

WATER EFFICIENCY LABELLING AND STANDARDS BILL 2006

EXPLANATORY MEMORANDUM

Overview of the Bill

The purpose of the *Water Efficiency Labelling and Standards Bill 2006* is to implement a cooperative scheme involving complementary Commonwealth, State and Territory legislation to ensure that purchasers of particular types of water-use and water-saving products are provided with information to assist and encourage them to select more water-efficient products.

The Water Efficiency Labelling and Standards (WELS) Scheme is also intended to encourage (and in some cases require) suppliers of these products to adopt more water-efficient technology. Ultimately, it is envisaged that the purchase of more water-efficient products will result in reduced water consumption, thus contributing to the conservation of water supplies.

The WELS Scheme provides for the determination of “WELS products” to be subject to the scheme, and for the specification of “WELS standards” to apply to WELS products, setting requirements for water efficiency, performance, registration and labelling of these products.

A Regulator is established under the Commonwealth Act to administer the scheme and is empowered to make arrangements with Commonwealth, State and Territory agencies to assist with the carrying out of their functions.

The legislation creates offences and associated penalties in relation to failing to comply with registration, labelling and minimum efficiency and performance requirements, and in relation to the misuse of standards. It provides for an enforcement regime that includes infringement notices, enforceable undertakings and injunctions. The legislation also provides for the appointment of inspectors to investigate possible contraventions and sets out their powers and obligations.

A WELS Account is established under the Commonwealth Act to receive funds and to make payments in relation to the operation of the WELS Scheme. Provision is made for fees and penalties collected by the State of Western Australia under the legislation to be credited to the WELS Account.

The Bill includes provisions for internal and Administrative Appeals Tribunal review of decisions and for the making of regulations. The Commonwealth Act requires an annual report on the WELS Scheme to be given to the State and requires an independent review of the WELS scheme after 5 years of the operation of the Commonwealth Act. The Bill requires these reports and reviews to be tabled in State Parliament when they are provided by the Commonwealth.

Clause Notes

PART 1—PRELIMINARY

- Clause 1 sets out the short title of the Bill.
- Clause 2 provides that the substantive provisions of the Bill will commence on a day or days to be proclaimed. The commencement is open-ended and allows commencement of different provisions on different days because the Bill forms part of a cooperative scheme between the Commonwealth and the other States and the Territories and commencement needs to await legislative implementation in those other jurisdictions.
- Clause 3 sets out the objects of the Bill. The Bill is intended to ensure that purchasers of particular types of water-use and water-saving products are provided with information to assist and encourage them to select more water-efficient products. It is also intended to encourage (and in some cases require) suppliers of these products to adopt more water-efficient technology. Ultimately, it is envisaged that the purchase of more water-efficient products will result in reduced water consumption, thus contributing to the conservation of water supplies.
- Clause 4 provides that the Crown is bound to comply with the provisions of the Bill, but is not liable to be prosecuted for an offence.
- Clause 5 comprises a note that states that the Commonwealth Act includes a provision that extends that Act to all external Territories other than Norfolk Island.
- Clause 5A provides that in order to maintain consistency in numbering between this Act and the Water Efficiency Labelling and Standards Act 2004 of the Commonwealth, if a section of the Commonwealth Act is not required in this Act, the section number and heading of that section will be included in the Act even though the body of that section will not be included.
- Clause 5A further provides that if this Act contains a section that is not included in the Commonwealth Act, that section will be numbered so as to maintain consistency in numbering between sections common to the Act and the Commonwealth Act.

PART 2—INTERPRETATION

- Clause 6 comprises a note that states that the Commonwealth Act section 6 applies Chapter 2 of the Commonwealth Criminal Code to offences against that Act.
- Clause 7 defines several terms used in the Bill—
- **"AAT "** is defined as meaning the Administrative Appeals Tribunal established by the AAT Act;
 - **"AAT Act"** is defined as the *Administrative Appeals Tribunal Act 1975* of the Commonwealth;
 - **"affected person"** is defined (by reference to clauses 69(2) and (3)) as a person whose application to register a WELS product is refused or whose registered WELS product has had its registration cancelled or suspended;
 - **"agency"** is defined as including agencies within the meaning of the Financial Management and Accountability Act 1977 of the Commonwealth, State and Territory Departments of State, and bodies corporate established for a public purpose under Commonwealth, State or Territory law. (In the Financial Management and Accountability Act 1977 of the Commonwealth, an agency is defined as meaning a Department of State, a

Department of the Parliament, or a body, organisation or group of persons prescribed by the regulations under that Act as a "prescribed Agency");

- **"applicable WELS standard"** is defined (by reference to clause 32) as the standard under which a WELS product is registered or, where the product is not registered, the most recent WELS standard relating to that type of product;
- **"Commonwealth Act"** is defined as meaning the *Water Efficiency Labelling and Standards Act 2004* of the Commonwealth;
- **"Commonwealth Minister"** is defined (by reference to the Commonwealth Act) as the Minister appointed to administer the Commonwealth Department that deals with the matters to which this Bill relates. (This is currently the Minister for the Environment and Heritage);
- **"corresponding law"** is defined (by reference to clause 12) as the Commonwealth Act or a State or Territory law (other than this Act) declared by the Commonwealth Minister under the Commonwealth Act to correspond to the Commonwealth Act and whose operation involves the use of determinations under section 18 of the Commonwealth Act that certain products are WELS products;
- **"damage"**, in relation to data, is defined as including damage by erasure or addition of data;
- **"evidential material"** is defined as any thing that may be relevant to the investigation or prosecution of an offence against this Bill;
- **"occupier"**, in relation to premises, is defined as including a person who apparently represents the occupier of the premises;
- **"person who has WELS information"** is defined (by reference to clause 60) as a person whom the Regulator believes on reasonable grounds to be capable of providing information, documents, etc. relevant for the purposes of investigating or preventing an offence under the Bill;
- **"registered"** relates to those products defined as registered under a WELS standard;
- **"Regulator"** is defined (by reference to section 21 of the Commonwealth Act) as the Secretary of the Commonwealth Department that deals with the matters to which this Bill relates. (This is currently the Secretary of the Department of the Environment and Heritage);
- **"reviewable decision"** is defined (by reference to clause 69(1)) as a decision by the Regulator to refuse to register a WELS product or to cancel or suspend the registration of a WELS product;
- **"supply"** is defined as being supply or offer to supply for consideration, and is intended to include (without limiting the general meaning of the term) supply by way of lease, hire or hire-purchase;
- **"water-saving product"** is defined as a device, appliance or fitting designed to operate in place of a water-use product (but which is not itself a water-use product);
- **"water-use product"** is defined as a device, appliance or fitting through which, or into which, water flows as part of its normal operation;

- **"WELS business premises"** is defined as WELS premises that are open to the public on a regular basis and used for, or in connection with, the supply of WELS products;
- **"WELS inspector"** is defined (by reference to clause 45(1)) as a Commonwealth, State or Territory employee or officer appointed as a WELS inspector by the Regulator;
- **"WELS-labelled"** is defined (by reference to clause 20(1)) as a product labelled in accordance with requirements set out in the WELS standard for products of that kind;
- **"WELS premises"** is defined as premises used for, or in connection with, the supply of WELS products;
- **"WELS product"** is defined (by reference to the Commonwealth Act) as a water-use product or water-saving product of a kind specified by the Commonwealth Minister to be a WELS product;
- **"WELS scheme"** is defined as the water efficiency labelling and standards scheme established by this Act and corresponding laws;
- **"WELS standard"** is defined as the standard relating to a given type of WELS product determined under section 18(1) of the Commonwealth Act. Under that Act standards may specify any registration and labelling requirements and any minimum standards to apply to products of that type, and may also set out the criteria for rating the water efficiency and/or performance of products of that type.

Clause 7(2) provides that a reference in the Bill to the Commonwealth Act or a corresponding State-Territory law includes a reference to that Act or those laws as amended or re-enacted and amended and in force for the time being

Clause 7(3) makes provision that a penalty unit described in the Bill is to be calculated by reference to the value of a penalty unit in section 4AA of the Crimes Act 1914 (Cth) in order to ensure consistency of penalties throughout the scheme.

PART 3—NATIONAL WELS SCHEME

Clause 8 notes that this Bill is intended to form a part of a cooperative scheme between the Commonwealth and the States and Territories. All State and Territory Ministers have agreed in principle to introduce complementary "mirror" legislation to operate in conjunction with the Commonwealth Act. The effect of the complementary legislation will also be to compensate for the jurisdictional gaps in the coverage of Commonwealth powers in relation to the operation of the WELS Scheme.

Clause 9 comprises a note that states that the Commonwealth Act includes a provision about the application of that Act.

Clause 10 clarifies that the provisions of this Act do not replace or override any existing State laws.

Clause 11 comprises a note that states that the Commonwealth Act includes a provision allowing State laws to operate concurrently with that Act.

Clause 12 defines "corresponding law".

Clause 13 comprises a note that states that the Commonwealth Act includes a provision allowing corresponding State-Territory laws to confer functions, powers and duties on certain Commonwealth officers.

- Clause 14 comprises a note that states that the Commonwealth Act includes a provision dealing with the imposing of duties on Commonwealth officers by corresponding State-Territory laws.
- Clause 15 comprises a note that states that the Commonwealth Act defines "**imposes a duty**" for the purposes of sections 13 and 14 of that Act.
- Clause 16 comprises a note that states that the Commonwealth Act section 16 avoids the doubling up of liabilities but that in Western Australia, the *Sentencing Act 1995* section 11(2) operates so that a person who has been sentenced for an offence under the Commonwealth Act cannot be sentenced for a corresponding offence under the Bill.
- Clause 17 comprises a note that states that the Commonwealth Act section 17 provides for the review of State-Territory decisions by the Administrative Appeals Tribunal and that the review of decisions under the Bill is dealt with in clause 72.

PART 4—WELS PRODUCTS AND WELS STANDARDS

- Clause 18 comprises a note that states that section 18 of the Commonwealth Act enables the Commonwealth Minister to determine that certain products are covered by the WELS scheme and set out standards for those products. Before such a determination can be made, however, the Commonwealth Minister must have the agreement of a majority of the participating States and Territories to the terms of the determination. A "participating State or Territory" is one in which there is a corresponding State-Territory law within the meaning of the Commonwealth Act.
- Clause 19 comprises a note that states that the Commonwealth Act includes a provision as to what must be set out in WELS standards and enabling the standards to require products to be registered or labelled for the purposes of specified supplies.
- Clause 20 enables a WELS standard to impose labelling requirements for WELS products. The clause allows the labelling requirements to encompass the characteristics, use and display of labels.

PART 5—THE WELS REGULATOR

- Clause 21 comprises a note that states that the Commonwealth Secretary (i.e. currently the Secretary of the Department of the Environment and Heritage) is the Regulator.
- Clause 22 sets out the functions of the Regulator, which are essentially to oversee the operation of the scheme, and include—
- To administer the WELS scheme: The Regulator will, inter alia, receive and process applications for registration and issue registrations, fund and provide WELS inspectors, and administer operation of the WELS Account established under the Commonwealth Act.
 - To undertake or commission research in relation to water-use and water-saving products, and provide advice in relation to determining that water-use or water-saving products are WELS products: The Regulator will evaluate which products should be subject to the scheme and the provisions that should apply to them and advise on this. The intent of this provision is to provide for a mechanism that will continuously identify products to be included in the scheme over time, and possibly also some products that no longer ought to be included.

To undertake or commission research in relation to WELS standards and their effectiveness in reducing water use, provide advice to the Minister about the operation of WELS standards, and assist in the development of WELS standards: The Regulator will evaluate the standards that should apply to particular WELS products and the effectiveness of standards in meeting the objects of the Act, and advise the Minister on this, as well as contributing to work to develop standards. (This could result in changes to standards. Some products might need to be modified in order to comply with the revised standards, or have their registration withdrawn.)

- To provide information and advice to the public, the Minister and the relevant agency about the operation of the WELS scheme: The office of the Regulator will be the principal contact point for members of the public on the WELS scheme and will be responsible for the preparation and dissemination of information regarding the scheme. It will also provide advice to, and circulate information on behalf of, government.
- Such other functions as are conferred on the Regulator by this Act, the regulations or any other law.

Clause 23 empowers the Regulator to do all things necessary or convenient to be done for or in connection with the performance of these functions.

Clause 24 provides for the Regulator to make arrangements with other government agencies to assist with carrying out functions and duties and exercising powers under the Act. Other agencies may have expertise in areas relevant to the operation of WELS, and it may increase efficiency and cost-effectiveness for the Regulator to draw on this. For example, it is envisaged that the certain State consumer affairs agencies could assist with compliance and enforcement action.

Clause 25 provides for the Regulator to delegate powers to other State/Territory or Commonwealth officers (subject to the Regulator's directions - see the note at the end of clause 25). It is envisaged that much of the work undertaken to fulfill the Regulator's functions will be carried out by officers within the Regulator's Department, so it will be necessary for the Regulator to delegate powers to the principal officers involved. Also, given the provision under clause 24 for the Regulator to make arrangements with State government agencies to assist with carrying out functions, it would be necessary for the Regulator's capacity to delegate to be extended to relevant officers of such agencies. Delegation of powers to a State government officer or employee is subject, however, to the agreement of the State.

PART 6—REGISTRATION OF WELS PRODUCTS

Clause 26 provides for the manufacturer (who may be defined for the purposes of this Bill by regulation under the Commonwealth Act) of a WELS product to apply for registration of the product. The purpose of registration is to develop better knowledge of the market and assist with compliance monitoring and enforcement of the WELS scheme. Information obtained through registration will be used to assess whether products comply with the relevant standards and to determine the appropriate rating labels. While it is intended that some types of WELS products will not be subject to mandatory registration, because the benefits of subjecting them to the scheme appear to be marginal, it will still be possible for products of those types to be voluntarily registered, so that, for example, the manufacturer of a water-efficient product of that type who wishes to demonstrate the product's water-efficiency is able to do so. Once a product has been registered, even if registration for that product is optional, the product must comply with any registration requirements, including labelling requirements, set out in the applicable WELS standard.

Clause 27 applies the requirements set out under the Commonwealth Act as to how an application for registration is to be made and the conditions that must be met to maintain registration. Subject

to disallowance by either House of the Commonwealth Parliament, the Commonwealth Act provides for the Commonwealth Minister to specify the form an application is to take, together with the documentation and registration fee that is to accompany the application. It is intended that the documentation required of applicants for registration of a WELS product is to include evidence of the results of testing the product against the relevant WELS standard, as well as (where relevant) a sample of the water efficiency label to be used for the product. It is also intended to charge a registration fee at a level sufficient to cover the costs of administering the WELS scheme, in line with Commonwealth Government cost-recovery policies.

- Clause 28 requires the Regulator to register, by notice published in the Commonwealth of Australia Gazette, a WELS product for which an application for registration has been received and approved by the Regulator, or, where an application for registration has been refused, to give the applicant written notice of the refusal. If the Regulator has neither registered the product nor notified the applicant of refusal within 3 months of the application being made, the application is automatically taken to have been refused.
- Clause 29 specifies grounds upon which the Regulator may refuse to register a WELS product. These are that the application has not been made in accordance with the requirements of clause 27, that the Regulator is not satisfied as to the accuracy of the information provided in the application, or that the product fails to satisfy the requirements of the relevant WELS standard.
- Clause 30 Sub-clause (1) provides for 5-year registration periods for WELS products (unless the registration is cancelled or suspended under clause 31). A 5-year registration period has been stipulated to mirror the arrangements in place for the existing energy labelling program and is accepted by industry as a suitable registration period due to the rapid changes in technology and the frequent introduction of new models. However, if during the registration period for a WELS product the Commonwealth Minister makes a determination on a new or revised WELS standard, sub-clause (2) provides that existing registrations under the superseded standard will expire 12 months after the introduction of the new or revised standard. If the Commonwealth Minister extends that 12 month period for the corresponding provision of the Commonwealth Act, sub-clause (3) applies that extension to the Victorian Act.
- Clause 31 empowers the Regulator to cancel or suspend the registration of a WELS product where conditions of registration are not being complied with or where the Regulator subsequently becomes aware that the information provided in the application for registration was not accurate at the time of application or is no longer accurate because changes have been made to the product. In circumstances where the Regulator determines that the registration of the WELS product is to be suspended or terminated, the Regulator is required to provide the person on whose application the product was registered with written notice of the cancellation or suspension of registration of the WELS product.
- Sub-clause (3) requires the Regulator to cancel a registration upon request from a manufacturer of a WELS product, in circumstances where the current WELS standard for that product type does not require the product to be registered. This provision is for the benefit of manufacturers who no longer wish to register WELS-label products that are not required to be registered.

PART 7—OFFENCES RELATING TO THE SUPPLY OF WELS PRODUCTS

Division 1—Applicable WELS Standards

- Clause 32 defines "**applicable WELS standard**" as the standard under which a WELS product is registered or, where the product is not registered, the most recent WELS standard relating to that type of product.

Division 2—Registration and Labelling

- Clause 33 makes it an offence to supply an unregistered WELS product where the applicable standard requires the product to be registered.
- Clause 34 makes it an offence to supply a registered WELS product without a label, where the applicable standard requires the product to carry a label if registered. (Note: in some cases, a product may not be required to be registered, but the standard may specify that if the product is registered, it must carry a label. In such a case, it would not be an offence for the product not to be registered, but if it were registered, it would then be an offence for it not to carry a label.)

Division 3—Minimum Efficiency and Performance Requirements

- Clause 35 makes it an offence to supply a WELS product required to be registered that does not comply with minimum water efficiency requirements specified in the applicable WELS standard.
- Clause 36 makes it an offence to supply a WELS product required to be registered that does not comply with minimum performance requirements specified in the applicable WELS standard.

Division 4—Misuse of WELS Standards etc.

- Clause 37 makes it an offence to use a WELS standard or information included in a WELS standard, in a manner that is inconsistent with the standard, for example, by supplying a labelled product that is not registered.
- Clause 38 makes it an offence to use information for or in relation to supply of a WELS product, that is inconsistent with information in the applicable WELS standard. For example, this would include supplying a product with additional labels or markings of a type that contradict the message of the approved label.
- Clause 39 elaborates on the meaning of using information for the purposes of clauses 37 and 38. Without limiting the general meaning of words used in those clauses, it specifies that information is used for, or in relation to, the supply of a product if the information is conveyed on or by a label, packaging, document or other material provided with or in connection with the product or any advertising relating to the product.

Offences against clauses 33, 34, 35, 36, 37 and 38 are all intended to be offences of strict liability to which the common law defence of honest and reasonable mistake of fact applies. Strict liability is imposed to facilitate the expedient enforcement of the provisions given that there are expected to be a high number of inadvertent contraventions of the Act. A strict liability regime is intended to facilitate the imposition of penalties for the physical elements of the offences without proof of fault. Without a strict liability regime in place, it would be very difficult to enforce these provisions.

Division 5—Extensions of Criminal Responsibility

- Clause 39A makes it an offence to give false or misleading information or produce a false or misleading document in connection with an application to the Regulator or in complying or purporting to comply with this Act (other than Division 4 of Part 9) or the regulations.

PART 8—OTHER ENFORCEMENT

Division 1—Infringement Notices

- Clause 40 authorises a WELS Inspector to give an infringement notice for prescribed offences against Division 2, 3 or 4 of Part 7 within 12 months of the date of the offence. The offence cannot be prescribed if it is punishable by imprisonment.
- Clause 40A specifies what must be set out in a prescribed infringement notice. The infringement penalty must not exceed 20% of the maximum fine for the offence.
- Clause 40B enables the extension of time to pay an infringement penalty.
- Clause 40C provides for the withdrawal of an infringement notice by notice in a prescribed form and the refund of any infringement penalty paid.
- Clause 40D provides that payment of the infringement penalty expiates the offence and that its payment is not to be taken to be an admission of guilt or liability
- Clause 40E provides for the amount paid as an infringement penalty to be dealt with as if it were a penalty imposed by a court as a penalty for an offence.
- Clause 40F requires a WELS inspector giving an infringement notice to produce their identity card if requested to do so by the person being given the infringement notice.

Division 2—Publicising Offences

- Clause 41 allows the Regulator to publicise convictions against the Act, without placing any limitations on the Regulator's powers in this regard. Nor does it prevent anyone else from publicising an offence against the Act or affect any obligation on anyone to publicise an offence against the Act. It is envisaged that publicising offences against the Act will act as a deterrent to others against further offences against the Act.

Division 3—Enforceable Undertakings

- Clause 42 enables the Regulator to accept undertakings (or variations to or withdrawal of undertakings) in connection with matters relating to compliance with a WELS standard or registration condition. This provision is intended to act as an alternative to prosecution in those circumstances where non-compliance with the Act would otherwise result in an offence in relation to the compliance with a WELS standard or a registration condition.
- Clause 43 provides for the Regulator to apply to the Supreme Court, where the Regulator considers that a person has breached any terms of an undertaking given under clause 42, for an order to direct the person either to comply with the terms of the undertaking, pay the State an amount up to that of any financial benefit the person has gained as a result of the breach, compensate any other person for loss or damage resulting from the breach, or anything else that the Court considers appropriate.

Division 4—Injunctions

- Clause 44 empowers the Supreme Court, on the application of the Regulator, to grant an injunction either to restrain a person who is engaging in or proposing to engage in conduct constituting an offence against the Act from engaging in that conduct, or to require the person to take such specified action as the Court determines in order to comply with the Act.
- Sub-clause (2) empowers the Court, on application, to grant an injunction, by consent of all parties to the proceedings regardless of whether the Court is satisfied of the commission or potential commission of an offence.
- Sub-clause (3) enables the Court to grant an interim injunction pending its determination of an application. The purpose of this is to enable the court to prevent any potential damage,

destruction or the removal of the products from the jurisdiction while it is considering the application. Sub-clause (4) prevents the Court from requiring the Regulator or anyone else to give an undertaking as to damages as a condition of granting an interim injunction.

Sub-clauses (5), (6) and (7) enable the Court to discharge or vary the injunctions referred to above.

PART 9—WELS INSPECTORS

Division 1—Appointment of WELS Inspectors

- Clause 45 empowers the Regulator to appoint State and Commonwealth government officers and employees as WELS inspectors. The appointment of State government officers and employees as WELS inspectors is, however, subject to the agreement of the State. This clause also requires WELS inspectors to comply with any directions of the Regulator in exercising their powers or performing their functions as WELS inspectors.
- Clause 46 requires the Regulator to issue photographic identity cards (the form of which is to be prescribed by regulation under the Commonwealth Act) to all WELS inspectors. It requires that WELS inspectors must carry their identity cards at all times while operating as WELS inspectors. Sub-clause (3) makes it an offence for WELS inspectors to fail to return their identity cards to the Regulator as soon as practicable after ceasing to be WELS inspectors, and imposes a maximum penalty of \$110 for this. Sub-clause (5) prohibits a WELS inspector from exercising powers as a WELS inspector without being able to produce his or her identity card at the request of the occupier of premises to be inspected.
- Clause 46A makes it an offence to hinder or obstruct or impersonate a WELS inspector.

Division 2—Powers of WELS Inspectors

- Clause 47 as a general provision, enables WELS inspectors to exercise their powers for the purposes of determining whether a person is complying with the Act or regulations or for the purposes of investigating offences against the Act or regulations.
- Clause 48 allows WELS inspectors, in exercising their powers, to enter WELS business premises at any time when the premises are open to the public (i.e. during normal business hours) to monitor compliance with the Act, and to do essentially the same things as members of the public are able to do on the premises during normal business hours, including inspecting WELS products; purchasing any WELS product that is available for sale; inspecting or collecting written information, advertising material or any other documentation that is available to the public; discussing product features with any person; or observing practices relating to the supply of products. However, this does not affect any rights of occupiers to refuse to allow inspectors on their premises.
- Clause 49 allows a WELS inspector to otherwise enter premises with the consent of the occupier of the premises. In seeking the consent of the occupier, the WELS inspector must make the occupier aware that he or she may refuse or withdraw consent at any time.
- Clause 50 makes it clear that it is not an offence for occupiers of WELS premises to refuse to allow WELS inspectors to enter or remain on their premises without a warrant.
- Clause 51 authorises a WELS inspector to enter premises with a warrant, irrespective of the occupier's consent. WELS inspectors who do enter premises with consent or with a warrant are provided general powers of search, inspection and information gathering. This clause also empowers a

WELS inspector (who has entered premises with a warrant) to require any person on the premises to answer questions and produce documentation. Failure to comply with such a request from a WELS inspector is an offence with a maximum penalty of 9 months imprisonment. This clause also empowers the inspector to seize or secure any evidential material on the premises and ensures that the Regulator has the powers needed to take immediate action to secure evidence relevant to an investigation or prosecution. (Note that clauses 55, 56 and 57 set out requirements relating to seizing, securing and holding of evidential material).

- Clause 52 requires a WELS inspector, before entering WELS premises under a warrant, to announce that he/she is authorised to enter the premises and to provide any person at the premises the opportunity to allow entry. However, a WELS inspector need not comply with this if he or she reasonably considers that immediate entry is necessary to ensure the effective execution of the warrant.
- Clause 53 requires a WELS inspector to give to the occupier of premises (if present) a copy of the warrant being executed in relation to the premises and identify himself or herself to the occupier. The copy of the warrant need not include the signature of the magistrate who issued the warrant. (Note: this is to allow for clause 59 urgent warrants, where there may not be an opportunity to obtain the magistrate's signature before executing the warrant.)
- Clause 54 makes it an offence for the occupier of WELS premises (at which a warrant is being exercised), not to provide the WELS inspector executing the warrant with all reasonable facilities and assistance for the effective execution of the warrant.
- Clause 55 requires a WELS inspector who seizes or secures evidential material to issue a receipt for such material to the occupier of the premises. The Regulator is permitted to make copies of the material, and to examine or test the material, even if that might result in damage to the material. The Regulator is, however, required to return or release the material when it is no longer needed for the purposes for which it was seized or secured, or within 90 days at the latest. The purpose of this provision is to prevent businesses from being impeded for longer than is necessary.
- Clause 56 enables the Regulator to apply to a magistrate for an order allowing possession or control of the material for a further specified period than the 90 days provided for by clause 55. In determining an application, the magistrate must allow the owner of the material to appear and be heard, and must not make an order for the extended possession or control of evidential material unless satisfied that it is necessary for the purposes of prosecuting an offence against this Act.
- Clause 57 allows the Regulator to dispose of evidential material, as the Regulator thinks appropriate, where the Regulator is unable to locate the owner of the material despite making reasonable efforts.

Division 3—Applying for Warrants to Enter WELS Premises

- Clause 58 enables a magistrate to issue a warrant to a WELS inspector, if the magistrate is satisfied that entering the premises is necessary to determine whether a person is complying with the Act or regulations or to investigate a possible offence against the Act. The magistrate may require further information to be provided with a warrant application in order to determine the need or otherwise for the warrant to be issued. A warrant authorises the WELS inspector to enter the premises using such assistance and force as is necessary and reasonable. The warrant must state the purpose for which it is issued, indicate when the entry is authorised, and specify the day on which it ceases to have effect (warrants may be issued for a maximum of one week).

Clause 59 allows for a WELS inspector to apply for an urgent warrant by telephone, fax or other electronic means. Where practical, the magistrate may require communication by voice and may record such communication. In such circumstances, before applying for the warrant the WELS inspector must still prepare information setting out the grounds on which the warrant is sought and of the necessity to enter the WELS premises, but if necessary the WELS inspector may apply for the warrant before the information is sworn or affirmed. If the magistrate is satisfied that there are reasonable grounds for doing so, he/she may then issue a warrant as if the application had been made under clause 58. The magistrate must then advise the WELS inspector of the terms of the warrant, the day on which and the time at which the warrant was signed, specify the day on which it ceases to have effect (warrants may be issued for a maximum of one week), and record on the warrant the reasons for its issue. The WELS inspector must complete a form of warrant in the same terms as advised by the magistrate and record the name of the magistrate and the time and date on which the warrant was signed. The WELS inspector must send this form of warrant to the magistrate within one day after the execution or expiry (whichever is earlier) of the warrant, together with duly sworn or affirmed information pertaining to the grounds on which the warrant was sought. The magistrate is then required to attach these documents to the warrant and deal with them as if they were an ordinary warrant under clause 58.

Division 4—Giving WELS Information to WELS Inspectors

Clause 60 defines a **"person who has WELS information"** as being a person whom the Regulator believes to be capable of providing information relevant for the purposes of investigating or preventing an offence under the Act.

Clause 61 enables the Regulator, by written notice, to require a person who has WELS information to provide such information, documents or records as specified in the notice to a WELS inspector within a specified period of not less than 14 days. It is an offence to fail to comply with this notice and a maximum penalty of 9 months imprisonment may be imposed.

Clause 62 enables the Regulator, by written notice, to require a person who has WELS information to appear before a WELS inspector in order to answer questions and provide to the inspector documents or records referred to in the notice, within a specified period of not less than 14 days.

It is an offence not to comply with requirements under clauses 61 and 62 and a maximum penalty of 9 months imprisonment may be imposed. Notices given by the Regulator under clauses 61 and 62 are required to set out the effect of clause 62A.

Clause 62A makes it an offence to knowingly give false or misleading information, or produce false or misleading documents, to the WELS inspector.

Division 5—Privilege against Self-Incrimination

Clause 63 provides that a person is not obliged to comply with the provisions of clauses 45 to 62 where to do so might entail self-incrimination.

PART 10—MONEY

Division 1—The WELS Account

Clause 64 comprises a note that states that section 64 of the Commonwealth Act establishes the WELS Account.

- Clause 65 requires all money appropriated or received for the purposes of, and in connection with, the WELS scheme to be paid to the Commonwealth for crediting to the WELS Account.
- Clause 66 identifies the purposes of the WELS Account as being to make payments for furthering the objects of the Act and for other reasons connected with the performance of the Regulator's functions and the administration of the Act and regulations.

Division 2—Charging Fees etc.

- Clause 67 enables the Regulator to charge fees for services provided in the performance of the Regulator's functions. This provides the option to run the scheme on a cost-recovery basis. It has been established (*Attorney-General v Wilts United Dairies Ltd* (1921) 38 TLR 781) that the imposition of fees or charges in respect of the performance of statutory duties needs to be authorised expressly by legislation or by necessary implication, which is the purpose of this clause. To avoid the imposition of taxation, any fees would be charged in respect of activities and services provided by the Regulator for the benefit of the fee payer, and the level of fees would be reasonably related to the costs of performing that function.
- Clause 68 allows for the recovery of fees and other amounts payable to the State in connection with the WELS scheme as a debt due to the State.

PART 11—REVIEW OF DECISIONS

- Clause 69 defines a "**reviewable decision**" as a decision by the Regulator to refuse to register a WELS product under clause 29 or to cancel or suspend the registration of a WELS product under clause 31. It also defines an "**affected person**" as a person whose application to register a WELS product has been refused or whose WELS product has had its registration cancelled or suspended.
- Clause 70 requires the Regulator to ensure that the affected person, in relation to a reviewable decision, is given written notice containing the terms of the decision, reasons for the decision and information regarding the person's review rights. Nevertheless, failure to comply with this provision does not affect the validity of the decision.
- Clause 71 provides for an affected person to apply for internal review by the Regulator of a reviewable decision made by a delegate of the Regulator. The Regulator is then required to review the decision personally. The Regulator may affirm, vary or revoke the decision and substitute such other decision as he/she sees fit. An application for internal review must be made within 30 days of receipt of the decision by the applicant.
- Clause 72 allows an affected person to apply to the Administrative Appeals Tribunal for review of a reviewable decision made by the Regulator or of an internal review decision made under clause 71. Clause 69(1) defines a "**reviewable decision**" for the purposes of this Act as a decision by the Regulator to refuse to register a WELS product under clause 29 or to cancel or suspend the registration of a WELS product under clause 31. Subclauses (2) and (3) ensure that the provisions of the *Administrative Appeals Tribunal Act 1975 (Cth)* will apply to applications for review. Sub-clauses (4) and (5) limit the review right to the affected person only.

PART 12—MISCELLANEOUS

- Clause 73 requires the Regulator to pay compensation to the owner of electronic equipment or the user of data or programs, where in the course of the operation of such equipment as provided for in

clause 49, damage or corruption results to the equipment, data recorded on the equipment or programs associated with the use of the equipment or data, arising from insufficient care being exercised by the person operating the equipment or in selecting that person to operate the equipment. Where the Regulator and the affected person disagree over the amount of the compensation, the person may take the matter to the Supreme Court to determine. In determining the compensation payable, the Court is to have regard to whether the occupier, or the occupier's employees and agents had provided appropriate warning or guidance on the operation of the equipment.

Clause 74 comprises a note that states that the Commonwealth Act includes a provision requiring the Commonwealth to pay reasonable compensation where operation of the Act would result in the acquisition of property from a person otherwise than on just terms as required under paragraph 52(xxxi) of the Constitution.

Clause 75 requires the Minister to table in both Houses of Parliament within 15 sitting days each annual report of the Regulator received on the operation of the WELS scheme.

Clause 76 requires the Minister to table in both Houses of Parliament within 15 sitting days the report received of the independent review of the WELS scheme carried out under the Commonwealth Act after the scheme has been in operation for 5 years.

Clause 77 provides for the making of regulations prescribing matters necessary or convenient to be prescribed for the purposes of the Act. This may include (but is not limited to) prescribing fees and penalties.

Regulations

Regulations will be required to prescribe offences in respect of which an infringement notice may be given (offences punishable by imprisonment may not be prescribed), prescribe the form of the infringement notice, the amount of the infringement notice penalty and the form of the notice to withdraw an infringement notice.