

## Chapter 2

### Issues raised by the Scrutiny of Bills Committee and the Minister's response

2.1 In Scrutiny Digest 2 of 2018, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) raised several concerns relating to the package of bills. The Minister responded to the Scrutiny Committee's concerns on 2 March 2018. The Scrutiny Committee then provided further comments in Scrutiny Digest 3 of 2018. The following section provides an overview of the Scrutiny Committee's concerns, and the Minister's response.

2.2 Many of the concerns raised by the Scrutiny Committee focused on the Road Vehicle Standards Bill 2018. It considered the three Charges bills together, and had no comment on the Consequential Provisions bill.<sup>1</sup>

#### Scrutiny concerns relating to the Road Vehicle Standards Bill 2018

##### *Broad delegation of legislative power*

2.3 Subclauses 6(5) and 7(3) of the bill seek to allow the Secretary to determine, by legislative instrument, that a class of vehicles or a class of components is, or is not, a road vehicle or road vehicle component for the purposes of the bill.

2.4 The Scrutiny Committee raised concern that significant matters, such as the range of vehicles and components captured by the regulatory scheme, should be included in primary legislation to provide for comprehensive parliamentary scrutiny.<sup>2</sup> However, the Minister advised the Scrutiny Committee that the provision is intended to enable departmental officials with relevant technical expertise to conduct a timely assessment of vehicles and components. The Minister further noted that, if the scope of road vehicles and components could only be determined through the primary legislation, it could pose 'a significant threat to public safety'.<sup>3</sup>

##### *Broad discretionary power*

2.5 Subclauses 6(6) and 7(4) of the bill seek to allow the Secretary to determine, by notifiable instrument, that an individual vehicle or component is, or is not, a road vehicle or road vehicle component.

---

1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 44.

2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 29–30.

3 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, pp. 1–2.

2.6 The Scrutiny Committee noted that these provisions seek to grant the Secretary broad powers, with no legislative criteria as to the matters that must be taken into account, when making such determinations. The Scrutiny Committee expressed concern that notifiable instruments are not subject to the same scrutiny requirements imposed on legislative instruments. Finally, the Scrutiny Committee questioned why the determinations would not be subject to merits review.<sup>4</sup>

2.7 In his response, the Minister suggested that the determination-making power for individual vehicles would only be used 'in complex cases where definitive advice is considered by the Secretary to be in the interests of meeting the objectives of the Bill'. This would ensure that the community is provided sufficient protection, without unduly hindering the supply of individual specialist vehicles.<sup>5</sup>

### ***Incorporation of external material into the law***

2.8 The Scrutiny Committee expressed concern regarding subclauses 6(8), 7(6) and 12(2) which allow instruments under the bill to make 'provision for a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time'.<sup>6</sup>

2.9 The Scrutiny Committee has longstanding concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents as such an approach 'raises the prospect of changes being made to the law in the absence of parliamentary scrutiny'. It can also create uncertainty in the law to the extent that those obliged to obey the law may not have adequate access to its terms. The Scrutiny Committee made the point that, as a matter of principle, any member of the public should be able to freely and readily access the terms of the law.<sup>7</sup>

2.10 In his response, the Minister stated that the approach taken is consistent with the MVS Act, whereby the Minister is permitted to make national road vehicle standards by harmonising them with international best practice. Furthermore, the EM explains that such determinations will allow the law to keep step with the road vehicle industry, and incorporate technical standards developed and agreed by the United Nations, as well as national vehicle standards of other countries.<sup>8</sup>

---

4 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 30–31.

5 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, pp. 2–3.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 31.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 31–33.

8 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, pp. 3–4.

2.11 While the Scrutiny Committee agreed that 'the benefit gained from the adoption of best-practice standards clearly outweighs the detriment that arises where such standards are not freely and readily available', it requested that the information provided by the Minister be included in the EM, and left the appropriateness of the provisions to the Senate as a whole.<sup>9</sup>

### ***Reversal of evidential burden of proof***

2.12 A number of provisions in the bill seek to introduce offence-specific defences, which reverse the evidential burden of proof.

2.13 The Scrutiny Committee noted that subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that manner. Individuals therefore have a right to be presumed innocent until proven guilty. The Scrutiny Committee pointed out that, in the *Guide to Framing Commonwealth Offences*, matters included in an offence-specific defence are permitted where it is peculiarly within the knowledge of the defendant, and where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. The Scrutiny Committee laid out its concerns with subclauses 16(3), 24(3), 24(4) and 32(2) in Scrutiny Digest 2 of 2018 and requested the Minister's detailed justification.<sup>10</sup>

2.14 In his response, the Minister advised that subclause 16(3) prevents vehicles that do not meet the requirements from being entered on the RAV. He noted that paragraphs 16(3)(a), (b), (c) and (d) provide a defence if the only reason that the vehicle did not comply with the entry pathway was due to the use of a non-compliant component represented by its supplier to be covered by a component type approval. The Minister continued:

The precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that the type approval holders retain this information in 'supporting documentation', rather than provide this information to the Department to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to request a full outline of the design and manufacturing process and spend time to develop a detailed understanding of one type approval holder's production process.

The type approval holders, to whom this offence relates, should already have both the documentation, and a detailed understanding of their own

---

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, pp. 246–251.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 33–36.

processes. This means that in addition to the type approval holder being the specific holder of this knowledge, it is significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to establish the matters in paragraphs (a), (c), and (d).<sup>11</sup>

2.15 With regard to clause 24, the Minister advised that, although the Department may have access to records of non-RAV entry import approval holders, the question of whether a specific vehicle relates to the non-RAV entry import approval is known to the defendant. Having access to the vehicle, and its sale and importation documents, the defendant would be able to link the vehicle and non-RAV entry import approval. For this reason, it would be significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to establish, the matter.<sup>12</sup>

2.16 With regard to subclause 32(2), the Minister advised that it is appropriate to reverse the evidential burden as any false or misleading information or documents will be peculiarly within the knowledge of the defendant. The Minister noted that this provision is consistent with other Commonwealth legislation, such as the *Biosecurity Act 2015*.<sup>13</sup>

2.17 In Scrutiny Digest 3 of 2018, the Scrutiny Committee noted that it is not clear that the matters set out in paragraph 24(3)(f) would be peculiarly within the knowledge of the defendant, particularly given that the Rules are yet to be made.<sup>14</sup>

### ***Strict liability offence***

2.18 Clause 38 of the bill sets out a strict liability offence in cases where a person refuses or fails to comply with a recall notice, or a person supplies to another person a road vehicle or component to which a recall notice relates. A strict liability offence removes the requirement for the prosecution to prove that the defendant intended to cause the circumstance, or was reckless or negligent. According to the Scrutiny Committee, the *Guide to Framing Commonwealth Offences* states that strict liability is only appropriate where the offence is only punishable by a fine of up to 60 penalty units for an individual. However, the Scrutiny Committee noted that the proposed offence in this case is subject to a maximum penalty of 1050 penalty units for an individual.<sup>15</sup>

---

11 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, p. 5.

12 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, p. 5.

13 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, p. 6.

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 257.

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 36.

2.19 In response, the Minister advised that the proposed number of penalty units is 'vital for ensuring the integrity of the regulatory regime' such that 'the supplier does not consider non-compliance with the recall notice to be a less expensive or more attractive option'. The Minister noted that the likelihood of an individual committing the offence is very low, and that the strict liability offence is already applicable to individuals who are supplying consumer goods, such as road vehicles, under the existing Australian Consumer Law.<sup>16</sup>

2.20 The Scrutiny Committee acknowledged the Minister's advice that the likelihood of an individual committing the offence is very low, and requested that the key information provided by the Minister be included in the EM.<sup>17</sup>

### ***Privilege against self-incrimination***

2.21 Clause 41 of the bill provides the Minister, the Secretary, or an SES officer with the power to issue disclosure notices in certain circumstances. Subclause 42(1) provides that a person is not excused from giving information or evidence, or producing a document, as required by a disclosure notice on the ground that doing so might tend to incriminate the person or expose them to a penalty.

2.22 Subclause 42(2) provides a 'use immunity' for individuals with respect to such self-incriminating information. It states that the information, evidence or documents provided in response to a disclosure notice are not admissible in evidence against the individual in civil or criminal proceedings, with the exception of proceedings relating to a refusal or failure to comply with a disclosure notice, knowingly providing false or misleading information in response to a disclosure notice, or knowingly giving false or misleading information to a Commonwealth entity. However, the Scrutiny Committee noted that the bill does not provide a 'derivative use immunity', which would prevent information or evidence indirectly obtained from being used in criminal proceedings against the person.<sup>18</sup>

2.23 The Minister's response outlined a number of reasons why a derivative use immunity for this offence is not appropriate. He noted that the disclosure notice provisions in the bill are designed to be consistent with existing requirements in Australian Consumer Law. He also stated that the inclusion of a derivative use immunity may provide an incentive for non-compliant suppliers to withhold information, thereby delaying relief to potentially serious community harm. A derivative use immunity may also prevent the Department from sharing information with other relevant departments and authorities, including the Australian Competition

---

16 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, pp. 6–7.

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 260.

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 37.

and Consumer Commission. Finally, the Minister noted that the suppliers most likely to be subject to disclosure notices are type approval holders, which are more likely to be corporate bodies. As such, it is unlikely that the disclosure notice provisions will affect individuals.<sup>19</sup>

2.24 The Scrutiny Committee noted the Minister's advice and requested that the key information provided by the Minister be included in the EM.<sup>20</sup>

***Broad delegation of administrative powers ('other persons')***

2.25 Clauses 50 and 52 of the bill trigger monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* which include coercive powers such as entry and inspection. Subclauses 50(5) and 52(4) would allow authorised persons to be assisted by 'other persons' when exercising powers of performing functions or duties in relation to monitoring and investigation.

2.26 The Scrutiny Committee expressed concern that the EM does not specify who the 'other persons' may be, and whether they will be required to possess appropriate training and experience.<sup>21</sup> However, the Minister noted that, as a wide range of expertise may be required during an investigation, such as emissions testing, software engineering, translation or interpretation services, further prescription in the EM 'would limit the ability of authorised persons to obtain the assistance of appropriately qualified persons'.<sup>22</sup>

2.27 The Scrutiny Committee left the matter of legislative guidance about the appropriate skills and training required of 'other persons' to the Senate as a whole.<sup>23</sup>

***Broad delegation of administrative powers (subclauses 73(5) and 74(5))***

2.28 Subclauses 73(5) and 74(5) state that the Rules may provide for the delegation of all or any of the Minister's functions or powers, and the Secretary's functions or powers, to an Australian Public Service (APS) employee. In Scrutiny Digest 2 of 2018, the Scrutiny Committee raised concern that these subclauses allow for the delegation of administrative powers to a relatively large class of persons, with little to no specificity as to their qualifications or attributes.

---

19 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, pp. 7–8.

20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 263.

21 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 38.

22 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, p. 8.

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, p. 265.

2.29 The Scrutiny Committee noted that the EM sets out 'core principles' with respect to delegation. However, it noted that there is no legislative requirement that they be followed. It expressed its preference that delegates be confined to the holders of nominated offices or to members of the SES.<sup>24</sup>

2.30 In response, the Minister noted that the Minister or Secretary is required to consider most applications from industry within 30 to 60 days, with close to 200 000 decisions expected to be made each year. Given the expected high volume of decisions of varied complexity, there is 'significant administrative efficiency to be gained' through the delegation of less complex decisions to appropriately trained APS staff. The Minister further advised that a Delegation Instrument managed through the Department ensures that the delegation of powers is determined on a risk management basis. He noted that departmental staff who exercise powers and functions under the current MVS Act receive 'appropriate training and support to make effective and lawful decisions' and would continue to do so under the new legislation.<sup>25</sup>

### ***Immunity from liability***

2.31 Subclause 81(1) seeks to prevent legal proceedings being brought against the Commonwealth in respect of any loss incurred, or any damage suffered, due to a reliance on an entry of a road vehicle on the RAV or the SEV register, and for a number of other activities associated with the new legislation. Additionally, subclause 81(2) seeks to prevent criminal and civil proceedings being brought against the Minister, the Secretary, an inspector, or an APS employee in the Department in relation to the function and duties set out in the bill if conducted in good faith.

2.32 The Scrutiny Committee expressed concern that these proposed provisions remove the common law right to bring an action to enforce legal rights, unless, in the context of anything done in connection with the performance or purported performance of functions or duties, it can be demonstrated that lack of good faith is shown. It further noted that courts have taken the position that bad faith can only be shown in very limited circumstances.<sup>26</sup>

2.33 The Minister made the point that clause 81 is consistent with section 27 of the MVS Act. He noted that allowing the Minister, Secretary and departmental employees to be criminally responsibly or civilly liable for losses incurred due to reliance on, for example, approvals granted under the new legislation, would be 'detrimental and

---

24 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 40–41.

25 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, pp. 9–10.

26 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 42.

unfair'. He argued that it would place an additional legal burden on the Department which could delay decisions and result in a more cautious and restrictive approach.<sup>27</sup>

### ***Review rights***

2.34 Subclauses 82(1) and 82(2) set out a number of specific matters that the Minister may make Rules for by legislative instrument. Paragraph 82(2)(c) specifies that the Rules may provide for the review of a decision made under the new legislation or any rules or instruments made under the legislation.

2.35 The Scrutiny Committee noted that significant matters, such as access to merits review, should be set out in primary legislation. In cases where these matters are left to delegated legislation, the Scrutiny Committee suggested that it should be a requirement that delegated legislation set out what decisions will be subject to review rights. Furthermore, it pointed out that, as the bill does not specifically subject any decisions to review under the *Administrative Appeals Tribunal Act 1975*, persons affected by a decision would not be able to seek a review under the Administrative Appeals Tribunal (AAT).<sup>28</sup>

2.36 In his response, the Minister advised that:

The Bill allows the Rules to set out which decisions can be subject to merit review, but does not require that decisions must be subject to merit review. This drafting ensures that when the Rules are made there are no foregone conclusions about the suitability of a decision for merits review. Instead, the drafting provides the Minister with the scope to consider the suitability of each decision point for merits review, taking into account the unique circumstances and requirements of the matter. This allows for a more nuanced and considered approach to merits review.

The Committee may wish to note that the draft Rules provide extensive rights to merit review by the AAT (see clause 219).<sup>29</sup>

### **Scrutiny concerns relating to the Charges bills**

2.37 The Scrutiny Committee considered the three Charges bills together.

#### ***Charges in delegated legislation***

2.38 Each Charges bill seeks to impose a charge as a tax in relation to prescribed matters related to the administration of the Road Vehicle Standards Bill 2018 and the Consequential Provisions bill. The Charges bills provide that the amount of charge

---

27 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, p. 10.

28 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 43.

29 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, p. 11.

payable in each case may be prescribed by the regulations, and that the regulations may either set out the amount of the charge payable or a method for working out the charge.

2.39 In Scrutiny Digest 2 of 2018, the Scrutiny Committee stated it is for the Parliament to set a rate of tax. Therefore, guidance in relation to the method of calculation of the charge, and/or a maximum charge, should be provided in the primary legislation to enable adequate parliamentary scrutiny.<sup>30</sup>

2.40 The Minister assured the Scrutiny Committee that regulations are subject to motions of disallowance and scrutiny by the Senate Standing Committee on Regulations and Ordinances. As such, rates of tax set out in delegated legislation may be scrutinised by Parliament at the appropriate time.

2.41 The Minister further stated that the amount of a charge or the method for calculating a charge is appropriate to include in the regulations, rather than primary legislation, to allow a flexible approach to the development of national vehicle standards, and other measures necessary for the 'dynamic' vehicle industry. He added that the Department has undertaken to review the charging points under future regulations twelve months after their commencement. Thereafter the Department will conduct reviews of all existing and potential charging activities at least every five years.<sup>31</sup>

---

30 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2018*, 14 February 2018, p. 46.

31 The Hon Paul Fletcher MP, Minister for Urban Infrastructure and Cities, *Response to Senate Scrutiny Committee – Road Vehicle Standards Bill*, 2 March 2018, [pp. 12–13].

