

Compliance and Enforcement Options under the WELS Act (effective 23 July 2012)

New compliance and enforcement provisions in the *Water Efficiency Labelling and Standards Act 2005* (Cth) (the **WELS Act**) came into effect on 23 July 2012. The following options are now available to the Regulator in response to contraventions of the WELS Act. The range of options available includes administrative measures, civil remedies and criminal penalties.

Prosecution (Criminal)

Prosecution may be sought in response to offences contained in the WELS Act. A successful prosecution requires establishing the existence of each element of the offence beyond reasonable doubt.

Offences that attract strict liability remove the need for the prosecution to prove fault by the corporation or individual accused of committing an offence. The only defence available against an offence attracting strict liability is the defence of mistake of fact.

Sections 6.1 and 9.2 of the Schedule of the **Criminal Code Act 1995** describe strict liability and mistake of fact respectively.

Litigation (Civil)

Litigation may be initiated by the Regulator in response to breaches of civil penalty provisions contained in the WELS Act. A lower standard of proof is required (compared to a criminal prosecution), where it is only necessary to establish that a contravention has occurred on the balance of probabilities.

Intent does not need to be established for civil penalties.

Cancelling or suspending registration (Section 31)

Registration of WELS products may be cancelled or suspended on a number of grounds including, (1) if conditions of registration were not complied with or (2) if information provided in an application for registration of a WELS product was not accurate at the time of the application or is no longer accurate as a result of changes to the product.

Infringement notices (Section 40)

Infringement notices are an alternative to prosecution which provide a timely and measured enforcement response to contraventions for which a predetermined penalty is deemed appropriate and commensurate with the level of the offence.

An infringement notice specifying a penalty may be issued if the Regulator has reasonable grounds to believe that a person has committed an offence. Payment of the fine is provided as an alternative to prosecution.

The fine amount permitted in an infringement notice is one-tenth of the maximum that a court could impose as a penalty for that offence. For an **offence by an individual**, the maximum a court could impose is \$10 200, whereas the maximum penalty that could be imposed by an infringement notice for the same offence is \$1020. For an **offence by a corporation**, the maximum a court could impose for the same offence is \$51 000, whereas the maximum penalty that could be imposed by an infringement notice for the same offence is \$5100.



Enforceable undertakings (Section 42 and Section 43)

An enforceable undertaking is a written undertaking, to do specified things, given by a person to the Regulator to become compliant as a remedy for an alleged breach of the WELS Act. Because giving an enforceable undertaking demonstrates a commitment to improving compliance, the Regulator takes this into account when determining whether to pursue other enforcement options such as criminal prosecution or civil penalties.

Enforceable undertakings are voluntary on the part of both parties, and are binding on the party offering the enforceable undertaking. They offer the potential to obtain a timely and cost-effective regulatory outcome, whilst avoiding unnecessary up-front involvement in alternative remedies which may be protracted, resource-intensive and/or unable to best address the harm caused.

Actions that typically form part of an enforceable undertaking include undertaking an internal and/or independent audit, implementing a record system for keeping track of WELS products, delivering a compliance training program to staff and acknowledging that the Regulator may make the undertaking publicly available and make public reference to it including in news media statements.

If an enforceable undertaking is accepted by the Regulator, and the person who gave the undertaking has breached any of its terms, the Regulator may apply to the Federal Court for an order that the person, among other things, comply with the enforceable undertaking.

Compliance audits (Section 43A)

The Regulator may require a person to conduct an audit of their compliance with the WELS Act. This involves, for instance, preparing an inventory of WELS products, noting the WELS registration status and labelling details.

In response to an audit report, the Regulator may undertake follow-up activities such as an enforceable undertaking, an infringement notice or a remedial action order under section 43B or may simply prompt the person to take action to be fully compliant with the WELS Act in the absence of a punishment.

Remedial action (Section 43B)

This allows the Regulator to better achieve the objects of the WELS Act in the absence of punishment for those persons who breach its provisions.

Remedial action could cover a range of actions, for example, to:

- require a person to provide new, corrected labels in shops;
- require a person to change information on labels to make them compliant with the WELS standard;
- require staff to be trained about how to comply with the WELS Act;
- require a person to set up store compliance record systems to record compliance with the WELS Act; or
- require a person to cease supplying a WELS product that has a non-compliant star rating label.



Injunctions (Section 44)

The Regulator may apply to a Court to seek an injunction where a person has engaged, is engaging or is about to engage, in any conduct that would be an offence or contravention of the WELS Act. The effect of an injunction is to restrain the person from engaging in the conduct (e.g. to remove products from supply).

Injunctions are particularly useful as timely action to prevent further activity arising from the offending conduct.

An injunction may be obtained to require a WELS product supplier to engage in certain conduct.

Civil penalty orders (Section 44A)

The Regulator may apply to a relevant court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.

Giving WELS information to WELS inspectors (Section 61)

The Regulator may issue a written notice requiring a person who has WELS information to give specified information and supporting evidence (e.g. books, records or documents) to a WELS Inspector.

Requiring a person to Appear before a WELS inspector (Section 62)

The Regulator may issue a written notice requiring a person who has WELS information to appear before a WELS Inspector to answer questions or produce specified material (e.g. books, records or documents).

Further information

For further information about WELS compliance please call 1800 218 478 or email WELSCompliance@environment.gov.au

