

The Auditor-General
Auditor-General Report No.5 2023–24
Performance Audit

Trade Measurement Compliance Activities

Department of Industry, Science and Resources



Audit snapshot

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Why did we do this audit?

- ▶ Trade measurement is an area of Australian Government administration that directly impacts on everyday life.
- ▶ The audit is part of the ANAO's coverage of regulatory activities.
- ▶ The National Measurement Institute, a division within the Department of Industry, Science and Resources (DISR) with more than 350 staff, is responsible for trade measurement compliance.

What did we find?

- ▶ DISR's administration of trade measurement compliance is partly effective.
- ▶ Sound governance arrangements were not fully in place to support trade measurement compliance activities. The approach is not adequately risk-based.
- ▶ The department's approach to trade measurement compliance has been partly effective. Compliance monitoring approaches are appropriate. The level of compliance monitoring activity has fallen. Action in response to non-compliance has not been timely or demonstrably effective.

Key facts

- ▶ Australia's trade measurement transactions are estimated to be worth more than \$750 billion each year.
- ▶ Trade measurement compliance activities include conducting trader audits, testing measuring instruments, and conducting enforcement activities where non-compliance is identified (such as issuing warning letters or infringement notices).

What did we recommend?

- ▶ There were six recommendations to DISR aimed at strengthening its governance arrangements and improving its approach to compliance activities.
- ▶ The department agreed to five recommendations and partially agreed to one.

3131

trader audits conducted in
2021–22.

29%

of 2021–22 trader audits
identified non-compliance.

56

warning letters or infringement
notices issued in 2021–22.

Summary and recommendations

Background

1. Trade measurement refers to all transactions in which the price of the commodities or goods is based on measurement of quantity or quality. The primary purpose of Australia's trade measurement system is to ensure that the pricing of traded goods is based on accurate measurement. Trade measurement covers both business-to-business transactions and business-to-consumer transactions. Australia's trade measurement transactions are estimated to be worth more than \$750 billion each year.

2. The Department of Industry, Science and Resources (DISR), through the National Measurement Institute (NMI), administers Australia's trade measurement laws. It is responsible for ensuring that businesses and individuals comply with the rules and regulations so that there is accurate and reliable measurement in trade. As part of this responsibility, DISR, through its NMI function, undertakes trade measurement compliance activities that include:

- conducting trader audits;
- testing measuring instruments in use for trade;
- testing pre-packaged goods;
- monitoring trading practices through trial purchases; and
- conducting enforcement activities where non-compliance has been identified.

3. DISR reported that in 2021–22 the NMI had:

- conducted 3131 trader audits (compared to 7600 in 2019–20 and 4842 in 2020–21);
- tested 7118 measuring instruments (compared to 13,588 in 2019–20 and 14,049 in 2020–21); and
- inspected 17,360 lines of packaged goods (compared to 78,290 in 2019–20 and 25,990 in 2020–21).

4. DISR reports the NMI as having more than 350 staff, of which 76 are estimated by DISR to work in trade measurement.

Rationale for undertaking the audit

5. The activities of the department, through its NMI function of trade measurement, impact on everyday life. The department has regulatory responsibility to ensure that the pricing of traded goods, based on quantity or quality, is based on accurate measurement. This audit provides assurance to the Parliament over the effectiveness of DISR's administration of trade measurement.

Audit objective and criteria

6. The objective of the audit was to examine whether compliance with trade measurement in Australia is being effectively administered.

7. To form a conclusion against this objective, the following high-level criteria were applied.

- Have sound governance arrangements been established to support trade measurement compliance activities?

- Is there an effective approach to trade measurement compliance activities?

Conclusion

8. DISR's administration of trade measurement compliance is partly effective.

9. Sound governance arrangements were not fully in place to support trade measurement compliance activities. A wide range of policy and procedural documents have been developed. However, there are gaps, overlaps and inconsistencies in those documents and they have not been updated in a timely manner. Evidence that appropriate appointment processes of officers under the relevant legislation are not consistently implemented exposes the department to a risk that actions taken in compliance activities are invalid. The annual targeting of compliance activities to particular industry sectors is not demonstrably risk-based, and the risk-based approach to selecting individual traders within targeted industries requires improvement.

10. The department's approach to trade measurement compliance has been partly effective. The department has appropriate approaches to monitor the level of compliance, however the level of monitoring activity (particularly trader audits) has declined significantly over the last five years, with no evidence that this was driven by a changed risk environment or risk assessment. Nearly a third of all trader audits conducted between 2019–20 and 2021–22 identified non-compliance. Action in response to identified non-compliance, including follow-up audits and enforcement actions, has not been timely or demonstrably effective. DISR's monitoring and reporting arrangements did not extend to the effectiveness of its regulatory approach, with its regulatory reporting more generally declining after 2019–20 such that it has not complied with its obligations.

Supporting findings

Governance arrangements

11. While DISR has many documents that cover a range of processes, there are gaps in the policies and procedures in place to support departmental officers in the administration of trade measurement compliance activities. Documents often overlapped and were not updated in a timely, consistent and transparent manner. Of the 60 officers that have undertaken trader audits in the period examined by the ANAO, 58 per cent had not been appointed in writing (as required by the *National Measurement Act 1960*) prior to undertaking their first audit, or there was no record of them having ever been appointed in writing. This impacted 1399 (eight per cent) of the 16,590 trader audits undertaken in the three-year period to 30 June 2022 examined by the ANAO. (See paragraphs 2.3 to 2.24)

12. The regulatory approach is not fully and appropriately informed by an assessment of compliance risk. DISR identified the need for a more sophisticated risk framework for legal metrology in December 2015. While progress has been made, trader audit activities are not yet being effectively and demonstrably targeted to market sectors and traders at higher risk of regulatory non-compliance. There is not a strong relationship between industry-level risk assessments and the department's targeting of compliance activities and development of the annual National Compliance Plans. While DISR has introduced a risk-based approach for selecting individual traders for audit within those sectors being targeted, the approach should be improved. (See paragraphs 2.29 to 2.60)

Compliance activities

13. A key component of monitoring industry compliance is the conduct of trader audits, with DISR reporting that 32,792 audits were conducted over the five years to 2021–22. The department's data overstates the number of trader audits it undertakes. There has been a downward trend in the number of trader audits planned to be conducted each year. The actual number of audits conducted has also fallen short of the target in each of the five years examined by the ANAO. In 2021–22, the department conducted 3131 audits which was less than half the target of 8000 audits which itself was significantly below the target of 11,500 audits for 2017–18. The department identifies in its National Compliance Plan particular industries to be targeted for compliance activity however the shortfall in performance against targets is as evident for the targeted programs as it is for the overall program of trader audits (59 per cent of planned audits under the targeted programs were not conducted in 2021–22).

14. There has been a similar declining trend across DISR's other trade measurement inspection activities. There was a decrease of 52 per cent in the number of measuring instruments inspected between 2017–18 and 2021–22. There was a decrease of 76 per cent in the number of pre-packaged article lines inspected over the same period.

15. In comparison, the department has consistently exceeded the number of Tobacco Plain Packaging information visits undertaken by trade measurement inspectors on behalf of the Department of Health and Aged Care (the department receives separate funding from the Department of Health and Aged Care for this work). The evidence is that the department is prioritising this work it undertakes on behalf of another department over its own responsibility for trade measurement compliance. Further, the scope of this work has extended beyond the intended purpose of checking plain packaging to include examining whether traders are conducting illegal activities through the sale of illicit tobacco, with the related risks to the officers undertaking this work not adequately addressed by the department. (See paragraphs 3.2 to 3.32)

16. Action in response to identified non-compliance has not been timely or effective. Documented procedures are in place to respond to non-compliance via a follow-up trade measurement compliance audit or to commence enforcement action. Fewer follow-up audits are being undertaken and delays in the conduct of follow-up audits are common. Where follow-up audits have been undertaken the trend has been for increasing rates of continuing non-compliance to be found. Continuing non-compliance is not consistently followed by enforcement action. Where escalated enforcement action is being taken it is most often through warning letters and infringement notices (with associated fines) but those actions have also not been timely. (See paragraphs 3.33 to 3.51)

17. The regulatory approach is not being regularly reviewed and updated reflecting that the department is not complying with Australian Government requirements for regulatory performance reporting, including by not having in place an appropriate Regulator Statement of Expectations and Statement of Intent. DISR has not established performance indicators against which to review or to demonstrate the effectiveness of its regulatory approach to trade measurement. DISR reports its outputs, such as the number of trader audits conducted, although advice from the department to the ANAO as part of this audit indicates that the department is overstating the number of audits it undertakes. DISR ceased externally reporting against output targets, and ceased its regulator performance reporting for legal metrology, after 2019–20. DISR

has not issued a Regulator Statement of Intent for its National Measurement Institute despite this being a requirement. (See paragraphs 3.52 to 3.80)

Recommendations

**Recommendation no. 1
Paragraph 2.12** The Department of Industry, Science and Resources implement stronger controls that ensure persons undertaking monitoring and compliance activities have been appointed in accordance with the relevant legislation, and that appropriate records are made and retained of all appointments.

Department of Industry, Science and Resources response: *Agreed.*

**Recommendation no. 2
Paragraph 2.25** The Department of Industry, Science and Resources improve its record keeping processes to ensure that trade measurement business information and records are accurate, fit-for-purpose and are appropriately stored within departmental systems.

Department of Industry, Science and Resources response: *Agreed.*

**Recommendation no. 3
Paragraph 2.61** The Department of Industry, Science and Resources put in place an improved approach to assessing the risk of legal metrology regulatory non-compliance at the industry and trader levels, and a transparent process that reflects the assessment of risk for selecting industries for targeting under its annual National Compliance Plans.

Department of Industry, Science and Resources response: *Agreed.*

**Recommendation no. 4
Paragraph 3.27** In its activities related to the *Tobacco Plain Packaging Act 2011* and the *Tobacco Plain Packaging Regulations 2011*, the Department of Industry, Science and Resources ensures that:

- (a) appropriate priority is given to its responsibilities under the *National Measurement Act 1960*;
- (b) its directions to officers are limited to the undertaking of education and investigation activities to promote compliance with the provisions of the legislation; and
- (c) it is complying with its duties and obligations to those officers under the *Work Health and Safety Act 2011*.

Department of Industry, Science and Resources response: *Partially Agreed.*

**Recommendation no. 5
Paragraph 3.44** The Department of Industry, Science and Resources strengthen its approach to conducting follow-up audits where an initial trader audit identifies non-compliance such that follow-up activities are conducted in a timely manner, regulatory action taken where there is continuing non-compliance and appropriate records made and retained.

Department of Industry, Science and Resources response: *Agreed.*

**Recommendation no. 6
Paragraph 3.81** As regulator of Australia's legal metrology system, the Department of Industry, Science and Resources:

- (a) apply *Resource Management Guide 128: Regulator Performance*; and
- (b) establish indicators of, and report on, the effectiveness of its regulatory approach.

Department of Industry, Science and Resources response: *Agreed.*

Summary of entity responses

18. The proposed audit report was provided to DISR and an extract was provided to the Department of Health and Aged Care. The letters of response that were received for inclusion in the audit report are at Appendix 1. Entities' summary responses are provided below. The improvements observed by the ANAO during the course of this audit are at Appendix 2.

Department of Industry, Science and Resources

The Department of Industry, Science and Resources (the department) acknowledges the audit report and welcomes the findings as an opportunity to improve.

The unique and critical functions of the National Measurement Institute (NMI) are central to unlocking innovation and leading advancements in science and technology. NMI received \$63.9 million in the 2023-24 budget to sustain its core measurement capabilities and modernise Australia's measurement laws. Updating legislation to be more principles-based will help new technologies get to market faster while retaining consumer and business protections.

The department's commitment to continuous improvement responds to an environment of rapid technological change and increasing costs of administering trade measurement law. NMI is developing options for Government to achieve ongoing financial sustainability and meet rising demand from industry.

The department notes that the scope of the audit coincided with the impacts of the COVID 19 pandemic. Compliance activities were undertaken in a way that protected the health and safety of trade measurement inspectors and supported the Government's response to COVID 19.

The department commits to continuing and completing a range of improvements already under way, including to Trade Measurement Inspector appointments and activities, document management, risk and accountability frameworks and reporting responsibilities.

Department of Health and Aged Care

The Department of Health and Aged Care (the Department) acknowledges the findings available in the extract of the report provided and notes the recommendation directed at the Department of Industry, Science and Resources in respect of activities related to the *Tobacco Plain Packaging Act 2011*.

Since December 2012, all tobacco products in Australia were required to be sold in plain packaging and feature graphic health warnings. The continued monitoring and enforcement of plain packaging requirements is an essential component of Australia's comprehensive approach to tobacco control.

The inspection scheme undertaken by the National Measurement Institute achieves a high-quantity, low-time investment balance, to ensure that retailers of tobacco products receive the greatest possible exposure to compliance activities and information. Where suspected illicit tobacco products are identified through compliance activities undertaken by the National Measurement Institute, the Department refers information to the relevant law enforcement agencies.

On 30 November 2022 the Australian Government announced significant tobacco control reforms with the aim of consolidating and modernising existing tobacco control legislation, including the *Tobacco Plain Packaging Act 2011*. The Department notes the audit will inform consideration of future compliance activities, including under the proposed Public Health (Tobacco and Other Products) Bill 2023.

Key messages from this audit for all Australian Government entities

19. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

Governance and risk management

- Where Parliament confers statutory powers to enable officers to monitor and enforce compliance with regulation, it is important that those powers are exercised lawfully by individuals that have been properly appointed, and that appointment instruments are complete and current.
- Determining the level of and focus of compliance and enforcement activity on areas of higher risk ensures that resources are targeted to the areas requiring the most attention and that resources are appropriately allocated commensurate with identified risk areas.
- Entities should avoid proliferation of guidance and procedural documentation which may make it challenging for staff to find the 'right' guidance document — and also creates a downstream administrative burden because such material must be periodically reviewed.
- Regulators should make appropriate use of their powers by applying a graduated approach to address non-compliance that includes the timely use of stronger sanctions when required. While the regulatory action should align with the severity and frequency of the non-compliance, it should also escalate if the non-compliance is not rectified over time.

Performance and impact measurement

- The benefits of establishing performance targets are diminished where entities do not assess and report their performance against those targets.