



Australian Government
Department of Industry,
Innovation and Science

DISCUSSION PAPER:
**COMPLIANCE
ARRANGEMENTS**

Measurement Law Review
2019

Have your say

The Australian Government is seeking responses to the issues and questions raised in this paper. You can submit your comments via the Department of Industry, Innovation and Science's Consultation Hub <https://consult.industry.gov.au/measurement-law-review/measurement-assurance>

Australia's measurement laws can be found on the Federal Register of Legislation <https://www.legislation.gov.au>.

Submissions will be considered by the government to help develop options for reform.

If you have difficulties or questions, please call **1300 686 664** or email measurementlawreview@industry.gov.au.

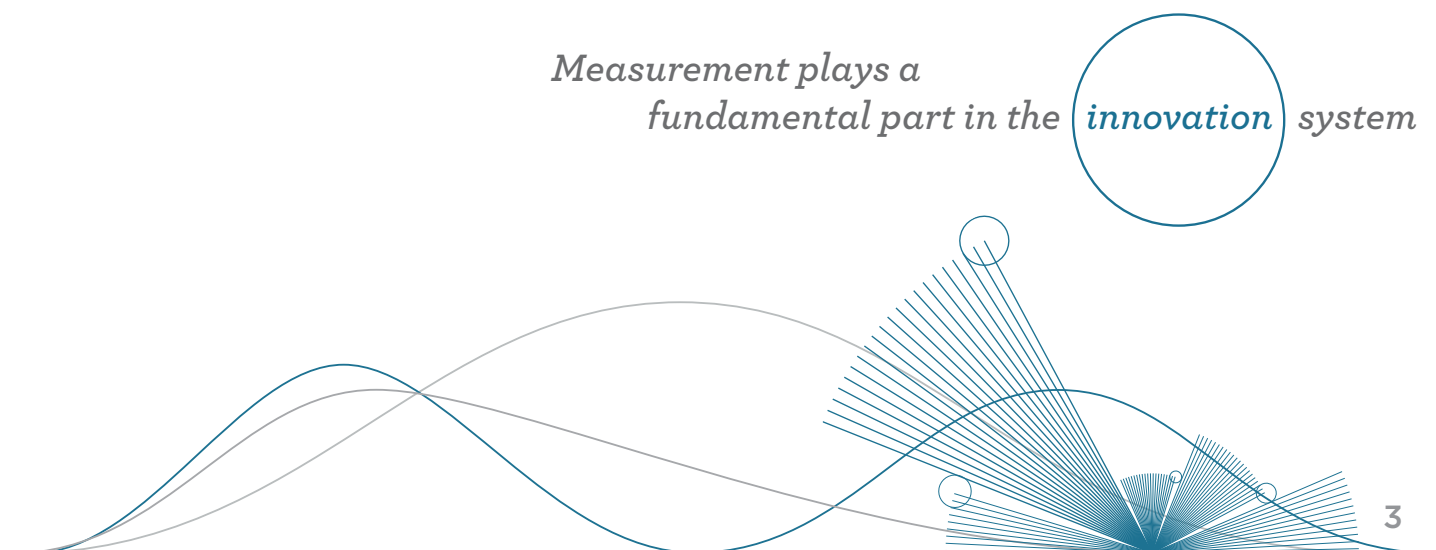
The closing date for submission is **23 December 2019**.

By making a submission you consent to the submission being made public on the consultation website unless otherwise specified. Submissions should indicate whether any part of the content should not be disclosed to the public.

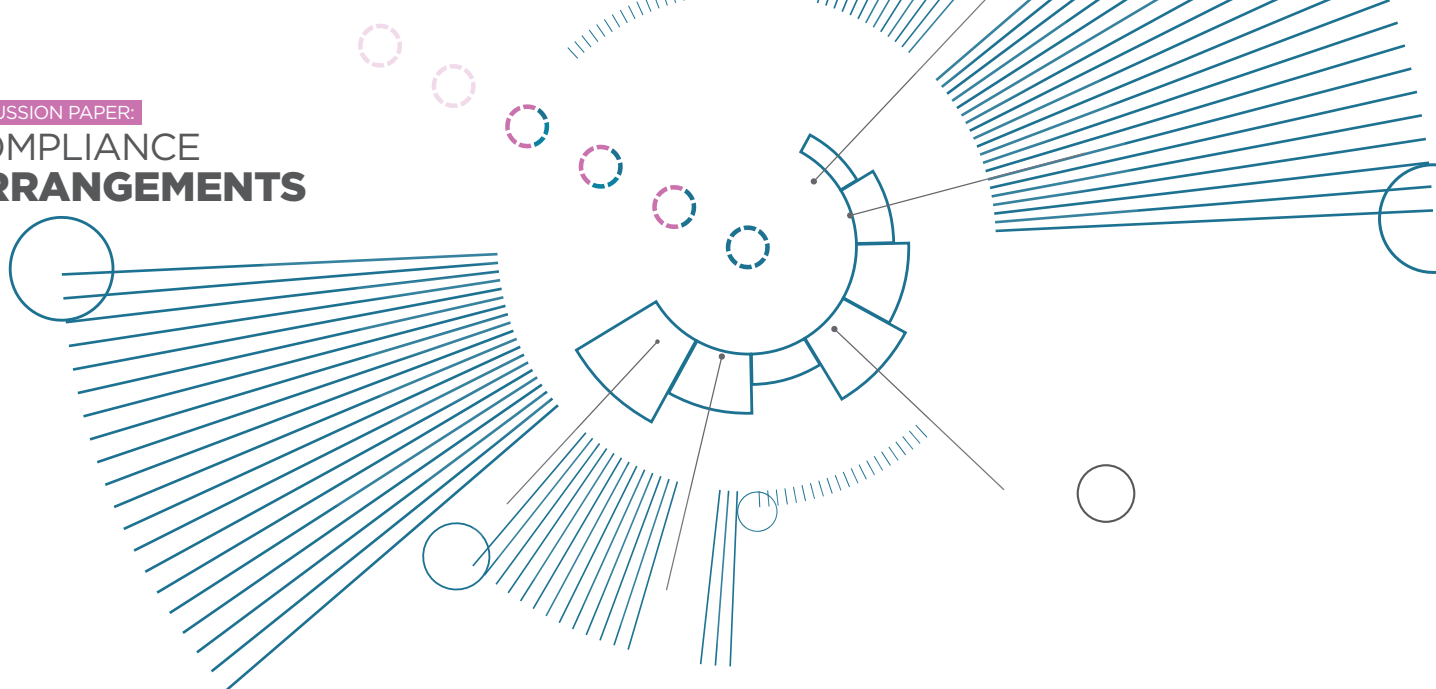
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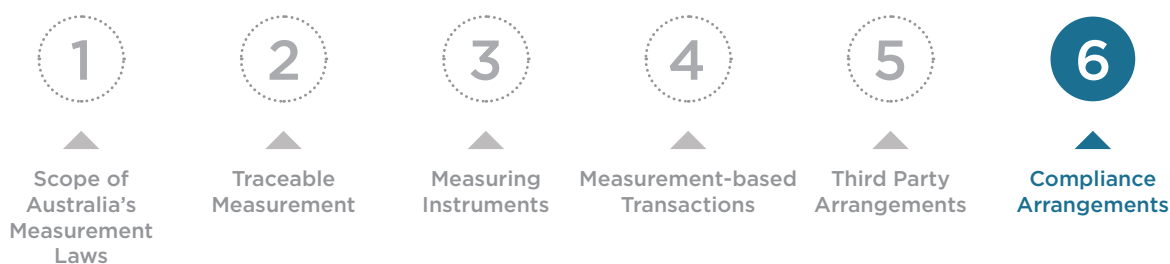
*Measurement plays a
fundamental part in the **innovation** system*



COMPLIANCE ARRANGEMENTS



MEASUREMENT LAW REVIEW - DISCUSSION PAPERS



1. Overview

Measurement plays an important role in Australia's economy. As detailed in section 51(xv) of the Constitution, the Australian Government has power to legislate in relation to weights and measures and has enacted legislation to carry out its metrological functions. The objectives of this legislation include establishing and coordinating a uniform national system of measurement, including trade measurement.

A 2015 independent review of Australia's legal metrology activities indicated while the national measurement system is working well, the legislation is:

- very prescriptive and needs to address matters of policy and principle, reduce prescription and remove matters of detail (regulatory processes) into subordinate legislation or guidance material
- complicated and needs to enable the public to understand their obligations and the implications of regulatory measurements, and
- not easy to understand and needs to be written in plain language to improve clarity and simplicity.

The measurement law needs to: better reflect and integrate current policy and principles into the legislation; articulate performance outcomes; and enhance flexibility, with consideration given to the application of a principles-based approach.

1.1 The Measurement Law Review (the Review)

The Australian Government is conducting a review of Australia's measurement laws. The review aims to ensure Australia's measurement framework can support the economy now and into the future as technology, industry and consumer needs evolve.

The Review provides an opportunity to consider whether the current legislation continues to be appropriate, effective and efficient. This paper is not an exhaustive exploration of the topic and you are welcome to raise issues and views not outlined in this paper in your submission. Questions are provided at the end of each section to prompt feedback. Any calculations of costs or benefits of the current regulations or in response to identified issues would be useful to include in your submission.

The Review secretariat would be interested in receiving responses from parties including, but not limited to:

- businesses or individuals involved in making or relying on measurements under the legislative framework;
- providers of physical, chemical and/or biological measurement services;
- providers of measuring instruments;
- innovators of measurement technology;
- jurisdictional agencies whose regulations call up measurement laws; and
- consumers and the general public who rely on or are impacted by measurement in their daily lives.

For more information on the Review, please visit www.industry.gov.au/measurement-law-review

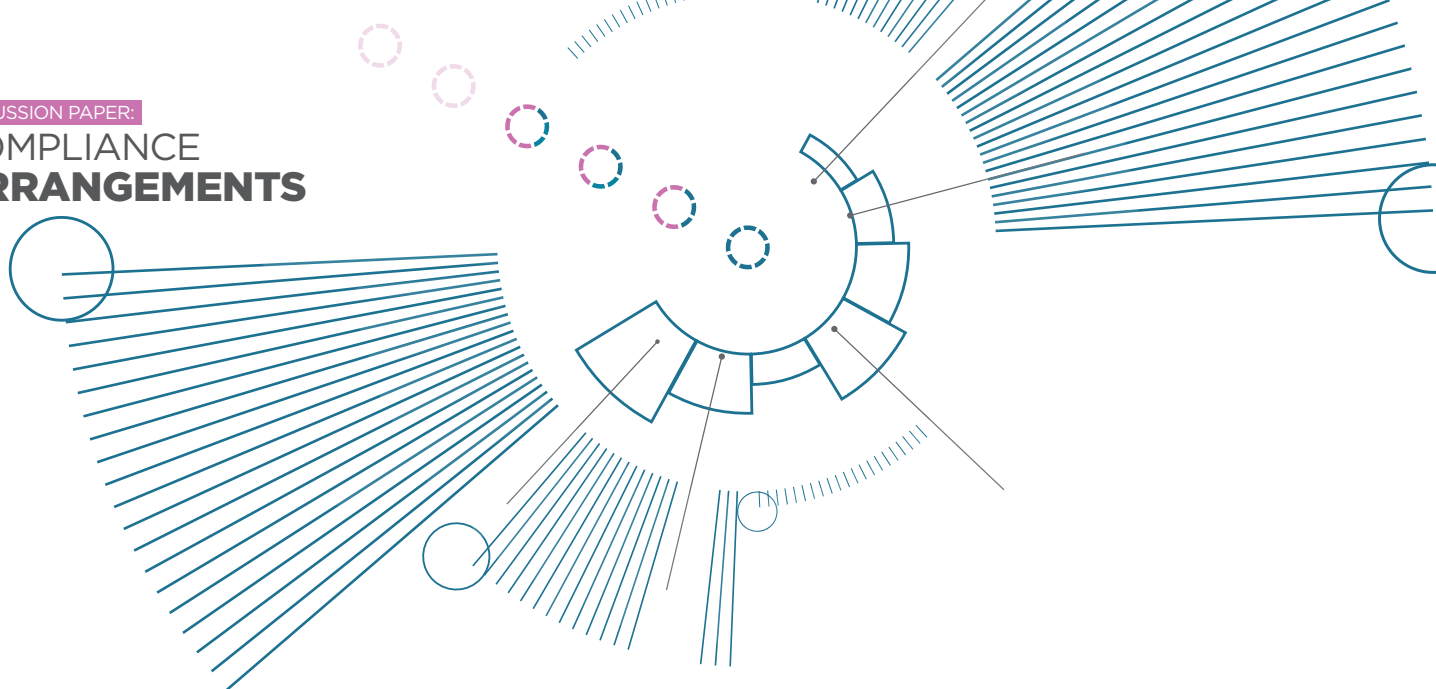
1.2 This Discussion Paper

This paper outlines the current legal framework that supports the compliance and enforcement arrangements for the regulation of measurement and measuring instruments used for trade. It focuses on approaches to compliance monitoring and the appropriateness of current enforcement options. It considers elements of the framework such as the adequacy and suitability of current enforcement options, and inspector powers. The paper seeks input on the benefits and challenges associated with introducing more varied and flexible penalty options and what improvements could be made to the current role the inspectorate plays in compliance monitoring.

This discussion paper on *Compliance Arrangements* will refer to:

- The *National Measurement Act 1960* (the Act): Part VIII – Enforcement of Parts IV to VII, Part IX – Trade measurement inspectors, Part XII – Disciplinary action against servicing licensees and public weighbridge licensees.
- The *National Measurement Regulations 1999* (NMR): Part 7, Division 2 – Appointment of authorities.
- The *National Trade Measurement Regulations 2009* (NTMR): Part 6 – Inspectors–prescribed qualifications and form of identity card.

For additional information on all discussion papers, please refer to the [Guide to the Discussion Papers](#).



2. Current Compliance Arrangements

2.1 What are ‘Compliance Arrangements’ and why they are necessary

The effective functioning of a regulatory framework will typically have various compliance arrangements supporting it. This allows the regulator to tailor their approach to compliance to achieve policy aims such as facilitating a level playing field and providing confidence to business and consumers. These ‘compliance arrangements’, in the context of this discussion paper, include:

- *Education and information provision*: providing businesses and consumers with information and advice regarding regulatory requirements.
- *Approaches to encouraging compliance*: assisting businesses to achieve compliance, warning letters and undertakings.
- *Activities to monitor compliance*: data collection, market surveillance and inspection activities.
- *Risk management*: how risk is used to focus compliance activities and target enforcement options.
- *Enforcement options to address non-compliance*: infringement notices, licence suspensions, and penalties.

The [National Measurement Policy statement](#) identifies that “*the primary objective of the Australian Government’s role in measurement is to provide a strong and effective national measurement system that is trusted and accepted both domestically and internationally.*”

As highlighted in the [Measurement-based Transactions](#) paper and the [Measuring Instruments](#) paper, the regulation of measurement primarily focuses on trade measurement.¹ The aim is to provide assurances and encourage compliance to make it possible for markets to operate efficiently and effectively. The current framework establishes a number of offences to address measurement practices considered unacceptable, including shortfall offences, use of unapproved or unverified measuring instruments, inaccurate use of measuring instruments and incorrect labelling of packaged products. To encourage compliance and enable action to be taken against breaches of these provisions, various compliance arrangements exist both within and outside of the legislation to help inform regulated entities and target non-compliance.

¹ ‘Trade measurement’ is a term that refers to the use of measurement as the basis for the price in a transaction. It also covers the use of measuring instruments to determine the amount of a tax or a tax credit (see section 3 of the Act definition “use for trade”).

2.2 Current Focus of Compliance Arrangements

The compliance arrangements in the measurement legislation have a strong focus on trade measurement. When the National Measurement Institute (NMI) was formed in 2004, the establishing legislation focussed on weights and measures in the broad sense and had few embedded compliance requirements. In part, that limited focus on compliance requirements was able to be maintained because in practice the states and territories undertook trade measurement activities. However, in 2007 the Council of Australian Governments (COAG) decided responsibility for trade measurement would transfer from the states and territories to the Commonwealth in 2010.

Trade measurement requirements help to provide protection to purchasers and foster confidence in transactions by addressing the power imbalance between the person in control of the measurement (typically the seller) and the buyer. As a result, the compliance framework in the measurement legislation does not apply to other types of measurement that may have an equally vital role to play in supporting the economy and providing confidence to the Australian community. Regulation based on non-trade uses of measurement is managed under different Commonwealth, state and territory legislation.

Imperfect measurement can impact the fair operation of markets, regardless of whether this results from lack of awareness, inadvertent non-compliance, or deliberate non-compliance. The legal framework for compliance arrangements set up in the national measurement legislation, particularly in the Act and NTMR, establishes the legal framework for compliance and enforcement of trade measurement:

- Compliance monitoring activities include:
 - Information provision, market surveillance and data analysis – conducted to assess risk and target compliance activities.
 - An inspectorate function – conducted by government, through the NMI, to monitor compliance with provisions that support correct measurement and the use of measuring instruments in trade.
- Compliance options exist in the legislation to support compliance and address contraventions through the use of appropriate sanctions to ensure the accuracy and equity of trade transactions. A national approach to trade measurement regulation provides for consistent enforcement across Australia, giving consumers and businesses certainty when it comes to compliance expectations.

2.3 Modern Regulatory Approaches

The compliance arrangements of the measurement framework were developed according to older compliance and enforcement models, which are generally reactive, adversarial and incident-driven. Such an approach is based on the theory of deterrence, that the imposition of sanctions will affect future behaviour. However, evidence suggests deterrence is frequently ineffective in affecting future behaviours² and imposing disproportionate sanctions against well-intentioned people produces a contrary effect on compliance to what is intended.³ Newer compliance and enforcement approaches are preventative and focus on providing compliance assistance and partnerships.⁴ Such approaches seek to achieve compliance by focusing on the culture of organisations and influencing future behaviour.⁵ Ideally a combination of these approaches should be employed.⁶ Individuals are motivated by different factors and successful regulators should retain a wide toolbox of compliance powers,⁷ which they can escalate in severity in response to more serious contraventions of the law.⁸ The Review will seek to identify and address some of the gaps in the current regulatory toolkit to support a contemporary approach to compliance and enforcement.

2 Christopher Hodges, 'Ethical Business Regulation: Understanding the Evidence' (Department for Business Innovation and Skills, 2016).

3 'The Future of Regulation is Culture', Professor Christopher Hodges and Ruth Steinholtz, presented at the *Future of Regulation Conference*, University of Queensland, 1-2 July 2019.

4 'Regulatory Futures Review' (Cabinet Office, 2017).

5 'The Future of Regulation is Culture', Professor Christopher Hodges and Ruth Steinholtz, presented at the *Future of Regulation Conference*, University of Queensland, 1-2 July 2019.

6 'Regulatory Enforcement and Inspections' (OECD, 2014).

7 Michelle Walsh, 'Civil Penalties and Responsive Regulation: the Gap Between Theory and Practice', *Melbourne University Law Review*, [Vol 33 2009].

8 Adam Graycar, 'The efficacy of civil penalty sanctions under the Australian corporations law', *Australian Institute of Criminology: trends and issues in crime and criminal justice*, November 1999.

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The current compliance arrangements reflect the existing legislative requirements, which are prescriptive and consistent with historical practices. Any change to the substantive requirements to make them more flexible may require a change in the compliance arrangements. For example, a reduction in prescriptive legislation and the introduction of increased flexibility may need to be balanced by enhanced education activities and sufficiently robust compliance arrangements to avoid the potential undermining of consumer and business confidence. Additionally, it will be important to align regulatory requirements with international obligations and models which focus on minimum effective regulation.

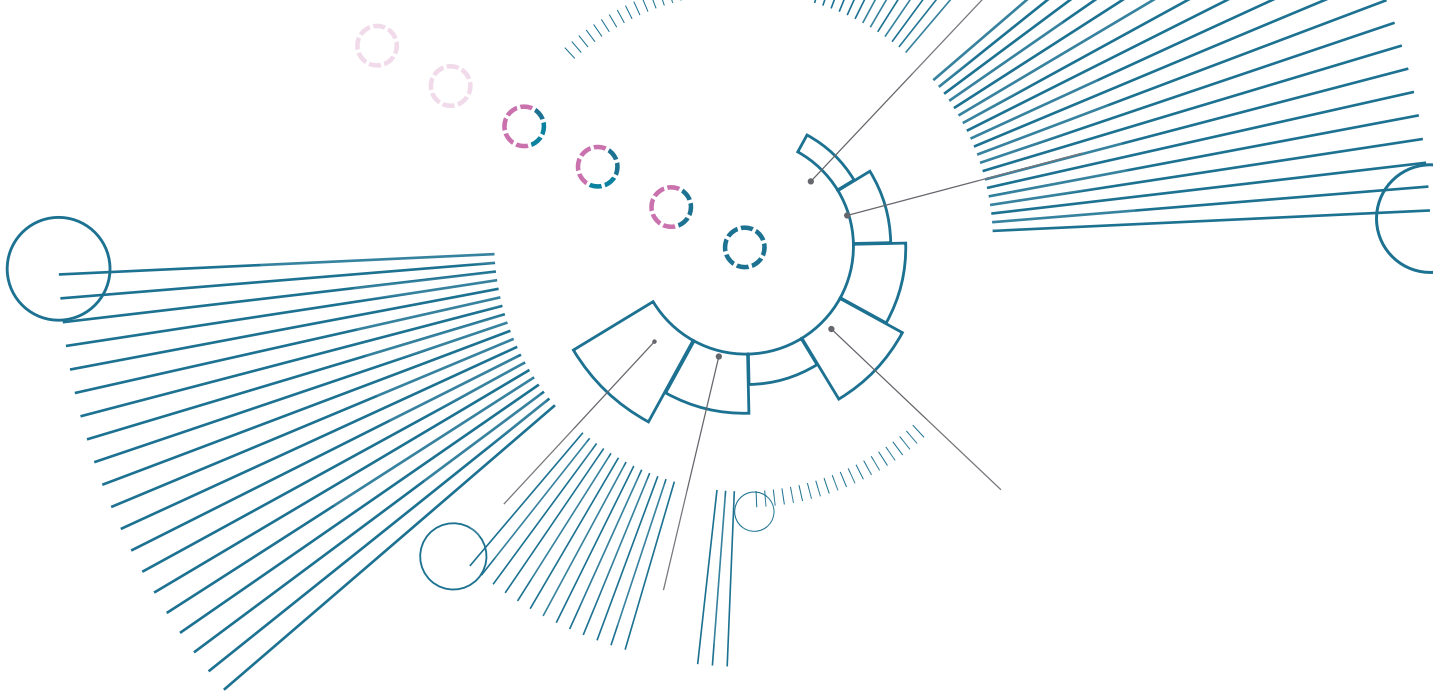
QUESTIONS

2.3.1 Is the focus of the compliance arrangements for measurement in Australia appropriate, efficient and effective? How could it be improved?

2.3.2 What are some of the benefits or challenges of a more modern approach to compliance arrangements for Australia's measurement framework?

2.3.3 How could compliance arrangements for Australia's measurement framework be made more flexible while remaining sufficiently robust?

2.3.4 To what extent should legislation outside the measurement framework—for example, consumer protection legislation—be relied upon to provide remedies and compliance options where there has been inaccurate measurement in a trade transaction?



3. Risk Management

3.1 Approach to Risk in the Current Framework

The current legislation deals with risk in different ways. Instead of providing for a risk-matrix approach to assessing risk, the current legislation deals with the risk associated in a particular area at a more granular level. For example, all measuring instruments used for trade are treated the same under the legislation (with the exception of weighbridges⁹ and more specifically, public weighbridges), regardless of the level of risk and potential harm associated with their use. However, the measurement legislation does factor in certain levels of tolerable risk in relation to particular things, such as measuring instrument errors and packaged products. For example:

- Measuring instruments have maximum permissible errors (MPE) prescribed in the legislation.¹⁰ The MPE is the maximum difference, positive or negative, allowed between the indication of an instrument and the corresponding true value (as determined by reference standards).
- The average quantity system (AQS) for testing certain packaged products allows for tolerable deficiencies in individual packages as long as the weighted average quantity is correct, the number of individual inadequate packages does not exceed a certain number and no inadequate packaged exceeds a certain amount.¹¹

Both of these examples relate to the legislative framework establishing an acceptable level of accuracy of measurements in trade. A risk-based approach to regulation allows for measurement to be made with a realistic understanding of the extent to which deviation from the true measurement value will not affect market confidence. It acknowledges the government cannot regulate to remove all risks and that regulatory action should be proportionate, targeted and based on risk assessment.¹²

3.2 Risk-based Approach to Compliance

The NMI currently takes a non-legislative approach to risk management, as set out in its National Compliance Policy.¹³ It accepts that it cannot address all non-compliance and instead focuses on areas of higher risk where there is likely to be greater impact to consumer confidence and/or fair business competition. Risk is measured in terms of the harm and likelihood of regulatory non-compliance.

⁹ Part 3 of the NTMR prescribes regulations specific to weighbridges used for trade, with Division 3.2 setting out provisions specific to public weighbridges.

¹⁰ Schedule 1 of the NTMR prescribes MPEs for material measures in Schedule 1, Part 2 and for measuring instruments in Part 3.

¹¹ Subdivision 1 of Division 4.7 of the NTMR, in relation to AQS, prescribes thresholds, tolerable deficiencies and the circumstances in which a group of packages is taken to have failed testing.

¹² 'Risk and Regulatory Policy: Improving the Governance of Risk' (OECD, 2010).

¹³ National Compliance Policy, Legal Metrology Branch – June 2017, <https://www.industry.gov.au/data-and-publications/national-measurement-institute-national-compliance-policy>.

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Modern approaches to regulation recognise it is not possible for any regulator to detect and enforce every contravention of the law it administers.¹⁴ While this is often addressed by regulators through the approach they adopt to targeting their compliance activities, some Commonwealth Acts have included legislative approaches, which are then supported by policy or guidance material to clarify how they are applied. For example:

- Section 5 of the *Biosecurity Act 2015* defines the *Appropriate Level of Protection* (or ALOP) for Australia, in terms of biosecurity measures, aimed at reducing biosecurity risks to a very low level, but not to zero.
- The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) subjects certain low-risk 'designated services' to reduced identification procedures¹⁵ and requires certain financial institutions to carry out a risk assessment when entering into corresponding banking relationships.¹⁶ In performing functions under the AML/CTF Act the AUSTRAC CEO must have regard to "the desirability of adopting a risk-based approach", amongst other things.¹⁷
- The *Therapeutic Goods Act 1989* sets out a legislative approach to risk management by treating different categories of products based on risk. Guidance material provides additional detail to support the legislation.

A similar approach could be considered for elements of the measurement legislation to introduce greater flexibility and assist in enabling innovation by allowing for a more dynamic approach to getting new technology to market. For example, applying a similar approach to that in the *Therapeutic Goods Act 1989* but to categories of measuring instruments. This may provide a level of flexibility for low risk, low harm instruments to be introduced into the market more quickly, while still protecting consumers and businesses from high risk measuring instruments that could potentially cause more significant harm. Other risk-based mechanisms that could be considered for regulated measuring instruments and products include:

- provisions in the legislation for exemptions to be granted where the regulator is satisfied that the risk to consumers and impact to market fairness is low; and
- fast track-pathways in the legislation based on risk categorisation, for example:
 - accepting overseas approvals; and
 - arrangements for innovative technologies.

QUESTIONS

3.2.1 How should risk be applied to matters regulated by the measurement legislation?

3.2.2 In what ways could the measurement legislation deal with risk and how should this be achieved?

In answering this question you may wish to consider the following:

- Should the measurement legislation differentiate between measuring instruments based on risk and how could this be achieved?
- Should the legislation provide a statement regarding risk tolerance for trade measurement, for example, applying an 'as low as reasonably achievable' approach, or by outlining a risk tolerance approach in terms of an industry's economic or trade value?
- What other risk based approaches should be incorporated into the legislation?

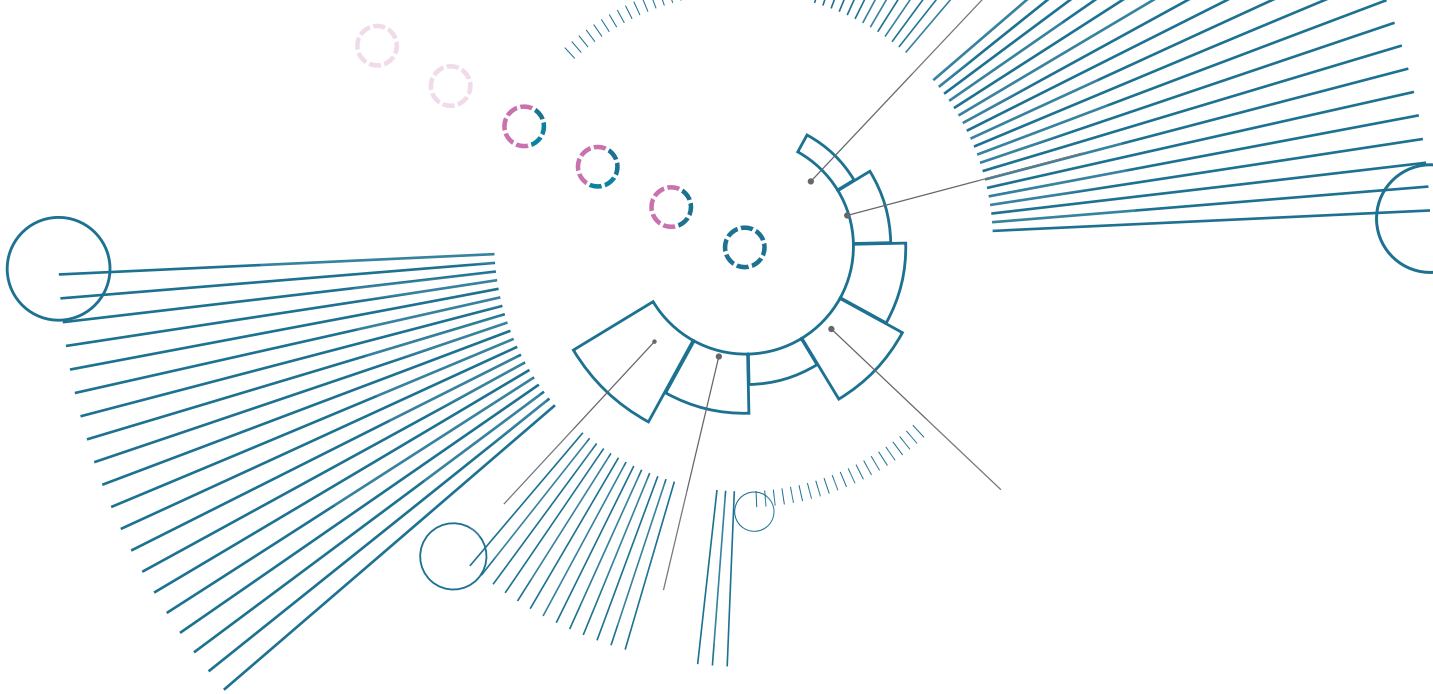
3.2.3 Are there areas of measurement where a risk based approach is not appropriate?

¹⁴ 'Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice', Michelle Welsh, *Melbourne University Law Review* [Vol 33, 2009, 908-933].

¹⁵ Division 3, Part 2 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

¹⁶ Section 97 and section 98 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

¹⁷ Subsection 212(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.



4. Compliance Monitoring

As outlined above, compliance monitoring activities being considered as part of this paper include data collection, market surveillance and inspections. Compliance monitoring activities can include legislated and non-legislated tools that support the regulatory framework in different ways. For example, data analysis may help early identification of areas of potential risk that could be addressed with mechanisms such as awareness campaigns. In contrast, audits of business premises provide a means to conduct specific education activities and undertake post-market surveillance on regulated goods and business behaviours.

4.1 Current Approach

In planning and undertaking its regulatory responsibilities, the NMI recognises that reducing the burden of inefficient regulation on industry can lower costs to businesses and facilitate innovation. The current regulatory approach seeks to strike the right balance between efficient markets and community expectations¹⁸ and meets the best practice regulation guide [previously published](#) by the Australian National Audit Office. This approach is implemented through NMI's [National Compliance Policy](#), focusing on the principles of proportionality, consistency and transparency and takes a risk based-approach when determining how to target compliance activities.

The NMI primarily relies on trade measurement inspections, which involve a qualified and appointed trade measurement inspector entering a business premises to determine whether activities undertaken at the premises are compliant. These inspections may include mystery shopper purchases and enable a range of other monitoring activities:

- *Data collection*: Trade measurement inspections are an important source of data used to inform proactive compliance monitoring activities such as pilot programs, targeted inspection programs and to assess on-going compliance levels.
- *Market surveillance*: NMI conducts trade measurement inspections to monitor industry compliance rates and assess the effectiveness of compliance activities.
- *Targeted industry campaigns*: NMI uses its intelligence sources to plan and implement targeted inspection programs of particular industry sectors. Industry is typically pre-informed by an associated media campaign.
- *Pilot Programs*: NMI also runs pilot programs to assess the level of risk in specific or emerging industry sectors to inform its future compliance activities.

¹⁸ National Compliance Policy, Legal Metrology Branch – June 2017, <https://www.industry.gov.au/data-and-publications/national-measurement-institute-national-compliance-policy>.

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Compliance monitoring activities relating to authorised third parties, along with mandatory reporting requirements (see [Third Party Arrangements](#) paper) also provide useful compliance data.

The NMI inspectorate supports other Commonwealth regulators with their regulatory activities. Through a series of agreements the NMI trade measurement inspectors audit businesses for compliance with Tobacco Plain Packaging (Department of Health) and Country of Origin Labelling (ACCC).

4.2 Issues

The Review has identified issues with NMI's compliance monitoring arrangements that may impact on its ability to be an agile regulator, and affect its ability to meet future compliance expectations, including:

- Current compliance monitoring powers could be simplified and streamlined. The adoption of powers provided for in the *Regulatory Powers (Standard Provisions) Act 2014* will contribute to improving the simplification of compliance monitoring and inspection powers in the measurement legislation. However additional bespoke powers will be required in order to maintain an appropriate level of oversight, for example, powers similar to those currently available to trade measurement inspectors.
- Compliance monitoring and investigative powers are currently limited to certain Parts of the Act, which restricts monitoring activities and leads to inadequate oversight of some areas. For example:
 - There are limited compliance mechanisms relating to pattern approval of instruments.¹⁹
 - There is currently no power to conduct audits of appointed authorities to ensure they are performing functions within the scope of their appointment, however other appointed third parties such as servicing licensees and utility meter verifiers are subject to auditing.
- The compliance monitoring arrangements in the current legislation have been designed around a more traditional business model with a physical presence. Increasing sales of products online may require new compliance approaches to maintain consumer confidence.

QUESTIONS

4.2.1 What benefits and cost burdens does your business associate with compliance monitoring inspections?

4.2.2 Is the scope of compliance monitoring powers appropriate?

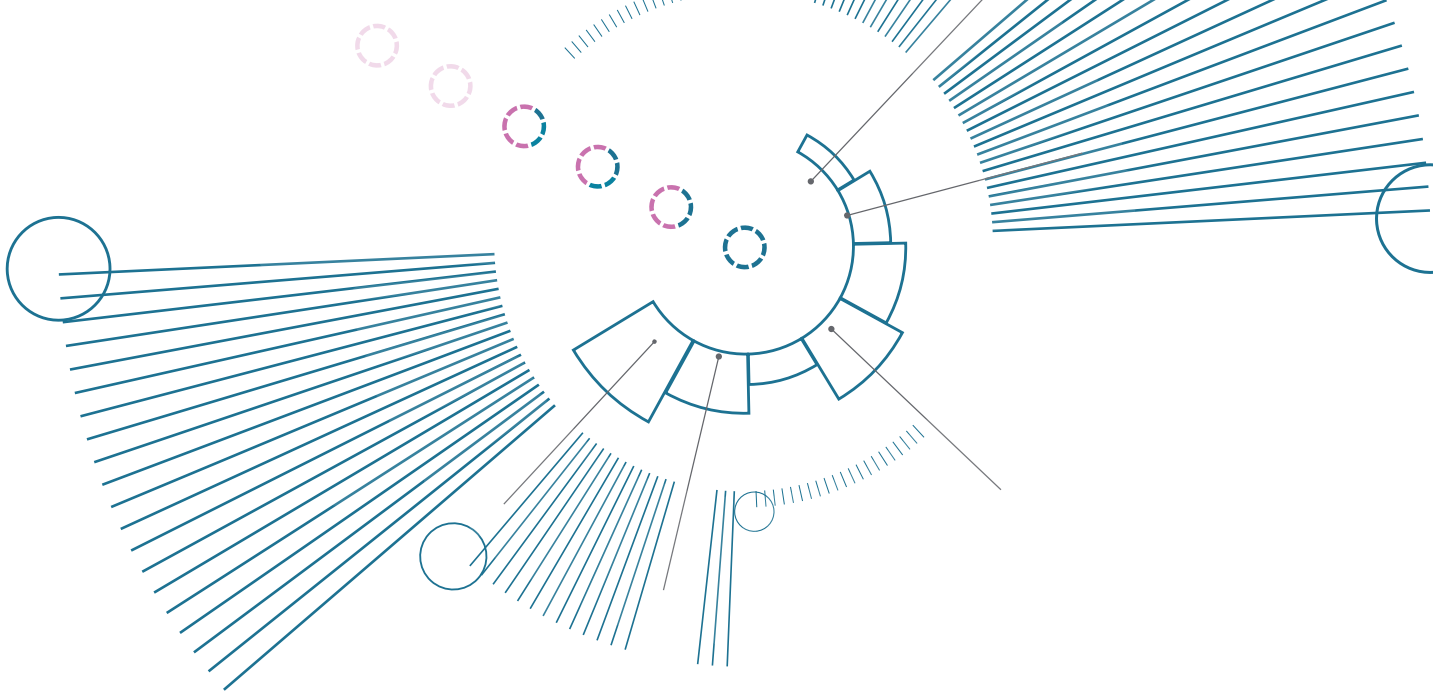
In answering this question you may wish to consider the following:

- Should compliance monitoring powers cover all matters in the legislation? Why/why not?
- What are some of the positive and negative aspects of the current compliance powers?

4.2.3 What alternatives are there to the current compliance monitoring framework? How else can compliance be monitored/incentivised?

4.2.4 How can the compliance arrangements be established to be transparent but also able to flexibly adapt to changes in the economy?

¹⁹ A number of provisions relating to patterns of instruments, including offences in section 19B, sit in Part XIV of the Act. Inspectors monitoring powers apply only to Parts IV, V, VI, or VII of the Act. Regulation 64 of the NMR is limited to examination of measuring instruments to ascertain whether the instrument is in accordance with the approved pattern.

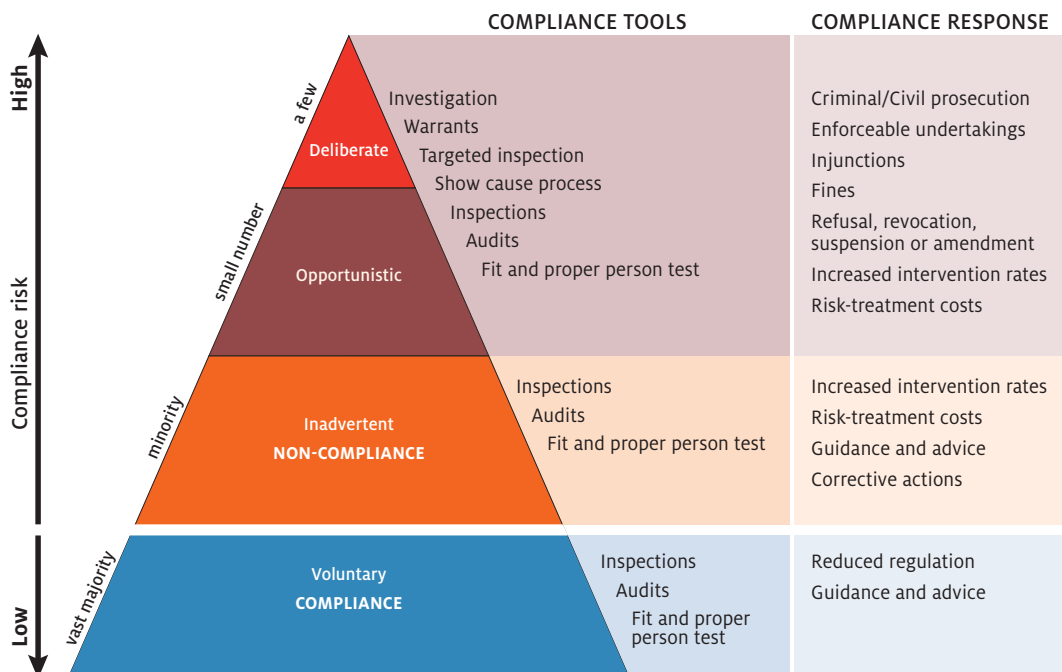


5. Compliance Options

5.1 An Overview of Compliance Options

Regulators typically have a series of compliance options for taking appropriate and proportionate action to address non-compliant behaviour of regulated entities. These can include non-legislated and legislated options that achieve compliance or support the enforcement of the framework in different ways. Typically these options will fall into a range of categories whose use is proportionate to the contravention.

These options are typically represented as part of a compliance pyramid:



Source: [Australia's Biosecurity Compliance Plan 2016-17](#)

Figure 1: Compliance Pyramid

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In comparison, NMI's compliance tools and responses can be represented as follows:

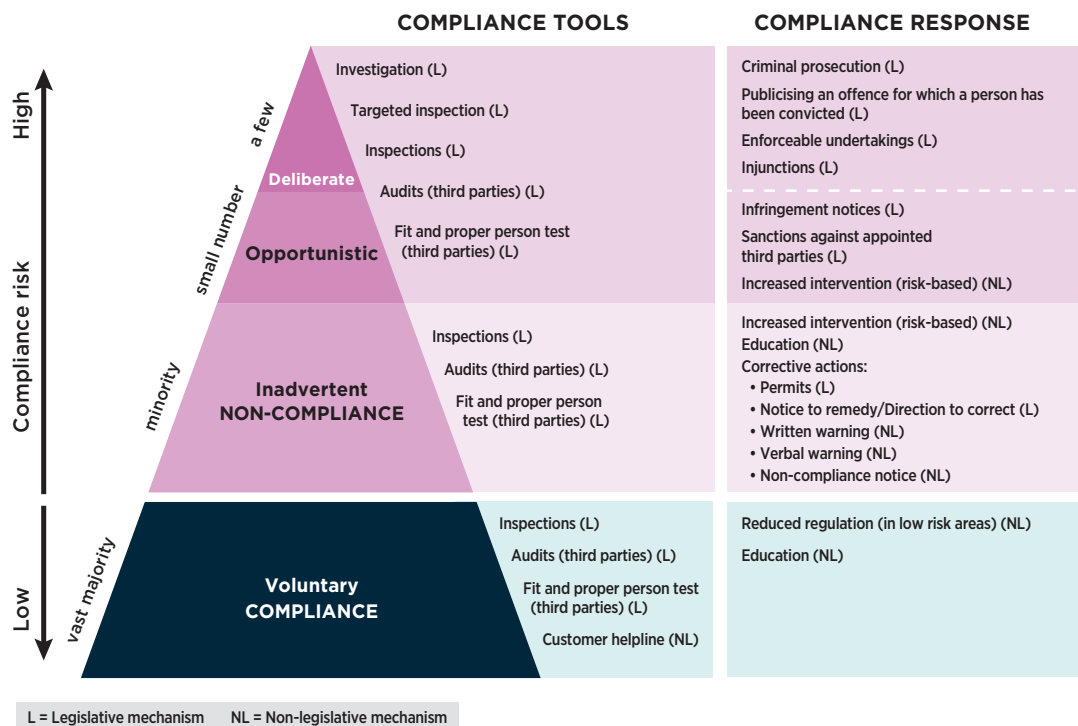


Figure 2: NMI's Compliance Pyramid

Statistics regarding the usage of different compliance options can be found in NMI's [most recent Trade Measurement Compliance Report](#).

NMI applies an escalating model to compliance based on risk. Typically where non-compliance results in low harm and there is minimal likelihood of continued non-compliance, then low-level compliance options are used. As the risk and harm associated with the non-compliance increases, or where there is repeat non-compliance, the NMI will escalate the compliance options used. For example:

- An inspector will issue a non-compliance notice whenever issues are identified. The notice sets out what issues require rectification and states that failure to fix the issues may result in further compliance action. The inspector will also provide verbal advice to the trader.
- The inspector conducts a follow-up visit to confirm that issues have been corrected.
- If follow-up inspections reveal continued non-compliance, or the level of non-compliance detected in initial audits results in more significant harm, the type of enforcement options may be escalated.
- This may result in the issuing of a warning letter or infringement notice.
- Where warnings and infringement notices have not proved successful in addressing the non-compliance or where the conduct is serious, NMI may enter into an enforceable undertaking with the trader or refer matters to the Commonwealth Director of Public Prosecutions for consideration of prosecution.

Most low-level compliance options utilised by the NMI in its regulatory activities exist outside the legislation. Those compliance options outlined in the measurement legislation are heavily focussed on the threat of criminal offences and infringement notice provisions. There is only a limited number of legislated administrative options available and a lack of varying penalty units for infringement notices. This limits NMI's ability to take an even more flexible approach to compliance and enforcement activities.

The NMI can also take disciplinary action against third parties licensed or appointed under the framework (see [Third Party Arrangements](#) paper).

QUESTIONS

5.1.1 Are the current compliance options available sufficient/appropriate? Where are there gaps?

5.1.2 What has been your experience with NMI's compliance options? How have you found them?

5.2 Education

Education is an important compliance option regulators use to prevent and reduce non-compliance, without the need to threaten further enforcement action for contraventions. NMI educates measurement framework stakeholders to raise awareness about its benefits and their compliance obligations. This is achieved through a mixture of:

- information provided on the department's websites;^{20, 21}
- the trade measurement helpline where enquires and complaints can be made; and
- by trade measurement inspectors during inspections.²²

Where an inspector identifies practices that may need to be rectified, depending on the severity of the issues, they will work through issues with a business with the aim of achieving compliance.

5.3 Administrative Options

Current approach

Administrative options discussed in this paper are those compliance options that are not strictly penalties, either criminal or civil, and do not include infringement notices. Non-legislative administrative options make up the majority of compliance options used by the NMI and include non-compliance notices, verbal warnings and warning letters. While these administrative options are not included in the legislation, they are important options that provide low-level alternatives to help achieve compliance and address non-compliance.

The administrative options available under the legislation are limited to issuing a notice to remedy, directions to correct, issuing permits, and the sanctions applicable to authorised third parties:

- Trade measurement inspectors may issue a 'notice to remedy'²³ in relation to measuring instruments²⁴ and goods (both packaged²⁵ and non-packaged²⁶).
- A trade measurement inspector may give a person a direction²⁷ to correct a matter in relation to the failure of a measuring instrument.
- A permit may be issued to enable the sale of certain articles that do not include the required information on the package or that include prohibited expressions.²⁸

20 <https://www.industry.gov.au/regulations-and-standards/buying-and-selling-goods-and-services-by-weights-and-other-measures>.

21 <https://www.business.gov.au/Products-and-services/Selling-products-and-services/Product-labelling/Australias-trade-measurement-laws>.

22 <https://www.industry.gov.au/regulations-and-standards/buying-and-selling-goods-and-services-by-weights-and-other-measures/trade-measurement-inspectors>.

23 Section 18MMA of the Act.

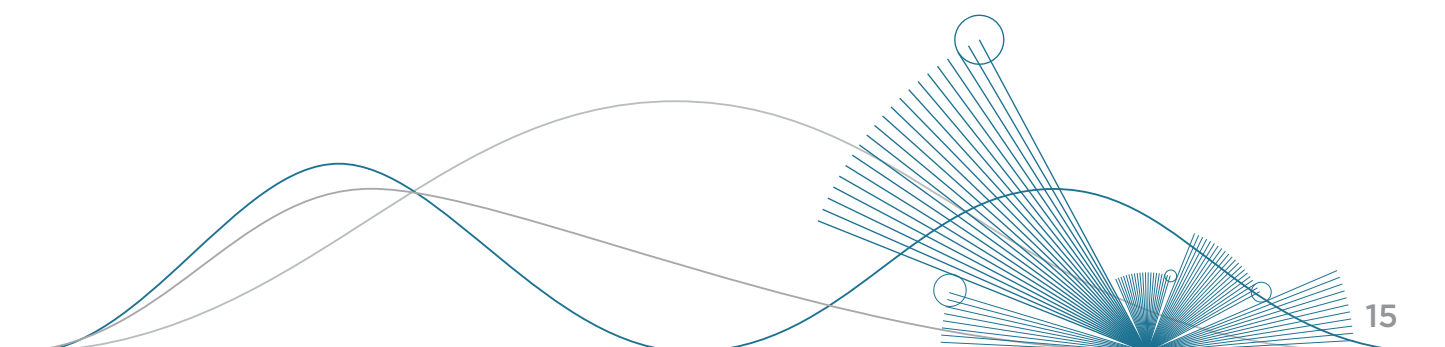
24 Subsection 18GE(8) and subsection 18HG(4) of the Act.

25 Subsection 18HB(7) and section 18JHA of the Act.

26 Subsection 18HC(4).

27 Section 18GR of the Act.

28 Division 5, Part VI of the Act contains provisions that create a system of permits for packaged products.



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Issues

A key issue with the legislation is the heavy focus on penalties and limited provision for administrative compliance options. Some examples of administrative options (legislative and non-legislative) available to other Commonwealth regulators and regulators from overseas jurisdictions with comparable frameworks include:

- **Measurement Canada** launched a new non-legislative initiative in 2019 called “Spot the Sticker” that helps businesses show their commitment to accurate measurement.²⁹ Businesses displaying the Spot the Sticker decal use measuring instruments that have been certified as measuring accurately. The sticker gives consumers visibility that a business is committed to ensuring accurate measurement and can be removed if the measuring instruments are found to be inaccurate during a subsequent inspection.
- **Compliance notices:**
 - The *Fair Work Act 2009* provides for **compliance notices** to be issued by a fair work inspector for the contravention of particular requirements. The notice requires the person to take specified action to remedy the direct effects of the contravention and/or produce reasonable evidence of the person’s compliance with the notice.³⁰
 - Under Part X of the model *Work Health and Safety Act 2011*, improvement notices and prohibition notices can be issued. **Prohibition notices**³¹ require a particular behaviour to stop until the risk has been satisfactory remedied, whereas **improvement notices**³² enable a workplace to continue to operate but require an identified issue to be fixed within a specified period of time.
- **Public warning notices** can be issued under the *Therapeutic Goods Act 1989*³³ and the *Australian Securities and Investments Commission Act 2001*.³⁴ These allow the public disclosure of certain information where it is in the public interest to issue the notice and certain other conditions are met.
- The Australian Competition and Consumer Commission (ACCC) maintains a **public infringement notice register** of paid infringement notices on its website which includes information such as, the name of the company or individual, the infringement notice number, the date the infringement notice was paid and the provision that it alleged to have been contravened.³⁵
- **Product recalls** can be effected under some legislation in certain circumstances.
 - Therapeutic goods can be recalled under the *Therapeutic Goods Act 1989* in prescribed circumstances, requiring a person to recall therapeutic goods and inform the public or a specified class of persons of specified information about the therapeutic goods.³⁶
 - Where the Controller of Weight and Measures³⁷ in Singapore believes a person has supplied a measuring instrument in contravention of the legislation, the Controller may require the person to effect a recall of any measuring instrument supplied by the person.³⁸

QUESTIONS

5.3.1 What types of administrative options should be utilised as additional compliance options?

For example:

- Should the measurement legislation provide for public warning notices or recall of measuring instruments in breach of the legislation?
- Should a register be kept of paid infringement notices?

²⁹ <https://www.ic.gc.ca/eic/site/mc-mc.nsf/eng/lm04926.html>.

³⁰ Section 716 of the *Fair Work Act 2009*.

³¹ Division 2, Part 10 of the *Work Health and Safety Act 2011*.

³² Division 1, Part 10 of the *Work Health and Safety Act 2011*.

³³ Section 42DY of the *Therapeutic Goods Act 1989*.

³⁴ Section 12GLC of the *Australian Securities and Investments Commission Act 2001*.

³⁵ The ACCC’s “Guidelines on the use of infringement notices” includes information about the ACCC infringement notice register (<https://www.accc.gov.au/publications/guidelines-on-the-use-of-infringement-notices/guidelines-on-the-use-of-infringement-notices/8-acc-cc-infringement-notice-register>), which is published here: <https://www.accc.gov.au/public-registers/infringement-notices>.

³⁶ Section 30EA of the *Therapeutic Goods Act 1989*.

³⁷ Section 29 of the *Weights and Measures Act* (Cap 349, 1985 Rev Ed) (Singapore).

³⁸ Section 31A of the *Weights and Measures Act* (Cap 349, 1985 Rev Ed) (Singapore).

5.4 Infringement Notices

Infringement notices under Commonwealth legislation differ from that of the states and territories, acting as a temporary bar to proceedings by the regulator.³⁹ If an infringement notice is paid within the prescribed timeframe, then the regulator is prevented from taking further action in respect of the offence. Payment of an infringement notice is not taken to be an admission of guilt by the alleged offender, however failure to pay permits allow the regulator to initiate action in respect of the offence. Under some legislative frameworks they may also be issued as an alternative to proceedings for a civil penalty order.

Current approach

Australia's measurement laws allow for the issuing of an infringement notice under the Act where the offence is one of strict liability.⁴⁰ An infringement notice can be issued by a trade measurement inspector where there are reasonable grounds to believe that a person has breached an offence provision.⁴¹ Infringement notices provide the NMI with flexibility to take action in relation to low-level contraventions more efficiently and effectively than seeking prosecution of offence provisions.

Issues

The main issue identified with the current infringement notice framework is that all infringement notices are equal to 5 penalty units⁴² (currently \$1050). Having the same number of penalty units attached to all infringement notices under the legislation can reduce the effectiveness of the infringement notice as a compliance option. The amount may be too severe, or too lenient depending on the case, and does not distinguish between the impacts for an individual versus a body corporate. For example, an offence involving selling an underweight product and an offence for incorrectly marking the measurement on a packaged product currently both carry the same penalty amount for an infringement notice.

A number of Commonwealth Acts have infringement notice penalty amounts that distinguish between whether the person is an individual or a body corporate and assign different penalty amounts to provisions based on the nature and severity of the contravention. For example:

- The *Competition and Consumer Act 2010* tabulates the prescribed penalty amounts for infringement notices for alleged contraventions of the Australian Consumer Law based on the provision and the type of entity.⁴³
- The *National Consumer Credit Protection Act 2009* prescribes the penalty amount for an infringement notice⁴⁴ in a way that allows multiple contraventions to add to the penalty.⁴⁵
- The penalty amount for an infringement notice in the *Regulatory Powers (Standard Provisions) Act 2014* (which prescribes the penalty amount for an infringement notice, unless another Act expressly provides otherwise), is the lesser of:
 - one-fifth of the maximum penalty a court could impose for the contravention; and
 - 12 penalty units for an individual or 60 penalty units for a body corporate.⁴⁶

The various approaches to infringement notice penalty amounts result in infringement notices that are tailored more appropriately to the offence circumstances making them a more effective enforcement option.

³⁹ [Australian Law Reform Commission, Principled Regulation: Federal Civil & Administrative Penalties in Australia, Report 95 \(2002\), 433 \[12.21\].](#)

⁴⁰ Subsection 18LF(1) enables a trade measurement officer to issue an infringement notice if they have reasonable grounds to believe that a person has contravened a provision of the Act that is stated to be an offence of strict liability.

⁴¹ Subsection 18LF of the Act.

⁴² Section 18LH of the Act states: "the penalty to be specified in an infringement notice relating to an alleged contravention of a provision in relation to which an infringement notice may be given must be a pecuniary penalty equal to 5 penalty units".

⁴³ Section 134C of the *Competition and Consumer Act 2010*. For example, the penalty amount for a contravention relating to the supply of consumer goods that do not comply with a safety standard is 600 penalty units for a listed corporation, 60 penalty units for a body corporate and 12 penalty units if the entity is not a body corporate.

⁴⁴ Subsection 288L(2) of the *National Consumer Credit Protection Act 2009*.

⁴⁵ For example, penalty units for a single contravention of an offence provision are equal to one-fifth of the maximum penalty that a court could impose, but for multiple contraventions of an offence provision the penalty units are equal to the amount for a single contravention multiplied by the number of contraventions. A similar multiplier applies for contraventions of a civil penalty provision.

⁴⁶ Subsection 104(2) of the *Regulatory Powers (Standard Provisions) Act 2014*.

COMPLIANCE ARRANGEMENTS

QUESTIONS

5.4.1 Is the current infringement notice amount of 5 penalty units (\$1,050) appropriate for all offences?

5.4.2 Should greater flexibility apply to the amount to be paid under an infringement notice? If so, how?

5.5 Sanctions for Third Party Arrangements

The measurement framework establishes a number of third party arrangements to perform various functions that support Australia's measurement system. The legislation includes sanctions that can be used to bring disciplinary action against third parties licensed or appointed under the framework, such as:

- reprimanding the licensee/appointee;
- varying the conditions of the licence/appointment;
- suspending their licence/appointment; and
- cancelling their licence/appointment.

The main issue identified with the available compliance options for third parties appointed or licensed under the measurement legislation is a lack of flexible options applicable to Utility Meter Verifiers and appointed authorities.

The [Third Party Arrangements](#) discussion paper has more detail on arrangements and current issues.

5.6 Civil Penalty Provisions

Civil penalty provisions prohibit or require certain conduct and set out a penalty for contravention of the provision. Contravention of a civil penalty provision is not an offence and a person who has contravened the provision is not subject to criminal prosecution. A court or tribunal has the power to impose a penalty (usually a financial penalty) up to a maximum amount specified in the provision, applying civil rather than criminal court processes.⁴⁷ The same conduct may also constitute a criminal offence, thus providing regulators with the choice to pursue a criminal or civil penalty depending on the circumstances. Less evidence is needed to prove that a civil penalty provision has been breached than a criminal penalty and civil penalties do not result in a criminal conviction.

The measurement framework's use of a compliance framework containing only criminal penalty provisions is unusual compared to modern Commonwealth frameworks that have adopted civil penalty provisions.⁴⁸ The *Regulatory Powers (Standard Provisions) Act 2014* also contains standard provisions relating to civil penalties⁴⁹ that can be triggered by other Commonwealth Acts. Civil penalties provide a means to introduce penalty options for offences that perhaps do not warrant criminal prosecution and allow the courts greater flexibility to determine appropriate penalties, given the role civil penalties play in the enforcement pyramid.⁵⁰ For example:

- The *Australian Consumer Law* enables a court, if satisfied that a person contravened certain provisions, to order the person pay a pecuniary penalty.⁵¹ The pecuniary penalty payable must not exceed the amount worked out using the prescribed table, which for a number of contraventions for a body corporate works out as the greater of the following:
 - \$10 million;
 - Three times the benefit received (if the court can determine the value of the benefit); or
 - 10 per cent of the annual turnover in the 12 months preceding the commission of the offence (where the court cannot determine the value of the benefit).

⁴⁷ Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report 95 (2002), 72 [2.45].

⁴⁸ Some examples of Commonwealth Acts that contain civil penalty provisions include, *Competition and Consumer Act 2001*, *Therapeutic Goods Act 1989*, *Corporations Act 2001*, *National Consumer Credit Protection Act 2009*, *Work Health and Safety Act 2011*, *Environment Protection and Biodiversity Conservation Act 1999* and *Telecommunications Act 1997*.

⁴⁹ Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* creates a framework for the use of civil penalties to enforce civil penalty provisions.

⁵⁰ Explanatory Memorandum, *Regulatory Powers (Standard Provisions) Bill 2014* (Cth).

⁵¹ Section 224 of the *Australian Consumer Law*, subsection 224(2) lists factors that the court must have regard to in determining the appropriate pecuniary penalty.

There are a number of offences under the current measurement framework that could be considered inappropriate to attract criminal penalties, for example those that deal with the marking of measurements and other information on packaged products. These type of lower level offences could benefit from treatment as a civil penalty, where there is not the stigma of a criminal conviction attached to the offending.

Case Study:

In 2013 nougat manufacturer Bon Fluer Australia Pty Ltd were fined \$14,000 after being convicted of packing and selling underweight products in breach of trade measurement law. Normally offences of this nature are quickly corrected by traders, however in this instance the matter was referred to the Commonwealth Director of Public Prosecution for prosecution because the company continued to produce underweight products after an initial warning and then failed to pay an infringement notice issued for a subsequent offence.⁵²

This case provides an example where the progressive escalation of the available enforcement options meant the next level of enforcement was criminal prosecution being brought against the company. In the absence of civil penalty provisions for offences of this nature, the options available to the NMI in these types of circumstances are to continue issuing infringement notices (which proved ineffective here) or proceed to criminal prosecution.

A predominantly civil penalty regime may be more appropriate for the majority of offences under the measurement framework and fairer for offenders, as administrative and low-level offences would no longer be criminalised. This could allow for greater flexibility in the compliance options available to the NMI and lead to more appropriate escalation of the compliance options used to address repeat or deliberate acts of non-compliance. Some offences could carry both a criminal and civil penalty, affording greater flexibility in the available enforcement options. It may also be possible to attach infringement notices to civil penalty provisions where the contravention is minor and no proof of fault element or state of mind is required.⁵³

Additional flexibility could also be afforded to the courts when determining appropriate penalties in the circumstances through that use of additional orders the court can issue:

- Under the *Australian Consumer Law* a court may, on application of the regulator, make a **non-punitive order directing a person to do things** such as, establish a compliance or training program, or revise internal operations to reduce the risk of future contraventions.⁵⁴ A court may also make an **adverse publicity order** requiring a person to disclose specified information in a way and to the persons specified in the order and to publish an advertisement in the terms specified in the order.⁵⁵

QUESTIONS

5.6.1 What might be the benefits/disadvantages of moving to a primarily civil penalty regime?

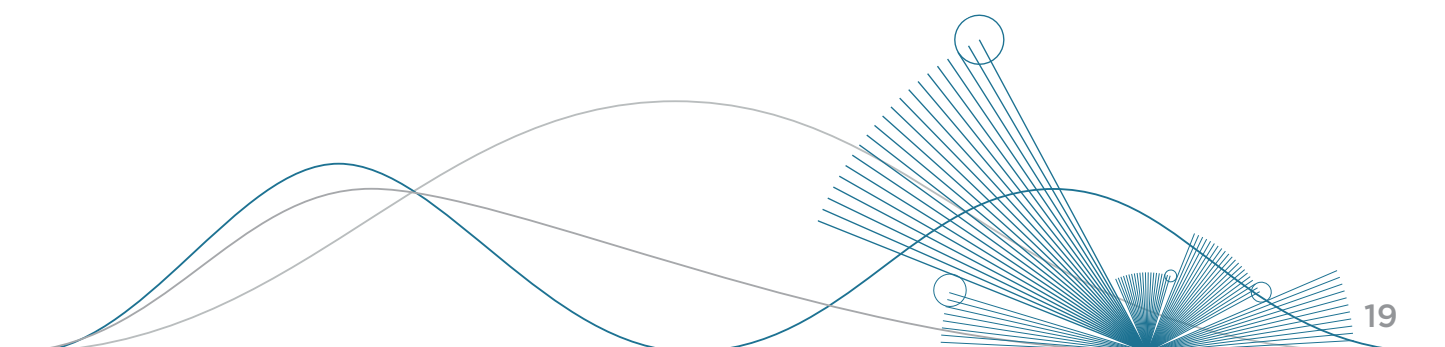
5.6.2 Are there additional powers that should be given to courts to enable more flexible outcomes?

⁵² Link to NMI Media Release: <http://www.fbia.org.au/wp-content/uploads/2016/12/MR-0307-Nougat-manufacturer-fined-Final.pdf>

⁵³ ALRC Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, December 2002, recommendation 12-2.

⁵⁴ Section 246 of the *Australian Consumer Law*.

⁵⁵ Section 247 of the *Australian Consumer Law*.



COMPLIANCE ARRANGEMENTS

5.7 Criminal Penalties

Australia's measurement laws currently consist of only criminal offence provisions with monetary penalties, most of which include an equivalent strict liability⁵⁶ offence.⁵⁷ While a lower penalty amount applies for the strict liability offences, the Act nevertheless treats all breaches as criminal in nature.

The result is that a finding of guilt in a court for a breach of these offences may result in monetary penalties that range from 20 penalty units (\$4,200) to 200 penalty units (\$42,000) for individuals and five times this amount for body corporates. The current penalty unit amounts are based to some extent on the type of offence and whether the offence is one of strict liability or an offence requiring fault element.

However, in a more modern compliance framework it may be inappropriate for the majority of the provisions in the legislation to contain offences. The same outcomes in terms of compliance goals could be achieved through provisions that carry civil penalties, as opposed to criminal offences. This would provide additional flexibility in the compliance options available to the NMI, as well as more appropriately rounding out its enforcement pyramid, reserving criminal offences more severe conduct where the harm or impact is likely to be high or wide spread.

Additional flexibility could also be afforded to the courts when determining appropriate penalties in the circumstances through the use of additional sentencing options. For example:

- In New Zealand if a person is convicted of an offence against particular provisions (those relating to supplying short measure,⁵⁸ supplying goods not in accordance with the stated quantity⁵⁹ and for a purchaser stating incorrect measurement)⁶⁰ a court may order the convicted person to make good to the person in respect of whom the offence was committed, either in goods or money, the deficiency in the actual goods.⁶¹

QUESTIONS

5.7.1 Should the legislation include both civil and criminal penalties?

5.7.2 Which of the current offence provisions in the measurement legislation warrant civil penalties only, and which would warrant both civil and criminal penalties being available?

5.8 Statutory Defences and Exemptions

The Act does not currently include specific defences for breaches of measurement offences. Providing clear statutory defences for measurement offences would:

- Provide businesses with a way to demonstrate that they have taken sufficient steps to avoid the contravention and so should not be subject to a penalty for the alleged contravention; and
- Could indirectly lead to establishing expectations that guide best practice business behaviours.

Statutory defences are different to 'deemed compliance pathways' which may be established to support principle based regulation. Where a principle based obligation is imposed (for example that labelling must be legible), a deemed to comply pathway (for example, that a particular font size be used) provides a way to show that this principle has been satisfied – such that there is no breach. In contrast, a defence operates once a breach has been established – as an excuse that means no sanction is imposed for the breach. The interaction of deemed compliance pathways and defences is something which will be considered further as part of the Review.

Statutory defences are included in a number of comparable overseas measurement frameworks, such as:

- Defences relating to the desiccation of products
 - In **New Zealand** it is an offence to supply packaged goods where the measurement of the goods is less than the amount stated.⁶² However, if the offence is in respect of packages containing desiccating goods,⁶³ a defence is

⁵⁶ An offence of strict liability is one where a person's liability for the offence does not depend on whether they were negligent or had intent, as long as their action, or lack of action, meets the criteria for the offence.

⁵⁷ For example, subsection 18GD(1) of the Act is a criminal offence provision attracting a monetary penalty equivalent to a maximum of 200 penalty units, subsection 18GD(2) of the Act is the same offence but one of strict liability attracting a monetary penalty equivalent to a maximum of 40 penalty units.

⁵⁸ Section 16 of the *Weights and Measures Act 1987* (New Zealand).

⁵⁹ Section 16A of the *Weights and Measures Act 1987* (New Zealand).

⁶⁰ Section 17 of the *Weights and Measures Act 1987* (New Zealand).

⁶¹ Section 35 of the *Weights and Measures Act 1987* (New Zealand).

⁶² Section 16A of the *Weights and Measures Act 1987* (New Zealand).

⁶³ Section 2 of the *Weights and Measures Act 1987* (New Zealand) defines 'desiccating goods' to mean any goods made up in a package that lose weight or volume solely through evaporation when the packaging is made up.

available if the person can prove that the package met the prescribed testing requirements during a specified period.⁶⁴

- Due diligence defences
 - In **Canada** a defence exists for a contravention of the legislation (with the exception of certain provisions)⁶⁵ if the person can establish that they exercised due diligence to prevent the commission of the offence.⁶⁶
- Defences relating to warranties for goods
 - Under legislation in the **United Kingdom** it is a defence, for offences relating to the quantity of goods, if a person can prove that they bought the goods from some other person with a written warranty that they were of the specified quantity.⁶⁷ The person must have had no reason to believe the statement was inaccurate⁶⁸ and, if the warranty was given by a person outside Great Britain, taken reasonable steps to check the statement's accuracy.⁶⁹

The current measurement legislation contains a number of exemptions, however there is no general provision to create additional exemptions by way of legislative instruments or any other mechanism. The permit system under the current framework allows for a form of temporary exemption but, unlike other legislation, there is no mechanism to permanently exempt products or measuring instruments from requirements in the legislation. For example:

- **Singapore** has a provision that enables the Minister by an order published in the Gazette to exempt a person or class of persons and any measuring instrument or class of measuring instruments for all or any of the provisions in the legislation, subject to any conditions imposed.⁷⁰
- **Canada** (through regulations made by the Governor in Council) is able to exempt, conditionally or unconditionally, any device or class, type or design of device or any class or type of trade transaction for any or all of the provisions of this Act.⁷¹

Allowing for exemptions to be created in this manner provides additional flexibility where particular types or categories of measuring instruments or trade transactions are identified as no longer requiring regulation, or for new technologies to be tested in the market before making a determination as to whether they should be subject to ongoing regulatory requirements.

QUESTIONS

5.8.1 How could statutory defences and/or exemptions play a role in improving compliance?

5.8.2 Should the Minister be given the power to exempt certain instruments or classes of instruments from the operation of parts of the measurement framework? If so, what restrictions should be imposed on this power?

64 Subsection 16A(4) of the *Weights and Measures Act 1987* (New Zealand). 'Required period' is defined at paragraph 16A(1)(d) to mean the period beginning at the time when the package was made up and ending on the seventh day after the day the package was made up.

65 This defence does not apply to paragraph 29(b), subsection 30(1) or 31(2) of section 32 of the *Weights and Measures Act R.S.C. 1985, c. W-6* (Canada), which relate to reporting of adjustments and repairs of devices, removing or breakings marks and seals, makings false or misleading statements to an inspector and failing to stop a vehicle or proceed as directed.

66 Section 35.1 of the *Weights and Measures Act R.S.C. 1985, c. W-6* (Canada).

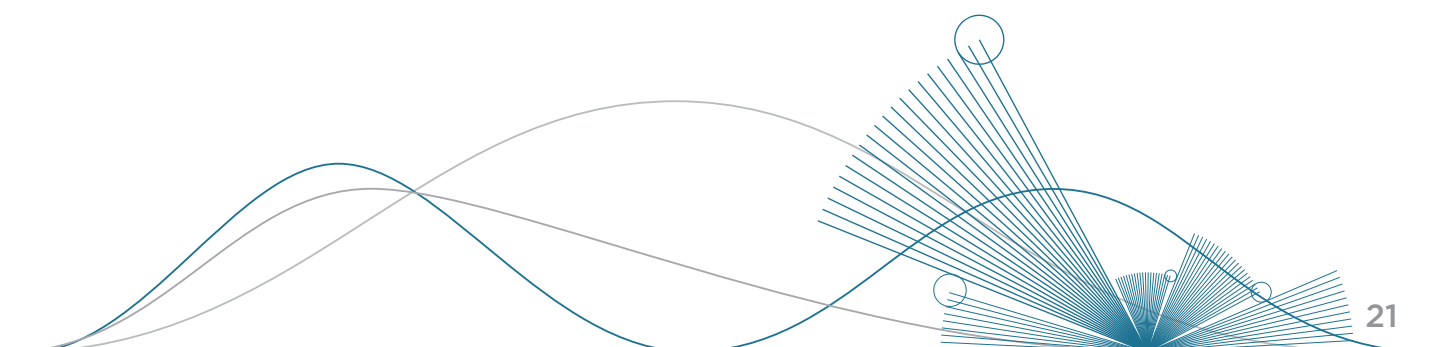
67 Section 33 of the *Weights and Measures Act 1985, c. 72* (United Kingdom).




68 Paragraph 33(1)(c) of the *Weights and Measures Act 1985, c. 72* (United Kingdom).

69 Paragraph 33(1)(d) of the *Weights and Measures Act 1985, c. 72* (United Kingdom).

70 Section 36B of the *Weights and Measures Act (Cap 349, 1985 Rev Ed)* (Singapore).

71 Paragraph 10(1)(u) of the *Weights and Measures Act R.S.C. 1985, c. W-6* (Canada).



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