

Water Efficiency Labelling and Standards Bill 2005

Explanatory Notes

General Outline

Short Title

The short title of the Bill is the *Water Efficiency Labelling and Standards Bill 2005*.

Policy Objectives of the Legislation

The legislation will give effect in this State to a nationally consistent Water Efficiency Labelling and Standards (WELS) scheme, described in detail at www.waterrating.gov.au.

The objects of the Bill are:

- (a) to conserve water supplies by reducing water consumption;
- (b) to provide information for purchasers of water-use and water-saving products; and
- (c) to promote the adoption of efficient and effective water-use and water-saving technologies.

Reasons for the Bill

The purpose of the *Water Efficiency Labelling and Standards Bill 2005* is to provide for the establishment and operation of a scheme to apply national water efficiency labelling and minimum performance standards to certain water-use products. The aim of water efficiency labelling is to encourage the uptake of water efficient products and appliances in domestic and commercial areas while maintaining individual choice and accounting for regional variations in water supply.

On 2 October 2003, the Ministerial Environment Protection and Heritage Council (EPHC) agreed to support the introduction of a national Water Efficiency Labelling and Standards (WELS) scheme. The legislative model supported by the EPHC to give effect to the scheme requires Australian

Government legislation to be supported by complementary ‘mirror’ State and Territory legislation.

The Australian Government passed the *Water Efficiency Labelling And Standards Act 2005* on 18 February 2005, providing for the establishment of a national WELS scheme, to be implemented cooperatively by Commonwealth, State and Territory governments. The Act commenced on 1 July 2005. It draws on powers under paragraph 51 of the Constitution in relation to corporations, trade and commerce to underpin the scheme. As there are expected to be small gaps in the Constitutional coverage of this Act, the Act makes provision to accommodate expected State and Territory ‘mirror’ legislation to cover these legislative gaps. The WELS Act (Cwlth) is supported by the *Water Efficiency Labelling and Standards Regulations 2005* and the *Water Efficiency Labelling and Standards Determination 2005*.

Development of WELS legislation also fulfils an obligation under the National Water Initiative, to which Queensland is a signatory.

WELS legislation is currently in place in Victoria, New South Wales and the Australian Capital Territory, and expected shortly in other States.

The WELS scheme will replace the voluntary National Water Conservation Rating and Labelling Scheme (commonly known as the ‘AAAAA’ scheme), administered by the Water Services Association of Australia, from 1 July 2006. Community awareness of the voluntary AAAAA scheme was somewhat limited. It is anticipated that the mandatory WELS scheme will have a much higher profile.

Achieving the Objectives of the Legislation

The objectives of the Bill will be achieved by establishment of a nationally consistent WELS scheme. The Queensland Bill applies the national scheme to the small number of unincorporated businesses and sole traders not otherwise regulated under the Commonwealth Act.

The Bill 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;
- the establishment of the functions of a WELS Regulator to administer the scheme who is empowered to make arrangements with Commonwealth, State and Territory agencies to assist with his or her

functions. The Secretary of the Australian Government Department of Environment and Heritage will be the Regulator and enforce the Queensland Act;

- 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;
- an enforcement regime that includes infringement notices, enforceable undertakings and injunctions;
- the appointment of inspectors to investigate possible contraventions, and sets out their powers and obligations;
- the establishment of a WELS account as a Special Account, to receive funds and to make payments in relation to the operation of the WELS scheme. Provision is made for fees to be charged and credited to the WELS Account, for services provided in performance of the Regulator's functions. Provision is also made for contributions to be made from the State Government to be credited to the Account. Once established, it is possible that the WELS scheme could be administered on a cost-recovery basis to the extent decided by Government; and
- internal and Administrative Appeals Tribunal review of decisions, for compensation for certain losses, for the making of regulations, and for independent review after 5 years of operation of the Act.

Under the WELS scheme, products will require to be tested in accordance with certain Australian and New Zealand Standards, chiefly AS/NZS 6400:2005 (Water Efficient Products – Rating and Labelling), and display the appropriate water-efficiency label at the point of sale. The label will identify the relative efficiencies of the products and award each item a star rating (up to a maximum of 6 stars), as described in AS/NZS 6400:2005.

The WELS scheme has similar objectives to the present successful national energy efficiency appliance labelling system. Mandatory energy efficiency labelling has contributed to an energy efficiency improvement of 50 percent over a 13 year period for refrigerators and freezers, and projected improvements of 70 percent over 25 years.

Products were identified for inclusion in the scheme following a Strategic Study conducted during 2003. This was built on by a Regulation Impact Statement (RIS) published by the Australian Government in March 2004.

The water-using products covered by the WELS scheme currently include:

- clothes washing machines;
- dishwashers;
- flow controllers;
- toilet (lavatory) equipment;
- showers;
- tap equipment (intended for use over a kitchen sink, bathroom basin, laundry tub or ablution trough); and
- urinal equipment.

Further products may be added to the scheme following appropriate technical and regulatory impact assessments.

The WELS scheme commenced on 1 July 2005 for voluntary registration and labelling. From 1 July 2006, mandatory registration and labelling will apply to all of these products apart from flow controllers, for which this will be optional.

In addition to labelling and performance requirements, a mandatory minimum water efficiency requirement will apply to toilet equipment.

The requirements of the WELS scheme apply only to new products (including specialist product ranges imported for specific one-off projects). The scheme will not apply to second-hand products unless these are imported to be supplied in Australia. The scheme will also not apply to products imported for personal use.

The Regulator's enforcement responsibilities will focus on incorporated companies and businesses with interstate operations, which will take in the majority of importers, manufacturers, agents, wholesalers and retailers of products covered under the scheme. The Queensland Bill applies to the small number of unincorporated businesses and sole traders not otherwise regulated under the Commonwealth Act.

The WELS scheme has been designed to assist consumers make an informed decision on the water-use characteristics of new purchases. The scheme aims to reduce Australia's per capita water consumption through greater consumer awareness of water conservation and increased uptake of water-efficient products. The initiative has the potential to reduce Queensland's per-capita water consumption, with the following potential flow-on benefits:

- reduce the demand for water from catchments;
- defer expenditure on new water-supply infrastructure;

- reduce household water and energy (gas/electric hot water) bills;
- reduce household water consumption;
- reduce the volume of effluent discharges to waterways;
- lower sewage and water supply treatment and pumping costs for local governments; and
- decrease Queensland's greenhouse gas emissions through reductions in hot water usage.

The RIS commissioned by the Australian Government identified the following benefits to Queensland by 2021:

- cost savings to households and industry of up to \$147.7 million per year through reduced water and energy bills (water heating);
- a 5 percent reduction in domestic water consumption, saving 18,836 megalitres per annum; and
- projected cumulative water savings of 131,700 megalitres.

The RIS identified that the projected reduction in annual water demand from mandatory labelling is equivalent to approximately one year's growth in water demand over the period 1997 to 2001. This would delay the need for new water supply infrastructure in each capital city by one year.

The RIS is available at www.waterrating.gov.au/publications/ris.html.

Alternatives to the Bill

There are no alternatives considered appropriate for achieving these policy objectives. The National Water Conservation Rating and Labelling Scheme ('AAAAA' scheme) is voluntary and has limited community awareness. It is anticipated that the mandatory WELS scheme will have a much higher profile.

The Commonwealth has enacted a *Water Efficiency Labelling and Standards Act 2005*. However, due to Constitutional limitations that statute does not provide full regulatory coverage for WELS products (e.g. it does not cover the activities of unincorporated businesses and sole traders). Therefore both State and Commonwealth legislation is required to provide full national regulatory coverage.

Estimated Cost for Implementation

The scheme will be administered by the Australian Government Department of the Environment and Heritage (DEH), with estimated running costs of approximately \$910,000 per annum. It is anticipated that 70 percent of such costs (\$637,000) will be recouped through product registration fees levied on manufacturers. Under the agreed Ministerial Council funding arrangement, the Queensland Government, through the Environmental Protection Agency (EPA), will contribute up to \$25,000 per annum for five years.

Consistency with Fundamental Legislative Principles

The Bill has been drafted with due regard to the Fundamental Legislative Principles (FLPs) described in Section 4 of the *Legislative Standards Act 1992*.

The Bill differs from the Commonwealth Act principally with respect to certain offence penalties. For example, the latter legislation provides for 6 months' imprisonment for a breach of section 51 (inspection powers with warrant) for a person who fails to answer a question or produce a book or document when requested by a WELS inspector. Similarly, in relation to giving WELS information to WELS inspectors, a 6 months' imprisonment penalty applied for breaches of section 61 (regulator may require a person to provide information) and section 62 (regulator may require a person to appear before a WELS inspector). The imprisonment term that applied for these sections has been removed from the Queensland Bill and replaced with a penalty unit fine, consistent with Queensland's Criminal Code. This approach follows that used in the Victorian WELS Act.

The Commonwealth legislation (in conjunction with the Criminal Code) and the Victorian WELS Act also provide for the offence of providing false or misleading information or documents, with a maximum penalty of one year's imprisonment. This imprisonment term breaches fundamental legislative principles and has been removed. The integrity of the operation of the WELS scheme is unaffected because uniformity of penalty levels between Commonwealth and State Acts under section 12 of the Act is not legally necessary for the purposes of the national WELS scheme.

Part 8, Division 2 of the Bill at clause 41 provides that the Regulator may publicise, in any way the Regulator thinks appropriate, an offence against the WELS Act for which a person has been convicted. The Bill modifies the Commonwealth Act to provide that this section is subject to the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Section 6 of this Act

provides for non-disclosure of convictions after the rehabilitation period, as defined in this Act, has expired.

The following elements of the Bill are, however, situations where a balanced interpretation of the fundamental legislative principles, rather than their literal application, has been considered necessary.

Sufficient regard to the institution of Parliament

This Bill forms part of a national scheme and elements of such schemes have been identified by the Scrutiny of Legislation Committee (and equivalents in other States) as undermining the institution of Parliament (*Legislative Standards Act 1992*, section 4(2)(b)). However, the Queensland Bill does not adopt a simple referral of powers to the Australian Government and is not identical to the corresponding Commonwealth legislation. Instead, the Bill incorporates Queensland drafting practices and modifications to comply with the fundamental legislative principles. The *Gene Technology Act 2001*, a recent example of a Queensland adaptation of national scheme legislation, has provided a model for dealing with specific modifications to address FLP issues.

Clause 27 of the Bill provides that an application for registration of a WELS product must be accompanied by any registration fee stated in a decision made by the Commonwealth Minister under section 27(1) of the *Water Efficiency Labelling and Standards Act 2005* (Cwlth). This approach is justified in the circumstances given that conferring fee-setting to the Australian Government is an element of the consistent national approach already agreed by governments and is administratively efficient. Registration is easier for businesses (most of which operate in national and global markets) if there is a single registration point and process for all products. Operating a State-based fee-setting regime, to apply only to a small number of unincorporated businesses and sole traders, would involve waiting for a fee determination before publishing fees in a Regulation. The added complexity of this system would have clear impacts on business time frames and compliance costs.

Sufficient regard to the rights and liberties of individuals

Part 7 provides for offences relating to the supply of WELS products. Sections 33-38 of the Commonwealth legislation are offences of strict liability. Strict liability offences, through imposition of presumed responsibility, are considered to raise issues for rights and liberties of individuals (*Legislative Standards Act 1992*, section 4(2)(a)).

These offences are justified in the circumstances to provide for uniform operation of the national WELS scheme. 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. The intent of imposing strict liability is not to criminalise innocent contraventions of the WELS scheme but to strongly discourage actions that lead to excess urban water consumption that would further jeopardise the supply of this diminishing resource. The Bill provides that the application of the Queensland Criminal Code, sections 23 (Intention—motive) and 24 (Mistake of fact), is not affected.

Consultation

The Commonwealth DEH have managed substantial consultation on the scheme with Queensland Government agencies. These consultations focussed on the *Water Efficiency Labelling and Standards Bill 2005* (Cwlth), on which the *Water Efficiency Labelling and Standards Bill 2005* (Qld) is based.

Consultation with relevant industry and stakeholder groups formed a major part of the feasibility assessment phase, with relevant documents prepared during the Strategic Study made available for public review during the project. Also, the RIS was subjected to a public comment period and the recommendations were modified in light of submissions received.

Public consultations were held in Brisbane in 2005. As this is a national scheme involving consistent legislation and regulations (to ensure consistency), the national consultative process has been relied upon to provide informed public comment.

The Australian Government DEH and the Queensland EPA have jointly conducted extensive consultation with local industry including brassware, shower rose and tapware, washing machine and dishwasher manufacturers. Key industry stakeholder groups engaged included the Plumbers Registration Board, the Master Plumbers Association of Queensland and Construction Training Queensland, which administers the Building and Construction Industry Training Fund.

Industry is also strongly represented on the Standards Australia technical committee that has established the testing criteria and rating schemes for WELS products.

There is keen industry support for the WELS scheme, both locally and nationally through the Water Services Association of Australia, who

administer the voluntary National Water Conservation Rating and Labelling Scheme (the 'AAAAA' Scheme) to be replaced by WELS on 1 July 2006.

In addition, the EPA consulted extensively with the following Agencies throughout the development of the Bill:

- Department of the Premier and Cabinet;
- Queensland Treasury;
- Department of State Development, Trade and Innovation;
- Department of Justice and Attorney-General;
- Department of Natural Resources and Mines; and
- Department of Local Government, Planning, Sport and Recreation.

All agencies support the proposed legislation.

Notes on Provisions

Part 1 Preliminary

Short title

Clause 1 states that the Act should be cited as the *Water Efficiency Labelling and Standards Act 2005*.

Commencement

Clause 2 provides for the Act to commence on proclamation.

Objects of Act

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.

Act binds all persons

Clause 4 provides that all persons, including the State and as far as the Parliament permits the Commonwealth and other States, are bound to comply with the provisions of the Bill, but that the Commonwealth and State are not liable to be prosecuted for an offence.

External Territories

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.

Numbering

Clause 5A(1)(a) provides that in order to maintain consistency in numbering between this Act and the *Water Efficiency Labelling and Standards Act 2005* 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(1)(b) 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.

Clause 5A(2) provides that a provision number and heading referred to in sub-clause (1)(a) form part of this Act.

Notes in text

Clause 5B provides that a note in the text of this Act is not part of this Act.

Application of Criminal Code

Clause 6 comprises a note that states that the Commonwealth Act includes a provision applying Chapter 2 of the Commonwealth Criminal Code to offences against that Act, but that the Criminal Code of Queensland applies for the purposes of this Act. The note also states that penalties prescribed

under this Act are expressed in Queensland penalty units. The Bill avoids tying maximum monetary penalties to the Commonwealth Act through defining WELS penalty units as equivalent to those in the Commonwealth Act to ensure ease of use of the legislation and maintain Parliamentary decision-making rights. Maximum monetary penalties in the Bill are maintained at near-parity with the monetary penalty levels applying in the Commonwealth and other State Acts, consistent with the national WELS scheme approach.

Part 2—Interpretation

Definitions

Clause 7 provides that the dictionary in the Schedule defines particular words and terms used in the Bill.

Part 3—National WELS scheme

WELS scheme to be part of a national cooperative 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.

Application of this Act

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

Relationship to other State laws

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

State and Territory laws may operate concurrently

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

Meaning of *corresponding law*

Clause 12 defines "corresponding law".

Commonwealth consent to conferral etc. on the regulator or inspectors by corresponding laws

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.

How duty is imposed by corresponding laws

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.

When a corresponding State-Territory law imposes a duty

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.

No doubling-up of liabilities

Clause 16 prevents persons from being punished or penalised twice for an offence under this Bill, if they have already been punished or penalised for the same offence under the Commonwealth Act.

Review of decisions under this Act

Clause 17 provides for application to be made to the Administrative Appeals Tribunal (AAT) for review of a "reviewable decision" as defined in clause 69(1). 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.

Part 4—WELS products and WELS standards

WELS products

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.

WELS standards

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.

Meaning of WELS-labelled

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

The Regulator

Clause 21 comprises a note that states that the Commonwealth Secretary (i.e. currently the Secretary of the (DEH)) is the Regulator.

Functions of 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 Department Secretary 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.

Powers of the Regulator

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.

Arrangements with other agencies

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.

Delegation

Clause 25 provides for the Regulator to delegate powers to other State/Territory or Commonwealth officers (subject to the Regulator's directions). 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

Applying for registration

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.

Documentation etc. to be provided with application for registration

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.

Registration of products

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.

Grounds for refusing to register

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.

Period of registration

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 Queensland Act.

Cancelling or suspending registration

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

Meaning of *applicable WELS standard*

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

Registration requirements

Clause 33 makes it an offence to supply an unregistered WELS product where the applicable standard requires the product to be registered.

Offences against clauses 33, 34, 35, 36, 37 and 38 are offences of strict liability in the Commonwealth legislation to which the common law defence of honest and reasonable mistake of fact applies. A strict liability regime is intended to facilitate the imposition of penalties for the physical elements of the offences without proof of fault. A defendant who fails to comply with the registration, labelling or minimum efficiency and performance requirements, or who misuses the standards established under the WELS scheme, cannot escape liability by demonstrating that he or she was not aware of these requirements or was otherwise reckless as to the requirements. The Australian Government has justified the imposition of strict liability to facilitate the expedient enforcement of the provisions. The application of the Queensland Criminal Code, sections 23 (intention—motive) and 24 (Mistake of fact), is not affected.

Labelling registered products

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

Minimum water efficiency—products required to be registered

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.

Minimum general performance—products required to be registered

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.

Misuse of WELS standards and information.

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.

Information inconsistent with WELS standards

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.

Using information in the supply of products

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.

Division 5—Extensions of criminal responsibility

Attempts to commit offences against Act

Clause 39A makes it an offence to attempt to commit an offence against Division 2, 3 or 4 punishable by a maximum fine of 50 percent of the maximum fine for the offence attempted to be committed.

False or misleading information or document

Clause 39B 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

Infringement notices

Clause 40 comprises notes that refer to the application of the *State Penalties Enforcement Act 1999* and the *State Penalties Enforcement Regulation 2000*. Infringement notices fines could be given to a person who is alleged to have committed an offence under Part 7 of the Bill.

The State Penalties Enforcement Registry (SPER) system will be used for all aspects of infringement notice fine collection and enforcement by WELS inspectors. Using the existing SPER system ensures that WELS inspectors do not have to operate under either separate infringement provisions within the Bill, or under the Commonwealth WELS Regulation. Sections 13, 14 and 15 of the Commonwealth Act provide for corresponding State-Territory laws to confer functions, powers and duties

on the Regulator or inspectors and enable the Regulator or inspectors to carry out these functions and duties and exercise these powers, consistent with the reasoning of the High Court in *The Queen v Hughes* (2000) 171 ALR 155 (where the Court held that a Commonwealth law which imposes upon a Commonwealth officer or body a duty to perform functions or exercise powers created and conferred by State law must be supported by a Commonwealth head of power).

Proposed amendments to the SPER Regulation will provide for operation of WELS with the SPER system, including nominating the Regulator as the administering authority, WELS inspectors as authorised officers and setting an infringement notice fine at one-tenth of the statutory penalty under the WELS Act (Qld). Payment of fines within 28 days will be direct to the regulator. If the person does not elect to have the matter heard in a court, non-payment of fines could result in registration with SPER, payment of additional fees to SPER and possibly further enforcement action.

Division 2—Publicising offences

Regulator may publicise 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. In a modification to the Commonwealth Act, this section is, however, subject to the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Section 6 of this Act provides for non-disclosure of convictions after the rehabilitation period, as defined in this Act, has expired.

Division 3—Enforceable undertakings

Acceptance of 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.

Enforcement of undertakings

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

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

Regulator may appoint 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.

Identity cards

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 1 penalty unit for this (currently \$75). 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.

Offences relating to WELS inspectors

Clause 46A makes it an offence to hinder or obstruct or impersonate a WELS inspector.

Division 2—Powers of WELS Inspectors

Purposes for which powers can be used

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.

Inspection powers—public areas of WELS business premises

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.

Inspection powers—with consent

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.

Refusing consent is not an offence

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.

Inspection powers—with 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. 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.)

Announcement before entry under warrant

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.

Copy of warrant to be given to occupier

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.)

Occupier must provide inspector with facilities and assistance

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.

Seizing or securing evidential material

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.

Holding evidential material for more than 90 days

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.

Returning evidential material

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**Ordinary warrants**

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).

Warrants by telephone, fax etc

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

Meaning of *person who has WELS information*

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.

Regulator may require a person to provide information

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.

Regulator may require a person to appear before a WELS court

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. Notices given by the regulator under clauses 61 and 62 are required to set out the effect of clause 62A.

False or misleading information or documents

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

Privilege against self-incrimination not affected

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

WELS account

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

Credits to the WELS account

Clause 65(1) requires all money received by the State in respect of fines, infringement notice fines given under the *State Penalties Enforcement Act 1999* or under a court order under section 43(2) in relation to the breach of an undertaking, and all money received by the State under Division 2 of Part 10 to be paid to the Commonwealth for crediting to the WELS account.

Clause 65(2) provides that the consolidated fund is appropriated as necessary to enable funds to be credited to the WELS account. This

requires a message of the governor under section 68 of the *Constitution of Queensland Act 2001* for appropriation from the consolidated fund.

Purpose of 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.

Regulator may charge for services

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.

Recovery of amounts

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

Meaning of *reviewable decision* and *affected person*

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.

Notification of decisions and review rights

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.

Internal review

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.

Review of decisions by Administrative Appeals Tribunal

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. Sub-clause (2) provides that “decision” has the meaning in the Administrative Appeals Tribunal Act section 3(3).

Part 12—Miscellaneous

Compensation for damage to electronic equipment

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.

Compensation for acquisition of property

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.

Annual report

Clause 75(1) requires the regulator to prepare and give to the Minister, as soon as practicable after the end of the financial year, a report on the operations of the Regulator under this Act during that year.

Clause 75(2) requires the Minister to table this report in the Legislative Assembly within 14 sitting days after the Minister receives this report.

Review of operations of WELS scheme

Clause 76 requires the Minister to table in the Legislative Assembly within 14 sitting days the report received of the independent review of the WELS scheme carried out under section 76 of the Commonwealth Act after the scheme has been in operation for 5 years.

Regulation-making power

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 for contravention of a regulation of not more than 20 penalty units.

Schedule

Dictionary

- “Administrative Appeals Tribunal” is defined as meaning the Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act 1975* of the Commonwealth;

- “affected person” is defined (by reference to clauses 69(2)) 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 2005* 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;
- “decision” includes determination;
- “evidential material” is defined as any thing that may be relevant to the investigation or prosecution of an offence against this Bill;
- “give” includes produce;

- “occupier”, in relation to premises, is defined as including a person who apparently represents the occupier of the premises;
- “offence against this Act” is defined as including an offence against the regulations;
- “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;
- “registration conditions” see section 27(2);
- “regulator” means the WELS regulator established under the Commonwealth Act, section 21. This is defined in 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;
- “stated” includes specified;
- “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 account” means the WELS Account established under the Commonwealth Act, section 64.
- “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.