THIRTY-EIGHTH PARLIAMENT

REPORT 55

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

TRADE MEASUREMENT LEGISLATION (AMENDMENT AND EXPIRY) BILL 2010

Presented by Hon Adele Farina MLC (Chairman)

November 2010

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)
Hon Liz Behjat MLC
Hon Nigel Hallett MLC (Deputy Chairman)
Hon Linda Savage MLC

Staff as at the time of this inquiry:

Susan O'Brien, Advisory Officer (Legal)
Mark Warner, Committee Clerk

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au
ISBN 978-1-921634-52-9

CONTENTS

RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

TRADE MEASUREMENT LEGISLATION (AMENDMENT AND EXPIRY) BILL 2010

RECOMMENDATIONS

1 Recommendations are grouped as they appear in the text at the page number indicated:

Page 8

Recommendation 1: The Committee recommends that when tabling the Explanatory Memorandum in respect of a bill to which Standing Order 230A applies, the responsible Minister ensure that that document provides a succinct statement of the rationale for, and practical effect of, the clauses of the Bill.

Page 12

Recommendation 2: The Committee recommends that when introducing a bill to the Legislative Council that proposes a Henry VIII clause, the responsible Minister provide in the Explanatory Memorandum the rationale for that provision.

Page 21

Finding 1: On the information provided to it, the Committee finds that enactment of the Bill is necessary to give certainty to the transfer of regulation of trade measurement to the Commonwealth.

Page 33

Finding 2: The Committee finds that in the particular circumstances applicable to the Bill, no fundamental legal scrutiny principles arise in respect of clauses 4, 6 and 7 of the Bill.

Page 37

Recommendation 3: The Committee recommends that clause 8 of the Bill be amended to reflect the intent that a person:

- **not be charged with an offence pursuant to the transitional provisions unless the relevant act or omission is currently an offence under the Commonwealth legislation; and**
- **in the event a person is so charged, that person be at risk only of the lesser of the penalties imposed under the respective legislation.**

This can be effected in the following manner

Page 6, line 28 - after "person", insert

cannot be

Page 6, lines 29 and 30 - delete

cannot be punished for the offence

Page 42

Recommendation 5: The Committee recommends that, subject to the amendments to clause 8 of the Bill recommended in this report, the Bill be passed by the Legislative Council.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

TRADE MEASUREMENT LEGISLATION (AMENDMENT AND EXPIRY) BILL 2010

---

1 INTRODUCTION

Reference

1.1 The Trade Measurement Legislation (Amendment and Expiry) Bill 2010 (**Bill**) was introduced to the Legislative Council by Hon Norman Moore, Minister for Mines and Petroleum on 14 September 2010.[1] Following its Second Reading, the Bill stood referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) pursuant to Standing Order 230A.

1.2 Standing Order 230A(4) requires the Committee to report not later than 30 days after the day of referral. The report date for the Bill was 14 October 2010.

1.3 However, due to late provision of the supporting documents, the Committee requested, and was granted, an extension of time to report to 11 November 2010.

Overview of the Bill

1.4 The Bill amends the *Trade Measurement Act 2006* and the *Trade Administration Measurement Administration Act 2006* (collectively, the **State Trade Measurement Acts**) to provide that, other than in respect of some transitional matters, those Acts cease to apply from **1 July 2010**. It is, therefore, proposed that the Bill have retrospective effect. (This is discussed in Parts 3, 7 and 8.)

1.5 Prior to 1 July 2010, trade measurement was regulated in Western Australia by the State Trade Measurement Acts as part of a uniform legislative scheme, whereby the various jurisdictions enacted model legislation but Western Australia did so as 'stand alone' legislation.[2] (See Part 5 for a summary of the matters included in "*trade measurement*" and the uniform legislative scheme.) Pursuant to agreements made at the Council of Australian Governments (**COAG**), the Commonwealth passed legislation regulating trade measurement in 2008. The intent was that when the

---

1 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6468.

2 Western Australia, Legislative Council , Standing Committee on Uniform Legislation and Statutes Review, Report 3, *Trade Measurement Bill 2005 and Trade Measurement (Administration) Bill 2005*, 19 October 2005, p2.

Commonwealth regime came into effect, on 1 July 2010, the State legislation would lapse.[3]

1.6 However, the government has been advised by the State Solicitor's Office that enactment of Commonwealth trade measurement legislation has not rendered the State Trading Acts ineffective.[4] In particular, State requirements in respect of re-verification of the accuracy measuring instruments may survive.[5]

1.7 The Bill is, therefore, required to ensure an end to State regulation and give effect to the agreement that there be a single, Commonwealth-based regulatory regime.

1.8 The Bill provides for the following transitional matters:

- issue or withdrawal of infringement notices in respect of matters occurring prior to transition day (that is, 1 July 2010);
- disciplinary action to be taken against licensees who have been issued with a written notice before transition day;
- investigation and prosecution of offences occurring before transition day;
- preservation of the right to review decisions [by SAT] made under State legislation (limited to decisions of the Commissioner[6] made under section 81 of the *Trade Measurement Act 2006*);
- recover fees and charges payable (proposed section 39(e) - clause 8 of the Bill - becoming payable or in respect of which an invoice was issued prior to transition day); and
- the Commonwealth to access information held by the State in relation to trade measurement regulation.

1.9 In respect of the transitional matters, the State Trade Measurement Acts will expire on or before 1 July 2013.

---

3 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p2.

4 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

5 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p2.

6 Being the person designated as Commissioner under Section6(2) of the Trade Measurement Administration Act 2006

2 INQUIRY PROCEDURE

2.1 The Committee did not seek submissions in respect of the Bill. However, the Committee's inquiry was published on its website.

2.2 Not having received the supporting information in respect of the Bill on tabling, the Committee wrote to the Minister for Commerce on 17 September 2010 requesting provision of those documents.

2.3 The Minister for Commerce provided the Committee with the information required by Ministerial Office Memorandum 2007/01 and supporting documents in respect of the Bill on 29 September 2010 - some 15 days into the Committee's 30-day inquiry period.

Supporting Documents

Provided by the government

2.4 The Minister for Commerce provided the following supporting documents:

- COAG Communiqué in respect of its meeting of 10 February 2006;
- Ministerial Council on Consumer Affairs (**MCCA**) Communiqué in respect of its meeting of 15 September 2006;
- COAG Communiqué in respect of its meeting of 13 April 2007; and
- Second Reading Speech to the National Measurement Amendment Bill 2008 (**Commonwealth Trade Measurement Act**).

Identified by the Committee

2.5 The Minister for Commerce advised the Committee:

> *There is no relevant intergovernmental agreement or memorandum of understanding,*[7]

in respect of the Bill. Even if it is taken to being confined to formal, written intergovernmental agreements, this advice is not correct. (The contradictory statements in the Minister's letter as to the existence of an intergovernmental agreement are discussed below.)

2.6 Prior to receipt of the Minister for Commerce's correspondence, the Committee had identified the following, relevant formal written intergovernmental agreements:

---

[7] Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p2.

- National Partnership Agreement to Deliver a National Seamless Economy, December 2008 (**National Seamless Economy IGA**); and

- Intergovernmental Agreement on Federal Financial Relations.

2.7 The Committee had also identified the following, additional supporting document:

- COAG Communiqué in respect of its meeting of 26 March 2008,

as well as the following documents throwing light on the development of the agreement for Commonwealth regulation of trade measurement:

- Intergovernmental Agreement in relation to the Adoption of Uniform Trade Measurement Legislation and Administration (**1990 IGA**);

- Productivity Commission of Australia, Inquiry Report 33, *Review of National Competition Policy Reforms*, 28 February 2005;

- National Competition Council, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, October 2005;

- COAG, *Background Paper: COAG National Competition Policy Review*, February 2006 (**COAG NCP Review**);

- Ministerial Council for Consumer Affairs, *Review of National Trade Measurement System*, Discussion Paper, June 2006; and

- COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008-9*, December 2009.

Hearing

2.8 The Committee held a hearing on 13 October 2010, which was attended by:

- Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce; and

- Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce.

2.9 Mr Newcombe and Mr Milford took two questions on notice. Additional information was provided by the Department of Commerce on 18 October and 25 October 2010.

2.10 The Committee thanks the witnesses for their assistance in its inquiry.

3 INQUIRY IMPEDED BY LATE PROVISION OF SUPPORTING DOCUMENTS AND INSUFFICIENT INFORMATION IN EXPLANATORY MATERIALS

Late Provision of Supporting Documents

3.1 Ministerial Office Memorandum 2007/01 (**MOM 2007/01**) requires Ministers presenting bills to which Standing Order 230A will apply on presentation to the Legislative Council to consider providing the Committee with supporting documents on introduction of the bill to either House of Parliament. The Bill was introduced to the Legislative Assembly on 16 June 2010. Supporting documents were not provided to the Committee until 29 September 2010.

3.2 In the interim, the Bill was referred to the Committee on 14 September 2010. In its letter to the Minister for Commerce, the Committee required provision of supporting documents, and the additional information required by MOM 2007/01, by 10 am on 22 September 2010. This did not occur.

Failure of the Executive to identify the Bill as uniform legislation

3.3 The Committee notes that the Department of the Legislative Council drew the government's attention to the application of SO230A to the Bill on 16 June 2010.[8] One purpose of this advice is to ensure early provision of information to the Committee in respect of SO230A bills that may have been overlooked by the government.

3.4 Another purpose of the advice is to allow the government to provide additional information that may cast doubt on the application of SO230A. The Department of the Legislative Council has confirmed to the Committee that the application of SO230A to the Bill was not queried by the government prior to referral.

3.5 In a letter to the Committee, the Minister for Commerce suggests that the Bill arises from a unilateral decision of the Commonwealth to which the State is responding. The Minister states:

> *I would like to note from the outset that this Bill does not, of itself, introduce a uniform legislative scheme. The Bill is a necessary consequence of the Commonwealth government introducing legislation to regulate trade measurement throughout Australia in accordance with its existing legislative authority under section 51(xv) of the Australian Constitution.*

---

8 In accordance with the procedure instituted in the 36th Parliament, the Bill was identified as uniform legislation by Legislative Council staff on introduction to the Legislative Assembly on 16 June 2010. The Department of the Legislative Council sent its standard email advice to the office of the Leader of the House identifying the Bill as one to which SO230A applied on 16 June 2010. The Department of the Legislative Council sent a further email alert on receipt of the Legislative Assembly message in respect of the Bill on 13 September 2010.

…

> *The government has acknowledged the Commonwealth's constitutional authority in the area of trade measurement (weights and measures.)*[9]

and, as noted above:

> *There is no relevant intergovernmental agreement or memorandum of understanding.*[10]

3.6 Later in the letter, the Minister for Commerce acknowledges:

> *The former Carpenter Government agreed though the Council of Australian Governments (COAG) and the Ministerial Council on Consumer Affairs (MCCA) to the establishment of a single, national regulatory regime for trade measurement,*[11]

which agreement, the Committee notes, is being implemented by the current government.

3.7 The Minister also advised that:

> *continued State regulation would be in breach of the COAG and MCCA agreements and expose the State to a financial penalty under COAG's National Partnership Payments.*[12]

3.8 The Committee observes that it is not possible for a State bill to "*of itself*" introduce a uniform legislative scheme. That the Minister's letter, in paragraph (a) at page 2 advises that there is no intergovernmental agreement but in paragraph (d) at page 2 and paragraph (g)(iv) at page 3, identifies two such agreements is concerning.

3.9 In contrast, the Second Reading Speech states that:

- the bill is part of the national reform agenda to establish a seamless national economy to boost productivity and deliver better services to the community; and

- in 2007 the Council of Australian Governments agreed to establish a national system of trade measurement to be regulated, funded and administered by the Commonwealth.[13]

---

9 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, pp1 and 2.

10 Ibid, p2.

11 Ibid, p2.

3.10 The Department of Commerce also advised:

> *The intention was - I think we provided you with a copy of the second reading speech for the commonwealth legislation and some other background information - that the commonwealth would take over regulation of trade measurement entirely. It was intended to replace a range of state schemes with one uniform scheme, one uniform administration,*

and that the Bill was seen as necessary to achieve that intent in the circumstance that there was scope for the State Trade Measurement Acts to, in part at least, continue to operate.[14]

3.11 As the background to the Bill set out in Part 5 clearly establishes, the Bill arises from an agreement between the Australian jurisdictions as to the best way to address problems arising from individual trade measurement legislation, not from a unilateral decision of the Commonwealth.

3.12 While from time to time the application of SO230A to particular bills may be debatable (and is, prior to referral, debated), the Bill is not such a bill. It clearly constitutes one of the long recognised structures of legislation to which that standing order applies. (See Part 4 and **Appendix 1**)

3.13 In light of the advance notice given by the Department of the Legislative Council as to the application of SO230A to the Bill, the Committee has some difficulty in understanding the delay in provision of supporting information and documents to the Committee.

3.14 The Committee intends to write to the Premier, requesting re-issue of Ministerial Office Memorandum 2007/01. It has also requested issue of a Premier's Circular, providing directions to the public sector in respect of provision of information to the Committee.

Deficient Explanatory Memorandum

3.15 The 'Explanatory' Memorandum paraphrases the Bill rather than 'explains' it. This problem is ongoing. It continues despite the Committee having drawn attention to the deficiencies of Explanatory Memoranda in recent reports.[15]

---

12 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p3.

13 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

14 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p2.

3.16 An 'explanation' addresses the rationale for, and practical effect of, the terms of a bill. Amongst other things, an explanation deals with impacts that are not apparent from the terms of a clause of the Bill itself.

3.17 A statement, for example, that:

> *Section 42 provides for the Commissioner for Consumer Protection to release a copy of the registers kept under the TM Act and TMA Act and any other information relating to the administration and enforcement of either Act to the NMI,*[16]

adds nothing to the terms of proposed section 42 and is, in fact, merely repetitive of section 42(1)(c). It does not explain the rationale for provision of this information to the NMI. That is, why provision of that information is necessary or desirable for the "*administration or enforcement*" of the *National Measurement Act 1960.*

3.18 The Committee and its predecessors have from time to time expressed views and made recommendations as to the types of clauses that require particular explanation in an Explanatory Memorandum. Examples of such clauses are 'Henry VIII' clauses and proposals that clauses of a bill have retrospective effect.

3.19 The Committee has a limited timeframe for its inquiries. Deficient Explanatory Memoranda result in the Committee directing time and resources to gathering preliminary information, rather than focussing on any issues arising when that preliminary information is considered.

Recommendation 1: The Committee recommends that when tabling the Explanatory Memorandum in respect of a bill to which Standing Order 230A applies, the responsible Minister ensure that that document provides a succinct statement of the rationale for, and practical effect of, the clauses of the Bill.

Insufficient information in respect of national scheme

3.20 As the Committee observed in it's Report 52 - *Health Professional Regulation National Law Bill 2010*:

---

15 See for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 53, *Pharmacy Bill 2010*, 26 June 2010, pp18, 20, 21, 23 and 24; and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 42, *Professional Standards Amendment Bill 2009*, 19 November 2009, pp27, 29 and 30 .

16 Explanatory Memorandum to the Trade Measurement (Amendment and Expiry) Bill 2010, p4.

> *State Ministers and departments need to justify to the Committee and ultimately Parliament why such a national scheme is necessary and why it is in the best interests of the Western Australian public to enact the legislation implementing or giving effect to the national scheme.*[17]

3.21 Although the Second Reading Speech provides some information on:

- the importance of trade measurement regulation;
- the current regime under the State Trade Measurement Acts;
- difficulties experienced in implementing a state-based national scheme; and
- advice as to intended outcome (reduction of compliance costs and provision of efficiency gains),[18]

no information is provided as to:

- the Commonwealth trade measurement regime; or
- the mechanisms for achieving the intended outcome.

3.22 Nor is any comparison made between the Commonwealth and State regimes. Amongst other things, lack of information on this point impeded the Committee's consideration of the necessity for, and effectiveness of, the transitional provisions.

3.23 Some additional information was provided by the Minister for Commerce on 29 September 2010. The Committee was, nonetheless, required to seek an extension of time to report in order that it could gather information by way of a hearing.

Failure to address retrospective effect and Henry VIII clauses

3.24 Particularly concerning to the Committee is the failure of the Explanatory Memorandum (or Second Reading Speech) to address the proposed retrospective effect of the Bill or justify the Henry VIII clauses in the transitional regulation-making power. (The particular clauses are discussed in Parts 7 and 8.)

---

17 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 52, *Health Professional Regulation National Law Bill 2010*, 22 June 2010, p4.

18 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, pp6468-9.

3.25 A Henry VIII clause is:

> *a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.*[19]

3.26 In summary:

> *It is the power of the Executive by means of subordinate legislation to override the intention of Parliament as expressed in an Act that causes consternation over "Henry VIII clauses". These clauses are sometimes regarded as having insufficient regard for the doctrine of separation of powers and ultimately, for the institution of Parliament.*[20]

3.27 The Second Reading Speech explains why the Bill was not introduced prior to 30 June 2010.[21] It does not, however, advise the circumstances that render it necessary for the Bill to have retrospective effect or advise whether the proposed retrospectivity will have an adverse consequence on the rights, obligations or liberties of persons. Lack of information as to the differences between the State and Commonwealth regimes left these questions open.

3.28 The Department of Commerce is of the view that transitional provisions conferring Henry VIII powers and power to make regulations with retrospective effect are not unusual and, therefore, do not require explanation in the Explanatory Memorandum:

> *We have a list of legislation that this provision is in that have gone through Parliament and that have not been the subject of amendment or rejection. So from our point of view in drafting, it is an appropriate provision to include. … If it were an unusual provision, we would have included more in the explanatory memorandum about it, but it is not, and the explanatory memorandum is pretty consistent with the others that have gone through with the legislation.*[22]

3.29 As Professor Dennis Pearce observed, in the first edition of his authoritative text, *Delegated Legislation in Australia and New Zealand*:

---

19 Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The Use of "Henry VIII" clauses in Queensland legislation*, January 1997, p24.

20 Ibid, p7.

21 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

22 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p11.

> *If "Henry VIII" clauses are allowed to pass by default, the parliamentary institution is placed in jeopardy.*[23]

3.30 In its Report 1 - *Planning Appeals Amendment Bill 2001*, the former Standing Committee on Public Administration and Finance annexed advice provided to the Joint Standing Committee on Delegated Legislation, stating the position of that committee on use of Henry VIII clauses:

> *The Committee is of the view that Henry VIII clauses should not be used as "insurance" against unforseen consequences or as a substitute for careful drafting or for mere administrative convenience. As the Queensland Scrutiny of Legislation Committee commented in its 1997 report on Henry VIII clauses:*
>
> > *'Henry VIII' clauses should not be inserted into hastily drafted legislation to be introduced in a restrictive timetable as a substitute for careful well developed drafting,*

and recommended deletion of Henry VIII subclauses in the transitional provisions of the Planning Appeals Amendment Bill 2001.[24]

3.31 The Standing Committee on Public Administration and Finance observed:

> *The House has the opportunity to treat the issue raised by clause 20 as one of legislative principle requiring proper consideration in which case, the joint recommendation of the committees to delete subclauses (3), (4) would be appropriate. Alternatively, it can decide whether to retain clause 20, either in its current form or as amended in the form suggested by the Minister, on the basis of reasonableness in context of what it permits in order to ensure an orderly transition between the existing scheme and its successor.*[25]

3.32 In its Report 3 - *Trade Measurement Bill 2005 and Trade Measurement (Administration) Bill 2005*, the Committee (as differently constituted) sought and reported on the reasons for the proposal of transitional provisions similar to those

---

[23] 1977, at paragraph 15. (Quoted in Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 1, *Planning Appeals Amendment Bill 2001*, 27 March 2002, Appendix 4, p51.)

[24] Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 1, *Planning Appeals Amendment Bill 2001*, 27 March 2002, p51. (Quotation from: Queensland, Legislative Assembly, Scrutiny of Legislation Committee, *The use of "Henry VIII Clauses" in Queensland Legislation*; January 1997, p50.)

[25] Ibid, p20.

proposed by the Bill and the factors that led the Committee to consider the retrospective and Henry VIII provisions appropriate to those bills.[26]

3.33 Consistent with other Legislative Council committees, the general approach of the Committee is that, as they are not enacted by the Parliament without good reason, Henry VIII clauses should be explained and justified in the explanatory materials. This enables the Legislative Council to weigh the desirability of such a clause in the particular circumstances against its impact on the institution of Parliament.

Recommendation 2: The Committee recommends that when introducing a bill to the Legislative Council that proposes a Henry VIII clause, the responsible Minister provide in the Explanatory Memorandum the rationale for that provision.

3.34 In its Report 47 - *Petroleum and Energy Legislation Amendment Bill 2009*, the Committee's Recommendation 5 was:

> *when introducing a bill to the Legislative Council that proposes amendments with retrospective effect, the Executive provide an explanation for the proposal that those amendments have retrospective effect and advice as to whether the those amendments will adversely affect rights and liberties, or impose obligations, retrospectively.*[27]

3.35 This recommendation was supported by both the government and opposition in the House.[28]

3.36 The Committee notes that the Explanatory Memorandum in respect of the Bill does not reflect the requirements of the Legislative Council.

3.37 The Committee sought explanations for the Henry VIII clauses and retrospective provisions of the Bill at the hearing of 13 October 2010. These are reported below in respect of the particular clauses.

---

26 Western Australia, Legislative Council , Standing Committee on Uniform Legislation and Statutes Review, Report 3, *Trade Measurement Bill 2005 and Trade Measurement (Administration) Bill 2005*, 19 October 2005, pp5-7 and pp10-12.

27 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 47, *Petroleum and Energy Legislation Amendment Bill 2009*, 22 April 2010, p27.

28 Hon Norman Moore MLC, Minister for Mines and Petroleum, and Hon John Ford MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 May 2010, respectively p3415 and p3413.

4 UNIFORM LEGISLATION

4.1 The establishment of a committee to scrutinise uniform legislation arose from the concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, seeks to bind a State Parliament to enact legislation giving effect to national uniform schemes or intergovernmental agreements.

4.2 Due to the limited information available to the Parliament in respect of negotiations for a uniform scheme, the purpose of the Committee is not only to identify any provisions of uniform legislation that detract from the powers and privileges of the Parliament but (to the extent necessary and possible within the limited time available for its inquiry) provide the Parliament with the rationale for, and practical effect of, the uniform legislation.

4.3 National legislative schemes implementing uniform legislation take a variety of forms. Nine different structures, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The structures are summarised in **Appendix 1**. The Bill resembles Structure 1.

4.4 When examining uniform legislation, the Committee considers what are known as 'fundamental legislative scrutiny principles'. The Committee applies the principles as a convenient framework for the scrutiny of uniform legislation.[29] These principles are set out in **Appendix 2**.

5 BACKGROUND TO THE BILL

Trade Measurement

5.1 Trade measurement legislation requires that all goods sold by measurement, weight, length, volume, area or count are accurately measured and labelled and the correct price is calculated. Its purpose is to ensure that businesses and consumers receive what they pay for and are not sold a short measure when they purchase goods.[30]

International trade measurement system

5.2 The *Metre Convention 1875* establishes the General Conference of Weights and Measures which, in 1960, agreed an International System of Units (**SI Units**) in

---

29 Further information on fundamental legislative principles can be found in a report by the predecessor Committee, the Standing Committee on Uniform Legislation and General Purposes. Refer to Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp4-9.

30 Western Australia, Legislative Council , Standing Committee on Uniform Legislation and Statutes Review, Report 3, *Trade Measurement Bill 2005 and Trade Measurement (Administration) Bill 2005*, 19 October 2005, p3. (Referring to Hon Kim Chance, Minister for Agriculture; Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 1 September 2005, p4933.)

respect of weights and measurements. Australia became a signatory to the *Metre Convention 1875* in 1947. The SI Units underpins Australian regulation of trade measurement.

5.3 The COAG Reform Council[31] states:

> *The trade measurement system is aimed at ensuring that trade in goods sold by measurement is accurate, consistent and conforms to the International System of Units. Transactions involving measurement impact all Australians and cover the broad spectrum of the economy, from the sale of consumer goods such as milk and bread to multi-million dollar exchanges of minerals and agricultural produce. An effective system of trade measurement engenders confidence in the measurements used in transactions and assists in maintaining Australia's competitiveness in global markets (National Measurement Institute, 2008d).*
>
> *The National Measurement Institute[11] (2008c, p. 5) estimates that greater than $400 billion of trade occurs annually in Australia that is based on some form of measurement.*[32]

Subject matter of Australian trade measurement legislation

5.4 The Australian trade measurement system covers:

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

---

31 The COAG Reform Council was established by the Council of Australian Governments as part of the arrangements for federal financial relations. It monitors, assesses and reports on the various jurisdictions compliance with specific intergovernmental agreements. It is independent of individual governments and reports directly to the Council of Australian Governments. (COAG Reform Council website, http://www.coagreformcouncil.gov.au.about.cfm, viewed 21 October 2010.)

32 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008-9*, 23 December 2009, p77.

- *inspection of trade measuring instruments and pre-packages, and*

- *penalties for breaches of the law.*[33]

Constitutional Context

5.5 The Commonwealth has constitutional power to legislate in relation to 'weights and measures' (section 51(xv) of the *Commonwealth of Australia Constitution Act*). As a result of Australia becoming a signatory to the *Metre Convention 1875*, the Commonwealth may also have power to legislate in the area under its external affairs power (section 51(xxix) of the *Commonwealth of Australia Constitution Act*).

5.6 However, prior to 2008, the Commonwealth chose not to enact comprehensive trade measurement legislation. The Commonwealth's role was limited to governing utility metering under the *National Measurement Act 1960*.[34]

5.7 Until 2010, responsibility for trade measurement regulation remained largely with the States and Territories.

Evolution of Uniform Legislative Scheme - 1990 IGA, NCP, COAG National Reform Agenda, 2007 COAG IGA and National Seamless Economy IGA

1990 IGA - WA chooses not to participate

5.8 In 1983, the Scott review first recommended a national approach to administration of trade measurement.[35] As a result of this recommendation uniform legislation was drafted and in 1990, all jurisdictions, other than Western Australia, agreed to adopt uniform trade measurement legislation, entering into the Intergovernmental Agreement in relation to the Adoption of Uniform Trade Measurement Legislation and Administration, 1990 (**1990 IGA**).

5.9 Model legislation was enacted by participating states between 1990 (Queensland) and 2000 (Tasmania).

---

33 Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Bills Digest No 50: 2008-09, *National Measurement Amendment Bill 2008*, 27 October 2008, p3.

34 COAG, *Background Paper: COAG National Competition Policy Review*, February 2006, p40.

35 Hon Dr C Emerson, Minister for Small Business, Independent Contractors and the Service Economy and Minister Assisting the Finance Minister on Deregulation MP, Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 24 September 2008, p8369.

WA joins uniform scheme, but not 1990 IGA

5.10 In 2005, Western Australia opted to participate in the uniform legislative scheme by enacting the State Trade Measurement Acts.[36] Participation was explained as giving:

> *greater certainty for international, national and domestic suppliers, retailers and consumers because the regime brings Western Australia into line with other jurisdictions.*[37]

5.11 Western Australia did not, however, become a party to the 1990 IGA. It appears that when Western Australia decided to join the uniform scheme, the need to reconsider the 1990 IGA had become apparent.

Uniform trade measurement regime not achieved

5.12 The adoption of uniform legislation was intended to provide "*a high level of consistency*" of regulation between the jurisdictions participating in the 1990 IGA.[38] The 1990 IGA provided a framework for amendments to be proposed, through the **MCCA**, and for each participating jurisdiction to implement those amendments.

5.13 However, in practice the requirement for all signatory jurisdictions to agree a change became cumbersome. Agreed amendments were introduced at different times, leading to an inconsistent pattern of regulation.[39] The interpretation of regulations varied between the jurisdictions and there were different approaches to administration.[40]

Reviews of trade measurement regulation

5.14 Trade measurement legislation was identified by the National Competition Council as an area for priority legislative review under the National Competition Policy intergovernmental agreements (**NCP**).[41] Pursuant to the NCP, the jurisdictions

---

36 National Competition Council, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, October 2005, p19.16.

37 Western Australia, Legislative Council , Standing Committee on Uniform Legislation and Statutes Review, Report 3, *Trade Measurement Bill 2005 and Trade Measurement (Administration) Bill 2005*, 19 October 2005, p4.

38 Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Bills Digest No 50: 2008-09, *National Measurement Amendment Bill 2008*, 27 October 2008, p4.

39 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

40 Hon Dr C Emerson, Minister for Small Business, Independent Contractors and the Service Economy and Minister Assisting the Finance Minister on Deregulation MP, Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 24 September 2008, p8369.

41 Productivity Commission of Australia, Inquiry Report 33, *Review of National Competition Policy Reforms*, 28 February 2005, p18. The National Competition Policy intergovernmental agreements are described in Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 53, *Pharmacy Bill 2010*, 26 June 2010 at p6ff.

participating in the 1990 IGA undertook a joint review of trade measurement legislation largely, though not finally, completed by 2005.[42]

5.15 The MCCA also undertook a national review of trade measurement commencing 2004.[43]

5.16 In the midst of these incomplete NCP reviews, the Productivity Commission was undertaking a general review of the NCP itself.[44]

5.17 On 3 June 2005, COAG decided to review the NCP.[45] The COAG NCP Review commented on productivity issues arising from the inconsistent trade measurement regulation in different jurisdictions.[46]

COAG National Reform Agenda, 2007 COAG IGA and National Seamless Economy IGA

5.18 At its meeting in February 2006, COAG endorsed a new competition policy reform agenda, called the National Reform Agenda.[47] Identifying trade measurement as one of six regulatory 'hot-spots' (where overlapping and inconsistent regulatory regimes impeded economic activity),[48] COAG requested the MCCA to develop a timeline for introduction of a national trade measurement system.[49]

5.19 The MCCA reported in August 2006, recommending that the State-based regime be replaced with a Commonwealth-based regime.

5.20 On 13 April 2007, COAG agreed to:

> *establishment of a national system of trade measurement funded and administered by the Commonwealth at an estimated cost of around $29 million over four years.*[50] (**2007 COAG IGA**)

---

42 National Competition Council, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, October 2005, p19.16.

43 Ministerial Council for Consumer Affairs, *Review of National Trade Measurement System*, Discussion Paper, June 2006, p1.

44 Productivity Commission of Australia, Inquiry Report 33, *Review of National Competition Policy Reforms*, 28 February 2005.

45 Council of Australian Governments, Communiqué in respect of meeting of 3 June 2005, p5.

46 Council of Australian Governments, *Background Paper: COAG National Competition Policy Review*, February 2006, pp40-41.

47 Council of Australian Governments Communiqué in respect of meeting of 10 February 2006, p9.

48 Ibid, p9.

49 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008-9*, 23 December 2009, p78.

50 Council of Australian Governments, Communiqué in respect of meeting of 13 April 2007, p2.

5.21 A transition period of three years was agreed, with the Commonwealth administration to commence on 1 July 2010.[51]

5.22 The 2007 COAG IGA was not subject to a formal, written intergovernmental agreement. However, the MCCA communiqué reports the 2007 COAG IGA in the terms noted.[52]

5.23 The 2007 COAG IGA is confirmed in formalisation of the National Reform Agenda. In March 2008, COAG identified trade measurement as one of the 27 areas for priority deregulation;[53] and the National Seamless Economy IGA provides that the Commonwealth is to be responsible for trade measurement.[54]

Implementation

National Seamless Economy Implementation Plan

5.24 The National Seamless Economy Implementation Plan (Attachment A to the National Seamless Economy IGA) calls for:

- regulations in respect of trade measurement to be agreed by the jurisdictions by August 2009;
- complete transfer of State and Territory staff and resources to the Commonwealth by 30 June 2010; and
- all jurisdictions to complete transitional arrangements to enable the Commonwealth scheme to become operational by 30 June 2010. [55]

5.25 The National Seamless Economy IGA provides (in conjunction with the Intergovernmental Agreement on Federal Financial Relations 2008) for the States to receive payments from the Commonwealth on achievement of key deregulation milestones set out in the National Seamless Economy Implementation Plan. Failure to implement milestones in respect of trade measurement can result in payments being forfeited.[56]

---

51 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

52 Ministerial Council on Consumer Affairs, Communiqué of meeting 17 May 2007, p2.

53 Council of Australian Governments Communiqué of meeting of 26 March 2008, p17.

54 National Partnership Agreement to Deliver a National Seamless Economy, December 2008, p5.

55 Ibid, Attachment A, pp4-5.

56 Clauses 32 and 34 of the National Partnership Agreement to Deliver a National Seamless Economy, December 2008. (*"The National Partnership provides for an up-front facilitation payment to the States and Territories of $100 million and reward payments totalling $450 million over 2011–12 and 2012–13":* COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008-9*, 23 December 2009, p3.)

5.26 The Commonwealth introduced the Commonwealth Trade Measurement Act in September 2008, amending the *National Measurement Act 1960* to include regulation of trade measurement. The Commonwealth Trade Measurement Act commenced on 1 July 2009, with the Commonwealth takeover regime becoming operative on 1 July 2010.

Presentation of the Bill appears Inconsistent with Uniform Scheme

5.27 The Bill was not introduced to the Parliament until 14 September 2010. The State has not, therefore, completed transitional arrangements in respect of the uniform scheme by 30 June 2010.

5.28 Late presentation of the Bill is explained on the basis that it was understood that Commonwealth legislation would be drafted so as to effectively render the State Trade Measurement Acts inoperative and that it was not until March 2010 that it was appreciated that this had not occurred.[57]

5.29 The Minister for Commerce advised that:

> *continued State regulation would be in breach of the COAG and MCCA agreements and expose the State to a financial penalty under COAG's National Partnership Payments.*[58]

5.30 The Department of Commerce, however, is of the view that, as administrative transition was effected by 30 June 2010, late introduction of the legislative transition and appeal provisions will not have any consequences of the State's receipt of funding under the National Seamless Economy IGA.[59]

6 PRACTICAL EFFECT OF THE BILL - STATE SOVEREIGNTY (POWERS AND PRIVILEGES OF THE PARLIAMENT)

Introduction

6.1 An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill itself, derogates from the sovereignty of the State.

---

57 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469. (See also, Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p 2.)

58 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p3.

59 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p13.

6.2 In a sense, all uniform legislation has this effect. As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report 19:

> *Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.*[60]

6.3 State Parliament sovereignty issues in respect of uniform legislation include:

- fiscal imperatives to pass uniform legislation;
- limited time frames for consideration of uniform legislation; and
- lack of notice and detailed information as to negotiations inhibiting Members formulating questions and performing their legislative scrutiny role.[61]

6.4 The Bill raises all of these issues.

6.5 Again in its Report 19, the Standing Committee on Uniform Legislation and General Purposes said:

> *it is important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.*[62]

6.6 In order for the Parliament to determine the "*appropriate balance*" between advantages to the State and loss of autonomy, it is necessary for the Parliament to be informed as to the proposed uniform scheme, the role played by uniform legislation in that scheme and any significant differences between what is being proposed and what is currently occurring (or could occur) under State legislation. It is the Committee's role to identify areas where further information is required and either, time permitting, obtain that information itself or recommend that the responsible Minister provide additional information to the House.

Bill Effects Transfer of Regulation from the State to the Commonwealth

6.7 The Second Reading Speech states that the government received advice from the State Solicitor's Office to the effect that the Commonwealth Trade Measurement Act was

---

60 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004, p11.

61 Ibid.

62 Ibid, p10.

not effectively drafted so as to override State regulation of trade measurement.[63] It follows that the Bill is required to give effect to the agreement that the Commonwealth administer a national system. The Minister of Commerce was more equivocal in his letter to the Committee, stating:

> *There is some doubt as to the extent to which the Commonwealth's National Measurement Act 1960, as amended, does in fact cover the field of trade measurement and therefore whether the existing State Acts are inconsistent in total with the Commonwealth Act.*[64]

6.8 The Department of Commerce identified State provisions in respect of re-verification of measuring instruments as the provisions most likely to have continuing effect.[65] As an interim measure, pending passage of the Bill, the government used the powers conferred by the State Trade Measurement Acts to make regulations exempting persons regulated under the Commonwealth legislation from complying with the provisions of the State legislation.[66]

6.9 It follows that enactment of the Bill is necessary to give certainty to the transfer of sole regulation to the Commonwealth. It is not simply an exercise in removing ineffective legislation from the statute book.

Finding 1: On the information provided to it, the Committee finds that enactment of the Bill is necessary to give certainty to the transfer of regulation of trade measurement to the Commonwealth.

Practical Effect of Transfer to Commonwealth Trade Measurement Regime

Introduction

6.10 In light of Finding 1, and the funding consequences that may flow from continuation of the State Trade Measurement Acts to frustrate creation of the national legislative scheme, the Committee is surprised at the lack of information in the explanatory materials as to the Commonwealth trade measurement regime and the differences between that regime and the current State regime.

63 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

64 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p3.

65 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, pp2-3.

66 Ibid, p3.

Current Western Australian scheme

6.11 The Second Reading Speech provides the following information in respect of the State Trade Measurement Acts:

- the *Trade Measurement Act 2006* provides for the regulation of measuring instruments used in trade, the measurement of articles and substances for determining their price, the packaging of pre-packed articles, the measurement and pricing of these articles and for related purposes;[67] and

- the *Trade Measurement Administration Act 2006* provides for the administration of the *Trade Measurement Act 2006*, providing for inspectors (including inspectors from other jurisdictions), fees and charges, infringement notices, search warrants etc.

6.12 The *Trade Measurement Act 2006* also provides for:

- service licensing in respect of measuring instruments;

- certification for the accuracy of weighing and measuring instruments; and

- licensing of public weighbridges.

Commonwealth regime

6.13 Legal units of measurement are prescribed by the Governor General (sections 7A and 20 of the *National Measurement Act 1960*). The prescribed 'legal units of measurement' are linked to the SI Units. (See Schedules 1, 2 and 3 of the *National Measurement Regulations 1999* and paragraphs 5.2 and 5.3 above.)[68] However:

> *Legal units of measurement have to be realised as tangible practical standards of measurement in order to be useful.*[69]

6.14 There appear to be two entities responsible for realising the SI Units-based legal units of measurement as practical standards of measurement. The Chief Metrologist, responsible for maintaining Australian standards of measurement (section 8 of the *National Measurement Act 1960*), and the National Measurement Institute (**NMI),**

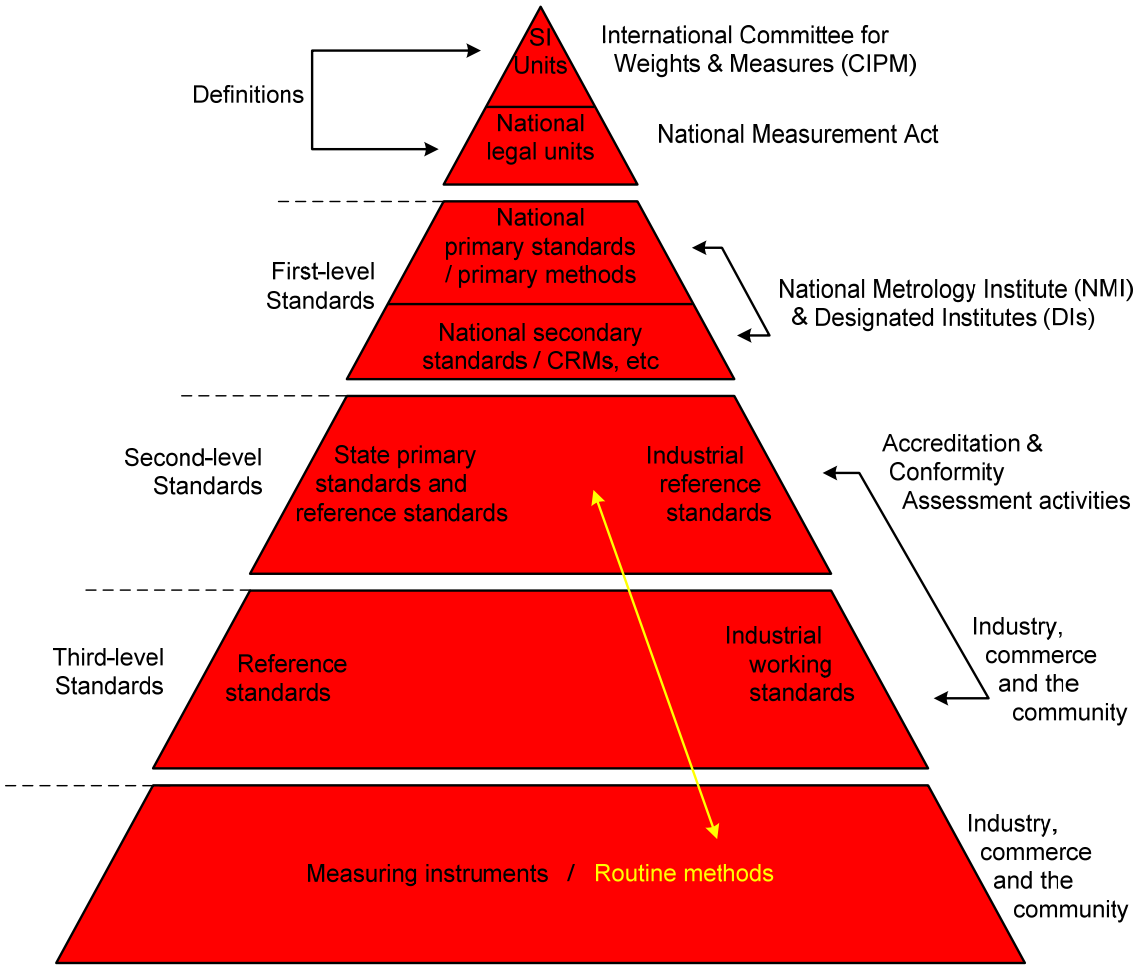
67 Explanatory Memorandum to the Trade Measurement (Amendment and Expiry) Bill 2010, p2.

68 As noted above, SI units were adopted by international agreement at the General Conference of Weights and Measures in 1960. (National Measurement Institute website, http://www.measurement.gov.au (viewed on 17 September 2010).)

69 National Measurement Institute website, http://www.measurement.gov.au (viewed on 17 September 2010).

which is responsible for maintaining the standards necessary to provide for measurement of physical quantities in terms of the legal units (sections 17 and 18).[70]

6.15 The graphic below shows the relationship between international SI Units and national standards.[71]



6.16 The NMI website advises:

> *NMI maintains a national (or Australian primary) standard for each of the SI base units except the ampere (which is derived from*

[70] Ibid. The National Measurement Institute brings together CSIRO's National Measurement Laboratory, the National Standards Commission and the Australian Government Analytical Laboratories. It is not entirely clear how the Chief Metrologist and National Measurement Institute share their joint functions.

[71] Ibid.

> *standards of voltage and resistance) and the mole (for which no internationally-defined realisation has been developed as yet). NMI also maintains Australian primary standards for a wide range of derived units.*
>
> *The primary standards for the SI base units and derived units are not always easy to work with. For that reason, NMI also holds Australian secondary standards (calibrated in terms of the primary standards) which are more convenient to use when calibrating lower-level standards or instruments.*[72]

6.17 The Commonwealth trade measurement legislation largely replicates the framework of the current 1990 IGA legislative regime. It establishes offences, a licensing regime and inspector powers similar to those in force in most jurisdictions. The penalties for offences are comparable to the existing national trade measurement offence penalties.[73]

6.18 However, the Commonwealth legislation also introduces measures that were approved by MCCA for inclusion in the uniform legislation, but had not been introduced across all jurisdictions. (For example, the introduction of the average quantity system.)[74]

6.19 The Second Reading Speech to the Commonwealth Trade Measurement Act provides a good overview of the Commonwealth regime and is attached as **Appendix 3**.

6.20 The explanatory materials provide no information as to:

- differences between the State and Commonwealth regimes; or
- how the transition from State to Commonwealth regulation was to be effected.

6.21 The National Reform Agenda Implementation Plan is premised on State resources being transferred to the Commonwealth (see paragraph 5.24 above). The Minister for Commerce advises that the State has transferred "*all but three*" of the State's administration staff.[75]

6.22 At the hearing, the Department of Commerce advised that:

- the three-year transition process had allowed for administrative transferral to occur at 1 July 2010;

---

72 Ibid.

73 Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Bills Digest No.50: 2008-09, *National Measurement Amendment Bill 2008*, 27 October 2008Australian Parliamentary Digest, p6.

74 Ibid.

75 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September, p3.

- former State employees, now employed by the Commonwealth, worked from the same premises as previously;

- the fact that stakeholders were dealing with the same persons at the same premises had enabled a seamless transition;

- transfer systems had been put in place by both the Commonwealth and State to redirect any inquiries; and

- regulations were made providing that licences issued under the State Trade Measurement Acts would continue for 12 months without need to apply for a new licence.[76]

6.23 The Department of Commerce identified the following differences between the Commonwealth and State regimes:

- re-verification of measuring instruments - under State legislation, all certified measuring instruments are tested either annually or biennially (depending on the type of instrument) for accuracy; under Commonwealth legislation only public weighbridges are currently subject to re-verification requirements;[77] and

- public weighbridge licence obligations - under State legislation, public weighbridges can only be operated by licensees and their employees; under Commonwealth legislation contractors of licenses are permitted to operate public weighbridges. There are "s*lightly different*" obligations in respect of the issue of tickets.[78]

6.24 The Committee enquired as to the position in respect of licensing of private weighbridges noting that, with the deregulation of the grain industry, such weighbridges had an increased importance. The Department of Commerce advised that licences for private weighbridges were not required under the State Trade Measurement Acts unless that weighbridge was made available to the public. Only licences for public weighbridges are required under the Commonwealth regime.[79]

---

76 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence,* 13 October 2010, p4.

77 Ibid p2 and Letter from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 18 October 2010, p2.

78 Ibid, pp3-4.

79 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence,* 13 October 2010, p6 and letter from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 18 October 2010, pp3-4.

6.25 Despite not requiring a licence for operation of private weighbridges, both the State and Commonwealth legislation requires private weighbridges to be verified where they are to be used for trade. The State legislation currently requires re-verification of private weighbridges used for trade: the Commonwealth legislation does not.[80]

Whether the State Parliament can amend the uniform legislation or the State opt out of the uniform scheme

6.26 The Minister of Commerce advises:

> *If the Commonwealth legislation does not currently cover the field, then State legislation could continue to operate as long as it is not directly, inconsistent with the Commonwealth legislation. However, this is not desirable because:*
>
> *(i) the Commonwealth could amend its legislation at any time to render the State legislation invalid;*
>
> *(ii) dual regulatory regimes could create uncertainty and confusion for consumers and businesses and create significant additional compliance costs for businesses operating in more than one jurisdiction;*
>
> *(iii) there is a small pool of qualified staff in this area and all but three of this staff and all related technical assets have been transferred to the Commonwealth; and*
>
> *(iv) continued State regulation would be in breach of the COAG and MCCA agreements and expose the State to a financial penalty under COAG's National Partnership Payments.*[81]

6.27 The Minister for Commerce also advised that:

> *It is also possible for the State to enact legislation in the future to regulate aspects of trade measurement, as long as that legislation is not inconsistent with the Commonwealth legislation.*[82]

6.28 However, it seems to the Committee that this would also raise the issues noted in paragraph 6.26 above.

---

80 Letter from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 25 October 2010, pp1-2.

81 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p3.

82 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p4.

Perceived Benefits of Commonwealth Regulation and Administration of National Scheme

Efficiency, cost savings and consistency

6.29 The Second Reading Speech states:

> *The move to central administration of trade measurement is designed to deliver benefits sought by businesses, consumers and government. It will reduce compliance costs and provide efficiency gains for business and at the same time maintain existing standards of service and levels of consumer protection.*[83]

6.30 As noted above, the State-regulated 'national' system was not viewed as delivering the desired uniformity. The COAG NCP Review concluded that:

> *Although UTML has now been incorporated in all States and Territories, its interpretation, administration and funding arrangements remain inconsistent across jurisdictions, with consequent costs to users of the system.*
>
> …
>
> *Increasingly trade measurement monitoring of measuring instruments is undertaken by private industry certifiers who are often licensed in multiple jurisdictions and must comply with multiple administration systems. For the traditional areas of trade measurement (weighing instruments and fuel dispensers) this commonly occurs in border regions. More recently the introduction of trade measurement controls for the grain and wine industries have meant that large companies, with their own centralised administrations, have to comply with the differing administration procedures of multiple jurisdictions.*[84]

6.31 A discussion paper released by the MCCA in June 2006 identified multiple ways in which the State-based trade management system could impede economic activity and create inefficiencies, including:

- difficulties in achieving a coordinated approach to decision making leading to divergent policy interpretation and enforcement of some aspects of the legislation;

---

83 Hon Norman Moore MLC, Minister for Mines and Petroleum; Fisheries, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 September 2010, p6469.

84 Council of Australian Governments, *Background Paper: COAG National Competition Policy Review*, February 2006, pp40-1.

- national retailers may need to consult multiple jurisdictions for approval of new selling methods for particular products;

- barriers for licensed certifiers of trade measuring instruments who operate across jurisdictions caused by having to pay different licence fees and comply with different reporting requirements;

- State and Territory boundaries creating a barrier to the efficient delivery of services by trade measurement authorities in rural and remote areas;

- efforts to harmonise trade measurement systems between Australia and New Zealand being restricted due to legislative and administrative differences within Australia; and

- difficulties for Australia in entering into national mutual recognition arrangements with other countries on trade measurement matters, potentially raising costs for exporters and importers.[85]

6.32 The Minister for Commerce advised that transition to the Commonwealth regime will result in an annual net saving to the government of $817,000.[86]

Possible disadvantages

6.33 The Minister for Commerce advised that a possible disadvantage of the transfer is that:

> *the Commonwealth regulatory framework may not be as complete or as effectively enforced as that already in place in Western Australia.*[87]

6.34 This comment can be related to the limited re-verification provisions in the Commonwealth legislation (reported above). On this, the Department of Commerce advised:

> *The commonwealth, in introducing its regime, decided not to implement reverification as a standard. They have reverification for public weighbridges, so they have established a reverification methodology for them. The legislation enables them to prescribe*

85 Ministerial Council for Consumer Affairs, *Review of National Trade Measurement System*, Discussion Paper, June 2006, p4.

86 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p2.

87 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p3.

> *regulations setting out additional reverification requirements, but, to date, they have not done so.*[88]

6.35 The Committee enquired as to the purpose of re-verification and why it was considered necessary by the State but not by the Commonwealth. The Department of Commerce's answer illustrates one of the major issues arising in uniform legislative regimes - the potential for a uniform scheme to represent minimum common standards, rather than the 'best practice' regulation that may be in place in State regulation. (This also arose in the classification of "*psychologists*" in the Health Practitioners' National Regulation Bill 2010.)

6.36 The Department advised:

> *But there are differing views about the validity and effectiveness of reverification in the marketplace. Part of this is that measuring instruments are becoming more and more accurate and self-correcting, so that the technology is actually being more effective in reverification than having a process, which is very labour intensive, of continually going out and checking measuring instruments; and, of course, as you will appreciate, there has been an explosion in what is a measuring instrument over the time. … their view was that, apart from public weighbridges, the cost benefit of having a reverification scheme did not justify applying it across the board. … We did argue for it. Our view was, based on our officer's experience, that there was a preference for it, but it was not supported by other jurisdictions or the public.*[89]

6.37 The Commonwealth's position on re-verification is, however, subject to review:

> *They have indicated that they will be reviewing the need for reverification. The commonwealth, as I understand it, has not yet started that process, but they will look at whether reverfication is needed at all or whether more rigorous reverification programs are required.* [90]

Funding consequences for failure to enact the Bill

6.38 The National Seamless Economy IGA provides that the State's receipt of funding is dependent on meeting particular milestones of the National Seamless Economy IGA

---

88 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence,* 13 October 2010, p2.

89 Ibid, p3.

90 Ibid, p2.

Implementation Plan, including repeal and transition legislation to give effect to Commonwealth regulation of trade measurement.

6.39 As noted above, although the Minister for Commerce advised that there is no relevant intergovernmental agreement in respect of the Bill, the Minister also advised that:

> *continued State regulation would be in breach of the COAG and MCCA agreements and expose the State to a financial penalty under COAG's National Partnership Payments.*[91]

Committee's Conclusion on Practical Effect

6.40 The Bill proposes removal of the vestiges of State regulation of trade measurement. It, therefore, derogates from the sovereignty of the State.

Matters drawn to attention of the House

6.41 The reservation that the Commonwealth Trade Measurement Act may not produce such a complete or effectively enforced regime as the State Trade Measurement Acts has been noted. Relevant to this is the advice that the State Trade Measurement Acts survive, at least in part, and that legislation that is not inconsistent with the Commonwealth legislation may be made by the State as a matter of law.

6.42 However, continuation of the provisions of the State Trade Measurement Acts that are not inconsistent with the Commonwealth legislation would be inconsistent with the various intergovernmental agreements (reported in Part 5) that there be a single, uniform national regime regulated and administered by the Commonwealth. Failure to implement those agreements will give rise to the financial and practical issues set out above.

6.43 Before federation, an international trade measurement system was underway. The drafters of the *Commonwealth of Australia Constitution Act* anticipated that a Commonwealth regime might be required in this area, conferring power on the Commonwealth to unilaterally legislate in respect of trade measurement should it be minded to do so.

6.44 The conclusion of several reviews has been that uniform regulation of trade measurement confers benefits in certainty and cost savings on consumers, industry and the State. The experience between 1990 and 2005 was that the State-based uniform legislative scheme did not produce the desired outcome.

---

91 Letter from Hon Bill Marmion MLA, Minister for Commerce, 28 September 2010, p3.

7 CLAUSES 4, 6 AND 7 OF THE BILL

Introduction

7.1 'Repeal' of the *Trade Measurement Act 2006* (**TMA**) is effected by reference to amendments to the *Trade Measurement Administration Act 2006* (**TMAA**) proposed by Part 3 of the Bill.

7.2 The structure of the Bill does not assist Parliamentary consideration of the individual clauses of the Bill.

7.3 So far as the Committee is able to determine, there is no reason why Part 2 of the Bill could not have dealt with the TMAA and Part 3 with the TMA. This was confirmed by the Department of Commerce, which advised that the ordering of the amendments was determined by Parliamentary Counsel's Office on the basis of the alphabetical sequence of the Acts.[92] The Department advised that the ordering was seen by it as "*logical*", as the TMA was the "*major act*" but the Department had not considered whether the ordering was appropriate for Parliament's consideration of the Bill.[93]

7.4 Had the order of the amendments been transposed, the Parliament would have dealt with the substantive amendments first. (Alternatively, the substantive amendments could have been inserted into the TMA, rather than the TMAA dealt with second in the Bill. The Committee notes, however, that this would not have been consistent with the drafting style of the two bills.)

Part 2 of the Bill - Amendments to the Trade Measurement Bill 2010

Clause 4 - retrospective effect

7.5 Clause 4 of the Bill proposes insertion into the TMA of:

- section 3A - which provides that, except as provided in Part 7 of the TMAA[94] - which clause 8 of the Bill proposes be inserted - the TMA does not apply on or after the "*transition day*". "*Transition day*" is defined as having the same definition as in the TMAA. A definition of this term will be inserted into the TMAA by clause 7 of the Bill; and

92 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence,* 13 October 2010, p13.

93 Ibid, p14.

94 By section 3 of the *Trade Measurement Act 2005*, "*Administration Act"* means the *Trade Measurement (Administration) Act 2005*.

- section 3B - which provides that the TMA "*expires*" on the same day that the TMAA expires under section 3B of the TMAA. Clause 6 of the Bill proposes insertion of section 3B into the TMAA.

7.6 It is, therefore, necessary to have regard to Part 3 of the Bill, containing clauses 6, 7 and 8 amending the TMAA, to ascertain the effect of Part 2 of the Bill.

7.7 By clause 7 of the Bill, section 4 of TMAA will be amended to provide that "*transition day*" has the same meaning as that given in Schedule 2 item 1(1) of the Commonwealth Trade Measurement Act. Schedule 2 item 1(1) of the Commonwealth Trade Measurement Act provides:

> ***transition day*** *means: 1 July 2010.*

7.8 Clause 4 of the Bill, therefore, proposes that other than the transitional provisions, the TMA will cease to have effect retrospectively from **1 July 2010**.

Part 3 - amendments to the *Trade Measurement Administration Act 2006*

Clause 6 - retrospective effect

7.9 As reported above, clause 6 of the Bill proposes new sections 3A and 3B for the TMAA. Proposed section 3A provides that the main part of the TMAA ceases to have effect from "*transition day*" and section 3B for the balance of the TMAA (being the transitional provisions) to expire on 1 July 2013 or such earlier day as is fixed by proclamation.

7.10 When read with clause 7 of the Bill, which defines "*transition day*" as having the meaning given in schedule 2 item 1(1) of the Commonwealth Trade Measurement Act, proposed section 3A has retrospective effect.

Impact of retrospective legislation

7.11 The terms of the proposed transitional provisions are relevant to considering the consequences of retrospectivity. Proposed section 39(e) for the TMAA, for example, provides for the continuation of reviews commenced after 1 July 2010 in respect of certain decisions made under the TMA prior to that date. (See discussion of clause 8, proposed section 39 in Part 8 for further information on this clause.)

7.12 The lack of information on mechanisms for transition to the Commonwealth regime and differences between the State and Commonwealth regime, together with the advice that unidentified aspects of the State regime survived the enactment of the Commonwealth Trade Measurement Act, raised questions as to whether there were decisions made under the State Trade Measurement Acts subsequent to 1 July 2010 in respect of which the right to review should also be continued. It was also not known

whether any vested licence rights would be extinguished through the Bill having retrospective effect. The Committee inquired into these matters at the hearing with the Department of Commerce.

7.13 The Department acknowledged the uncertainties that could be created by retrospective legislation in saying, after referring to the uncertainty as to whether the Commonwealth legislation covered the field:

> *If that is not the case, then we are relying on the retrospective element of this and we are saying that administratively we are not going to deal with this legislation in the shadow of retrospective legislation. We are not going to take action in relation to trade measurement matters in the marketplace that can occur now, because there is a commonwealth regime in place that is valid.*[95]

7.14 To avoid the need for recourse to retrospective legislation, the Department took steps to ensure that as at 1 July 2010:

- all state licences had been continued under the Commonwealth regime;[96]
- there were no outstanding applications, investigations, prosecutions or decisions under the State legislation;[97] and
- relevant persons had been exempted from the application of the provisions of any State legislation remaining in effect after the coming into effect of the Commonwealth legislation.[98]

7.15 The Department also advised any person affected by the legislation that the Bill would have retrospective effect to ensure that from 1 July 2010 statutory rights and obligations would arise only under the Commonwealth legislation.[99]

Finding 2: The Committee finds that in the particular circumstances applicable to the Bill, no fundamental legal scrutiny principles arise in respect of clauses 4, 6 and 7 of the Bill.

---

95 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p8.

96 Ibid, pp4 and 8.

97 Ibid, pp6 and 8.

98 Ibid, p3.

99 Ibid, p8.

8 CLAUSE 8 - TRANSITIONAL PROVISIONS: PROPOSED SECTIONS 38-43

Introduction

8.1 Clause 8 inserts Part 7 - sections 38 to 43 - to the TMAA to provide for transitional matters.

8.2 The transitional provisions will apply to both the State Trade Measurement Acts. Proposed section 38, for example, defines "*offence*" to be an offence under either of the TMAA or TMA.

8.3 The TMAA will, if the amendment proposed by clause 6 of the Bill is enacted, provide that that Act expires on 1 July 2013 or such earlier day as is fixed by proclamation. Proposed section 3B of the TMAA requires the Commissioner (the person designated in that role under that Act) to provide the Minister with a certificate stating that the TMAA and TMA are no longer necessary for an earlier proclamation to be made.

Proposed Section 39

8.4 Proposed section 39 sets out the transitional matters noted in paragraph 1.8 above, other than information to be provided to the Commonwealth (which is provided for in proposed section 42).

Proposed section 39(a)

8.5 Proposed section 39(a) contemplates continuation of investigations and prosecutions in respect of offences against the State Trade Measurement Acts occurring prior to transition day.

8.6 The Department of Commerce advised that, in the event, there are: no matters on foot; no outstanding complaints; and no outstanding compliance issues. In the event a matter requiring investigation and prosecution did arise, the Department would probably need to negotiate with the NMI as to which entity would staff the investigation or prosecution undertaken pursuant to the State legislation. However, a "*fundamental*" question would be whether there was any public purpose or benefit in prosecution of the matter.[100]

Proposed section 39(e)

8.7 Proposed section 39(e) provides for continuation of:

---

[100] Ibid, pp6-7.

the review by the State Administrative Tribunal under the [TMA] *section 81 of decisions of the Commissioner made before the transition day.*

8.8 Section 81 of the TMA provides for review to the State Administrative Tribunal in a number of instances, including the decision of the Commissioner[101] to:

- cancel a public weighbridge licence under section 66 of the TMA;
- refuse to change licence details on change of partnership details under section 75 of the TMA; and
- impose a sanction under section 80 of the TMA after issuing a notice for breach of licence.

8.9 In respect of each of these reviewable decisions, the TMA provides for a process of written notice of intention to take action, submissions by the licensee and that the Commissioner is not to take a decision until after consideration of any submissions. Section 39(e) preserves review of a decision made but, other than in respect of disciplinary action, not the decision-making process itself.

8.10 No information is provided in the explanatory materials as to what will occur with applications or decision-making commenced under the TMA but not concluded at 1 July 2010.

8.11 The Department of Commerce advised that there were no applications or decisions made under State legislation subsequent to 1 July 2010.[102]

Proposed Section 40

8.12 As previously reported, proposed section 39(a) contemplates investigations and prosecutions in respect of offences against the State Trade Measurement Acts occurring prior to transition day, notwithstanding the Acts ceasing to apply. Section 33(1) of the TMAA provides that offences against either of that Act or the TMA may be commenced within three years after the offence was committed. Proposed section 40(1) provides that, notwithstanding section 33(1), a prosecution cannot be commenced after 30 June 2011.

---

101 Section 6(2) of the *Trade Measurement (Administration) Act 2005* requires the responsible Minister to designate a person who is an executive officer of the department assisting the Minister in the administration of the Act as Commissioner for the purposes of that Act and the *Trade Measurement Act 2005*.

102 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p8.

8.13 Proposed section 40(2) provides that a person charged with an offence under the State Trade Measurement Acts after transition day cannot be "*punished*" unless at the time the act or omission constituting the offence would constitute an offence under the *National Measurement Act 1960* (Cwlth). Section 40(3) provides that the lesser of the State or Commonwealth penalties applies.

8.14 The Explanatory Memorandum advises that the distinction between "*charge*" and "*punish*" in proposed section 40 allows for:

- a person only to be punished in the event an offence under the State Trade Measurement Acts is also an offence under the *National Measurement Act 1960 (Cwlth)*; and
- for the lesser penalty under the two Acts to apply.[103]

8.15 As currently worded, proposed section 40 permits a person to be charged with, and possibly convicted of, an offence for which that person cannot be "*punished*" (in the event the offence does not constitute an offence under the *National Measurement Act 1960* (Cwlth)).[104]

8.16 At the hearing, the Department of Commerce suggested that the Parliament should rely on the Department not exercising its legislative powers:

> *whilst technically you might be able to charge somebody, you clearly would not do so if you made the charge when they could not be punished for it. There is just absolutely no point in doing so. … We will have to look at the drafting, obviously. There may be a view from the draftsman about this wording.*[105]

8.17 The Department's answer to questions taken on notice advises that the relationship between ability to charge and ability to punish in proposed section 40 arises from the terms of sections 10 and 11 of the *Sentencing Act 1995*. Section 10 provides that if the statutory penalty for an offence changes between the time when the offender commits the crime and the time of sentencing, the lesser penalty applies. Section 11 provides that a person cannot be punished for doing, or omitting to do, an act unless the act or omission constituted an offence under the law at the time it occurred (or did not occur). As it was unclear whether sections 10 and 11 of the *Sentencing Act 1995* would apply in the context of a State law being replaced by a Commonwealth law, the

---

103 Explanatory Memorandum to the Trade Measurement (Amendment and Expiry) Bill 2010, p4.

104 Letter from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 18 October 2010, p3.

105 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p9.

Bill proposes subsections 40(2) and (3) to ensure the Bill is consistent with the State's criminal laws.[106]

8.18 The Committee observes that proposed subsections 40(2) and (3) do not, in fact, mirror sections 10 and 11 of the *Sentencing Act 1995* but provide for a person to be charged with an offence for which that person cannot be punished, not because a lower penalty is imposed under the Commonwealth legislation or because the act or omission was not an offence under State law at the time it occurred (or did not occur), but because the act or omission does not constitute an offence under Commonwealth law at the time the person is charged.

8.19 The Committee notes that this outcome of subsections 40(2) and (3) achieves no identified policy objective and is seen as undesirable by the Department of Commerce.

Recommendation 3: The Committee recommends that clause 8 of the Bill be amended to reflect the intent that a person:

- **not be charged with an offence pursuant to the transitional provisions unless the relevant act or omission is currently an offence under the Commonwealth legislation; and**
- **in the event a person is so charged, that person be at risk only of the lesser of the penalties imposed under the respective legislation.**

This can be effected in the following manner

Page 6, line 28 - after "person", insert

cannot be

Page 6, lines 29 and 30 - delete

cannot be punished for the offence

106 Letter from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 18 October 2010, p3.

Proposed Section 43 - Henry VIII Clauses, Retrospective Regulations and Deeming Device

Introduction

8.20 Proposed section 43 provides wide regulation-making powers for transitional and savings matters.

Section 43(3) - Henry VIII clause

8.21 Proposed section 43(3) confers power on the Governor[107] to make regulations continuing the application of the State Trade Measurement Acts for transitional or savings purposes other than those set out in proposed sections 38 to 42 (also proposed by clause 8 of the Bill). As reported above, the need for this power is not explained in the explanatory materials.

8.22 As it permits regulations overriding proposed sections 3A of the State Trade Measurement Acts (that the State Trade Measurement Acts cease to have effect from 1 July 2010 other than in respect of the matters proposed in Part 7 - clauses 4 and 6 of the Bill), proposed subsection 43(3) is a Henry VIII clause.

Section 43(4) - retrospective effect

8.23 Proposed subsection 43(4) permits regulations to be made for the purposes of proposed subsection 43(2) (that is, in respect of transitional matters) providing that a 'state of affairs' is taken to have existed or not existed from a day earlier than that on which the regulations are gazetted.

8.24 This provision raises a number of issues under the fundamental legislative principles:

- it is a Henry VIII clause - it permits regulations to override section 41 of the *Interpretation Act 1984*, which provides for regulations to have effect on gazettal or such other day as stated in the regulations. In harmony with the common law presumption against retrospective operation of legislation, the Committee is of the view that this "*other day*" must be a day after gazettal;

- retrospectivity - it permits the making of regulations with retrospective operation; and

- the deeming provision allows regulations deeming a certain state of affairs to exist whether or not that is in fact the case. That is, the proposed section confers power for the Executive to create "*statutory fiction*".[108] This has

[107] By reference to section 35 of the *Trade Measurement (Administration) Act 2005*.

[108] Griffith CJ in Muller v Dalgety & Co Ltd (1909) 9 CLR 693 at 696.

ramifications for the rights, interests and obligations of persons and raises questions as to whether it is an appropriate conferral of power on the Executive, subject to suitable safeguards.

8.25 None of the matters noted in paragraph 8.24 are addressed in the explanatory materials beyond a statement that section 43 "*makes it clear*" that "*any transitional regulation*" will not affect the rights of any person that existed before publication.[109] (This is not, in fact, an accurate statement. Proposed subsection 43(5), requiring a provision not to affect the rights of a person in a manner that is prejudicial or impose liabilities on anyone other than the State or a State authority, is limited to the deeming regulations that may be made under proposed subsection 43(4).)

Parliament previously accepted deeming provision with retrospective effect

8.26 The Department of Commerce's view is that proposed clause 43 represents standard drafting practice.[110] The Department identified the rationale for such provisions as being a concern that something might be overlooked which might have a significant impact on the marketplace but could not be rectified immediately to due Parliament not sitting.[111]

8.27 In considering the State Trade Measurement Acts in 2005, the Committee (as it was then constituted) drew attention to clause 106 of the Trade Measurement Bill 2005, which enabled:

> *regulations to be made for the purposes of Part 9 "where there is no sufficient provision for any matter or thing necessary or convenient to give effect to the purposes" of the Part,*

to have effect prior to the date of publication of the regulations in the Gazette.[112] As with proposed subsection 43(4), the regulations could not have effect prior to the empowering bill coming into operation.

8.28 At that time, the Committee noted the terms of clause 106(3) (which was in the same terms as section 43(5) proposed by the Bill) and said:

---

109 Explanatory Memorandum to the Trade Measurement (Amendment and Expiry) Bill 2010, p5.

110 This Department sought the advice of Parliamentary Counsel's Office on the drafting of "*appropriate*" provisions (Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p12.).

111 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p10.

112 Western Australia, Legislative , Standing Committee on Uniform Legislation and Statutes Review, Report 3, *Trade Measurement Bill 2005 and Trade Measurement (Administration) Bill 2005*, 19 October 2005, p10.

> *The Committee notes that the Council has previously considered such provisions and made amendments to provide a check and balance by ensuring that:*
>
> • *the power to make retrospective regulations expires after a certain period of time; and/or*
>
> • *the regulations themselves expire after a certain period of time.*

8.29 In that instance, the Committee received information from the responsible Minister as to reasons for absence of the safeguards from the Trade Measurement Bill 2005 and noted that:

> *any retrospective regulations would only apply in relation to the trade measurement of certain alcoholic liquors over a transitional period of two years and therefore would have a relatively limited effect.*[113]

8.30 Clause 106 of the Trade Measurement Bill 2005 was passed by the Legislative Council.

8.31 Proposed sections 3B of the State Trade Measurement Acts (clauses 4 and 6 of the Bill) will, if enacted, provide that those Acts "*expire*", at latest, on 1 July 2013. The general rule is that delegated legislation made under a section of an Act that is expired is also expired.[114] This suggests that the transitional regulations would have effect for, at most, three years.

8.32 The Committee had regard to:

- the potentially longer period of operation of regulations made pursuant to the powers proposed by proposed section 43(4) than the two year period considered in respect of clause 106; and
- the broader ambit of matters that may be regulated pursuant to that power,

and enquired of the Department of Commerce what problems would arise if there was no power to make regulations with retrospective effect.

8.33 The Department's response was:

> *I think the practical reality at this stage, because there are not any outstanding transitional issues, is that it would have no impact, I*

---

113 Ibid, pp11-12.

114 Pearce D and Argument S, *Delegated Legislation in Australia*, 3rd edition, LexisNexis Butterworths, Australia, 2005, p308. Pearce and Argument refer to the rule in respect of "*repealed*" legislation. The Committee is of the view that the rule has equal application to expired legislation.

suspect. There is no current intention to make any regulations under this provision. … if something comes out of the woodwork and we do not have that provision, there is a problem.[115]

8.34 The Department of Commerce was also unable to identify a situation in which it would be necessary to make regulations deeming a state of affairs to have existed at some time between 1 July 2010 and enactment of the Bill.[116]

8.35 The Committee was not persuaded that a three-year power to make regulations with retrospective effect over the broad ambit of matters permitted by proposed section 43 was warranted.

8.36 The Department of Commerce stressed that it did not see the terms of clause 43 as representing "*laziness*" but as protection against human error.[117]

8.37 The Committee observes that the Department of Commerce has, in fact, been proactive in anticipating issues and preventing the need for transitional regulations to be retrospective.

Recommendation 4: The Committee recommends that clause 8 of the Bill be amended to delete the power to make transitional regulations with retrospective effect. This may be achieved in the following manner:

Page 8, lines 31 and 32 - delete the lines

Page 9, lines 1-19 - delete the lines

9 COMMITTEE'S CONCLUSION

9.1 The Committee observes that the Bill implements the COAG Agreement and National Seamless Economy IGA in removing the vestiges of State regulation of trade measurement. The evidence as to the perceived benefits and detriments of national regulation of trade measurement administered by the Commonwealth is set out in this report.

115 Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, *Transcript of Evidence*, 13 October 2010, p12.

116 Ibid, p12.

117 Ibid, p10.

Recommendation 5: The Committee recommends that, subject to the amendments to clause 8 of the Bill recommended in this report, the Bill be passed by the Legislative Council.

Hon Adele Farina MLC

Chairman

11 November 2010

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation*. The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation*. Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation*. Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism*. Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition*. A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?

2. Is the Bill consistent with principles of natural justice?

3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.

4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

6. Does the Bill provide appropriate protection against self-incrimination?

7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?

9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?

10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3

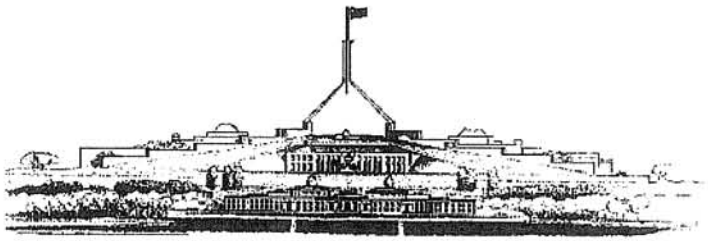
SECOND READING SPEECH - COMMONWEALTH NATIONAL MEASUREMENT AMENDMENT BILL 2008

APPENDIX 3

SECOND READING SPEECH - COMMONWEALTH NATIONAL MEASUREMENT AMENDMENT BILL 2008

COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

NATIONAL MEASUREMENT AMENDMENT BILL 2008

Second Reading

SPEECH

Wednesday, 24 September 2008

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date	Wednesday, 24 September 2008	**Source**	House
Page	8368	**Proof**	No
Questioner		**Responder**	
Speaker	Emerson, Craig, MP	**Question No.**	

Dr EMERSON (Rankin—Minister for Small Business, Independent Contractors and the Service Economy and Minister Assisting the Finance Minister on Deregulation) (9.54 am)—I move:

That this bill be now read a second time.

The National Measurement Amendment Bill 2008 is a bill to amend the National Measurement Act 1960. This legislation will establish a single trade measurement system for Australia, replacing the current fragmented situation in which each state and territory has a separate system.

The government is committed to reducing the regulatory burdens on Australian business and has embarked on an ambitious reform agenda through the Council of Australian Governments (COAG).

COAG has endorsed a business regulation reform agenda designed to advance Australia towards a seamless national economy. In partnership with the Minister for Finance and Deregulation, I co-chair the Business Regulation and Competition Working Group of COAG, which has responsibility for advancing the regulatory reform agenda.

COAG's Business Regulation and Competition Working Group has been directed to deliver early action on the regulatory reform 'hot spots' identified by COAG in 2006 and again in 2007. The area of trade measurement is one of the 10 identified regulatory 'hot spots'.

'Trade measurement' is a term that refers to the use of measurement as the basis for the price in a transaction. For example, by measuring the volume of fuel delivered from a petrol pump, a service station determines the total price you pay to fill your car's petrol tank.

A 'trade measurement system' is the term used to describe the infrastructure that is needed to make sure the petrol pump (or any other trade measuring instrument) is sufficiently accurate to give a fair result to the buyer and seller.

In Australia, an estimated $400 billion worth of trade based on some kind of measurement takes place annually. Transactions involving measurements range from simple consumer purchases at the corner shop to complex multimillion dollar international trade deals.

So, why does government need to be involved in these market processes? Well, consider how onerous it would be if traders had to prove to every customer that they had weighed each purchase accurately. Similarly, how difficult it would be for a packing house to prove to each purchaser that their cereal packet is filled with the stated amount. Also, think how wasteful it is for wine producers to sacrifice product to prove that a wine bottle is filled correctly.

A trade measurement system helps overcome these difficulties. It gives confidence to buyers and sellers that measurements are accurate and this reduces transaction costs in each trade.

Trade measurement is a classic example of a proper role for government in establishing the infrastructure that makes it possible for markets to operate efficiently and effectively.

But Australia's current trade measurement infrastructure is not operating as efficiently and effectively as it should. This is why the Rudd government is introducing this historic legislation. We are determined to create a truly national system that will deliver productivity improvements throughout the economy to the benefit of all Australians.

To describe how significant this change to Australia's trade measurement system will be, let me set out a bit of history.

Prior to Federation, each British colony in Australia had its own weights and measures system. When the Constitution was drawn up, the Commonwealth's constitutional power for weights and measures was established under section 51, subsection 15. However the scope of 'weights and measures' in 1901 was limited almost exclusively to measurements of mass and volume, and trade was very much more a local matter than it is today. Without a pressing need for national administration, the states retained responsibility for their various trade measurement systems.

However, within several decades, the desirability of having nationally consistent rules and practices was

evident and has been the subject of a number of reviews and inquiries. Two reviews in particular have been influential.

In 1983, the Scott review recommended a national approach to the administration of trade measurement. The recommendation resulted in drafting of uniform trade measurement legislation. Unfortunately it took more than 20 years for all jurisdictions to enact this legislation. Despite the uniform format of the legislation, practical problems persisted. This was largely because the amendments to legislation were not adopted simultaneously, the interpretation of regulations varied between jurisdictions, and there were different approaches to administration.

In 2006, the Ministerial Council on Consumer Affairs commissioned a review of trade measurement arrangements. The problems identified by stakeholders included unwarranted costs to businesses that operate across borders, different cost recovery procedures in different jurisdictions, different processes for licensing private sector verifiers of trade measuring instruments, and inconsistent advice being provided about trade measurement requirements.

This review concluded that the adoption of a national trade measurement system would deliver a net economic benefit to Australian industry, business, government and consumers. In April 2007, COAG accepted this recommendation.

The National Measurement Amendment Bill gives effect to this COAG decision. And it will create a national trade measurement system that will be administered by the Commonwealth from 1 July 2010.

The bill recognises that many elements in the existing model, the uniform trade measurement legislation, have stood the test of time. The bill adopts those elements where appropriate but frames them in a way that will be responsive to future needs and improvements in business practices and technologies.

The new national system will continue to ensure the accuracy and reliability of traditional trade measuring instruments such as scales, fuel dispensers and weighbridges. However, it provides the flexibility for new technologies to be introduced as business or consumers require additional assurance. For example, the price of grain is set by measuring grain protein and both the grain growers and grain receival sites need confidence that accurate results have been used to determine the price.

The new system will set uniform practices for each class of measuring instruments. Traders who operate across Australia will be able to use one set of procedures, rather than meeting different sets in the different states.

The bulk of verifications of trade measuring instruments will continue to be performed by the private sector, with firms or individuals licensed on the basis of competence and integrity. However, multiple licensing for cross-border operation will no longer be required, with one licence being valid for operation across Australia.

Licensees will continue to be responsible for ensuring that their employees are competent to perform verifications. Currently the means of demonstrating competence varies across jurisdictions. In implementing the national trade measurement system, the Commonwealth will develop nationally recognised qualifications for verifiers, providing a harmonised platform for skills development in the workforce.

As in state and territory trade measurement systems, government will perform an inspection function to ensure that traders and licensees are maintaining the accuracy of trade measuring instruments. Trade measurement inspection is a routine activity in business premises, and state and territory inspectors conduct this work without requiring warrants. Infrequently, access to residential premises is necessary and this must occur under warrant. To facilitate an effective inspection regime, these powers have been replicated for Commonwealth inspectors. They will be able to inspect, examine and test measuring instruments, examine and test prepackaged articles, investigate alleged offences, search and seize records, measuring instruments and prepackaged articles, subject to Commonwealth codes covering investigative practices. These inspection procedures have long been accepted in the marketplace as part of the cost of doing business and ensuring fair trading.

The current trade measurement systems also examine prepackaged goods to confirm that packages contain the stated quantities. At the request of wine producers and major packers, this new legislation includes the option for production-line packers to use an internationally agreed system to demonstrate compliance with quantity statements. This system—the Average Quantity System (AQS)—has already been adopted in New Zealand and by many of Australia's major trading partners, including Japan, the European Union and the United States. AQS is now available to production-line packers to adopt voluntarily in instances where it is a more efficient means to demonstrate compliance and to align with international practice.

The bill provides the heads of power for all the necessary elements in a national trade measurement system. As with the current trade measurement system, the bill provides for the technical and administrative

detail required to operate the system to be specified in regulations.

The bill creates the national trade measurement system by amendment of the National Measurement Act 1960. This act already defines technical infrastructure that the Commonwealth delivers to support trade measurement, such as maintaining Australia's measurement standards and approving the design of trade measuring instruments—and the National Measurement Institute performs those functions. Therefore, it is a logical progression to expand the National Measurement Act to encompass a national trade measurement system and to designate the National Measurement Institute as the body responsible for administering the system.

This government is serious about creating a seamless national economy unhampered by unnecessary duplications, overlaps and differences in regulation. In particular, we are determined to remove those inconsistencies that create unnecessarily complex and costly burdens on business.

I am pleased to introduce a National Measurement Amendment Bill that brings these necessary reforms to Australia's trade measurement system.

Debate (on motion by **Mrs May**) adjourned.

CHAMBER