will mean that corporations will be able to utilise their preferred reporting approach and remain within prescribed reporting timeframes.

The regulation sets out the process and requirements for applying for an extension of time, and provides for a review process in relation to the Secretary's (or delegate's) decision.

Item 17 — After paragraph 7.7(1)(b)

This amendment inserts certain information into the list of information that is required to be included in the report to the Secretary. Until now, this information has been given to the Secretary as part of the public report (see s 23(3)(a) of the Act, and regulation 7.2 and Schedule 4). This information is no longer required to be included in the public report (see item 11), but is still required by the Department as it informs future industrial energy efficiency policy development and provides a data source that can be used as the basis for the development of information and capacity building resources.

Item 18 — At the end of regulation 7.7

This amendment provides for new alternative options for reporting certain information to the Secretary.

First, the amendment provides that, as a replacement for the opportunities summary table currently required in reports, participants can elect to provide a list of the top 10 energy efficiency opportunities (or opportunities covering 80% of the identified energy savings, if the top 10 would cover more than 80%), with energy and financial savings payback and implementation status.

Further, whether the 'top 10' approach or summary table is used, participants that already report relevant energy data (as set out in regulation 7.7(1)(f) to the Clean Energy Regulator in accordance with the *National Greenhouse and Energy Reporting Act 2007*) can elect to avoid duplicate reporting of this data by permitting the Secretary to obtain it from the Clean Energy Regulator. The permission must be given in writing.

Streamlining arrangements are in place between the Clean Energy Regulation and the Department that will enable the Department to obtain the information once a permission has been given.

Item 19 — At the end of Part 9

New regulation 9.3 confers power on the Secretary to delegate, to SES employees in the Department, the Secretary's powers under the Regulations. It is anticipated that the Secretary would delegate these powers (for example, power to grant an extension of time to report) consistently with the delegations currently in place under the Act for approving assessment plans and variations.

Items 20—22 Part 10, Division 1 transitional arrangements

These amendments restructure Part 10 into Divisions. Previously there was just an undivided Part as the transitional arrangements only relating to a single instrument, the *Energy Efficiency Opportunities Amendment Regulations 2008 (No. 1)*.

Item 23 — At the end of Part 10

This item inserts a new Division 2, containing transitional provisions relating to this amendment regulation.

The transitional arrangements operate so that the current, unamended version of the Regulations (the 'old' Regulations) will continue to apply to participants in certain circumstances.

Relevantly, the old Regulations will continue to apply where, prior to the commencement of the amendments, a participant:

- already has an approved assessment plan (including a varied assessment plan), in which case the old Regulations will continue to apply to the carrying out of assessments and reporting about those assessments in accordance with that approved plan; or
- has given an assessment plan, or a variation to an assessment plan, to the Secretary for consideration. In this case the old Regulations will apply to the consideration and approval of that assessment plan, and (if it is approved) the subsequent carrying out of assessments and reporting in relation to that plan.

Further, any participant that has a plan approved according to the old Regulations can elect, if they wish, to have the old Regulations continue to apply if the plan is subsequently varied. In this situation the participant simply needs to include a statement to this effect in the proposed variation document. (Note that this option applies only in relation to variations relating to existing facilities

as the content of the NDE assessment and reporting obligations will not be substantially affected by these amendments.)

However, a participant is not required to continue to operate under the old Regulations if they wish to take advantage of the increased flexibility for assessment planning, assessing and reporting that are effected by the amendments in this regulation. A participant may move to the amended ('new') Regulations by submitting a variation to their assessment plan for consideration and approval under the new Regulations. Once an assessment plan (or variation) has been approved according to the new Regulations, all of the new amendments (including the repeal of Part 6 and the revised reporting requirements) will apply to the participant.

Item 24 — Item 206 of Part 2 of Schedule 2A

This amendment is consequential on amendments in items 6 and 15.

Item 25 — Item 301 of Part 3 of Schedule 2A

This amendment inserts the NDE Assessment Framework, previously in Schedule 6, into Schedule 2A. This move is intended to improve readability by removing the need to refer to a separate Schedule.

There has also been an amendment to the terminology in the NDE Assessment Framework, by substituting 'Requirements' for the previous 'Key Elements'. This is to maintain consistency with the language of the standard Assessment Framework (see item 28). With one minor exception, described below, the amendments are not intended to alter the meaning of the NDE Assessment Framework or participants' obligations in relation to the content of assessment plans relating to NDEs.

The exception is that there has been a minor amendment to the text of Requirement 3, to address an error in the previous drafting of that paragraph. 'Off the shelf' equipment is only intended to relate to subparagraph (c)(iii).

Item 26 — Item 404 of Part 4 of Schedule 2A

This amendment is consequential on the amendments in items 6 and 16.

Items 27 and 28 — Item 305 of Part 3 of Schedule 3

These amendments provide increased clarity in the content of the Assessment Framework, as well as greater flexibility for participants to develop assessment plans that make use of their existing systems and processes.

Structural changes

The Assessment Framework has been moved from Schedule 7 to Schedule 3, to improve readability by removing the need to refer to a separate Schedule.

The terminology of 'Key Elements' and 'requirements' has been updated to 'Requirements' and 'actions' to better reflect the language of the Act (see s 18) and provide greater reading clarity.

Content changes

The content of the Key Elements (now Requirements) has been updated to remove repetition and simplify presentation. These changes are outlined as follows:

- Former key requirements 2.1 and 2.2 have been merged into a single action (action 2), to remove duplication in the previous two key requirements.
- The content of action 3.1 has been updated to clarify the required business contextual information.
- Former key requirements 3.2 and 3.3 have been merged into a single action 3.2. The content of this action has been significantly revised, so as to streamline and simplify the required actions relating to data collection and analysis.
- Further descriptive information has been added to action 4.2, to highlight flexibilities in approaching the evaluation of energy efficiency ideas.
- The previous requirement to assess potential opportunities to an accuracy $\pm 30\%$, in former action 4.3, has been altered so that corporations are now required to evaluate the costs and benefits of potential opportunities to an accuracy that is commensurate with the financial investment associated with implementation of the opportunity.
- Corporations are also being provided with discretion as to what contextual information about energy use is provided to decision makers, as part of changes to action 5.1. These changes, in conjunction with those associated with action 4.3, provide corporations with the ability to align evaluation and decision making processes for energy efficiency opportunities with other business improvement projects.
- Former key requirements 5.1 and 5.2 have been merged into a single action 5.1, to streamline the action content. The amount of contextual information that needs to be

provided to corporate boards has been revised, with a focus on information that is of strategic importance.

In response to the specific Report recommendation that the Assessment Framework contain clear guidance on what is mandatory and what is discretionary, the information currently contained in the evidence/supporting documentation column of the Assessment Framework has been removed entirely from the Regulations, and will be provided to corporations in guidance material instead. This move is designed to remove any ambiguity about the delineation between compliance requirements and guidance in the Assessment Framework.

Increased flexibility in relation to assessment actions

These amendments provide more flexibility for participants planning assessments, by enabling participants to propose alternative actions to the actions specified for each Requirement (new paragraph 305(ab)). This is intended to recognise that energy efficiency assessments will vary across different industry sectors and that closer alignment of EEO Program requirements with a corporation's existing business systems can deliver timely and cost-effective energy efficiency improvements.

A participant can propose alternative actions for one, multiple or all of the Requirements of the EEO Assessment Framework. The integrity of the assessment process is maintained by requiring participants to include in their assessment plan, in relation to each Requirement for which alternative actions are proposed, an explanation of why the actions specified in the Assessment Framework are not appropriate or reasonable, and an explanation of how the alternative actions the participant intends to take will meet the Requirement. The Secretary (or delegate) will take this explanation into account when considering the assessment plan for approval.

Item 29 — Item 402 of Part 4 of Schedule 3

This amendment is consequential on the amendments in items 11 and 31.

Item 30 — Item 403 of Part 4 of Schedule 3 (note 2)

This amendment is consequential on the amendment in item 8.

Item 31 — Schedules 4, 4A, 6 and 7

This amendment repeals the Schedules containing the required content for public reports and the Assessment Frameworks. The content for public reports is now prescribed in regulation 7.2 — see

items 11 and 15 above. The Assessment Frameworks are now prescribed in Schedules 2A (in relation to NDEs) and 3 (in relation to existing facilities). See items 25 and 28 above.