



National Measurement Amendment Bill 2008

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Law and Bills Digest Section

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National Measurement Amendment Bill 2008

Date introduced: 24 September 2008

House: House of Representatives

Portfolio: Innovation, Industry, Science and Research

Commencement: 1 July 2009. However, the Commonwealth trade measurement system will not come fully into effect until 1 July 2010 as specified in Schedule 2, Part 2.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To introduce a new national trade measurement system for Australia based on the current trade measurement systems of the states and territories. The new national system will be administered by the Commonwealth Government, through the National Measurement Institute.

Background

What is trade measurement?

In his second reading speech for the Bill, the Minister for Minister for Small Business, Independent Contractors and the Service Economy and Minister Assisting the Finance Minister on Deregulation, Dr Craig Emerson, explained 'trade measurement' in simple terms as 'the use of measurement as the basis for the price in a transaction'. He also explained that a 'trade measurement system' is the term used to describe the infrastructure that is needed to make sure that trade measurement instruments are sufficiently accurate to give a fair result to buyer and seller.¹

The scope of Australia's existing trade measurement system is as follows:

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1. The Hon. Dr Emerson, Minister for Small Business, Independent Contractors and the Service Economy and Minister Assisting the Finance Minister on Deregulation, 'Second reading speech: National Measurement Amendment Bill 2008', House of Representatives, *Debates*, 24 September 2008, p. 11.

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The trade measurement system in Australia refers to all activities carried out by government and authorised private sector bodies in the application and enforcement of state and territory Trade Measurement Acts and Regulations. The system covers:

- the approval and usage of measuring instruments for trade (such as weighing scales, flow-meters, tanks, and beverage dispensers);
- the sale of goods by measurement (of quantity or quality);
- packaging and labelling of pre-packaged articles;
- licensing of operators of public weighbridges;
- licensing of measuring instrument servicing organisations that have personnel nominated to certify measuring instruments; and
- inspection of trade measuring instruments and pre-packages, and penalties for breaches of the law.

Studies in Australia, USA and Canada have indicated that the annual value of goods sold by measure is typically about 50% of GDP in developed countries. Based on this broad estimate, the trade measurement system in Australia may be underpinning transactions worth more than \$400 billion per annum. It is estimated that business-to-business transactions account for about 75% and retail transactions make up 25% of this value.²

The use of a government-implemented trade measurement scheme ensures that measuring implements used in trade are standardised, thereby allowing consumer confidence in the broader marketplace.

Robert McEntyre, in his address to the Queensland Studies Authority Asia Pacific Forum in 2003 about Australia's technical infrastructure, pointed out that:

In broad terms, the desired outcomes of an effective Australian technical infrastructure include:

- assurance provided to both domestic and international purchasers of Australian products, that the purchase has complied with strict standards as enforced by internationally recognised organisations, and

2. *Final Report – Review of National Arrangements for Administering Trade Measurement in Australia*, 30 August 2006, p. 6. This Review into the national trade measurement system was commissioned by the Standing Committee of Officials on Consumer Affairs and prepared by Booz Allen Hamilton (Australia) Ltd.

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- increased competitiveness, market share, innovation and lower operating costs for Australian industries and companies, through optimising trading environments as a result of removing technical barriers to trade.³

Basis of policy commitment

Currently, the majority of Australia's trade measurement system is enacted and administered by state and territory governments. In 1990, all states and territories signed an agreement to adopt Uniform Trade Measurement Legislation (UTML) by 1999 (with the exception of Western Australia, who did not enact trade measurement legislation until 2006). The enactment of mirror legislation by all states and territories was intended to provide a high level of consistency of regulation between jurisdictions. Each state and territory has a similar set of Acts and Regulations for ensuring that:

- all measuring instruments used in trade bear an inspector's or servicing licensee's mark attesting to their accuracy
- weighbridge licensees comply with the regulations governing weighbridges
- penalties are in place to deter incorrect or unjust use of measuring instruments in trade
- measuring instruments used in trade have been pre-approved for that purpose (pattern approval)
- responsibilities are established for administering authorities (typically the state or territory trade measurement agency) to arrange for the provision, custody and maintenance of state primary standards of measurement
- pre-packaged articles are of a correct measure and correctly marked, as specified in the corresponding regulations
- inspectors have the power to enter premises in order to fulfil their inspection duties such as checking the accuracy of weighing instruments or the correctness of pre-packaged articles, and ensuring that trading practices are compliant
- there is a system for licensing organisations to certify the accuracy of trade measuring instruments, and
- there is a licensing system for public weighbridge operators.⁴

3 Robert McEntyre, *Australia's Technical Infrastructure – its Value and Importance to Trade*, presented at the Queensland Studies Authority Asian Pacific Forum, August 2003, available at http://www.mcentyre.com.au/articles/tech_infra.pdf [accessed 20 October 2008]. Robert McEntyre is the director of business and management consultancy Robert McEntyre & Associates Pty Limited.

4. Final Report, op. cit, p. 13–14.

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The Commonwealth currently only has a limited role in inspection and enforcement of trade measurement, governing the sole area of utility metering. This role is set out in the *National Measurement Act 1960*.

The ongoing policy development of trade measurement issues occurs at the forum of the Ministerial Council of Consumer Affairs (MCCA), of which all jurisdictions (including the Commonwealth) are members.

Despite the use of the UTML, inconsistencies have developed between jurisdictions on issues such as fees, licensing and legislative interpretation. Additionally, the use of a separate (albeit similar) licensing scheme in each jurisdiction requires industry to hold multiple licences when operating in more than one jurisdiction.

Review of the National Trade Measurement System

In 2006 the Standing Committee of Officials on Consumer Affairs (SCOCA), operating under MCCA, commissioned a review of national arrangements for administering trade measurement in Australia. The Final Report from the review was published on 30 August 2006.

The Final Report detailed the consultation that occurred for the Review:

Detailed submissions were received from the Australian and New Zealand governments and from all state and territory governments. In total, 56 submissions were received from industry, of which 56% were from manufacturers and certifiers of measuring instruments, 17% from retailers, 8% from agricultural producers, 8% from packers and importers and 11% from others. No submissions were received from consumer representatives.⁵

The lack of consumer industry submissions was discussed further:

The consultants contacted a number of consumer groups with a view to eliciting a consumer perspective on the current system and identifying any requirements for change. The organisations contacted included: the Australian Consumers' Association, the Consumer Federation of Australia, NRMA, RACV, the Public Interest Advocacy Centre and the Consumer Law Centre in Victoria. However, no submissions were received from consumer organisations. Consumer groups typically cited a lack of resources, the relatively short time frame allowed for responses and higher priority consumer issues as the reasons for not making a submission.⁶

The consultation process asked stakeholders to identify key problem areas. The main problems identified were:

5. *ibid.*, p. 3.

6. *ibid.*, p. 19.

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- legislative differences across jurisdictions, due to lack of synchronisation of amendments to trade measurement acts and regulations
- the lack of a national trade measurement policy focus, as responsibilities lie with the states and territories
- different enforcement regimes, as jurisdictions have separate trade measurement administration acts which reflect different procedures, priorities, fees and charges
- multiple licensing systems for certifiers of measuring instruments, involving multiple fees and reporting systems for companies which operate across jurisdictions, and
- inconsistent advice and interpretation of legislation on the part of trade measurement authorities, leading to industry confusion and costs.⁷

In seeking to address the problems areas, the Review process was framed to consider the key problems areas with the following options for reform in mind:

- *Option 1:* Partial national legislation, based on the UTML, with consistent state and territory Administration Acts
- *Option 2:* Full national legislation, including administration aspects, with state and territory administration
- *Option 3:* National legislation with contracted administration undertaken by states and territories, and
- *Option 4:* National legislation and administration.⁸

The Review Report detailed a number of respondents' comments about the current administrative arrangements for trade measurement.⁹ It also offered a detailed analysis of each option for reform, including stakeholder preferences for a solution (some of which are detailed on pages 45-46 of the Final Report). Stakeholder comments showed a range of preferences, mostly for options 2 or 4, and the Report concluded that:

It is clear that the drivers for industry's choice of options are national legislation; consistent interpretation and application of legislation; and a single licensing system for servicing licensees.¹⁰

7. *ibid.*, p. 32.

8. *Review of the National Trade Measurement System: Discussion Paper*, June 2006, p. 5, available at http://www.consumer.gov.au/html/download/TradeMR_DP.pdf [accessed 20 October 2008]. The implications of each option are also detailed more fully at pages 39–44 of the Final Report.

9. Final Report, *op. cit.* p. 23–24.

10. *ibid.*, p. 46.





















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Subsequently, the Review Report offered the following table¹¹ as a summary of its qualitative analysis of Options 1 – 4 (including the practicality of their implementation).

Table 6.1: Summary of Qualitative Analysis

Concern	Option 1	Option 2	Option 3	Option 4
Legislative Differences				
Lack of National Policy Focus				
Multiple Licences				
Different Enforcement Regimes				
Inconsistent Advice				

 Not Met
  Marginally Met
  Partially Met
  Substantially Met
  Fully Met

Practical Implementation				
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 Extremely Difficult
  Easily Implemented

In assessing the merits of each option, the Report concluded:

Option 4 meets all of the concerns raised by industry. Option 4 is, however, the most difficult to implement, requiring not only the transfer of legislative responsibility but also the transfer of assets, operations and funding responsibilities from the States and Territories to the Australian Government. Option 4 could only be achieved through a significant commitment from the Australian Government to a national approach to the administration of trade measurement.¹²

The Report also notes that while option 4 is the preferred option of the majority of stakeholders, it is the most expensive and will take longest to implement.¹³

The Energy Networks Association Limited stated in their [submission](#) that:

Option 4 of the Discussion Paper would be the most efficient administrative option for addressing energy sector trade measurement issues and ensuring consistency and clarity of approach between the energy market and trade measures arrangements. This

11. *ibid.*, p. 56.

12. *ibid.*, p. 56.

13. *ibid.*, p. 76.

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approach also appears to be the most appropriate way to address future gas metrology arrangements, which are likely to follow similar arrangements to those in electricity, albeit with different rules given the significant differences in metrology needs between the two fuel types.¹⁴

Ultimately, the Final Report recommended the adoption of option 4,¹⁵ however it also acknowledged that implementation of Option 4 would involve the negotiation of budget transfers between the state and territory governments and the Commonwealth Government.¹⁶

MCCA presented the recommendation to the Council of Australian Governments (COAG), which was formally agreed to and accepted by COAG on 13 April 2007.¹⁷

Position of significant interest groups/press commentary

As the COAG agreement to reform trade measurement occurred before the last election, it is presumed that the proposed new system has in-principle bipartisan support. In April 2007 the then Minister for Industry, Tourism and Resources, the Hon. Ian MacFarlane, published a [media release](#)¹⁸ announcing the Howard Government's intention to adopt the new trade measurement system from 1 July 2010.

Financial implications

The Explanatory Memorandum for the Bill offers the following Financial Impact Statement:

Funding of \$31.65m, including \$3m capital and \$2.3m depreciation, was provided to the Department (of Innovation, Industry, Science and Research) for the transition to a national system of trade measurement and its first year of its operation (2007-08 to

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14. Energy Networks Association Limited, *Review of the National Trade Measurement System*, Submission, 7 July 2006, available at http://www.ena.asn.au/udocs/ena_071106_173119.pdf [accessed 21 October 2008]
 15. Final report, op. cit., p. 93
 16. *ibid.*, p. 77.
 17. National Measurement Institute, *A National Trade Measurement System*, 30 September 2008, available at <http://www.measurement.gov.au/index.cfm?event=object.showContent&objectID=C3EB158B-BCD6-81AC-1DC5A41E29837C8C> [accessed 21 October 2008]
 18. The Hon Ian MacFarlane, 'National Trade Measurement Reforms to Reduce Red Tape', *Media Release*, 16 April 2007.

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2010-11). Ongoing funding of \$23.653m including \$2.3m depreciation will be provided from 2011-12.¹⁹

The Final Report concluded that:

The Consultants recommend a phased implementation of Option 4 over a period of 5 years, with the establishment of a national trade measurement agency within the first year. The start-up costs of this proposal would be \$2 million over 3 years. When fully implemented, annual operating costs (excluding existing NMI operations) are estimated at \$19 million for an agency within the NMI or \$20.6 million for a statutory authority. A substantial portion of the ongoing costs could be met through cost recovery from industry and through a budget transfer from the States and Territories.

Budget estimates are based on the maintenance of existing (state and territory) resourcing and service levels. The number of trade measurement inspectors has declined significantly over the past 5 years and there is general concern that current resources are inadequate to cover new trade measurement responsibilities such as product quality measurements. It is anticipated that this situation would be partially addressed through the achievement of operational efficiencies within a national system, but a budget review may be required once a national system is in place.

Direct financial benefits to industry have proved difficult to quantify, but productivity benefits have been clearly identified and would justify the additional investment on the part of the Australian Government. The trade measurement system in Australia underpins transactions worth more than \$400 billion per annum. The accuracy and equity of these transactions depend on a strong measurement infrastructure and effective market surveillance operations. The cost of implementing national legislation and administration of the trade measurement system is insignificant in comparison with its importance to the Australian economy.²⁰

Key issues

In reforming the trade measurement system, the Commonwealth Government has attempted to closely replicate the current state and territory regime. Consequently, the provisions in the Bill will establish offences, a licensing regime and inspector powers which are largely identical to those already in force in most jurisdictions. Similarly, the sizes of penalties for offences in the Bill have been framed comparably to existing trade measurement offence penalties.

However, as noted in the Explanatory Memorandum, the Bill also introduces measures that have been approved by MCCA for inclusion in the uniform state and territory

19 Explanatory Memorandum, p. 10.

20. Final Report, op cit., p. 4-5.

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legislation, but have not yet been introduced across all jurisdictions.²¹ This mainly refers to the introduction of the average quantity system (AQS).

Average Quantity System

Currently, trade measurement legislation requires industry to comply with a Minimum Quantity System (MQS) – this means that an offence is committed by a supplier or seller where a tested package shows a ‘shortfall’ (inadequate amount in comparison to the stated amount on the packet) of the product in the package. As most filling and packing processes are automated, it is considered physically impossible for systems to achieve an exact amount as they fill each package in a production run. Therefore, packers set their target ‘fill quantity’ to an excess level to ensure they do not become liable for shortfall when tested. While the current regime allows for certain ‘tolerance levels’ of shortfalls (currently sets at 5% in any package, provided the contents of randomly selected packages of the same kind and quantity do not show an overall average deficiency), problems still occur with some items, particularly those that may lose weight or volume through evaporation (such as dessicated goods, like mushrooms or coconut).²² Another common complaint about the MQS is the cost that is incurred by industry in filling packages to an excess level.

In contrast, an Average Quantity System (AQS) allows packers to fill packages with an average amount, rather than a minimum amount. Literature suggests that correct application of AQS gives a 97.5% assurance that the measured content of pre-packed goods is accurate within the prescribed tolerance levels.²³ AQS has been adopted by various major trading nations, including Canada, China, the European Union, Japan, USA and New Zealand. In an attempt to promote international harmonisation of world trade practices, the International Organisation of Legal Metrology recommended the adoption of AQS for international trade in pre-packed goods.²⁴

In 2006, the Queensland Office of Fair Trading released a [Regulatory Impact Statement](#) (RIS) about AQS for the measurement of pre-packed articles. The RIS described compliance with AQS as involving a ‘three-rules-measure’,²⁵ as follows:

21 Explanatory memorandum, p. 10.

22 Office of Fair Trading Queensland, *Regulatory Impact Statement – Average Quantity System for the Measurement of Pre-packed Articles*, 2006, p. 1, available at http://www.consumer.gov.au/html/pdf/AQS_RIS.pdf [accessed 21 October 2008]

23. *ibid.*, p. 14.

24 *ibid.*, p. 2.

25. *ibid.*, p. 7.

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- Rule 1: the declared quantity on a package should accurately reflect the quantity being supplied, so the average net content of the packages in a lot (production run) may not be less than the declared quantity.
- Rule 2: no more than 2.5% of the packages in a lot may have negative errors more than the prescribed tolerable negative error.
- Rule 3: No package shall have a negative error by more than twice the prescribed tolerable negative error.

Some of the costs and benefits to industry identified in the RIS are:

Benefits

- Using AQS rather than MQS provides uniformity of standards and enables industry to compete on a more equitable basis with international traders
- In most cases, once packers set their measurement delivery systems to comply with AQS and implement a revised sampling system, the number of checks required would not change significantly
- Some industries with smaller content limits than 50 grams could benefit financially as the deficiency tolerance levels would increase from 5 percent to 9 percent under AQS
- Possible long-term benefits to industry in terms of fairer exchange and reduced degrees of over-packing

Costs

- Initially, there may be a need to extend sampling frequency, which would require short-term additional resources
- The Mushroom and Soap industries, which experience some difficulties with moisture loss, may need to incur significant initial costs to adjust to AQS, although this is not certain

The Explanatory Memorandum notes that the AQS provisions in the Bill may be accessed by industry on a voluntary basis and are intended to support the export of pre-packaged goods (such as wine) from Australia. It also states that Australian industry strongly supports the introduction of an AQS system.²⁶

While AQS is intended for use for pre-packaged articles for export or trade outside of Australia, the provisions in the Bill do not restrict its use to exportable goods, nor does it require goods being exported to be packed in accordance with AQS standards. Those not packed in accordance with AQS (including displaying the AQS mark on packaging) are

26 Explanatory memorandum, p. 10.

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subject to the current MQS standards, which are contained in Division 4 of Schedule 1 of the Bill.

Offences and penalties

Another new element in the proposed new system is found in the framing of the Bills offences, as compared to offences currently set in state and territory legislation. The majority of offences in the Bill are set out with two tiers of penalty – a larger penalty requiring a fault element to the offence, and a smaller penalty for the corresponding strict liability offence. Examination of existing state and territory legislation indicates that a general application of strict liability offence provisions operates under the current system.

Offences requiring a fault element should be considered in the context of Division 5 of the Criminal Code:

Where the physical element is conduct, the fault element if no other is specified is ‘intention’ (subsection 5.6(1)). Where the physical element is a circumstance or result, the fault element if no other is specified is ‘recklessness’ (subsection 5.6(2)).²⁷

A strict liability offence, in comparison, only requires evidence of the physical element of the offence, resulting in a lesser burden of proof and usually a lesser penalty. The application of strict liability still allows a defence of honest and reasonable mistake of fact to be raised.²⁸

Justification for the two-tiered system of penalties is set out in the Explanatory Memorandum:

The offence provisions in the Bill will apply to a wide range of entities, from small businesses to large multinational concerns, in a wide variety of circumstances. This makes it desirable to have a range of enforcement options appropriate to the difference circumstances to which the Bill might apply.²⁹

The penalties set in the Bill for offence provisions are comparable to those currently offered in state and territory legislation. While not appearing immediately similar (particularly due to the use of penalty units in the Bill, compared to pecuniary amounts as set in state legislation such as the *Trade Measurement Act 1989* (NSW)), the penalties for strict liability offences set by the Bill are not vastly different from the current penalties in state and territory legislation. However, the Bill’s penalties for fault element offences are much greater than the current state and territory penalties (but not overly onerous in context).

27. Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, 2008, p. 18.

28. *ibid.*, p. 24.

29. Explanatory memorandum, p. 11.

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Transition between state to Federal regimes

It is presumed that the states and Territories will, as part of the COAG agreement, legislate to repeal their relevant Trade Measurement legislation from the commencement of the new system (scheduled for 1 July 2010).

However, even if this does not happen, the presence of inconsistent state and territory laws would not impede the ability for the federal legislation to operate. Under the Constitution of Australia, section 51(xv) (weights and measures), the Commonwealth has the power to legislate on trade measurement. Further, section 109 of the Constitution provides that Commonwealth laws override state laws to the extent of any inconsistency between the two.

Main provisions

The Bill makes amendments to the *National Measurement Act 1960* (the Act).

Schedule 1 amends the Act to create a new system of trade measurement in Australia. **Items 1 – 64** insert necessary definitions and some minor technical amendments for the new system. Of note is **item 59**, which sets out the scope of the new trade measurement provisions, specifically excluding telephone and internet metering, taxi metering, motor vehicle hire, tyre pressures, parking meters, automated packing machines, or any measurements of greenhouse gas emissions.

Item 65 repeals old Part VA of the Act, which deals with utility meters, and replaces it with the majority of the bills' proposed new provisions. The requirements relating to utility meters have been incorporated into the new trade measurement scheme. Where necessary, current provisions have been replicated and re-inserted (the majority of them in **proposed Part XIII** – utility meter verifiers).

Item 65 inserts the following proposed new parts into the Act:

- **Part IV** – Using measuring instruments for trade
- **Part V** – General Provisions on using measurement in trade
- **Part VI** – Articles packed in advance ready for sale
- **Part VII** – Other articles
- **Part VIII** – Enforcement of Parts IV to VII
- **Part IX** – Trade measurement inspectors
- **Part X** – Servicing licensees
- **Part XI** – Public Weighbridges

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- **Part XII** – Disciplinary action against servicing licensees and public weighbridge licensees
- **Part XIII** – Utility meter verifiers

The new Parts create a wide range of offences to enforce the new trade measurement scheme. For most offences in the Bill, there are two levels of offence - fault element offences and strict liability offences. This point is discussed further in the Key Issues part of this Digest.

Under section 4AA of the *Crime Act 1914*, a penalty unit equals \$110. It should also be noted that subsection 4B(3) of the *Crimes Act 1914* provides that, under certain circumstances, if the guilty party is a body corporate rather a natural person, the maximum penalty can multiplied by five times. For example, if the general maximum penalty is 20 penalty units (\$2 200), a body corporate could face a penalty of up to 100 penalty units.

For ease of reference, the following commonly-occurring penalty amounts convert to pecuniary amounts as follows:

No. of penalty units	=	pecuniary amount
20 units		\$2 200
40 units		\$4 400
100 units		\$11 000
200 units		\$22 000

Proposed section 18LF states that infringement notices can be given in relation to strict liability offences under this Act, provided they are given within 12 months after discovery of the contravention. Infringement notices must contain certain information (**proposed section 18LG**) and specify that criminal proceedings will not be brought if the penalty is paid within 28 days. All infringement notices carry a pecuniary penalty equal to 5 penalty units, or \$550 (**proposed section 18LH**).

Part IV – Using measuring instruments for trade

Proposed **new Part IV** deals with measuring instruments. Generally, using a measuring instrument will attract an offence if the instrument is either inaccurate or unverified.

Verification of instruments is set out in **proposed sections 18GG – 18GL**. Verified instruments are represented by a verification mark on the instrument.

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proposed new section	Offence relating to use of measuring instruments for trade	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18GA	Using a measuring instrument for trade that is not verified	100	20
18GB	Installing an unverified measuring instrument for use for trade	200	40
18GC	Selling or supplying an unverified measuring instrument for use for trade	200	40
18GD	Using a measuring instrument for trade in a way that produces inaccurate measurement or information	200	40
18GD	Creating an inaccurate measurement or information through an act or omission	200	40
18GE	Using an inaccurate measuring instrument for trade	200	40
18GE	Selling or supplying an inaccurate measuring instrument	200	40
18GM	Making a verification mark on a measuring instrument without permission to do so	200	40
18GN	Selling or supplying a measuring instrument that has been marked by someone who had no permission to do so	200	40
18GO	Making a mark on an instrument that may be mistaken as a verification mark; or using, selling or supplying such an instrument	200	40
18GO	Possessing the tools to make a mark that may be mistaken as a verification mark	200	40
18GP	Wrongfully possessing an instrument for making a verification mark	200	N/A
18GQ	Failure to remove a verification mark from an instrument that has not been correctly adjusted or repaired under this provision	200	40

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Part V – General provisions on using measurement in trade

This part regulates the use of measurement in trade generally. **Proposed section 18HA** defines *articles packed in advance ready for sale*; offences for this section are set out below. Many of the offences in this Part are drafted to ensure that articles are packed and sold with certain prescribed information on the packet, such as measurement, price or contact details of the supplier. Additionally, regulations can be drafted to prohibit certain expressions being used on packages. The Part allows for the issue of permits to exempt people from these requirements where the subsequent breach is only minor and not misleading, and compliance would impose unnecessary costs on business (**proposed section 18JX**).

Other offences in this Part deal with the testing of packages for ‘shortfall’ (i.e. whether the amount or measurement in the packet meets the amount or measurement that it is said to contain). This part also introduces a new system of voluntary ‘AQS’ marking – see discussion about AQS in the Key Issues section of this Digest.

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The following table outlines offence provisions on using measurement generally in trade.

proposed new section	Offence relating to use of measurement in trade	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18 HB	Selling, possessing for sale, or offering or exposing for sale, an article packed in advance ready for sale which has not been priced in accordance with its measurement ³⁰	100	20
18HC	Selling an article that must be sold by measurement, which has not been priced in accordance with its measurement	100	20
18HD	Selling an article or utility without basing the price on the prescribed unit of measuring ³¹	N/A	40
18HE	Selling an article or utility which has not been measured by an instrument which follows the prescribed scale intervals ³²	N/A	40
18HG	Using a measuring instrument for trade for a purpose that is not its' prescribed purpose	100	20
18HI	Selling, possessing for sale, or offering or exposing for sale, and article which has been priced without reference to the net measurement ³³	100	20

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30. This provision is subject to extended geographical jurisdiction – Category B, as set out in section 15.2 of the *Criminal Code*, which extends the liability to Australian residents or companies that may conduct this activity overseas.
31. See footnote 30 about extended geographical jurisdiction.
32. See footnote 30 about extended geographical jurisdiction.
33. See footnote 30 about extended geographical jurisdiction.

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The following table deals with offences relating to *articles that have been packed in advance ready for sale*.

proposed new section	Offence relating to articles that have been packed in advance ready for sale	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18JA	Packing the article without marking it with the prescribed information ³⁴	100	20
18JB	Importing the article into Australia without marking it with the prescribed information ³⁵	100	20
18JC	Selling the article without it being marked with the prescribed information ³⁶	100	20
18JD	Possessing for sale, or offering or exposing for sale, the article without it being marked with the prescribed information ³⁷	100	20
18JE	Failing to mark the article in the manner prescribed ³⁸	100	20
18JF	Packing the article and marking it with a prohibited expression (as prescribed by Regulation)	200	40
18JG	Selling an article that has been marked with a prohibited expression (as prescribed by Regulation) ³⁹	200	40
18JH	Possessing for sale, or offering or exposing for sale, an article that has been marked with a prohibited expression (as prescribed by Regulation) ⁴⁰	200	40

34 See footnote 30 about extended geographical jurisdiction.

35 Except where a relevant permit has been issued under **proposed new section 18JX**.

36 See footnote 30 about extended geographical jurisdiction, and footnote 35 excluding permit holders.

37 See footnote 30 about extended geographical jurisdiction, and footnote 35 excluding permit holders.

38. See footnote 35 excluding permit holders.

39 See footnote 30 about extended geographical jurisdiction, and footnote 35 excluding permit holders.

40 See footnote 30 about extended geographical jurisdiction, and footnote 35 excluding permit holders.

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Proposed Division 3 of Part VI deals with the use of an AQS mark. **Proposed section 18JI** notes that AQS stands for Average Quantity System. The AQS system is voluntary and only applies to articles that are packed in advance ready for sale. The Overview of the Division states that ‘by marking a package with an AQS mark, a person represents that if the package is included in a group of like packages sampled and tested in accordance with AQS procedures, the group will be found on average to contain a measurement at least equal to the marked measurement’.

The provisions deal with appropriate marking of the AQS mark, and provide offences for shortfalls identified by AQS testing – that is, where the stated average quantity of a sample of articles is not met, as identified by an AQS test.

Absolute liability applies to the offences in **proposed sections 18JM – JP**. It applies to the physical elements of certain paragraphs in each offence (outlined in each section). The Explanatory Memorandum specifies for these sections that ‘absolute liability is being applied to jurisdictional elements of the offences (which can be established as simple propositions of fact) rather than elements going to the essence of the offence.’⁴¹ It explains that this means there are no fault elements for the physical elements specified, and the defence of mistake of fact is not available.

The following table deals with offences relating to AQS marking.

proposed new section	Offence relating to articles packed in advance ready for sale, which bear an AQS mark	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18JK	Making an AQS mark on a package that is not in accordance with the regulations	100	20
18JL	Packing an article and making a mark that is not an AQS mark, but may be mistaken as one	200	40
18JL	Possessing for sale, or offering or exposing for sale, an article that has a mark that is not an AQS mark, but may be mistaken as one	200	40
18JL	Selling an article that has a mark that is not an AQS mark, but may be mistaken as one	200	40
18JM	Packing an article and marking it with an AQS mark, which eventually fails AQS testing for ‘falling short’ in measurement ⁴²	200	40

41 Explanatory memorandum, pp. 59, 61, 62 and 64.

42. See footnote 30 about extended geographical jurisdiction.

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proposed new section	Offence relating to articles packed in advance ready for sale, which bear an AQS mark	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18JN	Importing an article which has been marked with an AQS mark, which eventually fails AQS testing for 'falling short' in measurement	200	40
18JO	Possessing for sale, or offering or exposing for sale, an article which has been marked with an AQS mark, and which eventually fails AQS testing for 'falling short' in measurement ⁴³	200	40
18JP	Selling an article which has been marked with an AQS mark, which eventually fails AQS testing for 'falling short' in measurement ⁴⁴	200	40

Where the AQS system has not been adopted, products are tested for shortfall using a nationally recognised system of sampling and testing groups of packages (**proposed section 18JQ**).

The Bill provides for shortfall testing of samples of groups of packages, in accordance with national sampling procedures. *Shortfall* is defined by **proposed section 18JR**, and amounts to a finding that the measurement in the package does not meet the measurement (or minimum measurement) which is either marked on the packages exterior, or represented by a document or statement.

Absolute liability applies to the offences in **proposed sections 18JS – JV**. It applies to the physical elements of certain paragraphs in each offence (outlined in each section). The Explanatory memorandum specifies for these sections that 'absolute liability is being applied to jurisdictional elements of the offences (which can be established as simple propositions of fact) rather than elements going to the essence of the offence.'⁴⁵ It explains that this means there are no fault elements for the physical elements specified, and the defence of mistake of fact is not available.

43. See footnote 30 about extended geographical jurisdiction.

44. See footnote 30 about extended geographical jurisdiction.

45. Explanatory memorandum, pp. 59, 61, 62 and 64.

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The following table deals with offences relating to articles packed in advance ready for sale, which fail national sampling procedures for shortfall.

proposed new section	Offence relating to articles packed in advance ready for sale, which DO NOT bear an AQS mark	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18JS	Packing an article which is found to have a shortfall ⁴⁶	200	40
18JT	Importing an article into Australia which is found to have a shortfall	200	40
18JU	Possessing for sale, or offering or exposing for sale, an article which is found to have a shortfall (whether against the amount stated on the package, or on the receptacle which contains the package) ⁴⁷	200	40
18JV	Selling an article which is found to have a shortfall (whether against the amount stated on the package, or on the receptacle which contains the package) ⁴⁸	200	40

Part VII – Other articles

This Part sets out offences relating to articles that are not packed in advance ready for sale, i.e. sold for a price determined by reference to the measurement of the article (**proposed section 18K**). According to the overview of the Part, measurements must be made in such a way that the purchaser can see it being made; alternatively, where the purchaser is absent, written statements of the measurement must be provided. The Part also contains a shortfall offence, and makes it an offence to sell packaging for an article at a price per unit of measurement, where the article has also been charged on a price per unit basis.

The following table deals with offences relating to articles that are sold for a price determined by reference to the measurement of the article (i.e. not articles packed in advance ready for sale).

46. See footnote 30 about extended geographical jurisdiction.

47. See footnote 30 about extended geographical jurisdiction.

48. See footnote 30 about extended geographical jurisdiction.

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proposed new section	Offence relating to articles sold for a price determined by reference to the measurement of the article	penalty units (for offence requiring fault element)	penalty units (for strict liability offence)
18KA	Selling an article to a purchaser to who is present, and not making the measuring process or measurement readily visible to that purchaser	200	40
18KB	Selling an article to a purchaser who is not present, and failing to provide them with a written statement of the measurement of the article	200	40
18KC	Selling an article for a price per unit of measurement, and also charging for packaging for that article on a price per unit of measurement basis	200	40
18KD	Selling an article which measures less than it should (shortfall)	200	40

Part VIII – Enforcement of Parts IV to VII

Proposed sections 18L – 18LQ outline enforcement issues relating to the offences listed in the tables above.

In particular, **proposed section 18LA** sets out the making of evidentiary certificates – these are certificates made by trade measurement inspectors to show where a package has failed testing, either against AQS testing procedures or national sampling procedures. The section states that an evidentiary certificate will be admissible as prima facie evidence of the matters stated on the certificate. However, certificates must be provided to defendants at least 14 days before being admitted as evidence (**proposed section 18LB**) and further evidence, either supporting or rebutting an evidentiary certificate, must be considered on its merits (**proposed section 18LD**). **Proposed section 18LE** also clarifies the evidentiary status of information provided on an articles packaging.

Part VIII also deals with infringement notices – see page 15 of this Digest.

The Federal Court or Federal Magistrates Court can grant an injunction restraining persons from committing offence(s) under Parts IV, V, VI or VII of the Act (**proposed section 18LO**).

Part IX – Trade measurement inspectors

Proposed section 18MA provides for the appointment of APS employees, Commonwealth authority employees, or Commonwealth office holders, as trade

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measurement inspectors. The section states that inspectors must hold prescribed qualifications, and they may be appointed to a particular class of inspector (as prescribed by regulation). Inspectors must hold a specially-issued identity card in order to exercise inspectors powers or perform functions (**proposed section 18MB**).

The powers of trade measurement inspectors are summarised in the Overview of Division 3 at **proposed section 18MD**, which states:

Trade measurement inspectors have the power to enter business or residential premises or to inspect business vehicles. Inspectors also have the power to search and seize things. This includes powers to copy documents, record information and test articles and instruments.

Inspectors must not enter residential premises without consent or a warrant (**proposed subsection 18MD(2)**). This is also reflected in the drafting of each power, which require an inspector to leave a residential premises if they have been requested to do so (except where they hold a warrant).

The monitoring power is set out in **proposed section 18ME**, which allows entry for the purposes of finding out if the following have been complied with:

- Parts IV, V, VI, VII, or
- licences issued under Parts X or XI, or
- conditions of appointment of utility meter verifiers under Part XIII,

The section also allows an inspector who, while on residential premises under a warrant, and believes on reasonable grounds that they have found evidential material of a breach, to secure the material pending obtaining a warrant for its seizure.

The power to collect evidential material is set out in **proposed section 18MF**. Under the section, an inspector must have reasonable grounds for suspecting that there may be evidential material⁴⁹ on a premises or vehicle, in order to enter the premises or vehicle to look for it (and seize it, if it is found).

General inspector powers are set out in **proposed section 18MG**. They include searching premises; taking photographs, audio or video recordings, or making sketches; sampling and testing measuring instruments; inspecting, examining, sampling, measuring or conducting tests on articles or packages; and inspecting and taking extracts or copies of books, records or documents. The section allows inspectors to sample and test, even if it might cause damage or destruction, so long as they are not unreasonably destructive in the process.

49. A definition of *evidential material* is contained in **item 13** of the Bill and is loosely defined as material related to an offence that has or will be committed.

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Proposed section 18MH makes it an offence to refuse, or fail to comply with a request, to answer questions or produce documents for an inspector. Under the section, inspectors may require the controller of a premises or vehicle to answer any question put by the inspector, and produce any book, record or document requested by the inspector (not applicable on residential premises without a warrant). The section provides two offence provisions for refusal or failure to comply – one at **proposed subsection 18MH(4)**, punishable by 200 penalty units; and a strict liability offence at **proposed subsection 18MH(5)**, punishable by 40 penalty units. However, the section provides that a person is excused from complying with the requirement to answer questions/produce documents if to do so would tend to incriminate the person or expose them to a penalty (**proposed paragraph 18MH(6)**). The Explanatory Memorandum notes that this is to protect a person's common law right not to incriminate him or herself⁵⁰ to penalties under external legislation. Upon claiming immunity under subsection (6), a person assumes the evidential burden to justify their reliance on the subsection.

Other powers include a power to require an English translation of a document (with a penalty for non-compliance of up to 200 penalty units) (**proposed section 18MI**); power to verify measuring instruments on request, for a fee (**proposed section 18MK**); and obligation to obliterate a verification mark on an instrument which should no longer bear it (**proposed section 18MM**).

Obligations of inspectors include:

- Obligation to produce identity card on request – **proposed section 18MN**
- Obtaining consent to enter residential premises – **proposed section 18MP**, and
- Provide copies of seized evidence on request – **proposed section 18MS**.

Where damage is caused to electronic equipment while an inspector collects evidentiary material, the Commonwealth must pay the owner of the equipment compensation (**proposed section 18MR**).

Proposed sections 18MY – 18MZD provide for the making and issuing of warrants, for the purposes of monitoring residential premises.

Part X – Servicing licensees

Proposed Part X deals with the granting of servicing licensees. **Proposed section 18NB** gives the Secretary authority to grant servicing licenses to applicants; this section states that an application must be granted unless there are grounds for refusal under the Act.

50. Explanatory Memorandum, p. 91. The common law rule that a person cannot be required to incriminate him or herself is discussed at pages 100-1 of [A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers](#); also see *Sorby v The Commonwealth* (1983) 152 CLR 281.

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Proposed section 18NC sets out the circumstances in which a licence must be refused. The circumstances are the same as those currently set out in the equivalent NSW legislation (*Trade Measurement Act 1989* (NSW)), with the added circumstance that an application must be refused if neither the applicant nor any of their employees are competent to be a verifier (**proposed paragraph 18NC(1)(d)**). What constitutes ‘competency’ is not clear; however, it may be set by Regulations in the future.

Servicing licences are subject to conditions (**proposed sections 18NG** and **18NH**) and breaching a condition of a servicing licence (for both licensees and employees acting outside of their scope of employment) is a strict liability offence, punishable by 30 penalty units (**proposed section 18NO**). This is in addition to possible disciplinary action against licensees under proposed **Part XII**, which provides for possible reprimand, or suspension or cancellation of licences.

Part XI – Public weighbridges

The provisions for public weighbridge licensing are similar to those for servicing licensing in **Part X**. The circumstances for refusal of a public weighbridge licence replicates those currently set out in NSW legislation, with the added circumstance that an application must be refused if neither the applicant nor their employees, contractors, or contractors’ employees, are competent to be a public weighbridge operator (**proposed paragraph 18PC(1)(d)**). As with servicing licences (above), the meaning of ‘competent’ in this context is unclear. A public weighbridge licensee who wishes to engage an external contractor to operate the weighbridge must first apply to the Secretary (**proposed section 18PK**). Possible disciplinary action under **proposed Part XII** applies to weighbridge licences.

Operating a public weighbridge without a licence, or breaching a licence condition (whether by licensee, employee, contractor or contractor’s employee) is a strict liability offence punishable by 30 penalty units, or \$3300 (**proposed sections 18PT** and **18PU**).⁵¹ Compared to the current penalty in NSW for operating a public weighbridge without a licence (\$20 000 – see section 43, *Trade Measurement Act 1989* (NSW)⁵²), this penalty seems relatively light.

Part XIII – Utility meter verifiers

Part XIII contains **proposed sections 18R – 18RI**, and deals with the appointment of utility meter verifiers. This Part replicates the current provisions for appointment of utility meter verifiers which will be repealed by **item 65** and replaced with **new Parts IV – XIII**.

51. For a body corporate this maximum penalty would be 150 penalty units, or \$16 500 – see section 4B(3) of the *Crimes Act 1914*.

52. NSW legislation also allows for penalties to be multiplied by five for a body corporate – see section 69, *Trade Measurement Act 1989* (NSW).

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The provisions are, on the whole, unchanged from the current Act. The only identified change is in **proposed section 18RD**, which requires the Secretary to give notice to a verifier of their intention to take disciplinary action, and gives a verifier 14 days in which to make a written submission. The period for making a submission is currently 28 days (section 18ZG of the Act). The Explanatory Memorandum does not discuss the basis for this shortened timeframe.

Miscellaneous

Another item of significance in Schedule 1 of the Bill is **item 72**, which does the following:

- inserts a number of proposed new sections into the Act to clarify to liability of persons who commit offences under the Act. In particular, they state that a person is vicariously liable for employees or agents who commit offences against the Act within the scope of their employment/authority, or at the authorisation of the employer/principal; and that a person is not criminally responsible for offences they commit within the scope of their employment (**proposed sections 19C – 19F**)
- inserts an offence provision at **proposed section 19H**, which states that a person commits an offence if they obtain protected information in the course of their duties under the Act, and subsequently use, copy, record or disclose that protected information. This offence is punishable by imprisonment for 2 years. A number of exceptions apply at **paragraph 19H(3)**, including an excuse of lawful purpose or consent
- provides the Administrative Appeals Tribunal power of review for certain decisions under the Act (**proposed section 19J**), and
- provides that, if the Commonwealth government acquires property from a person under the Act, other than on just terms, the Commonwealth government must pay that person a reasonable amount of compensation (**proposed section 19N**). The constitutionality of such a provision – particularly the use of term ‘reasonable amount of compensation’ rather than ‘compensation on just terms’ – is indeterminate. It is designed to be an ‘insurance’ provision to cover possible breaches of section 51(xxxi) of the Constitution (acquisition of property by the Commonwealth must be on just terms). The wording is a form of what used to be called a ‘Historic Shipwrecks clause’,⁵³ and a clause using similar wording is currently under challenge before the High Court.⁵⁴ The Government has said it has legal advice that a provision to pay a

53 The clause arises from the *Historic Shipwrecks Act 1976*.

54. See *Wurridjal & Ors v Commonwealth of Australia & Anor* [2008] HCATrans 348 (2 October 2008); *Wurridjal v Commonwealth of Australia* [2008] HCATrans 349 (3 October 2008)

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reasonable amount of compensation gives effect to the requirement for the payment of just terms compensation under the Constitution.⁵⁵

Schedule 2 of the Bill makes application and transitional provisions for the new trade measurement scheme, including:

- continued application of existing verification, certification and licensee's marks; servicing licence and public weighbridge licences; and existing marking systems for utility meters (**items 8, 9, 12, 18 and 19**)
- use of the existing Uniform Test Procedure (published by the NMI) as the national instrument test procedures, until new procedures can be determined

Concluding comments

It is likely that there will be widespread support for the passage of this Bill. Openly supported by both Government and Opposition, industry and stakeholders, it is expected that the new trade measurement system will reduce compliance costs for industry and remove complications associated with differences between states and Territories.

55. See the Hon. Tanya Plibersek, Minister for Housing and Minister for the Status of Women, House of Representatives, *Debates*, 21 February 2008, p. 1091. This statement was made in the Minister's second reading speech for the Families, Housing, Community Services and Indigenous Affairs and other Legislation Amendment (Emergency Response Consolidation) Bill 2008,

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