

EXPLANATORY STATEMENT

Issued by the Parliamentary Secretary to the Minister for the Environment

Subject - *Water Efficiency Labelling and Standards Act 2005*

Water Efficiency Labelling and Standards (No.2) Amendment Determination 2015 (No. 1)

The *Water Efficiency Labelling and Standards Act 2005* (the Act) establishes the Water Efficiency Labelling and Standards (WELS) scheme which applies national water efficiency labelling and minimum performance standards for prescribed water-use products or water-saving products. This delivers water conservation benefits by enabling consumers to choose between products based on their water efficiency.

The WELS 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.

Subsection 18(1) of the Act provides that the Commonwealth Minister (the Minister) may determine, in writing, that water-use products or water-saving products of a specified kind are 'WELS products'. Under subsection 18(2) of the Act, a determination made under subsection 18(1) must set out, or incorporate by reference, the WELS standard AS/NZS6400 (the WELS Standard) for those products. The WELS Standard sets out the criteria for rating the water efficiency and/or performance of each WELS product type. To do this the Minister is required under subsection 18(4) of the Act to have agreement to the terms of the determination from a majority of the participating states and territories. This state and territory consultation process has been undertaken and majority agreement reached.

Subsection 19(1) of the Act provides that the WELS standard must set criteria for rating WELS products in relation to either their water efficiency or general performance, or both. It must also set out criteria in relation to labelling WELS products. Subsection 19(2) of the Act provides the WELS standard must require WELS products to be registered for specified supplies of the product.

Subsection 26(1) of the Act provides that the Minister must, by legislative instrument, formulate a scheme relating to the registration of WELS products. Subsection 26(2) sets out that the scheme may make provision for various matters including (but not limited to) applications for registration of WELS products (including renewal of registration), registration fees and the period of registration.

The *Water Efficiency Labelling and Standards (No. 2) Determination 2013* (the Principal Determination) sets out the water-use or water-savings products that are WELS products, the WELS standard and WELS standard requirements, the application processes for registering new WELS products or renewing registration for currently registered WELS products, the waiver and refund of fees, the registration of products, and the register of WELS products.

The purpose of the *Water Efficiency Labelling and Standards (No. 2) Amendment Determination 2015 (No. 1)* (the Determination) is to:

- (a) define the term '*minor product*' for the purposes of applications made under sections 9 and 10 of the Principal Determination. Section 9 of the Principal Determination sets out the application process for the registration of new WELS products. Section 10 of the Principal Determination sets out the application process for renewing the registration

for registered WELS products i.e. a registrant for a registered WELS product may apply in writing to the Regulator to register the product for a further period.

- (b) decouple the definition of a WELS product in section 6 of the Principal Determination from the WELS Standard which is referenced in section 7 of the Principal Determination. Currently, section 6 provides that a water-use or water-saving product of any of the kind listed in section 6 is a WELS product if the WELS standard applies to it. The Determination consolidates the criteria to determine if a water-use or water-saving product is a WELS product and does not link the definition of WELS products to the WELS Standard.
- (c) provide that if, in the charging year (i.e. a period starting on 15 September as defined in section 5 of the Principal Determination) in which registration of a WELS product would end, and a person does not apply to renew the registration of a product in accordance with subsection 10(3) of the Principal Determination (i.e. providing the Regulator with information regarding minor products), the product will be registered until 21 July in that charging year.

Details of the Determination are set out in the Attachment.

In accordance with subsection 18(4) and 26 (4) of the Act, the Commonwealth provided each participating state and territory with a copy of the draft Determination for consultation and it was agreed by a majority of the States and Territories. The Standards Australia Committee WS-032, comprised of industry representatives, was also provided with a copy of the draft Determination for consultation purposes prior to making this determination.

The Determination is a Legislative Instrument for the purposes of the *Legislative Instruments Act 2003*.

The Determination would commence on 22 January 2015.

Details of the *Water Efficiency Labelling and Standards (No. 2) Amendment Determination 2015 (No.1)*

Section 1 – Name

This section provides that the title of the determination is the *Water Efficiency Labelling and Standards (No. 2) Amendment Determination 2015 (No. 1)* (the Determination).

Section 2 – Commencement

This section provides that the Determination commences on 22 January 2015.

Section 3 – Authority

This section provides that the Determination is made under the *Water Efficiency Labelling and Standard Act 2005* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable terms in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Section 5

This item amends section 5 of the *Water Efficiency Labelling and Standards Determination 2013 (No. 2)* (the Principal Determination) to include a definition of **minor product**. Minor product has the meaning given by subsections 5A(1) and (2) of the Determination.

Item 2 – At the end of Part 1

Item 2 inserts new section 5A at the end of Part 1 of the Principal Determination. New section 5A defines the term **minor product** for applications to register a minor product under sections 9 and 10 of the Principal Determination. Section 9 of the Principal Determination sets out the application process for the registration of a new WELS product. Section 10 of the Principal Determination sets out the application process for renewing the registration of a registered WELS product i.e. a registrant for a registered WELS product may apply in writing to the Regulator to register the product for a further period.

Currently, the term **minor product** is not defined in the Principal Determination. Subsection 5(3) of the *Water Efficiency Labelling and Standards (Registration Fees) Determination 2013* (the Registration Fees Determination) does in part deal with minor products. The subsection provides that two or more WELS products are taken to be a single product when calculating registration fees if the criteria specified in paragraphs 5(3)(a)-(d) of the Registration Fees Determination are satisfied.

Currently, the Regulator makes decisions about whether two or more WELS products are taken to be a single product when calculating registration fees. The Regulator is designated by the

Secretary of the Department of the Environment pursuant to subsection 21(1) of the Act. Under subsection 21(2) of the Act this position can only be occupied by a Senior Executive Service employee.

The Regulator's power to make decision about whether two or more WELS product are taken to be a single product when calculating registration fees cannot be delegated to an Australian Public Service employee.

The inability to delegate the Regulator's powers to an APS employee has created inefficiencies in relation to registering two or more WELS product taken to be a single product i.e. minor products. Further, it is inconsistent with the registration process for a single WELS product where, in accordance with subsection 25(1) of the Act, the Regulator is able to delegate this power to an officer or employee of an agency of the Commonwealth.

Inserting a definition of *minor product* in new section 5A rectifies the above-noted inefficiencies. It also means decisions to register a minor product are captured by the delegations' power in subsection 25(1) of the Act.

Subsection 5A(1) of the Determination provides a WELS product is a minor product for an application under section 9 of the Principal Determination if the person satisfies the Regulator that fewer than 100 units of the product are expected to be sold in Australia in a period of 12 months specified by the Regulator.

Subsection 5A(2) of the Determination provides a WELS product is a minor product for an application under section 10 of the Principal Determination if the product was a minor product under subsection 5A(1) and either one of the following are satisfied: (a) the Regulator has not given the person a notice under subsection 5A(3) of the Determination; or (b) the Regulator has given the person a notice under subsection 5A(3) in relation to the product and the Regulator is satisfied that the information provided satisfies the matters in paragraph 5A(3)(a) or (b).

Subsection 5A(3) of the Determination provides that if a person seeks to renew the registration of a minor product under section 10 of the Principal Determination, the Regulator may, by notice in writing, ask the application for information to satisfy the Regulator that the product meets the criteria to be defined as a minor product. This includes information that few than 100 units of the product were sold in Australia in the period of 12 months specified in the notice (paragraph 5A(3)(a); or fewer than 100 units of the product are expected to be sold in Australia in the next period of 12 months (paragraph 5A(3)(b)). It is intended that the Regulator will not invoke this power for applicants with 10 or fewer WELS products registered.

Item 3 – Part 2 (heading)

Item 3 repeals the current heading for Part 2 of the Principal Determination “Part 2 – Determination and registration of WELS products” and replaces it with a new heading “Part 2 – WELS products and WELS standards”.

Item 4 – Section 6, Item 5 – Paragraph 7(a) and Item 6 – Subsection 8(2)

Item 4 repeals and replaces section 6 of the Principal Determination to decouple the definition of a WELS product from the WELS Standard AS/NZS 6400 (the WELS Standard) and consolidates the criteria to determine if a water-use or water-saving product is a WELS product entirely within section 6.

Currently, section 6 of the Principal Determination lists the types of water-using or water-saving products that are captured under the WELS scheme. The list includes: showers, dishwashers, clothes washing machines, lavatory equipment, urinal equipment, tap equipment and flow controllers, and refers to the WELS standard in section 7 of the Principal Determination to further define those products.

Coupling the definition of a WELS product to the WELS Standard has limitations such as, excluding products that utilise new technology because they are not covered by the product specific standard called up by the WELS Standard. For example, a new technology for toilets (i.e. a highly water efficient toilet that could be the first toilet eligible for a 6 star rating) has been approved by the WaterMark Certification Scheme as fit for purpose. The WaterMark Certification Scheme is a mandatory certification scheme for plumbing and drainage products to ensure that plumbing and drainage materials and products are fit for purpose, and appropriately authorised for use in plumbing installations. However, the new technology is not covered by the lavatory standards called up by the WELS standard. This means the highly water efficient toilet cannot be registered and labelled as a WELS product.

A further limitation of coupling the definition is that it captures products that do not effectively contribute to the objects of the Act and, constitute an unnecessary burden on business. For example, suppliers have made enquires to the Department of the Environment regarding registration requirements for tap equipment attached to a mobile bench intended for outdoor use with a barbeque. The tap itself does not connect to the main water or the sewerage system. It attaches via garden hose, to an outdoor tap and drains into a bucket. This is a low volume product and the use of water is likely to be minimal, and also controlled to a large extent by the garden tap. Currently, under section 6 of the WELS Determination, such a product is captured under 'tap equipment' and requires the manufacturer to register such products before supplying them to the market. The registration of such products is unlikely to contribute effectively to meeting the objects of the WELS Act and constitutes an unnecessary burden on business.

Where possible, the terminology used in the WELS Standard has been retained to allow industry participants to maintain a level of familiarity with the definitions. For example, paragraph 6(b) captures "fixed showers that are for use exclusively for personal bathing". In this example, the word 'personal' has been retained and ensures only fixed showers intended for a person, not an animal, are captured. These do not necessarily have to be for domestic use, this would also capture public showers at the beach or local swimming pool.

The amendments have also removed ambiguities contained in the WELS Standard to allow products to be definitively included or excluded from the WELS scheme. For example, "for household or similar use" has been removed from the definition of both electric dishwashers and electric clothes washing machines, and has been replaced by "for household use". This ensures the WELS scheme only captures machines intended for the household market. Machines intended to be used for a commercial purpose, such as a coin-operated electric clothes washing machine, would be excluded from this definition.

Item 5 repeals and replaces paragraph 7(a) of the Principal Determination to provide that the WELS Standard for products mentioned in section 6 is limited to the performance, testing and labelling requirements of the Standard. This ensures that while the WELS Standard will no longer define a WELS product, the performance of products mentioned in section 6 will still need to be tested and labelled in accordance with it.

Item 6 is a consequential amendment required as a result of item 4 re-ordering the list of WELS products contained in the paragraphs of section 6. Item 6 ensures that the relevant WELS products, specifically those captured by subsections 6(a), (b), (e), (f), and (g), must comply

with either section G of the Plumbing Code of Australia (section G contains the procedures for certification of plumbing and drainage products), or section 2.2 of Part 1 of the Plumbing and drainage set AS/NZS 3500.

Item 7 – After section 8

Item 7 inserts a heading after section 8 titled “Part 2A – Registration of WELS products”.

Item 8 – At the end of section 9 and Item 9 – At the end of section 10

Items 8 and 9 respectively add subsections (5) and (6) to sections 9 and 10 of the Principal Determination. The subsections provide that an application made under the relevant section may relate to a product that is a minor product. This allows decisions to register a minor product to be captured under current delegations authorised by subsection 25(1) of the Act.

Item 10 – Subsection 13(1), Item 11 – After subsection 13(1) and Item 12 – Subsection 13(2)

Section 9 of the Principal Determination places responsibility for registering a WELS product on the manufacturer of that product, or on an importer or any other person provided that person has the written agreement of the manufacturer. This registration framework can create a situation where the product manufacturer could let the product’s registration lapse whilst there are still other persons, a retailer for example, with the stock on hand and unable to obtain the written agreement of the manufacturer to register the product. In this situation, subsection 33(1) of the Act would make it an offence for a retailer to supply the unregistered stock.

Item 11 rectifies this problem by inserting new subsection 13(1A) to provide that if in the charging year in which registration of a WELS product would end, and no application to renew the registration of a product is made in accordance with subsection 10(3), the product will be registered until 21 July in that charging year. This will provide all relevant parties in the supply chain an appropriate amount of time to clear stock that is not intended to be registered under section 10 of the Principal Determination, and allow manufacturers to alert their customers that they intend to cease registration of a certain product.

Items 10 and 12 are consequential amendments required due to the amendments contained in Item 11.

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 (No. 2) Amendment Determination 2015 (No.1)

Overview of the Legislative Instrument

The *Water Efficiency Labelling and Standards (No. 2) Amendment Determination 2015 (No.1)* amends the Water Efficiency Labelling and Standards Determination 2013 (No. 2) (the Principal Determination) to:

- define the term ‘*minor product*’ for the purposes of applications to (a) register a new water efficiency and labelling scheme (WELS) products under section 9 of the Principal Determination; (b) and to renew the registration of registered WELS products under section 10 of the Principal Determination;
- consolidate the criteria to determine if a water-use or water-saving product is a WELS product and does not link the definition of WELS products to the WELS Standard AS/NZS 6400; and
- clarify the registration period for minor product where a person does not renew the registration for the minor product/s in accordance with subsection 10(3) of the Principal Determination. Subsection 10(3) specifies the time period in which applications can be made.

Human rights implications

This Legislative Instrument has been assessed against the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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

Conclusion

This Legislative Instrument is compatible with Australia’s human rights obligations as it does not raise any human rights issues.

The Honourable Bob Baldwin MP, Parliamentary Secretary to the Minister for the
Environment