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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WATER EFFICIENCY LABELLING AND STANDARDS AMENDMENT
(SCHEME ENHANCEMENTS) BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Parliamentary Secretary for Sustainability and Urban
Water, Senator the Honourable Don Farrell)

WATER EFFICIENCY LABELLING AND STANDARDS AMENDMENT (SCHEME ENHANCEMENTS) BILL 2012

General Outline

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. The scheme is a national regulatory scheme administered by the Australian Government on behalf of participating States and Territories. It is a cooperative arrangement with supporting State and Territory legislation.

The objectives of the Act are to:

- conserve water supplies by reducing water consumption;
- provide information for purchasers of water-use and water-saving products; and
- promote the adoption of efficient and effective water-use and water-saving technologies.

In 2010, as required by the Act, an independent review was conducted of the WELS scheme's first five years of operation. In response, the Standing Council on Environment and Water has agreed a strategic plan and a number of changes to the governance, compliance, administration and funding arrangements for the scheme. This Bill implements, or provides the basis to implement, those decisions which require legislative amendment.

A key change this Bill makes to the Act is that it allows the Commonwealth Minister to determine more details of the WELS scheme, particularly those relating to registration of products, through a disallowable legislative instrument. This will make it easier for the scheme to be modified from time to time to improve its efficiency and effectiveness without the need to amend supporting State and Territory legislation. A majority of the States and Territories will still need to agree to the terms of the scheme, or to any variation of the scheme (other than a variation to remove an ambiguity or uncertainty, or to correct an error) before the legislative instrument is made. This mechanism will be used to implement a number of reforms determined by the Standing Council on Environment and Water, including improved cost recovery to ensure the ongoing sustainability of the scheme.

The Standing Council also agreed to other changes which contribute to the efficient and effective operation of the scheme. For instance, civil penalty provisions have been added for contraventions of the Act as well as other enforcement options so that a tailored and appropriate response can be provided in every instance. Some other changes of an administrative nature have also been made, including removing the requirement for gazettal of registration decisions (and instead specifying that the decisions will be published on the WELS website) and providing for further reviews of the operation of the WELS Scheme at five year intervals.

This Bill is divided into three schedules, with differing commencement dates to allow staged implementation. Schedule 1 relates to registration of WELS products, Schedule 2 relates to improving compliance and Schedule 3 relates to other administrative changes.

Financial Impact Statement

Since its inception, the WELS scheme has been intended to achieve eighty per cent cost recovery through fees for registration of WELS products. This Bill, along with the legislative instrument specifying registration requirements, is intended to improve the capacity of the scheme to achieve this target. As in the past, ten per cent of the scheme's revenue will be provided by the Commonwealth, with the remaining ten per cent shared amongst the States and Territories. The scheme's total budget for 2012-13 is \$1.85 million.

The transitional arrangements in this Bill involve five-year product registrations under the old WELS arrangements being transferred so that they are effective under the new Act, with pro rata payments being made to registrants for the unused whole years of their old registration. The cost of those payments is to be factored into the registration fees to be established under the new arrangements.

Human Rights Compatibility Statement

A Human Rights Compatibility Statement is provided at the end of the explanatory memorandum as attachment.

NOTES ON INDIVIDUAL CLAUSES

Clause 1 - Short Title

1. This clause provides that the short title by which the Act may be cited is the *Water Efficiency Labelling and Standards Amendment (Scheme Enhancements) Act 2012*.

Clause 2 - Commencement

2. Subsection 2(1) provides that Sections 1 to 3 and anything in the Act not covered in the table and Parts 1 and 3 of Schedule 3 (administrative changes) of the Act will take effect on the day the Act receives royal assent.
3. Staged commencement is necessary to allow notice periods for registrants and to allow time for the making of new regulations and determinations following the enactment of this Bill.
4. Schedule 1 (registration of WELS products) will commence on a day to be determined by Proclamation; otherwise the provisions commence 6 months after the day this Act receives royal assent. This is to allow time for the making of a new determination under the new registration provisions, including consultation with States and Territories.
5. Schedule 2 (improving compliance) will take effect the day after the Act receives royal assent.
6. Schedule 3 Part 2 (removal of voluntary registration) will take effect on 1 November 2013. This is to provide time for development of policy regarding flow controllers. These are currently a voluntarily registered product however once this Part takes effect, flow controllers will either need to be made mandatory or be removed from the scheme. This policy will be reflected in a determination to be made after 1 November 2013.
7. Subsection 2(2) indicates that the information included in Column 3 of the table at subsection 2(1) is not part of this Act, and may be edited or added at a later time in any published version of this Act.

Clause 3 - Schedule(s)

8. This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule in this Act has effect according to their terms.

Schedule 1 – Registration of WELS products

Part 1

Item 1 - Section 7 (definition of registered)

9. This item substitutes the definition of “registered” in the Act (“registered under a WELS standard”) with a new definition. A WELS product is “registered” if the product is registered under the scheme formulated under subsection 26(1). The Minister

determines the detail of the WELS scheme in a legislative instrument made under subsection 26(1).

Item 2 – Part 6

10. This item repeals the whole of Part 6 of the Act as it is now intended that these matters be determined by the Commonwealth Minister in consultation with the States and Territories.
11. Subsection 26(1) provides that the Commonwealth Minister must, by legislative instrument, formulate a scheme relating to the registration of WELS products, with the agreement of a majority of participating States and Territories to the legislative instrument (subsection 26(4)).
12. Accordingly, the contents of the previous Part 6 including, for instance, the publication of registration decisions, the period of registration and the power to suspend and cancel registrations are included in the list of matters that the legislative instrument under subsection 26(1) can provide for. The transfer of these matters from Commonwealth, State and Territory legislation to a single legislative instrument will provide greater flexibility to vary the scheme when this is needed to maintain its effectiveness and efficiency.
13. Subsection 26(2) provides that the legislative instrument may cover some or all of a range of suggested matters listed. This non-exhaustive list provides an indication of the kinds of matters to be covered in the scheme, as detailed in the legislative instrument. However, other aspects of registration that are not specified in the list could still be provided for in the legislative instrument, such as the ability to transfer review and notification rights in relation to registrations, and the kinds of administrative decisions that can be conferred on the Regulator.
14. Subsection 26(3) provides that the legislative instrument may make different provisions for different WELS products, applications, registrations or circumstances. This does not limit the operation of subsection 33(3A) of the *Acts Interpretation Act 1901*.
15. Subsection 26(4) provides that the Commonwealth Minister must have agreement to the terms of the scheme, as provided by a legislative instrument under subsection 26(1) from a majority of the participating States and Territories.
16. Subsection 26(5) provides that subsection 26(4) does not apply to a variation of the scheme to remove an ambiguity or uncertainty or to correct an error. In the absence of subsection 26(5), formal State and Territory agreement would have to be obtained before any change is made to the determination – even for the correction of a simple typographical error. The consultation process associated with obtaining such agreement could delay the commencement of a determination by 2-3 months.
17. Subsection 26(7) provides that the legislative instrument made under subsection 26(1) is a disallowable legislative instrument under subsection 42 of the *Legislative Instruments Act 2003* (“LIA”). This subsection is required because section 44(1) of the LIA provides that legislative instruments that facilitate the establishment or operation of Commonwealth-State cooperative schemes are not disallowable instruments, unless the enabling legislation or some other Act provides that they are disallowable.
18. The note at subsection 26(7) confirms that under section 54 of the LIA a legislative instrument made under subsection 26(1) is exempt from the sunset provisions in Part 6 of the LIA. This is because instruments that are part of a co-operative State-

Territory scheme should not be subject to a unilateral sunseting process which would cause them to cease to exist in only one of the jurisdictions that are a party to the agreement.

Justification for approach in subsection 26(1)

19. The intent of the approach in subsection 26(1) in leaving registration details to the subordinate legislation is due to a number of reasons:
 - a. as noted above, determining registration details in a legislative instrument means that States and Territories only need to amend their corresponding WELS Acts once to reflect these changes. From then on the Act provides for a flexible legislative instrument of registration details which makes it efficient and effective to administer. As subsection 26(4) and the Intergovernmental Agreement between the Commonwealth and all participating States and Territories requires the Commonwealth Minister to have agreement to the terms of the scheme from a majority State and Territory agreement, States and Territories still have input into the registration of the scheme without having to amend their legislation each time registration details of the scheme are changed;
 - b. there is need for flexibility in administering registration elements of the scheme. These amendments ensure that the Minister, by legislative instrument, may change registration related aspects of the scheme, such as the fee and registration period, from time to time. This flexibility will ensure that the scheme remains able to efficiently and effectively meet the objectives of the Act. In particular, the flexibility will allow timely changes to be made to the scheme where this is necessary, including to meet the eighty per cent cost-recovery target set for the scheme on its establishment and reaffirmed in November 2011 by the Standing Council on Environment and Water;
 - c. the Minister already had the power to determine aspects of registration under previous subsection 27(1) without State and Territory agreement, such as the registration fee and documentation to be provided with registration. With State and Territory agreement, the Minister also already had the power to determine WELS products and the WELS standard for WELS products;
 - d. currently registration details of the scheme are in two places, in the Act as well as the legislative instrument. Consolidating the requirements regarding registration should assist the reader's understanding of the rules. The legislative instrument was settled on as the one place for registration requirements for the reasons stated above.
 - e. the Commonwealth Parliament still maintains scrutiny of the legislative instrument made under subsection 26(1) as this instrument is disallowable (section 42 of the LIA)
 - f. as is the case now, the registration fees provided for in the legislative instrument are fees for services (not taxes) and will be charged on a cost recovery basis. The services include, for example, assessing applications for registration of products.

Item 3 - Paragraph 42(1)(b)

20. This item replaces “(see subsection 27(2))”, with “imposed under the scheme determined under subsection 26(1)”.

21. This is a consequential amendment as subsection 27(2) has been repealed as part of the repeal of Part 6.

Item 4 – Section 69

22. This item repeals and replaces section 69.
23. Section 69 relates to appeals of decisions by the Regulator to refuse, cancel or suspend registrations of WELS products. The wording of the new section reflects the fact that these decisions will be made under a legislative instrument made by the Commonwealth Minister rather than under Part 6 of the Act.
24. Subsection 69(1) sets out the decisions made by the Regulator that are reviewable decisions under the Act – namely refusal, cancellation or suspension of registration. The intended meaning is unchanged from the current provision.
25. Subsection 69(2) provides that an affected person for the purposes of a decision refusing to register a product is the person who made the application for registration. The intended meaning is unchanged from the current provision.
26. By contrast, subsection 69(3) is broader than the current provision as it provides that for cancellation or suspension decisions an affected person is the person “in relation to whom” a WELS product is registered, rather than the existing “person on whose application a WELS product was registered”.
27. The purpose of broadening subsection 69(3) to “in relation to whom” is to cover the scenario where transfer of registrations between registrants may be provided for in the legislative instrument under subsection 26(1) and the person who originally made the registration is no longer the registrant.

Part 2 – Transitional provisions

Item 5 – Definitions

28. This item provides for definitions of terms used in Part 2. These definitions clarify that in this Part, “commencement” refers to the commencement of this item only (on proclamation), “new WELS Act” means the Act as in force immediately after commencement, “old WELS Act” means the Act as in force immediately before commencement and “registration scheme” means the scheme created by legislative instrument made under subsection 26(1).

Item 6 – Pending applications at commencement

29. Item 6 applies to pending applications (i.e. those applications for registration that had not been registered under section 28 of the Act and the Regulator had not refused to register the product under section 29 of the Act.)
30. Subitem 6(2) provides that these applications are taken, immediately after commencement, to have been refused by the Regulator.

31. Subitem 6(3) provides that if a registration fee accompanied the application, the Regulator must refund the fee to the manufacturer. Refunds of these fees are taken to be payments in connection with the performance of the Regulator's functions under that Act, for the purposes of section 66 of the new WELS Act (subitem 6(4)).

Item 7 – Transitioning existing registrations

32. Item 7 applies to a WELS product that was registered within the meaning of the old WELS Act immediately before commencement.
33. It is expected that the arrangements for the new scheme to put in place under the new Act and determination will be substantially different in terms of registration fees, rules and procedures from the old scheme. For this reason, pending applications must be refused upon commencement.
34. A clear demarcation is needed between registrations under the old and new Acts, however, there is also the need to ensure continuity of registrations as far as possible (to reduce unnecessary breaches of the Act caused by the transition). These provisions therefore deem that the products are no longer registered under the old WELS Act and transfer those products to be registered under the new Act.
35. Subitem 7(2) provides that immediately after commencement those products are no longer registered within the meaning of the old WELS Act, and are taken to be registered under the new WELS Act and the scheme, as provided for in a legislative instrument under subsection 26(1) applies to that product. The applicable WELS standard for those transferred products is the standard they were registered under immediately prior to transfer to the new scheme (i.e. if a product was registered under the WELS standard in the 2007 determination, it will continue to be registered under that standard when transferred to the new registration scheme).
36. Subitem 7(3) provides that the WELS product stops being registered within the meaning of the new WELS Act at the end of 80 days if the fee payable in accordance with the scheme is not paid. 80 days was considered to be a reasonable period to allow the transition process for registrants.
37. Subitem 7(4) provides that paragraph 7(2)(b) and subitem 7(3) have effect despite the terms of the legislative instrument made under subsection 26(1).
38. Subitems 7(5), 7(6) and 7(7) provide for the refund of fees paid under the old WELS Act. Where a fee was paid for an application for registration under the old WELS Act the Regulator must refund the person in relation to whom the product was registered an amount on a pro rata basis which takes into account the originally intended registration period (5 years) and the number of whole years for which the product was registered during the current registration under the old WELS Act. The formula for calculating the credit is provided for at subitem 7(5). This refund may also be credited against any fees payable for products being transitioned to the arrangements under the new WELS Act.
39. The scope of this refund extends to “the person in relation to whom the product was registered”. It is envisaged this could extend further to, for example, companies that purchased another company holding a WELS registration, depending on provisions

regarding transfer of registrations specified in the legislative instrument made under subsection 26(1).

40. The Regulator is authorised and required to make these payments or credits as part of the performance of the Regulator's functions under the Act. It is intended that any credits will be taken up in the first year, and any unused credits will be refunded in the first year. The cost of crediting will be taken into account in the calculation of the annual registration fee.
41. Subitem 7(8) provides for a regulation making power to prescribe 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

Background

Civil penalties

42. This Schedule introduces a range of new civil penalties, many of which complement existing offences. It also amends some existing criminal offences. New civil penalty provisions are at sections 32A, 33, 34, 35, 36, 37, 37A, 38, 43A and 43B. The overall intention of this Schedule is to enable compliance and enforcement action taken by the WELS Regulator to be more efficient and effective. It will also provide a broader range of civil and criminal law responses to breaches of the Act, ensuring that responses can more closely reflect the nature and circumstances of the breaches. The reduced reliance on the Commonwealth Director of Public Prosecutions for taking court action and lower burden of proof for civil contraventions is also expected to contribute to the efficient and effective operation of the scheme. The penalty units for each of the civil and criminal provisions are (with the exception of sections 43A and 43B which have 30 penalty units) the same (60 penalty units) and have been generally set at the same level as the existing offences in the WELS Act.

Strict liability

43. All of the offences and civil provisions are strict liability (as were those in the old WELS Act). In light of the overriding public interest in the conservation of the urban water resource in Australia, the application of strict liability with respect to the provisions of sections 32A, 33, 34, 35, 36, 37, 37A, 38, 43A and 43B is deemed to be necessary to ensure that a defendant who fails to comply with the relevant requirements cannot escape liability by demonstrating that he/she was not aware of the requirements or was otherwise reckless to the requirements.
44. Application of strict liability to these offences is consistent with *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) which provides guidelines about justification for strict liability offences. For this bill (as was the case when the Act was first enacted) strict liability offences are considered appropriate as the penalty for the offences do not include imprisonment and any fine for an offence will not exceed 60 penalty units for an individual. Further, strict liability is

necessary to ensure the integrity of the regulatory regime as punishing offences not involving fault will deter prospective offenders. A strict liability regime in this Act is intended to facilitate the imposition of penalties for the physical elements of the offences without proof of fault. Without strict liability these provisions will be very difficult to enforce as the offences are centred on conduct rather than intent to commit that conduct. It would be very difficult to prove intention in relation to not registering a product or not labelling a product properly, and this would unnecessarily impede the efficient administration of justice.

45. The strict liability offences of the bill do not unduly trespass upon personal rights and liberties. The intent of imposing strict liability is not to criminalise innocent contraventions of the WELS scheme but to strongly discourage actions that lead to excess urban water consumption that would further jeopardise the supply of this necessary resource. The strict liability provisions contained in the Bill therefore remove uncertainty that would otherwise be inherent in the labelling and standards regime and creates a simpler - as well as more stringent - standard.

Part 1- Amendments

46. Amendments and insertions made in this Part are consequential to the introduction of civil penalties into the Act or the remaking of criminal offences in the Act. They ensure that the other provisions in the Act are appropriately worded to include civil penalties in addition to the criminal matters already in the Act.

Item 1 - Subsection 4(2)

47. Item 1 inserts “to a pecuniary penalty or” after “Crown liable”. This amendment provides that the Act does not make the Crown liable for pecuniary penalties under the new civil penalty provisions. This is in addition to subsection 4(2) which provides that the Crown is not liable to be prosecuted for an offence.

Item 2 – Section 7

48. Item 2 adds to the definitions section of the Act that “civil penalty order” has the meaning given by subsection 44A(4).

Item 3 – Section 7

49. Item 3 also adds to the definitions section of the Act, that a “civil penalty provision” is one which is so identified, either in that provision or elsewhere in the Act or regulations.

Item 4 – Section 7

50. Item 3 also adds to the definitions section of the Act, that “evidential burden” in relation to a matter is about the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This is consistent with the definition of “evidential burden” used at section 13.3 of the Commonwealth Criminal Code.

Item 5 – Section 7 (definition of evidential material)

51. Item 5 repeals the definition of “evidential material” and substitutes text. The amendments provide detail as to what evidential material could constitute.

Item 6 – Section 7

52. Item 6 adds to the definitions section of the Act, that “relevant court” means the Federal Court, the Federal Magistrates Court, or the court of a State or Territory that has jurisdiction in relation to matters arising under this Act. This new list of relevant courts is included to reduce the potential burden on the Federal Court, which was previously the only court in which proceedings under the WELS Act could be conducted.

Item 7 – Part 7 (heading)

53. Item 7 repeals the heading of Part 7.
54. Item 7 provides for the heading of Part 7 to reflect the introduction of civil penalties. It now reads “Part 7 – Offences and civil penalties relating to the WELS scheme”.

Item 8 – Division 2 of Part 7

55. Item 8 repeals Division 2 and substitutes text.

Section 32A

56. It is intended that section 32A would apply to situations where false or misleading information is provided in relation to an application for registration. This might include, for example, where an applicant provided false test reports to accompany an application for registration.
57. Section 32A introduces a civil penalty of 60 penalty units for providing false or misleading information or documents in an application for registration of a WELS product. This provision mirrors Part 7.4 of the Criminal Code.
58. Section 32A applies to applications made after the commencement of this item i.e. on royal assent to the bill (subitem 33(1) of Schedule 2).

Section 33

59. Section 33 provides that it is an offence to supply an unregistered product.
60. Section 33 is a remade offence, retaining 60 penalty units as previously for a contravention. A corresponding civil penalty with 60 penalty units is also introduced to provide an alternative enforcement option to a criminal offence.
61. The first two elements of the offence remain the same - it makes it an offence to supply a WELS product that the applicable WELS standard requires should be registered for the purposes of the supply. The amendment introduces a defence – that the product was registered at the time of the supply.
62. The Guide states that a matter should be included in a defence, thereby placing an evidential burden of proof on the defendant, “only where the matter is peculiarly within the knowledge of the defendant” and “is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish”.

63. It is considered appropriate to place the evidential burden on the defendant in this case because although the Regulator is currently able to identify registered products, the Regulator cannot demonstrate that a product not listed in the Regulator's database or list of registered products is unregistered. For example, currently where a product is identical to a registered product but sold under a different name, the first product is considered registered under the Act, even though its name is not registered. It can be a long and difficult process to proving that the product is or is not registered.
64. Under such circumstances it is reasonable that a supplier of a WELS product have the burden of proving that their product is registered where the Regulator is unable to find or establish the registration status of the product. This is also reasonable in light of the fact that registrants and suppliers are required to keep records under the WELS standard.
65. The supplier only has to point to evidence that suggests a reasonable possibility that the product is registered. If that burden is discharged, then the prosecution bears the burden of proving beyond reasonable doubt (for a criminal offence) or on the balance of probabilities (for a civil penalty), that the product is not registered.

Section 34

66. Section 34 is also a remade offence, which makes it an offence to supply a WELS product that is required to be registered for the purposes of supply without it being WELS-labelled. The penalty of 60 penalty units is kept as the appropriate maximum penalty.
67. This section has been remade to remove an element (that the product be registered). In this way the contravention of the offence and civil penalty provision occurs regardless of whether a product is registered. Considering the issues in proving registration as outlined above in the enforcement of section 33, this makes enforcement easier. This amendment also broadens the application of this Act to WELS products that are both unregistered and unlabelled (in circumstances where the product is required by the WELS standard to be both registered and WELS-labelled).
68. A note has been added to draw attention to the fact that "WELS-labelled" is a term defined at s 20(1) of the Act. Thus "WELS-labelled" not only refers to the presence of a label, but that the label meets the requirements of the WELS standard. These requirements can relate to the design and content of the label as well as to other factors such as the circumstances in which it is used (such as in advertising materials).
69. A corresponding civil penalty with 60 penalty units is also introduced to provide an alternative enforcement option to a criminal offence.

Items 9, 10, 11, 12 – Section 35

Section 35

70. Section 35 has been amended to introduce a corresponding civil penalty provision. Section 35 now provides for the offence and civil penalty of supplying a WELS product that is required to be registered, where that product must also meet a minimum water efficiency requirement for the purposes of supply, in circumstances where the WELS product does not comply with those minimum water efficiency requirements.

Items 13, 14, 15, 16 – Section 36

Section 36

71. Section 36 has also been amended to introduce a corresponding civil penalty provision. It provides for the offence and civil penalty of supplying a WELS product that is required to be registered, and must also meet a general performance requirement specified in the applicable WELS standard for the purposes of supply, but which does not comply with the general performance requirement.

Items 17, 18, 19 – Section 37

Section 37

72. Section 37 has been amended to introduce a corresponding civil penalty provision. This offence and civil penalty provision relate to circumstances where a person uses the WELS standard or information included in a WELS standard in a manner that is inconsistent with the standard. An example of this might include misrepresenting the meaning of a WELS standard in a product brochure or online advertisement, e.g. if the WELS standard uses between 0 and 5 stars to demonstrate efficiency, but the brochure claims that a product has a “10 star WELS rating”.

Item 20 – Section 37A

Section 37A

73. Section 37A creates a new offence and corresponding civil penalty provision for “WELS-labelling” a product which is not in fact a product included in the WELS scheme. This is intended to ensure that suppliers of non-WELS products (for example suppliers of televisions) cannot supply a product with what appears to be a WELS label in order to free-ride on the scheme and gain a potential market advantage over competitors.

Items 21, 22, 23 – Section 38

Section 38

74. Section 38 has been amended to introduce a corresponding civil penalty provision. It makes it an offence or creates a civil penalty for use of information for or in relation to supply of a WELS product that is inconsistent with information in the WELS standard. For example, this would include displaying a product with additional labels or markings of a type that contradict the message of the approved label. The distinction between section 37A and 38 is that section 38 does not explicitly require “supply”, but may pertain to conduct *in relation to* supply (emphasis added).

Item 24 – Subsection 40(1)

75. Item 24 is a consequential amendment to reflect that criminal and civil penalty provisions are now located across the Act. This item omits “Part 7” and substitutes “this Act” at subsection 40(1).

Item 25 – After subsection 40(1)

76. Item 25 amends this section to provide that regulations may allow infringement notices to be issued in the case of civil penalty contraventions.
77. Section 40 provides for the making of regulations for the purposes of allowing for a person alleged to have committed an offence relating to the supply of WELS products to pay a penalty to the Commonwealth as an alternative to prosecution. This provision is aimed at the speedy resolution of minor offences against the Act and to minimise the time and responses spent on court action.

Item 26 – Subsection 40(2)

78. Item 26 provides for a consequential amendment to allow for civil penalty contraventions.

Item 27 – After Division 3 of Part 8

79. Item 27 inserts a new division 3A, section 43A and section 43B.

Section 43A

80. Section 43A introduces a power for the Regulator to force a person to conduct an audit of their compliance with the Act. This involves, for instance, preparing an inventory of WELS products, noting the WELS registration status and labelling details.
81. Subsection 43A(1) applies if the Regulator suspects, on reasonable grounds, that a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute an offence against this Act or a contravention of a civil penalty provision.
82. Paragraph 43A(1)(b) denotes that the Regulator needs to be satisfied that it is in the public interest to give a person a notice under this section. The Regulator is exercising an administrative power, not a judicial power. For the purposes of the public interest test, the Regulator may consider how the conduct is seen in light of the objects of the Act.
83. Subsection 43A(2) provides what the Regulator may require of a person under section 43A. The Regulator may, by written notice given to the person, require the person to undertake, an audit of whichever of the following is specified in the notice, either the person's compliance with this Act and the regulations, or more specified aspects of the person's compliance with this Act and regulations.
84. Paragraph 43A(2)(b) provides that the Regulator may require the person to give the Regulator a written report setting out the results of the audit.
85. Subsection 43A(3) specifies the kinds of details the notice must specify.
86. Subsection 43A(4) provides that a contravention of this subsection is when a person subject to an order to conduct an audit fails to comply with that requirement.
87. Subsection 43A(5) provides that this is an offence of strict liability if the person contravenes subsection 43A(4).
88. Subsection 43A(6) provides that a person is liable to a civil penalty if the person contravenes subsection 43(4).

89. Subsections 43A(5) and (6) provide that the penalty for criminal and civil contraventions of section 43A is 30 penalty units.
90. The penalty provided for, 30 penalty units, is considered appropriate given the recommendations in the Guide. The Guide stipulates that if non-compliance with a notice to produce or attend is to be an offence under an enactment, the maximum penalty for non-compliance should generally be six months imprisonment and/or a fine of 30 penalty units. The Guide also notes that non-compliance with a notice can also be enforced by a civil penalty provision.
91. Subsection 43A(7) provides that the notice under subsection 43A(2) is not a legislative instrument. This clarification is for the assistance of readers, as the instrument is not a legislative instrument within the meaning of section 5 of the LIA.
92. The policy consideration around introducing this order is based on expanding the suite of tools the Regulator can use to enforce the Act. The introduction of both section 43A and section 43B are to provide the Regulator with the ability to provide an appropriate and tailored response to instances of breaches under the WELS Act.
93. The purpose of section 43A is to allow the Regulator to require a person to take action which may otherwise have been required through an enforceable undertaking. In this way, compliance and enforcement activity under the Act can become more efficient and effective for both parties, because an enforceable undertaking is a resource intensive activity for both parties to negotiate and then undertake or monitor. The section also provides an option that enables the Regulator to prompt the person to take action to be fully compliant with the Act in the absence of a punishment.
94. The Regulator may use the results of an audit in activities under other sections of this Part. Follow-up of an ordered audit may include activities such as an enforceable undertaking, an infringement notice or a remedial action order under section 43B.
95. Section 43A applies in relation to conduct engaged in after the commencement of this item i.e. on royal assent to the bill (subitem 33(2) of Schedule 2).

Section 43B

96. Section 43B introduces a broad ranging power for remedial action. The purpose of this section is to allow the Regulator to better achieve the objects of the Act in the absence of punishment for those persons who breach its provisions.
97. Remedial action could cover a range of actions, for example, to:
 - a. require a person to provide new, corrected labels in shops;
 - b. require a person to change information on labels to make them compliant with the WELS standard;
 - c. require staff to be trained about how to comply with the Act;
 - d. require a person to set up store compliance record systems to record compliance with the Act; or
 - e. require a person to cease supplying a WELS product that has a non-compliant star rating label.
98. Subsection 43B(1) applies if the Regulator suspects, on reasonable grounds, that a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute an offence against this Act or a contravention of a civil penalty provision.

99. Paragraph 43B(1)(b) provides that the Regulator needs to be satisfied that it is in the public interest to give a person a notice under this section. The Regulator is exercising an administrative power, not a judicial power. For the purposes of the public interest test, the Regulator may consider how the person's conduct is seen in light of the objects of the Act.
100. Subsection 43B(2) provides that 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 remedying the conduct, or ensuring that the person does not engage, or continue to engage, in such conduct in the future.
101. Subsection 43B(3) provides that a contravention of this subsection is if the person subject to the requirement in subsection 43B(2) fails to comply with the requirement.
102. Subsections 43B(4) and (5) provide that the penalty for both criminal and civil contraventions of section 43B is 30 penalty units.
103. The penalty provided for, 30 penalty units, is considered appropriate given the recommendations in the Guide. The Guide stipulates that if non-compliance with a notice to produce or attend is to be an offence, the maximum penalty for non-compliance should generally be six months imprisonment and/or a fine of 30 penalty units. The Guide also notes that non-compliance with a notice can also be enforced by a civil penalty provision.
104. Subsection 43B(6) provides that the notice under subsection 43A(2) is not a legislative instrument. This clarification is for the assistance of readers, as the instrument is not a legislative instrument within the meaning of section 5 of the LIA. As with an order under section 43A, the intention for section 43B is to expand the suite of tools the Regulator can use to enforce the Act. The introduction of both section 43A and section 43B are to provide the Regulator with the ability to provide an appropriate and tailored response to breaches of the WELS Act.
105. The purpose of section 43B is to allow the Regulator to require of a person something which may otherwise have been an agreed action, such as under an enforceable undertaking. In this way, compliance and enforcement activity under the Act can become more efficient and effective for both parties, because an enforceable undertaking is a resource intensive activity for both parties to negotiate and then undertake or monitor. The section also provides an option that enables the Regulator to require the person to take action to be fully compliant with the Act in the absence of a punishment.
106. Sections 43A and 43B apply to conduct occurring after the commencement of this item i.e. on royal assent to the bill (subitem 33(1) of Schedule 2).

Item 28 – Subsections 44(1) and (2)

107. Item 28 inserts “or a contravention of a civil penalty provision” after “against this Act” in both subsections 44(1) and (2).
108. Section 44 empowers the court, on the application of the Regulator, to grant an injunction either to restrain a person who is engaging in or proposing to engage in conduct constituting an offence against the Act from engaging in that conduct, or to require the person to take such specified action as the Court determines in order to comply with the Act.

109. The intention of these amendments is to broaden the provision to empower the Court to grant an injunction based on conduct constituting a contravention of a civil penalty provision as well as conduct that constitutes an offence.

Item 29 – After Part 8

110. Item 29 inserts a new Part 8A, sections 44A to 44Q. The purpose of these amendments is to provide rules around enforcing civil penalties. These are the standard rules across the Commonwealth statute book used to govern civil penalties and have not been altered.

Division 1 – Obtaining a civil penalty order

Section 44A – Civil penalty orders

111. Subsection 44A(1) provides that the Regulator may apply to a relevant court (defined in section 7) for an order that a person who is alleged to have contravened a civil penalty provision pay the Commonwealth a pecuniary penalty.
112. Subsection 44A(2) provides that the Regulator must make this application within 4 years of the alleged contravention. This is to ensure fairness and a quick resolution of cases.
113. Subsection 44A(3) provides that 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.
114. The note at subsection 44A(3) provides that the maximum penalty that a court may order a person to pay is set out at 44A(5).
115. Subsection 44A(4) provides that such an order under subsection 44A(3) is a civil penalty order.
116. Subsections 44A(5) and (6) provide rules around determining the pecuniary penalty.
117. Subsection 44A(5) provides that the pecuniary penalty must not be more than 5 times the pecuniary penalty specified for the civil penalty provision if the person is a body corporate. Otherwise, the pecuniary penalty is that specified for the civil penalty provision.
118. Subsection 44A(6) provides that the relevant court may take into account all relevant matters and lists examples of all relevant matters.

Section 44B – Civil enforcement of penalty

119. Subsection 44B(1) provides that a pecuniary penalty is a debt payable to the Commonwealth.
120. Subsection 44B(2) provides that 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.

Section 44C – Conduct contravening more than one civil penalty provision

121. Section 44C is intended to apply to scenarios where conduct contravenes more than one civil penalty provision.

122. Subsection 44C(1) provides that 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.
123. Subsection 44C(2) provides that although there may be contravention of 2 or more civil penalty provisions, the person is not liable to more than one pecuniary penalty under this Part in relation to the same conduct.
124. The intention of this section is to cover scenarios where one instance of conduct may constitute numerous offences. An example might be where a label on a product is in contravention of the WELS standard (a section 44 offence) and that same conduct might fall under section 37 (misuse of WELS standards and information) and /or section 38 (information inconsistent with WELS standards), depending on the exact circumstances of the conduct. In this case, subsection 44C(2) would mean that if court proceedings were pursued, the person is not liable for more than one pecuniary penalty under this Part in relation to the same conduct.
125. The question of whether conduct is the “same conduct” turns on the exact circumstances presented. This is not the same as section 44D, which provides rules around proceedings for contraventions founded on the same facts, or for contraventions that form, or are part of, a series of contraventions of the same or similar character.
126. This provision is consistent with the recommendation in the Guide that a person should not be penalised twice for the same or substantially the same conduct.

Section 44D – Multiple contraventions

127. Section 44D is intended to apply to scenarios where contraventions are founded on the same facts, or for contraventions that form, or are part of, a series of contraventions of the same or similar character.
128. Section 44D allows a relevant court to make a single civil penalty order against a person for multiple contraventions of a civil penalty provision for those scenarios.
129. The note at subsection 44D(1) points to a definition of continuing contraventions of civil penalty provisions at section 44N.
130. Subsection 44D(2) provides that 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.

Section 44E – Proceedings may be heard together

131. Section 44E provides that a relevant court may direct that 2 or more proceedings for civil penalty orders are to be heard together.

Section 44F – Civil evidence and procedure rules for civil penalty orders

132. Section 44F provides that a relevant court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty order.

Section 44G – Contravening a civil penalty provision is not an offence

133. Section 44G provides that a contravention of a civil penalty provision is not an offence.

Division 2 – Civil proceedings and criminal proceedings

Section 44H – Civil proceedings after criminal proceedings

134. Subsection 44H provides that 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.
135. The question of whether conduct is the “same conduct” turns on the exact circumstances presented.
136. Section 44H is analogous to the “double jeopardy” rule applicable to criminal offences.

Section 44J – Criminal proceedings during civil penalty proceedings

137. Further to section 44H, section 44J provides that proceedings for a civil penalty order are stayed whether the criminal proceedings are commenced or have already commenced against the person for an offence, and that offence is constituted by conduct that is the same, or substantially the same.

Section 44K – Criminal proceedings after civil proceedings

138. Section 44K provides that 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. This is regardless of whether a civil penalty order has been made against the person in relation to the contravention. Note section 44L which provides rules about evidence that cannot be used in criminal proceedings.

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

139. Although section 44K provides that criminal proceedings may be commenced after civil proceedings, section 44L provides that evidence given in civil proceedings where the conduct to constitute the offence is the same, or substantially the same, is not admissible in criminal proceedings.
140. The kind of evidence specified at subsection 44L(1) is evidence of information given, or evidence of production of documents by an individual. The individual must have previously given the evidence or produced the documents in proceedings for a civil penalty order against the individual, whether or not the order was made.
141. Section 44L(2) provides that section 44L(1) does not apply to criminal proceedings in relation to the falsity of evidence given by the individual in the proceedings for the civil penalty order.

Section 44M – Ancillary contravention of civil penalty provisions

142. Section 44M prohibits a person from involvement in contravening a civil penalty provision. Subsection 44M(1) enumerates the various ways in which a person can be involved in a contravention and aims to capture a wide variety of behaviour ranging from aiding or abetting to conspiracy.

Section 44N – Continuing contraventions of civil penalty provisions

143. Section 44N provides rules on when a contravention is considered to have continued or to be a separate contravention.
144. Subsection 44N(1) provides that if an act or thing is required under a civil penalty provision to be done within a particular period or before a particular time (for example under an audit under section 43A or some kind of remedial action under section 43B),

the obligation to do that act or thing continues until the act or thing is done. This is the case even if the period has expired or time has passed.

145. Subsection 44N(2) provides that as in subsection 44N(1), that act or thing is required under a civil penalty provision to be done within a particular period or before a particular time, a person commits a separate contravention in respect of each day during which the contravention occurs. This includes the day the relevant civil penalty order is made or any later day.

Section 44P – Mistake of fact

146. Section 44P provides for a defence of mistake of fact in relation to civil penalty proceedings.
147. Section 44P(1) enumerates the ways that a person is not liable to have a civil penalty order made against them.
148. Subsection 44P(2) includes two elements for determining whether a person may be regarded as having considered whether or not facts existed. First, the person must have considered on a previous occasion whether those facts existed in the circumstances surrounding that occasion. Second, the person must honestly and reasonably believe that those same, or substantially the same, circumstances surrounded this present occasion. Such a defence might arise where, for example, a person receives goods from a supplier, and views the print out of the WELS registration database certifying that the product was registered until a certain date and that date had not passed at the date of receipt of the goods, however the print out was actually falsified by the supplier.
149. Subsection 44P(3) provides that those who wish to rely on mistake of fact bear an evidential burden in relation to subsections 44P(1) or (2).

Section 44Q – State of mind

150. Section 44Q provides that it is not necessary to prove the state of mind of a person in proceedings for a civil penalty order.
151. Subsection 44Q(2) provides that subsection 44Q(1) does not affect the operation of section 44P (mistake of fact).

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

152. Item 30 repeals paragraphs 47(b) and 58(2)(b) and inserts text.
153. For paragraph 47(b), this insertion reflects the broadening of purposes for which WELS inspectors can use their power to include investigating a possible contravention of a civil penalty provision.
154. For paragraph 58(2)(b), this insertion broadens the grounds on which a magistrate may issue a warrant to include investigating civil penalty provisions.
155. Note that section 7 (definitions) defines an “offence against this Act” to include an offence against the regulations.

Item 31 – At the end of section 60

156. Item 31 broadens the meaning of a person who has WELS information to include for the purposes of investigating or preventing not just an offence against this Act, but also a contravention of a civil provision.

Item 32 – At the end of subsection 77(2)

157. Item 32 inserts text at the end of subsection 77(2) to provide that the regulations may declare that specified provisions of the regulations are civil penalty provisions for the purposes of this Act.
158. Item 32 also inserts text to provide the regulations may prescribe penalties for contraventions of such provisions that do not exceed 250 penalty units for bodies corporate, and 50 penalty units in any other case.
159. The purpose of this text is to provide for a parallel infringement notice system for civil penalty provisions in the regulations, consistent with item 5 in Schedule 2.

Part 2- Application provisions

Item 33 – Application provisions

160. Subitem 33(1) provides for a section 32A offence of providing false or misleading information or documents in relation to an application for registration to apply to applications made after the commencement of this item. This item commences on royal assent to the bill.
161. Subitem 33(2) provides for sections 43A and 43B to apply in relation to conduct engaged in after the commencement of this item. This item commences on royal assent to the bill.

Schedule 3 – Other amendments

Part 1 – Administrative improvements

Item 1 – Section 7

162. Item 1 provides a definition of Commonwealth Department.

Item 2 – Section 7

163. Item 2 provides that the definition of “Federal court” is the Federal Court of Australia.

Item 3 – Section 7 (definition of offence against this Act)

164. Item 3 repeals the definition of “offence against this Act” in section 7 and substitutes text. The repealed definition included the phrase “an offence against the regulations”.
165. This is a consequential amendment as item 6 of this Schedule provides that “this Act” includes regulations, and other legislative instruments, made under this Act. The references to the offences against the *Crimes Act 1914* and the *Criminal Code* remain the same.

Item 4 – Section 7 (definition of participating State or Territory)

166. Item 4 repeals the definition of participating State or Territory in the Act (“has the meaning given by subsection 18(5)”), as item 6 of Schedule 3 Part 1 repeals subsection

18(5). Item 4 replaces this with “a State or Territory is a participating State or Territory if there is a corresponding State-Territory law for the State or Territory.”

Item 5 – Section 7 (definition of supply)

167. Item 5 repeals the definition of supply and replaces it with a new section 7A.

Item 6 – Section 7

168. Item 6 inserts a new definition into section 7, providing that “this Act” includes the regulations and legislative instruments made under this Act.

169. This definition makes clear that the scheme is embodied in both primary and subordinate legislation. This is especially important now as the registration elements of the scheme are now in a legislative instrument under subsection 26(1).

170. One example of where this definition is useful is at section 66, which provides that the purpose of the WELS Account is to make payments to further the objects of this Act. For the purposes of the legislative instrument made under subsection 26(1), this definition allows the WELS Account to be used in the operation of the registration elements of the scheme.

Item 7 – At the end of Part 2

171. Item 7 inserts a new section 7A.

172. Section 7A redefines supply as providing products by way of sale, exchange, gift, lease, loan, hire or hire-purchase.

173. Offer to supply and supply of a WELS product as part of another thing are also included. Supply also includes the supply of WELS products online on websites. “Thing” is described as including a fitting or fixture but is also intended to include other matters such as supply of a product as part of a service.

174. “Re-supply” is intended to encompass supply in a supply chain, where for instance the importer resupplies it to the wholesaler who then resupplies it to the retailer. This will only apply to the re-supply of “new” WELS products as the WELS standard only applies to new products.

175. Supplies covered by this definition are only those which occur in the course of trading or commercial activities, for example a “free tap set provided with each vanity unit sold” rather than a gift given in a personal context e.g. from parent to child.

176. The amendments have been made to make more explicit the inclusion of matters such as hire and lease (which were previously made explicit in the original explanatory memorandum for the Act, but were not explicit in the Act itself).

177. It also broadens the definition to include the wider range of ways in which WELS products are supplied, such as the “supply” of WELS products in or as part of new dwellings such as display homes, renovated kitchens, laundries or bathrooms, or through service provision such as plumbing service contracts.

178. This is intended to provide a regulatory environment which has more equal application to the various suppliers of WELS products (as previously only those in the retail supply chain were explicitly covered by the Act). It is also intended to ensure that consumers

who are buying WELS products as part of another thing are made aware of the water efficiency of those products at the time of purchase.

Item 8 – Subsection 18(1)

179. Item 8 amends subsection 18(1) for clarity, so that it uses the defined term “water-use products” rather than the undefined “water-use”.

Item 9 – Subsection 18(5)

180. This item repeals subsection 18(5) and substitutes text.
181. Item 9 provides that the requirement at subsection 18(4) (that the Commonwealth Minister must have agreement to the terms of the determination from a majority of the participating States and Territories) does not apply where the determination is varied in order to remove an ambiguity or uncertainty or to correct an error in the determination. As noted above, this is also provided for at subsection 26(5), for a legislative instrument made under subsection 26(1).
182. In the absence of the new subsection 18(5), formal State and Territory agreement must be obtained before any change is made to the determination - even for a change as simple as correcting a typographical error. This consultation process associated with obtaining this agreement can delay the commencement of the determination by 2-3 months.
183. This item applies to determinations made after the commencement of this schedule, i.e. on royal assent (subitem 21(1) of Schedule 3).

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

184. Item 10 repeals paragraphs 19(3A)(a) and (b) and substitutes text.
185. Paragraphs 19(3A)(a) and (b) were inserted into the Act as part of the *Water Efficiency Labelling and Standards Amendment Act 2011*. This provided for the WELS standard to refer to matters in other documents (including the Plumbing Code of Australia or an Act or regulations made by a State or Territory) as in force from time to time.
186. Item 10 remakes this provision so that it allows the Commonwealth Minister to more easily include a State or Territory plumbing requirement imposed by or under a State or Territory law in the WELS standard. Previously this provision referred to “requirements relating to plumbing that are contained in a specified document”.
187. As previously, it is intended that the plumbing requirements imposed as part of the WELS standard would be incorporated as they exist from time to time. This is because plumbing requirements change regularly to keep pace with industry developments as well to reflect changes in rules. Those working with plumbing requirements are kept well informed of any such changes and are able to easily access those requirements.
188. This item commences upon royal assent to the bill, however 19(3A)(a) and (b) with the proposed text are renumbered to 19(3)(c) and (d) respectively on commencement of Schedule 3 Part 2 (1 November 2013).

Item 11 – Sections 21 and 22

189. Item 11 repeals sections 21 and 22 and substitutes text.

Section 21 – The Regulator

190. Subsection 21(1) provides that the Commonwealth Secretary must, in writing, designate a position in the Commonwealth Department (defined in section 7) as the position of Regulator.
191. Subsection 21(2) provides that the position of Regulator can only be occupied by an SES employee.
192. Subsection 21(3) provides that the “Regulator” is the SES employee who occupies that position.
193. Subsection 21(4) provides that an instrument under 21(4) is not a legislative instrument. It is for the assistance of readers, as the instrument is not a legislative instrument within the meaning of section 5 of the LIA.
194. The Regulator is designated as a member of the SES for a number of reasons. Firstly, although the ability to delegate statutory power is provided for at section 25 of the Act, having a Regulator who is not the Secretary of the Department provides for a WELS Regulator who has more hands on knowledge of the operation of the WELS scheme. This is intended to increase the cost-effectiveness and efficiency of the scheme. The aim is to have efficient processing times of decisions as well as making sure the powers are used appropriately and accountability is ensured. Similar schemes also provide for the Regulator to be a SES officer rather than the head of the Department.
195. Item 21 of this Schedule provides that although section 21 is being repealed, the Commonwealth Secretary of the Department remains the WELS Regulator until a designation is made. This transitional provision is intended to ensure that there is continuity in the position of WELS Regulator and that there will always be a WELS Regulator.

Section 22 – Functions of the Regulator

196. Item 11 provides a list of functions of the Regulator. Section 22 redefines the Regulator’s functions into a more succinct list which is nevertheless intended to have broad ranging coverage.

Item 12 – Paragraphs 47(a), and 58(2)(a)

197. Item 12 omits “or the regulations” from paragraphs 47(a) and 58(2)(a). This is consequential upon the new definition of “this Act” in item 6. As the definition of “this Act” includes regulations, there is no need to refer to regulations as well.

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

198. Item 13 omits “, the regulations” from paragraphs 65(b), 66(b) and 68(a). This is consequential upon the new definition of “this Act” in item 6. As the definition of “this Act” includes regulations, there is no need to refer to regulations as well.

Item 14 – Subsections 71(3) and (4)

199. Item 14 repeals the subsections 71(3) and (4) and substitutes text.
200. To ensure efficient and effective operation of the scheme this section is amended to also allow a person other than the Regulator to internally review reviewable decisions. The provision requires that review of a reviewable decision is carried out by either the Regulator or a person to whom the Regulator’s power is delegated (and who was not involved in the original decision-making and more senior to any person involved in making the decision). The Regulator or reviewer may make a decision reaffirming, changing or overturning the original decisions and if the decision is overturned, make an alternative decision.
201. This item applies in relation to a reviewable decision made after the commencement of item 14, which is on royal assent (subitem 21(2) of Schedule 3).

Item 15 – Paragraph 72(1)(b)

202. Item 15 omits “by the Regulator” from paragraph 72(1)(b). This is consequential upon subsections 71(3) and (4), which allow a person other than the Regulator to internally review reviewable decisions.
203. This amendment ensures that an application may continue to be made to the Administrative Appeals Tribunal from an internal review decision, whether or not it is made by the Regulator personally.

Item 16 – After subsection 76(1)

204. Item 16 inserts subsection 76(1A) which provides that the Commonwealth Minister must cause further independent reviews of the operation of the WELS scheme to be undertaken in not more than five years intervals. The last review was conducted in June 2010, and the next review must therefore be conducted within five years of that review.

Items 17, 18 – Subsections 76(2) and (3)

205. Items 17 and 18 are consequential amendments because of item 16.

Item 19– Paragraph 77(2)(a)

206. Item 19 is a consequential amendment from item 6. As the definition of “this Act” includes regulations, there is no need to refer to regulations as well.

Part 2 – Removal of voluntary registrations

Item 20 – Subsection 19(2) to (4)

207. Item 20 repeals subsections 19(2) to 19(4) and substitutes text.
208. Subsection 19(2) now only provides for mandatory registration. Previously voluntary registration was provided for the Act. This change is intended to make the WELS scheme more efficient, effective, fair to all registrants and informative to consumers, so

that where a Minister includes a type of product in the scheme, all such products intended to be included are mandatorily included.

209. Subsection 19(3) provides the kinds of thing the WELS standard may require, such as to comply with specified minimum water efficiency requirements for the purposes of specified supplies of the product. Subsection 19(3) amalgamates some of what is already in section 19.
210. Note that paragraph 19(3)(c) and (d) are modified text of subsection 19(3A), introduced as part of the amendments to the Act in 2011, as per item 10 of this Schedule.
211. Note also that subitem 21(3) provides that item 20 applies in relation to WELS standards made after the commencement of that time, i.e. after 1 November 2013. The intention of subsection 19(2) is that a determination made after 1 November 2013 determining which products are WELS products can only determine mandatory registration for products.
212. The commencement of this provision on 1 November 2013 to ensure that there is enough notice to industry about the mandatory registration of products. The WELS Determination 2011 specifies that all products are mandatory except for flow controllers.

Part 3 – Application and transitional provisions

Item 21 – Application of amendments

213. Subitem 21(1) provides that a legislative instrument can only be corrected under the new subsection 18(5) if the legislative instrument was made after that subsection takes effect i.e. on royal assent.
214. Subitem 21(2) provides that a reviewable decision may only be reviewed under new subsections 71(3) and (4) if the reviewable decision was made after those subsections take effect i.e. on royal assent.
215. Subitem 21(3) provides that the amendments made to subsections 19(2) to (4), which remove the ability for a standard to allow for voluntary registration, apply only in relation to WELS standards made after that item takes effect i.e. 1 November 2013.

Item 22 – Transitional provision

216. Item 22 provides that the Commonwealth Secretary continues to be the Regulator until a designation under section 21 is made. For the reasons outlined in relation to amendments at item 11 of Schedule 3, it is intended that the Regulator will be changed to a SES employee as soon as practicable after the commencement of the provision.

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 (Scheme Enhancements) Bill 2012

This Bill 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 Bill

The Bill makes amendments to the *Water Efficiency Labelling and Standards Act 2005* to improve the efficiency and effectiveness of the WELS scheme.

The Bill will allow the registration aspects of the scheme to be defined by Ministerial determination as well as introducing civil penalties to mirror existing and amended criminal offences.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

Parliamentary Secretary for Sustainability and Urban Water,

Senator the Hon Don Farrell