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Energy Efficiency Opportunities Bill 2005

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Law and Bills Digest and Science, Technology, Environment and Resources Sections.

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Energy Efficiency Opportunities Bill 2005

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House: House of Representatives

Portfolio: Industry, Tourism and Resources

Commencement: On Royal Assent.

Purpose

The Bill establishes an Energy Efficiency Opportunities program under which corporations that are large energy users are required to assess the potential to improve their energy efficiency and report publicly on the assessment. They are not bound to actually implement any measures in their assessment report. This measure was foreshadowed in the Government's June 2004 energy white paper *Securing Australia's energy future*.

Background

Energy efficiency opportunities

A National Greenhouse Response Strategy (NGRS) was adopted by the Council of Australian Governments in 1992 and, as a contribution to the NGRS, in 1995 the Commonwealth Government established a Greenhouse Challenge Office which was charged with the task of liaising with industry enterprises. In June 1996, the initial group of industry bodies signed up their commitment to the Greenhouse Challenge. With the voluntary agreements in place, by 1999 there were commitments to reduce greenhouse gas emissions relating to over 250 important sites across Australia.[1]

Separately, the Industrial Energy Efficiency Project undertaken by the Warren Centre for Advanced Engineering at the University of Sydney had a primary aim to demonstrate to Australian industry the financial benefits of energy efficiency. It was to show how significant savings can be achieved through the application of inexpensive, cost-justified techniques. The project, which ran from 1997 through to 1999, was built on five case studies that would each highlight techniques to increase energy efficiency and which can be applied widely throughout Australian industry.

Around 60 specific opportunities for energy savings were identified across the five case studies. Nearly a third of the opportunities related to better measurement and control, and a further quarter called for improvements to operational procedures. These twin themes of better measurement and better operation emerged time and again throughout the project. In over 50 per cent of the cases, realising the benefits required improvements in measurement, control and reporting of energy use. And some required simple changes to operating and maintenance procedures, and needed no capital expenditure.

In 2003, change to administration of the Greenhouse Challenge scheme was followed by the loss of 77 corporations from the program. According to the Government, most of the companies that withdrew from the scheme were small businesses that had found they were unable to afford the additional costs incurred of monitoring and reducing greenhouse emissions. However, the Greenhouse Challenge program has recovered since to reach agreements with some 780 companies.

On 15 June 2004, the Prime Minister released a national energy white paper, '*Securing Australia's Energy Future*'[2]. Regarding energy efficiency, the paper stated:

> … the government will require large energy users to undertake a rigorous assessment of energy efficiency opportunities every five years starting in 2006. These assessments will be undertaken consistent with an improved Australian standard and will be designed to identify energy efficiency investments with a payback of four years or less. Firms will be required to report publicly on the outcomes of the assessment, and will be free to make decisions on investments identified via their normal business processes. The government will act to ensure the assessments are rigorous and comprehensive, and to disseminate the lessons learned to the wider business community. Public reporting will be designed to provide the markets with useful information while protecting firms' reasonable commercial interests. Details of the regime will be developed in consultation with relevant stakeholders.

The issue of energy efficiency improvement in the private sector was also an issue included in the National Framework for Energy Efficiency, specific implementation of which was agreed by Australian state and federal energy ministers in August 2004.

The launch of Greenhouse Challenge-Plus, in March 2005 integrated two other industry focused measures (the Generator Efficiency Standards and Greenhouse Friendly initiative). Greenhouse Challenge Plus was designed to reduce greenhouse gas emissions; accelerate the uptake of energy efficiency; integrate greenhouse issues into business decision-making; and provide more consistent reporting of greenhouse gas emissions levels.

The Productivity Commission, in its April 2005 draft report on energy use, indicated strong reservations about the proposed Energy Efficiency Opportunities program. Whilst noting that the lack of full information about the program made it 'difficult to make a conclusive assessment', the draft report suggested a 'number of potential problems can be identified'. These include:[3]

- The criterion of amount of energy was arguably 'counter-intuitive and counter-evidentiary'

- The possible administrative costs, procedural difficulties and verification of energy efficiency assessments.

It also stated:[4]

> However, the most significant weakness of the Energy Efficiency Opportunities assessment (EEOA) framework is the context in which it is to be applied. While the EEOA policy does not specify what barriers to energy efficiency it seeks to address, judging from the consultation report and the DITR presentation to stakeholders, it appears that the main issue is the perceived lack of managerial attention to energy efficiency matters.
>
> The Commission reiterates its strongly held view that organisational barriers alone cannot justify regulatory intervention. To the extent that firms feel compelled by the EEOA process to invest in projects they would otherwise reject, the EEOA would distort investment decisions and reduce overall cost effectiveness. Competitive pressures on firms give them strong incentives to maximise their efficiency. This is particularly true for industrial firms competing in export markets, which make up a large proportion of the organisations targeted by the EEOA.

However, the Government argues that if it did not proceed with a mandatory energy efficiency opportunities assessment program for large energy users, then an inefficient status quo would prevail. A final report was submitted by Productivity Commission to the Treasurer in late August, but has yet to be publicly released.

Status quo and future options

According to the Warren Centre study, total energy consumption for Australia is 3000 petajoules per annum and is estimated to cost A$40 billion annually. Industrial energy consumption is 40 per cent, giving an energy bill of A$16 billion per year. Although many firms now achieve impressive economic returns by using energy more efficiently, numerous studies continue to uncover significant potential. Experience in Australia and overseas has demonstrated that it is possible to save 10 to 15 per cent of this over a five year program. This would result in reduced costs of up to A$2 billion annually, strengthening Australian industry and making it more competitive in world markets.

It is likely that energy is about 5 per cent of a company's total manufacturing costs, but it is not a fixed overhead, but rather a controllable cost, and for many manufacturers it is equivalent to half the annual profit. Saving 10 per cent of that energy will provide a 5 per cent increase in profits and, in most cases, will give more production capacity. Improving operations should be the core of any significant energy management activity. These suggestions of possible efficiency improvement rates seem to accord with the estimates contained in the circulated Explanatory Memorandum, which also notes the organisational barriers to energy efficiency improvements facing businesses today.

The Explanatory Memorandum states that the 250 largest energy user companies were identified in an Australian Bureau of Statistics (ABS) study. The ABS 2001-02 Energy Survey conducted in 2003 provides a breakdown of the surveyed entities. The top 250 businesses accounted for 62.2 per cent (or 1219.4 petajoules) with most from the mining and manufacturing industries. Of the largest 250, 47.2 per cent are in the manufacturing industry, 20.6 per cent are in the mining industry and 10.4 per cent are from the transport industry. However, as the Explanatory Memorandum notes, some large commercial sector businesses such as retail chains and banks are affected. The Explanatory Memorandum provides extensive information on business compliance cost estimates as well as expected benefits suggesting a decade's financial benefit around $760 million.

By way of comparison, the Victorian Environment Protection Agency (EPA) has conducted a program for Greenhouse Gas Emissions and Energy Efficiency in Industry. In part, this requires certain operations that operate under EPA statutory approvals to examine and implement measures to improve energy efficiency and reduce greenhouse gas emissions. The legislative requirement to implement measures that meet certain benchmarks (mainly relating to the payback period) distinguishes the Victorian program from the proposed Commonwealth Energy Efficiency Opportunities assessment program. Following the three year implementation period (2004 to 2006), it is anticipated that Victorian companies will achieve greenhouse gas emission reductions of approximately 1.15 million tonnes of carbon dioxide annually. In this program, existing EPA license holders are required to report annual energy usage and associated GHG emissions and to undertake an energy audit, if usage and emissions are above threshold values.[5]

In the context of an energy efficiency scheme, it is notable that, in addition to certain power and water utilities, the operations subject to the EPA statutory approvals generally only include industrial type operations. A large 'white-collar' office building operated by one company which has a large energy use due to electronic equipment, air conditioning etc would apparently *not* be subject to the scheme. It is understood that this limitation being reviewed with a view to considering and expansion of the program's scope.

Main Provisions

New section 3 sets out the object of the Bill – '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'.

New section 5 gives effect to the various provisions in **Schedule 1**. **Schedule 1** sets out the enforcement provisions where a contravention of a civil (as opposed to criminal) penalty provision occurs. Presumably these provisions are contained in a Schedule, rather than the main part of the Bill, for drafting simplicity.

New sections 6-8 contain definitions of 'holding company' 'controlling corporation' and 'group'. One of the reasons these definitions are important is because a controlling corporation's obligations under the Bill - see for example the commentary on **new section 9** below - depend on the amount of energy used by it and its subsidiaries[6] (collectively the 'group'), rather than just the controlling corporation alone.

Starting from the 2006 financial year, a controlling corporation whose group has a collective annual energy use[7] over a threshold of 0.5 petajoules must apply to be placed on the Register of Corporations for the Energy Efficiency Opportunities Scheme (the Register): **new subsection 9(1).** Application for registration can be done up to nine months after the end of the year ('trigger year') in which the threshold was exceeded. If for some reason the corporation did not know that the 0.5 petajoule threshold was exceeded in the trigger year, and could not have ascertained this through reasonable diligence, there is no obligation to register: **new subsection 9(2).** It is up to the corporation to prove that it could not have ascertained that it exceed the threshold: **new subsection 9(3).** A failure to apply to be registered is a contravention of civil penalty provision – see **clause 1** of **Schedule 1.**

Even where a group has exceeded the energy use threshold for a trigger year, registration is not required where an exemption is granted by the Secretary of the Department of Industry, Tourism and Resources (the DITR Secretary) under **new section 11**. As long as certain procedural conditions have been met, the DITR Secretary *must* grant the exemption application if he or she is satisfied that the corporation's energy use will not exceed the threshold in the year immediately following the trigger year: **new subsection 11(5).**

Part 4 (new sections 12-14) contain various administrative matters relating to the Register. The contents of the Register must 'be made available to the public by electronic or other means': **new subsection 12(3).** Besides the names of the relevant corporations, the information on the Register is to be determined by regulation: **new paragraph 12(4)(b).**

Part 5 (new sections 15-19) deal with energy efficiency assessment plans. Essentially, such plans must set out the particular actions by which the corporation intends to assess opportunities for improving its energy efficiency: **new subsections 18(1) and (4).** Only corporations registered under **Part 4** need to submit an assessment plan. The life of the plan is 5 years: **new subsection 18(2).** The various actions contained within them must have deadlines attached to them: **subsection 18(6).** More detail regarding general assessment plan requirements may be set out in regulations, including the 'types of actions' for the assessment of energy efficiency opportunities and deadlines for them: **new subsection 18(8).**

Assessment plans are to be given to the DITR Secretary within 18 months of the end of the trigger year and thereafter every 5 years: **new subsections 15(1)-(3).** Regarding the plan, the Explanatory Memorandum comments:[8]

> The information provided to the Department under this clause will be treated as commercial in confidence. Reference is made to section 70 of the *Crimes Act 1914* to make clear that the appropriate treatment of confidential information by Commonwealth Officers is covered by that provision.

A failure to submit a plan is a contravention of a civil penalty provision – see **clause 1** of **Schedule 1.**

Assessment plans are subject to approval of the DITR Secretary. The DITR Secretary *must* approve a plan if they are satisfied that it 'substantially meets' the requirements of **new section 18**. If they are not satisfied that it substantially meets the requirements of **new section 18**, they must refuse to approve it, and prepare a revised plan that does so: **new subsections 17(1)-(3**). The DITR Secretary must invite the relevant corporation to comment on the revised plan within a 'specified period': **new paragraph 17(3)b)**. After considering any comments, the DITR Secretary can either approve the plan as is, or revise it again and seek further comments: **new subsections 17(4)-(5**). A revised plan, whether it be revised once or several times, can only be approved if the DITR Secretary is satisfied that it 'substantially meets' the requirements of **new section 18**.

A theoretical consequence of the DITR Secretary's powers under **new section 17** is that a corporation may have an approved plan that it does not agree with. However, **new section 19** allows a corporation that has an approved plan in place to request a variation to that plan. The DITR Secretary may either approve or refuse to approve it. The DITR Secretary *must* approve the variation if they are satisfied that the amended plan 'substantially meets' the requirements of **new section 18**. However, if it is refused, the DITR Secretary takes no further action. It would be up to the corporation to submit another request for variation that takes into account any reasons given by the Secretary for refusal.

Part 6 (new section 20) provides that a corporation must carry out the proposed actions contained in the assessment plan. Regulations may set out further requirements for this. The Explanatory Memorandum comments that the regulations might require:[9]

> Firstly, [corporations] will have to assess the business objectives for energy use and reduction (if any). Secondly, they will have to measure and analyse energy efficiency data. Finally, they will undertake a process to a minimum standard that identifies and evaluates energy efficiency opportunities.

A failure to carry out apply the proposed actions is a contravention of a civil penalty provision – see **clause 1** of **Schedule 1.**

Part 7 (new sections 21-22) require periodic reporting both to the public and the DITR Secretary. The frequency of such reporting is to be set by regulation. The assessment plan itself is not required to be made public. Under **new subsection 22(3)**, both the public and DITR Secretary reports must contain:

- 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;
- the results of carrying out that proposal;

- the response of the corporation to those results; and
- any other information required by the regulations.

Regulations may set out additional required contents for the report to the DITR Secretary. Virtually all other aspects of reporting, including the form of the report, and the timing and manner of release to the public are to be governed by regulations. The report to the public must be signed off by the corporations' Chairperson (or equivalent): **new subsection 22(4)**. For whatever reason, there is no explicit requirement for this in the report to the DITR Secretary.

A failure to comply with the Part 7 reporting requirements is a contravention of a civil penalty provision – see **clause 1** of **Schedule 1.**

Part 8 (new sections 24-38) deal with powers of inspection. They are a fairly standard set of powers, encompassing powers such as entry of officials onto premises, search and securing of evidential material, issue and use of warrants, and the conditional ability to compel the answering of questions / production of documents.

The persons that exercise the **Part 8** powers are called 'authorised officers'. These are appointed by the DITR Secretary and must be either an officer or employee of the DITR or a 'suitably qualified person': **new section 25**. No guidance is given on what would constitute suitable qualifications. Perhaps this could be dealt with in regulations. As is usual, such officers are subject to the direction of the Secretary in exercising their powers or performing their functions.

New section 26 is a standard provision on identity cards. Importantly, a related provision is that an authorised officer cannot exercise their powers with respect to premises if they fail to produce their identity card if so required by the occupier of the relevant premises: **new subsection 30**.

Entry into premises by authorised officers must be under a warrant or by the consent of the occupier. If seeking the consent of the occupier to enter premises, the authorised officer must inform them that they may refuse consent: **subsection 31(1)**. However, there is no obligation to tell the occupier that they may withdraw consent after entry – this contrasts with other legislation – for example subsection 49(2) of the *Water Efficiency Labelling and Standards Act 2005*. Consent must be voluntary for entry without a warrant to be lawful: **new subsection 31(2)**.

Under **new section 32**, when entry is done pursuant to warrant, the authorised officer must announce that they are authorised to enter the premises and to provide any person at the premises with the opportunity to let them in. If the occupier of the premises (or someone who apparently represents the occupier) is present during the execution of the warrant, the authorised officer must identify themselves to the occupier and 'make available' a copy of the warrant: **new subsection 33(1).**

Once entry is gained through consent or by warrant, authorised officers may exercise various powers listed in **new section 28** – essentially they are to search the premises and anything on them, inspect records and documents and take extracts or copies of them. Evidential material can only be seized by a warrant, although can be secured until a warrant is obtained: **new paragraph 28(1)(h**). There is no express limitation of how long evidential material may be 'secured' if there is a delay in obtaining a warrant to seize it.

If entry is by warrant, an authorised officer can require the occupier of the premises (or someone who apparently represents the occupier) to answer questions and produce documentation: **new subsection 29(2**).[10] Failure to comply with such a request is an offence carrying a maximum penalty of six months imprisonment.[11] There is no requirement on the part of the authorised officer to warn a person about the penalty for non-compliance. Note that **new subsection 29(4)** provides that a person is not obliged to comply with the demand if this would tend to incriminate them or expose them to a penalty. Again, there no requirement on the part of the officer to inform a person that they are excused from complying under the self-incrimination provision.

New s**ection 37** is a standard provision regarding the obligation of the occupier (or someone who apparently represents the occupier) to provide all 'reasonable facilities and assistance for the effective execution' of the authorised officer's powers where entry is via warrant. However, there is no explicit exemption from this obligation even where compliance might tend to incriminate the person or expose them to a penalty. Failure to comply with **new section 37** is an offence carrying a maximum penalty of 30 penalty units ($3 300). Again there is no requirement on the part of the authorised officer to warn a person about the penalty for non-compliance.

New section 38 deals with the issuing of warrants (termed 'monitoring warrants') and is a fairly standard format. The issuing magistrate must be satisfied, by information on oath or affirmation, that access to the premises is necessary for the purpose of (i) substantiating information provided under the Act or (ii) determining whether the Act has been complied with. There is no ability to apply for warrants by fax, telephone etc. A warrant authorises the authorised officer to enter the named premises using such force use as is 'necessary and reasonable'.

Part 9 (new sections 39-41) deals with miscellaneous matters.

New section 38 allows the DITR Secretary to delegate his or her powers under this Act to a DITR SES employee.

New section 39 provides for Administrative Appeals Tribunal (AAT) review for various decisions made by the DITR Secretary. Notably these include a decision not to grant an exemption for registration under **new section 11** and decisions regarding approvals of assessment plans under **new section 17**.

New section 41 is a standard regulation-making power.

Schedule 1 – Consequences of contravening civil penalty provisions.

Under **clause 1, t**here are five provisions of the Act for which a contravention constitutes a 'civil penalty provision'. These are

- corporation must apply to be registered (**new subsection 9(1))**
- provision of an assessment plan by a registered corporation with a relevant specified period specified (**new subsection 15(5))**
- carrying out of assessments as per the approved assessment plan and any regulatory requirements (**new subsection 20(4**))
- public reporting (**new subsection 22(1)**)
- reporting to the DITR Secretary (**new subsection 23(1))**

A decision on whether a contravention has occurred is made by the Federal Court on application of the Minister[12]: **clauses 1 and 4.** The rules of evidence and procedure for civil matters[13] apply to a hearing in determine the matter: **clause 6**. If the Court finds a contravention, and deems it 'serious', it may order a penalty payable to the Commonwealth of up to 1000 penalty units ($110 000): **clause 3**. **Clause 11** provides that in certain instances where a civil penalty contravention appears to have occurred, but that the corporation acted honestly and that, having regard to relevant circumstances, it ought to be excused for the contravention, the Court may relieve it wholly or partly from any civil liability.

Clauses 7-9 deal with double jeopardy matters. The Federal Court cannot make a declaration of contravention or order a pecuniary penalty where the relevant corporation has already been convicted of a criminal offence 'constituted by conduct that is substantially the same': **clause 7**. If criminal proceedings have started, the civil proceedings are stayed, but can be resumed if the corporation is not convicted of the criminal offence: **clause 8**. A criminal prosecution can proceed for substantially the same conduct even after a declaration or contravention or pecuniary penalty order has been made: **clause 9**.

Subclause 10(1) enables the Minister to require a person to provide 'all reasonable assistance' in relation to civil or criminal proceedings under the Act. There are various limitations to this power in **subclauses 10(2)-(3) and (5)**, mainly relating to whether the person was themselves possibly involved in the contravention or offence (a self-incrimination issue) or are, or have acted as, lawyers for relevant persons or corporations. The Minister may seek a Federal Court order to direct a person to comply with the s**ubclause 10(1)** requirement 'in specific way': **subclause 10(7)**. A failure to comply with the requirement carries a 5 penalty unit penalty – presumably there would also be a question of contempt of court if any Federal Court order was not complied with.

Concluding Comments

As is not unusual for Commonwealth industry regulatory legislation, much of the actual implementation of the Energy Efficiency Opportunities program will be spelt out in regulations. Examples include:

- meaning of the term ‘energy used’
- information to be contained on the Register of Corporations for the Energy Efficiency Opportunities Scheme
- additional energy efficiency opportunities assessment plan requirements
- the frequency of reporting on a corporation’s energy efficiency opportunities assessment, and
- the timing of the release of the public report on a corporation’s energy efficiency assessment

When these regulations are released, it will important that adequate Parliamentary scrutiny is given to them to ensure the effective and open operation of the program.

Substantial powers are given to authorised officers under the powers of inspection in **Part 8**. A failure by occupiers of premises (and certain other persons in some cases) to comply with these powers can result in substantial fines or even imprisonment. Whilst **Part 8** generally includes sufficient safeguards covering the exercise of these powers, the main provisions section of this Digest notes a few instances where the Bill seems, at least on the face of it, to be silent on the issue.

Endnotes

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1 Minister for Industry, Science and Resources, ‘Greenhouse Challenge delivers results’, *Media Release* 99/346, 24 October 1999.

2 S*ecuring Australia's Energy Future*, p. 113.

3 Draft report, pp. 188–189.

4 ibid., p. 189.

5 John A Marsigio, ‘Greenhouse gas emissions and energy efficiency in industry – EPA Victoria’s role in the Victorian Greenhouse Strategy’, *Unpublished Conference paper*, April 2005.

6 And possibly joint ventures or partnerships in which the corporation is involved: see **new subsection 10(2).**

7 **New subsection 10(3)** provides that the termed ‘energy used’ is to be defined be regulations.

8 Explanatory Memorandum, p. 101.

9 Explanatory Memorandum, p. 103.

10 If entry is by consent, the authorised officer may only 'request' answers and documentation.

11 The standard *Criminal Code* offence provisions of giving false or misleading evidence would also apply.

12 The responsible Minister is the Minister for Industry, Tourism and Resources.

13 For example, the decision is presumably made on the balance of probabilities.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2764.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.