

Chapter 3

Parliamentary scrutiny of the Regional Broadband Scheme and overall committee view

3.1 This final chapter comments on certain issues related to the delegation of legislative power and parliamentary scrutiny of decisions that could be made as part of the proposed Regional Broadband Scheme (RBS). The committee's overall conclusions on the bills can be found at the end of the chapter.

Delegation of legislative powers and adequacy of processes for facilitating parliamentary scrutiny

3.2 As noted in Chapter 1, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) commented on the bills in its *Scrutiny Digest No. 8 of 2017*. Following publication of its Scrutiny Digest, that committee sought and received advice from the Minister regarding various aspects of schedule 4 to the CC Bill and the RBS Bill. Specifically, the Scrutiny Committee commented on:

- strict liability offences for failure to lodge certain reports to the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC);
- the ability for the Minister to make determinations amending the default rate of the RBS charge and affecting the meaning of certain terms;
- modified disallowance procedures relating to the determinations referred to above; and
- proposed sections 102Z and 102ZA of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act), which would enable the ACCC and the ACMA to declare, by notifiable instrument, that a specified Commonwealth, state and territory department or authority is a 'authorised government agency', for the purposes of disclosing certain information collected as part of the RBS regime.

3.3 The committee's comments in this chapter are limited to the issues related to whether the bills would inappropriately delegate legislative powers or insufficiently subject the exercise of legislative power to parliamentary scrutiny. Regarding the remaining matter highlighted by the Scrutiny Committee about the strict liability offences, the committee notes that the Scrutiny Committee has sought and received advice from the Minister about the proposed imposition of strict liability for these particular offences. The committee will leave further consideration of this matter to the usual Scrutiny Committee process.

Overview of the proposed ministerial powers regarding the RBS charge and modified disallowance procedures

3.4 As noted in Chapter 1, although specific base component and administrative cost amounts for the RBS charge are set in the bill (totalling \$7.10 for the first year) and indexed, the bill proposes that the Minister would have the power, by legislative instrument, to change the base component and the administrative cost amount following receipt of advice from the ACCC. This discretion is limited by clause 17A of the RBS Bill, which provides that the sum of the base component and administrative cost amount cannot exceed \$10 (for the first financial year, and indexed to the consumer price index thereafter). Essentially, this would enable the Minister, rather than the Parliament, to set the rate of the RBS charge up to a capped amount.

3.5 It is also proposed in the CC Bill that the Minister may, by legislative instrument, determine that one or more classes of carriage service is to be excluded from the definition of designated broadband service under paragraph 76AA(1)(f).¹ The explanatory memorandum (EM) states that this power is 'intended to give the Minister flexibility to alter the definition to ensure it continues to apply only to broadband services as technological changes arise'.²

3.6 Proposed section 79A further provides that the Minister may, by legislative instrument, determine that a location is taken, or not taken, to be 'premises', for the purpose of the RBS.

3.7 In the following paragraphs, the determinations outlined in paragraphs 3.4 to and 3.6 are referred to collectively as the 'RBS determinations'.

3.8 The ordinary procedure for the Senate or House of Representatives to disallow a legislative instrument is contained in section 42 of the *Legislation Act 2003*. However, the bills seek to exempt the RBS determinations from the provisions of section 42 of the *Legislation Act* and to establish a modified disallowance procedure.³

1 Proposed subsection 76AA(2) of the TCPSS Act.

2 Explanatory Memorandum (EM), CC Bill, p. 164.

3 For the legislative instruments relating to the RBS charge referred to in paragraph 3.4, the special disallowance process that would apply is set out in clause 19 of the RBS Bill. For the legislative instruments relating to the definition of designated broadband service, the disallowance process that would apply is set out in proposed section 102ZFB of the TCPSS Act.

3.9 Under the procedure for disallowance established in the Legislation Act, either the Senate or the House of Representatives may disallow a legislative instrument if, within 15 sitting days after the instrument is tabled, a senator or member of the House of Representatives gives notice of a motion to disallow the instrument (in whole or in part) and, within 15 sitting days after the giving of that notice:

- the motion is agreed to by the Senate or House of Representatives; or
- the notice of motion to disallow the instrument has not been resolved or withdrawn (in which case the instrument is deemed to have been disallowed).⁴

3.10 The proposed modified disallowance procedure reflects the Legislation Act procedure in relation to the period permitted for a notice of motion to be given to disallow the legislative instrument and the period by which the House must pass a resolution to disallow the instrument.⁵

3.11 However, the proposed disallowance procedure differs from the Legislation Act procedure in the following two ways:

- Ordinarily, legislative instruments commence at the start of the day after the day the instrument is registered or, if the instrument provides otherwise, that day.⁶ The instrument would cease to have effect if it is disallowed in accordance with section 42 of the Legislation Act. The procedure outlined in the bills differs in that the Minister's RBS determinations would not come into effect until the day after the period by which either House could have disallowed the instrument expires.
- The bills do not provide for an RBS determination to have been disallowed if a notice of motion to disallow the instrument has been given but has not been resolved or withdrawn. Therefore, under the procedure proposed in the bills, disallowance of an RBS determination could only occur if the Senate or the House of Representatives pass a resolution disallowing the determination within the 15 sitting day disallowance period.

Discussion

3.12 The proposed amendments discussed above present two key issues. The first is whether it is appropriate to delegate the Parliament's function to set the rate of the RBS charge. The second related issue is whether the proposed disallowance process for determinations made by the Minister is adequate to enable effective parliamentary scrutiny.

4 *Legislation Act 2003*, s. 42(1) and (2).

5 CC Bill, schedule 4, item 13 (proposed section 102ZFB of the TCPSS Act); RBS Bill, clause 19.

6 *Legislation Act 2003*, s. 12(1).

3.13 In commenting on the proposed power for the Minister to amend the RBS charge, the Scrutiny Committee emphasised that the levying of taxation is 'one of the most fundamental functions of the Parliament'. The Scrutiny Committee added that the 'committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax'.⁷

3.14 Although the Scrutiny Committee welcomed that the Minister's ability to alter the rate of the charge is subject to the \$10 cap, that committee nevertheless described the proposed arrangement as 'a significant delegation of the Parliament's legislative powers'. To address its concerns, the Scrutiny Committee concluded that 'it may be appropriate for the bill to be amended to further increase parliamentary oversight by requiring the positive approval of each House of the Parliament before a new determination...comes into effect'. That is, rather than relying on a disallowance process, each House of the Parliament would have to approve any determination before it could take effect. The Scrutiny Committee referred to section 10B of the *Health Insurance Act 1973* as an example of such a requirement.⁸

3.15 The Scrutiny Committee also commented on the proposed disallowance process contained in the bills that would apply to RBS determinations.

3.16 The Scrutiny Committee welcomed the proposal that, unlike other legislative instruments, the determinations would not come into effect until 15 sitting days after the disallowance period has expired. The Scrutiny Committee observed that this aspect 'improves parliamentary oversight of these determinations'.⁹ However, the Scrutiny Committee expressed concern that, unlike the usual disallowance procedure, the bill would provide that disallowance could only occur following a *positive* determination by a House to disallow the instrument. That is, unlike legislative instruments subject to the disallowance process outlined in the Legislation Act, if a notice of motion to disallow an RBS determination has been given which has not been withdrawn, and the motion either has not been called on or has been called on and moved but not disposed of, the RBS determination would come into effect.

3.17 The Scrutiny Committee provided the following observations about the benefits for parliamentary scrutiny associated with the ordinary process:

Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, August 2017, p. 38.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, p. 38.

9 This is the stated intent of the modified procedure: see EM, RBS Bill, p. 71.

instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.¹⁰

3.18 The Scrutiny Committee outlined its concerns about the absence of this provision for the RBS determinations as follows:

In practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*.¹¹

3.19 The Scrutiny Committee described the divergence from the usual disallowance process as having a 'significant practical impact' on parliamentary scrutiny of the RBS determinations. Accordingly, the Scrutiny Committee requested that the Minister provide detailed justification for the modified disallowance procedure.¹²

3.20 In his response to the Scrutiny Committee, the Minister emphasised that, under the modified disallowance procedure proposed in the bills, an RBS determination would only commence and take effect 'once the disallowance period has passed and the Parliament has had sufficient time to scrutinise the determination'. Accordingly, the Minister argued that the modified disallowance procedure proposed in the bills 'provides greater Parliamentary scrutiny over any such Ministerial determination than would be available under the usual disallowance procedure'.¹³

3.21 The Minister's response commented on the Scrutiny Committee's suggestion for positive approval of each House of Parliament to be required before any proposed change to the RBS charge could take effect. However, the Minister's response did not directly address the Scrutiny Committee's underlying concern regarding the absence of a procedure for disallowance when a motion to disallow an instrument is unresolved at the end of the disallowance period.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, pp. 34, 39 (citation omitted).

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, pp. 34, 39–40.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, pp. 36, 40.

13 Senator the Hon Mitch Fifield, Correspondence to the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2017, p. 2.

Committee view

3.22 The delegation of power to the executive to make legislative instruments to support primary legislation is a standard feature of bills examined by this committee. It is often desirable for practical reasons that various matters, particularly the details of a legislative regime, are left to legislative instruments. The committee, however, will not support inappropriate delegations of legislative power. The committee will also seek to ensure that powers to make legislative instruments are subject to appropriate scrutiny by the Senate.

3.23 In relation to the proposed ability for the Minister to amend the RBS charge, the committee notes that, importantly, the Minister's ability to do this is constrained by a cap. The RBS Bill proposes that the RBS would total \$7.10 in the first year of operation and, although the Minister could amend this, the substitute amount specified by the Minister cannot exceed \$10 (indexed annually). The Minister's determination would also be subject to disallowance by the Parliament before coming into effect.

3.24 As a general principle, the committee considers that primary legislation should determine rates of taxation. Given the RBS charge applies to a complex and rapidly changing industry, however, there is merit in providing the Minister with the ability to adjust the charge. Due to the safeguards provided by the combined component cap and the requirement for the Minister to have regard to advice from the ACCC, the committee is not concerned by the concept of delegating to the Minister a limited power to adjust the RBS as is proposed in the RBS Bill. The committee's conclusion, however, relies on the establishment of a suitable disallowance process for determinations made by the Minister. While flexibility to respond to rapid change is important, this must not outweigh appropriate parliamentary scrutiny of ministers' decision-making.

3.25 The committee has carefully considered the proposed disallowance process outlined in the bills. The bills propose that the Minister's determinations in relation to changes to the components of the RBS charge and to exclude classes of carriage services from the definition of designated broadband service would not take effect until after the period allocated for disallowance has expired. The committee welcomes this approach. As the government is proposing that the Parliament delegate to the executive aspects of its function to levy taxation, it is appropriate that enhanced arrangements for parliamentary scrutiny of the Minister's determination apply.

3.26 However, the committee is concerned about the proposal to exempt the determinations from the usual disallowance procedure established by subsection 42(2) of the Legislation Act. Subsection 42(2) provides that, where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument is taken to have been disallowed. The committee sees no reason to diverge from this practice. Indeed, the committee views this practice as an important safeguard for ensuring parliamentary scrutiny of delegated legislation.

3.27 The committee supports the comments made by the Scrutiny Committee and recommends that the bills be amended to provide that the RBS determinations will not come into effect if a motion to disallow is unresolved at the end of the disallowance period.

Recommendation 1

3.28 The committee recommends that the proposed disallowance procedure in clause 19 of the Telecommunications (Regional Broadband Scheme) Charge Bill 2017 and proposed section 102ZFB of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* be amended to provide that a determination is deemed to have been disallowed if:

- **notice of a motion to disallow the determination is given in a House of the Parliament within 15 sitting days of that House after the copy of the determination was tabled in the House under section 38 of the *Legislation Act 2003*; and**
- **at the end of 15 sitting days of that House after the giving of that notice of motion:**
 - **the notice has not been withdrawn and the motion has not been called on, or**
 - **the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of.**

Use of notifiable instruments to specify an 'authorised government agency'

3.29 Proposed new section 102Z of the TCPSS Act¹⁴ would provide the ACMA with the power to disclose certain information obtained in relation to the RBS to several specified departments and agencies.¹⁵ The entities specified in the CC Bill are the Department of Communications and the Arts, the ACCC, the Regional Telecommunications Independent Review Committee, the Department of Finance, the Treasury and any 'authorised government agency'. Proposed new section 102ZA mirrors new section 102Z, but would apply to the ACCC instead of the ACMA.

3.30 Whether an agency is an 'authorised government agency' would be determined by the ACMA (or ACCC, as applicable). That is, proposed new sections 102Z and 102ZA would enable the ACMA and ACCC to declare, by notifiable instrument, that

14 CC Bill, Schedule 4, item 13.

15 The CC Bill would provide that the ACMA and ACCC may disclose relevant information to certain government agencies if the ACMA or ACCC is satisfied that the information will enable or assist that body to perform or exercise any of their functions or powers. The information that may be disclosed is limited to information obtained under, or for the purposes of, proposed division 8 or as part of the reporting obligations related to the assessment, collection and recovery of the RBS charge in proposed section 100.

any specified department or authority of the Commonwealth, a state or a territory is an authorised government agency.

3.31 Notifiable instruments are a relatively new category of instruments. They were introduced in March 2016 following the commencement of the *Acts and Instruments (Framework Reform) Act 2015*. The EM for the Framework Reform Act provides the following explanation of notifiable instruments:

Notifiable instruments will not be legislative in character, and as such they will not be made subject to parliamentary scrutiny or sunseting.

The new category of notifiable instruments is designed to cover instruments that are not appropriate to register as legislative instruments, but for which public accessibility and centralised management is desirable. Instruments may become notifiable instruments by being registered, by being prescribed by regulation under the Legislation Act, or by being declared as notifiable instruments in the enabling legislation. Registration will satisfy any existing publication requirements for the instrument (for example, gazettal).¹⁶

Discussion

3.32 The Scrutiny Committee commented on the proposal for the ACCC and the ACMA to use notifiable instruments to add departments and agencies to the list of bodies to which the ACCC and the ACMA may disclose information. The Scrutiny Committee made the following observations:

Given that these declarations will allow the ACMA and ACCC to disclose information to further bodies not specified on the face of the primary legislation, it is not clear to the committee why these declarations are to be notifiable instruments (which are not subject to parliamentary disallowance), rather than legislative instruments.¹⁷

3.33 The Scrutiny Committee sought advice from the Minister as to why the declarations are to be notifiable, rather than legislative, instruments.¹⁸

3.34 In his response, the Minister emphasised that the proposed power would be constrained in two ways:

- first, by the requirement that the information must have been obtained under, or for the purposes of proposed division 8 or as part of the reporting obligations in proposed section 100; and
- secondly, by the requirement that the ACCC/ACMA be satisfied that the information will enable or assist the entity to which disclosure is proposed to be made to perform or exercise any of that entity's functions or powers.¹⁹

16 EM, Acts and Instruments (Framework Reform) Bill 2014, p. 3.

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, p. 36.

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, p. 36.

3.35 The Minister added that the class of persons to whom the ACCC or the ACMA may specify may receive information is constrained to government departments and agencies, which the Minister considers 'provides further protection and justification for the notifiable instrument form'. Furthermore, the Minister expects that declarations would only be made in 'exceptional cases'.²⁰

Committee view

3.36 The committee notes the Scrutiny Committee's comments in its *Scrutiny Digest No. 8 of 2017* regarding the proposal that declarations by the ACCC and the ACMA of an 'authorised government agency' for the purposes of proposed new sections 102Z and 102ZA of the TCPSS Act are to be notifiable instruments. Following the response from the Minister, the Scrutiny Committee's preliminary comments included a request that the key information provided by the Minister be included in the explanatory memorandum. The Scrutiny Committee noted the importance of the explanatory memorandum as part of access to understanding the law and if needed as intrinsic material to assist with interpretation.²¹

3.37 The committee supports the request of the Scrutiny Committee to include information in the explanatory memorandum.

Conclusion

3.38 This report has focused on the evidence received from industry stakeholders, as these stakeholders provided detailed comments on the specific provisions of the bills. However, the committee considers it is important to highlight that the bills received strong support from organisations representing consumers. It is clear from the evidence provided by these organisations that the proposed measures would be of significant benefit to consumers overall. The committee was mindful of these benefits when examining the details of the bills and the evidence received from industry.

3.39 The committee considers that the bills contain three important and related measures that will improve the broadband regulatory framework. Although the committee has made a recommendation intended to enhance the processes for ensuring decisions made as part of the RBS will be subject to adequate parliamentary scrutiny, the committee supports the bills and commends the government for continuing to pursue major reforms of communications regulation.

19 Senator the Hon Mitch Fifield, Correspondence to the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2017, pp. 3–4.

20 Senator the Hon Mitch Fifield, Correspondence to the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2017, p. 4.

21 Senate Standing Committee for the Scrutiny of Bills, *Preliminary comments as at 28 August 2017*, pp. 6–7.

Recommendation 2

3.40 After due consideration of recommendation 1, the committee recommends that the bills be passed.

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