



**Australian Government**

**Department of the Environment and Water Resources**

## WELS Compliance Risk Management Framework

*Water Efficiency Labelling and Standards Act 2005 (the WELS Act)*



Version (March 2007)

This is a WELS Compliance Risk Management working document.  
Prepared by the Water Policy Branch  
Department of the Environment and Water Resources



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# 1 OVERVIEW

## 1.1 Objective of the Compliance Risk Management (CRM) Framework

To set out the approach to compliance risk management as part of the implementation of the *Water Efficiency Labelling and Standards Act 2005* (WELS Act).

## 1.2 Basis for the Compliance Risk Management Framework

### 1.2.1 WELS Act and the National WELS Regulatory System

The purpose of the WELS Act is to provide for the establishment and operation of a scheme to apply national water efficiency labelling and minimum performance standards to certain water-using products. The objects of the Act are to:

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

The Act:

- forms part of a national regulatory system through the establishment of complementary State and Territory legislation to compensate for the small jurisdictional gaps in the coverage of Commonwealth powers in relation to the operation of the WELS Scheme;
- establishes a Regulator (at this time the Secretary of the Department of the Environment and Heritage) to administer the scheme and who is empowered to make arrangements with Commonwealth, State and Territory agencies to assist with his or her functions;
- provides for the determination by the Commonwealth Minister for the Environment and Heritage of “WELS products” to be subject to the scheme;
- provides for the specification of “WELS standards” to apply to WELS products, thus setting requirements for water efficiency, performance, registration and labelling of these products;
- creates offences and associated penalties such as:
  - a) Supplying products for sale that should be registered and/or labelled under the scheme;
  - b) Failure of a product to meet its performance requirements under the scheme;
  - c) Misuse of the WELS standards and information, or providing inconsistent information for products under WELS standards; and
  - d) Certain offences related to providing information, facilities and assistance to WELS inspectors; offences related to requirements to appear before an inspector; and offences related to obstruction of officers acting under warrants to monitor, search and seize evidence.

Offences a to c (above) are strict liability offences under the WELS Act. Strict liability refers to the determination of culpability in Court without the need for the Regulator to prove that the defendant (the accused) intentionally or negligently caused this result. The Regulator would be

unlikely to seek a prosecution where it can be shown the regulated client did what it could reasonably be expected to do to comply.

- provides for an enforcement regime that includes infringement notices, enforceable undertakings and injunctions;
- provides for the appointment of inspectors to investigate possible contraventions and sets out their powers and obligations. The Regulator (and delegates) have powers to:
  - a) Refuse, cancel or suspend a registration stopping Suppliers from operating under the WELS scheme and related markets where those products are required to be registered. These actions are reviewable decisions.
  - b) Issue infringement notices (with fines);
  - c) Publicise offences under the WELS Act;
  - d) Make enforceable undertakings; and
  - e) Establish injunctions.
- includes provisions for internal and Administrative Appeals Tribunal review of decisions, for compensation for certain losses, for the making of regulations, and for independent review after 5 years of operation of the Act.<sup>1</sup>

### 1.2.2 Commonwealth Criminal Code

Consistent with Part 2.5 of the Commonwealth Criminal Code (a Schedule to the *Criminal Code Act 1995*), our CRM arrangements will take account of corporate criminal responsibility and the corporate culture of organisations. As part of deciding whether to charge a corporation with a WELS Act offence, the Regulator will act in accordance with the *Criminal Code Act 1995*, and consider (among other things) whether:

- the corporation's directors or a high managerial agent of the corporation, intentionally, knowingly or recklessly authorised or permitted the commission of an offence;
- a corporate culture existed within the body corporate, (i.e. an attitude, policy, rule, course of conduct or practice) that directed, encouraged, tolerated or led to non-compliance with a relevant provision; and
- the corporation failed to create and maintain a corporate culture that required compliance with the relevant provision.

## **2 ELEMENTS OF THE FRAMEWORK**

### **2.1 Case by Case Approach to Compliance Action**

We will take a case by case approach to CRM based on ongoing profiling of the compliance culture (i.e. compliance willingness and preparedness) and the behaviour of Suppliers.

*Supplier's* is the term used to describe organisations and people that are subject to the national WELS regulatory system. Suppliers *supply* WELS products. The requirements of the WELS legislation centre around the meaning of the term *supply*. *Supply* is defined in Part 2 of the WELS Act as the "supply or offering to supply WELS products for a consideration (i.e.

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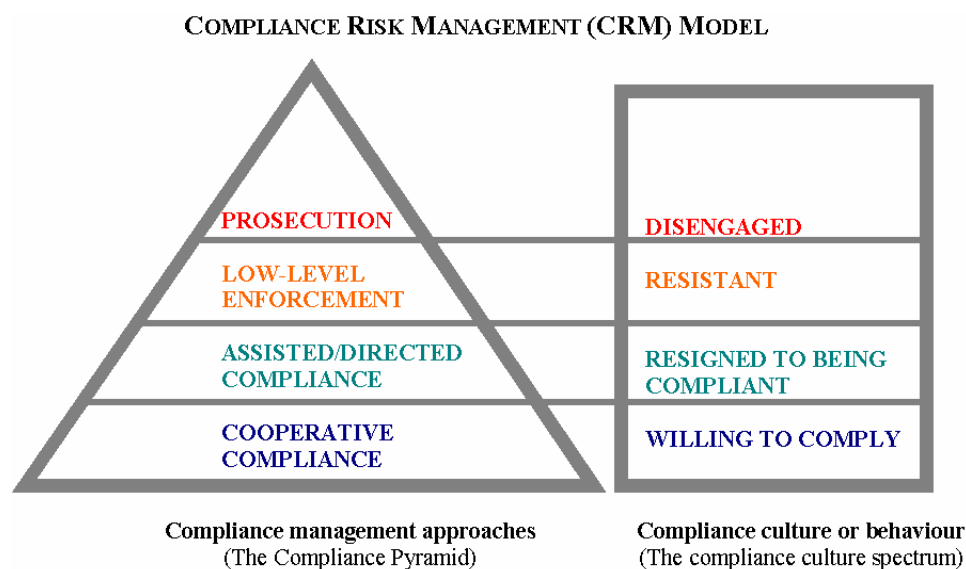
<sup>1</sup> Review would include consideration of continual improvement and revision of WELS Compliance Management approaches, tools and related protocols and procedures.

money or other value)”. Suppliers can be manufacturers, importers or retailers of WELS products.

Under some circumstances, non-compliances need not necessarily result in actions by the Regulator leading to offences or fines. For example, some suppliers may enter the regulatory scheme early. This could be one indicator of a compliance culture that is willing to comply. In some situations, the elements of a non-compliance might be examined and advice or directions might be provided to bring a regulated supplier back into compliance through education and administrative actions without taking enforcement action.

On a case-by-case basis we may, as an alternative to taking legal action on an offence, divert non-compliant organisations towards compliance with education and administrative actions. This will be done as part of an operational approach that will maintain the wels Regulator’s capacity to take enforcement action where necessary.

How do the possible compliance management activities relate to a spectrum of compliance behaviour?



The above model shows an adaptive hierarchy of compliance management levels, enabling a reduction or escalation in compliance management approach. Different approaches would depend on WELS officers’ findings, the client’s compliance behaviour and the attributes of their compliance culture. Compliance risks can increase in frequency and/or severity towards the top of the pyramid and the compliance culture spectrum.

As discussed, on a case-by-case basis we may, (as an alternative to taking legal action on an offence), divert non-compliant organisations towards compliance with education and administrative actions. This will be done as part of an operational approach that:

- Will maintain the WELS Regulator’s capacity to take enforcement action where necessary; and
- Will not compromise the objectives of the scheme or the credibility of the label, the standard.

The divisions between the levels are not mutually exclusive. For example, directions to stop certain acts could be given at the same time as when a regulated client is prosecuted for the non-compliant activity, or, as they are educated about principles for improved compliance management/behaviour.

## **2.2 Levels of WELS Compliance Risk Management Action**

The CRM model gives industry every opportunity to comply and the Regulator an range of options to manage compliance, namely:

### **2.2.1 Cooperative Compliance**

The WELS Act and the Regulator aim to keep industry at the bottom of the pyramid to achieve effective compliance performance and maximum cost efficiency of the WELS scheme. CRM therefore starts with compliance strategies like education, routine monitoring and inspections, check-testing of purchased products, performance feedback, seminars and web-site information and guides. It is expected that this will represent the bulk of WELS CRM work.

#### **Two-Way Advice and Feedback**

Suppliers can seek to review their compliance risk management arrangements by inviting WELS audits or indicative inspections to:

- Review existing management practices to improve compliance performance by building better systems and practices; and/or
- Resolve emerging risks to compliance performance arising from unforeseen factors; and/or
- Improve specifications within the legislation or technical specifications.

Advice from WELS officers/the Regulator on clients' CRM preparedness and performance must be limited to its compliance status, implementation actions for specific non-compliances, and advice about principles for developing better compliance risk management systems and practices. This information is not to be taken to replace professional legal advice on meeting clients' legal obligations.

At the end of compliance management activities, like inspections and auditing WELS officers will detail their finding which will include:

- The basis of any non-compliance findings or advice;
- Views about their conduct, compliance evaluation techniques and their communication and awareness activities;
- Observations about barriers to WELS compliance arising from unforeseen or external sources; and
- Observations about possible improvements to WELS compliance management arrangements, or legal and technical requirements.

### **2.2.2 Assisted and Directed Compliance**

*Assisted Compliance:* At this level the CRM strategies are designed to assist industry with maintaining compliance such as through tailored

inspection levels (including spot checks and re-visits or letters of advice).

*Directed Compliance*: This is still part of level 2, but allows for more certainty in assisting Suppliers raise compliance performance to a satisfactory level. The compliance strategies employed here can include warning letters, or letters with 'implementation requirements' or directions from the Regulator to comply with the Act, determinations and standards to place tighter control on an organisation's performance.

Responses at this level can include the elements of the *Cooperative Compliance* level.

### 2.2.3 Low Level Enforcement

This is an option where Suppliers are non-compliant after having been given reasonable opportunity to comply. At this level WELS CRM actions escalate towards intervention and low level enforcement. Suppliers could for example be de-registered or fined at this level. Responses at this level can include the elements of the *Cooperative Compliance* level through to the *Assisted/Directed Compliance* level.

### 2.2.4 Prosecutions

At the top of the hierarchy are our severest CRM strategies, used for the most non-compliant situations, particularly where the above techniques have not been successful. Criminal prosecution involves referral to the Director of Public Prosecutions. CRM Responses at this level can incorporate elements from the *Cooperative Compliance* level through to the *Low Level Enforcement* level.

## 2.3 Summary

The CRM approach seeks to put into place preventative measures to minimise non-compliant behaviour by organisations. The aim is to prevent actions at the *Low Level Enforcement* and *Prosecutions levels* of the above pyramid and to provide sufficient advice and support to enable clients to operate at the *Cooperative Compliance* level. At any time, the Regulator (or delegate), being satisfied about compliance risks and that an appropriate corporate culture is in place, can decide that non-compliances should be resolved through administrative or educative solutions (i.e. without fines or other enforcement action).

## 3 COMPLIANCE RISK MANAGEMENT TOOLS/ACTIVITIES

### 3.1 Case by Case Assessment and Response

As indicated, non-compliance will be assessed on a case-by-case basis. These assessments will be collated and re-assessed as part of annual compliance risk assessment for the whole scheme. Overall risk assessment and case by case assessment will be based on the following tools/activities:

- **Intelligence/profiling gathering** - for use in CRM strategic planning regarding the activities and corporate culture of Suppliers including retailers, importers, manufacturers, and related elements of the product supply chain;
- **Education and awareness** activities to enhance compliance and risk management planning of Suppliers subject to the Act;
- **Routine monitoring** of WELS products at suppliers premises: importers, manufacturers, related elements of the goods supply chain, and retail outlets (including unannounced spot checks);
- **Compliance Check testing** of WELS products so they can be technically assessed for compliance with requirements;
- **Audits** e.g. in response to findings of intelligence profiling or routine monitoring or as requested by a specific Supplier; and
- **Investigations** are undertaken in response to allegations or following profiling that indicates non-compliance with the Act or determinations or conditions of registration.
- **Administrative actions** include warning letters, or letters with 'implementation requirements' or directions from the Regulator to comply with the Act, determinations and standards to place tighter control (at the *directed compliance* level) on an organisation's performance.
- **Enforcement related legal action** is seen as a tool of last resort in achieving compliance risk management, however WELS officers will ensure the mechanisms, experience and legal requirements necessary to activate this option are credibly maintained to ensure the Regulator has this option available if necessary.

### 3.2 Protocols and Guides to help you

CRM Protocols explain how WELS officials will use the compliance risk management tools/activities. These are further discussed under the *Compliance Plan* section (below) and in the WELS Communication Strategy. These Protocols will:

- Be a basis for education and awareness about WELS CRM;
- Provide an overview of the legal basis of CRM activities and related powers of inspectors;
- Show Suppliers and the community what to expect in terms of the roles and behaviour of inspectors;
- WELS CRM operating procedures and strategic compliance activities;
- Show Suppliers and the community how compliance outcomes are transparently managed and reported; and
- Will be working documents available for input as part of continual improvement arrangements for WELS CRM.

CRM guides for Suppliers will also be issued to aid self-compliance risk assessment and management<sup>2</sup> or to provide advice to clients on best practice compliance principles. This will include providing general information on the

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<sup>2</sup> A *guide for WELS Suppliers' to self assessment and management of compliance risks* is available on the WELS website.

types of non-compliance found during WELS CRM activities and principles for Suppliers to use to prevent these non-compliances.

### **3.3 Procedural Direction**

All WELS CRM activities/officials will follow:

- The WELS legislation and other relevant law;
- The policies and principles outlined in this Framework;
- WELS CRM Protocols;
- Directions and policy of the Regulator;
- The Department of the Environment and Water Resources's Compliance and Enforcement Policy<sup>3</sup>;
- Prosecution Policy of the Commonwealth;
- Commonwealth Fraud Control Guidelines;
- Commonwealth Fraud Investigation Standards;
- Attorney-General's Department - Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions; and
- Officials will also be appropriately trained i.e. attained Certificate IV in Government Compliance.

### **3.4 National Coordination Elements**

WELS Advisory Committee<sup>4</sup> (WELSAC) will consider annually the possible compliance risks; previous compliance outcomes and an approach to compliance management for the forward year. It may also undertake a review following a specific non-compliance incident. This annual and incident-based review by the WELSAC supports the effective operation of the Act and may be linked to (annual and other) reviews of the resource adequacy cost recovery arrangements. Strategic partnerships may be developed for intelligence, and compliance and awareness outcomes with:

- Other Commonwealth and State and Territory agencies (eg Customs)
- Industry Associations
- Community organisations

### **3.5 Inspectors' Powers and Responsibilities**

WELS Inspectors have certain resources, powers and responsibilities, which include:

- Seeking permission for entry into non-public parts of premises when operating without a warrant, together with advice that it is not an offence to deny consent;
- Monitoring of premises and products that are offered for sale;
- Purchase of items for testing to assess whether they meet standards;
- Advising Suppliers of principles for improved compliance risk management;

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<sup>3</sup> Department of the Environment and Water Resources (August 2004) *Department of the Environment and Water Resources Compliance and Enforcement Policy*.

<http://www.environment.gov.au/about/compliance/index.html>

<sup>4</sup> Commonwealth, State and Territory Government Officials who advise the Regulator on matters including coordination and policy.

- Providing oral and written feedback on monitoring findings and implementation requirements to suppliers;
- Issuing of fines;
- Use of some powers of inspection, search, seizure and the showing of identification cards when requested;
- Seeking WELS information from a person;
- Obtaining and acting under warrants for entry to premises for monitoring or for investigation, questioning persons, searches and seizure of evidence;
- Practices in relation to monitoring; and
- Practices in relation to searches, seizure and handling of evidence.

For further information see the WELS inspector's protocol<sup>5</sup>.

### **3.6 CRM Activities - Annual CRM Plan**

The annual CRM Plan sets out the proposed compliance management activities. WELSAC will be consulted in its development and the plan will take into account key risks, information on the performance of Suppliers and any information on the barriers to their performance and will identify and manage non-compliance.

### **3.7 Sources of Information about Compliance**

Sources of information about compliance include:

- Suppliers who are striving for best practice and are aware of CRM difficulties or barriers and who want advice on establishing a better CRM outcome;
- The written positions and communications of Suppliers on WELS CRM arrangements;
- Customs officers who have detected or suspect a contravention;
- WELS compliance performance and intelligence records (eg compliance profiles on performance or corporate culture);
- Manufacturers who suspect or have demonstrated (through their own testing) a contravention by competitors;
- Retailers who have been supplied with products they suspect are in breach or believe that a competing retailer is in breach;
- Consumers and consumer groups (ACA) who suspect or have demonstrated (through their own testing) a possible contravention for investigation by WELS officials;
- Other intelligence or allegations from the Australian community;
- Inspections, audits or investigations carried out by the Regulator or other approved inspectors, including through a cyclical check testing program; and
- Networks including links with agencies like the Australian Federal Police (AFP) or the Australian Competition and Consumer Commission (ACCC), or State enforcement agencies, or consumer affairs agencies.

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<sup>5</sup> WELS INSPECTOR PROTOCOL IS AVAILABLE ON THE WELS WEBSITE.

### **3.8 Participation in WELS CRM Continual Improvement**

This document is a working document. We welcome input from suppliers and the Australian community. This document is expected to develop as a result of:

- Ongoing observations and assessment by WELS officials when monitoring and conducting other CRM activities;
- Feedback from suppliers as a result of WELS monitoring and other WELS CRM activities;
- Annual review by WELS officials, the WELS Advisory Committee and the WELS Regulator; and
- Independent review of regulatory arrangements under the WELS Act after five years.

We encourage your participation in WELS CRM continual improvement to maintain or improve the efficiency and cost-effectiveness of the scheme over time.

We recognise that suppliers who work towards better compliance performance and the effectiveness of the WELS CRM procedures enhance:

- the cost-effectiveness of the WELS Scheme for participants; and
- the success of the scheme, which aims to save valuable water for Australians and the environment.

Comment and Feedback may be sent to

The WELS Team which can be contacted on

[wels@environment.gov.au](mailto:wels@environment.gov.au)

1800 803 772

## 4 APPENDIX A CRM CONTINUAL IMPROVEMENT MODEL

### CRM and Continual Improvement

