



Guidance Note

Compliance approach in the Product Emissions Standards Bill 2017

The Product Emissions Standards (PES) Bill 2017 establishes a national framework to enable Australia to address the adverse impacts of air pollution from certain products on human and environmental health.

The Bill will facilitate this by:

- a) enabling the Minister to prescribe products as emissions-controlled products and make rules relating to those products
- b) providing mechanisms in the rules for emissions-controlled products to be certified to specified emissions standards
- c) providing a mechanism for the rules to exempt persons or products from the operation of one or more provisions of the Bill
- d) establishing offences and civil penalty provisions relating to the import of an emissions-controlled product to Australia, or supply of that product within Australia, if the product is not certified or marked in accordance with the rules for that product
- e) triggering the compliance and enforcement provisions of the Regulatory Powers (Standard Provisions) Act 2014 and providing for additional compliance and enforcement powers to support the objectives of the Bill
- f) enabling the sharing of information obtained under the Bill with other agencies and the publication of certain information relating to an emissions-controlled product
- g) enabling the delegation of the Minister's and the Secretary's functions and powers under the Bill, or the Regulatory Powers Act (as the case may be)
- h) requiring a review of the operation of the Bill at regular intervals.

The NRSIEE emissions standards will be detailed in a suite of Rules (subordinate legislation) made by the Minister under the PES Act.

The Rules are expected to be made in late 2017. Once the Rules take effect, new NRSIEE may only be imported (from 1 July 2018) or supplied to the Australian market (from 1 July 2019) if they are certified to the Australian emissions standards.

Enforcing Product Emissions Standards

Part 3 of the PES Bill establishes the offence and civil penalty provisions associated with the import or supply of uncertified emissions-controlled products. Part 3 also establishes offence and civil penalty provisions associated with the marking of uncertified emissions-controlled products, and the incorrect marking of emissions-controlled products.

Part 4 of the PES Bill enables the rules for an emissions-controlled product to specify the record keeping requirements for importers, suppliers and Australian manufacturers of those products. Part 4 also enables the Secretary to request information required to be kept in a record if the Secretary reasonably suspects there has been or there is a contravention of the Bill.

Part 5 of the PES Bill establishes a compliance and enforcement regime by adopting the standard suite of provisions under the Regulatory Powers Act. The new regulatory regime will consist of monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings and injunctions.

Triggering the standard provisions of the Regulatory Powers Act will provide a consistent framework, streamline Commonwealth regulatory powers and increase legal certainty for businesses and individuals who are subject to the Bill.

Part 6 of the PES Bill provides for emissions-controlled products to be seized and forfeited to the Commonwealth in certain circumstances. The provisions in Part 6 expand on the powers in Part 3 of the Regulatory Powers Act relating to the seizure of products.

Part 6 of the Bill makes provision for two separate processes by which emissions-controlled products may be forfeited to the Commonwealth:

- a) Automatic forfeiture - where an emissions-controlled product is automatically forfeited when a person is convicted of an offence, or ordered to pay a civil penalty, for contravening a provision of Part 3 (Enforcing product emission standards) of the Bill (Division 2 of Part 6); and
- b) General forfeiture - where a forfeiture notice is issued after an inspector seizes an emissions-controlled product where the inspector suspects, on reasonable grounds, that a provision of Part 3 (Enforcing product emission standards) of the Bill has been contravened in relation to the product (Division 3 of Part 6). A court may order the return of the product or that compensation be paid in certain circumstances where a product has been forfeited to the Commonwealth under this process.

The ability for emissions-controlled products to be forfeited to the Commonwealth, maintains the integrity of the emissions standard framework. This is achieved by ensuring that those persons who have contravened the prohibitions in the Bill or are suspected of contravening the prohibitions in the Bill (including in circumstances where an infringement notice has been issued) are not able to retain possession of the offending emissions-controlled products. This in turn will ensure that the environmental and human health risks associated with the use of non-compliant emissions-controlled products are appropriately managed.

Part 7 of the PES Bill deals with the appointment of inspectors, the publication and disclosure of information, and the conduct of audits to ensure compliance with this Bill.

Import and supply of emissions-controlled products

Import and supply of products that are not certified

Subclauses 13(1) and 15(1) prohibit the import and supply of uncertified emissions-controlled products. For the avoidance of doubt, an emissions-controlled product is taken not to be certified if the certification for the product is suspended (see subclauses 13(2) and 15(2)). Together, these prohibitions will ensure that only certified emissions-controlled products can enter the Australian market. It is necessary to set out the certification requirements in the rules rather than the Bill as the requirements may vary depending on the type of emissions-controlled product being regulated.

Penalties	Maximum penalty units per contravention	Maximum amount per contravention <small>(as at 2017 where each penalty unit is \$210)</small>
Strict liability offense (individual)	60	\$12,600
Strict liability offense (body corporate)	300	\$63,000
Civil penalty provision	120	\$25,200

NOTE: A contravention refers to each individual product in breach of the emissions standard

Import and supply of products that are not marked as required

Subclauses 14(1) and 16(1) prohibit the import or supply of certified emissions-controlled products which are not marked as required in the rules. This prohibition will only operate where the rules for a type of emissions-controlled product impose requirements for the marking of the product, and the product is not marked in accordance with those requirements. For example, this may include a requirement to mark an emissions-controlled product to indicate that it is certified.

It is necessary to set out the requirements for the marking of an emissions-controlled product in the rules rather than the Bill because the requirements may vary depending on the type of product. The rules for an emissions-controlled product may require, for example, the product to be marked with specific information to identify the manufacturer, the engine identification number, the date of manufacture and the details of certification. The rules may also provide for other marking requirements including, for example, that markings are to be in the English language, legible, durable, permanent, visible and not placed on a component that might be replaced during the life of the emissions-controlled product.

Penalties	Maximum penalty units per contravention	Maximum amount per contravention <small>(as at 2017 where each penalty unit is \$210)</small>
Strict liability offense (individual)	60	\$12,600
Strict liability offense (body corporate)	300	\$63,000
Civil penalty provision	120	\$25,200

Marking emissions-controlled products

Marking product that is not certified

Subclause 17(1) prohibits the marking of an emissions-controlled product in circumstances where the rules for the product require certified products to be marked, and a person marks a product as certified when it is not. The prohibition applies to products that are to be imported into, or supplied in, Australia. For the avoidance of doubt, a product is taken to be not certified if the certification of the product is suspended (subclause 17(2)).

Penalties	Maximum penalty units per contravention	Maximum amount per contravention (as at 2017 where each penalty unit is \$210)
Strict liability offense (individual)	60	\$12,600
Strict liability offense (body corporate)	300	\$63,000
Civil penalty provision	120	\$25,200

Incorrect marking of product

Subclause 18(1) establishes a prohibition on marking certified emissions-controlled products in a manner that is not in accordance with the requirements for marking the product as specified in the rules for that product. Marking an emissions-controlled product in a manner that is not in accordance with the requirements in the rules may include, but is not limited to, marking an emissions-controlled product in a manner that is not visible to consumers, or in a way that is not durable or permanent.

As stated above, the marking of an emissions-controlled product is a mechanism intended to provide suppliers and consumers with the confidence that they are supplying or purchasing an emissions-controlled product that complies with the relevant standard for that product. Marking an emissions-controlled product in a manner that is not in accordance with the specified requirement for that product may undermine that confidence.

Penalties	Maximum penalty units per contravention	Maximum amount per contravention (as at 2017 where each penalty unit is \$210)
Strict liability offense (individual)	60	\$12,600
Strict liability offense (body corporate)	300	\$63,000
Civil penalty provision	120	\$25,200

Record keeping

Rules may provide record-keeping requirements

Subclause 20(1) allow the rules made for an emissions-controlled product to require importers or suppliers of that product to make and keep records of imports or supplies of emissions-controlled products. The rules may set out requirements regarding the type of information which must be recorded, how and in what form the records must be kept, and the time period in which the records must be retained.

Providing these details in rules rather than the Bill will allow flexibility as record keeping requirements may be specific to a particular class of emissions-controlled products. It is anticipated that the records would be of the type that are likely to be made or kept in the normal course of importing or supplying a product. The rules would also be flexible enough to allow these records to be kept in a variety of forms and specific requirements could be updated with changes in technology.

Penalties	Maximum penalty units per contravention	Maximum amount per contravention (as at 2017 where each penalty unit is \$210)
Strict liability offense (individual)	40	\$8,400
Strict liability offense (body corporate)	200	\$42,000
Civil penalty provision	80	\$16,800

Secretary may require recorded information

Clause 21 allows the Secretary to request a person to provide information contained in the records the person is required to make or keep under the rules for an emissions-controlled product. The Secretary may only request the provision of such information if the Secretary reasonably suspects that a provision of the Bill has been, or is being, contravened and the information is relevant to the suspected contravention. A request to a person under clause 21 does not abrogate that person's privilege against self-incrimination.

This clause would provide additional means, beyond the monitoring and investigation powers in Part 5 (Regulatory Powers) of the Bill, to obtain information in relation to a suspected breach of the Bill.

The Secretary's request must be provided in a written notice which includes details of the information requested and the due date for the provision of that information (subclause 21(2)). The Secretary may extend the timeframe within which the information must be given on application by the person to whom the notice relates (subclause 21(3)).

Penalties	Maximum penalty units per contravention	Maximum amount per contravention (as at 2017 where each penalty unit is \$210)
Strict liability offense (individual)	40	\$8,400
Strict liability offense (body corporate)	200	\$42,000
Civil penalty provision	80	\$16,800

Reporting on supply of products manufactured in Australia

Clause 22 requires a person who first supplies an emissions-controlled product that is manufactured in Australia to provide a report to the Secretary relating to the emissions-controlled products supplied in a reporting period. The definition of supply in clause 7 includes an offer to supply including making available, exposing, displaying or advertising the product (see paragraph 7(3)(a)). However, for the purposes of clause 22, the requirement to provide a report on the emissions-controlled products first supplied does not include where the products are offered for supply (subclause 22(4)).

The information supplied in the reports will inform whether a person is liable to pay a charge in relation to the manufacture of the emissions-controlled product and the amount of any charge. Pursuant to clause 5 of the Excise Charges Bill, a charge is imposed on the manufacture of emissions-controlled products. Clause 7 of that Bill imposes liability to pay the charge on the manufacturer of the emissions-controlled product.

These maximum penalties in clause 22 are higher than the record keeping requirements in clauses 20 and 21 as information provided under this clause would be the main basis for identifying and determining the appropriate charge to be imposed on domestically manufactured emissions-controlled products under the Excise Charges Bill.

Penalties	Maximum penalty units per contravention	Maximum amount per contravention (as at 2017 where each penalty unit is \$210)
Strict liability offense (individual)	60	\$12,600
Strict liability offense (body corporate)	300	\$63,000
Civil penalty provision	120	\$25,200

Regulatory Powers

Part 5 of the Bill defines the roles of certain people and bodies in relation to the corresponding provisions of the Regulatory Powers Act. This ensures that the functions and powers triggered in the Regulatory Powers Act are exercised by appropriate people and bodies that are easily identified in the Bill.

The Bill provides that an inspector (appointed by the Secretary under clause 41) is an authorised applicant, authorised person and infringement officer for the purpose of provisions triggered in the Regulatory Powers Act (subclauses 24(3), 25(2), 26(2), 27(2), 28(2) and 29(2)). That is, an inspector would be able to exercise the same powers and functions that an authorised applicant, authorised person and infringement officer have in Parts 2 to 7 of the Regulatory Powers Act. For example, inspectors would have the power to apply for monitoring and investigation warrants; exercise monitoring and investigation powers such as the power to secure or seize evidence; and issue infringement notices for alleged contraventions of the Bill.

Subclause 24(4) and 25(3) also provides that an authorised person exercising monitoring or investigation powers may be assisted by other persons in exercising their powers or performing functions or duties in relation to offences and civil penalty provisions of the Bill. As provided for by paragraph 23(1)(a) and paragraph 53(1)(a) of the Regulatory Powers Act, a person exercising monitoring or investigation powers may only be assisted by another person if it is necessary and reasonable to do so.

Monitoring Powers

Clause 24 triggers the standard monitoring powers in Part 2 of the Regulatory Powers Act which creates a framework for monitoring compliance with the Bill. This would include powers of entry and inspection.

The monitoring powers triggered under Part 2 of the Regulatory Powers Act allows an inspector to enter a premise for the purpose of determining compliance with provisions in the Bill and determining whether information given in compliance, or purported compliance with the Bill, is correct (subsection 18(1) of the Regulatory Powers Act). Unlike the exercise of inspection powers, inspectors would not need to suspect on reasonable grounds that there may be material on the premises related to a contravention of an offence or civil penalty provision.

An inspector would need to have the consent of the occupier or a monitoring warrant to enter premises to exercise the monitoring powers under Part 2 of the Regulatory Powers Act (subsection 18(2) of the Regulatory Powers Act).

The general monitoring powers set out in Part 2 of the Regulatory Powers Act permit an inspector appointed under clause 41 of the Bill to, among other things, search premises, measure or test anything on the premises, photograph things or make copies of documents, take necessary equipment onto the premises, operate electronic equipment, secure electronic evidence for 24 hours in order to obtain expert assistance and secure evidence of a related provision for 24 hours.

Investigation powers

Clause 25 triggers the standard investigation powers in Part 3 of the Regulatory Powers Act. Part 3 of that Act creates a framework for investigating compliance with the offence and civil penalty provisions in the Bill or an offence against the *Crimes Act 1914* or the Criminal Code that relates to the Bill.

The investigation powers triggered under Part 3 of the Regulatory Powers Act allows an inspector to enter a premise to exercise investigation powers if they suspect on reasonable grounds that there is evidential material on the premises (subsection 48(1) of the Regulatory Powers Act). However, they

can only do so with the consent of the occupier or an inspection warrant (subsection 48(2) of the Regulatory Powers Act).

The investigation powers set out in Part 3 of the Regulatory Powers Act permit an inspector appointed under clause 41 of the Bill) to, among other things, search the premises and seize evidential material; inspect, test and copy evidential material, take necessary equipment onto the premises; operate electronic equipment found on the premises, secure electronic evidence for 24 hours in order to obtain expert assistance, and seize evidence of related provisions.

These investigation powers would allow non-compliance to be more easily detected and ultimately reduced, leading to greater compliance with the Bill and the better management of the risks arising from non-compliant emissions-controlled products overall.

Infringement notices

Clause 27 triggers the standard provisions of Part 5 of the Regulatory Powers Act. Under subclause 27(1) infringement notices will be able to be issued for strict liability offences and civil penalty provisions of the Bill. A person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against them for the contravention.

Enforceable undertakings

Clause 28 triggers the standard provisions of Part 6 of the Regulatory Powers Act. Subclause 28(1) enables an enforceable undertaking to be sought in relation to the offence and civil penalty provisions of the Bill.

Injunctions

Clause 29 triggers the standard provisions of Part 7 of the Regulatory Powers Act. Subclause 29(1) enables an injunction to be sought in relation to the offence and civil penalty provisions of the Bill. Injunctions (including interim injunctions) may be used to restrain a person from contravening a provision of the Bill, or to compel compliance with a provision of the Bill.

Forfeiture of emissions-controlled products

Product forfeited to Commonwealth

Clause 31 provides that, if a person is convicted of an offence, or ordered to pay a civil penalty, for contravening a provision of Part 3 (Enforcing product emissions standards), the emissions-controlled product to which the offence or civil penalty relates is forfeited to the Commonwealth.

Part 3 of the Regulatory Powers Act enables an authorised person to seize evidential material (section 49 of the Regulatory Powers Act). Under that Act, seized items must be returned if the reason for the seizure no longer exists, the thing is not to be used in evidence, or the period of 60 days after the item's seizure ends (subsection 66(1) of the Regulatory Powers Act). However, the requirement to return the seized item does not apply if the item is forfeited or forfeitable to the Commonwealth (subsection 66(2) of the Regulatory Powers Act). The automatic forfeiture of emissions-controlled products following conviction or a civil penalty order are necessary to ensure that non-compliant emissions-controlled products cannot enter the Australian market.

Power to seize forfeited product

If an emissions-controlled product is forfeited under clause 31 (Product forfeited to Commonwealth), subclause 32(1) provides an inspector with the power to seize that product. In order to seize the emissions-controlled product, the inspector must attach to that product, or to the container in which the emissions-controlled product is held, a notice in writing signed by the inspector (subclause 32(2)). The notice must identify the emissions-controlled product, state that the emissions-controlled product has been seized under clause 32 and specify the reason for the seizure. The inspector must give a copy of the notice to the owner of the emissions-controlled product or to the person from whom that product was seized as soon as practicable (subclause 32(3)).

It is reasonable and necessary to ensure that emissions-controlled products forfeited to the Commonwealth following conviction or an order to pay a civil penalty provision can be seized in a timely manner. This would allow the emissions-controlled products to be dealt with and disposed of appropriately in accordance with clause 39 (Disposal of forfeited products), and prevents those products from re-entering the market and contributing to adverse impacts non-compliant products can cause to the environment and human health.

Person must not interfere with seized product

Subclause 33(1) makes it an offence for a person to engage in conduct which interferes with, moves or alters a seized emissions-controlled product. The maximum penalty for a contravention of subclause 33(1) is 6 months imprisonment.

Subclause 33(3) also creates an offence where a person is given a forfeiture notice and the person does not take all reasonable precautions to prevent the emissions-controlled product being moved, altered or interfered with except in accordance with a direction given the Minister. The maximum penalty for a contravention of subclause 33(3) is 6 months imprisonment.

The penalties in clause 33 reflect the seriousness of the offences and ensure an adequate deterrent to maintain the integrity of the regulatory regime. The offence will apply in relation to an emissions-controlled product that has been automatically forfeited to the Commonwealth following a finding by a relevant court that the product relates to a contravention of Part 3 (Enforcing product emission standards) of the Bill; namely the import or supply of an uncertified emissions-controlled product, or the incorrect marking of an emissions-controlled product.

Forfeited products become property of Commonwealth

Clause 38 clarifies that emissions-controlled products forfeited under clauses 31 or 36 become the property of the Commonwealth. This would ensure that the Commonwealth can deal with the goods in the most appropriate manner.

Disposal of a forfeited products

Clause 39 (Disposal of forfeited products) requires emissions-controlled products forfeited to the Commonwealth under clause 31 (Product forfeited to Commonwealth) to be dealt with and disposed of in accordance with the direction of the Minister.

Miscellaneous

Inspectors

Subclause 41(1) would allow the Secretary to appoint an APS employee as an inspector for the purposes of this Bill.

Subclause 41(2) provides that the appointment of an inspector must be in writing and only where the Secretary is satisfied that the person has the knowledge or experience necessary to properly exercise the powers of an inspector.

Compliance audits

Clause 44 enables the Minister to require a person to conduct an audit and provide a report on their compliance with the Bill. Under subclause 44(1), the Minister may do this if the Minister suspects, on reasonable grounds, that a person has engaged, is engaging or is proposing to engage in conduct that constitutes an offence against the Bill or a contravention of a civil penalty provision. Before requiring a person to conduct an audit, the Minister must also be satisfied that it would be in the public interest to give the person a notice under this clause.

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Strict liability offense (individual)	40	\$8,400
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Civil penalty provision	80	\$16,800