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No. 25 2001–02

Motor Vehicle Standards Amendment Bill 2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 25 2001–02

Motor Vehicle Standards Amendment Bill 2001

Angus Martyn
Law and Bills Digest Group
27 August 2001

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Motor Vehicle Standards Amendment Bill 2001

Date Introduced: 28 July 2001

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: On a day to be fixed by Proclamation, or failing that, six months after Royal Assent

Purpose

To amend existing arrangements under the *Motor Vehicle Standards Act 1989* for the importation and supply of 'low volume' motor vehicles. In particular, it creates a new approval regime for the importation of low volume used vehicles.

Background

In general, vehicles being supplied to the Australian market must comply with a series of Australian Design Rules (ADRs). ADRs set the design and performance requirements for vehicle safety and emission standards. Before introduction into the Australian market, each model is tested for compliance with the relevant ADRs.¹ Once a model is certified as complying, identification plates may be fixed to all vehicles of that model, allowing the relevant authority in each jurisdiction to register individual vehicles on the basis of the identification plate. This is the so-called bulk 'type' approval system. The *Motor Vehicle Standards Act 1989* (MVSA) is the main legislative instrument for achieving Australian uniform standards through the ADRs.

The Low Volume Scheme (LVS)

The Low Volume Scheme (LVS) provides concessional treatment in complying with ADRs. The original idea behind the introduction of the LSV in 1970 was to service the specialist and enthusiast vehicle market. It was recognised that for this market, the costs of complying with ADRs in the normal manner was prohibitive, as these costs could only be recouped from a relatively small pool of buyers. In recent years, the LVS provided three major concessions compared with the 'normal' procedures of the Full Vehicle Scheme:

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- alternative certification procedures which allow for lower levels of assurance of compliance with some ADRs
- applicability of ADRs for used vehicles which were current when the vehicle was originally manufactured, and
- exemption from the \$12 000 special duty on imported used passenger motor vehicles.

Under the LSV, if a person wished to import a vehicle for resale it must first meet certain LSV eligibility criteria - for example, that the model was not marketed in Australia in full commercial volumes. If the vehicle is deemed eligible, it was then inspected by Government-employed inspectors for compliance with relevant ADRs. If it met the required standard, a compliance plate approval (CPA) was given, allowing special compliance identification plates to be fitted,² effectively enabling it to be registered and sold. CPAs are granted to the importer, not the vehicle: thus a person wishing to import the same type of vehicle for which another person already holds a CPA would still have to go through an inspection process before getting a CPA.

While the LSV was originally designed to assist low volume manufacturers of new vehicles, today it predominantly involves imported used vehicles. The number of used vehicles imported under the LVS has grown from approximately 1000 in 1993 to 16,825 in 2000.³ Particularly from the late 1990s, many of these were imported from Japan and required little work to comply with ADRs, but because of the \$12 000 exemption, could be sold in Australia at considerable profit.

The 1997-99 review of the *Motor Vehicle Standards Act 1989* and the Government response

In December 1997, the Minister for Transport and Regional Development commissioned a interdepartmental review⁴ of the MVSA, including related regulatory and administration matters such as the LSV. The review was also required to have regard to national competition policy. A draft report of the review was released for comment in April 1999 with a final report (the Review Report) delivered to the Government in August 1999.⁵ The Government response was released on 8 May 2000.⁶ Some changes to the LSV, such as amended eligibility criteria, came into effect from then.

Eligibility criteria, import caps and the impact of increased LSV numbers on the Australian car industry.

Given the rapid increase in the numbers of vehicles being imported under the LSV in the late 1990s, the review task force requested and received advice from the Department of Industry Science and Resources (DISR) in relation to car industry policy. Part of that advice that was included in the Review Report:⁷

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Imports of used vehicles could threaten the viability of automotive manufacturing in Australia if they enter in volumes and as models which could generate significant substitution for locally manufactured vehicles, whether sold as new or used. This risk is particularly acute if the imported used vehicles have been depreciated in their country of export at a more rapid rate than have vehicles sold new for the first time in Australia...On balance, therefore, it may not be possible to continue the concessional treatment currently afforded imports of used vehicles under the LVS without compromising the Government's commitment to a local automotive manufacturing industry...[the Industry Minister]... has stated in relation to the current MVSA review that the Government would consider whether any measures needed to be taken to ensure the integrity of existing automotive policy was maintained.

Commenting on these views, the Review Report noted⁸

the rapid increase in the numbers of imported used motor vehicles over the last three years, but considers that they are small compared with new vehicle sales. It has not been possible to quantify the impact of these vehicles on safety or the environment, however, the Task Force appreciates that at some number there would necessarily be a shift in the balance and safety/environment risks would increase. If the Scheme is to continue, [the Federal Office of Road Safety] should closely monitor the numbers of vehicles and continually assess whether the Scheme is compromising the objectives of the Act. Other areas of government (such as DISR) have the responsibility of ensuring that industry policy is not suffering as a consequence of the numbers of used vehicles being imported into Australia.

It also commented⁹

It is clear to the Task Force that industry policy is more sensitive to increasing numbers of imported used vehicles rather than the safety and emissions aims of the MVSA. Early in the review the Task Force formed the view that the intertwining of industry policy and uniform vehicle standards in the operation of the Low Volume Scheme under the MVSA was the major cause for the administrative problems engendered by the Scheme. The Task Force would like to see industry policy addressed elsewhere and the legislation return to its safety, emissions and anti-theft objectives.

The Task Force believes that the Government should re-visit the concessional duty treatment afforded to imported used vehicles under the Low Volume Scheme. The scrapping of the \$12 000 special duty concession for the Low Volume Scheme or its replacement with a protective/concessionary treatment which reflects the Government's industry policy by containing numbers at appropriate levels should be contemplated.

There have been two main regulatory influences on the number on vehicles imported under the LSV: firstly, the eligibility criteria and secondly, a function of the number of CPAs issued and the cap on the number of vehicles that can be imported under each CPA.

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In relation to eligibility criteria, the review report noted that submissions to the review suggested that the various changes of the eligibility criteria over the years had lead to a situation that the LVS had departed from its 'original intent'.¹⁰ However, it also noted that there were many different conceptions of what the original intent actually was. It did find that the LSV criteria were overly subjective, with the result that decision-making regarding eligibility was very time consuming. It considered three options in recommending the criteria be revised:

- Option 1 – limit the number of models by tightening up current eligibility criteria to ensure only “specialist and enthusiast” vehicles are eligible
- Option 2 – retain the current criteria with clearer working guidelines, or
- Option 3 – expand the scope of the scheme through having the single criterion that the vehicle models not be already in the Australian market in full volume.

The review report recommended option 2, provided the amendments or guidelines were developed to make the criteria less subjective. Option 1 was rejected because 'it would have an adverse impact on the viability of small business and would reduce consumer choice...[we]...do not see any positive benefits for restricting the vehicles to enthusiast vehicles'.¹¹

However, in releasing its response to the review in a policy announcement on 8 May 2000, the Government decided on Option 1. The Explanatory Memorandum to the Bill seems to indicate the major motivation behind this decision was the 'rapid increase in the number of imported used cars supplied to the market'.¹² To reflect the tightened criteria, the LSV was renamed the Specialist and Enthusiast Vehicle Scheme (SEVS).

In relation to CPAs, each Australian business that is holder of a CPA under the LSV is limited to supplying 25 vehicles per year per approval for passenger cars and either 25 or 100 for other types. However, the number of CPA holders is not controlled and an individual or company can operate several businesses each holding separate CPAs for the same type of vehicle. As at June 1998, figures suggested there were 527 holders of CPAs¹³ although in 2000 over 900 had applied for approvals. The Review Report did not make a specific recommendation on this issue, although it commented that 'it may ultimately be up to the Government to decide on the limit of vehicles per workshop and/or the number of workshops'.¹⁴

The approval system

Two options were considered by the review Report:

- Option 1 - retain the current type approval system, or
- Option 2 – registered workshop scheme for used vehicles.

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In relation to the existing 'type' approval system,¹⁵ the Review Report found this to be inappropriate for used vehicles because of the lack of uniformity between cars and thus a single test vehicle may not be particularly representative of all cars of that model. This raised issues of whether safety and emission standards could be properly regulated. The report recommended that the system should be replaced by vehicle-by-vehicle approval undertaken through a system of registered workshops.

Amongst other reasons, option 2 was favoured due the advantages of:¹⁶

- the potential for development of co-regulation with industry
- the workshop will provide a higher level of assurance that the vehicles comply with the ADRs
- the workshops can provide a network of service and spare parts
- the workshops may be held responsible to conduct vehicle safety recalls, and
- it would restrict the Scheme to legitimate vehicle converters.

This recommendation was accepted by the Government in its announcement of 8 May 2000.

Small business impacts

As previously mentioned, the review report stated that as at 30 June 1998, there were 527 holders of low volume CPAs. The report also noted that the submission by the Vehicle Importers and Converters Association of Australia estimated that the LSV sector employed 1,800 people directly and 2,500 indirectly and contributed \$350 million annually to the national economy, although the review task force 'was unable to substantiate these figures'.¹⁷ Other estimates of the value of the sector are that there are 1,500 small businesses importing vehicles under the LVS, employing 5000 people.¹⁸

In 2000, the Office of Small Business (OSB), at the request of the Minister for Employment, Workplace Relations and Small Business, prepared a report on the impact of small business of the Government's decision to replace the LVS with the SEVS. The OSB reported on 8 August 2000. The report was prepared in consultation with industry organisations representing low volume importers, but remains confidential and has not been tabled.¹⁹

The Explanatory Memorandum makes the following comments on possible impact of the proposed changes on businesses involved in the LVS²⁰

Many [businesses] do not solely rely on used import activities and LVS businesses also have the capacity to switch to other vehicle types. Industry representatives estimate there are approximately 400 of these businesses that will be affected by the tightening of the eligibility criteria. In particular, used 4WD importers will be

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adversely affected in the immediate term. However, smaller businesses involved in the trade will benefit from an increase in the annual cap from 25 to 100 used passenger motor vehicles per approval holder. This would help to improve the viability of firms currently constrained by the 25 car limit. Information is not available on the value of the turnover of LVS businesses, number of people employed, or contribution to the economy...the average amount of time spent on converting a used import to meet ADR requirements for a LVS compliance plate is eight hours. In 1999 some 5,000 used 4WDs were imported and fitted with a LVS compliance plate. Taking the worst case scenario that all 5,000 vehicles are no longer eligible, the new scheme would reduce the level of vehicle converting activities by 40,000 hours a year or around 20 full time positions across the entire vehicle conversion business. However, this scenario will be alleviated by the capacity businesses have to switch to other vehicle types and the increase in volume limits to 100 per licence holder.

Main Provisions

Clause 4 provides for transitional arrangements. In particular it will replace existing 'type' approvals applying to used imported vehicles with 'transitional' approvals. These approvals will remain in force for a certain period so as to allow existing businesses to sell vehicles whilst they gain 'registered automotive workshop' status. **Clause 4** also provides for regulations to set an expiry date for the *transitional approvals*. The purpose is to allow the termination date of *transitional approvals* for certain vehicles to be set by regulations. Finally, it provides that regulations may set out conditions applying to the transitional approvals.

Clause 6 provides that used vehicles imported under the 'old' arrangements, but not yet been supplied to the market when the Bill becomes law, will be subject to the new arrangements proposed by the Bill.

Schedule 1

Item 1 amends the object of the Act as currently set out in **section 3**. The change expands the object to explicitly recognising the role of the MVSA in regulating the 'first supply' of used vehicles imported into the Australia market. It is notable that **item 1** is *not* consistent with the Review recommendation (p25). The review recommendation emphasised objects of safety, environmental quality and anti-theft and made no mention of supply regulation.

Item 9 applies the *Criminal Code Act 1995* to a number of new offences created by the Bill. The criminal code contains a standardised set of definitions, concepts, defences etc applying to Australian criminal law.

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Items 14 and 15 amend parts of existing section 10A. Section 10A provides for the granting of approval to fix plates on (new or used) vehicles or vehicle components that identify them as being of a type or model that comply with national standards (eg ADRs). As it stands, section 10A reflects the existing bulk 'type' approval system discussed in the background section. The amendments under **new section 10A** will restrict approvals to new vehicles and vehicle components only.

Item 16 replaces existing **subsection 10A(3)** with a new version. **Subsection 10A(3)** provides for the granting of approval to fix identification plates on vehicles or vehicle components under certain circumstances even when there is significant non-compliance with national standards. As for **items 14 and 15**, **item 16** means that used cars are not eligible for **new subsection 10A(3)** approvals. A further new restriction is that approval can only be given if the vehicle is on the new Register of Specialist and Enthusiast Vehicles (see **item 37**) or listed in regulations.

Item 17 replaces existing **subsection 10A(4)** with a new version. **Subsection 10A(4)** provides that conditions may be attached to approvals granting under section 10(A). **Item 17** makes it clear that conditions can include a limitation on the number of identification plates fixed on a certain class of vehicle over a fixed period.

Item 31 inserts **new sections 13B-13G**. These deal with the fixing of 'used import plates' on imported used vehicles.

New section 13B provides that the Minister may make determinations about 'procedures and arrangements' for the placement of used import plates on vehicles. These determinations are disallowable instruments under section 46A of the **Acts Interpretation Act 1901**.

New section 13C allows a 'registered automotive workshop' (see **item 38**) to apply for an approval to place a used import plate on a used imported vehicle. As the Explanatory Memorandum comments, the effect of **new section 13C** 'is that only registered automotive workshops will be approved to place used import plates'.

New section 13D addresses the granting of an approval by the Minister in relation to a used import plate. The workshop must give a report on the relevant vehicle to the Minister. After 'having regard' to the report, the Minister may grant the approval if he or she 'is satisfied that it is appropriate' to do so. Guidelines are to be developed to which the Minister must comply in making a decision regarding approval. These guidelines are disallowable instruments. If approval is refused, the Minister must give a written statement of reasons to the applicant why it was refused.

A **new section 13D** approval may be made subject to any condition. A breach of any condition may constitute an offence carrying a penalty of 60 penalty units (\$6 600). **New subsection 13D(6)** provides that the holder of the **new section 13D** approval - that is the corporation in whose name the workshop is registered under **new section 21B** - is

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responsible for the offence rather than say the employee that took the action that breached the condition in question.

In relation to **new subsection 13D(6)**, two key elements would have to be proved: (i) that the holder intentionally took or omitted to take an action: and (ii) that they knew that the action or omission contravenes the condition or is reckless to this fact. The criminal code provides that actions of employees may be attributed to their corporate employers in certain circumstances. In relation to element (i), this means if the employee's action or omission was within the actual or apparent scope or authority of their employment, the corporation is deemed to have taken the action or omission. Likewise the employee's mental fault elements of intention and recklessness in (i) and (ii) must be attributed to the corporation if they expressly, tacitly or implied authorised or permitted the commission of the offence. This attribution can be established if amongst other ways, proving that the actions of a 'high managerial agent' tacitly authorised or permitted the offence or if the corporation failed to create and maintain a corporate culture that required compliance with the relevant provisions. The bottom line is that the workshop's corporate operators cannot escape liability for their employee's actions if they fail to exercise appropriate managerial oversight and control.

New section 13E provides for regulations to place a limitation on the number of used import plates that a workshop can place per vehicle category over a particular period. The government announcement of 8 May 2000 indicated this limit would be set at 100 vehicles, per vehicle category, per year.

New section 13F provides that the Minister may vary, cancel or suspend a workshop's used import plate approval if the Minister is satisfied that it workshop has not conformed to **new section 13B** arrangements, contravened a condition of the approval, or some other failure has occurred. Before doing so, the Minister must give written notice to the workshop stating the grounds for the possible variation, cancellation or suspension and invite the workshop to make a written submission about the matter. The Minister must consider the submission in making his or her decision. The Minister must give the workshop written notice of his or her decision regarding variation, cancellation or suspension of an approval and specify the reasons for the decision.

New section 13G creates an offence for the unauthorised manufacture, supply or placement of an used import plate, or placement of a false plate. The penalty is 120 penalty units (\$13 200). The Explanatory Memorandum comments that 'it is intended that all used import plates be supplied from a single source that has been granted authority to manufacture and supply used import plates'.²¹

Item 33 inserts **new sections 16** and **16A**.

Under **new section 16**, a person supplying the market with a used vehicle not previously supplied to the market is guilty of an offence unless the vehicle has a used import plate, or is supplied in accordance with regulations, or is supplied with the written approval of the Minister. The penalty is 120 penalty units (\$13 200). An application for Ministerial

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approval can cover only one vehicle. There are no matters or guidelines that the Minister must consider in relation to an application. An approval may be made subject to any condition. A breach of conditions may be an offence carrying a penalty of 60 penalty units (\$6600).

New section 16A provides for the Minister to vary, cancel or suspend a **new section 16** approval for breach of conditions, the making of false or misleading statements in relation to the approval application, or for 'other actions the Minister considers appropriate'. Before doing so, the Minister must follow the same procedures as contained in **new section 13F**.

Item 37 inserts **new section 21**, which provides for regulations to be made in relation to the Minister keeping a register of specialist and enthusiast vehicles (SEV). Regulations may specify, among other things, the criteria to be satisfied before road vehicles may be entered on the Register. The Explanatory Memorandum comments:²²

The scheme operates by assessing whether the same vehicle model is available in full volume in Australia and if not whether it meets the criteria that would classify it as specialist or enthusiast.

The criteria are

Appearance: significant difference in appearance to popular class of vehicle in that category

Unusual design features: significant difference in sub-assemblies to popular class of vehicle in that category;

Performance – significant difference in level of performance to popular class of vehicle in that category;

Featured in specialist motoring magazines in “as manufactured” condition.

The specialist and enthusiast eligibility criteria have been introduced to return the low volume scheme (in particular for used vehicles) to its long-term intention of catering for only those vehicles that are genuinely specialist or enthusiast.

The specialist and enthusiast vehicle criteria apply to both new low volume and used imported vehicle models. Once a model is listed on the Register of Specialist and Enthusiast Vehicles it is eligible for supply under the low volume scheme for new vehicles and or for used vehicles, under the Registered Automotive Workshop Scheme.

Item 38 inserts **new sections 21A-21E** which deal with registered automotive workshops.

New section 21A provides for a corporation to apply for approval as a registered automotive workshop, in a manner prescribed in the regulations. Used import plates will only be allowed to be placed by registered automotive workshops.

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New section 21B covers to the process by which the Minister may grant an approval to a corporation to be a registered automotive workshop. The Minister may do so if satisfied of various criteria, including that the corporation including its directors, officers and shareholders who are in a position to influence the management of the corporation are fit and proper. In determining the 'fit and proper person' status the Minister may determine, in writing, guidelines to be taken into account. These guidelines are disallowable instruments. Further criteria may be set down by regulations, including criteria placing restrictions on the relationships between an applicant and any other registered automotive workshop. As the Explanatory Memorandum comments, this last point is to 'prevent [the subversion of] the restriction on the number of used imported vehicles supplied by any one workshop'.²³ If the Minister refuses an application, he or she must give a written statement of reasons why it was refused.

New section 21C provides that **new section 21B** approvals last for 2 years. It also sets out the process for renewal of an approval.

New section 21D provides that approvals may be subject to conditions prescribed by the regulations and subject to any conditions specified by the Minister in the approval. A breach of any condition may constitute an offence carrying a penalty of 60 penalty units (\$6 600). The comments made in relation to **new section 13D** on corporate responsibility are also applicability to **new section 21D** offences.

New section 21E provides that the Minister may vary, cancel or suspend a workshop's **new section 21B** approval. A variation can be done on the Minister's or workshop's initiative. If done on the Minister's initiative, the Minister must follow the same procedures as contained in **new section 13F**. The grounds for cancellation or suspension are contraventions of the conditions of the approval, non-compliance with **new subsection 21B(1)** criteria (eg being a fit and proper person) or 'any other circumstances the Minister considers appropriate'. Again same procedures as under **new section 13F** apply.

Item 39 inserts **new paragraphs (f)-(h)** to section 23. Section 23 lists those decisions that the Minister **cannot** delegate to prescribed departmental officials. Those new decision-making powers introduced by the Bill that will now fall under section 23 are;

- the power to determine procedures and arrangements for the placement of used import plates under **new section 13B**
- the requirement to determine guidelines for the granting of approval to workshops to place plates under **new subsection 13D(3), and**
- the power to determine guidelines concerning 'fit and proper person' checks under **new subsection 21B(2)**.

Items 40-42 allow for the charging of fees for the various applications introduced under the Bill. The Act already allows for the charging of fees for current application types.

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Existing sections 27-29 deal with the powers of appointed inspectors to enter premises, require the production of information etc. **Items 43-47** extend these powers to cover new provisions introduced by the Bill.

Items 49-51 provide that the various Ministerial decisions under **new sections 13D and F, 16-16A, 21B-E** are subject to appeal through the Administrative Appeals Tribunal.

Endnotes

- 1 This might include tests that destroy the relevant car, eg impact tests.
- 2 Approval may be given to fix plates even if the vehicle type does not comply with all ADRs.
- 3 For comparative purposes, total new vehicle sales in Australia for 2000 was 787 000.
- 4 The review task force was chaired by the Federal Office of Road Safety, and overseen by an 'independent reference committee'.
- 5 *Report of the Review of the Motor Vehicle Standards Act 1989*, August 1999 (Review Report)
- 6 The Hon John Anderson and Senator Nick Minchin 'New Scheme for Imported New Vehicles' *Joint Press Release* 8 May 2000. The release can be viewed at:
http://www.dotrs.gov.au/media/anders/archive/2000/may_00/8may_2000.htm
- 7 Review Report, op cit pp 75–76.
- 8 Ibid, p. 89.
- 9 Ibid, p. 95.
- 10 Ibid, p. 79.
- 11 Ibid, p. 90.
- 12 *Explanatory Memorandum*, p. 13.
- 13 Review Report, op cit p. 75.
- 14 Ibid, p. 95.
- 15 That is, based on a single test and evaluation vehicle.
- 16 Review Report, op cit, p. 94.
- 17 Ibid, p. 74.
- 18 Question without Notice on Used Motor Vehicles: Low Volume Import Arrangements by Senator Harris to Senator Minchin, Senate *Debates* 5 October 2000, p. 17969.
- 19 Answer to Question on Notice: Office of Small Business: Report. House of Representatives *Debates* 6 February 2001, p. 24021.
- 20 *Explanatory Memorandum*, pp. 12–16.

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21 *Ibid*, p. 30.

22 *Ibid*, p. 13.

23 *Ibid*, p. 32.

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