



Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012

No. 108, 2012

***An Act to amend the *Water Efficiency Labelling and
Standards Act 2005*, and for related purposes***

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

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Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012

No. 108, 2012

An Act to amend the *Water Efficiency Labelling and Standards Act 2005*, and for related purposes

[Assented to 22 July 2012]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012*.

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2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	22 July 2012
2. Schedule 1	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	22 January 2013
3. Schedule 2	The day after this Act receives the Royal Assent.	23 July 2012
4. Schedule 3, Part 1	The day this Act receives the Royal Assent.	22 July 2012
5. Schedule 3, Part 2	1 November 2013.	1 November 2013
6. Schedule 3, Part 3	The day this Act receives the Royal Assent.	22 July 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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Schedule 1—Registration of WELS products

Part 1—Amendments

Water Efficiency Labelling and Standards Act 2005

1 Section 7 (definition of *registered*)

Repeal the definition, substitute:

registered: a WELS product is *registered* if the product is registered under the scheme formulated under subsection 26(1).

2 Part 6

Repeal the Part, substitute:

Part 6—Registration of WELS products

26 Registration of WELS products

- (1) The Commonwealth Minister must, by legislative instrument, formulate a scheme relating to the registration of WELS products.
- (2) Without limiting subsection (1), the scheme may make provision for, or in relation to, any of the following:
 - (a) applications for registration of WELS products (including renewal of registration);
 - (b) the information or documents to be provided with applications for registration (including verification by statutory declaration of the information);
 - (c) the fees to be paid in connection with applications for registration, including methods for working out such fees and the circumstances in which fees may be waived or refunded (either in whole or in part);
 - (d) the grounds for approving or refusing applications for registration;
 - (e) the period of registration;

- (f) the requirements to be met in order for WELS products to remain registered;
 - (g) the consequences for the registration of a product if a WELS standard for the product is varied or replaced;
 - (h) the suspension and cancellation of registration;
 - (i) the creation, maintenance and publication of a register of WELS products;
 - (j) the review of decisions made by the Regulator under the scheme;
 - (k) other matters in connection with the registration of WELS products.
- (3) Without limiting subsection 33(3A) of the *Acts Interpretation Act 1901*, the scheme may make different provision in relation to:
- (a) different kinds of WELS products; or
 - (b) different kinds of applications; or
 - (c) different kinds of registrations; or
 - (d) different circumstances.
- (4) Before formulating a scheme under subsection (1), the Commonwealth Minister must have agreement to the terms of the scheme from a majority of the participating States and Territories.
- (5) Subsection (4) does not apply to a variation of the scheme to remove an ambiguity or uncertainty, or to correct an error.
- (6) Subsection (5) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to the instrument.
- (7) Despite subsection 44(1) of the *Legislative Instruments Act 2003*, section 42 of that Act applies to the instrument.

Note: Part 6 (sunsetting) of the *Legislative Instruments Act 2003* does not apply to the scheme (see section 54 of that Act).

3 Paragraph 42(1)(b)

Omit “(see subsection 27(2))”, substitute “imposed under the scheme formulated under subsection 26(1)”.

4 Section 69

Repeal the section, substitute:

69 Meaning of *reviewable decision* and *affected person*

- (1) Each of the following decisions is a ***reviewable decision***:
 - (a) a decision by the Regulator under the scheme formulated under subsection 26(1) to refuse to register a WELS product;
 - (b) a decision by the Regulator under the scheme formulated under subsection 26(1) to cancel or suspend the registration of a WELS product.
- (2) A person whose application to register a WELS product is refused is the ***affected person*** for the purposes of a decision referred to in paragraph (1)(a).
- (3) A person in relation to whom a WELS product is registered is the ***affected person*** for the purposes of a decision referred to in paragraph (1)(b).

Part 2—Transitional provisions

5 Definitions

In this Part:

commencement means the commencement of this item.

new WELS Act means the *Water Efficiency Labelling and Standards Act 2005* as in force immediately after commencement.

old WELS Act means the *Water Efficiency Labelling and Standards Act 2005* as in force immediately before commencement.

registration scheme means the scheme formulated under subsection 26(1) of the new WELS Act.

6 Pending applications at commencement

- (1) This item applies if a manufacturer made an application for registration of a WELS product under section 26 of the old WELS Act and, immediately before commencement:
 - (a) the Regulator had not registered the product under section 28 of that Act; and
 - (b) the Regulator had not refused to register the product under section 29 of that Act.
- (2) The application is taken, immediately after commencement, to have been refused by the Regulator.
- (3) If a registration fee accompanied the application, the Regulator must refund the fee to the manufacturer.
- (4) Refunds of fees under subitem (3) are taken, for the purposes of section 66 of the new WELS Act, to be payments in connection with the performance of the Regulator's functions under that Act.

7 Transitioning existing registrations

Application of item

- (1) This item applies in relation to a WELS product that was registered within the meaning of the old WELS Act immediately before commencement.

Transitioning registrations

- (2) Immediately after commencement:
- (a) the WELS product is no longer registered within the meaning of the old WELS Act; and
 - (b) all of the following apply:
 - (i) the product is taken, for the purposes of the new WELS Act, to be registered within the meaning of that Act;
 - (ii) the registration scheme applies in relation to the product as if the product were registered within the meaning of the new WELS Act;
 - (iii) the applicable WELS standard for the product is the applicable WELS standard under which the product was registered within the meaning of the old WELS Act.
- (3) The WELS product stops being registered within the meaning of the new WELS Act at the end of 80 days after commencement, unless the fee payable in accordance with the registration scheme is paid within that period.
- (4) Paragraph (2)(b) and subitem (3) have effect despite anything in the registration scheme.

Refund of fees paid under old WELS Act

- (5) If a fee accompanied the application that was made under the old WELS Act for registration of the WELS product, the Regulator must pay the person in relation to whom the product is registered an amount worked out using the formula:

$$\$1,200 - \left(\frac{N}{5} \times 1,500 \right)$$

where:

N is the number (which may be zero) of whole years, as determined immediately before commencement, for which the product was registered within the meaning of the old WELS Act.

- (6) The Regulator may set off an amount payable under subitem (5) against the amount of the fee payable under subitem (3).

- (7) Payments of amounts under subitem (5) are taken, for the purposes of section 66 of the new WELS Act, to be payments in connection with the performance of the Regulator's functions under that Act.

Regulations

- (8) The Governor-General may make regulations prescribing additional matters of a transitional nature (including any saving or application provisions) relating to Part 6 of the new WELS Act.

Schedule 2—Improving compliance

Part 1—Amendments

Water Efficiency Labelling and Standards Act 2005

1 Subsection 4(2)

After “Crown liable”, insert “to a pecuniary penalty or”.

2 Section 7

Insert:

civil penalty order has the meaning given by subsection 44A(4).

3 Section 7

Insert:

civil penalty provision: a provision of this Act is a *civil penalty provision* if:

(a) either:

- (i) the provision sets out at its foot a pecuniary penalty, or penalties, indicated by the words “Civil penalty”; or
- (ii) another provision of this Act provides that the provision is a civil penalty provision; and

(b) the provision is of one of the following kinds:

- (i) a subsection, or a section that is not divided into subsections;
- (ii) a subregulation, or a regulation that is not divided into subregulations.

4 Section 7

Insert:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

5 Section 7 (definition of *evidential material*)

Repeal the definition, substitute:

evidential material means:

- (a) in respect of an offence against this Act:
 - (i) any thing with respect to which the offence has been committed or is suspected, on reasonable grounds, to have been committed; or
 - (ii) any thing as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of the offence; or
 - (iii) any thing as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing the offence; and
- (b) in respect of a contravention of a civil penalty provision:
 - (i) any thing with respect to which the civil penalty provision has been contravened or is suspected, on reasonable grounds, of having been contravened; or
 - (ii) any thing as to which there are reasonable grounds for suspecting that it will afford evidence as to the contravention of the civil penalty provision; or
 - (iii) any thing as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of contravening the civil penalty provision.

6 Section 7

Insert:

relevant court means:

- (a) the Federal Court; or
- (b) the Federal Magistrates Court; or
- (c) a court of a State or Territory that has jurisdiction in relation to matters arising under this Act.

7 Part 7 (heading)

Repeal the heading, substitute:

Part 7—Offences and civil penalties relating to the WELS scheme

8 Division 2 of Part 7

Repeal the Division, substitute:

Division 2—Registration and labelling

32A False or misleading information or documents

A person must not provide information or a document with an application for registration of a WELS product if the person knows, or is reckless as to whether, the information or document is false or misleading in a material particular.

Civil penalty: 60 penalty units.

Note: Part 7.4 of the *Criminal Code* provides offences in relation to false or misleading statements.

33 Supply of unregistered WELS products

- (1) A person contravenes this subsection if:
 - (a) the person supplies a WELS product; and
 - (b) the applicable WELS standard requires the product to be registered for the purposes of the supply.
- (2) Subsection (1) does not apply if the WELS product is registered at the time of the supply.

Strict liability offence

- (3) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note 1: For strict liability, see section 6.1 of the *Criminal Code*.

Note 2: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

Civil penalty provision

- (4) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

- (5) A person who wishes to rely on subsection (2) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.

34 Supply of WELS products that are not WELS-labelled

- (1) A person contravenes this subsection if:
- (a) the person supplies a WELS product; and
 - (b) the applicable WELS standard requires the WELS product to be WELS-labelled for the purposes of the supply; and
 - (c) the product is not WELS-labelled.

Note: For **WELS-labelled**, see subsection 20(1).

Strict liability offence

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty provision

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

9 Section 35 (heading)

Repeal the heading, substitute:

35 Minimum water efficiency

10 Subsection 35(1)

Omit “commits an offence”, substitute “contravenes this subsection”.

11 Subsection 35(1) (penalty)

Repeal the penalty.

12 Subsection 35(2)

Repeal the subsection, substitute:

Strict liability offence

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty provision

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

13 Section 36 (heading)

Repeal the heading, substitute:

36 Minimum general performance

14 Subsection 36(1)

Omit “commits an offence”, substitute “contravenes this subsection”.

15 Subsection 36(1) (penalty)

Repeal the penalty.

16 Subsection 36(2)

Repeal the subsection, substitute:

Strict liability offence

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty provision

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

17 Subsection 37(1)

Omit “commits an offence”, substitute “contravenes this subsection”.

18 Subsection 37(1) (penalty)

Repeal the penalty.

19 Subsection 37(2)

Repeal the subsection, substitute:

Strict liability offence

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty provision

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

20 After section 37

Insert:

37A WELS-labelling products that are not WELS products

- (1) A person contravenes this subsection if:
- (a) the person supplies a product; and
 - (b) the product is, or purports to be, WELS-labelled; and
 - (c) the product is not a WELS product.

Strict liability offence

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty provision

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

21 Subsection 38(1)

Omit “commits an offence”, substitute “contravenes this subsection”.

22 Subsection 38(1) (penalty)

Repeal the penalty.

23 Subsection 38(2)

Repeal the subsection, substitute:

Strict liability offence

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 60 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty provision

- (3) A person is liable to a civil penalty if the person contravenes subsection (1).

Civil penalty: 60 penalty units.

24 Subsection 40(1)

Omit “Part 7”, substitute “this Act”.

25 After subsection 40(1)

Insert:

- (1A) The regulations may provide for a person who is alleged to have contravened a civil penalty provision to pay a penalty to the Commonwealth as an alternative to proceedings for a civil penalty order.

26 At the end of subsection 40(2)

Add “or that contravention”.

27 After Division 3 of Part 8

Insert:

Division 3A—Compliance audits

43A Compliance audits

- (1) This section applies if the Regulator:
- (a) suspects, on reasonable grounds, that a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
 - (i) an offence against this Act; or
 - (ii) a contravention of a civil penalty provision; and
 - (b) is satisfied that it would be in the public interest to give the person a notice under this section.
- (2) The Regulator may, by written notice given to the person, require the person:
- (a) to undertake, or arrange for another person to undertake, an audit of whichever of the following is specified in the notice:
 - (i) the person’s compliance with this Act;
 - (ii) one or more specified aspects of the person’s compliance with this Act; and
 - (b) to give the Regulator a written report setting out the results of the audit.
- (3) The notice must specify:

- (a) if the notice requires the person to arrange another person to undertake the audit—requirements relating to the qualifications and independence of the other person; and
 - (b) the matters to be covered by the audit; and
 - (c) the period within which the audit must be undertaken; and
 - (d) the form and content of the report; and
 - (e) the period within which the report must be given to the Regulator.
- (4) A person contravenes this subsection if the person is subject to a requirement under subsection (2) and the person fails to comply with the requirement.
- (5) A person commits an offence of strict liability if the person contravenes subsection (4).
- Penalty: 30 penalty units.
- Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (6) A person is liable to a civil penalty if the person contravenes subsection (4).
- Civil penalty: 30 penalty units.
- (7) A notice under subsection (2) is not a legislative instrument.

Division 3B—Remedial action

43B Remedial action

- (1) This section applies if the Regulator:
- (a) suspects, on reasonable grounds, that a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
 - (i) an offence against this Act; or
 - (ii) a contravention of a civil penalty provision; and
 - (b) is satisfied that it would be in the public interest to give the person a notice under this section.
- (2) The Regulator may give the person a written notice requiring the person, within a specified period, to take specified action directed toward either or both of the following:

- (a) remedying the conduct;
 - (b) ensuring that the person does not engage, or continue to engage, in such conduct in the future.
- (3) A person contravenes this subsection if the person is subject to a requirement under subsection (2) and the person fails to comply with the requirement.
- (4) A person commits an offence of strict liability if the person contravenes subsection (3).
- Penalty: 30 penalty units.
- Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (5) A person is liable to a civil penalty if the person contravenes subsection (3).
- Civil penalty: 30 penalty units.
- (6) A notice under subsection (2) is not a legislative instrument.

28 Subsections 44(1) and (2)

After “against this Act”, insert “or a contravention of a civil penalty provision”.

29 After Part 8

Insert:

Part 8A—Civil penalty orders

Division 1—Obtaining a civil penalty order

44A Civil penalty orders

Application for order

- (1) The Regulator may apply to a relevant court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.
- (2) The Regulator must make the application within 4 years of the alleged contravention.

Court may order person to pay pecuniary penalty

- (3) If the relevant court is satisfied that the person has contravened the civil penalty provision, the court may order the person to pay to the Commonwealth such pecuniary penalty for the contravention as the court determines to be appropriate.

Note: Subsection (5) sets out the maximum penalty that the court may order the person to pay.

- (4) An order under subsection (3) is a ***civil penalty order***.

Determining pecuniary penalty

- (5) The pecuniary penalty must not be more than:
- (a) if the person is a body corporate—5 times the pecuniary penalty specified for the civil penalty provision; and
 - (b) otherwise—the pecuniary penalty specified for the civil penalty provision.
- (6) In determining the pecuniary penalty, the relevant court may take into account all relevant matters, including:
- (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered because of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by a court to have engaged in any similar conduct.

44B Civil enforcement of penalty

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

44C Conduct contravening more than one civil penalty provision

- (1) If conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted under this Part against a

person in relation to the contravention of any one or more of those provisions.

- (2) However, the person is not liable to more than one pecuniary penalty under this Part in relation to the same conduct.

44D Multiple contraventions

- (1) A relevant court may make a single civil penalty order against a person for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions of the same or a similar character.

Note: For continuing contraventions of civil penalty provisions, see section 44N.

- (2) However, the penalty must not exceed the sum of the maximum penalties that could be ordered if a separate penalty were ordered for each of the contraventions.

44E Proceedings may be heard together

A relevant court may direct that 2 or more proceedings for civil penalty orders are to be heard together.

44F Civil evidence and procedure rules for civil penalty orders

A relevant court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty order.

44G Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.

Division 2—Civil proceedings and criminal proceedings

44H Civil proceedings after criminal proceedings

A relevant court may not make a civil penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is the

same, or substantially the same, as the conduct constituting the contravention.

44J Criminal proceedings during civil proceedings

- (1) Proceedings for a civil penalty order against a person for a contravention of a civil penalty provision are stayed if:
 - (a) criminal proceedings are commenced or have already been commenced against the person for an offence; and
 - (b) the offence is constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the contravention.
- (2) The proceedings for the order (the *civil proceedings*) may be resumed if the person is not convicted of the offence. Otherwise:
 - (a) the civil proceedings are dismissed; and
 - (b) costs must not be awarded in relation to the civil proceedings.

44K Criminal proceedings after civil proceedings

Criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person in relation to the contravention.

44L Evidence given in civil proceedings not admissible in criminal proceedings

- (1) Evidence of information given, or evidence of production of documents by an individual, is not admissible in criminal proceedings against the individual if:
 - (a) the individual previously gave the evidence or produced the documents in proceedings for a civil penalty order against the individual for an alleged contravention of a civil penalty provision (whether or not the order was made); and
 - (b) the conduct alleged to constitute the offence is the same, or substantially the same, as the conduct alleged to constitute the contravention.

- (2) However, subsection (1) does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the civil penalty order.

Division 3—Miscellaneous

44M Ancillary contravention of civil penalty provisions

- (1) A person must not:
- (a) attempt to contravene a civil penalty provision; or
 - (b) aid, abet, counsel or procure a contravention of a civil penalty provision; or
 - (c) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
 - (d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or
 - (e) conspire with others to effect a contravention of a civil penalty provision.

Note: Section 44Q (which provides that a person's state of mind does not need to be proven in relation to a civil penalty provision) does not apply to subsection (1) of this section.

Civil penalty

- (2) A person who contravenes subsection (1) in relation to a civil penalty provision is taken to have contravened the provision.

44N Continuing contraventions of civil penalty provisions

- (1) If an act or thing is required under a civil penalty provision to be done:
- (a) within a particular period; or
 - (b) before a particular time;
- then the obligation to do that act or thing continues until the act or thing is done (even if the period has expired or the time has passed).
- (2) A person who contravenes a civil penalty provision that requires an act or thing to be done:
- (a) within a particular period; or
 - (b) before a particular time;

commits a separate contravention of that provision in respect of each day during which the contravention occurs (including the day the relevant civil penalty order is made or any later day).

44P Mistake of fact

- (1) A person is not liable to have a civil penalty order made against the person for a contravention of a civil penalty provision if:
 - (a) at or before the time of the conduct constituting the contravention, the person:
 - (i) considered whether or not facts existed; and
 - (ii) was under a mistaken but reasonable belief about those facts; and
 - (b) had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.
- (2) For the purposes of subsection (1), a person may be regarded as having considered whether or not facts existed if:
 - (a) the person had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
 - (b) the person honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.
- (3) A person who wishes to rely on subsection (1) or (2) in proceedings for a civil penalty order bears an evidential burden in relation to that matter.

44Q State of mind

- (1) In proceedings for a civil penalty order against a person for a contravention of a civil penalty provision (other than section 32A or subsection 44M(1)), it is not necessary to prove:
 - (a) the person's intention; or
 - (b) the person's knowledge; or
 - (c) the person's recklessness; or
 - (d) the person's negligence; or
 - (e) any other state of mind of the person.

(2) Subsection (1) does not affect the operation of section 44P (which is about mistake of fact).

30 Paragraphs 47(b) and 58(2)(b)

Repeal the paragraphs, substitute:

- (b) investigating:
 - (i) a possible contravention of a civil penalty provision; or
 - (ii) a possible offence against this Act.

31 At the end of section 60

Add “or a contravention of a civil penalty provision”.

32 At the end of subsection 77(2)

Add:

- ; and (c) declare that specified provisions of the regulations are civil penalty provisions for the purposes of this Act, and prescribe penalties for contraventions of such provisions that do not exceed:
 - (i) for a body corporate—250 penalty units; or
 - (ii) in any other case—50 penalty units.

Part 2—Application provisions

33 Application provisions

- (1) Section 32A of the *Water Efficiency Labelling and Standards Act 2005*, as inserted by item 8 of this Schedule, applies in relation to applications made after the commencement of this item.
- (2) Sections 43A and 43B of the *Water Efficiency Labelling and Standards Act 2005*, as inserted by item 27 of this Schedule, apply in relation to conduct engaged in after the commencement of this item.

Schedule 3—Other amendments

Part 1—Administrative improvements

Water Efficiency Labelling and Standards Act 2005

1 Section 7

Insert:

Commonwealth Department means the Department of State of the Commonwealth that deals with the matters to which this Act relates.

2 Section 7

Insert:

Federal Court means the Federal Court of Australia.

3 Section 7 (definition of *offence against this Act*)

Repeal the definition, substitute:

offence against this Act includes:

- (a) an offence against section 6 of the *Crimes Act 1914*; and
- (b) an offence against section 11.1, 11.4, 11.5, 136.1, 137.1 or 137.2 of the *Criminal Code*;

that relates to this Act.

4 Section 7 (definition of *participating State or Territory*)

Repeal the definition, substitute:

participating State or Territory: a State or Territory is a *participating State or Territory* if there is a corresponding State-Territory law for the State or Territory.

5 Section 7 (definition of *supply*)

Repeal the definition, substitute:

supply has the meaning given by section 7A.

6 Section 7

Insert:

this Act includes regulations, and other legislative instruments, made under this Act.

7 At the end of Part 2

Add:

7A Meaning of *supply*

- (1) A *supply* of a WELS product means a supply of the product in the course of trading or commercial activities, and includes:
 - (a) an offer to supply; and
 - (b) a supply (including a re-supply) by way of sale, exchange, gift, lease, loan, hire or hire-purchase; and
 - (c) a supply as part of the supply of another thing (including as a fitting or fixture).
- (2) For the purposes of subsection (1):
 - (a) offer to supply includes make available, expose, display or advertise; and
 - (b) it is irrelevant whether the supply is:
 - (i) for consideration; or
 - (ii) a wholesale or retail supply.

8 Subsection 18(1)

Omit “and in accordance with subsection (4), determine that water-use”, substitute “, determine that water-use products”.

9 Subsection 18(5)

Repeal the subsection, substitute:

- (5) Subsection (4) does not apply to a variation of a determination to remove an ambiguity or uncertainty, or to correct an error.
- (6) Subsection (5) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to a determination under subsection (1).

10 Paragraphs 19(3A)(a) and (b)

Repeal the paragraphs, substitute:

- (a) that the products comply with one or more requirements relating to plumbing imposed by or under a law of a State or Territory, as in force from time to time;
- (b) that a specified type of person or body certifies that the products comply with one or more requirements relating to plumbing imposed by or under a law of a State or Territory, as in force from time to time.

11 Sections 21 and 22

Repeal the sections, substitute:

21 The Regulator

- (1) The Commonwealth Secretary must, in writing, designate a position in the Commonwealth Department as the position of Regulator.

Note: For creation of positions, see section 77 of the *Public Service Act 1999*.

- (2) The position of Regulator can only be occupied by an SES employee.
- (3) The **Regulator** is the SES employee who occupies that position.
- (4) An instrument under subsection (1) is not a legislative instrument.

22 Functions of the Regulator

The Regulator has the following functions:

- (a) to administer the WELS scheme;
- (b) to provide information and advice in relation to the WELS scheme;
- (c) to undertake or commission research in relation to the WELS scheme;
- (d) to monitor and enforce compliance with the WELS scheme;
- (e) such other functions as are conferred on the Regulator by this Act or any other law.

12 Paragraphs 47(a) and 58(2)(a)

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Omit “or the regulations”.

13 Paragraphs 65(b), 66(b) and 68(a)

Omit “, the regulations”.

14 Subsections 71(3) and (4)

Repeal the subsections, substitute:

- (3) The Regulator must, on receiving an application:
 - (a) review the reviewable decision personally; or
 - (b) cause the reviewable decision to be reviewed by a person:
 - (i) to whom the Regulator’s power under this section is delegated; and
 - (ii) who was not involved in the making of the decision; and
 - (iii) who occupies a position in the Commonwealth Department that is senior to that occupied by any person involved in making the decision.
- (4) After the Regulator, or the person mentioned in paragraph (3)(b), has reviewed the reviewable decision, the Regulator or the person may:
 - (a) make a decision affirming, varying or revoking the reviewable decision; and
 - (b) if the decision is revoked—make such other decision as the Regulator or the person thinks appropriate.

15 Paragraph 72(1)(b)

Omit “by the Regulator”.

16 After subsection 76(1)

Insert:

- (1A) The Commonwealth Minister must cause further independent reviews of the operation of the WELS scheme to be undertaken:
 - (a) within 5 years after the completion of the review referred to in subsection (1); and
 - (b) thereafter, within 5 years after the completion of the previous review.

17 Subsection 76(2)

Omit “the review”, substitute “a review under this section”.

18 Subsection 76(3)

Omit “the review”, substitute “each review”.

19 Paragraph 77(2)(a)

Omit “(including the regulations)”.

Part 2—Removal of voluntary registrations

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20 Subsections 19(2) to (4)

Repeal the subsections, substitute:

- (2) The *WELS standard* must require the products to be registered for the purposes of specified supplies of the product.
- (3) The *WELS standard* may require one or more of the following:
 - (a) that the products comply with specified minimum water efficiency requirements for the purposes of specified supplies of the product;
 - (b) that the products comply with specified minimum general performance requirements for the purposes of specified supplies of the product;
 - (c) that the products comply with one or more requirements relating to plumbing imposed by or under a law of a State or Territory, as in force from time to time;
 - (d) that a specified type of person or body certifies that the products comply with one or more requirements relating to plumbing imposed by or under a law of a State or Territory, as in force from time to time;
 - (e) that the products be WELS-labelled for the purposes of specified supplies of the product.

Part 3—Application and transitional provisions

21 Application of amendments

- (1) The amendment made by item 9 of this Schedule applies in relation to determinations made after the commencement of that item.
- (2) The amendment made by item 14 of this Schedule applies in relation to a reviewable decision made after the commencement of that item.
- (3) The amendment made by item 20 applies in relation to WELS standards made after the commencement of that item.

22 Transitional provision

Despite the repeal of section 21 of the *Water Efficiency Labelling and Standards Act 2005* by item 11 of this Schedule, the Commonwealth Secretary continues to be the Regulator after the commencement of that item until a designation is made under section 21 of that Act as in force after that commencement.

[*Minister's second reading speech made in—
House of Representatives on 23 May 2012
Senate on 20 June 2012*]

(88/12)

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