



Australian Government
**Department of Climate Change
and Energy Efficiency**

Report 2010/05

Supplementary Discussion Paper

on

Compliance Obligations and Enforcement Measures

for the

**Proposed National Legislation for
Minimum Energy Performance Standards
(MEPS) and Energy Labelling**

July 2010

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PREFACE

The Department of Climate Change and Energy Efficiency (DCCEE) has released this Supplementary Discussion Paper to canvass a range of design features of the proposed national legislation for Minimum Energy Performance Standards (MEPS) and energy labelling for equipment and appliances.

In particular, this Supplementary Discussion Paper explores how compliance obligations could be imposed and enforced under the national legislation.

The new national legislation follows from recent commitments on MEPS and energy labelling by Australian, state and territory governments:

- The Australian Government undertook to fast track the deployment of more energy efficient appliances as part of its 2007 *Solar Schools – Solar Homes Plan*. A key element of this policy is to introduce greenhouse and energy minimum standards that ensure greenhouse benefits as well as energy savings are factored into standard setting.
- In July 2009, the Council of Australian Governments (COAG) signed the National Partnership Agreement on Energy Efficiency and released the National Strategy on Energy Efficiency (NSEE). The proposed legislation is an important part of the NSEE (measures 2.2.2 and 2.2.5).¹

The Commonwealth is conducting a comprehensive consultation program to ensure that the design of the national legislation is well-informed and debated. This Supplementary Discussion Paper follows from a wide-ranging discussion paper that the Commonwealth released in August 2009. That initial discussion paper explored the broad scope and design of the legislation and was accompanied by public consultation forums held in six capital cities. More recently, and consistent with COAG's Best Practice Guidelines, the Commonwealth released a Consultation Regulatory Impact Statement (RIS) in January 2010. A series of public information sessions were held around the country in February 2010.

This Supplementary Discussion Paper further explores issues that have been raised by firms, individuals and organisations in their submissions to the Discussion Paper and the Consultation RIS.

The views and opinions expressed in this paper do not necessarily reflect those of the Australian Government, the Minister for Climate Change, Energy Efficiency and Water or the government jurisdictions party to NSEE.

¹ Refer to Appendix 1.

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HOW TO RESPOND TO THIS SUPPLEMENTARY DISCUSSION PAPER

This Supplementary Discussion Paper explores the latest developments on the proposed national MEPS and energy labelling legislation and seeks feedback on the following important features.

Respondents are requested to prepare their responses such that they correspond with the numbered questions below:

1. *Registration at import and domestic manufacture:* Having considered the points raised in Chapter 2, are there any obstacles to the proposal to place registration obligations on importers and domestic manufacturers of products currently or forecast to be covered by the MEPS and energy labelling program?
2. *Grandfathering period:* Are there any practical obstacles to a grandfathering period of 12 months that may need to be considered, in light of the long-term energy efficiency strategies being developed for product categories and the regulation impact analyses conducted each time a standard is introduced or revised?
3. *Registration fees:* Should registration fees vary for different types of residential, commercial or industrial equipment?
4. *Penalty rates:* What penalty sizes would be appropriate for a sliding scale of penalty rates and on what basis should they vary?
5. *Enforcement options:* Are there any other enforcement options that should be incorporated into the new compliance and enforcement scheme for the MEPS and energy labelling program under the new national legislation?
6. *Powers of MEPS Inspectors:* Are there any other powers that would assist MEPS and energy labelling inspectors carry out their duties under the new national legislation?

Written comments on this Supplementary Discussion Paper may be forwarded:

- via email (preferred) to gems@environment.gov.au; or
- via mail to: GEMS Legislation Taskforce
Renewables and Energy Efficiency Division
Department of Climate Change and Energy Efficiency
GPO Box 854
CANBERRA ACT 2601

The deadline for written comments is **COB 9 August 2010**.

1. SNAPSHOT OF THE PROPOSED NATIONAL LEGISLATION

Australia's existing MEPS and energy labelling program places standards and labelling requirements on a range of appliances and equipment types. The program is playing a critical role in increasing the energy efficiency of equipment and reducing greenhouse gas emissions.

The objectives of the new national legislation are:

1. to capture and streamline existing administrative and compliance arrangements;
2. to introduce new features to improve national consistency; and
3. to allow for the coverage of a wider range of products and equipment types.

The new national legislation is being developed in consultation with individuals, firms and organisations with an interest in the MEPS and energy labelling program, with state and territory governments and with independent experts in the field of energy efficiency standards.

1.1. What will not change

Elements of the current program that will not change under the proposed legislation include:

- MEPS and/or energy labelling requirements will continue to be placed on those products that are presently regulated (listed in Appendix II);
- Standards for new equipment types or improvements to existing standards will be adopted only upon the completion of appropriate cost/benefit analysis;
- Products covered by the program will need to be registered with the MEPS Regulator;
- The MEPS Regulator will retain the main elements of its existing compliance program, including the national check-testing program and the option of deregistering non-compliant equipment; and
- The MEPS Regulator will continue to charge fees for product registration and other services.

1.2. New design features and reforms being considered

Consultations to date have revealed support for a range of new design features and reforms to the existing MEPS and energy labelling program. These design features include:

- A broadening in the scope of the legislation to cover:
 - products that use energy forms other than electricity (e.g. gas-using products);
 - non-energy using products (e.g. ducting and insulation materials);
 - greenhouse intensity standards and/or labelling; and
 - associated environmental impacts (e.g. mercury in compact fluorescent lamps).
- A streamlining of registration obligations, with explicit requirements that importers and domestic manufacturers register equipment at the first point of supply of that equipment.
- Reform and streamlining of compliance, enforcement and penalty options. This will ensure that the Program is enforced fairly and consistently, including penalties that not only protect consumers and the environment, but are also appropriate to the scale of an offence.

- Future requirements that energy label and/or other energy efficiency information be included in advertising and promotional material. This design feature will recognise that consumers are increasingly making purchasing decisions prior to visiting department stores or contracting an installer.
- Requirements for the reporting of data (import, export and/or sales) to the MEPS Regulator. This design feature recognises the value of reported data in the detection and enforcement of non-compliance as well as for program assessment purposes. The new national legislation would explicitly codify the confidential treatment of that data.

Written submissions responding to the Discussion Paper and the Consultation RIS were received from a range of firms, industry organisations, non-governmental organisations, consumer advocacy groups and from the community. Overall, these submissions were supportive that the proposed national legislation should improve the program's compliance and enforcement regime; however, that certain aspects of the compliance and enforcement regime should be discussed in further detail.

Design features and reforms relating to compliance obligations and enforcement are further discussed in this Supplementary Discussion Paper.

2. OBLIGATIONS RELATING TO THE REGISTRATION, MANUFACTURE, IMPORTATION AND DOWNSTREAM SUPPLY OF COVERED EQUIPMENT

A common theme expressed in submissions received in response to the Discussion Paper and Consultation RIS is that the proposed national legislation should apply at a variety of different points. Submissions conveyed the view that different points are appropriate for different equipment types.

Therefore, having considered these submissions, the Department considers that there is merit to the MEPS and energy labelling program placing obligations at a combination of points in the supply chain. These obligations would relate to registration, manufacture, import, supply and data reporting.

2.1. Problems with obligations and offences under the current MEPS and energy labelling program and options to address these problems

2.1.1. Inconsistent definition of 'sale or supply' across jurisdictions

Under the current legislative system, offences generally relate to the sale or supply of products (Box 1). At present, terminology is not consistent between jurisdictions. Furthermore, those various definitions of sale or supply do not always cover the full range of circumstances under which products reach the energy consumer². Therefore under the new national legislation, offences would be revised so that a nationally consistent approach applies to supply of unregistered or non-MEPS-compliant equipment. This definition of supply would be broad enough to cover all the circumstances by which one party sells or supplies covered products to consumers.

2.1.2. Definition of 'sale or supply' doesn't capture direct import and use

Certain transactions are not well captured by the regulation of sale and supply. Even under a nationally consistent and broad definition of 'sale or supply' there will be many instances where covered products are being used without any sale or supply taking place within Australia. An example is where equipment is directly imported for use by the importer within their Australian operations. Where products are of a high value (e.g. distribution transformers) or for use in remote locations (e.g. mining sites and their associated housing developments), some companies may consider it more cost effective to directly import non-compliant products than to purchase from local suppliers who would be obliged to offer only compliant products. This can distort competition and undermine the integrity of the program.

One possible way to address this problem would be to define 'sale or supply' even more broadly so as to cover the transfer, distribution or almost any movement of covered products. This may extend the offence of supplying unregistered or non-compliant products into many non-commercial areas and would require many exemptions for things like allowed personal use and movement of goods. The burden of compliance would also shift from supplier to consumer, requiring a major shift in education and compliance activity.

² For example, by way of gift, prize, lease, loan, rent, hire purchase, barter etc.

Box 1 | Examples of how existing state legislation defines the point of intervention

South Australia – Penalties are imposed on persons that ‘sell’ unregistered or unlabelled equipment, where:

to sell includes:

- (a) to let or hire
- (b) to advertise for sale or hire
- (c) to offer or expose for sale or hire.

Victoria – Penalties are imposed on persons that ‘supply or offer to supply’ unregistered or unlabelled equipment, where:

supply includes supply (including re-supply) by way of sale, exchange, lease, hire or hire purchase;

New South Wales – Penalties are imposed on persons that ‘sell ... whether by wholesale or retail’ unregistered or unlabelled equipment where:

sell includes:

- (a) auction or exchange
- (b) offer, agree or attempt to sell
- (c) cause or permit to be offered for sale
- (d) display for sale.

Queensland – Penalties are imposed on persons that ‘display for sale or sell’ unregistered or unlabelled equipment, where:

sell includes—

- (a) sell by wholesale, retail or auction; and
- (b) agree, attempt or offer to sell; and
- (c) possess, expose or advertise for sale; and
- (d) cause or permit to be sold; and
- (e) give away or swap.

Western Australia – Penalties are imposed on a person that ‘sells or hires; exposes or advertises for sale or hire; or causes to be sold or hired, or exposed or advertised for sale or hire’ unregistered or unlabelled equipment, but does not go on further to define ‘sale’ or ‘hire’.

Tasmania – Penalties are imposed on a person that “in the course of a business, sell(s) an electrical article of a relevant class unless the article conforms to the relevant minimum standards of energy efficiency”, but does not further define ‘sell’ beyond excluding the sale of second-hand items.

New Zealand – Penalties are imposed on manufacturers or importers of scheduled items (or an assembly that incorporates that item) that “sell that item or the assembly” unless it meets relevant energy performance standards and labelling requirements and has been appropriately registered. Specific duties are identified for persons dealing directly with consumers, including obligations relating to “the sale, lease, hire, or hire purchase” of scheduled items (or assemblies incorporating the item).

Another approach that has been suggested would be to impose obligations at the highest point in the supply chain. A product enters the Australian supply chain – complete or disassembled – either after having been manufactured in an Australian factory or imported from overseas. A number of firms and individuals that made submissions in response to the Discussion Paper and Consultation RIS expressed a preference for the new national legislation to apply to firms at the point that equipment enters the supply chain. Under such an approach, an explicit requirement would exist for all models covered by the Program to be registered by its importer or manufacturer. The New Zealand MEPS legislation places registration obligations on importers and manufacturers, as does the *Water Efficiency Labelling and Standards (WELS) Act 2005*. How this would address the problem of direct imports is discussed in s.2.2.1 below.

2.2. Product registration and obligations proposed for registrants

2.2.1. *Appropriate point in the supply chain to place registration obligations*

As noted above, it has been proposed that an explicit requirement exist for all models covered by the Program to be registered by its importer or manufacturer. There are a number of advantages of adopting such an approach:

- *For many firms, compliance obligations will not change dramatically.* At present, parent manufacturers (either in Australia or overseas) tend to be the entities responsible for ensuring that prescribed equipment types meet mandatory standards. Where a model of equipment is found to not comply with the appropriate standard, it is the parent manufacturer (or its domestic agent) that the regulator generally focuses its compliance attention on. Therefore, it makes sense to register products at the same points in the supply chain where compliance is not only determined by manufacturers, but also pursued by the regulatory body.
- *Improved and streamlined enforcement arrangements.* Where equipment enters the supply chain via the point of import, an upstream regulatory approach would be more practical and efficient since the Regulator may be able to detect and enforce compliance in co-operation with the Australian Customs Service (ACS). This would be particularly so for products such as lamps that are generally not manufactured in Australia, which arrive in large shipments, and which are widely distributed once imported.
- *Improved data reporting.* Requiring importers and manufacturers to register products would align with new mandatory data reporting obligations requiring importers and manufacturers to provide import, export and sales (wholesale) data on an annual basis for all product models registered and covered by the program (section 3.2.7). Better data tracking of all covered products as they enter the supply chain will greatly assist compliance activity (e.g. tracking direct imports not for sale or supply), as well as providing necessary information for program evaluation and future RISs.

With registration obligations placed at the points of import and domestic manufacture, it would then be an offence for importers or manufacturers to distribute unregistered or non-MEPS-compliant equipment to downstream firms or customers (see section 2.3 for discussion of offences). Note that, for the majority of products covered by the MEPS and energy labelling program, it would not be an offence to import unregistered or non-compliant products; the offence would only apply to post-import distribution. Prohibiting import would risk contravening Australia's international trade obligations, as well as requiring exemptions for the importation of equipment for the purpose of testing and seeking registration.

Other parties would not be allowed to register covered products. Note that it would still be an offence to sell or supply unregistered or non-compliant products, retaining the current point of obligation on sellers and suppliers.

2.2.2. Registration validity period for products and families of products

Registrations would continue to be valid for 5 years. Under the new national legislation, it is also anticipated that the legislation would retain existing arrangements allowing for registration of models that have identical energy performance but different aesthetic features (that is, a single registration for a model 'family', such as a range of refrigerators that come in stainless steel and plastic casings). For the avoidance of doubt, where two products have identical energy performance but are sold under different company badges, each badging would need to be registered separately.

2.2.3. Registration processing times

Given its objective of achieving national consistency, the new national legislation is expected to feature a consistent time period over which the MEPS Regulator would be expected to process registration applications. Many firms that made submissions in response to the Discussion Paper suggested that this period should be no longer than four weeks.

2.2.4. Responsibility for registered products

Registrants would accept liability for all products that are registered under their name and would need to be satisfied that the product is compliant. Local agents hired by a foreign manufacturer would not be able to argue that, if a product registered under the local agent's name is found to not meet a relevant standard, responsibility for the non-compliance lies with the manufacturer.

2.2.5. Obligations and offences relating to energy labelling

The existing offences that apply to energy labelling of covered equipment (for example, offences against supplying unlabelled or mislabelled equipment and for displaying equipment with an obscured label) are working well and are not expected to change under the new national legislation. Similarly, existing offences that impede the operations of inspectors or other authorised officers are not expected to change substantially. The legislation would be worded clearly to avoid confusion as to how energy labelling requirements apply to online sales.

2.3. Streamlining offence provisions

The new national legislation should look to create offences that address the problems with the current legislation of states and territories as well as taking up opportunities to expand the possible points of compliance.

Suggested offences are:

- It would be an offence to distribute an appliance that does not meet MEPS
- It would be an offence to distribute an unregistered appliance
- It would be an offence to distribute an unlabelled appliance
- It would be an offence to distribute an incorrectly labelled appliance

Offences relating to 'distribution' could be defined to explicitly include two categories of transaction:

- (a) 'Sale or supply', as broadly defined to capture gifts, leases, trade etc.; and
- (b) 'Put to commercial use' where there has been no sale or supply in Australia.

This second category of distribution would complement the first and cover post-import distribution of all kinds (including the direct import and use of products such as industrial and large commercial equipment).

The legislation would cover online sales, although it is not anticipated that the program would cover second-hand appliances. However, there may be some merit to the regulation of the energy performance of reconditioned industrial and large commercial equipment (such as distribution transformers and chiller units) on account of the substantial energy consumption of such equipment.

2.4. Options for import monitoring

Previous sections have canvassed that the new national legislation could introduce an explicit requirement that equipment covered by the MEPS and energy labelling program be registered at the highest point in the supply chain (i.e. by the importer or domestic manufacturer). This may present opportunities for the MEPS Regulator to obtain the assistance of the ACS³.

Two main options could be considered for involving the ACS in monitoring the import of equipment covered by the MEPS and energy labelling program:

- i) Direct intervention at the border via shipment inspections: This would involve ACS officers inspecting each shipment of covered equipment at the point of import.

Given the increasingly broad coverage of the MEPS and energy labelling program, as well as the fact that non-compliant equipment cannot always be visually distinguished from compliant equipment, this option would present substantial challenges to inspection officers. Moreover this option would require the government to either invest substantial new resources into the program; or to redirect resources from existing priorities. Importers are likely to be substantially disadvantaged by this option since shipments would need to be held by the ACS until compliance could be verified.

This would be an extremely costly and complex option for both the government and industry for most of the product types covered by the MEPS and energy labelling program.

- ii) Post-importation intervention via data sharing: This would involve the MEPS Regulator establishing a formal information-sharing arrangement with the ACS.

Import data gathered by the ACS on all covered equipment types could either be forwarded to the MEPS Regulator on a regular basis or requested by the Regulator for specific shipments, importers or products. This model-specific data would then be analysed and compared with industry-reported data (section 3.2.7) for any unusual import occurrences or inconsistencies.

Under this option, enforcement action – including check-testing – could be better targeted towards importers suspected of non-compliance.

The legislation would provide for information disclosed by the ACS to the MEPS Regulator to remain confidential unless needed for court action.

This option imposes a lower administrative cost on both the government and industry, whilst enabling compliance and enforcement activities to be effectively carried out.

Where possible and appropriate, any obligations placed on importers of MEPS-covered equipment will also be placed on domestic equipment manufacturers.

³ In recent years, the ACS have assisted in the delivery of Australia's energy efficiency agenda through the enforcement of border controls during the phase-out of inefficient incandescent light bulbs.

2.5. Grandfathering timeframes

'Grandfathering' refers to the time period in which remaining stocks of a product may be legally sold once a MEPS standard or energy label has been introduced or revised.

At present, grandfathering arrangements vary between jurisdictions as well as product types. A period of six months from the date that a new MEPS standard comes into effect is allowed for importers and domestic manufacturers to clear existing stocks of equipment in South Australia, while an indefinite grandfathering period is allowed in New Zealand and in other Australian states. A grandfathering period of 12 months applies to water-using and water-saving products covered by the *WELS Act*.

An unlimited grandfathering period is seen to disadvantage both consumers and complying firms. It can cause confusion among consumers as they may be comparing products that comply with different MEPS requirements. It can also disadvantage firms that have moved fastest to comply with new energy efficiency requirements.

The main rationale provided by industry for the new national legislation to retain an unlimited grandfathering period is that firms should not be disadvantaged by a change in government regulation for which no prior warning was provided. Nevertheless, the MEPS and energy labelling program is moving towards the introduction of long-term strategies for different product types. The development of such strategies, together with the regulation impact analysis that is conducted each time a standard is introduced or revised, would provide industry with ample advanced warning about when new standards will be coming into force.

For this reason, a grandfathering period of 12 months could strike a fair balance between providing firms with enough time to clear remaining stock of product that was either imported or manufactured domestically, while still providing consumers with the confidence that the products they are comparing are subject to the same MEPS levels. A period of 12 months also reflects that the annual sales patterns of many equipment types covered by the program peak on a seasonal basis (e.g. air conditioner sales tend to peak at the same time each year).

2.6. Registration test reports

One design feature for which feedback has previously been requested is whether there should be a requirement that test reports supplied with product registration applications be prepared by an appropriately accredited laboratory. Such an approach presently applies to products registered under the *WELS Act*.

A significant obstacle to such a requirement is the higher cost (both with respect to time and money) of submitting equipment for testing to the comparatively few laboratories in Australia that have been accredited by the National Association of Testing Authorities (NATA). Rather, submissions received in response to the Discussion Paper and the Consultation RIS generally expressed the view that test reports from any laboratory (including in-house testing laboratories) should be permissible.

One option could be to phase in the requirement for product registration test reports to come from a NATA-accredited laboratory, which could involve measures to encourage testing laboratories to gain NATA-accreditation. This would allow for the supply of NATA-accredited laboratories to rise over time to meet demand levels.

There is also value in continuing to allow the MEPS Regulator to refuse registration applications that are accompanied by test reports from certain laboratories. One circumstance where this might apply is where a particular laboratory has previously and/or repeatedly prepared sub-standard or fraudulent reports.

Further, there may be merit in allowing the regulator to assign particular products or product categories as having a high risk of non-compliance. High-risk products could require registration applications to be accompanied by a test report from a NATA-accredited or otherwise suitably qualified laboratory. This option would reduce the risk of non-compliance and shift some of the compliance costs associated with those higher risks away from the taxpayer.

The government will continue to ensure that all equipment testing undertaken as part of the national check-testing program is performed by NATA-accredited laboratories.

2.7. Registration fees

At present, the state regulatory authorities that administer the MEPS and energy labelling legislation charge fees for the registration of equipment models (including ‘families’ of models). The amount charged varies across jurisdictions, as outlined in Table 1. The new national legislation, given its objective of achieving national consistency, is expected to feature harmonised registration fees.

Table 1 Registration Fees						
	NSW	SA	QLD	VIC	NZ	WELS
Registration Fees \$	205	150	162.40	285	0 ⁴	1,500

An average of 2,864 models have been registered each year under the MEPS and energy labelling program since 2001. At present, jurisdictions only seek to recover part of the cost of registration, such as processing of registration applications and shop-front inspections. Other elements of the program (such as Australian Standards development, regulatory impact analysis, international standards harmonisation and other compliance and enforcement activities including check-testing) are met by jurisdictions making contributions to a special fund out of consolidated revenue. Consequently, research undertaken for the Commonwealth⁵ identified that registration fees represent approximately 5 per cent of the total costs of administering and enforcing the existing MEPS and energy labelling program.

The Government is presently considering whether the MEPS and energy labelling program should move, over time, from the existing partial cost recovery arrangements to full cost recovery. The Australian Government’s existing policy is that, where it is efficient and appropriate to do so, government agencies should set charges to recover all the costs of services, with partial cost recovery to apply in circumstances where new arrangements are phased in.⁶

Should it be considered appropriate for certain policy, administrative or enforcement elements of the MEPS and energy labelling program to move to full cost recovery, a significant design feature to be resolved is whether registration fees should vary across different equipment types so as to reflect variations in the production costs or energy consumption of different product types.

2.8. Appeal of Decisions

Certain decisions made by the MEPS Regulator would be eligible for review. The main reviewable decisions would be:

⁴ New Zealand’s Energy Efficiency and Conservation Authority (EECA) generally considers that, since reduced greenhouse gas emissions benefit the broader community, these functions should be funded from consolidated revenue.

⁵ See Appendix B of the Consultation RIS

⁶ <http://www.finance.gov.au/financial-framework/financial-management-policy-guidance/cost-recovery.html>

- The rejection of an application for product registration; and
- The cancellation or suspension of a product registration.

This is consistent with arrangements under the *WELS Act*. It is anticipated that the process for appealing decisions will also be largely consistent with the *WELS Act*. The review process would commence with an internal review that could elect to affirm, vary or revoke the decision. If the appellant remains unhappy with the result of the internal review, there would be provisions to request a review of the decision by the Administrative Appeals Tribunal (AAT). The AAT would have the power to substitute an alternative decision.

Responding to this Supplementary Discussion Paper:

1. *Registration at import and domestic manufacture:* Are there any obstacles to the proposal to place registration obligations on importers and domestic manufacturers of products currently or forecast to be covered by the MEPS and energy labelling program?
2. *Grandfathering period:* Are there any practical obstacles to a grandfathering period of 12 months that may need to be considered, in light of the long-term energy efficiency strategies being developed for product categories and the regulation impact analyses conducted each time a standard is introduced or revised?
3. Should registration fees vary for different types of residential, commercial or industrial equipment?

3. ENFORCEMENT OF AND PENALTIES FOR NON-COMPLIANCE

A common theme in submissions received in response to the Discussion Paper and Consultation RIS is that an improved, more rigorous compliance and enforcement scheme will be required to ensure the ongoing credibility of the MEPS and energy labelling program. While it should be strengthened, the enforcement scheme should remain simple and cost effective for all parties.

3.1. Pressures on the existing enforcement scheme

Compliance and enforcement activities are currently carried out by state regulators and by the Commonwealth. Compliance monitoring activities include a national check-testing program and national retail compliance audits. The worst cases of non-compliance have been referred to the Australian Competition and Consumer Commission (ACCC) for action.

At present, compliance with the MEPS and energy labelling program is enforced by a combination of criminal penalties and deregistration of non-compliant products. These penalties are imposed based on the findings of the check-testing process.

However certain submissions have asserted that product deregistration does not, alone, provide a sufficient disincentive against non-compliance.

A number of submissions also suggested that the penalty levels currently available to regulators are not sufficiently high to act as a serious disincentive. There was broad agreement that penalties should be scaled to reflect the seriousness of the offence, including on-the-spot fines for minor breaches as well as enforceable undertakings and higher penalties for more serious breaches.

The new national legislation will aim to build on the existing compliance and enforcement program so as to retain those aspects which have proven effective, while addressing a number of inconsistencies and shortcomings identified below.

1. Disproportionate penalty sizes: In any given jurisdiction, penalties are presently the same for all classes of equipment and are issued on a per unit basis. Consequently, penalties do not vary to reflect the value of the equipment, the environmental damage from the equipment's non-compliance or the unrealised savings by consumers who buy equipment on the expectation of a given energy efficiency.
2. Limited types of penalties: Penalties are largely limited to administrative measures (eg. deregulation of non-compliant products) and criminal penalties. There is general support for a range of criminal, civil and administrative penalties (including infringement notices) to be provided for so that the penalty is appropriate to the scale of the offence and suitably compensates for environmental cost and additional operating costs for consumers.
3. Lack of consistent enforcement across jurisdictions: For a given offence, penalty rates vary across jurisdictions. Moreover, a jurisdiction cannot cancel the registration of non-compliant equipment if the equipment has been registered in a different state.
4. Delays in enforcement: Under the current system, there can be substantial delays between identification of a compliance breach (eg. failure of a check-test) and subsequent enforcement activity. Such delays allow for:
 - the continued sale of non-compliant products (and consequently compounded environmental and consumer impact); or for
 - the supply of non-compliant products to be discontinued (with the effect that deregistration ceases to be an effective penalty).

Consequently, there is support for ensuring that penalties account for past non-compliance.

5. Lack of comprehensive reported data in Australia to support compliance and enforcement measures: Legislation in New Zealand – unlike that operating in the Australian jurisdictions – provides that import and sales data must be reported to the Energy Efficiency and Conservation Authority (EECA). The provision of and availability of up-to-date data has assisted New Zealand’s compliance and enforcement activities. This also acts as a reminder to firms of the regulations they are required to meet. The unavailability of corresponding data in Australia has contributed to delays in enforcement activity.

The proposed legislation provides an opportunity to develop a uniform series of offences, and to ensure that penalties are consistent and consistently applied.

3.2. Elements of an improved compliance and enforcement scheme

When addressing compliance with the new national legislation, the MEPS Regulator could apply a risk-based approach that takes into account the motivations and behaviour of offenders. Figure 1 illustrates how such an approach would apply.

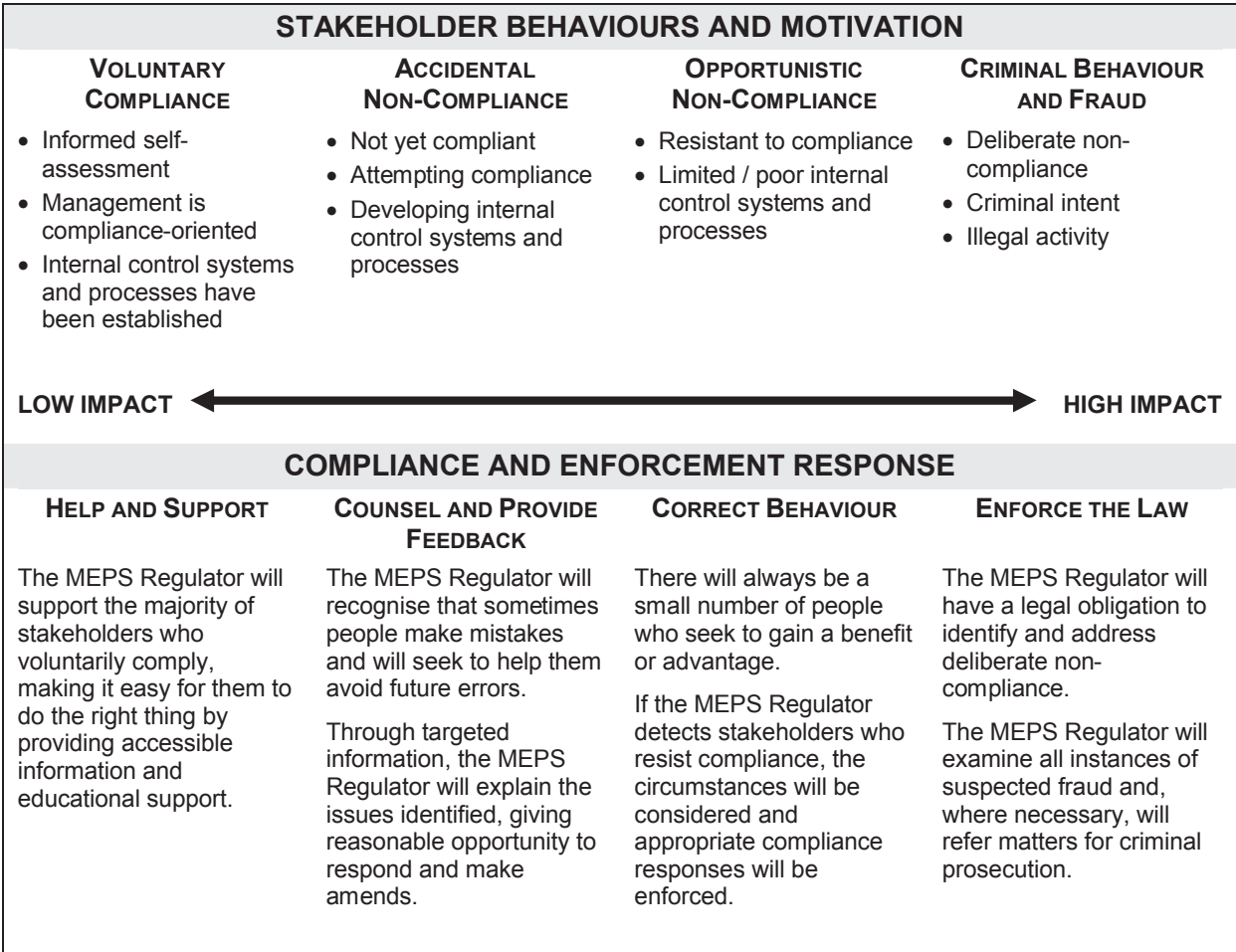


Figure 1. Proposed Compliance Model for the MEPS Regulator

Consistent with this compliance model, a number of enforcement options are available to the MEPS Regulator (Figure 2).

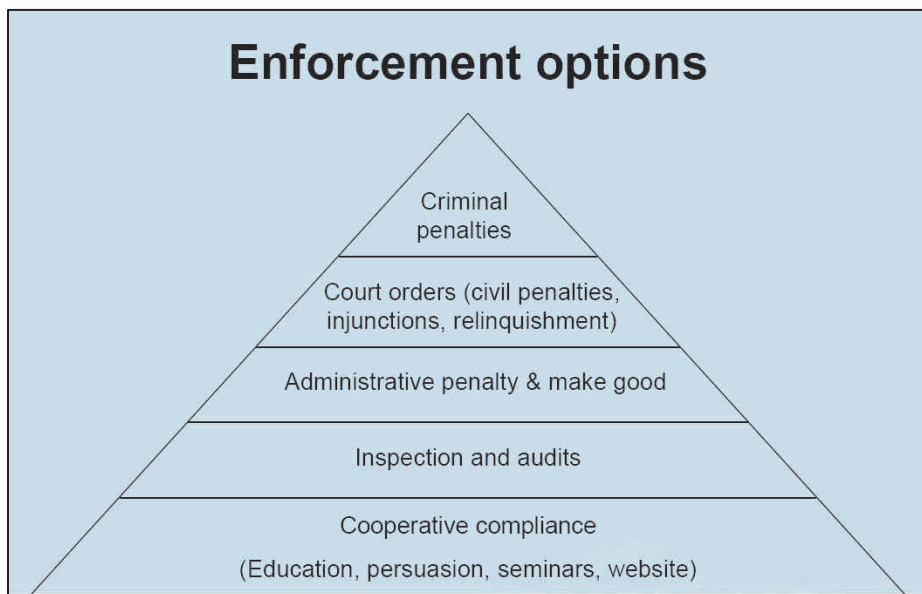


Figure 2. Enforcement Pyramid

Based on these options, the following measures are proposed to address the shortcomings in the current compliance and enforcement scheme (as identified in section 3.1):

1. Accessible information and support
2. Better resourcing of the compliance and enforcement program
3. Expand the types of penalties available:
 - a. *Suspension and deregistration*
 - b. *Infringement notices*
 - c. *Civil and criminal penalties*
 - d. *Enforceable undertakings*
 - e. *Injunctions*
 - f. *Public disclosure of non-compliance by the MEPS Regulator*
4. Sliding scale for penalty rates
5. Standardise regulatory powers across jurisdictions
6. Handling complaints from firms and consumers
7. Mandatory data reporting

These measures are discussed below.

3.2.1. Accessible information and support

The MEPS Regulator will continue to provide accessible information and educational support to encourage and assist firms and individuals complying with the program. In addition, the *energyrating.gov.au* website could be the platform for the development and dissemination of a range of new resources (such as industry fact sheets, retailer training and consumer awareness programs for disadvantaged sectors of the community).

One option would be to extend the *Reach for the Stars* program currently operating in Western Australia. This program involves a qualified advisor visiting major retailers throughout urban and regional areas and providing an overview of the scheme, information on labelling requirements, and support for retailers to assist them to comply with the scheme. The aim of the program is to help firms avoid accidental and unintentional non-compliance.

3.2.2. Continued resourcing of the check-testing program

Irrespective of what other enforcement options become available under the new national legislation, check-testing would retain its central role in the compliance and enforcement program.⁷ The check-testing program would continue to use market intelligence to carefully target non-compliance with the MEPS and energy labelling program.

3.2.3. Expand the types of penalties available

a. Suspension and deregistration

Under the existing program, the potential for a firm to generate income from a product is directly tied to its registration status. Consequently, one significant administrative enforcement option for regulators is to suspend or cancel a product's registration. Products can be deregistered if they are identified as non-compliant as a result of the check-testing process. This enforcement option would remain available to the MEPS Regulator.

b. Infringement notices ('On the spot' fines)

Where infringement notices are provided for, an inspector can give a notice alleging an offence to a suspected offender. The notice provides for the suspected offender to pay a specified penalty to avoid prosecution. Penalty infringement notices are a useful, efficient and inexpensive option for enforcement agencies and can act as low-key notices where non-compliance has been detected.

Certain jurisdictions have the option of issuing infringement notices under their existing MEPS and energy labelling legislation. Under Commonwealth legislation, infringement notices are typically set at one-fifth of the value of the prosecutable level.

c. Civil and criminal penalties

A meaningful pecuniary penalty would reinforce the disincentive offered by product deregistration. It is not uncommon for legislation to include a combination of civil and criminal penalties for some or all offences. Such an approach provides regulatory authorities with the flexibility to align penalties to the scale of an offence.

Criminal penalties may take either the form of imprisonment or fine. Subject to the final legislative model, the nationally consistent maximum penalties for offences under the new national legislation will be applied. Where appropriate, offences would also be increased from present levels (currently determined by each jurisdiction) to levels imposed by recent Commonwealth legislation of similar scope. For example, the *WELS Act 2005* presently imposes penalties of \$6,600 for individuals and \$33,000 for corporations for a range of offences. The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* imposes penalties of a similar scale.

Civil penalty provisions are another enforcement option that are generally invoked for regulatory or corporate misconduct. Civil penalty provisions differ mainly from criminal provisions in that enforcement is subject to the procedures and rules of evidence in civil cases, where proof is on the balance of probabilities. A civil penalty provision only carries a financial penalty, not an imprisonment penalty. The imposition of a civil penalty does not constitute a criminal conviction. The maximum for civil penalties are generally of similar magnitude or higher than a corresponding criminal penalty.

d. Enforceable undertakings

An enforceable undertaking would involve a written undertaking between a firm and the MEPS Regulator that documents actions that will be taken to rectify for non-compliance. Undertakings are legally enforceable and may include the following features:

- Nomination of a date by which the firm must become MEPS-compliant.

⁷ A brief overview of the current compliance and enforcement program is at Appendix III.

- *How the firm proposes to compensate consumers for excess energy bills over the life of the non-compliant product:* Where consumers have made purchasing decisions based on false or misleading information, the consumer will face higher operating costs over the life of the non-compliant product.

Non-compliant firms may be required to compensate consumers who have purchased inefficient products for the gap between expected and real operating costs over the average lifetime of the non-compliant product.

One option would be for the MEPS Regulator and the firm to agree the aggregate gap between expected and real operating costs for the firm's total sales of a non-compliant product. The firm would then pay that aggregate gap into a trust account from which the MEPS Regulator would disburse compensation to consumers. After a set time, remaining funds would be channelled towards compliance and check-testing activities. This would avoid a situation where non-compliant firms could avoid the full penalty for an offence if consumers were unaware of their right to reclaim compensation.

- *How the firm proposes to compensate the environment:* as energy inefficient products consume more energy, the environment will be required to bear a greater load of greenhouse gases associated with the generation of that energy.

Non-compliant firms may be required to purchase and retire an amount of carbon offset credits equivalent to the higher carbon dioxide emissions associated with the product's relative energy inefficiency over its lifetime.

e. Injunctions

The MEPS Regulator could seek an injunction (court order) that may prevent a firm from performing certain actions or ensure that certain actions are undertaken (e.g. to remove non-compliant products from supply).

f. Public disclosure of non-compliance by the MEPS Regulator

A supplementary 'publicity' mechanism could also be used, under which the identity of any person or firm which had imported, manufactured or supplied a non-compliant product would be made publicly available. Many submissions indicated that the threat to a firm's reputation can be an effective disincentive against non-compliance. This type of enforcement option is provided for in similar regulatory programs, including the WELS scheme.

3.2.4. Sliding scale for penalty rates

A sliding scale with categories for penalty sizes could be introduced to address the current disproportionality in penalty sizes between equipment types. One option could be to have different penalties apply for consumer appliances and large industrial or commercial equipment. This would better reflect the value of the equipment, the environmental damage from the equipment's non-compliance or the unrealised savings by consumers who buy equipment on the expectation of a given energy efficiency.

3.2.5. Standardise regulatory powers across jurisdictions

The standardisation of regulatory powers across jurisdictions is a key goal of the new national legislation. The new national legislation would eliminate shortcomings that exist under the current program, such as the limited capacity for equipment models registered in one jurisdiction to be adequately dealt with if detected as non-compliant in another jurisdiction. The new regulatory framework would allow for all enforcement options to be available to the MEPS Regulator, irrespective of the jurisdiction in which non-compliance is detected.

3.2.6. Mandatory data reporting

The legislation is likely to provide for the introduction of Australian data reporting requirements that align as much as possible with the annual requirements imposed in New

Zealand by the *Energy Efficiency and Conservation Act 2000* (Box 2). Firms would be required to provide import, export and sales (wholesale) data for all registered models covered under the program at the time of reporting. Data reporting requirements would not be imposed at the retail level.

There are a number of advantages to establishing data reporting requirements within the new national legislation:

- *Compliance and enforcement*. Complete and robust information about the amount and types of appliances and equipment being imported will assist in the enforcement of compliance under the program. Market data would allow the MEPS Regulator to identify unregistered models being imported and sold by manufacturers and importers in a way that is:
 - *Non-punitive* – the MEPS Regulator would have the capacity to educate and work with manufacturers and importers to ensure their compliance with the program
 - *Timely* – the MEPS Regulator would have the capacity to identify and respond to non-compliance at an early stage
 - *Co-operative* – with the compliance and enforcement program based on industry-reported data, industry would have the confidence that the MEPS Regulator is working to ensure a fair, transparent and level playing field.
- *Encourage co-operation between industry and government*. Annual data collection and reporting would also provide the MEPS Regulator with a set of regular industry contacts on compliance issues and help to build a co-operative and communicative approach to improving equipment energy efficiency.
- *Assist in program review and evaluation*. Market data on products that are either currently regulated or under consideration for regulation would provide a base from which to measure potential or actual benefits to the program. Data would help the MEPS Regulator to track actual against forecast impacts of the MEPS and energy labelling program. As a result, reported data would allow an assessment of the degree to which targets have been met or exceeded and allow the value and achievements of the program to be demonstrated.

The E3 Committee currently purchases data on the retail sales of energy labelled household products collected by a commercial market monitoring company. The data is analysed to identify sale-weighted efficiency and price trends. Purchased data has good coverage of whitegood sales, but incomplete coverage of air conditioners, many of which are supplied by installation companies and other non-retail channels. There are no practical ways to collect data on non-household products, other than direct from the importers or manufacturers.

Box 2 | Extract from the EECA Regulations relating to data

Requirement to provide information for statistical purposes

1. A person who manufactures in New Zealand or imports into New Zealand an item in a product class described in Schedule 1 or Schedule 2, or an assembly that incorporates that item, must provide the Authority with the following information every year no later than 4 months after the end of each year:
 - a. the number of items of each model that the person sold in New Zealand in that year; and
 - b. the number of items of each model that the person exported from New Zealand in that year; and
 - c. the number of items of each model that the person imported into New Zealand that year; and
 - d. the name of each model that the person discontinued—
 - i. manufacturing in that year; or
 - ii. exporting in that year; or
 - iii. importing in that year; and
 - e. a copy of any existing test report, or other energy performance data specified by the Authority, for each model named under paragraph (d).
2. If asked by the Authority in writing, a person who manufactures in New Zealand or imports into New Zealand an energy using item must provide the following information no later than 40 working days after receiving the request:
 - a. the number of items in each product class specified by the Authority that the person sold to a purchaser in New Zealand in each of the preceding 3 years; and
 - b. the energy performance characteristics of the items (as specified in the request).

The issue of data confidentiality was a concern expressed by a number of firms and industry associations in response to the Discussion Paper and the Consultation RIS. Data collected under the proposed legislation would only be publicly released in aggregate consistent with Australian Bureau of Statistics and privacy requirements. The legislation would be expected to provide for serious penalties for the improper release of confidential data.

Responding to this Supplementary Discussion Paper:

4. *Penalty rates:* What penalty sizes would be appropriate for a sliding scale of penalty rates and on what basis should they vary?
5. *Enforcement options:* Are there any other enforcement options that should be incorporated into the new compliance and enforcement scheme for the MEPS and energy labelling program under the new national legislation?

4. COMPLIANCE MONITORING AND POWERS OF INSPECTORS

The enforcement scheme will need to provide for inspectors to have appropriate powers to support the MEPS Regulator in monitoring and enforcing compliance under the legislation. The legislation is likely to provide for Commonwealth, state and territory officials and appropriately qualified third parties to be appointed as inspectors.

Currently, state and territory legislation provides for inspectors to be appointed to monitor compliance. The role of inspectors is generally limited to the detection of non-compliance with labelling requirements. Inspectors are provided with a range of powers that allow entry and search (in certain circumstances, only when possessing a warrant) of premises where a compliance breach is reasonably suspected. Inspectors are authorised to take samples as evidence, including of documents, books and records and, in certain circumstances, can require that a person answers questions. Significant penalties generally apply where a person hinders or impedes an inspector in enforcing legislation.

Powers that are expected to be provided to inspectors under the new national legislation are summarised in Box 3. These powers are based on those provided to inspectors under the existing MEPS program and under other relevant legislation.

Box 3 | Expected Powers of MEPS and energy labelling inspectors

The MEPS and energy labelling Regulator could appoint inspectors with the power to (under prescribed conditions and subject to a warrant, as appropriate):

- enter premises unannounced;
- inspect and purchase regulated appliances and equipment;
- inspect any advertising or other written documents;
- discuss product features;
- observe practices relating to the supply of products within the public area of the premises;
- search the premises and anything (including vehicles) on the premises;
- conduct tests on the premises;
- take photographs and make video/audio recordings;
- inspect records;
- make copies of records and use equipment as required on the premises; and
- remove items or restrict access to items on a premises.

Responding to this Supplementary Discussion Paper:

6. *Powers of MEPS Inspectors:* Are there any other powers that would assist MEPS and energy labelling inspectors carry out their duties under the new national legislation?

Appendix I EXTRACTS FROM NATIONAL STRATEGY ON ENERGY EFFICIENCY, 2009

2.2 APPLIANCES AND EQUIPMENT

Measure	Key Elements	Process	Implementation responsibility
2.2.2. Establish national legislation for Minimum Energy Performances Standards (MEPS) and labelling, and over time move to add Greenhouse and Energy Minimum Standards (GEMS).	<p>a. Measure is intended to include an overhaul and streamlining of the MEPS process to include target timelines for development and implementation of new standards.</p> <p>b. Include gas products in MEPS and labelling.</p> <p>c. GEMS legislation expected to cover non-electrical appliances and system components that affect the energy efficiency of appliances (for example air conditioner ducting).</p>	<p>Stage one: Australian Government tasked with leading an officials group to consider form of national legislation. Undertake stakeholder consultation, including regulatory impact analysis (RIA) process. As part of this RIA process, the issues and processes for including greenhouse and energy minimum standards will be examined. Stage one will be completed when the RIA process is complete. Expected to be mid-2010.</p> <p>Stage two: New legislation drafted or amendments to existing legislation and regulations. Bills(s), including a simplified and nationally consistent compliance and enforcement scheme, to be introduced and legislation enacted in Parliament. Stage two will be complete when the draft Bills(s) have been passed, target implementation timeframe is second half of 2010.</p>	<p>Australian Government</p> <ul style="list-style-type: none"> Department of the Environment, Water, Heritage and the Arts in consultation with the states and territories through the Ministerial Council on Energy (MCE).
2.2.5. Develop and implement additional consumer information programs.	<p>a. Mandate the requirement for star ratings of appliances to be displayed in advertising material such as brochures, television advertisements and websites (subject to regulatory impact analysis).</p> <p>b. Develop information and advice to assist the promotion and sale of the most efficient products.</p>	<p>A three pronged approach will be used to achieve this measure:</p> <ul style="list-style-type: none"> Consumer information – mandatory energy rating information in product advertising; and Retailer training – as product labelling is required for new products at point of sale, plans will be developed for provision of education materials for retailers which will be used to empower consumers when making purchasing decisions (for example retailer communications materials are currently being developed in readiness of the introduction of mandatory labelling for televisions and lighting changes). Websites – renovated www.energyrating.gov.au website as an information source, together with the LivingGreener.gov.au portal (refer measure 1.3.1). 	<p>Ministerial Council on Energy and the Australian Government</p> <ul style="list-style-type: none"> NFEE Equipment Energy Efficiency (E3) Committee <p>Australian Government</p> <ul style="list-style-type: none"> Department of the Environment, Water, Heritage and the Arts in consultation with the states and territories through the MCE.

A full copy of the strategy can be downloaded from: www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/Energy_efficiency_measures_table.pdf

Appendix II PRODUCTS EXPECTED TO BE COVERED BY THE EQUIPMENT ENERGY EFFICIENCY (E3) PROGRAM BY 2011

Location	No.	Product	Measure	
			MEPS	Labelling
Home	Whitegoods			
	1	Refrigerators	✓	✓
	2	Freezers	✓	✓
	3	Dishwashers		✓
	4	Clothes washers		✓
	5	Clothes dryers		✓
	Home Entertainment			
	6	Televisions	✓	✓*
	7	Set-top boxes	✓	✓*
	8	Other home entertainment :		
		• DVDs	✓	✓*
		• Home theatre	✓	✓*
	• New technologies	✓	✓*	
Heating and Cooling				
9	Air conditioners (single phase, three phase)	✓	✓	
10	Electric storage water heaters	✓		
11	Gas water heaters	✓		
Other Products				
12	Swimming pool equipment	✓	✓	
Office	Heating and Cooling			
	13	Air conditioners (packaged - 3 phase)	✓	✓*
	14	Close control AC (for computer rooms)	✓	
	15	Chiller towers for commercial AC	✓	
	IT and Office Equipment			
	16	Computers (including laptops) and monitors	✓	✓*
	17	External power supplies (EPS)	✓	✓*
	18	Internal power supplies (IPS)	✓	✓*
	Lighting			
	19	Fluorescent ballasts (linear)	✓	✓
	20	Fluorescent lamps (linear)	✓	✓*
	21	Fluorescent lamps (CFLs)	✓	✓*
	22	Halogen lamps (including reflector lamps)	✓	✓*
	23	Halogen transformers	✓	✓*
	24	Luminaires	✓	✓*
	25	High intensity discharge lamps	✓	✓*
	26	High intensity discharge ballasts	✓	✓*
	27	Control systems	✓	✓*
28	Emergency and exit lighting	✓	✓*	
Other Products				
29	Chilled and boiling water dispensers		✓*	
30	Refrigerated beverage vending machines	✓		

Location	No.	Product	Measure	
			MEPS	Labelling
Factory	Industrial			
	31	Electricity distribution transformers	✓	✓*
	32	Electric motors (3 phase)	✓	✓*
	33	Industrial fans	✓	
	34	Industrial pumps	✓	
	35	Air compressors	✓	
	Commercial Refrigeration			
36	Refrigerated display cabinets	✓	✓*	
Street	Lighting			
	37	Public amenity lighting (street lighting)	✓	✓*
	38	Traffic signals (LED)	✓	✓*

*High efficiency voluntary label

Appendix III OVERVIEW OF THE CURRENT COMPLIANCE AND ENFORCEMENT PROGRAM

The E3 program's existing compliance and enforcement activities aim to ensure:

- that electrical products entering the markets meet the MEPS specified in legislation; and
- that the performance of electrical products offered for sale meet the energy efficiency and performance claims made by suppliers on labels and claims contained in registration applications.

Products falling under the program must be registered for sale in Australia. The registration is a declaration by a firm that its product conforms to the relevant Australian Standard. The registrant must supply a test report upon a request from one of the state regulators.

Registrants' own test reports are normally accepted, although if they are found to have mis-reported energy performance the regulators can insist on independent test reports for all future registrations.

The check-testing program targets a range of size and types of products available in the open market and tests them in accredited laboratories. The check-testing program is not a random testing program. Rather, the program carefully targets non-compliance using market intelligence from a range of sources such as manufacturers, retailers and the general public. It identifies high-risk products from companies who have either previously failed; that consumers or industry representatives have reported as non-compliant; or whose registrations appear anomalous.

If a product fails its Stage 1 check-test, the firm is given the choice of either de-registering the product (so it can no longer be sold) or proceeding to Stage 2 check-testing. Here, three further samples of the same model are randomly selected and tested at the registrant's cost. If the average of the test results constitutes a failure, the product is de-registered. There are also fines for non-registration of products and for incorrect labelling of products – these vary from jurisdiction to jurisdiction.

Any case can be referred to the ACCC. If the firm has cooperated, the ACCC often elects to take no further action. If the firm has not cooperated, the Trade Practices Act provides a range of enforcement options from which the ACCC can choose.

Since 1991, about one-third of all products check-tested under this targeted program failed MEPS or were not as described. Since the program only check-tests products that are suspected of non-compliance, this represents a very small sample of the total number of products registered under the program. A recent survey showed that 98 per cent of whitegoods carried the correct energy efficiency label.