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Water Efficiency Labelling and Standards Bill 2004

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Water Efficiency Labelling and Standards Bill 2004

Date Introduced: 24 June 2004

House: House of Representatives

Portfolio: Environment and Heritage

Commencement: Sections 1 and 2 of the Bill commence on Royal Assent. The remainder commences 28 days after Royal Assent.

Purpose

To establish a national scheme to progressively apply water efficiency labelling requirements and minimum water efficiency standards to certain water-use¹ and water-saving² products such as washing machines, dishwashers, toilets, shower heads, taps and urinals. The initial emphasis will be on labelling rather than requiring efficiency standards on all of these products.

Background

Domestic water use in Australia³

Domestic households account for about 16% of the consumption of ‘mains-supplied’ water in Australia, the second largest share of mains water use after the agriculture, forestry and mining sector.⁴ Per household, the amount of water used for indoor purposes appears to be reasonably similar across many of Australia’s larger capital cities.⁵ On average, the main indoor use is showering, accounting for about 29% of indoor consumption, followed by toilet flushing and clothes washers (about 26 % each), taps over baths, sinks, handbasins and laundry tubs (18%) and dishwashers (1%).⁶ In terms of overall domestic consumption, it is worth noting that the amount of water used for outdoor purposes varies considerably between cities, with Perth using five times as much per household as Sydney, although some of the Perth supply comes from bores rather than mains sources.⁷

Between 1996 and 2001, the supply of water to households in the main urban areas of Australia increased at a rate of about 3.4% per annum.⁸ According to information supplied by the Water Services Association of Australia (WSAA),⁹ water consumption in two (unnamed) State capitals is already beyond the ‘safe yield’ level, meaning that additional

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supply or effective demand measures are required immediately. Three other capitals will be beyond safe yield between 2012 and 2020.¹⁰

Recommendations for Action

In December 2002, the Senate Environment, Communications, Information Technology and the Arts References Committee completed its inquiry into Australia's management of urban water. In its report, *The value of water*¹¹, the committee commented extensively on the issue of urban demand management:

There is considerable scope to reduce water use and achieve efficiencies. Water efficient appliances such as dual flush toilets, low flow shower heads, washing machines and dishwashers can dramatically reduce water use in homes. This can be coupled to water efficient gardens, using native plants, minimal lawns and efficient watering systems. However, the fundamental factor in a successful demand management program is changing behaviour away from habits such as hosing down driveways and gutters, watering lawns during the heat of the day and having long showers.

Variability in water usage patterns and geographic conditions means that no single demand management strategy will be appropriate for all places. Balancing costs and benefits is integral to deciding how to implement a demand management strategy and while the least cost basis is appropriate for initially choosing between demand management alternatives, achieving ecologically sustainable water use may require more aggressive adoption of demand management tools.¹²

The committee also recommended that a proposed National Water Policy should:

set standards that include national water efficiency standards and rating schemes for appliances and building systems...¹³

As at 30 July 2004, the Commonwealth Government had not formally responded to the committee report.

In May 2003, the Ministerial Environment Protection and Heritage Council (EPHC) agreed to develop a national mandatory water efficiency labelling scheme.¹⁴ Work on the subject had been commissioned in 2002 by the Commonwealth Environment Department, with a report being submitted in June 2003.¹⁵ This report formed the basis for the EPHC's agreement in October 2003 to draft national legislation to implement a Water Efficiency Labelling and Standards (WELS) scheme.¹⁶ The Regulatory Impact Statement (RIS) on the Bill reviews 4 options for achieving reductions in domestic water consumption. Two of these centre on voluntary labelling options, including the existing labelling scheme. On the voluntary labelling issue, the RIS comments:

A voluntary water efficiency labelling scheme has been in existence since 1988. It is now managed by the Water Services Association of Australia (WSAA). The WSAA

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program covers shower heads, toilets, taps, clothes washers, dishwashers, urinal flushing devices and flow regulators. The test requirements for each product type, the water efficiency levels required for each rating and the label design are all specified in Australian and New Zealand Standard AS/NZS 6400, *Water efficient products Rating and labelling*, the latest version of which was published in February 2003.

The coverage and impact of the existing program are limited. Because the scheme is voluntary, few suppliers have chosen to label, and those that have only label their better performing products. The main incentive for participation has been the support of the water utilities (the members of WSAA), many of whom have publicised the scheme, or offered cash rebates to their customers for the purchase of labelled appliances. These limitations are inherent in any voluntary approach.¹⁷

On a third option (the use of economic instruments), the RIS says:

While there is general agreement that the current pricing of water services is not fully cost-reflective, there is little agreement on the ways to increase cost-reflectiveness, there is active resistance to measures which increase the price of water services, and increasing cost-reflectiveness alone would not overcome the information failures in water product markets.

As the main problem is information failure, rather than the relative costs of water using products (which are affected by many factors other than water-efficiency), the use of economic instruments bearing on the relative price of products according to their water efficiency would not be effective, even if the considerable legislative impediments to their implementation could be overcome. As a result, the use of economic instruments is not considered a realistic alternative to the proposed regulation.¹⁸

The Bill

The Water Efficiency Labelling and Standards Bill 2004 establishes a national scheme to enable water efficiency labelling and minimum efficiency standards to be applied to certain water-use products.

The scheme allows for water-using products to be declared be 'WELS products' and for the specification of 'WELS standards' to apply to these. The standards may set out various requirements, including for water efficiency, performance, registration and labelling of WELS products. According the second reading speech, the **initial emphasis** will be on requiring **labelling** of certain products, with only toilets being required to comply with **efficiency** standards:

The government expects the scheme to commence in 2005. Initially, six appliances will be required to carry water efficiency labels: washing machines, dishwashers, toilets, shower heads, taps and urinals. Flow control devices will be covered on a voluntary basis. In addition to labelling, it is proposed that toilets will be required to

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comply with a minimum efficiency standard so that inefficient toilets with an average flush volume of more than 5 and a half litres can no longer be sold in Australia.

Under the framework set out in the bill, it will be possible in future years to introduce minimum water efficiency standards for additional water-using or water-saving products other than toilets, where the need for this can be established. Minimum water efficiency standards will ensure that inefficient products can no longer be sold.

The bill will also allow the product range covered by labelling requirements to be expanded if this is found to be appropriate in future years. Whilst the scheme will initially cover washing machines, dishwashers, toilets, shower heads, urinals, taps and flow control devices, there is every reason to believe that further research and development will reveal that other products would benefit from labelling and minimum standards. For example, evaporative air-cooling systems and hot-water systems are potential candidates for inclusion in the scheme.

Labelling and compliance with efficiency standards will not be required for water-use products already installed.

A WELS Regulator is established to administer the scheme. Their powers and functions may be conferred by State or Territory legislation, and various constitutional issues arise because of this. The relevant clauses (particularly **clauses 13-15**) are discussed in the main provisions section, whilst more detailed commentary on the constitutional issues is contained in the concluding comments of this digest.

The Bill creates offences and associated penalties in relation to failing to comply with registration, labelling, minimum efficiency and performance requirements. It provides for a fairly standard enforcement regime, including the information-gathering powers of inspectors. This digest does, however, make some comments about the apparent lack of information required to be given to affected persons when these powers are exercised. In this context, it is noted that the Senate Scrutiny of Bills committee is currently conducting its [Inquiry into Entry, Search and Seizure Provisions in Commonwealth Legislation](#). The committee is not due to report until 2005.

The impact of the labelling scheme

According to modelling undertaken in developing the RIS, the impact of the labelling component of the scheme will be to reduce total household water use by about 5% by 2021 as compared to a 'business as usual' approach.¹⁹ This equates to a saving of 87,200 million litres (ML) per annum as at 2021. No modelling has been done for the introduction of efficiency standards across all of the six products mentioned above (washing machines, dishwashers, toilets, shower heads, taps and urinals).

Paraphrasing the RIS, the projected impacts on the various stakeholders of water products are:

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Water users — the cost of water-efficient products will likely be higher, but consumers will benefit from a net saving because water bills will be less.

Manufacturers and importers — labelling requirements will come into force 12 months after regulations under the Bill are finalised. Consultations with manufacturers and importers indicate that this notice period will be enough to ensure products are labelled correctly. As water-efficiency labelling increases its influence on consumer preference, the extent to which the sales of various manufacturers and importers are affected will depend on the water-efficiency of their product ranges. Manufacturers and importers that only offer products of low water-efficiency will obviously be disadvantaged, and may need to cut prices and margins to retain market share.

Retailers — those which carry at least some water-efficient models should be advantaged, while those that specialise in low-cost products with low water efficiency will be disadvantaged. As the awareness of water labels is likely only to build up over time, retailers should have ample time to sell their old stocks and to order in more water-efficient models.

Plumbers and builders — The impact of WEL on plumbers and builders is likely to be gradual. These groups will still be free to select or recommend products irrespective of water efficiency, as many do now, and will be able to remove the water efficiency labels before the end users see it. However, the labelling requirement should assist those plumbers and builders who take an interest in, or seek competitive advantage from, advising clients on water- and energy-efficient products. There are already a number of programs under way to raise plumbers' awareness of product water efficiency, including the Green Plumbers program run by the Master Plumbers and Mechanical Services Association of Australia, with funding from the Australian Greenhouse Office.

Main Provisions

Parts 1 and 2 (clauses 1-7) set out various preliminary and interpretative matters.

Clause 3 sets out the objects of the Bill. They are:

- to conserve water supplies by reducing water consumption
- to provide information for purchasers of water-use and water-saving products, and
- to promote the adoption of efficient and effective water-use and water-saving technologies.

Clause 4 is a standard provision that provides that although Commonwealth, State and Territory governments are bound by the Bill, they cannot be prosecuted for an offence.

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Clause 5 provides that the Bill does not apply to Norfolk Island.

Clause 6 provides that the Chapter 2 of the *Criminal Code* (covering general principles of criminal responsibility) applies to all ‘offences against this Act’. Such offences include any offences created by regulations.

Part 3 (clauses 8-17) sets out federalist principles of the WELS scheme.

Clause 8 notes that the Bill is intended to form a part of a cooperative scheme between the Commonwealth and the States and Territories.²⁰

Clause 9 details the situations and/or entities to which the Bill applies. In effect, it lists the constitutional heads of power on which the Bill relies. These are:

- the corporations power (paragraph 51(xx))
- the overseas / interstate trade and commerce power (paragraph 51(i))
- Commonwealth matters (section 52)
- the incidental power (paragraph 51(xxxix))

It is notable the Territories power (section 122) is not fully exploited. It only applies in relation to trade and commerce between Territories or between a State and a Territory.

Clause 11 provides that State and Territory laws are not affected by the Bill to the extent they are ‘capable of operating concurrently with [the] Act’. This is a standard provision for federalist-type schemes.

Clause 12 defines a ‘corresponding State-Territory law’. The importance of such a law is explained under **clause 13** below. Going back to **clause 12**, a ‘corresponding State-Territory law’ is a law of a State or Territory (i) ‘whose operation involves the use of determinations made under [clause]...18’ and (ii) is declared by the Commonwealth Minister in the gazette to ‘correspond’ to the Bill. In part, **clause 18** allows the Minister to determine that water-use or water saving products of specified kinds (for example, washing machines) are WELS products. Thus (i) effectively restricts the type of law that can be a corresponding State-Territory law to one that deals with the supply, sale etc of WELS products.

Clauses 13-15 deal with the conferral of functions or powers, or imposition of duties, on the WELS Regulator or inspectors. The drafting of these clauses is designed to avoid constitutional problems in conferring State powers on the Commonwealth following the decision of the High Court in *R v Hughes*.²¹

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Clause 13 provides the Commonwealth's consent to the conferral of functions and powers and imposition of duties on the WELS Regulator or inspectors by a 'corresponding State-Territory law'. As the High Court noted in *Hughes*, 'a State by its laws cannot unilaterally invest functions under that law on officers of the Commonwealth'.²² **Subclause 13(3)** provides that there is no consent to such conferral or imposition where this would 'contravene any constitutional doctrines...or...otherwise exceed the legislative power of the Commonwealth'. In addition, **subclause 13(4)** provides that any duty, function or power exercised under a corresponding State-Territory law must be 'in accordance with an agreement between the Commonwealth and the State or Territory concerned'.

Whilst it is accepted that a Commonwealth body can be given functions and powers under State legislation,²³ *Hughes* provides that any attempt in Commonwealth legislation to impose a duty on a Commonwealth body to exercise State power which could adversely affect the rights of individuals must be firmly supported by a head of Commonwealth constitutional power.²⁴ The WELS Regulator and / or inspectors will have various legal enforcement powers under the Bill, including in relation to:

- the power to obtain information
- the power to obtain and exercise search warrants, and
- the power to seek and obtain compensation and enforcement orders from the Federal Court.

The exercise of such powers could plainly affect the rights of individuals.

Clause 14 applies where a corresponding State-Territory law purports to 'impose a duty' on the WELS Regulator or inspectors. The effect of **subclause 14(2)** is that a duty will *only* be imposed by the law where this is *both* within the legislative power of the State or Territory and does not contravene any constitutional doctrine. Where the **subclause 14(2)** conditions are not met, the duty will be deemed to be imposed under the Bill, but only to the extent this is within the legislative power of the Commonwealth and is consistent with relevant constitutional doctrines: **subclauses 14(3)** and **(5)**. Interestingly, where the duty is deemed to be imposed by the Bill, **subclause 14(4)** states that all available constitutional powers are intended to support the imposition. However, as previously noted, the effect of **clause 9** (which sets out the situations and/or entities to which the Bill applies) is that the Territories head of power only applies in relation to trade and commerce between Territories or between a State and a Territory.

For the purposes of **clauses 13-14**, a corresponding State-Territory law is taken to impose a duty on the WEL regulator or inspectors where it *both* confers a function on such persons and where the 'circumstances' of such conferral 'gives rise to an obligation' on the Regulator / inspector 'to perform or to exercise the power': **clause 15**.

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Clause 16 provides that where an act or omission is both an offence under the Bill and a State or Territory law, persons cannot be punished under the Bill if they have already been punished under the relevant law State or Territory law. This includes where punishment is payment of a fine.

If the WELS Regulator makes a decision where performing a function or exercising a power conferred by a **clause 12** corresponding State-Territory law, the Commonwealth Administrative Appeals Tribunal (AAT) will have jurisdiction to review the decision if both the relevant law provides for AAT review and Commonwealth regulations declare the decision to be reviewable for the purposes of **clause 17**.

Part 4 (clauses 18-20) define the terms ‘WELS products’ and ‘WELS standards’.

As previously noted, **clause 18** allows the relevant Commonwealth Minister to determine that water-use or water saving products of specified kinds are WELS products. However, the Minister must first have the agreement of a majority of the participating States and Territories to the terms of the determination: **subclause 18(4)**. A participating State or Territory is one in which there is in place a **clause 12** corresponding State-Territory law: **subclause 18(5)**. **Clause 18** determinations are disallowable instruments.

Under **subclause 18(2)**, a WELS product *must* have a WELS standard attached to it. The standard must set out both criteria for rating the water efficiency and/or general performance of products of that type and how ratings are to be communicated through product labels: **subclause 19(1)**. The standard *may* also require the relevant products to be ‘registered for the purposes of specified supplies of the product’: **subclause 19(2)**. No detail is provided is what such ‘specified supplies’²⁵ might be. If required to be registered²⁶, the standard *may* also require the product to comply with water efficiency and/or general performance ratings for the purposes of specified supplies of the product: **subclause 19(3)**. If a product *is* registered (whether or not it is *required* to be registered), the standard *may* also require the product to be ‘WELS labelled’ for the purposes of specified supplies of the product: **subclause 19(4)**. The standard may prescribe the WELS labelling requirements to cover such things as the characteristics, use and display of labels, and matters relating to the advertising of the product: **clause 20**.

Part 5 (clauses 21-25) deal with establishment and operation of the WELS Regulator.

Clause 21 creates the position of the Regulator and provides it is to be held by the Secretary of the administering Commonwealth Department.²⁷ **Clause 22** sets out the various functions of the Regulator, which includes administration of the scheme. Functions may also be conferred by the regulations made under the Bill or ‘any other law’ – presumably ‘law’ only means a Commonwealth law. Subject to any other limitations in the Bill, **clause 23** gives the Regulator power ‘to do all things necessary or convenient’ to be done for or in connection with the performance of [clause 22] functions.

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Clause 25 allows the Regulator to delegate any of his / her functions or powers (including those conferred under a corresponding State-Territory law), to any other officer or employee of a Commonwealth, State or Territory agency. Such delegation must be in writing and any delegation to a State or Territory officer must be agreed by the relevant jurisdiction. Exercise of a function or power is subject to the Regulators directions. **Clause 25** is somewhat unusual as it does not restrict the Regulator from delegating power to junior officers or employees.

Part 6 (clauses 26-31) covers the registration of WELS products.

Clause 26 provides that a manufacturer of a WELS product may apply for registration of the product. According to the RIS:

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.

Registration may be refused if, amongst other things, the product does not comply with the water efficiency and/or general performance rating required under the relevant WELS standards: **clause 29**. In general registration lasts for five years. However, if a new applicable WELS standard is introduced during this time, registration lasts a maximum of one year past the date of introduction, unless extended by the Commonwealth Minister: **clause 30**. Registration may be cancelled or suspended if various conditions are not met: **clause 31**. Persons affected by **clause 29** and **31** decisions may seek review under **Part 11**.

Part 7 (clauses 32-39) covers various offences relating to the supply of WELS products.

If a WELS standard requires a product to be registered for the purposes of supply, supplying an unregistered product is a strict liability offence with a maximum penalty of 60 penalty units (\$6600): **clause 33**. Similarly, supply of an unlabeled registered product that is required to be WELS-labelled is a strict liability offence with a maximum penalty of 60 penalty units: **clause 34**. If, for the purposes of supply, a WELS standard requires a product to be both registered and comply with a water efficiency and/or general performance rating meeting, supply of non-complying products is a strict liability offence with a maximum penalty of 60 penalty units: **clauses 35 and 36**.

For the purposes of supplying WELS products, clauses **37** and **38** create strict liability offences of misusing WELS standards and/or information²⁸ and using any information where it is inconsistent with the WELS standard. The maximum penalty is 60 penalty units.

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Clause 40 enables regulations to provide that a person alleged to have committed an offence under **Part 7** (ie relating to the supply of WELS products) to pay a fine as an alternative to prosecution. The maximum fine is 20% of the maximum penalty that could have been imposed by a court upon a conviction. Such arrangements are increasingly common in Commonwealth legislation – eg *Section 117 Aviation Transport Security Act 2004*. The RIS comments:

this provision is aimed at facilitating the speedy resolution of minor offences against the Act and to minimise the time and resources spent on litigation.

Clause 41 enables the Regulator to publicise convictions against the Act ‘in way he or she thinks appropriate’. This provision doesn’t prevent anyone else from publicising an offence against the Act or affect any obligation on anyone to publicise an offence against the Act. There is no requirement to publish a retraction in the case that a conviction is reversed on appeal.

Clauses 42-44 contain standard provisions on undertakings and injunctions.

Part 9 (clauses 45-63) covers WELS inspectors, including their information gathering powers.

WELS inspectors are appointed by the Regulator. They must be an officer or employee of a Commonwealth, State or Territory government agency. In exercising their powers or performing their functions, WELS inspectors are subject to the direction of the Regulator. There is no requirement that the Regulator be satisfied that officers or employees have sufficient training or experience relevant to the duties of inspectors.

Clause 46 is a standard provision on identity cards. Importantly, an inspector cannot exercise their powers (inspection, search and seizure) with respect to premises if they fail to produce their identity card if so required by the occupier of the relevant premises: **subclause 46(5)**.

WELS inspectors may exercise their powers for the purposes of (i) determining whether a person is complying with the Act or regulations or (ii) investigating offences against the Act or regulations: **clause 47**.

In entering the public areas of WELS premises,²⁹ inspectors need not identify themselves, although in effect must do so if required under **subclause 46(5)**. Entry into relevant non-public areas of WELS premises must be under a warrant or by the consent of the occupier. If seeking the consent of the occupier to enter premises, the inspector must inform them that they may refuse consent or withdraw consent: **subclause 49(2)**. 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 50**. The RIS notes that:

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‘these safeguards are in line with the Scrutiny of Bills Committee's views in its Fourth Report of 2000 into entry and search provisions in Commonwealth legislation (that is, that consent must be "genuine and informed" and refusing entry, where entry is not under a warrant, must not be an offence).

If entry to WELS premises is with the occupiers consent, inspectors may search the premises and anything on them, take measurements and inspect records and documents: **subclause 49(3)**.

Under **clause 52**, when entry is done pursuant to warrant, the inspector must announce that they are authorised to enter the premises and to provide any person at the premises the opportunity to let them in, except if the inspector believes on reasonable grounds that immediate entry is necessary for the ‘effective execution’ of the warrant.

If the occupier of the premises is present during the execution of the warrant, the WELS inspector to must identify themselves to occupier and give them a copy of the warrant: **subclause 53(1)**.

Entry by warrant provides the WELS inspector with additional powers. Specifically, they can seize or secure any evidential material on the premises, and require any person on the premises to answer questions and produce documentation: **paragraphs 51(2)(b)-(c)**. Failure to comply with such a request from a WELS inspector is an offence carrying a maximum penalty of six months imprisonment. An occupier is also obliged to provide the inspector(s) ‘with all reasonable facilities and assistance for the effective execution of the warrant’: **clause 54**. Failure to comply is an offence carrying a maximum penalty of 30 penalty units. There is no requirement on the part of the inspector to warn a person about the penalty for non-compliance under **paragraphs 51(2)(b)-(c)** or **clause 54**. Note that **clause 63** provides that a person is not obliged to comply with the provisions of **Part 9** (which includes **clauses 51** and **54**) if this would tend to incriminate them or expose them to a penalty. Again, there no requirement on the part of an inspector to inform a person that they are excused from complying with **clauses 51** and **54** under the self-incrimination provision.

Clauses 55-57 cover the handling of evidential material.

If an inspector seizes or secures evidential material, they must issue a receipt for the material to the occupier of the premises: **subclause 55(1)**.

Under **subclauses 55(2)-(3)**, the Regulator may make copies of the material and examine or test the material, even if latter might result in damage to the material. Any material must be returned or released when it is ‘no longer needed for the purposes for which it was seized or secured’, or within 90 days, whichever occurs first: **subclause 55(4)**. However the 90 day period may be extended by a magistrate under **clause 56**. The magistrate must hear the owner of the material in question in deciding on an extension, and must not extend the period unless ‘satisfied that it is necessary for the purposes of prosecuting an

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offence against this [Bill].’ There is no upper limit on any extension order, and there is no bar on seeking a second or third extension.

If the Regulator is unable to locate the owner of the material ‘despite making reasonable efforts’, the material may be disposed of: **clause 56**.

Clauses 58-59 deal with warrants to enter WELS premises. The issuing magistrate must be satisfied that entering the premises is necessary to (i) determine whether a person is complying with the Act or regulations and/or (ii) to investigate a possible offence against the Act. A warrant authorises the WELS inspector enter the named premises using such force use as is ‘necessary and reasonable’.

A ‘person who has WELS information’ may be required by the Regulator to provide such information to a WELS inspector: **subclause 61(1)**. A ‘person who has WELS information’ is defined as someone whom the Regulator³⁰ believes, on reasonable grounds, to be capable of providing information relevant for the purposes of investigating or preventing an offence under the Act: **clause 60**. Such persons may also be required to appear before an inspector to answer questions and provide other information to the inspector: **subclause 62(1)**. A person must be given at least 14 days notice of these **clause 61** and **62** demands. Except in cases where **clause 63** applies, failure to provide required information or answer questions is an offence with a maximum penalty of 6 months imprisonment: **subclauses 61(3)** and **62(4)**. In addition, the standard *Criminal Code* offence provisions of giving false or misleading evidence apply. Any **clause 61** or **62** notice must include a warning of the penalty for violating these *Criminal Code* offences, but there is no requirement regarding either warning of the penalties for failing to provide information / appear before a WELS inspector or the availability of the **clause 63** excuse for non-compliance.

Clause 67 allows the Regulator to charge fees for services provided by, or on behalf of, the Regulator ‘in the performance of [their] functions. **Clause 68** provides that fees and any other amounts payable to the Commonwealth in relation to the WELS scheme are recoverable in court as a Commonwealth debt. The Explanatory Memorandum to the Bill comments:

These provisions provide for the option to run the scheme on a cost-recovery basis. It has been established (*Attorney-General v Wilts v 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.³¹

Presumably these fees will be set by regulations.

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Part 11 (Clauses 69-72) deal with review of decisions made under the Bill.

Clause 71 allows for an ‘internal review’ by the Regulator of a decision originally made by a delegate of the Regulator – ie the Regulator must personally review the original decision. An application for internal review must be made within 30 days of receipt of the notice of the original decision by the applicant.

Clause 72 allows for a review by the AAT of either (i) an ‘original’ decision made by the Regulator (or their delegate) under **clauses 29** or **31** or (ii) a **clause 71** internal review decision. Only an affected person within the meaning of **clause 69**³² may seek an AAT review under this provision. The Explanatory Memorandum to the Bill comments

Despite subclause 27(1) of the *Administrative Appeals Tribunal Act 1975*, third party appeals (i.e. an appeal made by another person on behalf of the affected person) are also intentionally excluded. This is for consistency with the internal review provisions under clause 71, which provide only for an affected person to apply – it would be unusual to then allow additional parties to appeal at the external review stage. This provision is also consistent with the model set by the Gene Technology Act.³³

Clauses 73 and **74** require the Commonwealth to pay compensation for (i) damage to electronic equipment³⁴ operated under clause 49 (ie during a search)³⁵ and (ii) acquisition of property. Note, however, the **clause 73** obligation only arises where the damage that occurs is a result of insufficient care exercised by the WELS inspectors.³⁶ Disputes about the amount of damage or value of property may be decided by the Federal Court.

Under **clause 75**, the Regulator must give the Commonwealth Minister an annual report on the operation of the WELS scheme. The Minister must table this in both Houses of Parliament within 15 sitting days of its receipt, with copies to participating States and Territories.

An independent review of the WELS scheme must be commissioned by the Minister ‘as soon as possible’ after the Act has been in operation for 5 years: **subclause 76(1)**. ‘Independent review’ means one that is undertaken by persons (i) appropriately qualified (in the Minister’s view) and (ii) at least one must not be a Commonwealth public servant: **subclause 76(4)**. Given that administration of the WELS scheme will likely involve officers from State and Territory agencies, it is questionable whether the potential appointment of such an officer to the review in order to satisfy (ii) above would necessarily add to the ‘independence’ of the review. They may be independent from the Commonwealth, but not from the operation of the scheme. The Minister must table the finished report in both Houses of Parliament within 15 sitting days of its receipt, with copies to participating States and Territories: **subclause 76(3)**.

Clause 77 is a standard regulation-making provision. Penalties for offences against the regulations must be not more than 50 penalty units.

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Concluding Comments

Clauses 13-15 largely deal with the conferral of functions, powers and duties on the WELS Regulator and inspectors by ‘corresponding State-Territory’ laws. The drafting of these clauses is virtually identical to sections 44AI-AK of the recently passed *Trade Practices Amendment (Australian Energy Market) Act 2004*. It is worth repeating the relevant comments from the [Bills Digest](#)³⁷ for this Act with respect to some of the (arguably) unresolved constitutional issues that remain as a product of the High Court’s decision in *Hughes*:

The drafters of the Bill appear to have interpreted the High Court's judgment in *Hughes* to mean that a constitutional issue will only arise if the Bill *imposes a duty* on the AER to exercise such powers. However this is not necessarily so. An alternative reading of *Hughes* is that any provision in a Commonwealth law that *authorises* the use of State law by a Commonwealth body for enforcement purposes may need to be supported by a specific head of power in the Constitution...

An article written in 2002 by the then Counsel assisting the Solicitor-General for the Commonwealth, Graeme Hill reinforces questions about the constitutional validity of provisions in the Bill. Indicating that these were his personal views (so not necessarily those of the Government), he stated:

One reading of *Hughes* is that a Commonwealth body cannot be given exclusive power to perform a function conferred by State law unless it is a function that the Commonwealth could have conferred itself.

Hill notes, however, that the judgment in *Hughes* may also indicate that the Commonwealth could rely on its executive power (based on section 61 of the Constitution) 'to authorise Commonwealth bodies to perform exclusively what might be termed "non-coercive" functions (that is, functions that do not adversely affect the rights of individuals)'. Based on this view, a question mark clearly remains about the validity of the AER's exercise of State power for its coercive enforcement functions.

Subclause 14(3) of the Bill recognises that it may be constitutionally necessary for a duty to be imposed by the Bill rather than a State or Territory law. In such cases, **subclause 14(5)** restricts any duty to one that is within the legislative power of the Commonwealth and is also not inconsistent with ‘constitutional doctrines’. However, if the ‘alternative’ reading of *Hughes* referred to above is correct, there is a danger that a Commonwealth law that *authorises* the use of State law by a Commonwealth body for enforcement purposes would be constitutionally invalid if the content of the State law is not within the legislative power of the Commonwealth. A similar issue applies to **clause 13**, which deals with the conferral of functions etc on the WELS Regulator and / or inspectors.

On other matters, it is worth noting that the introduction of water efficiency labelling for various indoor water use products will only have a modest effect on household consumption, and that effect will take some time to materialise. The requirement for

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labelling foreshadowed by the Bill is a positive step, but is only one aspect of managing the demand for water by Australian households.³⁸ In this context, it would be worthwhile if some modelling was done on how the possible introduction of compulsory water efficiency standards to new shower heads and washing machines would affect household consumption.

Endnotes

- 1 These are defined in the Bill as devices through which, or into which, water flows as part of its normal operation.
- 2 These are defined in the Bill as devices that are not water-use products but are designed to operate in place of a water-use products.
- 3 The statistics in the following section are extracted from the May 2004 *Regulation Impact Statement for Proposed National System of Mandatory Water Efficiency Labelling and Standards for Selected Products* (The RIS) See <http://www.deh.gov.au/water/urban/pubs/ris.pdf>. More general information on household water use can be found in chapter 9 of the the recent ABS publication, *Water Account Australia*. See [http://libabs1.parl.net/abs/subscriber.nsf/Lookup/5469708047B0C960CA256E980079E54C/\\$File/46100_2000-01.pdf](http://libabs1.parl.net/abs/subscriber.nsf/Lookup/5469708047B0C960CA256E980079E54C/$File/46100_2000-01.pdf)
- 4 RIS, p. 20.
- 5 Ibid., p. 21.
- 6 Ibid., p. 22.
- 7 Ibid., pp 21-22.
- 8 Ibid., p 20.
- 9 The WSAA represents water utilities.
- 10 Ibid., p. 67.
- 11 http://www.aph.gov.au/senate/committee/ecita_ctte/water/report/contents.htm
- 12 p. *xiv*.
- 13 p. *xviii*.
- 14 Environment Protection and Heritage Council, *Communique*, 23 May 2003.
- 15 See <http://www.deh.gov.au/water/urban/final-report.html>

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- 16 As a member of EPHC, New Zealand (NZ) also agreed to implement national scheme in its jurisdiction. However, the means of implementation is at the discretion of the NZ government and they are not course bound by this Bill.
- 17 p. 3.
- 18 p. 4.
- 19 p. 10.
- 20 Such a statement is unlikely to have any legal affect in terms of a court deciding on the constitutionality validity of the federalist aspects of the Bill. See the concluding comments of [Bills Digest No.171 of 2003-04](#).
- 21 (2000) 202 CLR 535.
- 22 op cit. at 553.
- 23 *R v Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.
- 24 Op. cit at 558.
- 25 Although the definition of supply in clause 7 requires supply, or the offer to supply, to be for consideration (ie not for free).
- 26 See Part 6 of the Bill.
- 27 Environment and Heritage.
- 28 ‘Misusing’ in this context means using the standard or information ‘in a manner that is inconsistent with the standard’: **paragraph 37(1)(c)**.
- 29 These are premises use for, or in connection with, the supply or one or more WELS products: **clause 7**.
- 30 Or their delegate.
- 31 At p. 29.
- 32 Essentially these are persons whose applications to register a WELS product was refused or existing registration was cancelled or suspended.
- 33 At p. 29.
- 34 This includes software and/or data recorded on the equipment.
- 35 If electronic equipment is, or contains, evidential material and is seized under clause 54 and taken off-premises, a literal reading of clause 73 is that no compensation is payable where damage occurs off-premises.
- 36 This is a standard provision.
- 37 See <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd171.pdf>
- 38 Obviously some States and Territories also have their own programs to encourage household water efficiencies, such as offering rebates on the purchase of certain shower heads.

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