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THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL MEASUREMENT AMENDMENT
BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon Kim Carr, Minister for Innovation, Industry, Science and Research)
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NATIONAL MEASUREMENT AMENDMENT BILL 2010

GENERAL OUTLINE
The National Measurement Amendment Bill 2010 amends the National Measurement Act 1960 to correct some unintended consequences from the translation of trade measurement provisions of State and Territory legislation into the Commonwealth legislation.

Following a review of the State and Territory trade measurement systems, the Council of Australian Governments (COAG) decided in 2007 that a Commonwealth system of trade measurement should be introduced. Amendments to the National Measurement Act 1960 were made in December 2008 to give effect to that decision. The corresponding National Trade Measurement Regulations 2009 were made in September 2009. The transition to a national system of trade measurement will occur on 1 July 2010.

The translation of the trade measurement provisions of the State and Territory legislation into the Commonwealth legislation resulted in some unintended consequences. Industry stakeholders have expressed concerns about these issues. The National Measurement Amendment Bill 2010 ensures that these problems are remedied as close as possible to commencement of the new system.

The Bill contains some adjustments to offence provisions which were inserted in the 2008 amendments. Specifically, the Bill narrows the circumstances in which some offence provisions may apply, to remove doubt about the application of those offences to inappropriate persons.

Although the Bill contains one new offence provision (comprising a fault offence and a strict liability offence, which are drafted consistently with the drafting policies contained in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers), this provision does not criminalise any new behaviour, but rather preserves the effect of some previous offence provisions on a specific category of behaviour which continues to be considered appropriate to penalise (see proposed new section 18GCA).

The Bill therefore reduces the circumstances in which the existing offence provisions apply, and does not penalise any new behaviour.

The Bill also makes some minor amendments to penalty clauses which were drafted otherwise than in accordance with current drafting policy for criminal offences. Specifically, it replaces references to monetary penalties with references to penalty units.

The offence provisions are considered in more detail in the Notes on Clauses discussion below.
The Bill also contains a number of minor and technical amendments to facilitate the working of the Act.

The Bill provides for a greater role for the Chief Metrologist in relation to determining various technical procedures under the Act. The 2008 amendments contemplated a number of technical standards and procedures being set out in the regulations or being determined by the Minister.

However, on further consideration, it has been concluded that these documents may need to be regularly produced and updated, and it would be administratively complex and slow to require legislative amendments whenever the procedures needed to be added to or amended. It is also considered that the technical content of these documents is more appropriately determined by the Chief Metrologist, due to the expertise associated with that position.

The Bill therefore now provides for the Chief Metrologist to determine, in writing:
- Average Quantity System (AQS) sampling procedures for the purposes of Subdivision 3-C of Division 3 of Part VI;
- AQS test procedures for the purposes of Subdivision 3-C of Division 3 of Part VI;
- national group test procedures for the purposes of Subdivision 4-B of Division 4 of Part VI;
- national sampling procedures for the purposes of Subdivision 4-B of Division 4 of Part VI;
- national single article test procedures for the purposes of Subdivision 4-B of Division 4 of Part VI; and
- national instrument test procedures for the purposes of section 18GG.

These instruments will not be legislative instruments. However, they will be made publicly available on the National Measurement Institute website at http://www.measurement.gov.au

**FINANCIAL IMPACT STATEMENT**

Funding of $31.65m, including $3m capital and $2.3m depreciation, was provided to the Department for the transition to a national system of trade measurement and its first year of its operation (2007-08 to 2010-11). Ongoing funding of $23.653m including $2.3m depreciation will be provided from 2011-12.

No new financial impacts from these amendments are expected.
NOTES ON CLAUSES

Clause 1  Short title

1. Clause 1 provides for the Act to be cited as the National Measurement Amendment Act 2010.

Clause 2  Commencement

2. Clause 2 specifies that sections 1 to 3 of the Act commence on the day the Act receives Royal Assent. It also specifies that the amendments to the National Measurement Act 1960 (the Act) in Schedule 1 commence on the day after the Act receives Royal Assent.

Clause 3  Schedules

3. Clause 3 provides for the arrangements set out in the schedules to have legal effect on commencement of the Bill.

Schedule 1: Amendments to the National Measurement Act 1960

Item 1  Subsection 3(1) (definition of approved pattern)

4. This item amends the definition of ‘approved pattern’ for a measuring instrument so that it includes a pattern that has expired or been cancelled (but not withdrawn), but was in force at the time when the measuring instrument was manufactured. Previously, a measuring instrument was only regarded as being in accordance with an approved pattern if that pattern was currently in force, or was in force when the measuring instrument was first verified.

5. This change recognises that manufacturers of measuring instruments often supply instruments to third parties prior to their verification. For further detail on this issue, refer to the amendments to the offence provisions under items 15-21. It is appropriate that the manufacturer be required to have ensured that the instrument was in accordance with a pattern in force when the instrument was manufactured, not at some later date.

Item 2  Subsection 3(1) (definition of AQS sampling procedures)

6. This item removes a reference to the AQS sampling procedures being prescribed in regulations, and refers instead to procedures determined by the Chief Metrologist under section 19Q (see item 29 for further detail).

Item 3  Subsection 3(1) (definition of AQS test procedures)
7. This item removes a reference to the AQS test procedures being prescribed in regulations, and refers instead to procedures determined by the Chief Metrologist under section 19Q (see item 29 for further detail).

**Items 4 and 5  Subsection 3(1) (definition of certified reference material)**

8. This item inserts a definition of 'Australian certified reference material', and removes the term 'certified reference material'. The latter term is in use in jurisdictions outside Australia as well as being widely used as a generic term in the field of science. This may cause some stakeholder confusion about compliance with obligations under Australian law, particularly when using imported products available in Australia and which are described as certified reference materials in their jurisdiction of origin.

9. The new term 'Australian certified reference material' will replace all former references to certified reference material in the Act and subordinate legislation. The definition will capture all reference material that has been certified in accordance with the regulations. This amendment is also consistent with the use of the term 'Australian legal unit of measurement' in the legislation to clarify the requirements within the jurisdiction of Australia for units of measurement.

**Item 6  Subsection 3(1) (definition of component)**

10. This item repeals the previous definition of 'component' and replaces it with a new definition. Although the wording has been simplified using a more modern drafting style to improve the readability of the provision, the new definition covers all of the components which were covered by the previous definition.

11. The new definition has also been expanded to include a new category of component; a thing designed or intended to convert a physical quantity into another physical quantity. This change reflects the fact that the previous definition did not cover some commonly used measurement modules; for example, load cells, which are transducers used to convert force into electrical signal and are used in weighing instruments.

**Item 7  Subsection 3(1) (paragraph (a) of the definition of measuring instrument)**

12. This item makes a minor change to the definition of the term 'measuring instrument' to remove a redundant reference to physical quantities. The definition predated the insertion of a definition for the term 'measurement' in the Act in 2008. It is now redundant to refer to a measurement of a physical quantity, since this is now covered by the definition of measurement.

13. This change has a minor effect on the definition; specifically, a measuring instrument now expressly includes a thing by means of which a
determination of number, not just physical quantity, may be made, and excludes a thing by means of which a determination of number or physical quantity which is for descriptive purposes only may be made.

**Item 8 Subsection 3(1) (definition of national group test procedures)**

14. This item removes a reference to the national group test procedures being prescribed in regulations, and refers instead to procedures determined by the Chief Metrologist under section 19Q (see item 29 for further detail).

**Item 9 Subsection 3(1) (definition of national instrument test procedures)**

15. This is a consequential amendment to reflect the transfer of responsibility for determining national instrument test procedures under subsection 18GG(2) from the Minister to the Chief Metrologist (see item 29 for further detail).

**Item 10 Subsection 3(1) (definition of national sampling procedures)**

16. This item removes a reference to the national sampling procedures being prescribed in regulations, and refers instead to procedures determined by the Chief Metrologist under section 19Q (see item 29 for further detail).

**Item 11 Subsection 3(1) (definition of national single article test procedures)**

17. This item removes a reference to the national single article test procedures being prescribed in regulations, and refers instead to procedures determined by the Chief Metrologist under section 19Q (see item 29 for further detail).

**Item 12 Subsection 4(1A)**

18. This is a minor technical amendment to subsection 4(1A) that removes a reference to former subsection 4(3) in that subsection.

**Item 13 Section 10**

19. This is a consequential amendment to replace references to 'certified reference material' with 'Australian certified reference material' (see items 4 and 5 for more detail).

**Item 14 Subsection 12A(6)**

20. This item amends the offence provision relating to contracts with respect to interest in land not expressed in Australian legal units of measurement to specify the penalty in penalty units instead of dollars. This is consistent with current penalty provision drafting policy, which specifies punishments in penalty units so that the severity of the punishment can be maintained over time without the need for legislative amendment of the offence provision.

**Items 15 and 16 Paragraphs 18GB(1)(c) and 18GB(2)(c)**
21. These items amend the offence provisions associated with the installation of unverified measuring instruments to instead penalise the installation of measuring instruments which are not of an approved pattern.

22. The offence provisions in their previous form contemplated the installer also being responsible for the instrument being verified (that is, tested to determine that the instrument works correctly). In practice, many measuring instruments in use for trade may be supplied, installed and verified by different people at different times. In particular, it is often inappropriate to verify a measuring instrument until it is installed in the location where it will be used and connected to the power, display and storage facility for the commodity that it will be used to measure (for example, a petrol pump in a service station). Additionally, a person who is not a verifier could be contracted to install an instrument prior to its verification.

23. Measuring instruments may therefore pass through several hands before their final installation, verification and use for trade. Industry have expressed concern that the strict liability offence in particular could lead to an installer of measuring instruments being liable where the instruments are sold to an intermediary or third party before their final installation and use for trade, and verification was not the installer’s function.

24. The amendments will ensure that the offences only apply to an installer who installs an instrument not of an approved pattern.

**Items 17 and 18  Paragraphs 18GC(1)(c) and 18GC(2)(c)**

25. These items amend the offence provisions associated with the supply of unverified measuring instruments to instead penalise the supply of measuring instruments which are not of an approved pattern.

26. As discussed under items 15 and 16, this change reflects industry practice whereby a manufacturer may sell a measuring instrument for trade without having it verified (because it may be more appropriate to verify it after installation due to site variations). The amendments will ensure that the offence provisions only apply to a supplier who supplies an instrument not of an approved pattern.

27. However, where the supply is by way of loan or letting for hire, the original offence will still apply to unverified supplies (see item 19).

**Item 19  Section 18GCA**

28. This item inserts a new section 18GCA, which preserves the previous offence that applied to the loan or letting of unverified measuring instruments for trade.
29. Items 17 and 18 amend section 18GC to ensure that manufacturers supplying instruments are only penalised if they supply an instrument not of an approved pattern. This was in recognition that in some circumstances, manufacturers supply instruments to third parties or intermediaries, and verification occurs after installation. The original supplier should not be held accountable for the user ultimately failing to have that instrument verified.

30. However, section 18GC also applied to situations where the supply was by way of loan or letting for hire. In those circumstances, the verification is the responsibility of the person loaning or letting the instrument, because it is an offence to use an instrument for trade unless it is verified (section 18GA). It is therefore necessary to insert a new provision which preserves the original offence as it relates to the supply by way of let for hire or loan. The new provision does not make any new behaviour subject to an offence.

**Items 20 and 21  Paragraphs 18GE(5)(a) and 18GE(6)(a)**

31. These items amend the offence provisions associated with the supply of measuring instruments which give inaccurate measurements so that they apply only where the supply is by way of loan or let for hire.

32. As discussed under items 15 and 16, this change reflects industry practice whereby a manufacturer may sell a measuring instrument for trade without having it verified. Inaccurate measurements are detected at the verification stage and may be caused by site variation factors. It is therefore inappropriate that the offence apply to the supplier where it is the user who will be responsible for verification.

33. It is considered appropriate that the offence continue to apply in loan/letting situations, however, since in those circumstances, the verification is the responsibility of the person loaning or letting the instrument (because it is an offence to use an instrument for trade if it has not been verified; see section 18GA).

**Item 22  Subsection 18GG(2)**

34. This item amends subsection 18GG(2) so that the responsibility for determining the national instrument test procedures lies with the Chief Metrologist.

35. The government has further considered the types of national instrument test procedures that will be required, and concluded that it is likely that there will be numerous national instrument test procedures which will need to be determined on a regular basis to cover an increasing range of measuring instruments. These documents will be routine technical documents reflecting current scientific practice and they will be used to ensure uniformity in the testing of instruments in the field throughout Australia.
36. Under the present arrangement, such determinations need to be made by the Minister by legislative instrument. Given the routine and technical nature of the documents, this would be unnecessarily administratively onerous. It is more appropriate that the Chief Metrologist undertake this role, due to his expertise.

37. The provision specifies that the national instrument test procedures will not be legislative instruments. This is for information only, to assist readers (the national instrument test procedures do not meet the definition of 'legislative instrument' in section 5 of the Legislative Instruments Act 2003; they are administrative, rather than legislative, in nature, since they will not have a direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right. They are also of a category of instrument expressly excluded as legislative instruments, being an instrument the effect of which is to approve a manner of doing an act (verification testing)).

**Item 23  Subsection 18MA(2)**

38. This item expands the capacity of the Secretary to appoint a person as a trade measurement inspector. Specifically, it allows the prescribed criteria to include not just formal qualifications, but also knowledge or experience. This is in recognition that formal qualifications may not be the only appropriate way of prescribing suitable persons to be trade measurement inspectors.

**Item 24  Section 18RA(2A)**

39. This item inserts a new express requirement in relation to the appointment of utility meter verifiers. New subsection 18RA(2A) will require that the Secretary be satisfied that a utility meter verifier, or an employee of the verifier, is competent to test a particular class of utility meter before specifying that class as a class that the utility meter verifier may verify under subsection 18RA(2). For example, the person may be accredited by the National Association of Testing Authorities (NATA) (see item 26 and new section 18RCA), or may otherwise satisfy the Secretary that he or she is competent.

40. This amendment reflects the practical reality that in the near future, the national legal metrology control regime for utility meters will be greatly expanded to include electricity meters and there will be a need to appoint many more utility meter verifiers. Not all potential appointees have the appropriate NATA accreditation, and many are unlikely to be able to acquire it within an appropriate time. The new arrangements will permit the Secretary more flexibility in the appointment of utility meter verifiers by allowing the Secretary to be otherwise satisfied of a person’s competence. This is in line with the flexibility afforded to the Chief Metrologist in the appointment of legal metrology authorities under regulation 73(1) of the National Measurement Regulations 1999.
41. Consistently with item 24, this item removes the condition that a person must be accredited by NATA in order to be appointed as a utility meter verifier, and replaces it with a more general requirement that the verifier must, if personally verifying a utility meter, be competent to test that class of utility meter. The verifier also must not employ a person to verify a utility meter unless that person is competent to test that class of utility meter.

42. As discussed under item 24, accreditation by NATA will automatically mean that a person is taken to be competent (see item 26 and new section 18RCA), but it will no longer be necessary.

**Item 26 Section 18RCA**

43. This item provides for a person to be taken to be competent to test a class of utility meter if they are accredited by NATA. That is, without limiting the criteria that the Secretary may use to be satisfied of a person's competence, NATA accreditation to test a class of utility meter automatically means that a person will be competent to test that class of utility meter.

**Item 27 Paragraph 19B(a)**

44. This item corrects a limiting reference in paragraph 19B(a).

45. Under paragraph 19A(1)(b) of the Act, the regulations may make provision in relation to the approval and verification of patterns of measuring instruments as patterns of measuring instruments suitable for use for trade or any other legal purpose. Currently, the offence provision prohibits a person from falsely representing that a pattern is in accordance with a pattern approved under the regulations as suitable for use for trade. For consistency with paragraph 19A(1)(b), the offence should apply to false representations that a pattern is in accordance with a pattern approved under the regulations, regardless of whether it is approved under the regulations for use for trade or for some other legal purpose.

46. Accordingly, this item removes the words 'as a pattern of a measuring instrument suitable for use for trade' so that the offence applies to any false representation that a pattern is in accordance with a pattern approved under the regulations.

**Item 28 Section 19B (penalty)**

47. This item amends the offence provision for false representations about patterns and measuring instruments to specify the penalty in penalty units instead of dollars. This is consistent with current penalty provision drafting policy, which specifies punishments in penalty units so that the severity of the punishment can be maintained over time without the need for legislative amendment of the offence provision.
**Item 29 Section 19Q**

48. This item replaces a number of regulation-making provisions (see item 32) with a provision permitting the Chief Metrologist to make written determinations on those matters.

49. Originally, it was contemplated that the regulations would contain AQS sampling and test procedures and national group test, sampling and single article test procedures. However, on further consideration, due to the technical nature of these documents and the frequency with which they will be updated over time, it is considered more appropriate and administratively efficient for the Chief Metrologist to make written determinations in relation to these procedures.

50. These determinations will not be legislative instruments because they do not meet the definition of legislative instrument in section 5 of the *Legislative Instruments Act 2003* (being administrative, rather than legislative, in nature, since they will not have a direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right, and also being expressly excluded by being an instrument the effect of which is to approve a manner of doing an act). New section 19Q will state that these determinations are not legislative instruments, but this is merely to assist readers.

**Item 30 Paragraph 20(1)(ea)**

51. This item allows regulations to be made that will permit verifying authorities for reference standards of measurement to make single measurements of physical quantities within their scope of appointment as a verifying authority on artefacts other than standards of measurement. It will also allow regulations to be made which permit verifying authorities to issue certificates for these measurement that have the evidential status described in regulation 90 of the *National Measurement Regulations 1999*.

52. This regulation making power reflects a need that has been identified for single measurements of physical quantities on artefacts other than standards of measurement to be made and reported in a form that has evidential status. For example, when a verifying authority is asked to weigh an artefact for which the weight needs to be known for legal purposes such as in accident investigations and other occupational health and safety litigation.

**Item 31 Subparagraph 20(1)(l)(ii)**

53. This item is a minor technical amendment. Following amendments made in 2008 an additional ‘and’ was introduced at the end of paragraph 20(1)(l)(ii). The amendment will remove this word.

**Item 32 Paragraphs 20(1)(r), (s), (u), (v) and (w)**
This item is a consequential amendment, removing the regulation-making powers associated with a number of technical procedural documents which will be the subject of determinations under new section 19Q (see item 29). It is no longer necessary to provide a regulation-making power for these matters.
**Item 33 Application provisions**

55. This item provides for the application of the changes contained in this Bill to instruments, contracts, appointments and other actions.

56. Specifically, this item provides that amendments which could affect a person’s compliance with an obligation under the Act apply only to actions taken on or after the commencement of the relevant items.

57. For example, the changes to the offence provisions relevantly apply to the installation, sale, supply, letting for hire or loaning of measuring instruments on or after the commencement of the relevant items. Actions taken before that date are subject to the existing provisions.

58. Likewise, adjustments to the penalties associated with some actions only apply to actions taken (such as the entry into a contract or the making of a false representation) on or after the date of commencement.