EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 21

Issued by the Parliamentary Secretary for Urban Water and Sustainability

Water Efficiency Labelling and Standards Act 2005

Water Efficiency Labelling and Standards Amendment Regulation 2013 (No. 1)

The Water Efficiency Labelling and Standards Act 2005 (the Act) provides for the operation of a scheme (known as the WELS scheme) to apply national water efficiency labelling and minimum performance standards to specified water-use and water-saving products. It is a national scheme, with supporting State and Territory legislation, administered by the Australian Government on behalf of the States and Territories.

The objectives of the Act are to:

• conserve water supplies by reducing water consumption;
• provide information about the water efficiency of products that consumers may take into account in their purchasing decisions; and
• promote the adoption of efficient and effective water-use and water-saving technologies.

Under subsection 77(1) of the Act, the Governor-General can make regulations relating to matters that are required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 40 of the Act provides that the regulations may specify a procedure for people who are alleged to have committed an offence under the Act to pay a financial penalty to the Commonwealth (an infringement notice) in lieu of prosecution. An infringement notice regime for the WELS Scheme was established by the Water Efficiency Labelling and Standards Regulations 2005 (the WELS Regulations 2005).

In July 2012 amendments to the Act included provisions for civil penalties and the potential for payment of a financial penalty (infringement notice) with respect to those provisions. Previously, the Act only contained criminal offence provisions.

The amendments to the Regulation:

• complete the inclusion of civil penalty infringement notices in the WELS scheme;
• lower the amount of a criminal infringement notice and set the amount for civil infringement notices to match that lower amount (this is to make the amount commensurate with the nature of the offences and civil penalty provisions they will relate to); and
• make the WELS Regulator (an SES employee as appointed by the Commonwealth Secretary of the Department of Sustainability, Environment, Water, Population and Communities in accordance with the WELS Act 2005), responsible for issuing infringement notices, rather than a WELS inspector, as is currently the case.
These amendments have been drafted taking into account the new standard infringement notice provisions which are stipulated in the Regulatory Powers (Standard Provisions) Bill 2012 which was introduced into the Parliament on 10 October 2012.

Part 6 of the Regulation specifies requirements relating to applications for registration of WELS products. The amendments remove Part 6 from the WELS Regulations 2005, as these requirements are now included in a legislative instrument made by the Minister under section 26 of the Act. This allows consolidation of all scheme registration requirements in one document, making it easier for registrants to understand their obligations under the scheme. The legislative instrument has been made by the Minister and commenced on 22 January 2013.

The Water Efficiency Labelling and Standards Amendment Regulation 2013 (No. 1) is a legislative instrument for the purposes of the Legislative Instruments Act 2003. It commences on the day after it is registered on the Federal Register of Legislative Instruments.

Consultation
These amendments to the Regulations reflect the results of stakeholder consultations conducted in conjunction with consultations resulting in the Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012. The public consultation process included public forums, the release of a consultation paper and receipt of written submissions. Any changes not directly consulted on are minor or machinery in nature.

States and territories were consulted regarding the content of these Regulations for pursuant to the Intergovernmental Agreement for the WELS scheme.

Statement of Compatibility with Human Rights
Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Water Efficiency Labelling and Standards Amendment Regulation 2013 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Legislative Instrument

The Water Efficiency Labelling and Standards (WELS) scheme is a cooperative initiative of the Commonwealth, States and Territories. The Commonwealth has enacted the Water Efficiency Labelling and Standards Act 2005 (the Act) as part of this initiative. It supports conservation of Australia’s water resources, through empowering consumers to make informed decisions about water using and water
saving products, and encouraging the adoption of better water use and water saving
technologies.

Under the WELS scheme, it is prohibited to supply a range of water using products, if
these have not been registered and properly labelled to show their water efficiency.
There have been a range of criminal offences in the Act which apply to the failure to
meet this requirement, and other misconduct, since its enactment. In 2012, the Act
was amended to add a range of civil penalty provisions.

The Act provides that an infringement notice scheme may be established by
regulation, so that a person alleged to have committed an offence or contravened a
civil penalty could be given the option of paying an amount to the Commonwealth,
rather than facing court proceedings (section 40). If the person chose to pay an
amount in this way, then the maximum amount is capped at a fraction of the
maximum fine which could be imposed by a court in court proceedings.

A WELS infringement notice scheme was first introduced in 2005, when the Act did
not contain any civil penalty provisions. This Instrument updates the existing
infringement notice scheme to include payment of an infringement notice as an option
in relation to a civil penalty provision contravention, as well as in relation to criminal
offences.

**Human rights implications**

The Instrument engages the following human rights:

- the right not to be tried or punished more than once for the same criminal
  offence (double jeopardy).

*The right not to be tried or punished more than once*

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) sets
out certain minimum guarantees to which individuals are entitled in the
determination of any criminal charge against that individual. In particular, Article
14(7) sets out the prohibition on double jeopardy, which prevents a person who has
been convicted or acquitted of a criminal charge from being re-tried for the same or
substantially the same offence.

The Instrument provides for certain kinds of residual liability where a person has
been dealt with by way of an infringement notice under the new scheme.

The Instrument provides that where an infringement notice issued in relation to a
criminal offence is paid in accordance with the specified requirements, then the
criminal liability for that offence is extinguished. Neither criminal proceedings nor a
further infringement notice may ensue. Where an infringement notice issued in
relation to a criminal offence is not paid in accordance with the Regulations, then
criminal liability for the offending conduct remains.

Some conduct, however, can constitute both a criminal offence and a contravention
of a civil penalty provision under the Act. If an infringement notice is issued in
relation to the criminal offence in these circumstances, then proper payment of the
infringement notice discharges both the criminal and civil penalty liability for the
conduct in question.
Where an infringement notice is issued in relation to a civil penalty provision contravention, for conduct which can also constitute a criminal offence, then payment of that infringement notice in accordance with the Regulations extinguishes the civil, but *not* the criminal, liability.

This aligns the infringement notice regime with section 44K of the Act, which allows for criminal proceedings to be brought in relation to conduct which has already been the subject of a civil penalty order.

Consistent with the prohibition on double jeopardy in Article 14(7) of the ICCPR, the instrument does not allow for a person to be subjected to criminal liability twice for the same conduct. While a person who has been dealt with by way of an infringement notice for contravention of a civil penalty provision may be subjected to further criminal liability for the same conduct, this does not fall within the scope of Article 14(7). The civil penalty provisions under the Act do not constitute criminal offences (see section 44G of the Act) and carry low penalties of 60 penalty units, so therefore do not constitute a ‘criminal charge’ for the purposes of Article 14(7).

**Conclusion**

The Legislative Instrument is compatible with human rights.

**Don Farrell**  
**Parliamentary Secretary for Sustainability and Urban Water**
Details of the Water Efficiency Labelling and Standards Amendment Regulation 2013 (No. 1)

Section 1 – Name of Regulation

This section sets out the name of this Regulation as the Water Efficiency Labelling and Standards Amendment Regulation 2013 (No. 1).

Section 2 – Commencement

This Regulation commences the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Amendments of Water Efficiency Labelling and Standards Regulations 2005

This Regulation amends the Water Efficiency Labelling and Standards Regulations 2005.

Schedule 1 – Amendments

Item [1]
Refers to definitions of various terms (civil penalty order, civil penalty provision and Regulator) which are provided in the Water Efficiency Labelling and Standards Act 2005.

Item [2]
This item repeals Regulation 6 of the Water Efficiency Labelling and Standards Regulations 2005, which provided for the circumstances in which a person can be regarded as a manufacturer of a WELS product under subsection 26(1) of the Act. These provisions can now be found in Section 8 of the WELS Determination 2013, as authorised by section 26 of the Act.

Item [3]
Substitutes a new Part 8 of the Water Efficiency Labelling and Standards Regulations 2005.

Division 1
Section 6 provides a simplified outline of this Part.

Section 7 provides that this Part enforces the strict liability offences of the WELS Act and the civil penalty provisions.

Division 2
Section 8 provides the circumstances under which an infringement notice may be given. It provides that an infringement notice may be given to a person by the Regulator where the Regulator has reasonable grounds to believe that the person has contravened a strict liability offence or civil penalty provision under the Act. The Water Efficiency Labelling and Standards Regulations 2005 previously provided that a WELS inspector is responsible for issuing an infringement notice. This change
reflects that, in practice, a decision to issue an infringement notice is made by more senior staff, taking into account the advice of an inspector, and so the notice is issued by the Regulator or delegate.

Section 9 provides a list of matters that may be included in an infringement notice but allows the Regulator to include any other information considered necessary. For example, it may be necessary to identify the recipient of an infringement notice with more information than just a name in some circumstances, to ensure that it is directed to the correct person.

Diagram 1 summarises the potential consequences where an infringement notice is paid or not paid. These need to be described in an infringement notice.

Diagram 1: Effect of paying, or not paying, an infringement notice

Diagram 1 summarises the potential consequences where an infringement notice is paid or not paid. These need to be described in an infringement notice.
Subsection 9(2) provides that the amount of the notice for the alleged contravention of the provision must be the lesser of (a) one tenth of the maximum penalty that a court could impose on the person for that contravention or (b) six penalty units for an individual or 30 penalty points for a corporation.

The *Water Efficiency Labelling and Standards Regulations 2005* had this sum as one-fifth of the maximum fine that a court could impose. *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* notes that the one-fifth ratio is applied in Commonwealth legislation, except where the one-tenth ratio has been considered more appropriate. In the case of the WELS scheme, one-tenth is considered appropriate, as this lower amount is more commensurate with the nature of the offence or penalty provision. This infringement notice system will be instituted consistently, and set a level that ensures non-compliance is deterred, in line with the Department’s compliance and enforcement policy.

Section 10 provides that a person who has been provided with an infringement notice may seek an extension by writing to the Regulator, and that the Regulator may grant an extension, or extensions, provided that the applications for an extension are received prior to the most recent due date for payment. Where no extension has been granted, the due date for payment is the later of (a) the last day of the time period for payment or (b) the day that is seven days after the person was given notice of the Regulator’s decision to not extend the period.

Section 11 provides that the recipient of an infringement notice may apply in writing to the Regulator to request arrangements for the infringement notice penalty to be paid by instalment, and that the Regulator may make such arrangements. The person must pay the penalty in accordance with the arrangements for instalments, or where instalments arrangements have been refused by the Regulator, before the end of the later of the 28 day payment period or seven days after the notice of refusal was received.

Section 12 provides for withdrawal of an infringement notice, either in response to a request from the recipient or because the Regulator has otherwise determined that this is the appropriate course of action. Withdrawal of the infringement notice does not necessarily mean that the Regulator has determined that no legal action should be taken against the person. Payments made in respect of a withdrawn notice are to be refunded. Information that the infringement notice recipient gives to the Regulator in the course of seeking withdrawal of a notice is not admissible in evidence against that person in any proceedings, unless the proceedings relate to the provision of false or misleading information to the Regulator.

Section 13 Subsection 13(1) provides for the consequences that may result where an infringement notice has been paid. This is summarised in Diagram 1.

Infringement notices can be issued when a person’s conduct is reasonably believed to constitute an offence, or a contravention of a civil penalty provision (see new Regulation 8).
If the person pays the infringement notice as required, then this discharges the person’s liability for that conduct in relation to the offence or civil penalty provision identified in the notice.

Some conduct, however, can constitute both an offence and a contravention of a civil penalty provision – see, for example, section 33 of the Act. If an infringement notice is issued in relation to the offence in these circumstances, then proper payment of the infringement notice discharges both the criminal and civil penalty liability for the conduct in question.

If, however, the infringement notice is issued in relation to the civil penalty provision contravention in these circumstances, then proper payment of the infringement notice discharges the civil penalty liability only for that conduct. There remains the possibility that criminal proceedings could be brought in relation to the same conduct, pursuant to section 44K of the Act.

Subsection 13(2) provides that subsection 13(1) does not apply if the notice has been withdrawn, or where a person does not make instalment payments in accordance with the agreed arrangement. It would be appropriate for the WELS Regulator, however, to ensure that action taken in response to any breach of the agreed instalment arrangement is reasonable and commensurate with the extent of the variation with that arrangement.

Section 14 clarifies that the WELS Regulator is not required to give an infringement notice wherever it is possible to do so, and that the liability of a person for an alleged contravention is unaffected where an infringement notice is not given or has been withdrawn. It also clarifies that the liability of a person for an alleged contravention of a civil penalty provision or strict liability offence under the Act is unaffected if the person does not comply with an infringement notice. This provision also clarifies that the Regulator is able to give two or more infringement notices to a person for an alleged contravention. It also provides that the penalty amount of an infringement notice does not limit a court’s discretion to determine the amount of a penalty it may impose on a person found to have contravened a civil penalty provision or strict liability offence under the Act.

Section 15 relates to certificates of evidence that may be provided at a proceeding for a contravention of a provision mentioned in an infringement notice. Certificates signed by the Regulator or delegate may serve as evidence of the following facts: (a) that a notice was served on a person, (b) that the infringement notice penalty has not been paid in accordance with these Regulations, (c) that the notice was withdrawn on a specified date, (d) that an extension for payment of the amount was not granted under regulation 10, and that the amount was not paid in accordance with the Regulations, (e) that an extension for the payment of the amount was granted under regulation 11, and the amount was not paid by the extended due date.

Certificates signed by the Regulator or a delegate are taken to have been signed by that person unless it can be shown that the person was not the Regulator or a delegate.