

2004-2005

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Energy Efficiency Opportunities Bill 2005

No. , 2005

(Industry, Tourism and Resources)

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

Contents

Part 1—Preliminary	1
1 Short title.....	1
2 Commencement	2
3 Object.....	2
4 Definitions.....	2
5 Schedule 1 (consequences of contravening civil penalty provisions).....	3
Part 2—Definitions relating to groups	4
6 Holding company.....	4
7 Controlling corporation	4
8 Group and members of a group.....	4
Part 3—Corporations required to register	6
9 Obligation to apply to register	6
10 Energy use threshold.....	6
11 Exemption from registration on application by corporation.....	8
Part 4—Registration	9
12 The Register	9
13 Secretary must register corporation.....	9
14 Corporation may apply for deregistration.....	9
Part 5—Assessment plan	11
15 Registered corporation must submit assessment plan every 5 years.....	11
16 Approval of assessment plan	11
17 Refusal to approve assessment plan	12
18 Requirements for an assessment plan.....	13
19 Registered corporation may seek variation to approved assessment plan.....	14
Part 6—Energy efficiency opportunities assessments	15
20 Requirement to carry out energy efficiency opportunities assessments.....	15
Part 7—Reporting about energy efficiency opportunities assessments	16
21 Overview.....	16
22 Reporting to the public.....	16
23 Reporting to the Secretary	17

Part 8—Powers of inspection	18
Division 1—Overview	18
24 Overview of Part.....	18
Division 2—Appointment of authorised officers and identity cards	19
25 Appointment of authorised officers.....	19
26 Identity cards.....	19
Division 3—Powers of authorised officer	20
Subdivision A—Monitoring powers	20
27 Authorised officer may enter premises by consent or under monitoring warrant.....	20
28 Monitoring powers of authorised officers.....	20
Subdivision B—Power of authorised officer to ask questions and seek production in certain circumstances	22
29 Authorised officer may request persons to answer questions.....	22
Division 4—Obligations and incidental powers of authorised officers	24
30 Authorised officer must produce identity card on request.....	24
31 Consent.....	24
32 Announcement before entry.....	24
33 Details of monitoring warrant to be given to occupier etc. before entry.....	24
34 Use of electronic equipment in exercising monitoring powers.....	25
35 Compensation for damage to electronic equipment.....	26
Division 5—Occupier’s rights and responsibilities	28
36 Occupier entitled to be present during execution of monitoring warrant.....	28
37 Occupier to provide authorised officer with all facilities and assistance.....	28
Division 6—Warrants	29
38 Monitoring warrants.....	29
Part 9—Miscellaneous	30
39 Delegation.....	30
40 AAT review of decisions.....	30
41 Regulations.....	30

**Schedule 1—Consequences of contravening civil
penalty provisions**

		31
1	Declarations of contravention	31
2	Declaration of contravention is conclusive evidence	31
3	Pecuniary penalty orders	31
4	Who may apply for a declaration or order	32
5	Time limit for application for a declaration or order	32
6	Civil evidence and procedure rules for declarations of contravention and civil penalty orders.....	32
7	Civil proceedings after criminal proceedings.....	32
8	Criminal proceedings during civil proceedings.....	33
9	Criminal proceedings after civil proceedings.....	33
10	Minister requiring person to assist	33
11	Relief from liability for contravention of civil penalty provision	35

1 **A Bill for an Act to encourage more efficient use of**
2 **energy by large energy using businesses, and for**
3 **related purposes**

4 The Parliament of Australia enacts:

5 **Part 1—Preliminary**
6

7 **1 Short title**

8 This Act may be cited as the *Energy Efficiency Opportunities Act*
9 2005.

1 **2 Commencement**

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

4 **3 Object**

5 (1) The object of this Act is to improve the identification and
6 evaluation of energy efficiency opportunities by large energy using
7 businesses and, as a result, to encourage implementation of cost
8 effective energy efficiency opportunities.

9 (2) In order to achieve its object, this Act requires large energy using
10 businesses:

11 (a) to undertake an assessment of their energy efficiency
12 opportunities to a minimum standard in order to improve the
13 way in which those opportunities are identified and
14 evaluated; and

15 (b) to report publicly on the outcomes of that assessment in order
16 to demonstrate to the community that those businesses are
17 effectively managing their energy.

18 **4 Definitions**

19 (1) In this Act:

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

22 *Australia* does not include any external Territory. However, it
23 includes an installation (within the meaning of the *Customs Act*
24 1901) that is deemed by section 5C of that Act to be part of
25 Australia.

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

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

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

- 1 ***Court*** means the Federal Court of Australia.
- 2 ***energy use threshold*** has the meaning given by section 10.
- 3 ***group*** has the meaning given by subsection 8(1).
- 4 ***holding company*** has the meaning given by section 6.
- 5 ***joint venture*** means an enterprise carried on by 2 or more entities
6 in common otherwise than in partnership.
- 7 ***member*** has the meaning given by subsection 8(2).
- 8 ***monitoring warrant*** means a warrant issued under section 38.
- 9 ***penalty unit*** has the meaning given by section 4AA of the *Crimes*
10 *Act 1914*.
- 11 ***registered corporation*** means a controlling corporation that is
12 registered under Part 4.
- 13 ***Secretary*** means the Secretary of the Department.
- 14 ***subsidiary*** has the meaning given by section 46 of the
15 *Corporations Act 2001*.
- 16 ***warrant premises***, in relation to a monitoring warrant, means the
17 premises to which the warrant relates.
- 18 (2) In this Act:
- 19 (a) a reference to energy use is taken to be a reference to energy
20 use in Australia; and
- 21 (b) a reference to energy efficiency is taken to be a reference to
22 energy efficiency in Australia.

23 **5 Schedule 1 (consequences of contravening civil penalty provisions)**

24 Schedule 1 has effect.

1

2 **Part 2—Definitions relating to groups**

3

4 **6 Holding company**

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

7 **7 Controlling corporation**

8 (1) A *controlling corporation* is a constitutional corporation that:

- 9 (a) does not have a holding company incorporated in Australia;
10 and
11 (b) is covered by subsection (2).

12 (2) A corporation is covered by this section unless:

- 13 (a) the corporation's activities are mainly in the electricity
14 generation, electricity and gas transmission, or electricity and
15 gas distribution sectors; and
16 (b) it is within a class of corporations (if any) specified in the
17 regulations.

18 **8 Group and members of a group**

19 (1) A controlling corporation's *group* consists of the controlling
20 corporation and its subsidiaries covered by subsections (3) and (4)
21 (if any).

22 (2) The *members* of the group are the controlling corporation and its
23 subsidiaries covered by subsections (3) and (4) (if any).

24 (3) A subsidiary of the controlling corporation is covered by this
25 section unless:

- 26 (a) the subsidiary is also a subsidiary of another body corporate
27 because the other body corporate meets the requirement in
28 subparagraph 46(a)(i) or (ii) of the *Corporations Act 2001* in
29 relation to the subsidiary; and

- 1 (b) the other body corporate is not a member of the group
2 (including by reason of a previous operation of this
3 subsection).
- 4 (4) A subsidiary of the controlling corporation is covered by this
5 section unless:
- 6 (a) the subsidiary's activities are mainly in the electricity
7 generation, electricity and gas transmission, or electricity and
8 gas distribution sectors; and
- 9 (b) it is within a class of entities (if any) specified in the
10 regulations.

1

2 **Part 3—Corporations required to register**

3

4 **9 Obligation to apply to register**

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

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

10 (2) Subsection (1) does not apply if the corporation:

11 (a) did not know; and

12 (b) could not, with reasonable diligence, have ascertained;
13 that its group met the energy use threshold for the trigger year
14 under section 10.

15 (3) A corporation that wishes to rely on subsection (2) bears an
16 evidential burden in relation to that matter.

17 (4) The application must be made on or before 31 March in the
18 financial year after the trigger year.

19 (5) The application must:

20 (a) be in the form (if any) specified in the regulations; and

21 (b) contain any other information that is required by the
22 regulations.

23 (6) This section applies only if the trigger year ends on or after 30 June
24 2006.

25 **10 Energy use threshold**

26 (1) A controlling corporation's group meets the *energy use threshold*
27 for a financial year if in that year the total energy used by the
28 entities mentioned in subsection (2) is more than 0.5 petajoules.

29 (2) The entities are:

30 (a) the members of the group; and

-
- 1 (b) a joint venture, if a member of the group is a participant in
2 the joint venture and the participants in the joint venture have
3 either:
- 4 (i) nominated that member as the responsible entity for the
5 joint venture in accordance with regulations made for
6 the purposes of subsection (6); or
- 7 (ii) not nominated an entity as the responsible entity for the
8 joint venture in accordance with those regulations; and
- 9 (c) a partnership, if a member of the group is a partner in the
10 partnership and the partners in the partnership have either:
- 11 (i) nominated that member as the responsible entity for the
12 partnership in accordance with regulations made for the
13 purposes of subsection (6); or
- 14 (ii) not nominated an entity as the responsible entity for the
15 partnership in accordance with those regulations.
- 16 (3) For the purposes of subsection (1), the *energy used* by an entity
17 has the meaning given by the regulations.
- 18 (4) Without limiting subsection (3), regulations made for the purposes
19 of that subsection may determine that meaning:
- 20 (a) by reference to particular kinds and uses of energy; and
21 (b) in relation to particular periods during which an entity is a
22 member of a controlling corporation's group during a
23 financial year.
- 24 (5) Without limiting subsection (3), regulations made for the purposes
25 of that subsection may determine that meaning:
- 26 (a) in relation to activities of a member of a controlling
27 corporation's group as the trustee of a trust; and
28 (b) in relation to activities under a franchise of which a member
29 of a controlling corporation's group is a franchisor.
- 30 (6) The regulations may establish rules under which:
- 31 (a) participants in a joint venture may make, and revoke,
32 nominations for the purposes of paragraph (2)(b); and
33 (b) partners in a partnership may make, and revoke, nominations
34 for the purposes of paragraph (2)(c).
-

1 **11 Exemption from registration on application by corporation**

- 2 (1) Subsection 9(1) does not apply to a controlling corporation in
3 relation to a particular financial year if the corporation is covered
4 by an exemption under subsection (5) for that year.
- 5 (2) A controlling corporation may apply to the Secretary for an
6 exemption from the requirement to be registered under Part 4 in
7 relation to a particular financial year if:
8 (a) it is not already registered under Part 4; and
9 (b) the controlling corporation's group met the energy use
10 threshold for the previous financial year (the *trigger year*)
11 under section 10.
- 12 (3) The application must be made on or before 31 December in the
13 financial year after the trigger year.
- 14 (4) The application must:
15 (a) be in the form (if any) specified in the regulations; and
16 (b) contain any other information that is required by the
17 regulations.
- 18 (5) The Secretary must grant the exemption if:
19 (a) the application is in accordance with subsections (2), (3) and
20 (4); and
21 (b) the Secretary is satisfied that the controlling corporation's
22 group is not likely to meet the energy use threshold under
23 section 10 for the financial year after the trigger year.
- 24 (6) The Secretary is taken to have granted the exemption under
25 subsection (5) if he or she has not given the controlling corporation
26 notice in writing, within 60 days after receiving the application for
27 exemption, of a decision not to grant the exemption.

1

Part 4—Registration2
3**12 The Register**

4

5

6

7

8

9

10

11

12

13

14

15

16

17

- (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 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.
- (5) A corporation is registered under this Part when the Secretary has entered the name of the corporation on the Register.

18

13 Secretary must register corporation

19

20

21

22

23

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.

24

14 Corporation may apply for deregistration

25

26

27

28

- (1) A registered corporation may apply to the Secretary to be deregistered.
- (2) The application must:
 - (a) be in the form (if any) specified in the regulations; and

Part 4 Registration

Section 14

- 1 (b) contain any other information that is required by the
2 regulations.
- 3 (3) The Secretary must remove the name of the corporation from the
4 Register if the Secretary is satisfied that the registered
5 corporation's group is not likely to meet the energy use threshold
6 in section 10 for:
7 (a) the financial year in which the application is made; and
8 (b) the next 2 financial years.
- 9 (4) The corporation ceases to be registered under this Part when the
10 Secretary has removed its name from the Register.

1

2 **Part 5—Assessment plan**

3

4 **15 Registered corporation must submit assessment plan every 5**

5 **years**

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

8 Note: Section 70 of the *Crimes Act 1914* imposes secrecy obligations on

9 Commonwealth officers.

- 10 (2) An assessment plan must be given to the Secretary at a time during
- 11 each period that:

- 12 (a) begins 6 months before a day covered by subsection (3); and
- 13 (b) ends on that day.

- 14 (3) The following days are covered by this subsection:

- 15 (a) 31 December in the financial year following the financial
- 16 year in which the corporation was first required to apply
- 17 under sections 9 and 11 to be registered under Part 4; and
- 18 (b) every fifth anniversary of the day mentioned in paragraph (a).

- 19 (4) To avoid doubt, a controlling corporation that has applied to be
- 20 registered under Part 4, but is not yet registered, may give the
- 21 Secretary an assessment plan for the purposes of complying with
- 22 subsection (1).

- 23 (5) A registered corporation contravenes this subsection if it fails to
- 24 comply with subsections (1) and (2).

25 Note: Clause 3 of Schedule 1 provides for a civil penalty for failing to

26 comply with this subsection.

27 **16 Approval of assessment plan**

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

- 30 (2) If the Secretary is satisfied that the assessment plan substantially
- 31 meets the requirements in section 18, the Secretary must:
-

Section 17

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

9 **17 Refusal to approve assessment plan**

- 10 (1) This section applies if:
11 (a) the Secretary has been given an assessment plan under
12 section 15; and
13 (b) he or she is not satisfied that the assessment plan
14 substantially meets the requirements in section 18.
- 15 (2) The Secretary must:
16 (a) refuse to approve the assessment plan; and
17 (b) give the controlling corporation written notice of the refusal.
- 18 (3) The Secretary must also:
19 (a) prepare a revised assessment plan for the controlling
20 corporation that substantially meets the requirements in
21 section 18, to the satisfaction of the Secretary; and
22 (b) give the controlling corporation a notice:
23 (i) setting out the revised assessment plan; and
24 (ii) inviting the controlling corporation to comment on the
25 revised assessment plan within a specified period.
- 26 (4) At the end of the period specified in the invitation, the Secretary
27 may:
28 (a) approve the revised assessment plan; and
29 (b) give the controlling corporation written notice of the
30 approval.

- 1 (5) In making a decision under subsection (4), the Secretary must
2 consider any written comments received from the controlling
3 corporation within the period specified in the invitation.
- 4 (6) If the Secretary does not approve the revised assessment plan under
5 subsection (4), this section applies in relation to that plan as if:
6 (a) it were an assessment plan that the Secretary had been given
7 under section 15; and
8 (b) the Secretary were not satisfied that it substantially met the
9 requirements in section 18.
- 10 Note: This means that the Secretary must prepare a new revised assessment
11 plan, and send it to the controlling corporation for comment.

12 **18 Requirements for an assessment plan**

- 13 (1) An assessment plan must set out a proposal for assessing the
14 opportunities for improving the energy efficiency of the controlling
15 corporation's group for the period mentioned in subsection (2).
- 16 (2) The period is the period of 5 years ending on the latest day on
17 which the controlling corporation is next required under section 15
18 to give the Secretary an assessment plan.
- 19 (3) The assessment plan must be in the form (if any) specified in the
20 regulations.
- 21 (4) The proposal must set out particular actions that need to be done to
22 assess those opportunities.
- 23 (5) Those actions must be specified for the group:
24 (a) as a whole; or
25 (b) in terms of particular parts of the group.
- 26 (6) The proposal must set out a deadline or deadlines for doing all of
27 those actions.
- 28 (7) The assessment plan must meet any extra requirements set out in
29 the regulations.
- 30 (8) Without limiting subsection (7), regulations made for the purposes
31 of that subsection may:

Section 19

- 1 (a) set out requirements for a proposal in relation to the
2 following:
3 (i) the types of actions mentioned in subsection (4);
4 (ii) the deadlines for doing those actions;
5 (iii) any other matter; and
6 (b) require particular information to be set out in the assessment
7 plan.

8 **19 Registered corporation may seek variation to approved**
9 **assessment plan**

- 10 (1) A registered corporation with an approved assessment plan may
11 give the Secretary a proposed variation to the plan.
12 (2) Section 16 and subsections 17(1) and (2) apply to the variation as if
13 it (together with the approved assessment plan) were an assessment
14 plan given to the Secretary.

1

**Part 6—Energy efficiency opportunities
assessments**

3

4

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

6

7

8

9

(1) A registered corporation must carry out the proposal in its approved assessment plan for assessing the opportunities for improving the energy efficiency of its group.

10

11

(2) A registered corporation must carry out that proposal in accordance with requirements (if any) set out in the regulations.

12

13

(3) Regulations made for the purposes of subsection (2) may set out requirements relating to:

14

15

16

17

18

19

20

(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 related to the carrying out of proposals in an approved assessment plan.

21

22

(4) A registered corporation contravenes this subsection if it fails to comply with subsections (1) and (2).

23

24

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

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

(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.

(4) The report must:

- (a) be in the form (if any) specified in the regulations; and
- (b) be signed by the chair of the board of directors (or equivalent officer) of the registered corporation.

- 1 (5) The report must be made available to the public:
2 (a) at the time specified in the regulations; and
3 (b) in the manner (if any) specified in the regulations.

4 **23 Reporting to the Secretary**

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

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

12 Note 2: Section 70 of the *Crimes Act 1914* imposes secrecy obligations on
13 Commonwealth officers.

- 14 (2) The period is the period specified in the regulations.
15 (3) The report must contain:
16 (a) the information required to be contained in a report made to
17 the public under section 22; and
18 (b) any further information required by the regulations.
19 (4) The report must be in the form (if any) specified in the regulations.
20 (5) The report must be given to the Secretary:
21 (a) at the time specified in the regulations; and
22 (b) in the manner (if any) specified in the regulations.

1

2 **Part 8—Powers of inspection**

3 **Division 1—Overview**

4 **24 Overview of Part**

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

1

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

4 **25 Appointment of authorised officers**

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

12 **26 Identity cards**

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

21 Penalty: 1 penalty unit.

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

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

1

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

3 **Subdivision A—Monitoring powers**

4 **27 Authorised officer may enter premises by consent or under**
5 **monitoring warrant**

6 (1) For the purposes of substantiating information provided under this
7 Act or of determining whether this Act has been complied with, an
8 authorised officer may:

9 (a) enter any premises:

10 (i) during normal business hours; or

11 (ii) if the entry is made under a monitoring warrant—at any
12 time specified in the warrant; and

13 (b) exercise the monitoring powers set out in section 28.

14 (2) An authorised officer is not authorised to enter premises under
15 subsection (1) unless:

16 (a) the premises are business premises, the occupier of the
17 premises has consented to the entry and the officer has shown
18 his or her identity card if required by the occupier; or

19 (b) the entry is made under a monitoring warrant.

20 (3) If an authorised officer is on the premises with the consent of the
21 occupier, the authorised officer must leave the premises if the
22 occupier asks the authorised officer to do so.

23 **28 Monitoring powers of authorised officers**

24 (1) For the purposes of this Part, the following are the monitoring
25 powers that an authorised officer may exercise in relation to
26 premises under section 27:

27 (a) the power to search the premises for any thing on the
28 premises that may relate to compliance with this Act;

29 (b) the power to examine any activity conducted on the premises
30 that may relate to information provided for the purposes of
31 this Act;

- 1 (c) the power to examine any thing on the premises that may
2 relate to information provided for the purposes of this Act;
- 3 (d) the power to take photographs or make video or audio
4 recordings or sketches on the premises of any such activity or
5 thing;
- 6 (e) the power to inspect any document on the premises that may
7 relate to information provided for the purposes of this Act;
- 8 (f) the power to take extracts from, or make copies of, any such
9 document;
- 10 (g) the power to take onto the premises such equipment and
11 materials as the authorised officer requires for the purpose of
12 exercising powers in relation to the premises;
- 13 (h) the power to secure a thing that:
14 (i) is found during the exercise of monitoring powers on
15 the premises; and
16 (ii) an authorised officer believes on reasonable grounds
17 affords evidence of a contravention of this Act or of the
18 commission of an offence against the *Crimes Act 1914*;
19 until a warrant is obtained to seize the thing;
- 20 (i) the powers in subsections (2) and (3).
- 21 (2) For the purposes of this Part, **monitoring powers** includes the
22 power to operate equipment at premises to see whether:
23 (a) the equipment; or
24 (b) a disk, tape or other storage device that:
25 (i) is at the premises; and
26 (ii) can be used with the equipment or is associated with it;
27 contains information that is relevant to assessing the correctness of
28 information provided under this Act.
- 29 (3) For the purposes of this Part, **monitoring powers** includes the
30 following powers in relation to information described in
31 subsection (2) found in the exercise of the power under that
32 subsection:
33 (a) the power to operate facilities at the premises to put the
34 information in documentary form and copy the documents so
35 produced;

Section 29

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

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

13 **29 Authorised officer may request persons to answer questions**

- 14 (1) If the authorised officer was only authorised to enter premises
15 because the occupier of the premises consented to the entry, the
16 authorised officer may ask the occupier to:
17 (a) answer any questions related to the operation of this Act that
18 are put by the authorised officer; and
19 (b) produce any document requested by the authorised officer
20 that is so related.
- 21 (2) If the authorised officer was authorised to enter the premises by a
22 monitoring warrant, the authorised officer has power to require the
23 occupier (if the occupier is in or on the premises), or another
24 person who apparently represents the occupier (if that person is in
25 or on the premises), to:
26 (a) answer any questions related to the operation of this Act that
27 are put by the authorised officer; and
28 (b) produce any document requested by the authorised officer
29 that is so related.
- 30 (3) A person commits an offence if the person refuses or fails to
31 comply with a requirement under subsection (2).
- 32 Penalty: 6 months imprisonment.

1
2

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

3
4
5
6

(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.

7
8

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

1

2 **Division 4—Obligations and incidental powers of**
3 **authorised officers**

4 **30 Authorised officer must produce identity card on request**

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

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

11 **31 Consent**

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

18 **32 Announcement before entry**

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

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

25 **33 Details of monitoring warrant to be given to occupier etc. before**
26 **entry**

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

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

3 (2) The authorised officer must identify himself or herself to that
4 person.

5 (3) The copy of the warrant referred to in subsection (1) need not
6 include the signature of the magistrate who issued the warrant.

7 Note: Monitoring warrants are issued under section 38.

8 **34 Use of electronic equipment in exercising monitoring powers**

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

14 (2) If the authorised officer or a person assisting believes, on
15 reasonable grounds, that:

16 (a) there is on the premises material relating to information
17 supplied under this Act that may be accessible by operating
18 electronic equipment on the premises; and

19 (b) expert assistance is required to operate the equipment; and

20 (c) if he or she does not take action under this subsection, the
21 material may be destroyed, altered or otherwise interfered
22 with;

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

25 (3) The authorised officer or a person assisting must give notice to the
26 occupier of the premises of his or her intention to secure equipment
27 and of the fact that the equipment may be secured for up to 24
28 hours.

29 (4) The equipment may be secured:

30 (a) for a period not exceeding 24 hours; or

31 (b) until the equipment has been operated by the expert;

32 whichever first happens.

Part 8 Powers of inspection

Division 4 Obligations and incidental powers of authorised officers

Section 35

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

19 **35 Compensation for damage to electronic equipment**

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

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

1

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

3 **36 Occupier entitled to be present during execution of monitoring**
4 **warrant**

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

13 **37 Occupier to provide authorised officer with all facilities and**
14 **assistance**

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

22 Penalty: 10 penalty units.

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

1

2 **Division 6—Warrants**

3 **38 Monitoring warrants**

4

(1) An authorised officer may apply to a magistrate for a warrant under this section in relation to premises.

5

6

(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.

7

8

9

10

11

12

(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.

13

14

15

16

17

(4) The warrant must:

18

(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:

19

20

21

(i) to enter the premises; and

22

(ii) to exercise the powers set out in section 28 in relation to the premises; and

23

24

(b) state whether the entry is authorised to be made at any time of the day or during specified hours of the day; and

25

26

(c) specify the day (not more than 6 months after the issue of the warrant) on which the warrant ceases to have effect; and

27

28

(d) state the purpose for which the warrant is issued.

1

2 **Part 9—Miscellaneous**

3

4 **39 Delegation**

5

6

7

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.

8 **40 AAT review of decisions**

9

10

11

12

13

14

15

16

17

18

19

20

21

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).

22 **41 Regulations**

23

24

25

26

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.

Clause 4

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

6 **4 Who may apply for a declaration or order**

7 *Application by Minister*

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

11 *No one else may apply*

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

16 **5 Time limit for application for a declaration or order**

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

20 **6 Civil evidence and procedure rules for declarations of**
21 **contravention and civil penalty orders**

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

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

26 **7 Civil proceedings after criminal proceedings**

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

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

4 **8 Criminal proceedings during civil proceedings**

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

14 **9 Criminal proceedings after civil proceedings**

- 15 Criminal proceedings may be started against a controlling
16 corporation for conduct that is substantially the same as conduct
17 constituting a contravention of a civil penalty provision regardless
18 of whether:
- 19 (a) a declaration of contravention has been made against the
20 controlling corporation; or
 - 21 (b) a pecuniary penalty order has been made against the
22 controlling corporation.

23 **10 Minister requiring person to assist**

- 24 (1) The Minister may require a person to give all reasonable assistance
25 in connection with:
- 26 (a) an application for a declaration of contravention or a
27 pecuniary penalty order; or
 - 28 (b) criminal proceedings for an offence against this Act.
- 29 The person must comply with the request.
- 30 Penalty: 5 penalty units.

Clause 10

- 1 (2) The Minister can require the person to assist in connection with an
2 application for a declaration or order if, and only if:
3 (a) it appears to the Minister that:
4 (i) a controlling corporation may have contravened a civil
5 penalty provision; and
6 (ii) the person required to assist is not that controlling
7 corporation; and
8 (b) the Minister suspects or believes that the person required to
9 assist can give information relevant to the application.
- 10 (3) The Minister can require the person to assist in connection with
11 criminal proceedings if, and only if:
12 (a) it appears to the Minister that the person required to assist is
13 unlikely to be a defendant in the proceedings; and
14 (b) the person required to assist is, in relation to a person who is
15 or should be a defendant in the proceedings:
16 (i) an employee or agent (including a banker or auditor) of
17 the other person; or
18 (ii) if the other person is an individual—a partner of the
19 other person.
- 20 (4) The Minister can require the person to assist regardless of whether:
21 (a) an application for the declaration or penalty order has
22 actually been made; or
23 (b) criminal proceedings for the offence have actually begun.
- 24 (5) The person cannot be required to assist if they are or have been a
25 lawyer for:
26 (a) in an application for a declaration or penalty order—the
27 controlling corporation suspected of the contravention; or
28 (b) in criminal proceedings—a defendant or likely defendant in
29 the proceedings.
- 30 (6) The requirement to assist must be given in writing.
- 31 (7) The Court may order the person to comply with the requirement in
32 a specified way. Only the Minister may apply to the Court for an
33 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.