

The Auditor-General  
Auditor-General Report No.5 2023–24  
Performance Audit

# **Trade Measurement Compliance Activities**

Department of Industry, Science and Resources

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Senior Executive Director  
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Australian National Audit Office  
GPO Box 707  
Canberra ACT 2601

Or via email:

[communication@anao.gov.au](mailto:communication@anao.gov.au).





Canberra ACT  
5 September 2023

Dear President  
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Department of Industry, Science and Resources. The report is titled *Trade Measurement Compliance Activities*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, reading 'Grant Hehir'.

Grant Hehir  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

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The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:  
**Australian National Audit Office**  
**GPO Box 707**  
**Canberra ACT 2601**

**Phone: (02) 6203 7300**  
**Email: [ag1@anao.gov.au](mailto:ag1@anao.gov.au)**

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### **Audit team**

Tiffany Tang  
Nicole McNee  
Tracey Bremner  
Brian Boyd

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# Audit snapshot

## Auditor-General Report No.5 2023–24 *Trade Measurement Compliance Activities*

### Why did we do this audit?

- ▶ Trade measurement is an area of Australian Government administration that directly impacts on everyday life.
- ▶ The audit is part of the ANAO's coverage of regulatory activities.
- ▶ The National Measurement Institute, a division within the Department of Industry, Science and Resources (DISR) with more than 350 staff, is responsible for trade measurement compliance.

### Key facts

- ▶ Australia's trade measurement transactions are estimated to be worth more than \$750 billion each year.
- ▶ Trade measurement compliance activities include conducting trader audits, testing measuring instruments, and conducting enforcement activities where non-compliance is identified (such as issuing warning letters or infringement notices).

### What did we find?

- ▶ DISR's administration of trade measurement compliance is partly effective.
- ▶ Sound governance arrangements were not fully in place to support trade measurement compliance activities. The approach is not adequately risk-based.
- ▶ The department's approach to trade measurement compliance has been partly effective. Compliance monitoring approaches are appropriate. The level of compliance monitoring activity has fallen. Action in response to non-compliance has not been timely or demonstrably effective.

### What did we recommend?

- ▶ There were six recommendations to DISR aimed at strengthening its governance arrangements and improving its approach to compliance activities.
- ▶ The department agreed to five recommendations and partially agreed to one.

3131

trader audits conducted in  
2021–22.

29%

of 2021–22 trader audits  
identified non-compliance.

56

warning letters or infringement  
notices issued in 2021–22.

# Summary and recommendations

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## Background

1. Trade measurement refers to all transactions in which the price of the commodities or goods is based on measurement of quantity or quality. The primary purpose of Australia's trade measurement system is to ensure that the pricing of traded goods is based on accurate measurement. Trade measurement covers both business-to-business transactions and business-to-consumer transactions. Australia's trade measurement transactions are estimated to be worth more than \$750 billion each year.

2. The Department of Industry, Science and Resources (DISR), through the National Measurement Institute (NMI), administers Australia's trade measurement laws. It is responsible for ensuring that businesses and individuals comply with the rules and regulations so that there is accurate and reliable measurement in trade. As part of this responsibility, DISR, through its NMI function, undertakes trade measurement compliance activities that include:

- conducting trader audits;
- testing measuring instruments in use for trade;
- testing pre-packaged goods;
- monitoring trading practices through trial purchases; and
- conducting enforcement activities where non-compliance has been identified.

3. DISR reported that in 2021–22 the NMI had:

- conducted 3131 trader audits (compared to 7600 in 2019–20 and 4842 in 2020–21);
- tested 7118 measuring instruments (compared to 13,588 in 2019–20 and 14,049 in 2020–21); and
- inspected 17,360 lines of packaged goods (compared to 78,290 in 2019–20 and 25,990 in 2020–21).

4. DISR reports the NMI as having more than 350 staff, of which 76 are estimated by DISR to work in trade measurement.

## Rationale for undertaking the audit

5. The activities of the department, through its NMI function of trade measurement, impact on everyday life. The department has regulatory responsibility to ensure that the pricing of traded goods, based on quantity or quality, is based on accurate measurement. This audit provides assurance to the Parliament over the effectiveness of DISR's administration of trade measurement.

## Audit objective and criteria

6. The objective of the audit was to examine whether compliance with trade measurement in Australia is being effectively administered.

7. To form a conclusion against this objective, the following high-level criteria were applied.

- Have sound governance arrangements been established to support trade measurement compliance activities?

- Is there an effective approach to trade measurement compliance activities?

## Conclusion

8. DISR's administration of trade measurement compliance is partly effective.

9. Sound governance arrangements were not fully in place to support trade measurement compliance activities. A wide range of policy and procedural documents have been developed. However, there are gaps, overlaps and inconsistencies in those documents and they have not been updated in a timely manner. Evidence that appropriate appointment processes of officers under the relevant legislation are not consistently implemented exposes the department to a risk that actions taken in compliance activities are invalid. The annual targeting of compliance activities to particular industry sectors is not demonstrably risk-based, and the risk-based approach to selecting individual traders within targeted industries requires improvement.

10. The department's approach to trade measurement compliance has been partly effective. The department has appropriate approaches to monitor the level of compliance, however the level of monitoring activity (particularly trader audits) has declined significantly over the last five years, with no evidence that this was driven by a changed risk environment or risk assessment. Nearly a third of all trader audits conducted between 2019–20 and 2021–22 identified non-compliance. Action in response to identified non-compliance, including follow-up audits and enforcement actions, has not been timely or demonstrably effective. DISR's monitoring and reporting arrangements did not extend to the effectiveness of its regulatory approach, with its regulatory reporting more generally declining after 2019–20 such that it has not complied with its obligations.

## Supporting findings

### Governance arrangements

11. While DISR has many documents that cover a range of processes, there are gaps in the policies and procedures in place to support departmental officers in the administration of trade measurement compliance activities. Documents often overlapped and were not updated in a timely, consistent and transparent manner. Of the 60 officers that have undertaken trader audits in the period examined by the ANAO, 58 per cent had not been appointed in writing (as required by the *National Measurement Act 1960*) prior to undertaking their first audit, or there was no record of them having ever been appointed in writing. This impacted 1399 (eight per cent) of the 16,590 trader audits undertaken in the three-year period to 30 June 2022 examined by the ANAO. (See paragraphs 2.3 to 2.24)

12. The regulatory approach is not fully and appropriately informed by an assessment of compliance risk. DISR identified the need for a more sophisticated risk framework for legal metrology in December 2015. While progress has been made, trader audit activities are not yet being effectively and demonstrably targeted to market sectors and traders at higher risk of regulatory non-compliance. There is not a strong relationship between industry-level risk assessments and the department's targeting of compliance activities and development of the annual National Compliance Plans. While DISR has introduced a risk-based approach for selecting individual traders for audit within those sectors being targeted, the approach should be improved. (See paragraphs 2.29 to 2.60)



## Compliance activities

13. A key component of monitoring industry compliance is the conduct of trader audits, with DISR reporting that 32,792 audits were conducted over the five years to 2021–22. The department's data overstates the number of trader audits it undertakes. There has been a downward trend in the number of trader audits planned to be conducted each year. The actual number of audits conducted has also fallen short of the target in each of the five years examined by the ANAO. In 2021–22, the department conducted 3131 audits which was less than half the target of 8000 audits which itself was significantly below the target of 11,500 audits for 2017–18. The department identifies in its National Compliance Plan particular industries to be targeted for compliance activity however the shortfall in performance against targets is as evident for the targeted programs as it is for the overall program of trader audits (59 per cent of planned audits under the targeted programs were not conducted in 2021–22).

14. There has been a similar declining trend across DISR's other trade measurement inspection activities. There was a decrease of 52 per cent in the number of measuring instruments inspected between 2017–18 and 2021–22. There was a decrease of 76 per cent in the number of pre-packaged article lines inspected over the same period.

15. In comparison, the department has consistently exceeded the number of Tobacco Plain Packaging information visits undertaken by trade measurement inspectors on behalf of the Department of Health and Aged Care (the department receives separate funding from the Department of Health and Aged Care for this work). The evidence is that the department is prioritising this work it undertakes on behalf of another department over its own responsibility for trade measurement compliance. Further, the scope of this work has extended beyond the intended purpose of checking plain packaging to include examining whether traders are conducting illegal activities through the sale of illicit tobacco, with the related risks to the officers undertaking this work not adequately addressed by the department. (See paragraphs 3.2 to 3.32)

16. Action in response to identified non-compliance has not been timely or effective. Documented procedures are in place to respond to non-compliance via a follow-up trade measurement compliance audit or to commence enforcement action. Fewer follow-up audits are being undertaken and delays in the conduct of follow-up audits are common. Where follow-up audits have been undertaken the trend has been for increasing rates of continuing non-compliance to be found. Continuing non-compliance is not consistently followed by enforcement action. Where escalated enforcement action is being taken it is most often through warning letters and infringement notices (with associated fines) but those actions have also not been timely. (See paragraphs 3.33 to 3.51)

17. The regulatory approach is not being regularly reviewed and updated reflecting that the department is not complying with Australian Government requirements for regulatory performance reporting, including by not having in place an appropriate Regulator Statement of Expectations and Statement of Intent. DISR has not established performance indicators against which to review or to demonstrate the effectiveness of its regulatory approach to trade measurement. DISR reports its outputs, such as the number of trader audits conducted, although advice from the department to the ANAO as part of this audit indicates that the department is overstating the number of audits it undertakes. DISR ceased externally reporting against output targets, and ceased its regulator performance reporting for legal metrology, after 2019–20. DISR

has not issued a Regulator Statement of Intent for its National Measurement Institute despite this being a requirement. (See paragraphs 3.52 to 3.80)

## Recommendations

**Recommendation no. 1**  
**Paragraph 2.12** The Department of Industry, Science and Resources implement stronger controls that ensure persons undertaking monitoring and compliance activities have been appointed in accordance with the relevant legislation, and that appropriate records are made and retained of all appointments.

**Department of Industry, Science and Resources response:** *Agreed.*

**Recommendation no. 2**  
**Paragraph 2.25** The Department of Industry, Science and Resources improve its record keeping processes to ensure that trade measurement business information and records are accurate, fit-for-purpose and are appropriately stored within departmental systems.

**Department of Industry, Science and Resources response:** *Agreed.*

**Recommendation no. 3**  
**Paragraph 2.61** The Department of Industry, Science and Resources put in place an improved approach to assessing the risk of legal metrology regulatory non-compliance at the industry and trader levels, and a transparent process that reflects the assessment of risk for selecting industries for targeting under its annual National Compliance Plans.

**Department of Industry, Science and Resources response:** *Agreed.*

**Recommendation no. 4**  
**Paragraph 3.27** In its activities related to the *Tobacco Plain Packaging Act 2011* and the *Tobacco Plain Packaging Regulations 2011*, the Department of Industry, Science and Resources ensures that:

- (a) appropriate priority is given to its responsibilities under the *National Measurement Act 1960*;
- (b) its directions to officers are limited to the undertaking of education and investigation activities to promote compliance with the provisions of the legislation; and
- (c) it is complying with its duties and obligations to those officers under the *Work Health and Safety Act 2011*.

**Department of Industry, Science and Resources response:** *Partially Agreed.*

**Recommendation no. 5  
Paragraph 3.44** The Department of Industry, Science and Resources strengthen its approach to conducting follow-up audits where an initial trader audit identifies non-compliance such that follow-up activities are conducted in a timely manner, regulatory action taken where there is continuing non-compliance and appropriate records made and retained.

**Department of Industry, Science and Resources response:** *Agreed.*

**Recommendation no. 6  
Paragraph 3.81** As regulator of Australia's legal metrology system, the Department of Industry, Science and Resources:

- (a) apply *Resource Management Guide 128: Regulator Performance*; and
- (b) establish indicators of, and report on, the effectiveness of its regulatory approach.

**Department of Industry, Science and Resources response:** *Agreed.*

## Summary of entity responses

18. The proposed audit report was provided to DISR and an extract was provided to the Department of Health and Aged Care. The letters of response that were received for inclusion in the audit report are at Appendix 1. Entities' summary responses are provided below. The improvements observed by the ANAO during the course of this audit are at Appendix 2.

### Department of Industry, Science and Resources

The Department of Industry, Science and Resources (the department) acknowledges the audit report and welcomes the findings as an opportunity to improve.

The unique and critical functions of the National Measurement Institute (NMI) are central to unlocking innovation and leading advancements in science and technology. NMI received \$63.9 million in the 2023-24 budget to sustain its core measurement capabilities and modernise Australia's measurement laws. Updating legislation to be more principles-based will help new technologies get to market faster while retaining consumer and business protections.

The department's commitment to continuous improvement responds to an environment of rapid technological change and increasing costs of administering trade measurement law. NMI is developing options for Government to achieve ongoing financial sustainability and meet rising demand from industry.

The department notes that the scope of the audit coincided with the impacts of the COVID 19 pandemic. Compliance activities were undertaken in a way that protected the health and safety of trade measurement inspectors and supported the Government's response to COVID 19.

The department commits to continuing and completing a range of improvements already under way, including to Trade Measurement Inspector appointments and activities, document management, risk and accountability frameworks and reporting responsibilities.

## Department of Health and Aged Care

The Department of Health and Aged Care (the Department) acknowledges the findings available in the extract of the report provided and notes the recommendation directed at the Department of Industry, Science and Resources in respect of activities related to the *Tobacco Plain Packaging Act 2011*.

Since December 2012, all tobacco products in Australia were required to be sold in plain packaging and feature graphic health warnings. The continued monitoring and enforcement of plain packaging requirements is an essential component of Australia's comprehensive approach to tobacco control.

The inspection scheme undertaken by the National Measurement Institute achieves a high-quantity, low-time investment balance, to ensure that retailers of tobacco products receive the greatest possible exposure to compliance activities and information. Where suspected illicit tobacco products are identified through compliance activities undertaken by the National Measurement Institute, the Department refers information to the relevant law enforcement agencies.

On 30 November 2022 the Australian Government announced significant tobacco control reforms with the aim of consolidating and modernising existing tobacco control legislation, including the *Tobacco Plain Packaging Act 2011*. The Department notes the audit will inform consideration of future compliance activities, including under the proposed Public Health (Tobacco and Other Products) Bill 2023.

## Key messages from this audit for all Australian Government entities

19. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

### Governance and risk management

- Where Parliament confers statutory powers to enable officers to monitor and enforce compliance with regulation, it is important that those powers are exercised lawfully by individuals that have been properly appointed, and that appointment instruments are complete and current.
- Determining the level of and focus of compliance and enforcement activity on areas of higher risk ensures that resources are targeted to the areas requiring the most attention and that resources are appropriately allocated commensurate with identified risk areas.
- Entities should avoid proliferation of guidance and procedural documentation which may make it challenging for staff to find the 'right' guidance document — and also creates a downstream administrative burden because such material must be periodically reviewed.
- Regulators should make appropriate use of their powers by applying a graduated approach to address non-compliance that includes the timely use of stronger sanctions when required. While the regulatory action should align with the severity and frequency of the non-compliance, it should also escalate if the non-compliance is not rectified over time.

### Performance and impact measurement

- The benefits of establishing performance targets are diminished where entities do not assess and report their performance against those targets.

# Audit findings

# 1. Background

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## Introduction

1.1 Measurement is integral to any well-functioning and productive economy, and plays a critical role in domestic law and international treaties for trade, commerce and consumer protection. Following a decision of the Council of Australian Governments to transfer trade measurement responsibilities from the states and territories, national trade measurement commenced on 1 July 2010. Trade measurement refers to all transactions in which the price of the commodities or goods is based on measurement of quantity or quality. The primary purpose of Australia's trade measurement system is to ensure that the pricing of traded goods is based on accurate measurement. Trade measurement covers both business-to-business transactions and business-to-consumer transactions. Australia's trade measurement transactions are estimated to be worth more than \$750 billion each year.

1.2 The Department of Industry, Science and Resources (DISR), through the National Measurement Institute (NMI)<sup>1</sup>, administers Australia's trade measurement laws. It is responsible for ensuring that businesses and individuals comply with the rules and regulations so that there is accurate and reliable measurement in trade. As part of this responsibility, DISR, through its NMI function, undertakes trade measurement compliance activities that include:

- conducting trader audits;
- testing measuring instruments in use for trade;
- testing pre-packaged goods;
- monitoring trading practices through trial purchases; and
- conducting enforcement activities where non-compliance has been identified.

1.3 DISR reported that in 2021–22 the NMI had:

- conducted 3131 trader audits (compared to 7600 in 2019–20 and 4842 in 2020–21);
- tested 7118 measuring instruments (compared to 13,588 in 2019–20 and 14,049 in 2020–21); and
- inspected 17,360 lines of packaged goods (compared to 78,290 in 2019–20 and 25,990 in 2020–21).<sup>2</sup>

1.4 DISR reports the NMI as having more than 350 staff, of which 76 are estimated by DISR to work in trade measurement.<sup>3</sup> The NMI has offices located around Australia with its head office located in Sydney (see Figure 1.1).

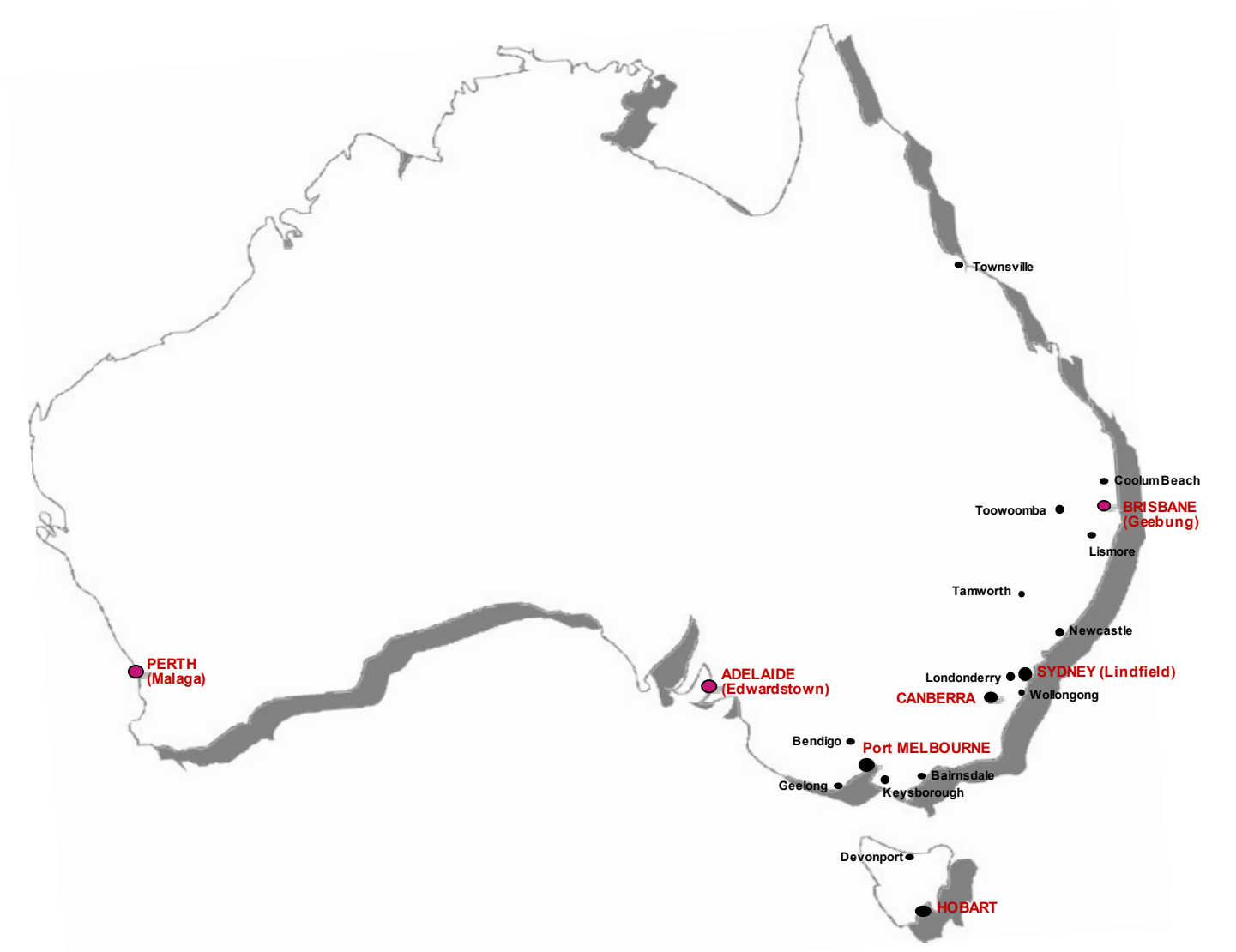
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1 The National Measurement Institute is a division within DISR's Science and Technology Group.

2 DISR, *Legal Metrology Compliance in 2021–22* [Internet], available from <https://www.industry.gov.au/publications/legal-metrology-compliance-2021-22> [accessed 15 December 2022].

3 In June 2023, DISR advised the ANAO that this 'number includes regional trade measurement inspectors, programs and governance officers who support trade measurement activities, licencing and policy officers, TMARS project support and Investigations and Compliance staff. The number includes relevant leadership positions that support the above roles, including the General Manager.' See further details on resourcing at paragraphs 3.10–3.13.

Figure 1.1: National Measurement Institute office and laboratory locations



Note: The red dots identify Measurement Standards laboratory locations.

Source: Department of Industry, Science and Resources.

## Rationale for undertaking the audit

1.5 The activities of the department, through its NMI function of trade measurement, impact on everyday life. The department has regulatory responsibility to ensure that the pricing of traded goods, based on quantity or quality, is based on accurate measurement. This audit provides assurance to the Parliament over the effectiveness of DISR's administration of trade measurement.

## Audit approach

### Audit objective, criteria and scope

1.6 The objective of the audit was to examine whether compliance with trade measurement in Australia is being effectively administered.

1.7 To form a conclusion against this objective, the following high-level criteria were applied.

- Have sound governance arrangements been established to support trade measurement compliance activities?
- Is there an effective approach to trade measurement compliance activities?

1.8 The scope of the audit covered the period from 1 July 2019 until 30 June 2022. In relation to examining the adoption of a risk-based approach to regulation, the audit focussed on the two programs where DISR has documented approach to assessing compliance risk, being the concentrated national audit and compliance confidence programs. Concentrated national audit programs focus on targeted industry sectors over a specific time period to assess compliance with trade measurement legislation. Under the compliance confidence programs, DISR targets a selection of traders and industry groups found to be non-compliant in previous years.

### Audit methodology

1.9 The audit methodology included:

- reviewing and analysing relevant departmental records;
- reviewing and analysing relevant data in the Trade Measurement Activity Recording System (TMARS) relating to trade measurement compliance activities<sup>4</sup>;
- collecting and reviewing email accounts;
- examination of a sample of trader audits and enforcement actions;
- meetings with key staff; and
- observing the conduct of trade measurement compliance activities by departmental officers in four states and territories, and site visits to two NMI offices.

1.10 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$458,000.

1.11 The team members for this audit were Tiffany Tang, Nicole McNee, Tracey Bremner and Brian Boyd.

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4 TMARS is a Microsoft dynamic platform used by DISR to record information related to trade measurement activities (such as records of traders, trader audits and enforcement actions).



## 2. Governance arrangements

### Areas examined

The ANAO examined whether the Department of Industry, Science and Resources (DISR) had established sound governance arrangements to support the administration of trade measurement compliance activities, particularly of its trader audits.

### Conclusion

Sound governance arrangements were not fully in place to support trade measurement compliance activities. A wide range of policy and procedural documents have been developed. However, there are gaps, overlaps and inconsistencies in those documents and they have not been updated in a timely manner. Evidence that appropriate appointment processes of officers under the relevant legislation are not consistently implemented exposes the department to a risk that actions taken in compliance activities are invalid. The annual targeting of compliance activities to particular industry sectors is not demonstrably risk-based, and the risk-based approach to selecting individual traders within targeted industries requires improvement.

### Areas for improvement

The ANAO has made three recommendations to DISR to improve: the appointment process for persons undertaking trader audits; its record keeping processes; and the approach to assessing compliance risk and selecting higher-risk industries for targeted activities.

2.1 Procedures and guidance are important to ensure the delivery of policy, including regulation, is consistent with achieving intended outcomes. The ANAO examined whether DISR had appropriate policies, procedures and guidance in place to support the administration of trade measurement compliance activities.

2.2 Best practice regulators take a risk-based approach to compliance activities and are informed by data, evidence and intelligence. Regulators that assess the risk of non-compliance are better positioned to focus limited resources on areas of greatest impact.<sup>5</sup> The ANAO examined DISR's approach to assessing the risk of regulatory non-compliance and the extent to which the results informed the targeting of its trader audit activities.

### Are appropriate policies, procedures and guidance in place?

While DISR has many documents that cover a range of processes, there are gaps in the policies and procedures in place to support departmental officers in the administration of trade measurement compliance activities. Documents often overlapped and were not updated in a timely, consistent and transparent manner. Of the 60 officers that have undertaken trader audits in the period examined by the ANAO, 58 per cent had not been appointed in writing (as required by the *National Measurement Act 1960*) prior to undertaking their first audit, or there was no record of them having ever been appointed in writing. This impacted 1399 (eight per

5 'Risk based and data driven' is one of the three best practice principles outlined in the Department of Finance, *Resource Management Guide 128: Regulator Performance* [Internet], available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 10 July 2023].

cent) of the 16,590 trader audits undertaken in the three-year period to 30 June 2022 examined by the ANAO.

2.3 The primary objective of trade measurement compliance activities is to assess whether traders are complying with their obligations under trade measurement laws.<sup>6</sup> DISR officers who are appointed as trade measurement inspectors are responsible for conducting trader audits to monitor trader compliance.<sup>7</sup> Inspectors may undertake different activities during a trader audit including:

- testing measuring instruments;
- checking pre-packaged articles<sup>8</sup>;
- checking trading practices<sup>9</sup>; and
- conducting 'secret shopper' trial purchases.

2.4 Trader audits may be conducted as part of a trade measurement compliance program, or in response to a complaint or enquiry from a consumer.<sup>10</sup>

### Appointment of trade measurement inspectors

2.5 Under section 18MA of the *National Measurement Act 1960*, the Secretary may by instrument in writing, appoint a person as a trade measurement inspector if that person has the prescribed qualifications, knowledge or experience and falls under one of the following categories:

- an APS employee in the department;
- an employee (whether or not an APS employee) of a Commonwealth authority;
- the holder of an office established by or under a law of the Commonwealth.

2.6 The people eligible to be appointed as trade measurement inspectors are limited to Commonwealth employees due to the search and entry powers conferred upon them. A person that has not been appointed by written instrument as a trade measurement inspector is unable to

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6 The applicable legislation includes the: *National Measurement Act 1960*; *National Measurement Regulations 1999*; *National Measurement Guidelines 2016*; and *National Trade Measurement Regulations 2009*.

7 Under a Memorandum of Understanding with the Department of Health and Aged Care, trade measurement inspectors may be appointed as authorised officers under the *Tobacco Plain Packaging Act 2011* to undertake tobacco plain packaging information, compliance and enforcement activities (see further information on tobacco plain packaging activities at paragraphs 3.21–3.26).

Trade measurement inspectors who are separately appointed as inspectors under the *Fuel Quality Standards Act 2000* also undertake inspection and sampling activities on behalf of the Department of Climate Change, Energy, the Environment and Water (see further information on fuel quality standards activities at paragraphs 3.31–3.32).

8 A pre-packaged article is an article (including substance) which is packed in advance ready for sale. An article is packed in advance ready for sale once it is packed in the package in which it will be sold. Pre-packaged articles must be marked with certain information such as the name and address of the packer.

9 This includes checking that: measuring instruments being used for trade meet the legislative requirements (such as being verified, of an approved pattern and being used in a manner that produces an accurate measurement); and articles are being sold in accordance with the legislative requirements (such as being sold by measurement and in the prescribed unit of measurement (where applicable), having an appropriate written statement, and being sold by net measurement).

10 Complaints and enquiries about Australia's measurement laws can be made via phone or email. Further details are available on the NMI's website at <https://www.industry.gov.au/national-measurement-institute/about-national-measurement-institute/customer-service-charter> [accessed 4 January 2023].

legally undertake monitoring and enforcement activities under the legislation, such as to enter and search business premises, inspect business vehicles, seize certain things, require answers to questions and issue non-compliance notices.<sup>11</sup>

2.7 The Secretary of DISR signed an instrument in May 2017 delegating functions and powers under the *National Measurement Act 1960*, including the power to appoint trade measurement inspectors. In a report of October 2019, a legal firm engaged by DISR recommended that this instrument be amended to rectify a number of identified risks. The instrument had not been amended as at June 2023, notwithstanding the legal advice or that the holder of the position of Secretary had changed twice since 2017 (in February 2020 and again in August 2022). The Australian Government Solicitor advises that ‘it is clearly good administrative practice to provide new office-holders with the opportunity to reconsider arrangements for delegated decision-making and issue new instruments of delegation’.<sup>12</sup>

2.8 A further shortcoming in the department’s approach was that all copies of the legal advice were marked ‘draft’. Not finalising draft legal advice<sup>13</sup> is not a sound reason for entities to not action the advice.<sup>14</sup>

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- 11 Auditor-General Report No.43 2020–21 *Australian Federal Police’s Use of Statutory Powers* highlighted the importance of ensuring that, where Parliament confers statutory powers to enable officers to monitor and enforce compliance with regulation, powers are exercised lawfully, and that instruments are complete and current.
- 12 Australian Government Solicitor, *Legal briefing – After the election – what happens* [Internet], AGS, Canberra, May 2022, available from <https://www.ags.gov.au/publications/legal-briefing> [accessed 25 June 2023].
- 13 The report on the legal review of delegations and authorisations of the National Measurement Institute and the Resources Division of DISR followed on from an earlier review of the full department’s processes for creating and managing delegations and authorisations. It concluded that: ‘while the department had adequate policies and procedures in respect of its delegation and authorisation framework, that framework had not been adequately applied in practice. A review of a sample of instruments found issues with the record-keeping of the instruments (including access and currency issues, allocation of responsibility and incomplete or inaccurate recording of instruments) and issues with the instruments themselves (including incomplete instruments (unsigned, undated, no authorising instrument), incorrect or mischaracterisation of power, and uncertainty as to financial delegations).’
- 14 The Attorney-General’s Department’s initial guidance on the use of draft legal advice within government (May 2023) states:
- ‘Legal advice cannot be disregarded merely because it is in draft form.
  - While legal advice should be sought with an intention to receive final advice, there are occasions when it will be appropriate to seek and provide legal advice initially in draft form...
  - However, once all queries and clarifications have been conveyed to the advice author, draft advice should ordinarily be finalised. If a decision is taken not to finalise the draft advice, the reasons for that decision should be documented.
  - It is never acceptable for legal advice not to be finalised on the basis that the advice may be inconvenient or unwelcome.’

The Report of the Royal Commission into the Robodebt Scheme, dated 7 July 2023, similarly stated that: ‘The Commission recognises that there may be circumstances where it is reasonable to obtain advice in draft to allow further clarification of facts, issues and instructions. However, unless there is very good reason, the advice should always be finalised, and if it is not, that very good reason should be documented.’

2.9 As at 31 December 2022, DISR did not have a policy or procedure in place relating to the appointment of trade measurement inspectors.<sup>15</sup> The ANAO observed that written instruments of appointment for trade measurement inspectors were not appropriately filed within DISR's systems for all relevant individuals. Between 1 July 2019 and 30 June 2022, a total of 16,590 trader audits were recorded as having been completed by 60 individual inspectors in TMARS.<sup>16</sup> Of those 60 individuals:

- 40 (67 per cent) had instruments of appointment filed within DISR's systems<sup>17</sup>;
  - 12 were appropriately appointed as a trade measurement inspector under an instrument prior to completing their first trader audit; and
  - 28 were appointed after already having completed their first trader audit (the maximum time taken between the first trader audit being completed and the instrument being signed was 5.8 years, with the average being 9.8 months);
- 13 (22 per cent) had scans of the hard copy instruments of appointment subsequently filed within DISR's systems after the ANAO requested further information (all inspectors had been appropriately appointed prior to completing their first trader audit)<sup>18</sup>; and
- seven (12 per cent) did not have evidence of a valid appointment.

2.10 In aggregate, 1399 of the 16,590 trader audits undertaken between 1 July 2019 and 30 June 2022 were conducted by a person that either had not yet been appointed (67 audits)<sup>19</sup> or there is no record of them having ever been appointed (1332 audits). Of those 1399 trader audits, 456 or 33 per cent resulted in a 'Failed' audit result. In June 2023, DISR advised the ANAO that it 'considers it cannot take valid enforcement actions where the audit was conducted by a person not appointed, or not yet appointed, under the legislation.'

2.11 In December 2022, DISR moved to having a single instrument of appointment in the form of a Schedule that lists all departmental staff appointed as trade measurement inspectors, rather than

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15 DISR listed 'LMB procedure 4.X – Appointment of trade measurement inspectors' as a potential document in its document lists as provided to the ANAO in June and July 2022 (see paragraph 2.15 for further information on DISR's document lists). A new 'LMB Procedure 4.9 – LMB officer authorisations and appointments' was approved on 3 February 2023. In June 2023, DISR advised the ANAO that it had 'commenced research regarding inspector appointment processes and procedures in March 2021'.

16 Two of the 16,590 completed audits had no inspector names recorded against them in TMARS.

17 Note that documents were not saved consistently within DISR's systems. While DISR's internal records management policy requires that Content Manager be used (see further detail at paragraph 2.16), some instruments were either saved in Content Manager or the Shared Drives, while others were saved in both. Documents were also not consistently saved in the same folder. For one of the inspectors, DISR was unable to locate the instrument of appointment however the ANAO was able to locate a scanned copy using its e-Discovery tool.

18 Of these 13, 11 were saved in both Content Manager and the Shared Drives. The remaining two were only saved in the Shared Drives.

19 In June 2023, DISR advised the ANAO that '55 were of an inspection type that did not exercise regulatory powers, such as desktop or online research of traders or a new trader program that did not involve site visits'. Of these 55 audits: 20 (36 per cent) were recorded as having failed to comply; 25 (45 per cent) had passed; and 10 (18 per cent) had no action. See further detail on the reporting of such 'inspection types' at paragraph 3.6. DISR also advised the ANAO that Assistant Trade Measurement Officers (ATMOs) 'assist with tasks such as preparing non-compliance notices subsequently signed by the appointed Inspector and entering audit information into TMARs on behalf of the appointed Inspector, which do not constitute undertaking a trader audit or exercising regulatory powers. DISR notes that TMARS currently includes a field to identify the appointed Assisting Inspector to an ATMO, but that this field has not always been in place.' Seven of the 67 audits were conducted by ATMOs in the company of an appointed inspector.

having separate certificates issued to each individual as the appointment instrument. The new instrument does not of itself mean that persons undertaking monitoring and compliance activities have been appointed before undertaking this work. For example, based on TMARS data the ANAO identified seven audits conducted after the new instrument was introduced which had an unappointed officer listed as the 'Inspector' within TMARS, and no appointed officer listed as assisting. In July 2023, DISR provided the ANAO with records that indicated TMARS had not recorded that four of those seven audits had been conducted under the supervision of a person that had been appointed.

### Recommendation no. 1

2.12 The Department of Industry, Science and Resources implement stronger controls that ensure persons undertaking monitoring and compliance activities have been appointed in accordance with the relevant legislation, and that appropriate records are made and retained of all appointments.

**Department of Industry, Science and Resources response: Agreed.**

2.13 *In February 2023, the department introduced stronger controls including a centralised process and instrument to appoint and record the appointment of Trade Measurement Inspectors. The department will continue to utilise these controls to ensure that appropriate records are kept of all Trade Measurement Inspector appointments.*

2.14 *The department will implement a new policy outlining when and how persons, who are not appointed as a Trade Measurement Inspector, can support trade measurement compliance activities. The department will also update guidance on what constitutes a trader audit.*

### Policies and procedures

2.15 In response to the ANAO's request for an inventory of the National Measurement Institute's (NMI) documents, DISR provided in June and July 2022 three spreadsheets that comprised the document lists. The document lists were separated into: documents directly related to trade measurement activities; and other overarching documents related to the legal metrology framework.<sup>20</sup> In total, there were 184 documents listed as being in effect and 263 with a status of 'Potential'.<sup>21</sup>

2.16 DISR's internal records management policy requires that the NMI use Content Manager (the department's record keeping system) to store and access documents and digital information.<sup>22</sup> Of the 184 current documents, 77 were identified by DISR as being 'directly related to trade measurement activities'. These 77 documents were filed across five different folders/containers

20 Legal metrology refers to the legislative and regulatory framework that underpins measurement and measuring instruments used for trade and legal purposes. This regulatory function sits within the Legal Metrology Branch (LMB) of NMI.

21 Of these 184 documents, 70 had an 'Approved' status and the remaining 114 had a status of 'Under Review'. DISR advised the ANAO in June 2022 that 'documents 'under review' are still current but undergoing review, 'potential' maybe in draft format (for drafting [sic] and/or consultation) or to be developed in due course'.

22 An exception exists for 'work created and stored in the Trade Measurement Activity and Reporting (TMARS)... [which has been] developed to be considered 'manage-in-place''. In July 2022, DISR advised the ANAO that the databases used by the NMI included: Content Manager; DocHub; iAuditor; TMARS and local shared drives.

within Content Manager. The effective dates of the documents spanned over a period of more than 10 years, with the oldest document having been last revised in February 2012 and the newest document being approved in June 2022.<sup>23</sup>

2.17 The ANAO's examination of DISR's policies and procedures identified instances where documents were confusing and incomplete (see Appendix 3 for further details and examples). The ANAO also identified gaps in the available guidance material and some areas where the documents could be improved.

- There is an absence of TMARS-specific guidance which outlines how inspectors are to record information related to trader audits within TMARS and the level of detail required (see paragraphs 3.41–3.42 and 3.74–3.76 for further details on the inconsistencies observed by the ANAO in how information is input into TMARS and the level of detail recorded against trader audits).
- There is no policy or guidance relating to the management of hard copy inspector notebooks and non-compliance notices by DISR officers (see paragraph 3.43 for further details on missing notebooks and notices). In June 2023, DISR advised the ANAO that:

As of 20 April 2023, several actions were taken to improve guidance and processes for management of hardcopy inspector notebooks including: all inspector notebooks being recorded in TMARS as an asset, LMB Procedure 8.18 'Updating asset details in TMARS' has been updated to include guidance regarding inspector notebook management and a new Inspector Handbook known as Draft LMB Procedure 'Inspection and investigation' is in draft format and will include guidance relating to storage of inspector notebooks.

- The ANAO's analysis was that the process of recording all issued notebooks in TMARS as an asset was completed on 21 June 2023. LMB Procedure 8.18 (approved on 10 February 2023) does not include reference to inspector notebooks<sup>24</sup> and does not include guidance regarding the management or storage of those notebooks by inspectors. Further, draft LMB Procedure – Inspection and Investigation does not include any reference to the storage of inspector notebooks.

2.18 The ANAO also observed that existing policies and procedures were not being updated in a timely manner (see Table A.1 in Appendix 3 for examples). It is important to maintain the currency of all supporting documentation, including metadata, to enable robust data management and analysis. This will also ensure the implementation of legislative or policy/procedural changes is consistent with achieving intended outcomes. To obtain an indication on the currency of the 77 policies and procedures related to trade measurement activities, the ANAO examined the time lapsed since the documents were last approved/reviewed, as at 30 June 2022. For this analysis, the ANAO did not include: 12 documents that were plans for specific programs undertaken in 2021–22

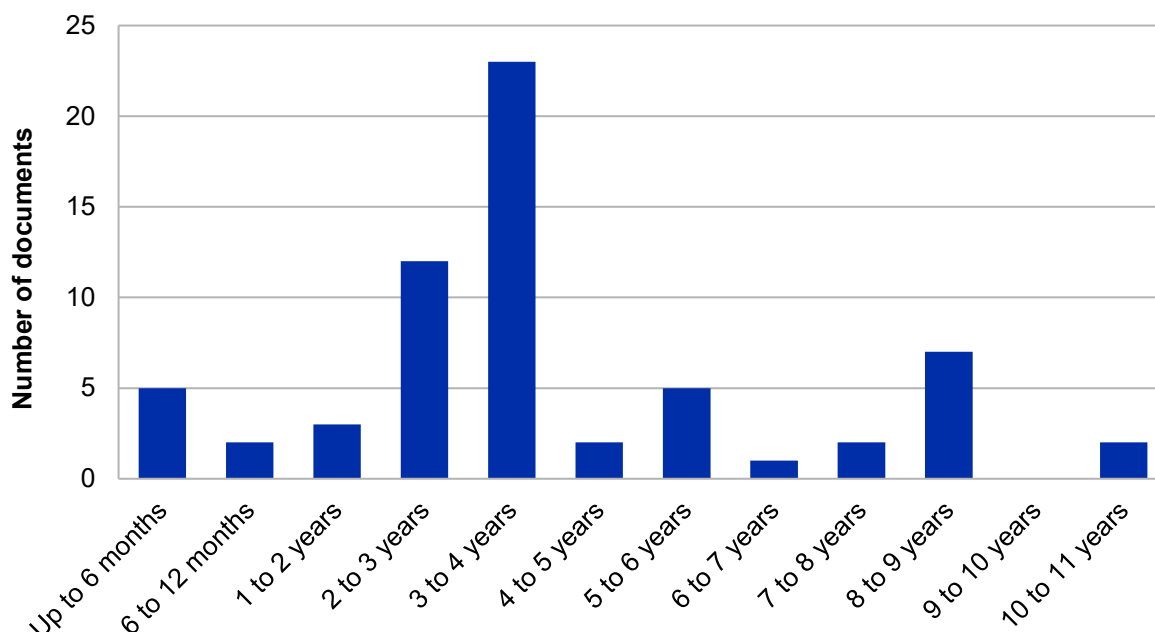
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23 Auditor-General Report No.43 2020–21 *Australian Federal Police's Use of Statutory Powers* identified as a key message for all Australian Government entities that they should avoid proliferation of guidance material which may make it challenging for staff to find the 'right' guidance document and noted that this also creates a downstream administrative burden because such material must be periodically reviewed.

24 In August 2023, DISR advised the ANAO that 'Further updates to LMB Procedure 8.18 were made on 5 July 2023 to include a reference to inspector notebooks and relates to how they are recorded in TMARS as an asset'. While the procedure was amended as advised by DISR, the changes were not noted under the 'Amendment Record' table. Further, under the 'Document Control' table the approval date was still recorded as 10 February 2023 and the Version as being 1. Further advice from DISR to the ANAO in August 2023 was that slight changes to LMB documents are not normally recorded in the amendment record.

and one document which did not have an approved/reviewed/effective date. Of the remaining 64 documents, 17 (27 per cent) had been approved or reviewed more than five years ago (see Figure 2.1).<sup>25</sup>

**Figure 2.1: Time lapsed since documents last approved/reviewed as at 30 June 2022**



Note: This analysis did not include 13 documents: 12 were plans for specific programs undertaken in 2021–22 and one did not have an approved/reviewed/effective date.

In July 2022, DISR advised the ANAO that one of the documents in the ‘8 to 9 years’ category had been made obsolete.

Source: ANAO analysis of departmental records.

### *Internal audit findings*

2.19 At a cost of \$64,000, Nous Group was contracted to conduct an internal audit of the NMI’s trade measurement regulatory performance. The report was completed in April 2018. It found that:

LMB has many policies and procedures that cover a range of processes, including policies on enforcement actions and investigation procedures. However, many are scattered across LMB’s IT infrastructure and most have not been reviewed for a while. A few stakeholders observed that some policies and procedures were not used, and others were out of date. One stakeholder considered that some staff don’t know where to find relevant documents.

This issue was identified a year ago, and a project was initiated to gather them in one directory and review them periodically. This project will make every instruction, policy, and procedure available in one location sorted by Branch. There will also be an ongoing review process for policies

25 These include documents related to enforcement actions and investigation procedures: NTM 9.1: Investigation Process – Operations Instructions; NTM 9.2: Entry/Exit of Premises Instructions; NTM 9.3: Search and Seizure Instructions; NTM 9.4: Exhibit Management Instructions; NTM 9.5: Questioning Instructions; NTM 10.4: Minor Enforcement Actions; NTM 10.6: Trade Measurement Prosecution Policy (DISR advised in July 2022 that this policy had been made obsolete); Referral of alleged licensing non-compliances; and Contacting an alleged offender of a strict liability offence for a follow-up interview.

and procedures so that they are all updated on a regular basis, based on consultation with the original author of the document.

2.20 Two related internal audit recommendations were that the NMI:

1. Consolidate policies and procedures following the review.
2. Make a designated person or team responsible for updating policies and procedures in line with performance insights.

2.21 Following an internal review in 2019 of the LMB structure, the NMI commenced the LMB Structure Pilot in March 2020 which transferred responsibility to the Policy Unit for 'Facilitating the development and maintenance of non-technical documentation on behalf of LMB'. In February 2023, the NMI provided the following information about the LMB document management project:

- The Policy Unit began a stocktake of documents currently used or identify for use within LMB. These documents were found in various states of approval and locations. As of 3 February 2023 nearly 1700 documents have been identified in the LMB Document Register.<sup>26</sup>
- The stocktake identified the potential need for the review or creation of 300 - 350 critical LMB documents (policies, plans and procedures).
- On 1 October 2020 LMB introduced a new document management system for critical LMB documents not covered by other quality systems. The laboratory and training functions within LMB are already subject to separate quality systems that include their critical documents.
- As of 3 February 2023, 67% (40/61) of the old LMB documents have been updated, merged or archived. In the same period 142 new LMB documents were approved and another 57 are currently under development.
- The new document management system outlines the responsibility of the (currently 13) document owners. The Policy Unit meets with the document owners approximately every 6 weeks and have provided weekly updates to the LMB General Manager.

## Managing and maintaining records

2.22 Many of the documents relating to the administration of trade measurement activities were not created and/or maintained within Content Manager but in network drives.<sup>27</sup> For example, in respect of records relating to investigations and compliance, as at 28 September 2022, 3025 records were saved across 422 sub-folders within the NTM Group shared drive. There was no equivalent or

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26 The LMB Document Register is an excel spreadsheet 'that is used to record the status of current, future and archived documents'. This spreadsheet is maintained within the network drives.

27 As stated on the National Archives of Australia website: 'Network drives can't manage information and records to meet Australian Government or international standards'. It then lists the following as risks in using a network drive to manage and store information:

- Anyone who has access can alter or delete records.
- It is difficult to demonstrate the authenticity, integrity and trustworthiness of uncontrolled records.
- It can be difficult to identify the record's status or version.
- Metadata is often missing and there are no links between documents and their business context.
- Poor management can result in large volumes of uncontrolled information, which is difficult to manage and takes up network space.
- Difficulty finding relevant records poses a reputational risk to the agency.



similarly titled container/folder within Content Manager. The closest was a container/folder called 'Compliance enforcement' with four records saved in one sub-folder.

2.23 There were also instances where records relating to trade measurement compliance activities (including changes/updates to procedures and processes, decisions on enforcement actions and reporting on program progress) were not maintained in DISR's record management system (Content Manager), but were only available in officer email accounts or business systems (such as TMARS). Due in part to the insufficiencies of the files, the ANAO obtained extracts of 106 email accounts to inform this audit.

2.24 Paragraphs 3 and 4 of Appendix 3 provide further details on DISR's management of Commonwealth records.

## Recommendation no. 2

2.25 The Department of Industry, Science and Resources improve its record keeping processes to ensure that trade measurement business information and records are accurate, fit-for-purpose and are appropriately stored within departmental systems.

**Department of Industry, Science and Resources response:** *Agreed.*

2.26 *The department had commenced a review, prior to the audit, of its policies and procedures, with a focus on completion of higher priority documentation, to be completed by the end of 2023.*

2.27 *However, the department commits to regular reviews to ensure trade measurement business information and records are accurate, fit-for-purpose and are appropriately stored within departmental systems. The department will undertake refresher training for Legal Metrology Branch staff in the use of the department's record keeping and store in place systems.*

2.28 *The department acknowledges gaps in procedures associated with Trade Measurement Inspector practices and the use of the departmental record keeping system. The department will develop guidance materials outlining Trade Measurement Inspector practices and use of the departmental record keeping system.*

## Is the regulatory approach informed by an assessment of compliance risk?

The regulatory approach is not fully and appropriately informed by an assessment of compliance risk. DISR identified the need for a more sophisticated risk framework for legal metrology in December 2015. While progress has been made, trader audit activities are not yet being effectively and demonstrably targeted to market sectors and traders at higher risk of regulatory non-compliance. There is not a strong relationship between industry-level risk assessments and the department's targeting of compliance activities and development of the annual National Compliance Plans. While DISR has introduced a risk-based approach for selecting individual traders for audit within those sectors being targeted, the approach should be improved.

2.29 DISR has documented that its administration of legal metrology regulatory compliance will be informed by an assessment of compliance risk. Its published *National Compliance Policy* and annual *National Compliance Plans*, for example, state that:

- ‘We use a risk-based approach when ... targeting compliance activities’; and
- ‘We measure risk in terms of the harm and likelihood of regulatory non-compliance.’

### Internal audit findings and responses

2.30 An internal audit of the NMI’s legal metrology activities was completed in December 2015 by NERA Economic Consulting at a cost of \$267,106. The ‘overarching findings’ included that:

while the NMI has a risk framework for legal metrology, it is unsophisticated. It does not articulate the risks of non-compliance (i.e. what harm or detriment is being experienced, by whom) and does not appear to be proportionate to risk. The NMI currently focuses its compliance activities on ensuring the accuracy of measurement rather than focusing on minimising harm. The current risk framework has also been ineffectual in directing the compliance and enforcement activities to areas of high non-compliance and delivering a nationally consistent approach to legal metrology ...

[the internal audit] anticipates that introducing a risk-based approach to regulation will require a significant program of change within the Legal Metrology Branch that will impact every facet of its operations and will require a strong change agent to drive these reforms.

2.31 Three related internal audit recommendations were that the NMI:

- publish a strategic plan to communicate how it intends to deliver on the Government’s objectives and report on its performance on a regular basis; [and]
- reform its compliance and enforcement policy to align with the principles of a risk-based approach to regulation; [then]
- reset its approach to targeted inspections, its enforcement thresholds, and its education/communication activities to reflect a risk-based approach to regulation.

2.32 DISR recorded that implementation of the above three recommendations was ‘Complete’ by the milestone date of 30 June 2017, with a delivery confidence of ‘High’, based largely on the provision of three documents. The ANAO’s analysis is that these documents did not implement the internal audit recommendations, as follows.

- *2017–18 National Compliance Plan* — Plans are produced annually. The ANAO compared the 2017–18 plan with two that preceded the 2015 internal audit report. It did not differ from the previous plans in a manner that would implement the recommendations or address the related findings.
- *2017 National Compliance Policy* — The three-page 2017 policy replaced an 11-page 2011 policy. The 2017 policy did not differ in a manner that would implement the recommendations or address the related findings.
- *2017 Non-Compliance and Enforcement Protocol* — The six-page 2017 document replaced a 14-page 2014 document and was not applicable to the ‘targeted inspections’ or ‘education/communication activities’ components of the recommendation.

2.33 DISR also recorded against one of the above recommendations that ‘NMI has changed its approach to inspections and now uses data from [TMARS] to inform risk-based targeting’. The ANAO’s analysis of this assertion is that it has not yet been effectively and demonstrably delivered, for the reasons set out in the remainder of this Chapter.

2.34 A methodology and proposed data sets for assessing compliance risk at the industry-level were outlined in a *Trade Measurement Risk Based Monitoring Program Evaluation Principles* ('risk principles') document dated February 2017. While DISR did not reference this document when tracking implementation of the December 2015 recommendations, it had the following related purpose.

The [internal audit of December 2015] considered NMI's focus on regulating for accuracy rather than regulating to prevent harm or negative impact is not a best practice approach to regulation. This document details a strategy for identifying future risk based monitoring programs focussed on minimising harm rather than regulating for measurement accuracy ...

The purpose of this document is to provide a three stage strategy to implement by July 2018 a sophisticated risk based framework for trade measurement monitoring (inspection) programs with a primary focus on minimising harm.

2.35 The risk principles document explained that an industry risk assessment 'should be undertaken for the previous 1, 2 and 5 calendar years, to identify the ten industries with the greatest potential risk or harm to the Australian community'. The explanation did not extend beyond this to the development of the annual National Compliance Plans, and the methodology did not extend to assessing risk at the trader-level.

2.36 An internal audit completed by KPMG in May 2020 recommended that NMI 'Formalise and document the methodology used for the collation of Annual Program Plans, including the considerations staff should use in the selection of traders'. For context, the internal audit report outlined:

It is important that the department has documented a defensible approach to support the integrity of the selection process for both annual programs and traders ...

[The] selection of programs and traders may not have been targeting the areas of highest risk as the methodology for compiling the annual planning and trader selection has not been clearly defined, which may have resulted in staff undertaking inspections of low risk programs and traders.

2.37 NMI was advised that 'To close this recommendation, Internal Audit will need to see the methodology that has been produced during the development of the 2021/22 Annual Program Plans — this should include consideration staff need to use in the selection of traders'. The due date to provide the methodology was originally 31 March 2021, which was then extended to 30 June 2021. The recommendation was closed on the basis of NMI providing a risk principles document dated 30 June 2021.

2.38 The risk principles document of June 2021 was largely identical to the risk principles document of February 2017. The methodology was not, therefore, 'produced during the development of the 2021/22 Annual Program Plans' and it did not include 'considerations staff need to use in the selection of traders'. The minor differences in the wording of the June 2021 version included that: the three stage strategy was written in the past tense; the target implementation date of 'July 2018' for Stage 3 was deleted; and the words 'Stage 3' were deleted from the heading 'Future Data Sets to be considered for use in Stage 3'. The 10 data sets listed under that heading were not yet in active use as at 31 March 2023 (see paragraph 2.43).

## Assessing compliance risk at the industry-level

2.39 In response to ANAO requests for its industry-level risk assessments and methodology, DISR provided in August 2022 (and again in October 2022) a copy of the risk principles document dated June 2021 and three spreadsheets produced in November 2021 that comprised the ‘industry risk assessment 1, 3 and 5 years’. The difference between the spreadsheets was the time span of the data used, being 1 July 2016–4 November 2021, 1 July 2018–4 November 2021 and 1 July 2020–4 November 2021.

2.40 There were 43 market sectors (or trader types) listed in the spreadsheets, which were a subset of the 59 sectors listed in TMARS. DISR did not document why it chose to leave some of the sectors out of the risk assessment, such as the ‘Manufacturer – Food’ sector for which more trader audits were completed during 1 July 2018–4 November 2021 than 70 per cent of the sectors in the spreadsheets.

2.41 The spreadsheets ranked the 43 market sectors in order of relative risk according to a numerical ‘risk factor’ calculated for each. The lower the rank, the higher the potential harm and likelihood of regulatory non-compliance.

2.42 The ANAO identified shortcomings with the basis on which the risk factor was calculated. These reduced the reliability of the rankings and the extent to which risk was being measured in terms of the harm of regulatory non-compliance, and not just the likelihood. The December 2015 internal audit had found that NMI’s risk framework did not focus on minimising harm (see paragraph 2.30).

2.43 The risk principles document stated that the calculation of the risk factor for each sector would be based on ‘a minimum of 12 different data sets’. The spreadsheets presented 19 different data sets, however 12 of these had no impact on the ranking of sectors. For example, 10 of the data sets had no impact because a risk rating of ‘1’ (minor) was hard-keyed against every sector. That is, there was no data in the 10 data sets. These 10 data sets were indicators of the relative level of harm that may result from non-compliance and required data external to TMARS to populate.

2.44 One of the seven data sets that did impact the ranking of sectors sought to measure the harm or detriment of regulatory non-compliance through the ‘projected annual community detriment based on initial visits’. In reference to this measure, the risk principles document had stated: ‘At present the available community detriment data is insufficient to reliably use this data as part of the total risk evaluation’. The data set was unreliable because the population of traders in TMARS may not represent the population in the community and because the financial detriment data in TMARS contained errors.<sup>28</sup> For example, following a Major Supermarkets Audit conducted in 2020 under which 195 non-compliance notices were issued, DISR identified that ‘In the majority of instances of non-compliance (customer detriment), no financial detriment estimation was recorded, and in the cases where a figure was included there was no consistency in the way the figure was determined’. Failure to complete the financial detriment fields in TMARS was the most frequent error picked up in the data quality reports until May 2021, at which time the fields were removed from the data quality script which meant that the errors were no longer reported. The

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28 The calculation of ‘projected annual community detriment’ within the risk assessment spreadsheets relied on the ‘financial detriment’ data within TMARS.

fields still appear in the department's Data Quality Management Processes document (last updated 27 May 2022) as though they are captured in the reporting.

2.45 Additional information on the risk assessment spreadsheets and their key shortcomings is in Appendix 4 (paragraphs 2–3 and Table A.3).

2.46 In June 2023, DISR advised the ANAO that:

Data driven risk-assessment processes are a key component used when selecting target trader sectors. However, DISR also uses additional qualitative, anecdotal and workforce information to inform the selection of target trader sectors. These additional factors include stakeholder feedback, trade measurement inspector feedback, consumer sentiment (e.g. cost of living pressures), consideration of broader government priorities (e.g. consumer protection or regulatory burden) and operational constraints ensuring the efficient use of a finite inspector workforce. DISR acknowledges that the current published and internal information does not articulate that the data-driven risk assessment processes is supplemented by other information.

### **Targeting compliance activities at the industry-level**

2.47 The use of assessed risk is most relevant to the targeting of trader audit activities under the 'concentrated national audit' and 'compliance confidence' programs.<sup>29</sup> It was not evident to the ANAO from the records examined how DISR used the risk assessments as a 'key component' when selecting industries for targeting through these programs. DISR advised the ANAO in June 2023 that:

Industries targeted under the compliance confidence program are determined with reference to the previous year's targeted industries and not the "Industry risk assessment spreadsheet". The compliance confidence program focuses on industries or trader types that have previously been non-compliant or subject to an enforcement action to determine if there is a long-term change in compliance levels through the intervention of DISR compliance activities. ...

Each year DISR refresh their 1, 3 and 5 year risk assessments that are used to determine industries to target for the forward financial year. The 1 July–4 Nov 2021 ranking would only have been used to help determine target industries for the 2022–23 financial year.

#### *Concentrated national audit program*

2.48 The ANAO requested copies of the '1, 3 and 5 year risk assessments' that DISR used to determine industries to target through its concentrated national audit program in each of 2019–20, 2020–21 and 2021–22. DISR was unable to provide a set of '1, 3 and 5 year risk assessments' for any of these years, which was contrary to DISR's assertions of June 2023 and to the process outlined in its risk principles documents of February 2017 and June 2021 (see paragraph 2.35).

2.49 DISR was able to provide the ANAO six spreadsheets in June 2023:

- two spreadsheets covering the same unspecified period for its 2019–20 planning;
- one spreadsheet covering one unspecified period for its 2020–21 planning; and
- three spreadsheets covering two specified periods (being 1 July 2016–30 June 2020 and 1 July 2017–30 June 2020) for its 2021–22 planning.

<sup>29</sup> Activities outside of these include pilot programs to assess the level of risk within particular or emerging sectors and the undertaking of random trader audits. See Table A.4 in Appendix 4 for a list of all the compliance programs as outlined in the National Compliance Plans for 2019–20 to 2021–22.

2.50 The ANAO examined the extent to which DISR's selection of industries, or trader types, for targeting was consistent with the results of its industry risk assessments. For the purpose of this analysis, the ANAO considered the four National Compliance Plans from 2019–20 and used the nine industry risk assessments provided by DISR (being the three spreadsheets provided in 2022 and the six spreadsheets subsequently provided in June 2023).

2.51 The ANAO's analysis indicated there was a weak alignment between a trader type's assessed risk and its selection for targeting under the concentrated national audit program. Of note:

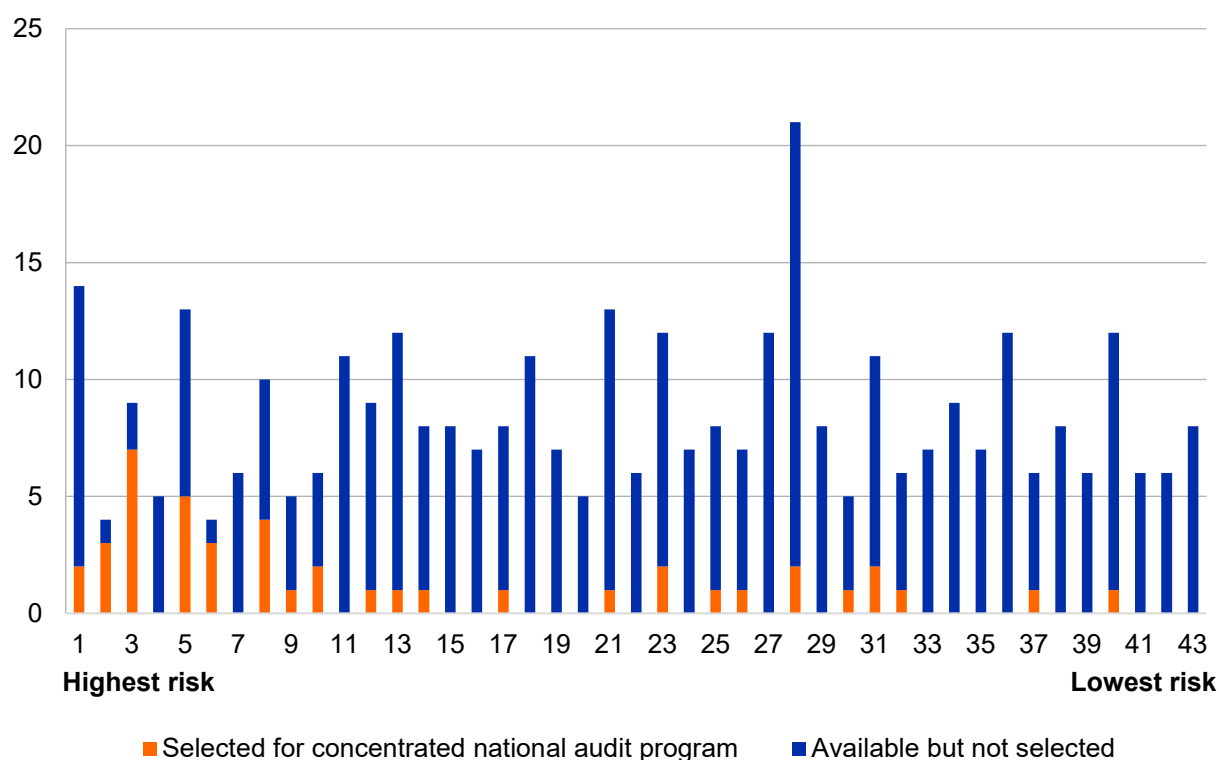
- DISR had assessed three-quarters of the trader types it selected for the program as having an above average risk.
- The one-quarter DISR selected with a below average risk included 'licensed premises', 'poultry retail' and 'smallgoods'.
- Those DISR did not select for targeting in any of the four years under any program, despite rating them as comparatively high risk, included 'mining and resources', 'recycling' and 'small business – food' (which had the highest risk rating in seven of the nine spreadsheets examined).

2.52 The ANAO's analysis covered both the risk rankings and the risk factors assigned by DISR. The analysis of the risk rankings included identifying the number of trader types assigned to each of the 43 possible ranks in each of the nine spreadsheets (DISR ranked trader types in declining order of risk from one to 43, assigning those with the same risk to the same rank). The number of trader types at each ranking that DISR selected for its concentrated national audit programs, compared with those it chose not to select for either its concentrated national audit or compliance confidence programs, is presented in Figure 2.2.<sup>30</sup>

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30 For the purpose of this analysis, the cohort DISR selected for its compliance confidence program has been removed from the data in Figure 2.2 on the basis that those trader types were no longer available for selection under the concentrated national audit program.

**Figure 2.2: Risk ranking of trader types selected for targeting under the concentrated national audit program**



Source: ANAO analysis of nine risk assessments provided by DISR and four National Compliance Plans from 2019–20.

2.53 In July 2022, DISR briefed the Minister for Industry and Science on its National Compliance Plan for 2022–23 and listed the three sectors chosen for its national concentrated audit program: fruit and vegetable retailers; meat, fish and poultry retailers; and delicatessens and smallgoods retailers. The Minister asked, ‘why are these three being targeted?’ and DISR responded in August 2022 as follows.

NMI takes a risk-based approach to selecting market segments for targeted compliance activities. In relation to historical compliance data, the three target market segments above have been subject to previous audit programs undertaken between 2017 and 2021.

- Previous compliance programs found high instances of non-compliance during initial and follow up audits, including significant non-compliance (significant non-compliance is when there is a detriment to a customer such as a shortfall in the product advertised).
- High numbers of enforcement actions were issued to the three market segments following previous audit programs.

2.54 DISR’s advice to the Minister was not supported by the departmental data, nor was the basis on which the market segments were selected otherwise evident from the records. Delicatessens and smallgoods retailers had not been targeted between 2017 and 2021. Further, the data DISR extracted to inform its response to the Minister contained no enforcement actions for poultry, delicatessens or smallgoods retailers. In terms of risk, DISR had ranked smallgoods retailers at a relatively low 37th out of the 43 sectors it assessed. DISR advised the ANAO in June 2023:

DISR acknowledges the information provided to the Minister implied high instances of non-compliance actions for poultry, delicatessen and smallgoods retailers which was incorrect. DISR will work with the Minister's office to clarify the advice provided.

2.55 In August 2023, DISR advised the ANAO that 'The Acting Head of Division, National Measurement Institute has raised this issue with the Minister's Office', and provided evidence to the ANAO that it had done so.

### *Compliance confidence program*

2.56 The ANAO examined the extent to which DISR's selection of industries, or trader types, for targeting through its compliance confidence program in each of the three years from 2020–21 had an above average level of non-compliance and enforcement actions the previous year. (The 2019–20 National Compliance Plan had not specified industries for this program type.)

2.57 The ANAO's analysis indicated a moderate alignment. Of the trader types DISR selected for the compliance confidence program, three-quarters had above average non-compliance and most had an above average number of warning letters and/or infringement notices issued.

### **Taking a risk-based approach at the trader-level**

2.58 DISR introduced the use of trader-level risk assessments to inform trader selection in its 2022–23 'Tare It' program.<sup>31</sup> The program consisted of three one-week national concentrated audits, with each audit focussing on a different retail sector. The first concentrated audit was undertaken the week commencing 17 October 2022 and focussed on fruit and vegetable retailers.

2.59 DISR provided the ANAO with the trader-level risk assessment spreadsheet produced for the fruit and vegetable retail sector and outlined the assessment methodology in an email. The spreadsheet listed 2152 traders and calculated a numerical risk factor for each, drawing on 10 data sets. Each trader had been manually assigned a risk category on a four-point qualitative scale according to their relative risk factor. Trade measurement inspectors were provided a list of traders for their region and advised that 'inspections should prioritise traders with the highest risk category (Very High to Low)'.<sup>32</sup>

2.60 A challenge with the approach is factoring in the assessment and selection of new traders for inspection. The spreadsheet was populated with the traders and trader audit data from TMARS. If a trader had not been visited previously, so was a 'new trader', then it was assessed as having a 'Very High' risk against two of the data sets. The impact was largely offset by it also being assessed as having a 'Minor' risk against the other eight data sets in the spreadsheet. The result was that all new traders were assigned the risk category 'Medium', which was the second lowest priority for inspection. This result is at odds with inspector guidance for other compliance programs that included 'new traders' in the list of priorities for trader selection. Further, TMARS does not contain a complete list of all traders within a given sector nationally.

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31 'Tare It' refers to subtracting the weight of any packaging (the tare) when measuring the weight of fruit and vegetables, for example, for sale. Charging a customer for the weight of fruit and vegetables without subtracting the weight of the packaging is an offence under the *National Measurement Act 1960*.

32 DISR's use of the trader-level risk assessment to monitor compliance is examined in paragraphs 3.17–3.20.



### Recommendation no. 3

2.61 The Department of Industry, Science and Resources put in place an improved approach to assessing the risk of legal metrology regulatory non-compliance at the industry and trader levels, and a transparent process that reflects the assessment of risk for selecting industries for targeting under its annual National Compliance Plans.

**Department of Industry, Science and Resources response:** *Agreed.*

2.62 *The department will continue to improve its processes as updates to regulator guidance, introduction of new analytical tools, and additional data sources technologies become available to refine the assessment of non-compliance risk at the industry and trader levels. The department will include information in its publications indicating how trade measurement compliance targets were selected.*

## 3. Compliance activities

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### Areas examined

The ANAO examined whether the Department of Industry, Science and Resources (DISR) had implemented an effective approach to trade measurement compliance activities, particularly of its trader audits.

### Conclusion

The department's approach to trade measurement compliance has been partly effective. The department has appropriate approaches to monitor the level of compliance, however the level of monitoring activity (particularly trader audits) has declined significantly over the last five years, with no evidence that this was driven by a changed risk environment or risk assessment. Nearly a third of all trader audits conducted between 2019–20 and 2021–22 identified non-compliance. Action in response to identified non-compliance, including follow-up audits and enforcement actions, has not been timely or demonstrably effective. DISR's monitoring and reporting arrangements did not extend to the effectiveness of its regulatory approach, with its regulatory reporting more generally declining after 2019–20 such that it has not complied with its obligations.

### Areas for improvement

The ANAO has made three recommendations to DISR to: improve its approach to undertaking Tobacco Plain Packaging activities; strengthen its approach to conducting follow-up audits; and to meet its regulator performance reporting requirements and to monitor and report on the effectiveness of its regulatory approach. There is also an opportunity to improve the accuracy and consistency of its data.

3.1 Regulators have a responsibility to give confidence to Parliament, the Government and the community that regulated entities are complying with their statutory obligations and that appropriate enforcement action is taken when a regulated entity fails to meet its obligations. To assess whether there is an effective approach to trade measurement compliance activities, the ANAO examined whether:

- industry compliance is appropriately monitored;
- identified non-compliance is acted upon; and
- the regulatory approach is regularly reviewed and, where appropriate, updated.

## Is industry compliance appropriately monitored?

A key component of monitoring industry compliance is the conduct of trader audits, with DISR reporting that 32,792 audits were conducted over the five years to 2021–22. The department's data overstates the number of trader audits it undertakes.<sup>a</sup> There has been a downward trend in the number of trader audits planned to be conducted each year. The actual number of audits conducted has also fallen short of the target in each of the five years examined by the ANAO. In 2021–22, the department conducted 3131 audits which was less than half the target of 8000 audits which itself was significantly below the target of 11,500 audits for 2017–18. The department identifies in its National Compliance Plan particular industries to be targeted for compliance activity however the shortfall in performance against targets is as evident for the targeted programs as it is for the overall program of trader audits (59 per cent of planned audits under the targeted programs were not conducted in 2021–22).

There has been a similar declining trend across DISR's other trade measurement inspection activities. There was a decrease of 52 per cent in the number of measuring instruments inspected between 2017–18 and 2021–22. There was a decrease of 76 per cent in the number of pre-packaged article lines inspected over the same period.

In comparison, the department has consistently exceeded the number of Tobacco Plain Packaging information visits undertaken by trade measurement inspectors on behalf of the Department of Health and Aged Care (the department receives separate funding from the Department of Health and Aged Care for this work). The evidence is that the department is prioritising this work it undertakes on behalf of another department over its own responsibility for trade measurement compliance. Further, the scope of this work has extended beyond the intended purpose of checking plain packaging to include examining whether traders are conducting illegal activities through the sale of illicit tobacco, with the related risks to the officers undertaking this work not adequately addressed by the department.

Note a: In June 2023, DISR's advice to the ANAO in relation to the appointment of trade measurement inspectors was that 'a trader audit involves a Trade Measurement Inspector exercising their powers under the *National Measurement Act 1960* and is conventionally associated with physically visiting the trader'. The department also advised the ANAO that its database (that records the conduct of trader audits) includes inspection types that 'did not exercise regulatory powers, such as desktop or online research of traders or a new trader program that did not involve site visits'. See further information at paragraph 3.6.

3.2 DISR's trade measurement compliance activities are directed towards assessing whether traders are complying with their obligations under trade measurement laws. Compliance activities include trader audits which may be conducted as part of a trade measurement compliance program.

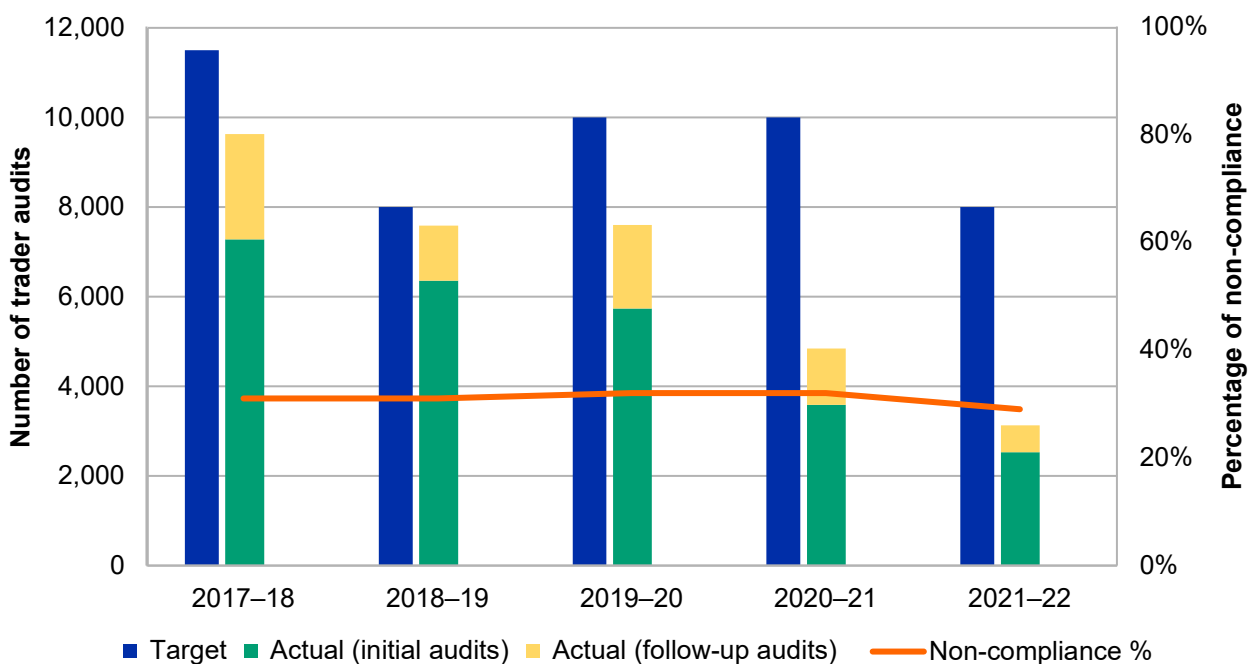
### Performance against targets

3.3 Each year DISR publishes a National Compliance Plan on its website. The plan outlines the compliance programs and the compliance targets for the year ahead in relation to its inspection activities, including the number of trader audits to be completed.

3.4 As shown in Figure 3.1, the reduction that has occurred in the level of trader audit activity reflects both a plan to conduct fewer audits as well as a failure to deliver the planned number of audits.

- The largest reduction in the number of planned audits occurred between 2017–18 and 2018–19, when the department reduced its target by more than 30 per cent from 11,500 to 8000. The target was increased to 10,000 for each of 2019–20 and 2020–21 before being reduced again to 8000 for 2021–22.
- There has been an overall decline in the total number of trader audits conducted from 2017–18 to 2021–22 (a decrease of 67 per cent). The performance target has not been met once over the five-year period with 39 per cent of the target being achieved in 2021–22. In aggregate across the five years, the department conducted 32,792 (69 per cent) of the 47,500 audits it planned to conduct meaning there were 14,708 fewer audits than the department had identified as required to provide an appropriate level of compliance monitoring.

**Figure 3.1: Target vs actual trader audits and proportion of non-compliance**



Note: Where non-compliance is identified during a trader audit, a follow-up audit may be subsequently conducted to check whether the non-compliance has been corrected.

Source: ANAO analysis of DISR’s National Compliance Plans and National Compliance Reports.

3.5 The reduction in trader audit activity does not reflect improving levels of compliance. Across the five-year period, the level of non-compliance identified varied between 31 per cent and 35 per cent of the traders subject to an initial audit, and between 18 per cent and 27 per cent of follow-up audits also found non-compliance.

3.6 The ANAO’s analysis of the extent of trader audit activity is based on DISR’s National Compliance Reports and records of audits in the Trade Measurement Activity Recording System (TMARS).<sup>33</sup> In June 2023, the department advised the ANAO that ‘a trader audit involves a Trade Measurement Inspector exercising their powers under the *National Measurement Act 1960* and is

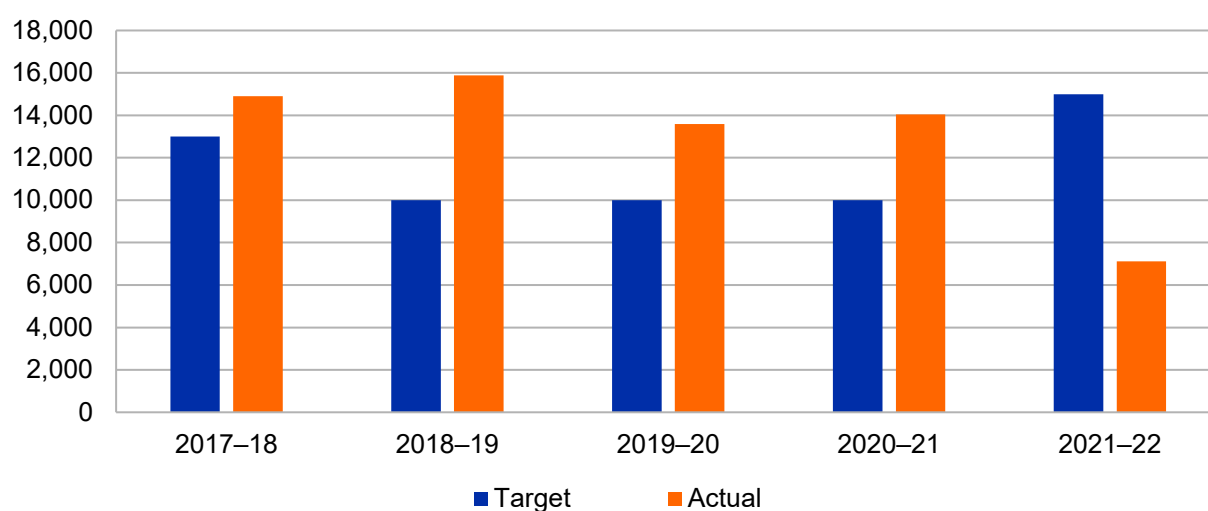
33 The National Compliance Reports are published on DISR’s website each year.

TMARS is a Microsoft dynamic platform used by DISR to record information related to trade measurement activities including trader audits.

conventionally associated with physically visiting the trader'. The department also advised the ANAO that TMARS includes records of inspection types that 'did not exercise regulatory powers, such as desktop or online research of traders or a new trader program that did not involve site visits'. Nonetheless, in its public reporting on its compliance activities, the department includes those inspection types as a trader audit. The ANAO also observed instances where those inspection types were recorded as having identified non-compliance and enforcement action taken in the form of non-compliance notices.<sup>34</sup> While TMARS includes fields to record trader audit information such as 'Audit Type' and 'Program', there is no separate field that identifies which inspection types should or should not be counted for reporting purposes.<sup>35</sup>

3.7 There has also been a declining trend across DISR's other trade measurement inspection activities. As shown in Figure 3.2, the department reduced its target for the number of measuring instruments to be tested by 23 per cent from 13,000 in 2017–18 to 10,000 in 2018–19 (despite the target having been achieved in 2017–18). This target of 10,000 was maintained for three years, and exceeded in each of those years, before being increased to 15,000 in 2021–22. DISR achieved 47 per cent of its target in 2021–22. Overall, there has been a decrease of 52 per cent in the number of measuring instruments tested between 2017–18 and 2021–22.

**Figure 3.2: Target vs actual measuring instruments tested**



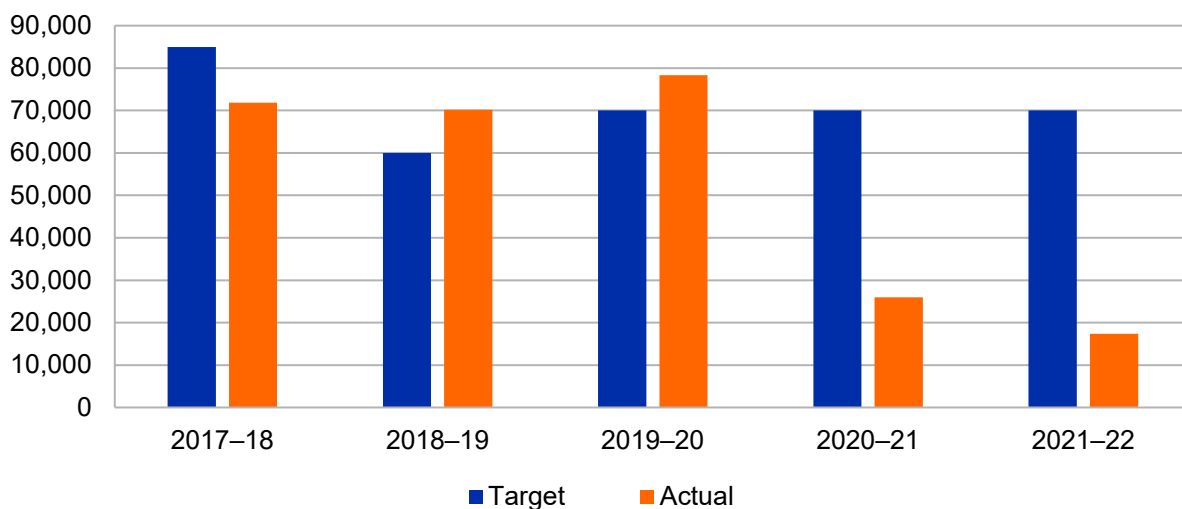
Source: ANAO analysis of DISR's National Compliance Plans and National Compliance Reports.

3.8 As shown in Figure 3.3, for pre-packaged article lines the largest reduction in the planned number of lines to be tested occurred between 2017–18 and 2018–19, when the department reduced its target by 29 per cent from 85,000 to 60,000. The target was increased to 70,000 from 2019–20 to 2021–22. There has been an overall decrease of 76 per cent in the number of pre-packaged article lines tested over the five years examined, with DISR achieving 37 per cent of its target in 2020–21 and 25 per cent in 2021–22.

34 See paragraph 3.34 for further information on the different types of enforcement actions, including non-compliance notices, that DISR may take in response to identified non-compliance.

35 'Audit Type' includes: 'Desktop', 'Routine' and 'Follow Up Visit'. The 'Program' field is intended to reflect the relevant compliance program such as: 'Internet Based Retail Sales – NCP' and 'New Trader'.

**Figure 3.3: Target vs actual pre-packaged article lines tested**



Source: ANAO analysis of DISR’s National Compliance Plans and National Compliance Reports.

3.9 While DISR includes targets on the number of ‘secret shopper’ trial purchases to be conducted each year in its National Compliance Plans, it does not report on the total number achieved in its National Compliance Reports (see further detail of the shortcomings of DISR’s external reporting at paragraphs 3.68–3.72).<sup>36</sup>

**Resourcing**

3.10 The performance targets for each inspection activity and compliance program are set by DISR based on the number of trade measurement inspectors available and an estimate of how many audits those inspectors can undertake.

3.11 The number of staff conducting trade measurement compliance activities, including trader audits, fluctuates throughout the year and some staff may have duties outside of trade measurement.<sup>37</sup>

3.12 DISR provided the ANAO with data on the staffing profile of the Legal Metrology Branch (LMB) within the National Measurement Institute (NMI) from 2017–18 to 2021–22. As shown in Table 3.1, while the number of full-time equivalent (FTE) staff allocated to trade measurement compliance activities has declined by 24 per cent from 2017–18 to 2021–22, the number of audits conducted per FTE has decreased at a greater rate (57 per cent over the five-year period). DISR

36 The National Compliance Reports do not report on the total number of trial purchases conducted throughout the year in the Summary of Compliance Activities and Outcomes section. Rather trial purchase figures are only included under the Concentrated National Audit Programs (although it is unclear whether this means that trial purchases were not conducted as part of any other compliance program).

As part of the Concentrated National Audit Programs, DISR reported that: 995 trial purchases were conducted in 2019–20; 510 in 2020–21; and 430 in 2021–22. The performance target for each of these years was 1000 trial purchases.

37 Inspectors may act in different roles or do secondments to other areas of the branch to do other work. Inspectors may also conduct tobacco plain packaging compliance activities and fuel quality sampling and testing activities (see paragraphs 3.21–3.32 for further details).

advised the ANAO that the reduction in staffing levels was not driven by a lack of available resources, but the inability to attract and retain staff.<sup>38</sup>

**Table 3.1: Ratio of staff to audits conducted each year**

Year	Full-time equivalent (FTE) staff	Trader audits conducted	Trader audits per FTE
2017–18	75	9633	129
2018–19	76	7586	100
2019–20	69	7600	110
2020–21	63	4842	76
2021–22	57	3131	55

Source: ANAO analysis of departmental records.

3.13 In June 2023, DISR advised the ANAO that:

Table 3.1 currently details all staff assigned to Trade Measurement Services, which includes staff who undertake supporting duties and would not be solely tasked to field based activities. These staff include Regional Managers, Assistant Regional Managers, Trainers and Assessors. Additionally, some staff have been seconded from time to time to support other Legal Metrology Branch (LMB) operations or surge requests.<sup>39</sup>

### *Impact of COVID-19 pandemic*

3.14 DISR reported that compliance activities were impacted by the COVID-19 pandemic with trade measurement field audit activity largely suspended in mid-March 2020. At odds with the three stage return to the field for trade measurement inspectors that commenced in June 2020, with all jurisdictions (except for Victoria) commencing stage 3 field activities in November 2020<sup>40</sup>, DISR continued to report that ‘trade measurement field audit activity was suspended or restricted for significant periods in many parts of the country’ during 2020–21 and 2021–22.

38 In August 2023, DISR advised the ANAO that ‘In the 2019-20 and 2020-21 financial years, staffing levels were impacted by the COVID19 pandemic, particularly the limitations on the ability to undertake comprehensive training of new recruits which requires trader visits and interstate travel. DISR made a conscious decision to delay ATMO recruitment activities to contribute to efforts to reduce the spread of COVID19. Since August 2021, coinciding with the abatement of the COVID19 pandemic, DISR has recruited 18 new ATMOs. DISR acknowledges that attraction of ATMOs to the greater Sydney area presents challenges’.

39 The ANAO’s analysis recognised that decisions about the number of staff allocated to managerial roles, training roles or seconded to other operations will impact the ratio of audits conducted per FTE. This is appropriate as it means the analysis reflects an overall measure of resource efficiency taking into account decisions about the allocation of staff resources as well as the work output of those staff allocated to the conduct of trader audits.

40 The National Compliance Plan 2020–2021 noted that: ‘Stage one of the return to fieldwork is expected to last for four weeks and will involve audits in a restricted group of industries. Stage two is planned for the following four weeks and will extend the list of industry sectors subject to trade measurement audits. Stage three will represent an effective resumption of business as usual, subject to the provisions of safe work method statements and risk assessments, with all industry sectors subject to audits.’

See Table A.5 in Appendix 5 for further details on the different stages.

## Monitoring compliance of targeted industries

3.15 The ANAO examined the extent to which the audits conducted aligned with the compliance programs as set out in the National Compliance Plans and whether the audits focussed on those industries identified as being higher-risk.

3.16 As shown in Table 3.2, DISR did not meet the target number of trader audits under its concentrated national audit and compliance confidence programs<sup>41</sup>, with 41 per cent achieved in 2021–22. In aggregate, the audits under these targeted programs represented 27 per cent of planned audits and constituted 33 per cent of actual trader audits conducted over the three-year period.<sup>42</sup> That is, the shortfall in audits conducted under the targeted programs was broadly similar to the shortfall across the overall audit program.

**Table 3.2: Target vs actual audits conducted under targeted programs**

Year	Target	Actual	Percentage of target achieved
2019–20	3050	2575	84%
2020–21	2300	1751	76%
2021–22	2090	857	41%

Source: ANAO analysis of departmental records.

## Monitoring compliance at the trader-level

3.17 DISR introduced the use of trader-level risk assessments to inform trader selection in its 2022–23 ‘Tare It’ program (see paragraphs 2.58–2.60 for further details on DISR’s trader-level risk assessments).<sup>43</sup> The first concentrated audit was undertaken the week commencing 17 October 2022 and focussed on fruit and vegetable retailers. The program plan stated that the national target was for 500 trader audits to be conducted during that week. Based on TMARS data, this target was not met with 358 trader audits (72 per cent) being completed.

3.18 Trade measurement inspectors were provided a list of traders for their region and advised that ‘inspections should prioritise traders with the highest risk category (Very High to Low)’. No other advice was provided to inspectors as to what proportion of traders should be selected for audit under the different risk categories.

3.19 As shown in Table 3.3, 36 per cent of the audits conducted during the fruit and vegetable concentrated program was of traders who were not included in DISR’s risk assessment and as such not assigned a risk category. By number, this was followed by audits of traders who had been

41 ‘Concentrated national audit programs’ focus on targeted industry sectors over a specific time period to assess compliance with trade measurement legislation. Under the ‘compliance confidence’ programs, DISR targets a selection of traders and industry groups found to be non-compliant in previous years.

42 The remaining 67 per cent of actual trader audits conducted over the three-year period were under DISR’s other compliance programs. See Table A.4 in Appendix 4 for a list of all the compliance programs as outlined in the National Compliance Plans for 2019–20 to 2021–22.

43 ‘Tare It’ refers to subtracting the weight of any packaging (the tare) when measuring the weight of fruit and vegetables, for example, for sale. Charging a customer for the weight of fruit and vegetables without subtracting the weight of the packaging is an offence under the *National Measurement Act 1960*.



assessed as either High (equating to 69 traders or 19 per cent of the 354 audited) or Medium (equating to 67 traders or 19 per cent those audited) in terms of risk.

**Table 3.3: Breakdown of traders and trader audits conducted by risk category during the October 2022 Fruit and Vegetable concentrated audit program**

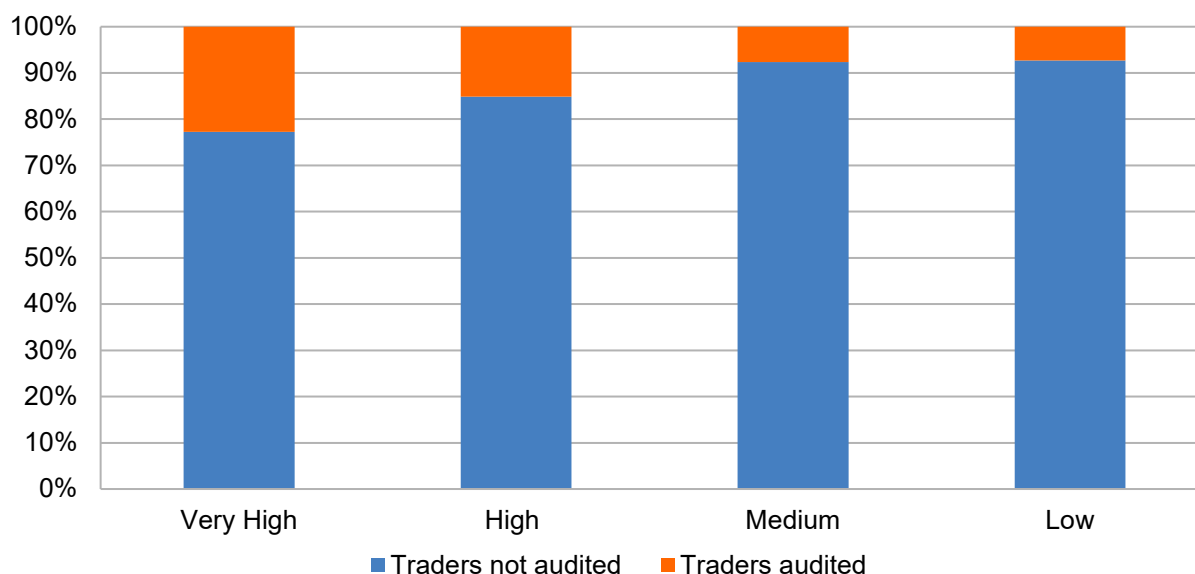
Risk category	# traders in risk assessment	# and % of traders audited	# and % of those audited with a 'Failed' audit result
Very High	198	45 (13%)	25 (56%)
High	456	69 (19%)	36 (52%)
Medium	879	67 (19%)	29 (43%)
Low	619	45 (13%)	18 (40%)
N/A <sup>a</sup>	0	128 (36%)	83 (65%)
<b>Total</b>	<b>2152</b>	<b>354 (100%)</b>	<b>191 (54%)</b>

Note a: 'N/A' captures traders who were not listed in DISR's trader-level risk assessment spreadsheet and hence not assigned a risk category.

Source: ANAO analysis of departmental records.

3.20 Noting that the majority of traders (70 per cent) fall within the 'Medium' and 'Low' risk categories (with those assessed as 'Very High' only constituting nine per cent of the total number of traders listed in the risk assessment), the ANAO considered the number of trader audits conducted proportional to the total number of traders in each risk category. As illustrated in Figure 3.4, 23 per cent of all traders assessed as being 'Very High' risk were audited, compared to seven per cent of those traders assessed as 'Low' being audited. The absence of targets on the level of compliance monitoring activity expected across each risk category makes it difficult to assess the department's performance in adopting a risk-based approach to monitoring compliance.

**Figure 3.4: Proportion of all traders audited in each risk category**



Source: ANAO analysis of departmental records.

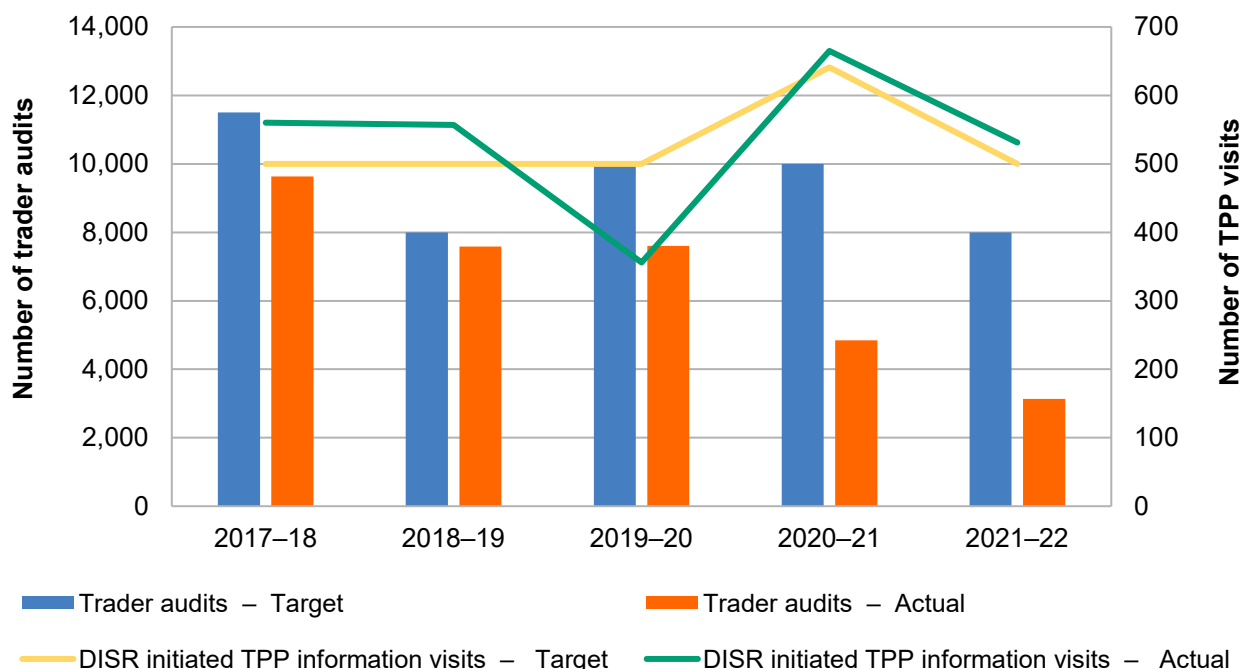
## Tobacco Plain Packaging activities

3.21 Under a Memorandum of Understanding (MOU) with the Department of Health and Aged Care (Health), DISR officers undertake compliance and enforcement activities associated with the *Tobacco Plain Packaging Act 2011* and the *Tobacco Plain Packaging Regulations 2011*.<sup>44</sup> Under this legislation, tobacco products must be packaged in a certain colour and not display branding, to reduce their appeal. Activities undertaken by DISR include:

- information visits – a proactive visit to a tobacco supplier to provide information and education on Tobacco Plain Packaging, which is initiated by DISR<sup>45</sup>; and
- inspection or re-inspection – a compliance visit to a tobacco supplier, which is requested by Health based on a complaint, information or allegation.

3.22 DISR directs its officers to make Tobacco Plain Packaging (TPP) visits a priority over their trader audit activities to meet the MOU. The proportion of activity allocated to TPP visits has been increasing as total output has been decreasing. In 2021–22, there were 1024 TPP visits compared with 3131 trader audits. DISR also consistently exceeded the target number of DISR initiated TPP information visits, as illustrated in Figure 3.5.

**Figure 3.5: Comparison of DISR’s performance against targets for trader audits and TPP visits**



Note: By agreement between DISR and Health in 2020, a shortfall (due to COVID-19) in 2019–20 against the target for TPP information visits was added to the 2020–21 target. In total over these two financial years, DISR undertook 1021 visits against a target of 1000 visits (500 each year) set out in the MOU.

Source: ANAO analysis of departmental records.

44 DISR officers are appointed as authorised officers under subsection 81(1) of the *Tobacco Plain Packaging Act 2011*, by the Secretary of the Department of Health and Aged Care or their delegate.

45 Health pays an agreed annual retainer to the NMI, as well as an additional capped amount for itemised activity-based components. If the number of expected information visits is not met, a credit note is applied to the final variable invoice for the financial year to cover the number of these visits which did not occur.

3.23 Some of the TPP visits requested by Health result from allegations that a store is selling illicit tobacco.<sup>46</sup> DISR officers are required to report observations that extend well beyond the checking of plain packaging, such as from ‘surveillance’ of the storefront. This is inconsistent with the purpose of the legislation and advice to the Parliament that:

Tobacco plain packaging was established as a public health measure and as such, compliance and enforcement mechanisms in the *Tobacco Plain Packaging Act 2011* (the TPP Act) are designed to ensure that people accessing tobacco products receive the full benefit of plain packaging as a health measure – they are not intended or designed to counter criminal behaviour. ...

The purpose of the TPP Act is not to tackle illicit tobacco or criminal behaviour by organised groups or syndicates. The Department acknowledges the potential for cooperation with other agencies on illicit tobacco. When the Department suspects the sale of illicit tobacco occurring, information is provided to relevant agencies to appropriately deal with the criminal networks and elements who profit from illegal activity.<sup>47</sup>

3.24 DISR officers have raised concerns internally about undertaking compliance checks that are based on illicit tobacco allegations and the risks to them associated with illegal activity. Officers have also reported incidents that occurred during TPP visits, which indicated they were at physical and/or psychological risk. Examples of instructions to officers, and concerns raised by officers, are in Table A.6 of Appendix 6.

3.25 The ANAO considers DISR’s response to officer concerns has been inadequate, given the seriousness of the matters raised and given its staff have no training in, or responsibility for, illicit tobacco matters and related criminality.

3.26 In June 2023, DISR advised the ANAO that:

DISR has developed a draft procedure... for inspectors to follow when undertaking TPP inspections. The draft procedure highlights the importance of safety of inspectors participating in the TPP inspection program.

#### Recommendation no. 4

3.27 In its activities related to the *Tobacco Plain Packaging Act 2011* and the *Tobacco Plain Packaging Regulations 2011*, the Department of Industry, Science and Resources ensures that:

- (a) appropriate priority is given to its responsibilities under the *National Measurement Act 1960*;
- (b) its directions to officers are limited to the undertaking of education and investigation activities to promote compliance with the provisions of the legislation; and
- (c) it is complying with its duties and obligations to those officers under the *Work Health and Safety Act 2011*.

46 In August 2023, Health advised the ANAO that it ‘does not specifically target illicit tobacco through its Tobacco Plain Packaging (TPP) inspection program. The reference to illicit tobacco in training and inspection reporting material reflects the significant correlation between illicit tobacco and non-compliant tobacco products at the retail level. Where illicit tobacco is detected or suspected, on a risk-basis, there is a high likelihood that non-compliance with tobacco plain packaging requirements is occurring’.

47 Department of Health, Submission 178 of November 2019 to ‘Inquiry into Illicit Tobacco’ by the Parliamentary Joint Committee on Law Enforcement [Internet], available from [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Law\\_Enforcement/IllicitTobacco46th](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/IllicitTobacco46th).

**Department of Industry, Science and Resources response: Partially Agreed.**

3.28 The department places the importance of work health and safety of its officers at the highest importance. The department's commitment to compliance with the Work Health and Safety Act 2011 is ongoing.

3.29 The department will develop an accountability framework for trade measurement regulatory compliance activities. This framework will track progress against a series of indicators including trade measurement targets and inspection activities undertaken on behalf of other government departments.

3.30 The department considers that if appropriate priority is given to its responsibilities under the National Measurement Act 1960, it is a matter for the department to agree on the scope of Tobacco Plain Packaging inspection activities with the Department of Health and Aged Care against the Tobacco Plain Packaging Act 2011 and associated legislation.

### Fuel Quality Standards activities

3.31 In early 2020, DISR became responsible for administering compliance with the *Fuel Quality Standards Act 2000* and *Fuel Quality Standards Regulations 2019*. Following Machinery of Government changes in June 2022, the Department of Climate Change, Energy, the Environment and Water (DCCEEW) became the administering authority for this legislation. Under a Head Agreement between DISR and DCCEEW, DISR officers continue to undertake inspection and sampling activities under the legislation on behalf of DCCEEW.<sup>48</sup>

3.32 DISR directs its officers to make Fuel Quality Standards activities a priority. DISR reported that 384 fuel quality audits were conducted in 2021–22, compared to 346 in 2020–21. Table 3.4 shows DISR's performance against its performance targets, with DISR achieving 99 per cent of its target in 2021–22.

**Table 3.4: Performance against targets for Fuel Quality Standards activities**

Performance measure	2020–21		2021–22	
	Target	Actual (% achieved)	Target	Actual (% achieved)
Fuel samples screened	2000	1138 (57%)	3000	n/a <sup>a</sup>
Fuel samples submitted for analysis	180	157 (87%)	600 <sup>b</sup>	596 (99%)

Note a: In November 2021, DISR removed fuel screening from its Fuel Quality Monitoring Program as 'compliance levels are now very high [and] the value that fuel screening can provide is limited. Removing fuel screening allows reallocation of resources towards fuel sampling activities'.

Note b: The target as originally published in the 2021–22 National Compliance Plan was 530 fuel samples submitted for analysis. This was increased to 600 following the removal of fuel screening.

Source: ANAO analysis of departmental records.

<sup>48</sup> DISR officers are appointed as inspectors under subsection 38(1) of the *Fuel Quality Standards Act 2000*.

## Is identified non-compliance acted upon?

Action in response to identified non-compliance has not been timely or effective. Documented procedures are in place to respond to non-compliance via a follow-up trade measurement compliance audit or to commence enforcement action. Fewer follow-up audits are being undertaken and delays in the conduct of follow-up audits are common. Where follow-up audits have been undertaken the trend has been for increasing rates of continuing non-compliance to be found. Continuing non-compliance is not consistently followed by enforcement action. Where escalated enforcement action is being taken it is most often through warning letters and infringement notices (with associated fines) but those actions have also not been timely.

3.33 When a regulated entity fails to meet compliance obligations, a regulator should assess the extent of the non-compliance and the potential for harm, and initiate proportionate action to address the risks posed.<sup>49</sup> DISR's National Compliance Policy states that it will take a 'risk-based approach when ... determining the appropriate and proportionate regulatory response where non-compliance is identified'.

3.34 Under DISR's enforcement and compliance policies, the first step following the identification of non-compliance during an audit involves the inspector issuing a non-compliance notice<sup>50</sup> and scheduling a follow-up audit (usually 28 days after the initial audit). A follow-up audit is to check whether the non-compliance has been corrected. If there is continued non-compliance, or the level of non-compliance initially detected results in more significant harm, the inspector (also known as the investigating officer) may recommend an escalated regulatory response to the Investigations and Compliance team for review and decision.<sup>51</sup> DISR divides the escalated regulatory responses into three categories: low (warning letters); medium (compliance agreements or infringement notices<sup>52</sup>); and high (injunctions, enforceable undertakings or prosecution). Figure 3.6 outlines the decision-making process for enforcement actions depending on the escalated regulatory response.<sup>53</sup> The ANAO's analysis was that, while the documented process involved different individuals performing different roles, there have been instances where this was not the case in

49 The seriousness of the non-compliance and the regulated entity's compliance history may influence the design of a regulator's response. Graduated responses allow the regulator to either escalate action if an entity does not respond appropriately to the initial regulatory action or reward an entity for improved performance by moving down the hierarchy.

50 A non-compliance notice is issued to the trader and provides information relating to the alleged non-compliance identified during the audit (including the relevant legislative provision breached). The notice informs the trader of their obligation to undertake any appropriate corrective action(s), and that failure to comply with trade measurement legislation may constitute an offence which may result in the issuing of an infringement notice or prosecution and the imposition of a penalty.

51 The *National Measurement Act 1960* sets out a number of enforcement mechanisms/options to address contraventions of the Act including: criminal prosecution; infringement notices; enforceable undertakings; injunctions; and publicising an offence for which a person has been convicted.

52 An infringement notice is a notice issued to the trader setting out the particulars of an alleged contravention of an offence and the penalty payable. Infringement notices are distinct from non-compliance notices.

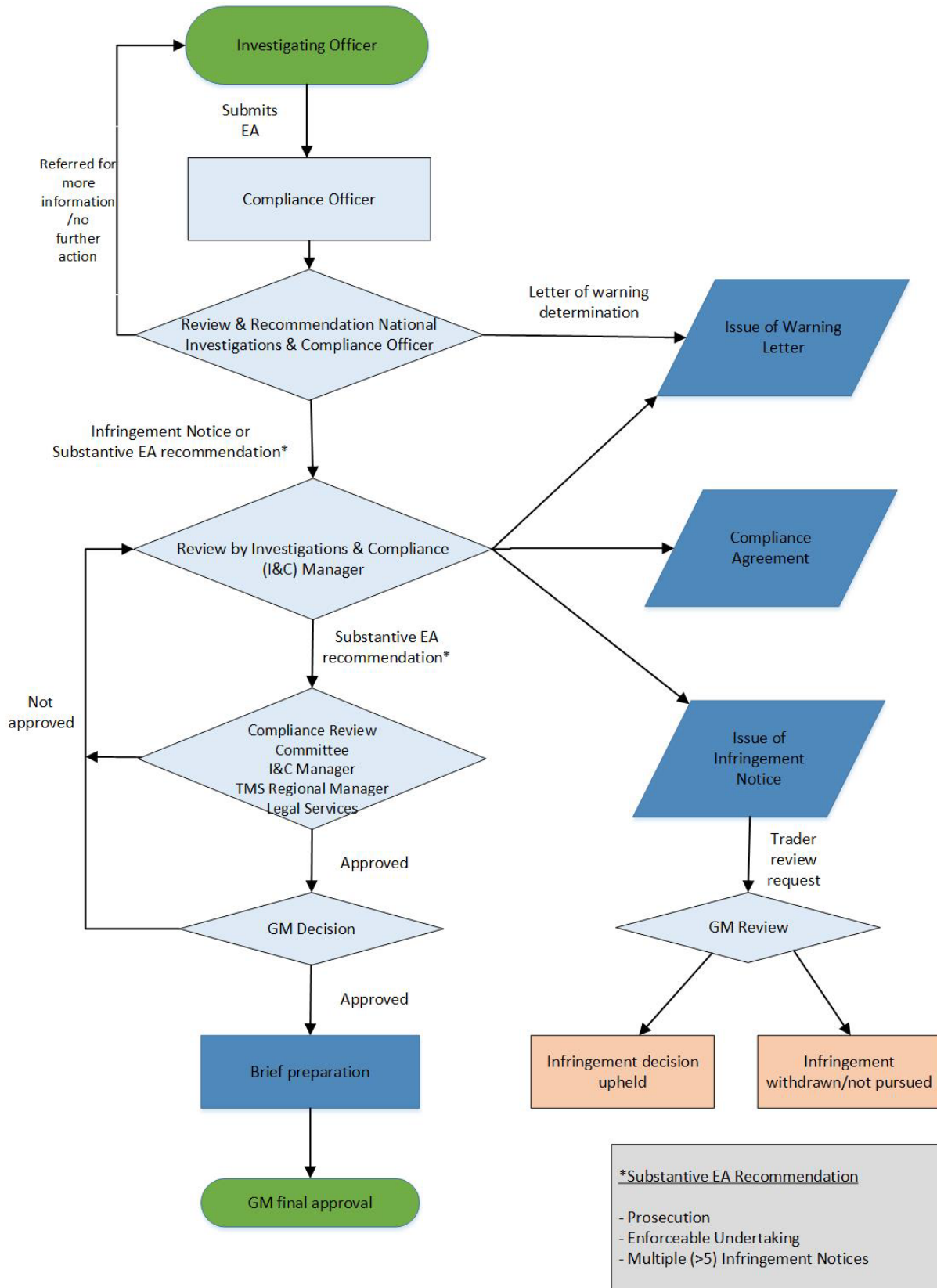
53 On 23 April 2020, a Legal Metrology Branch (LMB) Manager emailed all LMB staff (including trade measurement inspectors) and noted that during the COVID-19 pandemic: 'In conjunction with the [General Manager (GM)] it has been decided that each [enforcement action (EA)] that is submitted will continue to be assessed against the Enforcement Protocol which means that an infringement notice recommendation will still be recorded where appropriate. However, we are mindful of the current economic climate for businesses and will only issue an infringement notice for the most serious of offences with GM approval.'

practice.<sup>54</sup> Specifically, in six (30 per cent) of the 20 enforcement actions sampled by the ANAO, DISR records indicated that one individual performed more than one role in relation to the same enforcement action (see Case study 1 in Appendix 7 for an example).

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54 In June 2023, DISR advised the ANAO that: ‘Prior to April 2020 the NMI had a system of Regional Compliance Officers (RCO). These RCO’s were also trade measurement inspectors so it was possible that a trade measurement inspector could perform dual roles before submitting the [enforcement action (EA)]. This practice was not precluded by procedures at the time... There were also some inconsistencies amongst the geographic trade measurement regions in how EAs were processed including how officer roles were identified in the Trade Measurement Activity Record System (TMARS).’

Figure 3.6: Processing of Enforcement Action (EA) flowchart



Source: National Measurement Institute, DISR.

## Conduct of follow-up audits

3.35 Over the three-year period from 2019–20 to 2021–22 there were 4190 initial audits where non-compliance was identified. The most common enforcement response is for inspectors to provide advice to the trader, issue a non-compliance notice and conduct follow-up inspections to ensure non-compliance is rectified.<sup>55</sup> Inspector guidance says that follow-up audits should be scheduled 28 days after the initial non-compliance was identified. DISR records identified that a follow-up audit was to be conducted for 2352 (56 per cent) of those 4190 initial audits that had identified non-compliance.<sup>56</sup> Of those 2352 instances where a follow-up audit was to occur:

- 336 (14 per cent) were scheduled to be conducted in accordance with the 28-day target;
- 1779 (76 per cent) were scheduled to occur between 29 and 1444 days (nearly four years), and on average 5 months, after the initial audit was conducted; and
- 237 (10 per cent) did not have a scheduled date recorded.

3.36 As at 31 March 2023, 2021 (86 per cent) of the 2352 follow-up audits had been conducted.<sup>57</sup>

3.37 It has been common for follow-up audits to not be conducted by the scheduled date. Of the 2977 follow-up audits recorded as having been completed between 2019–20 and 2021–22<sup>58</sup>, 570 (19 per cent) did not have a scheduled date recorded in TMARS. Of the remaining 2407 follow-up audits:

- 544 (23 per cent) were completed on or before the scheduled date; and
- 1863 (77 per cent) were completed after the scheduled date, on average being 186 days (6 months) after the scheduled date and up to 2379 days (6.5 years) after the scheduled date.

3.38 As shown in Table 3.5, there has been a downward trend in the total number of follow-up audits conducted (decreasing by 54 per cent from 1195 in 2019–20 to 548 in 2021–22). The proportion of non-compliance identified for those audits increased from 21 per cent in 2019–20 to 26 per cent in 2020–21 before decreasing to 21 per cent in 2021–22. By comparison, the non-compliance rate for follow-up audits was 18 per cent in 2017–18 and 19 per cent in 2018–19.

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55 The ANAO observed instances where non-compliance notices were not issued despite non-compliance being identified (see footnote 65 for an example). This is contrary to DISR's internal procedures and public-facing documents.

56 This figure is based on TMARS data as at 31 March 2023. The ANAO observed data quality issues including: follow-up audits not being linked to the relevant initial audit and/or being linked to an 'inactive' trader audit. Departmental records also indicated a practice of 'repurposing' records of follow-up audits which had been scheduled but not undertaken (see paragraph 4 in Appendix 3).

57 Appendix 7 includes a case study of an initial audit conducted on 27 November 2019 resulting in a follow-up audit being scheduled for 8 February 2021 (well outside the 28 days). As at 31 May 2023, more than two years after the scheduled date, the follow-up audit had not been conducted.

58 Some of these follow-up audits may be in relation to initial audits conducted prior to 1 July 2019. Of the 2977 follow-up audits recorded as having been completed between 2019–20 and 2021–22: 2117 (71 per cent) had an audit result of 'Passed'; 687 (23 per cent) 'Failed'; and 173 (six per cent) had 'No Action'.



**Table 3.5: Number of follow-up audits conducted and proportion of non-compliance identified**

Year	# of follow-up audits	# (%) follow-up non-compliance
2019–20	1195	254 (21%)
2020–21	1234	320 (26%)
2021–22	548	113 (21%)

Source: ANAO analysis of departmental records.

3.39 In relation to the results of those 2977 follow-up audits that have been undertaken between 2019–20 and 2021–22<sup>59</sup>:

- 778 instruments were found to be non-compliant, including 302 instances of the instrument being inaccurate;
- 1298 lines of pre-packaged articles were non-compliant, including 516 lines having a shortfall and 718 having non-compliant labelling or measurement markings; and
- 291 failures of trading practices were found:
  - 168 trial purchases failed (of which 82 were due to shortfall offences); and
  - 123 did not meet other legislative requirements (such as not using a verified instrument, not taring and selling goods other than by a prescribed unit of measurement).

3.40 Where available, the ANAO analysed the notebooks and non-compliance notices provided by DISR in conjunction with the data in TMARS to assess whether the non-compliances identified in a sample of 20 trader audits had been addressed at the time of the follow-up audits.<sup>60</sup> Twelve of the 20 audits sampled by the ANAO had follow-up audits conducted.<sup>61</sup> Of those 12 follow-ups:

- eight (67 per cent) had resolved the issues identified during the initial audit<sup>62</sup>; and
- four (33 per cent) had not resolved the issues identified during the initial audit. However, two had 'No Action' recorded against the audit result and the other two were recorded as 'Passed'. As a result, notwithstanding the follow-up audit had identified continuing non-compliance, no further enforcement action was taken.

59 A trader audit may fail on more than one ground. For the purpose of this analysis, the ANAO relied on TMARS data as extracted and used by DISR for its annual compliance reporting. The ANAO observed data quality issues, including instances where the audit was recorded as having 'Passed' despite non-compliance being identified.

60 For the purpose of selecting the sample for detailed examination, the ANAO identified from TMARS records 4876 trader audits which were completed between 1 July 2019 and 30 June 2022 and had a 'Failed' audit result. Of those 4876 trader audits, the ANAO randomly selected 20.

In February 2023, the ANAO requested that copies of the relevant hard copy inspector notebook entries and non-compliance notices be provided for 33 trader audits. These 33 trader audits included: the 20 sampled audits assessed as having failed to comply; the 12 follow-up audits associated with those 20 sampled; and one associated 'parent' audit. DISR was unable to locate the complete records for nine of the audits (27 per cent).

61 Of the remaining eight audits, three had follow-ups scheduled in TMARS but had not yet been conducted as at 31 March 2023 (having been scheduled between December 2019 and September 2022).

62 One of these eight follow-ups had an overall 'Failed' audit result – the same instrument which had failed the initial audit was inspected and found to be compliant, but the audit failed due to other instruments being found to be non-compliant. The remaining seven follow-up audits had an overall 'Passed' audit result.

## Record keeping

3.41 The ANAO's analysis of DISR's enforcement activities was impeded by inconsistencies in the level of detail recorded, and documentation filed, in TMARS relating to trader audits. For instance, while non-compliance notice numbers were recorded in TMARS, none of the audits sampled by the ANAO had a copy of the non-compliance notice filed in the system. In December 2022, DISR advised the ANAO that:

- The unique non-compliance notice number is recorded in a required field in TMARS. The officer must enter this number in order for the record to be completed.<sup>63</sup>
- After speaking to a couple of officers, the practice of uploading a copy of the notice may have been undertaken by certain regions depending on expectations of line management or specific requirements associated with concentrated audits. This practice may or may not have been adopted by different officers.
- Essentially the paper non-compliance form is the primary document where a copy is provided to the trader and the other copies are filed by the inspecting officer.
- We trialled the use of a digital non-compliance form earlier in 2022 with Coles and Woolworths. The TMARS enhancement project (as discussed today – which has just commenced) will include moving the digital non-compliance form into production.

3.42 The inconsistencies in record keeping and limited information meant it was difficult to assess whether non-compliance identified in initial audits had been addressed at the time of the follow-up audits.

3.43 In February 2023, the ANAO requested that copies of the relevant hard copy inspector notebook entries and non-compliance notices be provided for 33 trader audits.<sup>64</sup> The department was unable to locate the complete records for nine of the audits (27 per cent):

- for three, the relevant inspector notebook entry was not located;
- for five, a non-compliance notice was not located<sup>65</sup>; and
- for one, neither the inspector notebook nor non-compliance notice was located.<sup>66</sup>

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63 Non-compliance notice numbers comprise of the letters 'NTM' followed by five digits. The ANAO observed inconsistencies and errors in how data was entered into the non-compliance notice number field in TMARS. Between 2019–20 and 2021–22, there were 4874 trader audits recorded in TMARS with a 'Failed' audit result. Of those 4874 audits, 1117 (23 per cent) had either no non-compliance notice number recorded against them or had an invalid notice number recorded. There were 49 audits which had a 'Passed' audit result but also had a notice number recorded against it.

These instances of invalid notice numbers were not picked up as a TMARS data quality issue in DISR's Data Quality Reports (see further details on the quality reports at paragraphs 3.74–3.76).

64 These 33 trader audits included: the 20 sampled audits assessed as having failed to comply; the 12 associated follow-up audits to those 20 sampled; and one associated 'parent' audit.

65 Only one of the five audits had a valid notice number recorded in TMARS. For the remaining four, TMARS records do not indicate that a non-compliance notice was issued despite the trader being assessed as having failed to comply.

66 An invalid notice number was recorded in TMARS against this failed trader audit.

## Recommendation no. 5

3.44 The Department of Industry, Science and Resources strengthen its approach to conducting follow-up audits where an initial trader audit identifies non-compliance such that follow-up activities are conducted in a timely manner, regulatory action taken where there is continuing non-compliance and appropriate records made and retained.

**Department of Industry, Science and Resources response:** *Agreed.*

3.45 *The department will develop and implement an accountability framework that will strengthen its approach to follow-up audits and regulatory responses, including appropriate record keeping. The accountability framework will track progress against established performance indicators.*

## Enforcement actions

3.46 As shown in Table 3.6, the most common escalated regulatory responses between 2019–20 and 2021–22 were warning letters and infringement notices. During that same period, there were four compliance agreements, four enforceable undertakings, two referrals to the Commonwealth Director of Public Prosecutions (CDPP) and one conviction.

**Table 3.6: Enforcement actions**

Year	Warning letter	Compliance agreement	Infringement notice	Enforceable undertaking	Referral to CDPP <sup>a</sup>	Conviction
2019–20	191	1	101 (\$123,900)	2	1 <sup>b</sup>	1
2020–21	41	3	12 (\$18,510)	2	1	0
2021–22	38	0	18 (\$28,860)	0	0	0

Note a: The CDPP decides whether to take forward a referral to prosecution.

Note b: The CDPP advised the ANAO in April 2023 that this matter was 'referred for pre-brief advice on the preparation of briefs of evidence only. CDPP provided the advice to NMI on 21 August 2020... There were no subsequent brief referrals, nor prosecutions instituted, following the provision of the advice.'

Source: ANAO analysis of departmental records.

3.47 DISR has not reported accurately on the extent to which it has been referring matters for possible prosecution. DISR externally reported that three referrals had been made to the CDPP in 2020–21.<sup>67</sup> The CDPP advised the ANAO that one matter was referred in 2020–21. In relation to this matter:

- in April 2023 the CDPP advised the ANAO that, while a decision was made to commence a prosecution, in November 2022:

67 In June 2023, DISR advised the ANAO that it 'acknowledges that the LMB Compliance Report dated 8 December 2022 contains an incorrect number of prosecutions referred to the CDPP in 2020–21. DISR has commenced steps to correct the number from 3 to 1... DISR notes that the previous year's LMB Compliance Report published in October 2021 contains the correct CDPP referral number for the 2020–21 financial year.' On 7 July 2023, the 2021–22 Compliance Report was updated with the 2020–21 CDPP referral figure corrected.

the accused company formally rejected the plea negotiation proposal on the basis of perceived problems in the way evidence was obtained during the investigation, which would affect its admissibility in a trial. CDPP reviewed the circumstances surrounding the investigation, including reviewing further documentation received from NMI that was not previously disclosed to CDPP nor the accused company. As a result, CDPP concluded that there were deficient cautions provided by the investigator to the director of the accused company which resulted in the improper gathering of evidence. ... [In] January 2023, following consultation with NMI, CDPP made the decision to discontinue the prosecution.

- in June 2023, DISR advised the ANAO that:

DISR consulted with CDPP regarding shortcomings with the investigation and the following actions occurred:

- January 2023 – existing procedure NTM 9.5 Questioning Instructions reviewed and found to be insufficient.<sup>68</sup>
- January 2023 – LMB Procedure 5.5 – Questioning Alleged Offenders was drafted...
- 3 February 2023 – CDPP consulted on draft procedure.
- 13 February 2023 – LMB Procedure 5.5 published
- 16 February 2023 – ...debrief meeting held for inspectors involved and LMB Management...
- 7 March 2023 – LMB Procedure 5.5 released to the inspectorate and brief overview given at a meeting.
- Week commencing 13 March 2023 – Notebook inserts detailing caution and brief guidance circulated to inspectors...
- 30 May 2023 – Training session presented to inspectors on lessons learnt and new procedure...

DISR will review the effectiveness of the updated procedure and training no later than 31 May 2024.

### 3.48 ANAO analysis of DISR's timeliness in actioning warning letters and infringement notices during the three years examined found that:

- Of the 270 warning letters issued, one did not have the date of the investigating officer's recommendation recorded in TMARS and as such it was not possible to calculate the time taken to issue the letter. The remaining 269 warning letters were issued on average 53 days after this action was recommended, with the maximum time taken being 395 days or just over one year (153 or 57 per cent of these warning letters were issued within 43 days as required under DISR's current procedures which were introduced in May 2022).
- The 131 infringement notices were issued on average 84 days (nearly three months) after the recommendation, with the time taken ranging from 12 to 316 days (21 or 16 per cent of infringement notices were issued within 34 calendar days as required by the department's current procedures).

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68 This document was listed as being 'Under Review' in the document lists provided by DISR to the ANAO in June and July 2022. It was approved on 4 January 2011 (a new version was approved on 23 June 2014 to renumber the document from 10.5 to 9.5).

3.49 Due to data quality issues, including the inconsistency of information recorded in TMARS, the ANAO was unable to assess the timeliness of substantive enforcement actions.

3.50 The ANAO examined a sample of 20 enforcement actions.<sup>69</sup> Of the 20 enforcement actions:

- nine (45 per cent) resulted in a warning letter being issued with the warning letter being issued, on average, 74 days (more than two months) after this action was recommended (a range of nine days to 6.4 months);
- four (20 per cent) resulted in infringement notices (totalling \$8400) with the time taken to issue the notices ranging from 78 days to 4.6 months;
- five (25 per cent) resulted in no further action being taken; and
- two (10 per cent) were still in progress as at March 2023, having been commenced between August 2020 and December 2021.

3.51 In June 2023, DISR advised the ANAO that:

performance indicators for issuing enforcement actions were not introduced until LMB Procedure 5.2 - Processing enforcement actions and regulatory outcomes was approved on 22 May 2022<sup>70</sup> ... since the timeliness metrics were introduced 91% of warning letters have been issued within 43 days and 83% of infringement notices have been issued within 34 days.

## Is the regulatory approach regularly reviewed, and where appropriate, updated?

The regulatory approach is not being regularly reviewed and updated reflecting that the department is not complying with Australian Government requirements for regulatory performance reporting, including by not having in place an appropriate Regulator Statement of Expectations and Statement of Intent. DISR has not established performance indicators against which to review or to demonstrate the effectiveness of its regulatory approach to trade measurement. DISR reports its outputs, such as the number of trader audits conducted, although advice from the department to the ANAO as part of this audit indicates that the department is overstating the number of audits it undertakes.<sup>a</sup> DISR ceased externally reporting against output targets, and ceased its regulator performance reporting for legal metrology, after 2019–20. DISR has not issued a Regulator Statement of Intent for its National Measurement Institute despite this being a requirement.

Note a: See paragraph 3.6.

3.52 Structured monitoring and reporting assists in the oversight of entity performance and enhances accountability, including in the performance of regulatory functions. Appropriate reporting arrangements enable decision-makers to identify where plans and objectives are not being met and take action accordingly. In addition, external reporting provides the Parliament and the public with assurance that the entity's regulatory approach is effective in achieving the desired outcomes.

69 For the purpose of selecting the sample for detailed examination, the ANAO identified from TMARS records 550 active enforcement actions that had a 'date of breach' occurring between 1 July 2019 and 30 June 2022. Of those 550 enforcement actions, the ANAO randomly selected 20.

70 DISR's advice incorrectly states the approval date – the procedure was approved on 31 May 2022.

## Commonwealth performance framework reporting

3.53 The Commonwealth Performance Framework sets out requirements for performance reporting and the preparation of annual performance statements to promote accountability and transparency of entity performance. The Framework consists of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the accompanying Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) and guidance issued by the Department of Finance. The Framework requires entities to: prepare and publish a corporate plan; specify performance measures and targets; and prepare statements about the annual performance of the entity in achieving its purposes, which are included in the entity's annual report.

3.54 Against the strategic objective 'Provide a trusted national system of measurement', DISR specified three performance criteria with targets in its 2019–20 Corporate Plan. One of the three criteria related to its trade measurement compliance activities, being 'Percentage of (trade measurement) trader audit target met' with a 2019–20 target of '≥90%'.<sup>71</sup> DISR reported a result of '112%' in its 2019–20 Annual Report. DISR calculated this result using its internally reported data and the methodology outlined in Table 3.7, which factors in the various activities undertaken by inspectors during trader audits.

3.55 There was no comparable performance criterion for legal metrology in subsequent Corporate Plans<sup>72</sup> or reporting of performance against trader audit targets in subsequent Annual Reports.

3.56 DISR continued to report internally against its trader audit targets. DISR did not achieve a result of '≥90%' in 2020–21 or in 2021–22, as per Table 3.7.

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71 The other two performance criteria were: 'Percentage of National Measurement Institute reports, certificates and services delivered on time' with a target of '≥85%'; and 'Australia's national system of measurement is trusted nationally and internationally' with no target.

72 DISR's 2020–21 and 2021–22 Corporate Plans contained a single performance criterion for its NMI activities, which was 'Australia's national system of measurement is trusted nationally and internationally', with no associated performance target. DISR replaced the criterion in its 2022–23 Corporate Plan with 'Number of third-party accreditations maintained to ensure NMI measurement services meet national and international best practice' and specified a target. This criterion is being examined by the ANAO as part of its 2022–23 performance statements audit program.

**Table 3.7: Annual performance against a target of ≥90 per cent**

Inspection activities	2019–20		2020–21		2021–22	
	Target	Met	Target	Met	Target	Met
Trader audits conducted	10,000	81%	10,000	48%	8000	37%
Instruments tested	10,000	129%	10,000	127%	15,000	40%
Pre-packaged article lines tested	70,000	106%	70,000	37%	70,000	24%
Trial purchases	1000	133%	1000	73%	1000	52%
Liquid fuel quality: analysed	N/A <sup>a</sup>	N/A	180	72%	600	99%
Liquid fuel quality: screened	N/A <sup>a</sup>	N/A	2000	57%	–	–
<b>Percentage met<sup>b</sup></b>	<b>112%</b>		<b>69%</b>		<b>50%</b>	

Note a: DISR became responsible for administering the *Fuel Quality Standards Act 2000* in early 2020. Following Machinery of Government changes in June 2022, the Department of Climate Change, Energy, the Environment and Water (DCCEEW) became the administering authority for this Act. Under a Head Agreement between DISR and DCCEEW, DISR officers continue to undertake inspection and sampling activities on behalf of DCCEEW.

Note b: As per DISR's methodology for calculating performance against its target of ≥90%, which was to add the percentages together then divide by the number of inspection activity categories.

Source: ANAO analysis of DISR's internal Legal Metrology Branch Monthly Performance Reports.

### Statements of expectations and of intent

3.57 An internal audit report of December 2015 recommended that 'A statement of expectations should be provided to NMI to set out the Government's policy objectives and priorities for legal metrology'. The report proposed that the Secretary issue the statement, that NMI issue a response and that these be published.

3.58 The Secretary issued a statement of expectations for NMI in June 2016. It focussed on 'the initial phase of the transition programme to be implemented during 2016 and 2017' and noted that 'subsequent statements of expectation will be issued'. The Secretary's statement included:

I expect NMI to establish effective performance measures and evaluation arrangements ... I expect NMI to make effective use of the data that it collects through its regulatory activities by ensuring its information management systems and processes are fit for purpose and supported by an appropriately skilled workforce. Good information management practices will underpin evidence-based decision making in the areas of regulation and policy advice.

3.59 NMI signed a responding statement of intent in September 2016. DISR did not publish the statement of expectations or of intent.

3.60 The subsequent statement of expectations for NMI was issued to DISR five years later in September 2021 by the Minister for Industry, Science and Technology. This was triggered by an Australian Government decision of April 2021 for Ministers to issue or refresh Ministerial Statements of Expectations for the regulators within their portfolios. As outlined in *Resource Management Guide 128: Regulator Performance*, regulators are to:

- 'integrate these Statements into performance reporting through their corporate plan and annual report';

- respond with a Regulator Statement of Intent; and
- make the statements ‘publicly available on regulator websites or on transparency.gov.au as part of a corporate plan and/or annual report’.<sup>73</sup>

3.61 There was a change of Minister (11 days later in September 2021 after the Statement of Expectations had been issued) prior to the Regulator Statement of Intent being due from, or provided by, DISR as the entity responsible for NMI. Statements of Expectations should be issued or refreshed if there is a change in Minister.<sup>74</sup> In February 2022, the Minister for Science and Technology issued a Statement of Expectations for NMI containing the same words as the previous version. These included that NMI: ‘apply a proportionate and risk-based approach to compliance and enforcement actions ...; and take a proactive approach to continuously improving regulatory performance by embedding the regulator best practice principles’ (see paragraph 3.65).

3.62 A federal election was called in April 2022, prior to the responding Regulator Statement of Intent being either due or provided by DISR. There was a change of Minister on 1 June 2022. As at 24 May 2023, the Ministerial Statement of Expectations for NMI has not been published or refreshed or referenced in DISR’s Corporate Plans/Annual Reports, and there has been no responding Regulator Statement of Intent issued.

### Regulator performance reporting

3.63 The regulator performance reporting requirements changed during the three years examined by the ANAO. The requirements for 2019–20 were as per the *Regulator Performance Framework* that had operated since 1 July 2015. The Framework contained six ‘outcomes-based key performance indicators (KPIs) to articulate the Government’s overarching expectations of regulator performance’.<sup>75</sup> DISR had established a set of nine measures of the NMI’s performance against the six KPIs, which were approved for use by the Minister in July 2015. As required, DISR published a report of its self-assessment of the NMI’s performance for 2019–20.<sup>76</sup> DISR had assessed itself as having ‘Met’ each of the nine measures and, by extension, the six KPIs.<sup>77</sup> ‘Met’ was the highest rating available, defined by DISR as ‘Strong performance against all aspects of the metric’.

3.64 Four measures of performance against two KPIs focussed on trade measurement compliance activities. The ANAO considers that these measures in combination with DISR’s

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73 Guidance on Ministerial Statements of Expectations and Regulator Statements of Intent is in:

- Department of the Prime Minister and Cabinet, *Regulator Performance Guide*, PM&C, Canberra, July 2021, pp. 10–11; and
- Department of Finance, *Resource Management Guide 128: Regulator Performance* [Internet], Finance, Canberra, July 2023, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 10 July 2023].

74 ‘Ministerial Statements of Expectations should be issued or refreshed every two years for all Commonwealth entities with regulatory functions, or earlier if there is a change in Minister, change in regulator leadership, or significant change in Commonwealth policy’. Department of the Prime Minister and Cabinet, *Regulator Performance Guide*, PM&C, Canberra, July 2021, p. 10.

75 Department of the Prime Minister and Cabinet, *Regulator Performance Framework*, PM&C, Canberra, October 2014, p. 4.

76 Department of Industry, Science, Energy and Resources, *Regulator Performance Framework Self-Assessment Report: National Measurement Institute 2019–20*, DISER, Canberra, December 2020.

77 DISR had externally validated its assessment by providing the draft report to the NMI’s Consumer and Industry Liaison Committee for comment, which was the stakeholder consultation mechanism approved by the Minister in July 2015.



assessment approach were not a sufficient basis for concluding that the related two KPIs had been met. A summary of the four measures, DISR's reported assessment and the ANAO's analysis is provided in Table 3.8.

**Table 3.8: Regulator performance reporting on trade measurement compliance activities for 2019–20**

Performance measure	DISR's reported assessment	ANAO comment
KPI 3: Actions undertaken by regulators are proportionate to the regulatory risk being managed		
'Number of enforcement actions that do not involve a fine'	'Met. Of 2521 enforcement actions in 2019–20, 2416 (96%) did not involve a fine'.	The measures were not meaningful. The first measure was the inverse of the second measure and there was no benchmark established by DISR against which to assess performance.
'Number of enforcement actions that involve at least a fine'	'Met. Of 2521 enforcement actions in 2019–20, 105 (4%) involved at least a fine'.	
KPI 4: Compliance and monitoring approaches are streamlined and coordinated		
'Proportion of trade measurement inspections that address areas identified as high-risk'	'Met. All (100%) of the 7856 trader audits undertaken in 2019–20 were conducted as part of national targeted programs based on risk profiles'.	The figure of '7856' was the number of trader audits reported for 2018–19 and not the number undertaken in 2019–20.  The result of '100%' was inaccurate. Not all trader audits were (or were intended to be) conducted 'as part of national targeted programs based on risk profiles' and/or to 'address areas identified as high-risk'.  There was no benchmark established by DISR against which to assess performance.
'Assessments or inspections that take account of risk profile'	'Met. The 2019–20 and 2020–21 National Compliance Plans were published on the NMI website and confirmed our approach to program-driven compliance activities based on risk profile.  The 2020–21 Plan allocates all compliance activity to program-based activities based on risk profile'.	The evidence presented in the report by DISR was not sufficiently relevant to the 2019–20 performance measure.  As reported, the 2019–20 and 2020–21 National Compliance Plans were published and did state that a 'risk-based approach' was used.  Neither Plan allocated 'all compliance activity to program-based activities based on risk profile'. For example, a portion of resources was allocated to the conduct of 'random audits'.

Source: Extracts from, and ANAO analysis of, DISR's *Regulator Performance Framework Self-Assessment Report: National Measurement Institute 2019–20*.

3.65 The *Regulator Performance Framework* was replaced by the *Regulator Performance Guide*. Instead of KPIs, it contained three principles of regulator best practice: 'continuous improvement and building trust'; 'risk based and data driven'; and 'collaboration and engagement'. It outlined that 'regulator performance reporting should be incorporated into an entity's reporting processes (with a focus on the corporate plan and annual report – including annual performance statement), as required under the PGPA Act and PGPA Rule'.<sup>78</sup>

78 Department of the Prime Minister and Cabinet, *Regulator Performance Guide*, PM&C, Canberra, July 2021, p. 10.

3.66 To support the transition to the new requirements, entities could report on their 2020–21 performance by either continuing to use the previous process or by adopting the new requirements.<sup>79</sup> DISR ceased its regulator reporting. It did not continue to use the previous process by publishing a self-assessment report for 2020–21. It also did not adopt the new requirements, with the 2020–21 Corporate Plan and Annual Report instead representing a decline in DISR’s reporting on legal metrology (see paragraph 3.55).

3.67 The transition to the new requirements was extended with the release of the *Resource Management Guide 128: Regulator Performance*.<sup>80</sup> DISR did not use the previous process or adopt the new regulator reporting requirements for 2021–22.

## Other reporting

3.68 DISR published a National Compliance Report on its trade measurement activities each year. These contained between 16 and 20 pages of information and outputs data, including on trader audits conducted, inspection activities undertaken, rates of non-compliance identified, and enforcement actions taken. The data tables extended from 2015–16, allowing readers to observe changes over time.

3.69 The National Compliance Reports did not report against the targets set out in the National Compliance Plans or against other performance measures. DISR advised the ANAO in June 2023 that:

For the 2023/2024 financial year, DISR will replace the previous National Compliance Plan with a Legal Metrology Strategic Plan that will incorporate all work undertaken within the Legal Metrology Branch (LMB) and include performance reporting. DISR will then utilise this strategic plan to make connections between branch operations and Divisional and Departmental plans.

3.70 The proposed Legal Metrology Strategic Plan was not in place, or in draft form, as at 29 June 2023.

3.71 An internal ‘Legal Metrology Branch Monthly Performance Report’ was circulated to Branch staff and the NMI Executive. The internal report contained more detail than the published reports, including performance to date against the National Compliance Plan targets (see Table 3.7).

3.72 In each of the three years examined, DISR’s Annual Report contained the number of trader audits conducted, measuring instruments tested and pre-packaged article lines tested. The Annual Report data was consistent with DISR’s internal monthly performance reports (and therefore with the data presented in Table 3.7). This data was usually lower than the published National Compliance Report data (and therefore than the data presented in Figure 3.1, Figure 3.2 and Figure 3.3). The reported figures varied by up to 17 per cent across reporting products, with an average difference of six per cent. The discrepancy in numbers were in small part due to the data for different reports being extracted from TMARS on different dates. A more significant factor was that different assumptions were used when generating the reports, as the following example illustrates.

- The National Compliance Report stated that 7118 measuring instruments were tested in 2021–22, and that ‘more than 85.1 per cent of instruments tested were found to be fully compliant with legislative requirements’. The figure of 7118 included 1039 visual

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79 Department of the Prime Minister and Cabinet, *Regulator Performance Guide*, PM&C, Canberra, July 2021, p. 10.

80 Department of Finance, *Resource Management Guide 128: Regulator Performance* [Internet].

examinations of measuring instruments that did not involve testing their performance. It could not be concluded from a visual examination that a measuring instrument was ‘fully compliant with legislative requirements’.

- The Annual Report stated that ‘almost 6,000’ measuring instruments were tested in 2021–22, which was a rounding-up of 5943. The primary reason for the Annual Report figure being 17 per cent lower was that it excluded the visual examination of instruments. (The Annual Report did not include compliance data.)

### *Data quality*

3.73 Accurate, integrated and reliable information on regulated entities, activities and individuals supports regulators in assessing the risk of non-compliance and the development of targeted compliance and enforcement strategies. It also forms data which can be used as intelligence in planning future compliance strategies.

3.74 There was no guidance on the processes to transpose/record information collected during a trader audit into TMARS.<sup>81</sup> The ANAO observed errors and inconsistencies in the information entered into TMARS. In December 2022, DISR advised the ANAO that Data Quality Reports were previously run each month ‘but due to high overall compliance rates and generally low number of Data Quality issues, in recent times, have been running every 2–3 months’.<sup>82</sup>

3.75 The ANAO undertook targeted testing to examine whether issues identified in Data Quality Reports were being resolved in a timely manner. The testing indicated that most data issues were not being resolved, as follows.

- In its Data Quality Report of 25 May 2022, DISR reported 446 data quality issues.
- ANAO testing identified that 69 of the 446 issues (15 per cent) had been fixed in TMARS by 21 December 2022.
- Of the 377 issues (85 per cent) that remained, the elapsed time between the applicable trader audit being completed and 21 December 2022 ranged from 212 to 538 days, and averaged 356 days.

3.76 The Data Quality Report does not pick up all issues and inconsistencies. For example, it does not identify the incorrect non-compliance notice number issues referred to in footnote 63 and, as mentioned in paragraph 2.44, the financial detriment fields were removed from the Data Quality Report.

### **Opportunity for improvement**

3.77 There is an opportunity for improvement in the accuracy and consistency of data entered into TMARS, and in the transparency and consistency of the assumptions used to produce reports based on TMARS data.

3.78 In June 2023, DISR advised the ANAO that:

DISR agrees with this opportunity to improve.

81 There was TMARS guidance on: organisation naming rules; creating organisations and contacts; creating and using a case; creating an enforcement action; how to process a trade measurement complaint or enquiry.

82 For 2022, data quality reports were run in February, May, August and November.

DISR notes that during 2022 and 2023, a project has been undertaken to enhance TMARS to include capabilities for digital non-compliance forms. Digital non-compliance forms will go live on 1 July 2023 and will assist with improving the consistency of how non-compliance information is recorded.

## Reporting on effectiveness

3.79 To facilitate a meaningful review of progress and achievement, entities should ensure they are monitoring, evaluating and reporting on their effectiveness at achieving their objectives. This was absent from DISR's administration of legal metrology.

3.80 DISR's targets and reporting did not extend to the effectiveness of its regulatory approach and progress towards achieving the desired regulatory outcomes. For example, the proportion of traders found to be compliant each year was not benchmarked against a desired rate of compliance. Reporting on the number of enforcement actions undertaken did not include a performance indicator or review of their effectiveness.

### Recommendation no. 6

3.81 As regulator of Australia's legal metrology system, the Department of Industry, Science and Resources:

- (a) apply *Resource Management Guide 128: Regulator Performance*; and
- (b) establish indicators of, and report on, the effectiveness of its regulatory approach.

**Department of Industry, Science and Resources response:** *Agreed.*

3.82 *The department notes that processes are under way relating to our Corporate Plan.*

3.83 *The department will enhance its annual compliance plan publication to include performance measures to indicate the effectiveness of its regulatory approach.*



Grant Hehir  
Auditor-General

Canberra ACT  
5 September 2023

# Appendices

## Appendix 1 Entity responses



**Australian Government**  
**Department of Industry,  
Science and Resources**

**OFFICE OF THE SECRETARY**  
**MEGHAN QUINN PSM**

Mr Grant Hehir  
Auditor General  
Australian National Audit Office  
38 Sydney Avenue  
Forrest ACT 2603

Dear Mr Hehir

Thank you for your correspondence of 17 July 2023 seeking comment from the Department of Industry, Science and Resources (the department) on the Australian National Audit Office's (ANAO) report for trade measurement compliance activities as undertaken by the National Measurement Institute (NMI).

NMI's unique and critical functions are central to unlocking innovation and leading advancements in science and technology. NMI received \$63.9 million in the 2023-24 Budget to sustain its core measurement capabilities and to modernise Australia's measurement laws. Updating Australia's measurement legislation to be more principles-based and more flexible will help new technologies get to market faster, while retaining consumer and business protections.

The department notes that continuous improvement in how we undertake compliance activity is important given rapid technological change and the shifting geostrategic environment. We note the costs associated with administering Australia's trade measurement laws are increasing. This requires NMI to adapt to meet rising demand from industry and government. The ongoing difficulty of recovering the high fixed costs incurred delivering NMI's essential services also limits how quickly improvements can be implemented. NMI is developing options for Government to achieve ongoing financial sustainability.

The department agrees with recommendations 1, 2, 3, 5 and 6 in relation to governance arrangements and the approach to compliance activities. The department partially agrees with recommendation 4.

The report concludes that sound governance arrangements are partially in place to support trade measurement compliance activities and the approach to trade measurement compliance has been partially effective. The department acknowledges the ANAO observation that while the department's compliance approaches are appropriate, action in response to non-compliance has not been as timely or effective as it could be.

The department accepts the first three recommendations relating to strengthening the appointment process for persons undertaking trader audits, improving record keeping, and enhancing the approach to assessing compliance risk and selecting higher risk industries for targeted activities.

Industry House - 10 Binnara Street, Canberra City, ACT 2601 - GPO Box 2013 Canberra ACT 2601 - [www.industry.gov.au](http://www.industry.gov.au) - ABN: 74 599 608 295

Work was under way to improve appointment processes and review documentation prior to commencement of the audit.

The department notes that all individuals using powers under the *National Measurement Act 1960* to conduct trade measurement audits were appointed as Trade Measurement Inspectors. However, the department commits to clarifying how and when persons not appointed as a Trade Measurement Inspector can assist with trade measurement compliance activities, together with improvements to document management processes.

Assessing risk of non-compliance at the industry and trader levels will be improved as updates to regulator guidance, introduction of new data analytical tools, and additional data sources become available. The department will continue to implement targeted compliance programs underpinned by data and intelligence-driven analysis, alongside broad inspection programs across a range of industry and trader types to maintain expertise and market presence. The need for increased transparency regarding how trader types are selected will be actioned.

ANAO's observation that the department has made progress toward a framework that adequately assesses compliance risk of trade measurement activities is welcomed. This includes introducing a risk-based approach for selecting individual traders for audit within broader industry sectors.

The department aims to continuously improve its regulatory approach to ensure it is a contemporary and transparent regulator. In response to recommendations five and six, an improved accountability framework will be implemented to ensure compliance activities are timely, effective, and accurately recorded. We will also ensure our reporting provides useful insights into performance.

The department notes that the scope of the audit coincided with the impacts of the COVID 19 pandemic. The department ensured that trade measurement compliance activities were undertaken in a way that protected the physical health and safety of trade measurement inspectors, supported the Australian Government's response to COVID 19 and minimised the opportunity for trade measurement inspectors to be vectors for COVID 19 within the community.

The department places the importance of work health and safety of its officers at the highest importance. The department's commitment to compliance with the *Work Health and Safety Act 2011* is ongoing.

Regarding Tobacco Plain Packaging audit activities, it is a matter for the department to agree with the Department of Health and Aged Care on directions to officers for activities undertaken against the relevant legislation.

Attached is the department's response to the relevant recommendations and summary response.

I would like to thank the Australian National Audit Office for its collaborative approach throughout the audit process.

Yours sincerely



11 August 2023



**Australian Government**  
**Department of Health  
and Aged Care**

**Secretary**

Mr Grant Hehir  
Auditor-General for Australia  
Australian National Audit Office  
GPO Box 707  
CANBERRA ACT 2601

Dear  Mr Hehir

**Department of Health and Aged Care (the Department) response to the Proposed Audit Report – Trade Measurement Compliance Activities.**

Thank you for providing an extract of the Australian National Audit Office (ANAO) proposed report, pursuant to section 19 of the *Auditor-General Act 1997*, on the audit of the Trade Measurement Compliance Activities. I appreciate the opportunity to respond to the extract of the report.

The Department is responsible for administering the *Tobacco Plain Packaging Act 2011*, the *Tobacco Advertising Prohibition Act 1992* and the associated regulations. Since December 2012, all tobacco products in Australia were required to be sold, offered for sale, or otherwise supplied in plain packaging and feature graphic health warnings.

Australia's [National Tobacco Strategy 2023-2030](#) sets out a comprehensive range of evidence-based policy actions to prevent and reduce tobacco use. The continued monitoring and enforcement of legislation relating to plain packaging of tobacco products and associated health warnings is a key action under Priority Area 6 of the Strategy, to eliminate all tobacco-related advertising, promotion, and sponsorship.

Phone: (02) 6289 8400 Email: [Blair.Comley@health.gov.au](mailto:Blair.Comley@health.gov.au)  
Sirius Building, Level 6, Furzer Street, Woden ACT 2606 - GPO Box 9848 Canberra ACT 2601 - [www.health.gov.au](http://www.health.gov.au)



- 2 -

The National Measurement Institute's (NMI) role in conducting tobacco plain packaging inspection activities is governed by a Memorandum of Understanding (MoU) between the Department and the Department of Industry, Science and Resources (DISR). Under the MoU, compliance and enforcement activities undertaken by NMI may include inspections of manufacturers, retailers or suppliers. Activities also include information visits to tobacco suppliers and retailers.

The inspection scheme under the MoU achieves a high-quantity low-time investment balance, to ensure retailers receive the greatest possible exposure to compliance activities and information. Annual training is conducted for authorised officers, addressing tobacco product compliance issues and work health and safety.

I note the extract of the Proposed Audit Report identifies findings related to illicit tobacco. Illicit tobacco is generally understood in Australia to be tobacco where excise or excise-equivalent duties have not been paid, either upon importation or domestic cultivation. The Australian Border Force (ABF) is responsible for managing the flow of legitimate tobacco across the Australian border, collecting customs duty and taxes on imported tobacco products, and detecting, deterring, and disrupting illicit tobacco at the border.

While the Department does not administer enforcement activities in relation to illicit tobacco, the presence of illicit tobacco may suggest non-compliance with the *Tobacco Plain Packaging Act 2011*. Where the Department holds suspicion of illicit activity occurring, including when this information is detected through plain packaging inspections, the Department refers information to relevant authorities and may also take compliance activities related to plain packaging requirements.

On 30 November 2022, Minister Butler announced the Australian Government's intention to introduce significant tobacco control reforms with the aim of consolidating and modernising existing tobacco control legislation, including the *Tobacco Plain Packaging Act 2011*. The Department notes the audit will inform consideration of future compliance activities, including under the proposed Public Health (Tobacco and Other Products) Bill 2023.

The wording provided for the Department's Summary Response can be found at [Attachment A](#).

If you have any questions regarding the department's response please contact Narelle Smith, Assistant Secretary, Corporate Assurance Branch on (02) 6289 5342.

Yours sincerely



Blair Comley PSM  
14 August 2023

## Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.

2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's 2021–22 Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.

3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:

- strengthening governance arrangements;
- introducing or revising policies, strategies, guidelines or administrative processes; and
- initiating reviews or investigations.

4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.

- In December 2022, DISR moved to having a single instrument of appointment in the form of a Schedule that lists all departmental staff appointed as trade measurement inspectors under the *National Measurement Act 1960*, rather than having separate certificates issued to each individual as the appointment instrument.
- A new procedure relating to LMB officer authorisations and appointments was approved on 3 February 2023.
- DISR developed a guide outlining the process related to enforceable undertakings and compliance agreements which was approved on 9 January 2023.
- DISR developed a new procedure relating to questioning alleged offenders which was approved on 13 February 2023.
- DISR is in the process of updating its procedures relating to the storing and managing of inspector notebooks, including a register of all notebooks that have been issued.

## Appendix 3 Having appropriate policies, procedures and guidance

1. This appendix provides additional information on matters raised in Chapter 2, under ‘Are appropriate policies, procedures and guidance in place?’
2. Table A.1 provides examples of issues identified with DISR’s policies and procedures by the ANAO. The issue of having multiple overlapping documents is further illustrated in Table A.2.

**Table A.1: Examples of issues identified by the ANAO**

Issue	Example
Policies and procedures were not updated in a timely manner.	<p>The <i>National Measurement Act 1960</i> was amended in 2013 to add a new monitoring power under section 18MDA that allows inspectors to enter public areas of business premises to purchase any article for sale and collect information about trade measurement activities without having to identify themselves as an inspector (i.e. to provide for trial purchases as a method of investigation).</p> <p>NTM 9.2: Entry/Exit of Premises Instructions has not been updated to include reference to this new provision.</p> <p>An LMB Manager emailed LMB staff in April 2020 notifying of changes made to the processing of enforcement actions and noted that ‘this will be formalised in a proper procedure in due course’.</p> <p>LMB Procedure 5.2: Processing Enforcement Actions and regulatory outcomes was approved on 31 May 2022, more than two years later.</p>
Poor document control (updates to existing policies are not transparent which makes it difficult to determine currency of documents and identify changes).	<p>LMB Procedure 5.2, approved on 31 May 2022, outlines the procedures for actioning NMI’s regulatory responses. As at 30 June 2022, the document appeared to be incomplete. For example, guidance to NMI staff in relation to compliance agreements was limited to: <i>‘Further details to be included once a review of recent agreements has been undertaken’</i>.</p> <p>On 23 February 2023, the NMI modified Procedure 5.2 (in Content Manager folder 20/010/512) to include the following information in relation to compliance agreements:</p> <p style="padding-left: 40px;">The [relevant] manager may accept a written undertaking relating to compliance with Part IV, V, VI or VII of the Act.</p> <p style="padding-left: 40px;">Such non-legislative co-operative agreements are negotiated by the I&amp;C section and authorised by the [relevant] manager.</p> <p style="padding-left: 40px;">For more information refer to LMB Procedure 5.7 - Guide to Enforceable Undertakings and Compliance Agreements (20/010/512.000111).</p> <p>These changes were not noted under the ‘Amendment Record’ table on page 15 of the document. Under the ‘Document Control’ table the approval date is still recorded as 31 May 2022 and the Version as being 1. This presents challenges to staff as it is difficult to identify when and what has been amended, or what version of the document has been or is being used by staff at any given time. It also raises questions as to whether documents have been appropriately updated and approved.</p>
Updates/changes to processes made via email but official policy not changed.	<p>An LMB Manager sent an email to LMB staff in April 2020 advising that, during the COVID-19 pandemic, while ‘an infringement notice recommendation will still be recorded where appropriate...[NMI] will only issue an infringement notice for the most serious of offences with GM approval’. This was not subsequently updated in any policy.</p>

Issue	Example
Approved documents were incomplete.	<p>LMB Procedure 5.2: Processing Enforcement Actions and regulatory outcomes, as approved on 31 May 2022, contains the following phrases:</p> <ul style="list-style-type: none"> <li>• [Content Manager Reference]</li> <li>• (include TMARS link here)</li> <li>• Further details to be included once a review of recent agreements has been undertaken.</li> <li>• &lt;link to document&gt; Further details to be included in this procedure once a review of recent agreements has been undertaken.</li> <li>• Further details to be included.</li> <li>• Further details to be included once a review of recent agreements has been undertaken.</li> <li>• Etc (details to be finalised).</li> <li>• (Refer to LMB Procedure 6.X – Generating the LMB Monthly Performance Report (under development)).</li> <li>• (details to be finalised).</li> </ul>
Approved documents cross-referencing to other documents that have not yet been developed/approved.	<p>LMB Procedure 4.5: Measuring instrument inspections &amp; associated records refers to 'Procedure 4.X – Verifying measuring instrument on request (under development)...'</p> <p>LMB Procedure 5.1: Guide to creating an Enforcement Action<sup>a</sup> refers to the following documents:</p> <ul style="list-style-type: none"> <li>• TMARS User Manual (under review)<sup>b</sup>;</li> <li>• LMB Procedure 5.X – Questioning alleged offenders (under development);</li> <li>• LMB Procedure 5.X - Processing Enforcement Actions (under development); and</li> <li>• Detriment calculations as per LMB Procedure 4.X Detriment Calculation procedure (under development).</li> </ul>
Documents and information stored/filed outside Content Manager (for instance, in Shared Drives or emails).	<p>A 'Duplicate Instrument Correction Guide' was emailed out to trade measurement staff in June 2020 as a TMARS Alert. The ANAO located a copy of the document within an NMI staff's individual folder within the shared drives. The Guide was not filed within the Content Manager LMB documents folder or available in another more centrally accessible repository.</p> <p>LMB Procedure 4.3: How to process a trade measurement complaint or enquiry states that:</p> <p style="padding-left: 40px;">Once a case has been created in TMARS the LMB support officer must save the email(s) and related documents under that case number into the TMARS folder on the NMI N drive.</p> <p style="padding-left: 40px;">This is the link to the folder — N:\NTM\Group\TRADE MEASUREMENT SERVICES\TMARS\TMARS EMAILS.</p>
Multiple overlapping documents.	As at 30 June 2022, there were 20 approved policies on enforcement actions and investigation procedures related to trade measurement activities. For the majority (65 per cent), more than five years had lapsed since the documents were last approved/reviewed. See further in Table A.2 below.

Note a: Two different approval dates are recorded within the document: p. 1 states 'Date approved: 18 November 2021' whereas the Document Control table on p. 13 states that the 'Date Approved' is 18 November 2020.

Note b: In the document lists provided by DISR to the ANAO, 'TMARS User's Manual' is listed as a potential document.

Source: ANAO analysis of departmental records.

**Table A.2: Approved policies on enforcement actions and investigation procedures**

Document	Effective date	Status as at 30 June 2022
LMB Procedure 5.2: Processing Enforcement Actions and regulatory outcomes	31/05/2022	Approved
LMB Procedure 5.1: Guide to creating an Enforcement Action	18/11/2021	
LMB Policy: Non Compliance and Enforcement Protocol	10/05/2021	
LMB Policy: Investigating Offences – Evidence Matrix	30/03/2021	
LMB 15.1: Licensing Compliance and Enforcement Procedure	08/08/2019	Under review
Licensee Non-Compliance and Enforcement Protocol	01/07/2018	
Inspector's Bulletin 2016/0005 Completing Trade Measurement Notices	10/05/2017	
Changes to warning letter approvals	24/02/2017	
Introduction of a 'Notice to show cause' letter and 'Inspection Referral Request Form'	27/10/2016	
NTM 9.1: Investigation Process – Operations Instructions	29/09/2016	
Contacting an alleged offender of a strict liability offence for a follow-up interview	01/03/2015	
Referral of alleged licensing non-compliances	02/09/2014	
NTM 9.2: Entry/Exit of Premises Instructions	23/06/2014	
NTM 9.3: Search and Seizure Instructions		
NTM 9.4: Exhibit Management Instructions		
NTM 9.5: Questioning Instructions		
NTM 9.6: Reference Numbering Instructions		
NTM 10.4: Minor Enforcement Actions		
NTM 10.6: Trade Measurement Prosecution Policy <sup>a</sup>		
NTM F10.4.2: Warning letter template	Not dated	

Note a: DISR advised the ANAO in July 2022 that this document had been made obsolete.

Source: ANAO analysis of departmental records.

### Management of Commonwealth records

3. Section 24 of the *Archives Act 1983* prohibits the alteration, damage, destruction or other disposal of Commonwealth records unless it is: required by law; done with the permission of the National Archives of Australia or in accordance with a practice or procedure approved by the Archives; or in accordance with a normal administrative practice that the Archives had not disapproved.

4. The ANAO observed instances where it appears that DISR has inappropriately altered, disposed of and/or destroyed Commonwealth records. For example:

- On 29 July 2019, a trade measurement inspector disclosed that they were unable to locate their previous NMI instrument non-compliance book:

I think it is possible that I have discarded it [NMI instrument non-compliance book] into the secure shredding bin that was provided to me by the security team when I moved office as I was asked to discard all sensitive material stored at the office prior to moving.

- On 11 September 2019, all trade measurement staff were directed by the relevant LMB Manager to cease the practice of ‘repurposing’ enforcement data within TMARS. Prior to this direction, trade measurement inspectors had reported merging multiple enforcement action cases into single cases as well as overwriting data. All trade measurement staff were informed that:

Repurposing of enforcement data is a breach of the Archives Act as the data entered in Enforcement Actions (EA) represents current Commonwealth records.

If you have been completing actions of this nature the practice is to cease forthwith.

- On 13 May 2020, a LMB officer suggested changing the status or repurposing active trader audits with a passed schedule date and no completion date:

I don’t think we are allowed to delete the audits but we can change the status or possibly repurpose the record. If the trader has not been visited and it fits with the current or future programs we can rebook the visit for a future date.

- On 19 May 2020, there was a directive to trade measurement staff that existing follow-up audits which were scheduled in TMARS but failed to be undertaken, should be repurposed and the record altered to ‘routine audits’ — this was to align with upcoming compliance programs.

- In May 2022, NMI staff could not locate an ex-inspector’s Tobacco Plain Packaging (TPP) non-compliance notice book. NMI staff concluded that the inspector likely shredded the original copy of a notice issued to a non-compliant TPP trader and that in response NMI would delay the disclosure of this breach to the Department of Health and Aged Care. It was recorded that:

We should not be shredding any notices etc regardless as they fall into the category where we must keep them for so many years. Its worse if the document has not been saved anywhere electronically.

...

My action will be to break this to [the Department of Health and Aged Care] when we have done something good and they are happy with us and maybe that might soften it.

## Appendix 4 Taking a risk-based approach

1. This appendix provides additional information on matters raised in Chapter 2, under ‘Is the regulatory approach informed by an assessment of compliance risk?’

### Industry risk assessment spreadsheet

2. Table A.3 provides additional detail on key issues identified with the industry risk assessment spreadsheets by the ANAO. These issues appear in all versions of the spreadsheet examined. The examples are drawn from the 1 July 2018–4 November 2021 (‘3 year’) version.

3. For context, the following explains how the spreadsheet calculates the risk rank for the 43 sectors (or trader types) and explains the terms used in the spreadsheet and in Table A.3.

- The spreadsheet calculates a ‘risk rank’ by ranking each sector in relative order from highest to lowest ‘risk factor’. Sectors with the same risk factor are assigned the same risk rank.
  - Small Business–Food had the highest risk factor of 117 and so was assigned a risk rank of 1.
  - Bakery Wholesale had the lowest risk factor of 41 and so was assigned a risk rank of 43.
- The spreadsheet calculates the risk factor for each sector by summing the product of a ‘risk rating’ multiplied by an ‘importance bias’ for 19 different ‘data sets’.
  - The importance bias for each data set is determined by DISR and is a single value within the range of 1 (minor importance) to 5 (very high importance).
  - The risk rating for each data set is determined using arbitrary limits set by DISR, which is usually a five-point scale from 1 (minor risk) to 5 (very high risk).
- An example of a data set is ‘Projected Annual Community Detriment based on initial visits’. The importance bias for this data set was 4 (‘high’). The risk rating for this data set ranged from 1 (being a projected community detriment of less than \$20,000) to 5 (being a projected community detriment of greater than \$1 million).
  - Small Business–Food had a projected community detriment of \$1.8 million, which corresponds to a risk rating of 5. Therefore, the spreadsheet added 20 to that sector’s risk factor (being 5 multiplied by the importance factor of 4).
  - Bakery Wholesale had a projected community detriment of \$18,898 and therefore the spreadsheet added 4 to that sector’s risk factor (being 1 multiplied by the importance factor of 4).

**Table A.3: Key issues identified with the industry risk assessment spreadsheets**

Summary	Detail
<p>Only 7 of the 19 different data sets in the spreadsheet could influence the risk ranking of sectors.</p>	<p>Of the 12 data sets that could not influence the risk ranking of sectors:</p> <ul style="list-style-type: none"> <li>• 10 had no influence because all sectors had a hard-keyed risk rating of '1', resulting in the same value being returned for every sector. These 10 data sets are indicators of the relative level of harm that may result from non-compliance and require data external to TMARS to populate. DISR's <i>Risk Based Monitoring Program Evaluation Principles</i> ('risk principles') document identified them as 'Future Data Sets to be considered for use'.</li> <li>• One data set ('% of complaints') had no influence because all points on the five-point risk scale were set at '100%', resulting in the same value being returned for every sector.</li> <li>• One data set ('Projected Annual Community Detriment based on Follow Up visits') had no influence because the data set was not included in the formula for calculating the risk factor. The risk principles document said, 'At present the available community detriment data is insufficient to reliably use this data as part of the total risk evaluation.'</li> </ul>
<p>Two of the data sets had little influence on the risk ranking, due to the limits chosen for the five-point risk rating scale.</p> <p>These were the '% Significant N/C initial Visit' and the '% N/C on Follow Ups' data sets.</p>	<p>The '% N/C on Follow Ups' data set, for example, is 'the percentage of non-compliant traders identified on follow up visits against all follow up trader audits for the industry during the reporting period'.</p> <p>DISR assigned the data set an importance bias of 3 ('medium') and the following limits for the risk rating scale:</p> <ol style="list-style-type: none"> <li>1. &lt; 2% &amp; &gt; 0%</li> <li>2. &lt; 5% &amp; &gt; 2%</li> <li>3. &lt; 8% &amp; &gt; 5%</li> <li>4. &lt; 12% &amp; &gt; 8%</li> <li>5. &gt; 12%</li> </ol> <p>In this data set, 39 out of the 43 sectors had a percentage greater-than 12 (ranging from 16.4% to 100%). As the spreadsheet calculated a risk rating of '5' for all 39 sectors, this data set had little influence on their relative ranking notwithstanding the intent that it have a 'medium' level impact.</p>
<p>The definition of 'significant non-compliance' in the risk principles document differs from that used to populate the spreadsheet.</p>	<p>Two of the data sets were measures of 'significant non-compliance'; one relating to initial visits and one to follow-up visits. The risk principles document described the measures as follows.</p> <p style="padding-left: 40px;">This is the percentage of significant non-compliance reported as enforcement actions against all non-compliant traders with the industry for the reporting period. Significant non-compliance would be non-compliances resulting in an enforcement action equal to or greater than a warning letter.</p> <p>The definition in the risk principles document does not, however, reflect the criteria for 'significant non-compliance' used to populate the data sets in the spreadsheets, which is based on the rejection reason recorded. The risk assessment methodology and risk assessment spreadsheets should be consistent.</p>
<p>The 'Projected Annual Community Detriment based on initial visits' data set had a relatively significant influence on the risk rating, yet the</p>	<p>The data set drew on the financial detriment data that the risk principles document had said was 'insufficient to reliably use'. ANAO comment on the unreliability of this data is at paragraph 2.44.</p> <p>As an example of its unreliability, the following table outlines how the financial detriment of a shortfall in a single 30 ml measure of spirit was calculated three different ways in the same week, in the same region.</p>



Summary	Detail		
underpinning data was unreliable.	Shortfall	Detriment	Calculation
	24.34%	\$2.20	24.34% of the sale price of that single measure of spirit
	14.82%	\$6,233.98	16.47% [sic] of the annual revenue from the sale of that brand of spirit
	11.40%	\$30,223.68	11.40% of the annual revenue from all spirit and liqueur sales combined
	DISR assigned the data set an importance bias of 4 ('High') which was the equal highest out of the seven data sets that could influence the risk ranking. As an indicator of its impact, if this data set was removed from the spreadsheet, then licensed premises would drop from 23rd to 34th in the risk ranking.		
Formulas missing from cells that calculate the risk rating for the data set '% of Justified Complaints'. This limited the possible risk ratings to 1 and 5.	DISR had also assigned the '% of Justified Complaints' data set an importance bias of 4. While it had a five-point risk rating, missing formulas meant that the ratings 2, 3 and 4 were not achievable. The 14 sectors recorded as having no justified complaints had a risk rating of 1, which increased their risk factor by 4 (i.e. 1 x 4). The other 29 sectors recorded as having between one and 109 justified complaints had a risk rating of 5, which increased their risk factor by 20 (i.e. 5 x 4).		
The intended calculation of the risk rating for the data set '% of Justified Complaints' does not factor in whether the sector receives a relatively high or low number of justified complaints.	If the formulas were not missing from the '% of Justified Complaints' data set, then there would still be shortcomings. For example, the Agricultural Wholesale sector would be assessed as 'very high' risk on the basis of its single justified complaint, while the sector with the most justified complaints (Fuel Retail) would be assessed as 'medium' risk. The reason for this result is presented in the following table.		
		Agricultural Wholesale	Fuel Retail
	Data set and risk rating in the spreadsheet		
	% of the complaints about the sector that were 'justified' complaints	50%	9.7%
	Associated risk rating	5 (increases the risk factor by 20)	3 (increases the risk factor by 12)
	Underlying data		
	Number of complaints about the sector (% of all complaints made)	2 (0.1%)	1124 (66.2%)
	Number of justified complaints about the sector (% of all justified complaints)	1 (0.4%)	109 (41.1%)
Number of traders in the sector (% of all traders)	908 (1.5%)	10,414 (16.9%)	

Source: ANAO analysis of DISR's industry risk assessment spreadsheets.

## Compliance programs

4. Table A.4 lists the different compliance programs outlined by DISR in the National Compliance Plans for 2019–20 to 2021–22.

**Table A.4: Compliance Programs for 2019–20 to 2021–22**

Financial year	Compliance program
2019–20	Concentrated national audit program
	Compliance confidence program
	Livestock saleyard program
	New traders program
	Proactive high risk program
	Remote and Indigenous communities program
	Verified instrument audits program
	Waste management program
	Weighbridge testing program
2020–21	Concentrated national audit program
	Compliance confidence program
	Fuel quality testing program
	New traders program
	Proactive high risk program
	Regional and remote inspections program
	Waste management program
	Weighbridge testing program
2021–22	Concentrated national audit program
	Compliance confidence program
	Agriculture and farm supplies program
	Bulk fuel program
	Fuel quality testing program
	Proactive high risk program
	Regionally-based local audits program
	Remote and Indigenous communities program
	Waste management program
	Weighbridge testing program

Source: DISR's National Compliance Plans for 2019–20, 2020–21 and 2021–22.

## Appendix 5 Monitoring industry compliance

1. This appendix provides additional information on matters raised in Chapter 3, under ‘Is industry compliance appropriately monitored?’

### Impact of COVID-19 pandemic

2. Table A.5 provides further details on the three stage return to field activities for trade measurement inspectors.

**Table A.5: COVID-19 return to field work**

Stage	Industry types	Transition date
1 <sup>a</sup>	Complaints Management Fuel Retail Livestock Weighbridges	From 22 June 2020 (all jurisdictions except VIC) From 9 November 2020 (VIC)
2	Online Retail Supermarkets (Complaint & Verifier Instrument Audits only) Firewood Hardware Retail Postal Distribution	From 8 September 2020 (all jurisdictions except VIC) (VIC – TBC)
3 <sup>b</sup>	All other industries normally serviced by National Trade Measurement 2020–21 National Compliance Plan	From 9 November 2020 (all jurisdictions except VIC) (VIC – TBC)

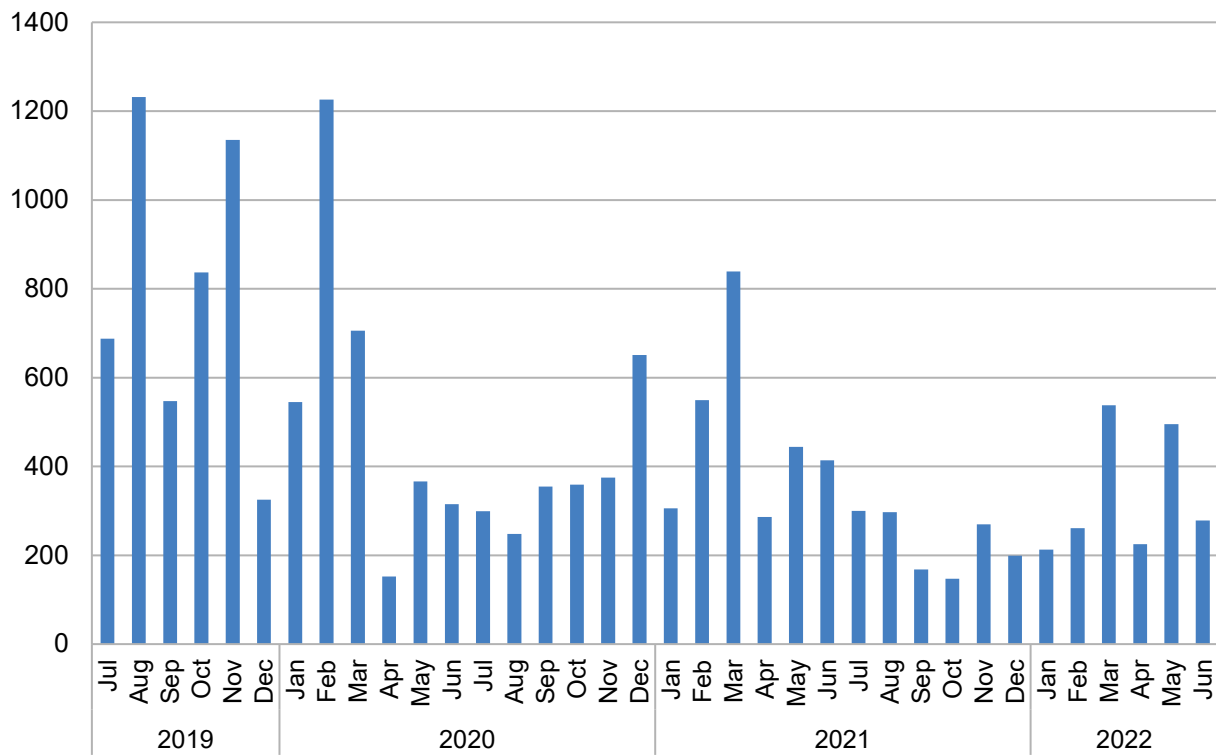
Note a: Stage 1 activities were ‘restricted to businesses of lowest risk, particularly outdoor locations such as fuel stations and weighbridges.’

Note b: Stage 3 had ‘no restrictions on business type, and resumes compliance monitoring across the full range of regulated trade.’

Source: DISR records.

3. As shown in Figure A.1, the number of trader audits conducted each month in 2021–22 were considerably lower than that done prior to March 2020 despite largely returning to business as usual.

**Figure A.1: Trader audits completed per month**



Source: ANAO analysis of DISR's TMARS data.

## Appendix 6 Tobacco Plain Packaging

1. Examples of the evidence underpinning the audit findings at paragraphs 3.23 to 3.24 on Tobacco Plain Packaging activities is provided in the table below. This includes examples of officers being directed to undertake compliance visits due to illicit tobacco allegations and being directed to make observations that extend beyond the checking of plain packaging. It also includes examples of safety concerns raised by officers and incidents reported by officers.

**Table A.6: Extracts from records relating to Tobacco Plain Packaging (TPP) visits**

Examples of ...	Extracts
TPP visits allocated to officers, which were related to illicit tobacco <sup>a</sup>	<ul style="list-style-type: none"> <li>• ‘TPP inspection request for [...] Tobacconist &amp; Accessories. They are alleged to be selling illicit tobacco in prefilled tubes.’</li> <li>• ‘DoH [Department of Health and Aged Care] has requested a site inspection due to intelligence gained that the trader may have illicit tobacco onsite.’</li> <li>• ‘Store alleged to be selling illicit tobacco products’</li> <li>• ‘Store is allegedly selling loose leaf (chop chop) tobacco and branded cigarette packs. There has been strong media reporting about this store and its brazen activities. Media reported ... that store is now closed. Would be worthwhile to investigate if the closure is permanent.’</li> <li>• ‘Store is allegedly selling branded cigarette packs, loose tobacco (chop chop), nicotine vapes and ice pipes. Please conduct full site inspection.’</li> <li>• ‘Business is alleged to be selling illicit tobacco products.’</li> <li>• ‘Store is alleged to be selling illicit tobacco. Please conduct full site inspection.’</li> <li>• ‘Request follow-up following suspected sale of illicit tobacco. Previous visit found several customers told to come back later by owner while NMI AO [authorised officer] in store. AO noted several customers waiting outside the store. These same customers exited the store with plastic bags wrapped around cartons or similar.’</li> </ul>
Comments made about TPP visits requests being related to illicit tobacco	<ul style="list-style-type: none"> <li>• ‘We have moved on from when DOH first approached us and now the complaints appear to have shifted to illegal and illicit tobacco complaints.’</li> <li>• ‘We have discussed many times that a significant percentage of TPP complaints are actually related to illicit tobacco’</li> </ul>

Examples of ...	Extracts
Officer concerns about TPP visits being related to illegal activity	<ul style="list-style-type: none"> <li>• ‘The main concern inspectors have with TPP is the growing involvement of organised crime in illicit tobacco’</li> <li>• ‘The only concern I have is the potential link to organised crime (this is the bit that makes me nervous and nervous for my staff)’</li> <li>• ‘For me the biggest risk is the rise of illegal/illicit tobacco sales being run by bikie gangs/criminal gangs here’</li> <li>• ‘We are trained for plain packaging requirements but not illegal activity.’</li> <li>• ‘NMI staff should not be involved in any investigation of illicit and illegal tobacco shop fronts.’</li> <li>• ‘One area of concern was performing TPP work when it involves site inspections in regard to the sale illicit tobacco by the underworld and bikie syndicates. Staff said they fear for their own and families safety when conducting this type of work, especially when working in areas close to home. They felt that DOH need to involve the AFP [Australian Federal Police] in these investigations. NMI are AO for TPP only.’</li> </ul>
Psychological and physical safety incidents relating to TPP visits	<ul style="list-style-type: none"> <li>• ‘While conducting a TPP inspection, the trader/occupier was very aggressive and abusive ... made me feel threatened and unsure of my safety.’</li> <li>• ‘shop assistant left the counter and went to the front door and dead locked the door and removed the key leaving me with no access to leave the premises.’</li> <li>• ‘the business closed the roller doors, via a remote, while two of us were in the store. Non-compliance had been detected. Fortunately the controller was not aggressive and the situation did not escalate to violence.’</li> <li>• ‘I have been in the situation on three occasions where the door of the shop was locked behind me and I was alone with one or two traders. They were not in least bit aggressive however I could see the potential for this situation to escalate had they become stressed by my findings/taking photographs.’</li> <li>• ‘After leaving the premises I was followed and approached by the trader and offered what might be considered a bribe, not to report what I had witnessed in his store.’</li> <li>• ‘From my limited experience I have personally seen the risk of stress related illness escalate rapidly and unexpectedly in situations where an authorised officer discovers that a trader is selling illicit or tobacco products that do not comply with TPP legislative requirements.’</li> <li>• ‘Officer was conducting Tobacco Plain Packaging inspections. Attended a liquor outlet, and when inspecting a drawer which contained the tobacco to be inspected, identified a gun and knife in the same drawer. The liquor store attendant indicated that the gun was not real, and removed it from the drawer and took it elsewhere.’</li> </ul>

Examples of ...	Extracts
<p>Officers instructed to make observations during a TPP visit that fall outside the checking of plain packaging, and appear illicit tobacco related<sup>b</sup></p>	<ul style="list-style-type: none"> <li>• ‘Store is suspected of selling illicit and/or non-compliant tobacco products. Please conduct full site inspection. ...TPP inspections commence upon observation of the trading premises and cease upon your departure. For example: <ul style="list-style-type: none"> <li>– Time of observation and period?</li> <li>– Number of customer entries and exits? Is it busy?</li> <li>– How much stock do they hold relative to other stores? Number of cabinets?</li> <li>– Departing packages? Black plastic bags?</li> <li>– Premise appearance? Entry and exits?</li> <li>– What specific days the owner attends the premises?</li> <li>– Packaging or cigarette butts adjacent?</li> <li>– Is there any other products or services offered in-store?’</li> </ul> <p>On your next visit perhaps you could further elaborate on your observations prior to entry and the surroundings ...</p> <p>We carry out TPP inspections including surveillance based on direction from DoHAC ...</p> <p>Failure to obtain consent should not be considered a failed inspection attempt considering your previous inspection report and the valuable surveillance details provided without consent. I would however take the time to observe and focus on the surveillance prior to the consent request.’</p> </li> </ul>
	<ul style="list-style-type: none"> <li>• ‘It is important to be factual, concise and accurate in your information as it may be used as intelligence which guides decisions made by other Enforcement Agencies to determine what further action is required.</li> </ul> <p>Even if refused entry to a trading premises it is vital to collect and record information ... about the visit such as surveillance results, layout of store, level of trade (e.g. ranges from very few/no customers to very busy store), other observations when in the premises, any information received from the occupier, details of conversation and any other information you consider relevant... remembering to be factual.’</p>
	<ul style="list-style-type: none"> <li>• ‘We need to ensure we provide DoH a clear understanding of what was inspected in store as it may provide evidence for a future enforcement action.</li> </ul> <p>When reviewing the case, DoH should be aware of what areas of the site were checked as well as what was not, if there was a separate storage facility or storeroom etc. DoH require this information for multiple purposes, including the potential of including information in future inspection requests or, if required, these details could be included in an application for a warrant. While it may still mean an AO cannot inspect these areas due to consent limitations or safety reasons, having this information gives us greater understanding of the trader and what can be expected should we be required to return.’</p>

Examples of ...	Extracts
	<ul style="list-style-type: none"> <li>• [Information an officer was requested to gather] <ul style="list-style-type: none"> <li>– ‘Whether the store had EFTPOS or was a cash only store?’</li> <li>– If EFTPOS, was it a standard bank provided terminal or other payment type, i.e. “Square Reader” tap and go?</li> <li>– Was there a register or POS? Did have ability to print receipts?</li> <li>– Was there an ABN?</li> <li>– Any indication on the number of packs sold each day?</li> <li>– What time did the visit begin and how many pack had been sold so far?</li> <li>– How many customer attempted to purchase packs while in store?</li> <li>– How many were turned away?</li> <li>– Did you see how much cash was in the till?</li> <li>– Was there other cash stored elsewhere? (i.e. separate box under the counter, etc.)</li> <li>– Did you see a safe/s? Size/s?</li> <li>– Is the store selling vape products?’</li> </ul> </li> <li>• ‘Even if officers are denied entry we are still required to provide full details about the business to DoH, including business name, ABN, owner/manager name, name of person we spoke to (if not owner/manager), whether that person has the authority to act on behalf of the owner, reason for entry being denied etc. And then we are still expected to observe the store for 5–10 minutes for anything unusual.’<sup>c</sup></li> </ul>
Officers undertaking store surveillance, or asking about illicit tobacco, as part of TPP visit	<ul style="list-style-type: none"> <li>• ‘I sat in vehicle for half an hour to observe movements of customers in and out of the shop prior to my entry.’</li> <li>• ‘We parked in the complex carpark with an unobstructed view of the front entrance of the ... Tobacconist &amp; Gift Shop and observed the comings and goings of the shop for 35 minutes.’</li> <li>• ‘Observed store for 10 minutes, observed no transactions’</li> <li>• ‘When asked if aware of any illicit tobacco products in the area, Manager said he is not aware of any.’</li> </ul>

Note a: In August 2023, Health advised the ANAO that ‘When issuing inspection requests to NMI, where possible, [Health] will provide the wording of the complaint alleged against the business. Noting the likelihood of illicit tobacco demonstrating non-compliance with tobacco product requirements of the TPP Act, this terminology often appears in complaints received by [Health] receives, and may be used interchangeably in some situations’.

Note b: In August 2023, Health advised the ANAO that ‘Observations recorded at each inspection hold great value, including those made before and after a visit, as this assists the Department to adequately:

- Build a historical record of visit experiences at each store to address potential WHS risks at future site visits;
- Form the most complete picture of store interactions and behaviours from the investment applied to undertaking any site visit; and
- Plan for executing search warrants should the need arise.’

Note c: In August 2023, Health advised the ANAO that ‘In line with consent provisions in the Regulatory Powers Act, [Health] instructs Authorised Officers in training that they must immediately leave the premises if consent to be in store is not given, or is withdrawn. When the occupier of a store places limitations on consent but does not deny consent for the authorised officer to be on premises, authorised officers are expected to have discussions with the occupier to ensure they are aware of the TPP legislation. Obtaining and recording business details is a standard part of this conversation practice, should consent permit’.

Source: ANAO analysis of, and extracts from, DISR’s records.



## Appendix 7 Acting on identified non-compliance

1. This appendix provides additional information on matters raised in Chapter 3, under 'Is identified non-compliance acted upon?'

### Non-separation of duties

2. In six (30 per cent) of the 20 enforcement actions sampled, DISR records indicated that one individual held more than one role in relation to the same enforcement action (see Case study 1 for an example).

#### Case study 1 An individual performing more than one role

In this instance, one individual NMI officer held the role of Investigating Officer (IO), Supervisor and National Investigations & Compliance Officer (NICO).

- On 23 August 2019, the NMI officer conducted an audit of the trader as part of the 2019–20 Licensed Premises Program.<sup>a</sup> The trader was found to be non-compliant as five instruments gave incorrect measurements and a non-compliance notice was issued.<sup>b</sup>
- On 1 October 2019, the same NMI officer (in their capacity as IO) recommended that an infringement notice be issued.
- On that same day, that NMI officer (in their capacity as Supervisor) recommended that an infringement notice be issued noting 'In accordance with current enforcement protocol, I agree with the IO in this instance to issue an infringement notice'.
- On 15 November 2019, the same NMI officer (in their capacity as the NICO) recommended that an infringement notice be issued noting again 'In accordance with current enforcement protocol, I agree with the IO in this instance to issue an infringement notice'.
- On 19 November 2019, the Investigations Manager (a different NMI officer) recommended that an infringement notice be issued. Under 'Recommendation Reason', the Investigations Manager noted:  

The Panel discussed the RCEO's proposal to issue an infringement notice...However the Panel recommends that the trader be referred to CDPP due to shortfalls detected (some of which were significant) across multiple dispensers.

On 6 January 2020 the [relevant LMB Manager] decided against the direct referral to the CDPP and recommended the issuing of an infringement notice...
- On 22 January 2020, an infringement notice for \$4200 was issued to the trader.<sup>c</sup>
- On 6 February 2020, the NMI received payment of the penalty.

Note a: This was a concentrated national program that ran from 19–24 August 2019.

Note b: The five dispensers tested were found to be inaccurate to consumer disadvantage. This is a contravention of section 18GE of the *National Measurement Act 1960*.

Note c: The number of days between the Investigating Officer's recommendation on 1 October 2019 and the infringement notice being issued on 22 January 2020 is 113 (equivalent to 3.7 months). This fell outside DISR's internal KPI of 34 calendar days.

## Enforcement actions

3. The ANAO observed instances where procedures were applied inconsistently and enforcement actions were not actioned in a timely manner (see Case study 2 for an example).

### Case study 2 Timeliness of actioning enforcement actions (EA)

Timeline of events:

- 27 November 2019 – breach was identified and a non-compliance notice issued
- 25 March 2020 – IO recommended an infringement notice
- 6 April 2020 – Supervisor recommended an infringement notice. NICO (the same individual as the Supervisor) also recommended an infringement notice<sup>a</sup>
- 14 April 2020 – Investigations Manager recommended an infringement notice be issued
- 29 May 2020 – the General Manager agreed to issue the infringement notice<sup>b</sup>
- 26 June 2020 – infringement notice for \$1050 emailed to trader (93 days or 3 months after IO recommendation which falls outside DISR’s internal KPIs; nearly 7 months after the date of breach; and nearly a month after the General Manager’s approval)
- 13 August 2020 – failure to pay letter emailed to trader (48 days after the notice was first issued which is outside the 28 days required by the notice and departmental procedures)
- 24 September 2020 – final notice to pay letter emailed to trader (90 days after notice was first issued – departmental procedures require final reminder letters to be sent within 48 calendar days)
- 8 December 2020 – the relevant LMB managers met to discuss non-payment and next steps. ‘Advised that COVID excuses had pushed this one out when we had tried [sic] to chase payment and it had now gone out of time to refer for prosecution. Agreed that the EA would remain on record and we would arrange for a thorough follow-up audit.’ Payment was not pursued and the EA was recorded as being completed in TMARS.

A follow-up audit was scheduled for 8 February 2021. As at 31 May 2023 (more than two years after the scheduled date), the follow-up had not been conducted.

Note a: In June 2023, DISR advised the ANAO that: ‘DISR acknowledges that, for this case study, the Supervisor and NICO are the same person. This occurred just after the transition to the new pilot structure and changes to EA processing procedures had yet to be finalised.’

Note b: In June 2023, DISR advised the ANAO that: ‘on 23 April 2020 the enforcement action process was amended due to the impacts of COVID-19 and all infringement notice decisions had to be approved by the LMB General Manager (GM) with due regard given to the potential impact of COVID restrictions. This change in process had a direct impact on the timeliness of enforcement actions due to the introduction of GM approval processes.’

## Compliance agreements

4. Compliance agreements are a non-legislative compliance mechanism cooperatively entered into by a non-compliant party (the trader) and the regulator (DISR). Between 1 July 2019 and 30 June 2022, DISR entered into four compliance agreements. As at March 2023:

- two had been completed with the traders being advised that DISR was satisfied that the trader had fulfilled the commitments under the agreements;

- one was closed by DISR prior to the end of the compliance agreement as the information requested had not been provided (see Case study 3); and
- one was initially closed by DISR one month prior to the agreement expiring as the trader had ‘failed to provide any evidence that shows it has met these commitments’ but appears to still be in progress within TMARS.<sup>83</sup>

### Case study 3 Compliance agreement closed prior to completion

#### Key events:

- Breach was identified on 19 June 2019 and a non-compliance notice was issued.
- EA downgraded by the relevant General Manager from a CDPD referral to an infringement notice on 6 January 2020. On 29 May 2020, the General Manager reviewed the case and ‘bearing in mind COVID-19 considerations’ decided to pursue an administrative undertaking.
- The compliance agreement was entered into on 29 March 2021 for a term of 12 months.
  - On 23 July 2021, DISR met with the trader and followed up via email on actions to be taken.
  - On 6 October 2021, trader provided a brief update on each commitment (as requested by DISR on 28 September 2021).
  - On 3 November 2021, trader provided response and supporting documents in response to DISR’s request for information (sent on 8 October 2021).
  - On 4 November 2021, DISR emailed the trader noting ‘I can see that [the trader] has made limited progress towards to the commitments made within the agreement ...The following is what needs to be done if you wish to continue with the agreement. If we don’t receive all of the following information by 19th November the NMI will consider the agreement closed.’
  - On 19 November 2021, trader provided re-labelling procedure and measurement procedure.
- On 22 November 2021, the relevant LMB Manager emailed the trader advising that ‘as the information requested has not been provided the NMI now considers the agreement closed. There will not be any further action at this time.’
- EA status in TMARS changed to completed.
- The most recent audit of the trader was conducted on 15 February 2022 and the trader was found to be non-compliant. A follow-up was scheduled for 15 April 2022 but not yet completed as at 31 May 2023 (more than a year later).

83 In June 2023, DISR advised the ANAO that: ‘DISR closed the agreement in September 2021 due to a lack of evidence from the business adhering to its contents. The business subsequently requested that it continue with the agreement and DISR agreed to continue if the business was able to prove the agreement was being complied with... DISR accepts it should have subsequently closed off the agreement a second time after the business was again non-responsive. However, as part of the pilot program it was kept open as a reminder that further trader audits should be conducted to see if the agreement had any effect to assist in the development of our co-operative agreement strategy. These visits took place on 14 September 2022 and whilst most non-compliances had been addressed, further non-compliance was identified and reported ... and an infringement notice issued on 25 January 2023.’

- In June 2023, DISR advised the ANAO that this 'compliance agreement was part of the NMI's compliance agreement trial program'.

### *Enforceable undertakings*

5. An enforceable undertaking is a promise given by a relevant entity (the trader) to a regulator (DISR) to take, or refrain from taking, certain actions and it is enforceable in court if breached. Between 1 July 2019 and 30 June 2022, DISR entered into four enforceable undertakings. As at 31 March 2023, two had been completed and two were still in progress.

6. In June 2023, DISR advised the ANAO that:

The use of co-operative agreements is a relatively new concept to the NMI. The NMI has been on a journey to develop the skills and knowledge required to negotiate, prepare and audit both enforceable undertakings and compliance agreements. Along the way there has been a lot of success and some failure. The practical experience and lessons learnt have led to the development of internal procedure LMB 5.7 – Guide to Enforceable Undertakings and Compliance Agreements published on 9 January 2023.

As each agreement is individually tailored the audit actions vary according to what is agreed between the NMI and the entity. So far the NMI has undertaken to audit each undertaking itself rather than contract this responsibility to a third party.

The audit actions may include:

- Initial informal meetings to discuss progress.
- Reporting requirements for the entity agreed and detailed in each undertaking – usually a report and accompanying evidence every 6 months is required.
- A desktop audit is conducted on every report/set of evidence submitted.
- Further contact is made if evidence supplied is lacking for each report.
- A meeting is undertaken to discuss each report and audit findings.
- Physical visits are also undertaken to check compliance at a site level.