



Australian Government

WATER  
RATING

# Compliance and Enforcement Policy

## Water Efficiency Labelling and Standards scheme

Water Efficiency Labelling and Standards Regulator

2017

The Water Efficiency Labelling and Standards (WELS) scheme is an Australian Government initiative in partnership with state and territory governments.



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# Introduction

The Water Efficiency Labelling and Standards (WELS) scheme is established and operates under the *Water Efficiency Labelling and Standards Act 2005* (Cth) (WELS Act) and corresponding state and territory legislation. The WELS scheme is a cooperative initiative between the Australian Government, state and territory governments and industry. The Australian Government administers the scheme on behalf of the other governments.

The objects of the WELS Act are:

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

A recent review of the WELS scheme estimates that the scheme could result in water savings of about 2 835 gigalitres by 2030, and that savings attributable to the scheme as of 2015 could have an economic value of up to \$1.5 billion. These findings demonstrate that the WELS Act is an effective regulatory framework that is meeting its objects.

Under the WELS Act, the WELS Regulator has a range of functions and powers relating to the overall administration of the WELS scheme.

The functions of the WELS Regulator are:

- to administer the WELS scheme
- to provide information and advice in relation to the WELS scheme
- to undertake or commission research in relation to the WELS scheme
- to monitor and enforce compliance with the WELS scheme
- such other functions as conferred on the Regulator by the WELS Act or any other law.

The WELS Regulator may implement a range of compliance and enforcement responses when acting in regard to suspected non-compliance with the WELS Act, ranging from the provision of advice and education through to undertaking civil litigation and criminal offence proceedings.

# Purpose

The WELS Scheme Compliance and Enforcement Policy sets out the approach taken by the WELS Regulator to:

- maximise compliance with the requirements of the WELS Act
- assist in making defensible decisions in accordance with a sound risk-based framework when undertaking compliance and enforcement actions.

The policy guides the Regulator in undertaking industry-wide compliance and enforcement in an efficient and effective manner.

The policy complements the department's [corporate plan](#) and broader Australian Government law enforcement policy and helps industry participants understand their obligations and the WELS Regulator's approach to resolving non-compliance.

The policy is supported by:

- the WELS Compliance and Enforcement Strategy 2017—to be developed in consultation with industry to guide and focus compliance and enforcement activity from 2017 to 2019
- [WELS Infringement Notice Statement 2017](#).

# Principles

The WELS Regulator's approach to compliance and enforcement is underpinned by these principles:

- encouraging voluntary compliance—industry participants will be helped to understand their obligations as a way of supporting and encouraging voluntary compliance
- being fair and respectful—compliance and enforcement activities will be undertaken in a manner that is in accordance with the law, fair and impartial, respectful of individuals and within the officers' authority
- providing due process in decision-making—procedural fairness and natural justice will consistently be applied to all participants
- taking a consistent approach—the WELS Act will be administered and enforced in a coherent, consistent and objective manner
- good governance and transparency—the Regulator's decisions will be underpinned by clear corporate governance processes that will be transparent and defensible
- risk-based approach—compliance and enforcement will be undertaken in a manner that is proportionate to the risks, is cost effective, maximises compliance and achieves the objectives of the WELS Act
- behaviour of the regulated entities—entities that choose to be non-compliant or uncooperative will be subject to stronger enforcement responses than those that are cooperative and willing to remedy inadvertent non-compliance.

# Compliance and enforcement: context and approach

The Regulator has identified the following key areas where compliance and enforcement is critical:

- registration of all WELS products supplied or offered for supply
- registered WELS products meet the applicable water-efficiency and performance standards
- only registered WELS products are supplied or offered for supply
- correct labelling and advertising of all WELS products supplied or offered for supply.

## Supply chain

The WELS scheme regulates the supply of WELS products. When considering compliance and enforcement activities and responses, the Regulator will have regard to the common supply chain, which results in the use of WELS products by consumers.

The key parts of the supply chain are:

- manufacturers of WELS products
- importers, retailers and/or wholesalers of WELS products
- installers of WELS products (noting the intersection between WELS and Watermark).

People who register WELS products are known as registrants. Registrants may occupy any point of the supply chain. A registrant is responsible for supplying accurate information to the WELS Regulator for registration, renewing registration and updating information so that registrations remain accurate in regard to the standards that apply to each registered product.

Each participant in the supply chain has a responsibility to comply with the WELS scheme.

## Manufacturers

Manufacturers are responsible for ensuring that the WELS products they manufacture are not supplied unless they are registered under the WELS scheme and comply with the performance, testing and labelling requirements of the standard for each product.

## Importers, retailers and wholesalers

Importers, retailers and wholesalers receive products from manufacturers and must take reasonable actions to ensure that they only supply or offer for supply WELS products that are registered, packaged and labelled in accordance with the standard for each product.

## Installers of WELS products

Installers who also supply the products they install must take reasonable actions to ensure that they only supply WELS products that are registered, packaged and labelled in accordance with the standard for each product. Licensed plumbers are required to install only plumbing products that

have a Watermark certification; in regard to WELS, a plumbing product may only be registered where it has Watermark certification.

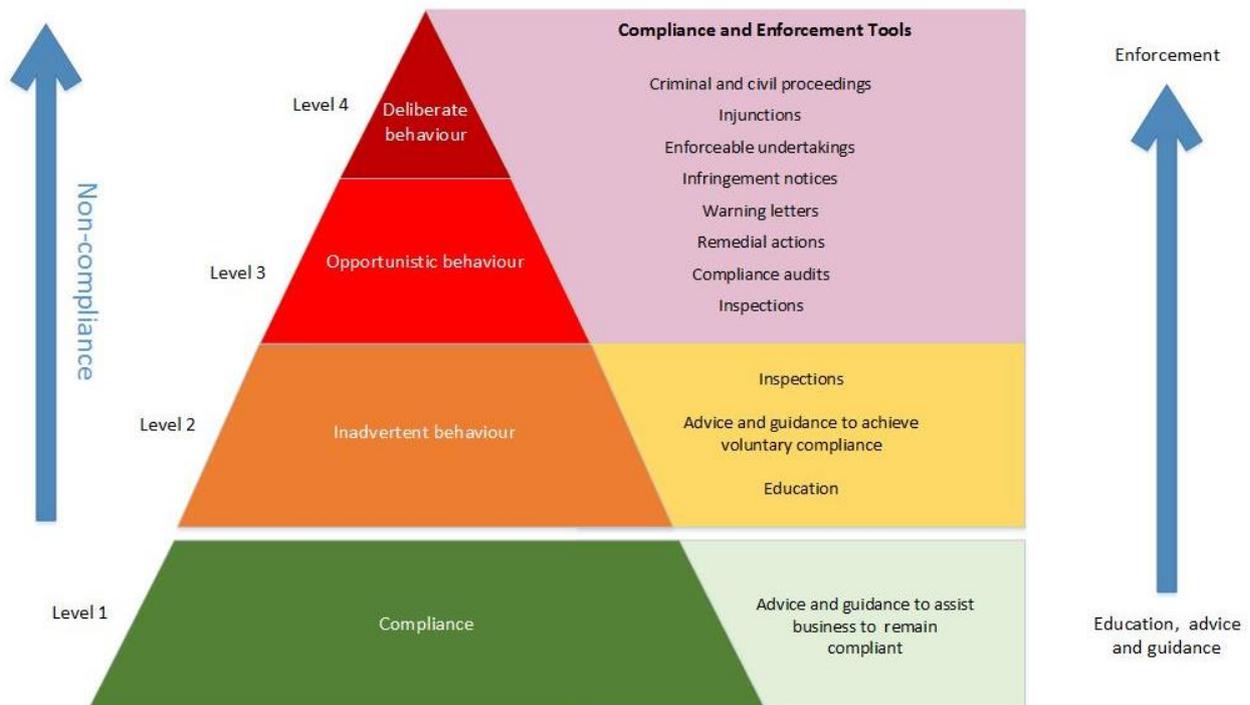
### WELS compliance management model

The WELS Regulator understands that most industry participants will comply or try to comply with their obligations, particularly where they are given an opportunity to do so or clearly understand what they have to do to be compliant. Working cooperatively with industry participants and encouraging voluntary compliance with the requirements of the WELS Act are considered to provide the most effective means of achieving widespread compliance.

The WELS Act provides the WELS Regulator with a range of tools to achieve compliance, deter and effectively rectify non-compliance. The choice of the most appropriate tools depends on the risks posed to the WELS scheme and on the attitude and behaviour of industry participants towards meeting their obligations. Where non-compliance cannot be resolved cooperatively, the Regulator will escalate an enforcement response using the full force of the law if necessary. This may result in penalties for continued non-compliance.

Figure 1 shows the relationship between attitude to compliance, behaviour in achieving compliance and the compliance and enforcement tools that may be applied.

**Figure 1 WELS compliance management model**



Source: Adapted from Ayres & Braithwaite 1992, *Responsive regulation: transcending the deregulation debate*

Level 1 of the compliance management model represents the majority of industry participants, who are aware of their obligations and have processes in place to ensure they continue to achieve compliance with those obligations. Guidance and advice will be provided as necessary to assist these participants to remain compliant.

Level 2 of the compliance management model represents industry participants that have not yet become compliant, though they are attempting to become compliant. Non-compliance by these participants is driven by factors such as not understanding all requirements or not having developed effective processes to allow them to achieve compliance. This is often because they are new participants in the WELS scheme or their business is rapidly growing. Their attitude and behaviour indicates that providing assistance in achieving compliance through advice, guidance and education, complemented by inspections, is likely to result in many of these participants moving to full compliance over reasonable time frames.

Levels 3 and 4 of the compliance management model represent those industry participants that are either resistant to compliance, choose not to comply where opportunity exists, or are deliberately non-compliant. Provision of further assistance to these participants is not likely to be effective in achieving compliance. Therefore, the likely response of the Regulator in these instances will be enforcement.

## **Assistance to achieve voluntary compliance**

The WELS Regulator recognises that engagement, education and provision of assistance in the first instance are the best approach to ensuring industry participants meet their obligations. The Regulator publishes resources and guidance information and provides advice to industry participants on the requirements of the WELS Act.

# Compliance monitoring

## Inspections

### Purpose

Undertaking inspections is a visible and reportable compliance activity. Inspections are an efficient and effective means of detecting and investigating non-compliance. Informing industry participants of the findings provides a pathway to enable corrective action to be undertaken.

Intelligence data obtained from a range of sources will be used to inform the nature, frequency and location of inspections and investigations.

### Intelligence data

Information provided by registrants to support the registration of WELS products such as test reports, Watermark certificates, performance results or further declarations about the products is stored in the WELS registration database.

Where inspections are undertaken, registration data provide a ready source of information against which compliance can be assessed. Registration information also provides a basis to examine performance claims relating to registered products. This may involve independent testing of products to verify performance claims.

Intelligence is also collected from reports of alleged non-compliance by industry participants, consumers and other regulators.

### Inspection programme

The WELS Regulator determines a programme of inspection of WELS products and premises each year based on its strategic priorities and available resources. The programme includes the inspection of publicly available information, including supplier websites and advertising material.

Part 9 of the WELS Act provides for the WELS Regulator to appoint WELS inspectors and sets out a range of powers that may be exercised in undertaking inspections and investigations. These powers relate to entry to premises and inspection of WELS products, associated written information and advertising, and collection of evidentiary material.

In undertaking inspections and investigations, the WELS Regulator may use powers that require a person to provide information or appear before a WELS inspector.

### Operation

Procedures for undertaking inspections, compliance assessment, collection of evidentiary material and undertaking enforcement actions are set out in Standard Operating Procedures and broader Australian Government policies.

# Enforcement tools

Where guidance and advice has not resulted in compliance or is not appropriate, enforcement action may be necessary to ensure that industry-wide compliance is achieved.

## Offences and contraventions

A range of offences in regard to registration and labelling of WELS products and use of WELS standards are set out in Part 7 of the WELS Act. In nearly all cases, a breach will give rise to a strict liability offence or liability for a civil penalty.

## Suspension and cancellation of registration

In accordance with the WELS Act and the Water Efficiency Labelling and Standards Determination 2013 (No. 2), the WELS Regulator will suspend or cancel the registration of a WELS product if:

- it has been altered in a way that affects its performance or compliance with the WELS standard and the registrant does not notify the Regulator
- the information provided in an application for registration was not accurate at the time of the application or is no longer accurate.

## Compliance audits

If the WELS Regulator suspects a person may be in breach of the WELS Act, the Regulator may, if satisfied that it would be in the public interest to do so, give the person a notice requiring them to undertake an audit of their compliance with the Act and provide the Regulator with a written report setting out the results of the audit.

Failure to comply with a compliance audit notice is an offence of strict liability and renders a person liable for a civil penalty.

Requirements in regard to compliance audits are set out in Part 8 of the WELS Act.

## Remedial action

If the WELS Regulator suspects that a person is in breach of the WELS Act, the Regulator may, if satisfied that it would be in the public interest to do so, give the person a notice requiring them to take specified action directed towards remedying the conduct and/or ensuring that the person does not engage in such conduct in the future.

Failure to comply with a remedial action notice is an offence of strict liability and renders a person liable for a civil penalty.

Requirements in regard to remedial action are set out in Part 8 of the WELS Act.

## Infringement notices

A person can be given an infringement notice if the WELS Regulator has reasonable grounds to believe that person has contravened certain provisions of the WELS Act.

The WELS Infringement Notice Statement 2017 sets out in more detail matters relating to the issuing of infringement notices.

## **Enforceable undertakings**

The WELS Regulator may use an enforceable undertaking, whereby a person agrees in writing to do certain things to comply with the WELS Act. If the Regulator considers that the person has breached any of the terms of the undertaking, an application may be made to the Federal Court for an order. If the court makes an order, that order may, among other things, direct the person to comply with the relevant term of the undertaking and may include the awarding of costs.

Requirements in regard to enforceable undertakings are set out in Part 8 of the WELS Act.

## **Injunctions**

If a person has engaged, is engaging in or is proposing to engage in conduct that was, is or would be in breach of the WELS Act, the WELS Regulator may apply to the Federal Court for an injunction restraining the person from engaging in the conduct or requiring the person to take action.

The circumstances in which the WELS Regulator may seek an injunction are where the contravention is serious and ongoing despite requests from the Regulator to remedy the contraventions.

## **Civil penalties**

Litigation may be initiated by the WELS Regulator in response to breaches of civil penalty provisions contained in the WELS Act.

Requirements in regard to civil penalty orders are set out in Part 8A of the WELS Act.

The circumstances in which the WELS Regulator may commence civil litigation seeking a civil penalty are where:

- the contravention is serious because of its impact or because of the behaviour of the person committing the breach having regard to the WELS compliance management model
- the contravention is of such a nature that it is important to deter others from similar conduct and it is considered that civil penalty litigation will have this effect
- other enforcement tools have been ineffective or are not appropriate given the nature of the contravention.

## **Criminal prosecution**

Where a criminal offence has occurred the WELS Regulator may refer a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP), who has the responsibility for prosecuting offences against Australian Government law.

The WELS Regulator may refer matters to the CDPP where:

- there is a real of potential harm to the Australian Government or the community
- the Australian Government or community would expect that an offence would be dealt with by a prosecution conducted in public before a court

- the offence is of such a nature or magnitude that it is important to deter other potential offenders and it is considered that a prosecution will have this effect
- previous administrative or civil responses have not prevented non-compliance.

If a matter is referred to the CDPP, the CDPP will make the final decision on whether a prosecution should be commenced.

## **Deciding which enforcement tool to use**

The WELS Regulator makes decisions about which enforcement tool to use when non-compliance is suspected or detected. The decision will be made in accordance with a risk-based framework, which considers matters such as the behaviour of the person who has been non-compliant and the impact of the non-compliance. This will ensure that the tool chosen to resolve any non-compliance is proportionate to the associated risk and that the resources applied are commensurate with the impact of the non-compliance.

The WELS Regulator has undertaken a risk assessment of the compliance obligations that must be met by industry participants. This enables the WELS Regulator to identify the relative risk associated with a suspected non-compliance. The factors that the WELS Regulator will take into account when making a risk-based decision include:

- the behaviour of the person who has been non-compliant, taking into account the compliance management model, including their compliance history with the WELS Regulator
- the role of the person in the supply chain—a person who has inadvertently received non-compliant WELS products will be treated differently to a person who has falsely supplied non-compliant WELS products
- the impact of the non-compliance—non-compliant WELS products that have been supplied or offered for supply as compliant WELS products will have the greatest impact
- the number of WELS products involved in the non-compliance
- the degree of misinformation through non-compliance with labelling requirements—minor errors on labelling are considered less serious than fraudulent labels
- the degree of non-compliance with the relevant water-efficiency and performance standards—minor departures from the requirements of the standard will be treated differently from departures that result in significant reduction in water efficiency.

# Reporting and information sharing

Information on compliance and enforcement undertaken by the WELS Regulator will be included in the annual report required under the WELS Act. Compliance and enforcement reporting will be aggregated and will not refer to individual cases except as permitted under the Act.

In undertaking compliance and enforcement, the WELS Regulator may share information with other regulators such as the Australian Taxation Office, Australian Competition and Consumer Commission, Australian Building Codes Board, Greenhouse and Energy Minimum Standards (GEMS) and state and territory government consumer protection agencies. Information sharing will be undertaken in accordance with the WELS Regulator's obligations under privacy laws.