National Measurement Amendment Bill 2013

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Law and Bills Digest Section

Note: This Digest is an historical Digest, published after the Bill was passed by Parliament and became an Act.

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National Measurement Amendment Bill 2013

Date introduced: 20 March 2013

House: House of Representatives

Portfolio: Industry and Innovation

Commencement: The Bill has been passed by Parliament and is now an Act. Sections 1, 2 and 3 of the National Measurement Amendment Act 2013 commenced on Royal Assent, which occurred on 1 July 2013. Schedules 1, 2 and 3 of the Act commenced on 2 July 2013.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The Bill amends the National Measurement Act 1960 (the NMA) in relation to (i) the powers of trade measurement inspectors, (ii) offence provisions, and (iii) smaller technical matters.

Structure of the Bill

The National Measurement Amendment Bill 2013 (the Bill) contains three covering clauses and three schedules. Schedule 1 amends provisions in the NMA concerning the powers of ‘trade measurement inspectors’ appointed under Part IX of the Act. Most amendments concern the issuing of ‘notices to remedy’ in situations of minor infringement. However, provision is also made for certain substantive offences, discussed below. Schedule 2 amends existing offence provisions concerning the use and repair of measuring instruments. Schedule 3 contains other minor amendments to the NMA.

Background

The Commonwealth Constitution empowers the Federal Parliament to make laws with respect to weights and measures. The Parliament enacted the Weights and Measures (National Standards) Act

1. The Bill was passed in the House of Representatives on 15 May 2013 and then in the Senate on 20 June 2013. The Bill was assented to on 1 July 2013. This Bills Digest is written on the basis that the Bill is prospective.
4. Section 51 of the Constitution provides in part:
   The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
   (i) ..... 
   (xv) weights and measures;

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1948, a four page document. This was replaced by the *Weights and Measures (National Standards) Act 1960*, a seven page document. This Act has been amended on 26 occasions since, including a change of name in 1984 legislation. It is now the *National Measurement Act 1960* (the NMA), and it runs to 204 pages. The NMA is a piece of legislation unfamiliar to many people.

The NMA establishes a national system of measurement. It also establishes a framework for the regulation of measuring instruments. The NMA was amended in 2004 to create the National Measurement Institute (NMI) by merging the National Measurement Laboratory from the CSIRO, the National Standards Commission and the Australian Government Analytical Laboratories. The NMA also establishes the office of Chief Metrologist.

In 2007 the Council of Australia Governments agreed the Commonwealth should assume responsibility for trade measurement, following which the *National Measurement Amendment Act 2008* was passed to enable the Commonwealth, acting through the NMI, to establish and operate a single national trade measurement system. This was facilitated by the *National Trade Measurement Regulations 2009*. On 1 July 2010 NMI became the national regulator for trade measurement. The purpose of this Bill is to make minor adjustments to the NMA to fine-tune the legal regime regulating measurement.

**Financial implications**

In the Explanatory Memorandum it is stated the Bill will have no financial impact.

**Statement of Compatibility with Human Rights**

The Statement of Compatibility with Human Rights can be found at pages 4-11 of the Explanatory Memorandum to the Bill. As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Statement of Compatibility considers the right to freedom of movement. There is some impact on this right as trade measurement inspectors are to have powers to give reasonable directions to the controllers of vehicles to remain in, leave and/or return to them. Failure to comply with a reasonable direction in this regard can be an offence. The Bill does contain various safeguards as to

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9. Section 18A of the NMA. (Metrology is the science of measurement.)
the exercise of these powers by trade measurement inspectors. It is concluded in the Statement of Compatibility that the limited impact on the right to freedom of movement occasioned by the Bill is reasonable, necessary and proportionate.

The Statement of Compatibility then considers the right to freedom from arbitrary detention. The powers conferred on trade measurement inspectors to give reasonable directions to the controllers of vehicles can be seen to engage the right to freedom from arbitrary detention, as those controllers will typically be directed to do something they would not have otherwise chosen to do. The minimal impact on this right was considered to be necessary, reasonable and proportionate in the circumstances.

The Statement of Compatibility then looks at the right to privacy in light of the provisions in the Bill allowing trade measurement inspectors to enter public areas of business premises to purchase items and collect information without notice. Any interference with the right to privacy was felt to be necessary, reasonable and proportionate.

Finally, the Statement of Compatibility considers the right to the presumption of innocence. The strict liability offences already provided for in the NMA and contained in the Bill remove the need to prove fault. The Statement notes that Article 14(2) of the International Convention on Civil and Political Rights (ICCPR) only applies to criminal proceedings. It also states that the various offence provisions already contained in the NMA, along with those added by the Bill, are regulatory rather than criminal in nature. It is stated that the strict liability offences exist in order to pursue a legitimate policy objective and any limitation of the presumption of innocence (to the limited extent that there might be such a limitation) is reasonable, necessary and proportionate.

**Parliamentary Joint Committee on Human Rights**

In its *Sixth Report of 2013*, tabled on 15 May 2013, the Parliamentary Joint Committee on Human Rights concluded that the Bill ‘does not appear to give rise to human rights concerns’.  

**Scrutiny of Bills Committee**

This Committee, in its Sixth Report of 2013, noted three concerns with the Bill. These three concerns, and the Minister’s responses are as follows.

Firstly, the Committee was concerned with the reversal of onus of proof in situations of minor infringement of the NMA where a trade measurement inspector issues a notice to remedy. If the recipient complies with such a notice, there is to be no further liability. The Bill proposes that the defendant bears the evidential burden of proof to establish compliance with the terms and

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15. See items 7, 8, 10, 12, 15 18, 24 and 26 discussed below.
conditions set out in the notice. The Committee was concerned whether this was appropriate. The Minister replied that it was appropriate for a defendant who seeks to rely upon a defence or exemption provided by the law to bear the evidential burden in relation to that matter. This was confirmed by subsection 13.3(3) of the Criminal Code Act 1995. The Minister considered that the reversal of the onus of proof was therefore appropriate. The Committee thanked the Minister for these comments and left consideration of the appropriateness of the approach adopted in the Bill to the consideration of the Senate as a whole.

Secondly, the Committee was concerned with the scope of proposed subsection 18MIA(3), under which failure to comply with a reasonable direction would be an offence. This ‘reasonable direction’ element was broader than more specific types of direction provided for elsewhere in proposed section 18MIA. The Committee was concerned that this may trespass unduly on personal rights and liberties. The Minister replied that proposed section 18MIA as a whole was reasonable and that the NMI was developing administrative guidelines as to how trade measurement inspectors might exercise their powers to give reasonable directions. The Committee noted this response and made no further comment.

Thirdly, the Committee was concerned as to the strict liability offence provision contained in proposed subsection 18MIA(4) and whether or not this trespassed unduly on personal rights and liberties. The Committee noted this topic was addressed at length in the Statement of Compatibility with Human Rights and left consideration of the appropriateness of the approach adopted in the Bill to the consideration of the Senate as a whole.

Key issues and provisions

Schedule 1 – powers of trade measurement inspectors

Section 18GE of the NMA is an offence provision concerned with using or supplying inaccurate measuring instruments. Item 7 seeks to add proposed subsections 18GE(8), (9), (10) and (11). These provisions will enable a trade measurement inspector to give a person a ‘notice to remedy’ in relevant situations. This is where (i) a trade measurement inspector reasonably believes a person has contravened an existing offence provision contained in the section and either (ii) the trade measurement inspector nevertheless believes the instrument could be used for trade during the

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17. Ibid., p. 221.
18. Ibid.
19. Ibid., p. 222.
20. Ibid., p. 222-3.
21. Ibid., p. 223.
22. Ibid., p. 224.
23. See in particular subsection 18GE(1) which provides for an offence with a fault element, and subsection 18GE(2) which provides for a strict liability offence.
24. Proposed subsection 18GE(8) of the NMA.
remedy period set out in the notice without causing material detriment to affected persons,\(^{26}\) or (iii) the trade measurement inspector is satisfied that the instrument could be used for trade during the remedy period set out in the notice without there being material detriment to affected persons if conditions set out in that notice are complied with.\(^{27}\) The difference between (ii) and (iii) is that in the latter situation the trade measurement inspector considers that there are conditions which must be complied with in order to avoid causing material detriment.

A trade measurement inspector may attach conditions to a notice to remedy.\(^{28}\) The existing offence provisions contained in section 18GE will not apply to recipients of a notice to remedy so long as any conditions are complied with\(^{29}\) and all reasonable steps are taken to remedy whatever it was that gave rise to the contravention.\(^{30}\)

A number of the other items contained in Schedule 1 insert similar provisions concerning ‘notices to remedy’ to operate in situations of minor regulatory non-compliance.\(^{31}\) The provisions contained in each of these items softens the impact of the existing legislation by providing for prompt rectification of matters in suitable cases, instead of the possibility of more cumbersome administrative and/or legal measures.

**Item 8** inserts **proposed section 18GR**, which will apply to persons who use a measuring instrument for trade. The proposed section provides that such an instrument is not to be taken to have failed test procedures in certain circumstances. This will be when a trade measurement inspector finds an instrument no longer complies with verification requirements,\(^{32}\) and he or she then gives a written direction as to action to be taken.\(^{33}\) So long as this direction is complied with, the instrument is taken not to have failed test procedures.\(^{34}\) This also softens the impact of the current legislation.

**Item 10** inserts **proposed subsections 18HB(7), (8) and (9).** This is comparable to the provisions contained in item 7 noted above. Section 18HB presently provides for offences in the context of prepacked items where the item is of a class that by regulation must be sold by measurement. The offences arise where (i) the package in which the article is sold is marked with a price that is not determined by measurement or (ii) there is a marking on or near the container marked with a price not determined by measurement. The new provisions inserted by the Bill will enable a trade measurement inspector to issue a notice to remedy. It will be a defence to section 18HB infringement proceedings if a person complies with the notice and takes all reasonable steps to remedy the problem.

\(^{26}\) Proposed subparagraph 18GE(8)(b)(i).

\(^{27}\) Proposed subparagraph 18GE(8)(b)(ii).

\(^{28}\) Proposed subsection 18GE(9).

\(^{29}\) Proposed paragraph 18GE(10)(a).

\(^{30}\) Proposed paragraph 18GE(10)(b).

\(^{31}\) Items 10, 12, 15, 18, 24 and 26 of the Bill.

\(^{32}\) Proposed paragraph 18GR(1)(b) of the NMA.

\(^{33}\) Proposed subsections 18GR(2), (3), (4) and (5).

\(^{34}\) Proposed subsection 18GR(6).
Item 12 inserts proposed subsections 18HC(4), (5) and (6). Section 18HC currently provides for offences where an article must be sold at a price determined by measurement, but in fact the price is not determined by measurement. These new provisions will also enable a trade measurement inspector to give a notice to remedy in circumstances where trading activities could continue without material detriment to purchasers. The existing offence provisions already in the section will not apply if the person complies with any conditions contained in such a notice and takes all reasonable steps to rectify the situation.

Item 15 inserts proposed subsections 18HD(4), (5) and (6). Section 18HD currently makes it an offence to sell an article where a unit of measurement is prescribed to determine the price, but in fact the price is not determined by reference to the relevant measurement. These new provisions will also enable a trade measurement inspector to give a notice to remedy in situations where trading activities could continue without material detriment to purchasers. The offence provisions already in the section will not apply if the person complies with such a notice and takes all reasonable steps to rectify the situation.

Item 18 inserts proposed subsections 18HG(4), (5), (6) and (7). Section 18HG currently makes it an offence to use an instrument for a purpose other than the purpose prescribed. These new provisions will also enable a trade measurement inspector to give a notice to remedy in situations where trading activities could continue without material detriment to purchasers. The offence provisions already in the section will not apply if the person complies with such a notice and takes all reasonable steps to rectify the situation.

Item 24 inserts proposed section 18JHA. This is a notice to remedy provision similar to the others listed above. There are existing offence provisions contained in Division 2 of Part VI. Some of these arise from a requirement that a package must be marked with required package information, and this requirement is imposed upon packers, importers, sellers and persons possessing, offering or exposing products for sale. Another offence provision arises from the requirement that packages must be marked in a prescribed manner. Sections 18JF, 18JG and 18JH provide for offences where ‘prohibited expressions’ are used in connection with packing and selling goods as well as possessing, offering or exposing them for sale. ‘Prohibited expressions’ are those prescribed for the purposes of the relevant provisions. Under the proposed section 18JHA, a trade measurement inspector will be able to give a notice to remedy in each of these situations where trading activities could continue without material detriment to purchasers. The offence provisions in Division 2 of Part VI will not apply if the person complies with such a notice and takes all reasonable steps to rectify the situation.

Item 26 inserts proposed section 18JLA. This is a notice to remedy provision similar to the others listed above, which applies to the offences in sections 18JK and 18JL. These offences involve (i) the

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35. Section 18JA.
36. Section 18JB.
37. Section 18JC.
38. Section 18JD.
39. Section 18JE.
use of Average Quantity System (AQS) marks prescribed under section 18JK other than in accordance with the regulations and (ii) the use of misleading marks (that is, a mark that is likely to give the impression that it is an AQS mark) under section 18JL. Under proposed section 18JLA, a trade measurement inspector will be able to give a notice to remedy situations where trading activities could continue without material detriment to purchasers. The offence provisions already contained in sections 18JK and 18JL will not apply if the person complies with such a notice and takes all reasonable steps to rectify the situation.

Item 27 repeals section 18MD and inserts proposed sections 18MD and 18MDA. These new provisions will allow for trade measurement inspectors to enter public areas of business premises to inspect and/or purchase items sold there. They may also collect written information made available to the public, discuss with any person features of items available for sale, and observe business practices.

Trade measurement inspectors may only exercise the powers noted immediately above for the purposes of the NMA. The right of an occupier of business premises to refuse to allow a trade measurement inspector to enter or remain on the premises is not affected by the insertion of this item.

Items 28 and 29 amend paragraphs 18ME(1)(a) and 18MF(2)(a) so that existing powers to inspect a business vehicle are broadened to become ‘stop, detain and inspect’ such vehicles.

Item 30 inserts proposed subsection 18MG(2A) into section 18MG. This new subsection limits existing general powers of trade measurement inspectors so that business vehicles are not to be detained for any longer than is necessary and reasonable.

Item 31 inserts proposed section 18MIA which contains an offence provision. Proposed subsection 18MIA(1) provides that trade measurement inspectors may give reasonable directions to the controller of business vehicles in connection with the exercise of powers under sections 18ME, 18MF and 18MG.

Non-compliance with such a direction can trigger the office provisions contained in the proposed section. Proposed subsection 18MIA(3) provides for an offence requiring a fault element – the maximum penalty is 200 penalty units. Proposed subsection 18MIA(4) provides for a strict liability offence with a maximum penalty of 40 penalty units. The Scrutiny of Bills Committee had some concerns with both proposed subsections 18MIA(3) and 18MIA(4), which are noted above.

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40. Proposed paragraphs 18MDA(1)(a) and (b).
41. Proposed paragraph 18MDA(1)(c).
42. Proposed paragraph 18MDA(1)(d).
43. Proposed paragraph 18MDA(1)(e).
44. Proposed subsection 18MDA(2).
45. Proposed subsection 18MDA(3).
46. Section 4AA of the Crimes Act 1914 (Cth) provides that a penalty unit is currently $170, accessed 31 July 2013.
Item 33 inserts proposed section 18MMA, which is a definition of a notice to remedy. There are various formal requirements set out in proposed subsection 18MMA(3). Conditions may be attached. 47 The remedy period commences the day after the notice is given and may last up to 28 days. 48 The giving of a notice to remedy in itself does not affect a person’s liability for contravention of the NMA. 49 Rather, the ‘notice to remedy provision’ contained in Schedule 1 needs to be complied with in order for liability to be avoided.

Schedule 2 – offences relating to the use and repair of measuring instruments

At present, section 18GQ provides for two offences arising from the defective repair of measuring instruments where a verification mark (discussed immediately below) is not obliterated. There is one offence with a fault element carrying a 200 penalty unit maximum penalty, 50 as well as a strict liability offence with a maximum penalty of 40 penalty units. 51 At present, section 18GQ applies in two situations (i) to persons who defectively adjust or repair measuring instruments and (ii) to persons who cause measuring instruments to be adjusted or repaired, other than by properly licensed persons, where the result is defective. Section 18GQ is to be split into proposed section 18GPA and proposed section 18GQ, which will cover both of these situations.

Item 2 inserts proposed section 18GPA, which is a replacement offence provision. The offence is committed when a person defectively adjusts or repairs a measuring instrument used for trade without obliterating a verification mark. ‘Verification mark’ is defined in section 3 of the NMA as follows:

verification mark means:
(a) in relation to utility meters—a utility meter verifier’s mark; and
(b) in relation to any other measuring instrument:
   (i) an inspector’s mark; or
   (ii) a servicing licensee’s mark.

There are to be both an offence requiring a fault element 52 as well as a strict liability offence. 53 The maximum penalty for the strict liability offence is 40 penalty units, which is one-fifth that of the offence containing a fault element. These penalty amounts are the same as those contained in the current section 18GQ. The offence provisions will not apply if the effect on the measuring instrument can be corrected by normal operational adjustment. 54

Section 18GQ, as amended by items 3 to 9, will apply to persons who cause a measuring instrument to be defectively adjusted or repaired where the verification mark is not obliterated. There will be an

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47. Proposed subsection 18MMA(4) of the NMA.
48. Proposed subsection 18MMA(5).
49. Proposed subsection 18MMA(6).
50. Subsection 18GQ(1).
51. Subsection 18GQ(2).
52. Proposed subsection 18GPA(1).
53. Proposed subsection 18GPA(2).
54. Proposed subsection 18GPA(4).
offence requiring a fault element and a strict liability offence, with the same penalty levels as currently exist under section 18GQ.

**Items 10 and 11** amend section 18K, which provides an overview of Part VII of the NMA. The Part applies to articles sold at a price determined by reference to the measurement of an article. At present, a key factor is whether or not the purchaser is present at the point of sale. Under the proposed amendments, the key factor will be whether or not the purchaser is present when the measurement is made.

**Item 12** replaces current sections 18KA and 18KB. **Proposed section 18KA** applies where a person sells an article at a price determined by reference to measurement, the article is not packed in advance, and the buyer is present when the measurement is made.\(^{55}\) Under the proposed section, the seller must either (i) ensure the measuring process is clearly visible to the buyer\(^ {56}\) or (ii) give the buyer a written statement of the measurement.\(^ {57}\) Contravention of this requirement is an offence carrying with it a maximum penalty of 200 penalty units.\(^ {58}\) There is also a strict liability offence with a maximum penalty of 40 penalty units.\(^ {59}\) These penalties are the same as those contained in the current section 18KA.

**Proposed section 18KB** applies in situations where a person sells an article at a price determined by reference to measurement, the article is not packed in advance, and the purchaser is not present when the measurement is made.\(^ {60}\) The seller must give the buyer a written statement of the measurement when the article is delivered to the buyer.\(^ {61}\) Failure to do so amounts to an offence carrying with it a penalty of 200 penalty units.\(^ {62}\) There is also a strict liability offence of 40 penalty units.\(^ {63}\) These are the same as those currently contained in the NMA.

**Schedule 3 – other amendments**

**Item 6** replaces the present definition of ‘utility meter’ contained in section 3 of the NMA. ‘Exempt utility meters’ are defined in proposed subsection 4A(4) contained in **item 11**.

**Item 7** inserts proposed subsection 3(6A) which provides that regulations may be made setting out circumstances in which the use of measuring instruments to determine the amount of a tax credit, or the adjustment of such a credit, is a ‘use for trade’.

Section 4A presently provides that as a general rule, the NMA and its regulations are to apply to the exclusion of State and Territory laws relating to utility meters used for trade. **Item 9** inserts proposed

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55. Proposed paragraphs 18KA(1)(a), (b) and (c).
56. Proposed paragraph 18KA(1)(d).
57. Proposed paragraph 18KA(1)(e).
58. Proposed subsection 18KA(2).
59. Proposed subsection 18KA(3).
60. Proposed paragraphs 18KB(1)(a), (b) and (c).
61. Proposed subsection 18KB(1).
62. Proposed subsection 18KB(2).
63. Proposed subsection 18KB(3).
subsections 4A(1A), (1B), (1C) (1D) and (1E) which together will provide an exception to this general rule. There is to be concurrent operation of State and Territory laws relating to ‘exempt utility meters for use for trade’. ‘Exempt utility meters’ are defined in item 11 (which inserts proposed subsection 4A(4)) to be such utility meters as are prescribed in the regulations.

Concluding comments

The Bill appears to successfully insert a number of amendments into the NMA to enhance the operation of the national trade measurement system which was only recently adopted in Australia. The various ‘notice to remedy’ provisions contained in Schedule 1 lessen the regulatory impact of the current statutory regime.