

Transport Operations (Road Use Management) (Offensive Advertising) Amendment Bill 2016

Explanatory Notes

Short title

The short title of the Bill is the Transport Operations (Road Use Management) (Offensive Advertising) Amendment Bill 2016 (the Bill).

Policy objectives and the reasons for them

Advertising on vehicles is able to be viewed by a large number and wide range of people as the vehicles travel around the road network. There are occasions when vehicles display advertising that is sexist, discriminatory or otherwise offensive to members of the community.

Currently, advertising, including advertising on vehicles, is self-regulated by the industry. The Australian Association of National Advertisers (AANA) has developed the Code of Ethics for advertisers (Code of Ethics) which seeks to ensure that advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to consumers and society. The vast majority of advertising displayed on vehicles complies with the relevant codes.

Complaints about breaches of the Code of Ethics are made to the Advertising Standards Bureau (ASB) and determined by the Advertising Standards Board (Standards Board), which is an independent board comprised of 20 people representing the diversity of Australian society. Where the Standards Board determines that advertising has breached the Code of Ethics, the ASB reports that the majority of advertisers either modify or discontinue the offending advertisement. However, if an advertiser decides not to comply with the Board's determination, neither the Board nor the ASB has any powers to enforce the determination.

In response to community concern about advertising on vehicles, the objective of the Bill is to minimise the amount of offensive advertising on Queensland registered vehicles by allowing the chief executive of the Department of Transport and Main Roads to cancel a vehicle's registration to enforce Standards Board determinations.

Achievement of policy objectives

The Bill introduces new provisions to apply when the ASB notifies (through an *advertising code breach notice*) the chief executive of the Department of Transport and Main Roads that advertising on a Queensland registered vehicle has been determined by the Standards Board to breach the Code of Ethics, and no action has been taken by the advertiser to modify or remove the advertisement.

The new provisions:

- allow the chief executive to give a *registration cancellation notice* to the registered operator advising that the vehicle's registration will be cancelled on a stated date, unless the ASB's *advertising code breach notice* is withdrawn
- require that the cancellation date must be at least 14 days after the *registration cancellation notice* is given to the registered operator
- allow the chief executive to cancel the vehicle's registration if the *advertising code breach notice* is not withdrawn by the relevant date
- enable the chief executive to, by written notice, delay registration cancellation (for example, if the vehicle is a hire vehicle that is out on hire, the chief executive may decide to delay the cancellation of registration if the registered operator requires further time to contact the driver and arrange for the advertisement to be removed)
- ensure that, after the registered operator receives a *registration cancellation notice*, they cannot transfer the vehicle's registration to another person to avoid de-registration
- ensure that, where a vehicle's registration is cancelled under the new provisions, the registered operator is not entitled to a refund of registration fees
- require a statutory declaration stating that the advertisement has been removed before the vehicle will be able to be re-registered in Queensland.

The approach outlined in the Bill ensures that the chief executive of the Department of Transport and Main Roads can use registration cancellation to enforce Standards Board determinations. The process contained in the Bill builds on the robust ASB processes which provide sufficient notice and opportunity for the advertisement to be modified or removed so that de-registration can be avoided. In addition, the inconvenience and cost of re-registering vehicles are further incentives to encourage compliance with Standards Board determinations to avoid registration cancellation.

Alternative ways of achieving policy objectives

Consideration was also given to the findings of the former Queensland Parliamentary Health and Community Services Committee in the *Inquiry into sexually explicit outdoor advertising* (report tabled in the Legislative Assembly on 31 January 2014). That report recommended that legislation be introduced to establish a co-regulatory approach to outdoor advertising, including government enforcement of Standards Board determinations.

However, the current self-regulation of the industry is largely effective and introducing a co-regulatory approach would not be in proportion to the outstanding issues.

Estimated cost for government implementation

Based on ASB records to date, these amendments will impact only a small number of vehicles and advertisers. The implementation costs are therefore expected to be low and will be funded from within existing budget allocations.

Consistency with fundamental legislative principles

A number of the amendments in the Bill may raise fundamental legislative principle issues. These are identified and justified below.

Legislation should delegate legislative power only in appropriate cases and to appropriate persons and should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly - Legislative Standards Act 1992, s4(3)(c) and s4(4)(a) and (b)

The Bill provides, in section 19E, that the new provisions are activated by the ASB forwarding an *advertising code breach notice* to the chief executive. These notices are issued once the Standards Board has determined that a particular piece of advertising breaches the Code of Ethics and any review has been finalised. The Code of Ethics is not a government-approved document and the ASB, Standards Board and independent reviewers are not government entities.

However, the ASB is an independent body experienced in administering the system of advertising self-regulation. The ASB is a member of the European Advertising Standards Alliance and, using this affiliation, has access to best practice principles for advertising complaints resolution. The ASB has clearly articulated and well considered processes that apply principles of natural justice, including ensuring that there are opportunities for advertisers to respond to complaints and to seek an independent review of any adverse determination.

The Code of Ethics aims to, amongst other things, provide guidance to the advertising industry to ensure that advertisements are decent and have been prepared with a sense of obligation to society. The Code of Ethics is broadly written and expressly ensures prevailing community standards, as determined by the Standards Board, are considered in the context of consumer complaints.

The Standards Board is comprised of 20 members who represent the diversity of Australian society. They are selected through a public application process and members have a range of experience and skills and have an interest and views on advertising and community standards. All members are independent of the advertising industry. Determinations made by the Standards Board have been extremely well regarded within the industry for more than 20 years. This is evidenced by the fact that the ASB reports a compliance rate of over 96% for 2015.

If the advertiser, or complainant, is dissatisfied with the Standards Board decision, they can seek an independent review. There are currently two independent reviewers, both of whom have significant legal experience relevant to these processes.

The rigour built into the ASB processes ensures that they may be appropriately relied on for the purposes of the proposed scheme. To impose government regulation on these highly effective self-regulated bodies would be an unnecessary regulatory burden.

As a further safeguard, the chief executive retains a discretion as to whether to issue a *registration cancellation notice* (section 19F) or to cancel a registration (section 19H).

Legislation should have sufficient regard to rights and liberties of individuals - rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review - Legislative Standards Act 1992, s4(3)(a)

The proposed section 19N provides that the chief executive's decisions to give a *registration cancellation notice* and to cancel, or not cancel, a vehicle's registration, will not be subject to

any review or appeal, including judicial review except to the extent it relates to jurisdictional error.

Importantly, under the proposed section 19E, the chief executive will only be making decisions after the ASB's process, including any review, has been finalised. The ASB process is clearly defined and is published on the ASB's website. The ASB's process provides natural justice as it ensures that advertisers have sufficient opportunity to make submissions on the complaint before the decision is made by the Standards Board and to challenge any determination through an independent review. In particular, prior to the ASB informing the chief executive of the Standards Board's determination, the advertiser has had:

- seven days to respond to the initial complaint to the ASB
- five days to respond to the notification of the decision of the Standards Board and draft case report
- 10 business days to apply for an independent review of the Standards Board's determination from the date of the Standards Board's final letter notifying of a determination.

The grounds for review include:

- where new or additional relevant evidence which could have a significant bearing on the determination becomes available
- where there was a substantial flaw in the Board's determination
- where there was a substantial flaw in the process by which the determination was made.

However, once the robust ASB process is finalised, it is considered appropriate that the actions taken under the new provisions should be implemented quickly and with finality to reflect community expectations. It would not be appropriate for challenges to decisions made by the chief executive to be used as a de-facto means to challenge the decisions made by the Standards Board on breaches of the Code of Ethics.

Consultation

In July 2016, the Attorney-General and Minister for Justice and Minister for Training and Skills announced the government's intention to introduce legislation to regulate offensive advertising on vehicles and, in particular, to provide legislative support to determinations of the Standards Board. Since that announcement, the proposal has received widespread support in the media, including from the RACQ, the ASB and the peak advertising industry body, the Australian Association of National Advertisers.

There has been ongoing consultation with the ASB during the development of the legislation. The ASB is supportive of the approach contained in the Bill.

The Motor Accident Insurance Commission has been consulted and has notified the Heads of Motor Accident Insurance Schemes about the proposal.

All relevant government agencies support the proposal.

Consistency with legislation of other jurisdictions

The amendments in the Bill are specific to the State of Queensland and do not introduce uniform or complementary legislation.

Notes on provisions

Clause 1 states that the Act may be cited as the *Transport Operations (Road Use Management) (Offensive Advertising) Amendment Act 2016*.

Clause 2 states that the Act will commence on a date to be fixed by proclamation.

Clause 3 indicates the Bill amends the *Transport Operations (Road Use Management) Act 1994*.

Clause 4 inserts a new Part 1B into Chapter 3 of the *Transport Operations (Road Use Management) Act 1994*.

Division 1 of Part 1B outlines relevant definitions for the part.

Division 2 outlines the provisions for cancelling vehicle registration under Part 1B. This division includes section 19E which explains that Part 1B applies if the board (as defined in section 19D) makes a determination that a registered vehicle breaches the advertising code and the Advertising Standards Bureau gives the chief executive an **advertising code breach notice**. Section 19E(2) explains when a determination is final.

Section 19F indicates that the chief executive may give the registered operator of the vehicle a **registration cancellation notice** advising them that an **advertising code breach notice** has been provided to the chief executive and indicating that the registration will be cancelled on a date specified in the notice unless the Advertising Standards Bureau withdraws its notice. The cancellation date stated in the notice must be at least 14 days after the date the notice is given to the registered operator, but may be delayed by the chief executive by further written notice. For example, if the registered operator was intending to remove the advertisement but was unable to access the vehicle because it was out on hire, the chief executive may decide to delay cancelling the registration.

Section 19G provides that if the chief executive has given the registered operator a **registration cancellation notice** and the Advertising Standards Bureau withdraws its **advertising code breach notice** before the registration is cancelled, the chief executive is to take no further action to cancel the registration of the vehicle and must provide written notice to that effect to the registered operator.

Section 19H allows the chief executive to cancel the registration of a vehicle that was the subject of an **advertising code breach notice** that has not been withdrawn. If the chief executive cancels the registration, written notice must be provided to the registered operator confirming the cancellation. If the chief executive decides not to cancel the registration, the registered operator must be advised in writing.

Section 19I indicates that the notice issued to advise the registered operator of the registration cancellation under section 19H(2) must also require the return of the number plates and any registration label applicable to the vehicle. If the person does not advise the chief executive that the plates and/or registration label has been lost, stolen or destroyed, and does not return them within 14 days, an offence will apply with a maximum penalty of 20 penalty units.

Division 3 of Part 1B deals with matters after the vehicle's registration has been cancelled following the issuing of a **registration cancellation notice**. This division will apply where the registration was cancelled either by the chief executive under section 19H or by another means including, for example, if the person voluntarily cancelled the registration under the *Transport Operations (Road Use Management–Vehicle Registration) Regulation 2010*. The person will not be entitled to a refund of any of the registration fees already paid for that vehicle and if they apply to register the vehicle again they will need to provide a statutory declaration stating the relevant advertisement has been removed. Providing a false declaration is an offence under section 194 of the *Criminal Code*.

Division 4 of Part 1B includes various general provisions. Section 19M ensures the chief executive cannot record the transfer of registration of a vehicle, the subject of a **registration cancellation notice**, unless the chief executive has advised that no further action will be taken to cancel the registration. This provision is designed to ensure a registered operator does not attempt to circumvent the new provisions by transferring the vehicle to another person or entity.

Section 19N provides that the chief executive's decisions to give a *registration cancellation notice* and to cancel, or not cancel, a vehicle's registration, will not be subject to any review or appeal, including judicial review except to the extent it relates to jurisdictional error.

Section 19O, in keeping with modern business practices, allows the chief executive to provide notices under the scheme to registered operators electronically if the registered operator has provided an electronic address, such as an email address or mobile phone number, for use by the chief executive. The registered operator can notify the chief executive if they want use of the electronic address to be discontinued.

Clause 5 amends schedule 4 of the *Transport Operations (Road Use Management) Act 1994* to include cross references to definitions used in the new Part 1B.