

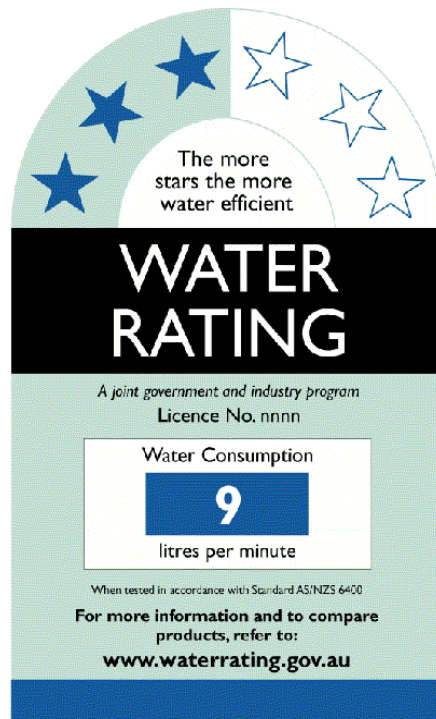


**Australian Government**

**Department of the Environment and Water Resources**

## WELS Inspectors' Protocol

General information on how WELS inspectors will operate and what they can do.



A working document (March 2007)

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



March 2007

Contact WELS by telephone 1800 803 772  
or email [wels@environment.gov.au](mailto:wels@environment.gov.au)  
[www.waterrating.gov.au](http://www.waterrating.gov.au)

ISBN 0642 55141 3  
© Commonwealth of Australia 2005

Disclaimer

This publication is presented by the Commonwealth for the purpose of disseminating information free of charge for the benefit of the public. The Commonwealth monitors the quality of the information available in this publication and updates the information regularly. However, the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this publication or on any linked web site or document. The Commonwealth recommends that users exercise their own skill and care with respect to their use of this publication and that users carefully evaluate the accuracy, currency, completeness and relevance of the material in the publication for their purposes. This publication is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances. The material in this publication may include the views or recommendations of third parties, which do not necessarily reflect the views of the Commonwealth, or indicate its commitment to a particular course of action.

# Contents

1.	Introduction.....	1
2.	Objective of inspections .....	1
3.	Inspection activities .....	1
4.	Timing, focus and frequency of the inspections program ...	2
5.	Inspection teams .....	2
6.	Powers and responsibilities of inspectors .....	2
7.	Penalty infringement notices (fines) .....	6
8.	Monitoring.....	7
9.	Audits .....	7
10.	Investigations .....	8
11.	Reporting on WELS compliance management outcomes ..	9
12.	Two-way advice and feedback.....	9
13.	Participation in WELS CRM continual improvement .....	10

## 1. Introduction

The purpose of the *Water Efficiency Labelling and Standards Act 2005* (the WELS Act) is to provide for the establishment and operation of a scheme to apply national water efficiency labelling and minimum performance standards to certain water-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.

The objects of the Act are to:

- Conserve water supplies by reducing water consumption;
- Provide information for purchasers of water-use products; and
- Promote the adoption of efficient and effective water-use technology.

## 2. Objective of inspections

Inspections are undertaken to determine whether there are risks of non-compliances or offences being committed under the WELS Act. We aim to detect, prevent and manage the compliance risks and offences under the WELS Act.

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

- Maintain the WELS Regulator's capacity to take enforcement action where necessary; and
- Not compromise the objectives of the scheme or the credibility of the label, or the standard.

## 3. Inspection activities

Inspectors may undertake the following activities on suppliers' premises concerning the detection, prevention and management of offences under the WELS Act related to the supply of WELS products:

- *Routine monitoring*;
- *Unannounced 'spot checks'*, as a subset of other inspections;
- *Follow-up visits* to verify understandings or the implementation of remedial action (e.g. related to enforceable undertakings as per Sections 42 and 43 of the Act), which may arise from previous monitoring, audits and investigations;
- *Audits*, including visits to premises to observe and record an organisation's operations, practices and systems, which may be focused on:
  - a comprehensive examination of an organisation's activities; and

- an issue or a range of issues that are being reviewed across a number of organisations.
- *Investigations*, which are comprehensive assessments of the possible commission of an offence under the Act and can arise from allegations, WELS intelligence, referral from monitoring, or audits.

#### **4. Timing, focus and frequency of the inspections program**

The timing, focus and frequency of inspections will depend on:

- Annual and ongoing compliance risk assessment (carried out under the Compliance Risk Management (CRM) Framework);
- The review of the annual CRM Plan (carried out under the CRM Framework);
- Ongoing assessment of records and intelligence about the compliance and corporate culture of suppliers; and
- The effectiveness of suppliers in managing compliance risks.

These factors may also have an impact on any review of the level of registration fees (which are set at a level aimed at recovering the costs of running the scheme).

#### **5. Inspection teams**

Each inspection visit will be undertaken by two WELS inspectors. Expert advisors may be included as required. All external experts will be required to disclose any potential conflicts of interest to the WELS Regulator (or delegate) as to whether the disclosed interest is likely to conflict with the proposed inspection activity. All external experts will sign a confidentiality agreement preventing disclosure of information relating to the monitoring activities.

#### **6. Powers and responsibilities of inspectors**

Inspectors' powers and responsibilities are set out in the WELS Act (accessible from the legislation page of the WELS internet site at <http://www.waterrating.gov.au>) and also detailed in the WELS Compliance Risk Management Framework. A WELS inspector may exercise these powers and responsibilities in determining whether a person is complying with (or committing a possible offence against) the Act, the Regulations and Determinations.

All WELS inspectors will follow:

- The WELS legislation and other relevant law;
- The policies and principles outlined in the CRM Framework;
- WELS CRM Protocols;
- Directions of the WELS Regulator;

- The Department of the Environment and Water Resource's Compliance and Enforcement Policy<sup>1</sup>;
- Prosecution Policy of the Commonwealth;
- Commonwealth Fraud Control Guidelines;
- Australian Government Investigation Standards; and
- Attorney-General's Department - Overarching Principles for Selecting Cases for Investigation and Administrative, Civil and Criminal Sanctions.

Sections 46 to 62 of the WELS Act and the *Water Efficiency Labelling and Standards Regulations 2005* (the WELS Regulations) provide WELS Inspectors with certain resources, responsibilities and powers. The Act, Regulations and the above policies and procedures also provide WELS inspectors with certain responsibilities.

The WELS Regulator appoints WELS inspectors. A WELS inspector 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 WELS Regulator.

Section 46 is a standard provision regarding identity cards. Importantly, inspectors 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 (Subsection 46(5)).

WELS inspectors may exercise their powers for the purposes of determining whether a person is complying with the Act or regulations or investigating offences against the Act or Regulations (Section 47).

In entering the public areas of WELS premises, inspectors need not identify themselves, although in effect must do so if required under Subsection 46(5).

WELS inspectors may 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. This includes:

- Inspecting WELS products;
- Purchasing any WELS product that is available for sale;
- Inspecting or collecting written information, advertisement 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.

---

<sup>1</sup> Department of the Environment and Water Resources (August 2004) *Department of the Environment and Water Resources Compliance and Enforcement Policy*.  
<http://www.environment.gov.au/about/compliance/index.html>

Entry by a WELS inspector into relevant non-public areas of WELS premises must be under a warrant or with the consent of the occupier.

If seeking the consent of the occupier to enter premises, the inspector must inform the occupier that they may refuse or withdraw consent (Subsection 49(2)). It is not an offence under the Act for occupiers of WELS premises to refuse to allow WELS inspectors to enter or remain on their premises without a warrant (Subsection 50).

If entry to WELS premises is with the occupier's consent, inspectors may search the premises and anything on them, take measurements and inspect records and documents (Subsection 49(3)). Under Section 52, when entering is done pursuant to a warrant, the inspector must announce that they are authorised to enter the premises and 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 must identify themselves to the occupier and give the occupier a copy of the warrant (Subsection 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) and (c)).

Failure to comply with a request from a WELS inspector to answer questions or produce documentation 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' (Section 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) and (c) or Section 54. Note that Section 63 provides that a person is not obliged to comply with the provisions of Part 9 (which includes Sections 51 and 54) if this would tend to incriminate them or expose them to a penalty. Again, there is no requirement on the part of an inspector to inform a person that they are excused from complying with Sections 51 and 54 under the self-incrimination provision. Although there is no requirement, it is envisaged that WELS Inspectors will always seek to work with suppliers and explain legislative provisions where practicable.

Sections 55 to 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 (Subsection 55(1)). Under Subsections 55(2) and (3),

the WELS Regulator may make copies of the material and examine or test the material, even if this 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 (Subsection 55(4)). However the 90-day period may be extended by a magistrate under Section 56. The magistrate must give the owner of the material in question an opportunity to be heard in deciding on an extension, and must not extend the period unless 'satisfied that it is necessary for the purposes of prosecuting an offence against the Act.' There is no upper limit on any extension order, and there is no bar on seeking a second or third extension.

If the WELS Regulator is unable to locate the owner of the material 'despite making reasonable efforts', the material may be disposed of (Section 56).

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

A 'person who has WELS information' may be required by the WELS Regulator to provide such information to a WELS inspector (Subsection 61(1)). A 'person who has WELS information' is defined as someone whom the Regulator believes, on reasonable grounds, to be capable of providing information relevant for the purposes of investigating or preventing an offence under the Act (Section 60).

Such persons may also be required to appear before an inspector to answer questions and provide other information to the inspector (Subsection 62(1)). A person must be given at least 14 days notice of these *Section 61 and 62 demands*.

Except in cases where Section 63 applies, failure to provide required information or answer questions is an offence with a maximum penalty of 6 months imprisonment (Subsections 61(3) and 62(4)). In addition, the standard Criminal Code offence provisions for giving false or misleading evidence apply. Any *Section 61 or 62 notice* must include a warning of the penalty for violating these Criminal Code offences. However, there is no requirement regarding either warning about the penalties for failing to provide information or appear before a WELS inspector or about the availability of the Section 63 excuse for non-compliance. Although there is no requirement, it is envisaged that WELS Inspectors will always seek to work with suppliers and explain legislative provisions where practicable.

Inspectors also:

- Conduct inspection activities under a project management framework to maximise the efficiency and effectiveness of WELS compliance management and to minimise the impact on suppliers as far as possible;
- Participate in the registration of WELS products and contribute to the continual improvement of the registration process and the development of registration conditions, particularly with insights derived from field observations;
- Collect feedback from WELS business representatives on the conduct of the inspection and advise of opportunities for improvement;
- Collect field intelligence, including making observations about an organisation's corporate culture for the purposes of compliance with the Criminal Code related to CRM under the WELS Act - see 1.2.2 of the WELS CRM Framework;
- Collect and disseminate best practice principles for compliance risk management by organisations subject to the WELS Act;
- Educate and raise awareness about compliance management risks and better practice;
- Where possible:
  - Assist in the detection and prevention of non-compliance in a cooperative manner; and
  - Encourage compliant corporate cultures, systems and practices;
- Provide written advice of inspection outcomes and any implementation actions or compliance management issues; and
- Collate inspection outcomes and contribute to:
  - The development of WELS CRM records, WELS intelligence, and an annual assessment/review of WELS CRM; and
  - Building data for the WELS Scheme on inspection outcomes to facilitate strategic compliance risk assessment and management, and the WELS Regulator's review and reporting obligations under the WELS Act.

## **7. Penalty infringement notices (fines)**

In circumstances where fines become necessary, inspectors may issue fines under Part 8 of the WELS Regulations. These Regulations set out a procedure by which a person who is alleged to have committed an offence against Part 7 of the Act (Offences relating to the supply of WELS products) may, as an alternative to prosecution, pay an infringement notice penalty (i.e. a monetary penalty or fine). It provides the basis for fines and certain requirements for information on the penalty infringement notice and other requirements. It provides procedures for seeking withdrawal of a penalty infringement notice or extensions of time to pay.

The Regulations and the explanatory statement for the Regulations are available on the Legislation page of the WELS website (at <http://www.waterrating.gov.au>).

Under Subregulation 7(1), an inspector may serve an infringement notice if he or she has reasonable grounds for believing that the person has committed an offence under Division 2, 3 or 4 of Part 7 of the WELS Act. Subregulation 7(2) provides that the financial penalty set out in an infringement notice will be one fifth of the maximum fine that a court could impose as a penalty for that offence.

## **8. Monitoring**

Monitoring inspections can include:

- Unannounced site inspections conducted in the public areas of suppliers' premises without drawing attention to the presence of the inspectors, possibly followed by consent being sought to enter the non-public areas;
- Pre-arranged site inspections of public and/or non-public areas of a WELS business with consent sought via telephone and/or in writing;
- Follow-up visits (i.e. with consent or unannounced and/or under warrant - depending on the circumstance) to verify implementation of undertakings or the recommendations of WELS officials on risks associated with the compliance risk management activities of a WELS business;
- On-site education and awareness activities; and
- Preparation for audits and/or investigations;
- Issuing fines.

## **9. Audits**

An Audit is a broad examination and assessment (including inspections) of an organisation's (or a range of organisations') procedures, records, practices and other relevant information to:

- Determine whether legislative requirements are being met by the organisation(s) being audited;
- Identify improvements to organisations' management of compliance, and/or corporate culture and
- Identify improvements to the WELS Scheme to:
  - Enhance the effectiveness of its CRM arrangements; and/or
  - Remove barriers to effective CRM or the objectives of the Scheme.

Audits are based on a profile of the supplier's compliance risks against WELS compliance requirements and are conducted under a project management framework. Audits:

- Can involve fieldwork with questioning and the making of observations by inspectors;
- Always involve assessment of suppliers' documentation;
- Always involve the development of an inspector's assessment report to the WELS Regulator on the findings, recommendations and implementation actions of the audit; and

- Always involve communicating the findings and implementation actions to the recipient of the audit.

The project management schedule, scope and exclusions of an audit will be discussed with the subject organisation(s) in a meeting to initiate the audit, and will also be canvassed separately prior to the audit in telephone discussions and/or by email. This may provide opportunities to include further information gathering and redirect the scope of an audit following discussion with the organisation personnel.

Where feasible, the project management schedule of an audit will be negotiated to accommodate business needs of the subject organisation(s) while allowing sufficient time for the audit team to conduct the audit and interviews, make observations, and collect and/or record information. An audit will be conducted consistent with the section above: *Powers and responsibilities of inspectors*.

## **10. Investigations**

Investigations are comprehensive assessments of the possible commission of an offence or offences under the Act. Investigations can arise from allegations, and/or WELS intelligence and strategic risk management, and/or referral from monitoring, and/or other investigations, and/or audits.

Where investigations identify alleged offences against the Act, the WELS Regulator may provide a brief of evidence to the Commonwealth Director of Public Prosecutions (DPP). Prosecution decisions are under the direction of the Commonwealth DPP. This level of enforcement action by the DPP could occur following:

- Attempts by WELS officials to, where possible, divert non-compliant organisations towards compliance with education, administrative actions; and
- Low-level enforcement action such as fines.

The outcomes of investigations can include:

- A finding that there is insufficient evidence to substantiate an allegation and that low-level monitoring or no further action should be the result;
- Determining that education and/or administrative compliance management responses would be an appropriate course of action;
- Recommending to the WELS Regulator that a brief of evidence be provided to the Commonwealth DPP for possible legal action.

An investigation will be conducted consistent with the section above: *Powers and responsibilities of inspectors*.

## 11. Reporting on WELS compliance management outcomes

Section 41 of the Act allows the WELS Regulator to publicise convictions against the Act as a deterrent to others against further offences against the Act.

Under Section 75 of the Act, the WELS Regulator must provide the Commonwealth Minister at the end of each financial year with an annual report on the operation of the WELS scheme. This will include information on WELS compliance management. The Minister must then cause this to be tabled in both Houses of Parliament within 15 sitting days. The Minister is also required to forward a copy of the report to each participating State and Territory. This obligation is likely to be met through the Annual Report of the Department of Environment and Water Resources.

## 12. Two-way advice and feedback

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

Representatives of suppliers can seek the routine advice of WELS officials about compliance status and risks and better practice options.

Suppliers seeking to review their compliance risk management arrangements can invite WELS audits or indicative inspections. WELS businesses could take advantage of these WELS CRM tools to review existing management practices to improve compliance performance and build better systems and practices. Suppliers could use these processes to resolve emerging risks to compliance performance arising from unforeseen factors; and/or improve specifications within the legislation or technical specifications. Depending on the assessment of the resource intensity of some of these activities over time, the WELS Regulator may consider proposing Regulations for cost recovery (e.g. for invited audits conducted to assist suppliers with change management arrangements). No charge is contemplated at this time and any future charged activity (e.g. invited audits) would run alongside the routine advice of WELS officials about compliance status and risks and better practice options.

Queries and feedback about WELS CRM arrangements and WELS legislation, specifications, information and systems are always welcome. This protocol is a working document, which is subject to continual improvement. Additionally, the legislation and scheme are subject to review after five years.

All inspections will be completed with an oral debriefing. At this time WELS officers will ask for written and oral feedback, which can include:

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

As soon as practicable, all inspections will result in written confirmation to the inspected suppliers of the outcome together with advice of any implementation actions recommended or required as enforceable undertakings.

### **13. Participation in WELS CRM continual improvement**

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

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

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

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

- Cost-effectiveness of the scheme for participants; and
- Success of this scheme, which aims to save valuable water for Australians and the environment.

Comment and Feedback may be sent to

WELS Regulator, GPO Box 787,  
CANBERRA, ACT, 2601  
Phone 1800 803 772  
Email [wels@environment.gov.au](mailto:wels@environment.gov.au)