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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**ROAD TRANSPORT LEGISLATION AMENDMENT
REGULATION 2010 (No 3)**

EXPLANATORY STATEMENT

Circulated by
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Overview

The primary purpose of this regulation is to provide for the accreditation of heavy vehicle driver assessors. Part 7 of the *Road Transport (Driver Licensing) Regulation 2000* currently provides for the accreditation of driving instructors. This part is amended to extend its operation to heavy vehicle driver assessors. The opportunity is also taken to make some minor amendments of road transport regulations.

Strict liability offences

The amendments (see clauses 18 and 22) create several new strict liability offences. For offences to which strict liability applies there is no requirement for the prosecution to establish that the defendant had a particular state of mind (for example, intention, knowledge, recklessness or negligence) when the actions or circumstances constituting the offence or elements of the offence were done or otherwise occurred.

Strict liability offences engage the presumption of innocence under the *Human Rights Act 2004*. All strict liability offences are assessed by the Human Rights and Criminal Law Units in the Department of Justice and Community Safety. When assessing whether an offence is suitable to be a strict liability offence, the Department has regard to a number of criteria, including:

- whether the defendant was “put on notice” of a requirement to do an act, and that a failure to do so will result in the commission of an offence;
- whether the defendant can be reasonably expected, because of his or her admission to a particular profession or because the requirements of a regulatory regime to which he or she is subject to, to know of their legal obligations under that regime;
- whether the commission of the conduct constituting the offence is technical in nature, or whether the commission of the conduct is “morally blameworthy” or “repugnant”: see *Wholesale Travel Group Inc v R* [1991] 3 S.C.R. 154;
- whether the burden on the defendant to raise a mistake of fact defence is an evidential or legal one;
- whether requiring the prosecution to prove a subjective mental fault element or higher level of fault would impose a difficult or impossible burden on it, thereby undermining the legitimate regulatory objectives of the state; and
- the severity of the penalty for the offence: a penalty of imprisonment is very serious, and requires exceptional justification.

In *Travel Group Inc* a majority Court drew a distinction between ‘true crimes’ and regulatory offences. The Court observed the earlier distinction it had drawn in *R v City of Sault Ste. Marie* [1978] 2 S.C.R. 1299. In that case Dickson J (as he then was), writing on behalf of a unanimous Court, recognised:

public welfare offences as a distinct class. ... such offences, although enforced as penal laws through the machinery of the criminal law, ‘are in substance of a civil nature and might well be regarded as a branch of

administrative law to which traditional principles of criminal law have but limited application.’

Cory J, writing for the majority in *Travel Group Inc*, observed that:

It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

The Court recognized that strict liability offences would be more readily justified when applied to regulatory offences which do not imply the same degree of moral blameworthiness as ‘true crimes’.

Having regard to the matters considered above, it is considered that the strict liability offences in the amending regulation impose reasonable and proportionate limitations on the presumption of innocence in section 22 (1) of the of the Human Rights Act. The offences are essentially of a regulatory nature and are directed at categories of people who should know the legal obligations under which they practise. The defence of mistake of fact is available to a defendant charged with a strict liability offence. The defence only imposes an evidential burden, as opposed to a legal or ‘persuasive’ burden, on the defendant: the defendant need only present or point to evidence which suggests that there is a ‘reasonable possibility’ that he or she acted under a mistake of fact (see the Criminal Code, section 58 (4) and (7)). If the defendant discharges this onus, the burden is then put back on the prosecution to disprove beyond reasonable doubt that the

defendant did not act under a mistake of fact (see the Criminal Code, section 56 (2)). The use of strict liability offences will substantially assist in protecting the efficiency and integrity of the regulatory regime under the *Road Transport (Driver Licensing) Regulation 2000*.

Clause notes

Part 1 Preliminary

Clause 1 Name of Regulation

This clause is a formal provision and provides that the name of the amending regulation is the *Road Transport Legislation Amendment Regulation 2010 (No 3)*.

Clause 2 Commencement

This clause provides for the commencement of the regulation.

Clauses 55 to 57 make minor corrections to the *Road Transport (Offences) Regulation 2005*. Together with clause 52 (which provides that part 5 amends the Offences Regulation), subclause (1) provides that they commence on the day after the regulation is notified.

Part 4, which makes minor amendments of the *Road Transport (Mass, Dimensions and Loading) Regulation 2010*, commences on 1 July 2010 (see subclause (2)). This is because it includes amendments consequent on the transfer to the Commonwealth of full responsibility for administration and enforcement of trade measurement matters from that date.

The remaining provisions (see subclause (3)) commence 2 months after the amending regulation is notified. This is to allow for applications for accreditation by heavy vehicle driver assessors to be processed before the relevant amendments commence.

Part 2 Road Transport (Driver Licensing) Regulation 2000

Clause 3 Legislation amended—pt 2

This clause provides that the part amends the *Road Transport (Driver Licensing) Regulation 2000*.

Clause 4 Section 4, note 1

This clause makes a consequential change to the note to reflect the addition of the new offences created by clauses 18 and 22.

Clause 5 Section 15, notes 1, 2 and 3

This clause amends the section to remove the requirement that the Austroads Incorporated publication, *Assessing Fitness to Drive*, must be notified on the legislation register. The Legislation Act, section 47 (6) is displaced here because the medical standards set out in the publication are nationally applicable and the publication is freely available on the Austroads website.

Clause 6 Section 23 (4)

Section 23 sets out requirements for heavy vehicle learners, including requirements (see subsection (3) (b) and (c)) that the driver be accompanied by an instructor who is

the holder of a full licence of the relevant class and that the driver and instructor are the only people in the vehicle. Subsection (4) provides that these requirements do not apply to an authorised person during a test or assessment of the driver's driving ability. The section is amended to provide that the requirements also do not apply to a heavy vehicle driver assessor.

Clause 7 Section 23 (4), notes 2 to 4

This clause amends a minor typographical error in the notes.

Clause 8 Section 28 (2) (h)

The paragraph provides that for a heavy vehicle licence the person must successfully complete an approved heavy vehicle driver training course or a test or assessment set by the road transport authority. The existing paragraph provides that the test or assessment must be carried out by an authorised person. The paragraph is amended to provide that the test or assessment must be carried out by an authorised person or heavy vehicle driver assessor.

Clause 9 Section 28 (4)

This clause brings a cross-reference within the section into line with current drafting practice.

Clause 10 Part 7 and division 7.1 headings

This clause replaces the headings to part 7 and division 7.1. The new part 7 heading includes a reference to 'heavy vehicles driver assessors' consequent on the extension of the part to include the accreditation of heavy vehicle driver assessors. The heading to division 7.1 is amended to remove a reference to 'driving instructors' since part 7 will apply to the accreditation of driving instructors and heavy vehicle driver assessors.

Clause 11 New section 103A

This clause defines the term "accreditation" for the purpose of part 7 to mean accreditation under section 107 as a driving instructor or heavy vehicle driver assessor.

Clause 12 Section 104 heading

The heading is amended to remove a reference to 'driving instructors' since part 7 will apply to the accreditation of driving instructors and heavy vehicle driver assessors.

Clause 13 Section 104 (1) (b), (c) and (d)

This clause amends the section to include new eligibility criteria for accreditation as a heavy vehicle driver assessor. To be eligible for accreditation as a heavy vehicle driver assessor a person must:

- hold a licence of the same class as, or a higher class than, the licence class for which the person is applying for accreditation as an assessor;
- have sufficient driving ability, and knowledge of safe driving practices and road law to provide heavy vehicle driver assessment; and
- have the other skills needed to provide driver assessment for the licence class for which application is made.

Clause 14 Section 104 (1) (g)

This paragraph is amended to remove a reference to ‘driving instructor’ since part 7 will apply to the accreditation of driving instructors and heavy vehicle driver assessors.

Clause 15 Section 104A heading and subsection (1)

This clause replaces the heading to section 104A to provide for its application to both driving instructors and heavy vehicle driver assessors.

This clause expands section 104A (1) to set out the training requirements for heavy vehicle driver assessors. To be eligible for accreditation as a heavy vehicle driver assessor, a person must have:

- within the previous 1-year period, completed a training course approved under section 122 for heavy vehicles driver assessors for the licence class for which accreditation is sought; or
- within the previous 5-year period, held accreditation as a heavy vehicle driver assessor for the class of licence, or a higher class, for which accreditation is sought.

Clause 16 Section 106 (1) (d)

This clause makes a consequential amendment to the paragraph to reflect that the road transport authority may approve a code of practice for heavy vehicle driver assessors under section 118 as amended by clause 23.

Clause 17 New Section 107 (2) (f)

If the road transport authority approves an application for accreditation, subsection 107 (2) requires the authority to issue a certificate of accreditation. The certificate must include the person’s name, a photograph of the person, the person’s accreditation number and the expiry date of the accreditation. This clause inserts a new provision to also require that a certificate of accreditation for a heavy vehicle driver assessor must include the licence class for which the person is accredited.

Clause 18 Section 108

Existing section 108 provides that a driving instructor must display his or her certificate of accreditation and produce it when required by a police officer or authorised person. New sections 108, 108A and 108B are substituted.

New section 108 contains the requirements for a driving instructor in relation to the display of a certificate of accreditation inside a motor vehicle when providing driver instruction or assessment. It requires that information on the photo-side of the certificate can reasonably be read by a person in the driver’s seat or that the certificate be displayed in accordance with guidelines made, or an approval given, under the section. A decision to refuse to give an approval is reviewable by the ACT Civil and Administrative Tribunal (see clause 39).

New Section 108A is a similar provision for a heavy vehicle driver assessors. It requires that information on the photo-side of the certificate can reasonably be read by a person in the driver’s seat where the driver assessor uses a motor vehicle that is owned by the assessor or assessor’s employer. Otherwise, the assessor must show the

assessor's certificate of accreditation, before beginning assessment, to the person being assessed.

The reason for the difference in requirements for instructors and assessors is that driving instructors use their own vehicle for driver instruction and assessment.

New Section 108B creates an offence for a driving instructor or heavy vehicle driver assessor to fail to produce a certificate of accreditation for inspection when required by a police officer or authorised person.

The offences under the new sections are strict liability offences.

Clause 19 Section 111 (e) and (f)

This clause amends the titles of provisions mention in section 111 consequent on other amendments.

Clause 20 Section 112 (7)

This clause makes it clear that if a person's accreditation is suspended, that person is disqualified from applying for accreditation for the duration of the suspension period.

Clause 21 Division 7.3 heading

This clause replaces the heading to division 7.3 to provide for its application to both driving instructors and heavy vehicle driver assessors.

Clause 22 Section 115

Existing section 115 requires a driving instructor to hold personal liability insurance for at least \$5 000 000 and to produce evidence of the policy when required.

New section 115 requires a driving instructor or heavy vehicle driver assessor to be covered by such a policy rather than to hold such a policy personally. This allows a relevant association to obtain the requisite insurance cover on behalf of its members.

New section 115A creates an offence for a driving instructor or heavy vehicle driver assessor who fails to produce evidence of an insurance policy mentioned in section 115 when required by a police officer or authorised person. The section provides a defence that the offender may be given 3 days to produce the required evidence if they have a reasonable excuse for failing to produce the evidence when required.

Clause 23 Section 118 heading and subsection (1)

This clause replaces the section heading and subsection (1) to provide for the application of codes of practice to both driving instructors and heavy vehicle driver assessors.

Clause 24 Section 119 heading and subsection (1)

This clause replaces the section heading and subsection (1) to provide for the application of assessment standards to both driving instructors and heavy vehicle driver assessors.

Clause 25 New Section 119A

This clause inserts a new section to provide that a heavy vehicle driver assessor who is accredited for a particular licence class may assess a person for a lower licence class and, to remove any doubt, makes it clear that a heavy vehicle driver assessor is not authorised to instruct or assess a driver for a car licence.

Clause 26 Section 120 (1) (a)

This clause substitutes an amended paragraph so that its requirements in relation to suitability for accreditation apply to both driving instructors and heavy vehicle driver assessors.

Clause 27 Section 120 (1) (b)

This clause amends the section to provide for its application to both driving instructors and heavy vehicle driver assessors.

Clause 28 Section 121 and 122

This clause amends these sections, which are about tests and medical examinations of driving instructors and training for driving instructors, to provide for its application to both driving instructors and heavy vehicle driver assessors. A requirement to undertake training, or a decision not to approve a course, is reviewable by the ACT Civil and Administrative Tribunal (see clause 40).

Clause 29 Section 122A (2) (a) (i)

This clause amends the section, which is about accreditation guidelines, to provide for its application to both driving instructors and heavy vehicle driver assessors.

Clause 30 Dictionary, definition of *accreditation*

This clause substitutes a new definition of ‘accreditation’ for the existing definition to include both driving instructors and heavy vehicle driver assessors within the meaning of the term.

Clause 31 Dictionary, definitions of *approved driving instructors training course* and *approved learner driver standards*

This clause omits these definitions from the dictionary consequent on changes in terminology used in other amendments.

Clause 32 Dictionary, definition of *driver assessment*

This clause substitutes a new definition of ‘driver assessment’ for the existing definition to include both driving instructors and heavy vehicle driver assessors within the meaning of the term.

Clause 33 Dictionary, new definition of *heavy vehicle driver assessor*

This clause inserts into the dictionary a new definition of ‘heavy vehicle driver assessor’.

Clause 34 Further amendments, mentions of *allied medical professional*

This clause brings the references in the regulation to ‘allied medical professional’ in the body of the regulation into line with the relevant term in the dictionary which is ‘allied professional practitioner’.

Part 3 Road Transport (General) Regulation 2000

Clause 35 Legislation amended—pt 3

This clause provides that the part amends the *Road Transport (General) Regulation 2000*.

Clause 36 Section 14 (1) (f) and (g)

This clause amends the section, which is about refund of fees, consequent on the amendments of the *Road Transport (Driver Licensing) Regulation 2000* to provide for the wider application of the accreditation provisions in the regulation to both driving instructors and heavy vehicle driver assessors.

Clause 37 Section 14 (2), note

This clause amends the section, which is about refund of fees, consequent on the amendments of the *Road Transport (Driver Licensing) Regulation 2000* to provide for the wider application of the accreditation provisions in the regulation to both driving instructors and heavy vehicle driver assessors.

Clause 38 Section 16 (1) (b)

This clause amends the section, which is about dishonour notices, consequent on the amendments of the *Road Transport (Driver Licensing) Regulation 2000* to provide for the wider application of the accreditation provisions in the regulation to both driving instructors and heavy vehicle driver assessors.

Clause 39 Schedule 1 part 1.4, new items 46A and 46B

This clause adds as decisions reviewable by the ACT Civil and Administrative Tribunal decisions not to approval a way in which a driving instructor or heavy vehicle driver assessor may display a certificate of accreditation.

Clause 40 Schedule 1, part 1.4, items 51 and 52

This clause adds as decisions reviewable by the ACT Civil and Administrative Tribunal decisions to require a heavy vehicle driver assessor to undertake further training or not approve a course for training for heavy vehicle assessors.

Clause 41 Dictionary, new definition of *heavy vehicle driver assessor*

This amendment is consequential on the use of the term 'heavy vehicle driver assessor' in the amendments of part 1.4 of schedule 1 of the regulation.

Clause 42 Further amendments, mentions of *instructor*

This clause adds as decisions reviewable by the ACT Civil and Administrative Tribunal a range of decisions relating to the accreditation of heavy vehicle driver assessors.

Part 4 Road Transport (Mass, Dimensions and Loading) Regulation 2010

Clause 43 Legislation amended—pt 4

This clause provides that the part amends the *Road Transport (Mass, Dimensions and Loading) Regulation 2010*.

Clause 44 Parts 2 and 3 heading

This clause removes references to the *Road Transport (Mass, Dimensions and Loading) Act 2009* in the headings to bring them into line with current drafting practice.

Clause 45 New section 54 (1A)

This clause inserts a new section 54 (1A) to provide that a determination by the road transport authority in relation to gross road train mass is a notifiable instrument. This amendment brings the section in line with the requirement in all other provisions in the regulation about determinations relating to road trains to be notifiable instruments. These include section 56 (Length of road trains) and schedule 1, section 1.17 (Mass limits for axle spacing).

Clause 46 Part 4 heading

This clause removes references to the *Road Transport (Mass, Dimensions and Loading) Act 2009* in the heading to bring it into line with current drafting practice.

Clause 47 Section 63, note

This clause amends the note to bring it into line with new national arrangements for trade measurement. In April 2007 the Council of Australian Governments agreed to establish a national system of trade measurement. The system provides a national legal framework to ensure that weights and measures used in trade are accurate. The arrangements are given effect to by the *National Measurement Amendment Act 2008* (Cwlth) which comes into effect on 1 July 2010.

Clause 48 Section 66 (1) (c)

This clause gives effect to the new national trade measurement arrangements under the *National Measurement Act 1960* (Cwlth) commencing on 1 July 2010.

Clause 49 Section 66 (1) (c) note

This clause gives effect to the new national trade measurement arrangements under the *National Measurement Act 1960* (Cwlth) commencing on 1 July 2010.

Clause 50 Part 5 heading

This clause removes references to the *Road Transport (Mass, Dimensions and Loading) Act 2009* in the heading to bring it into line with current drafting practice.

Clause 51 Dictionary, definition of *measuring instrument*

This clause replaces the *Trade Measurement Act 1999* (ACT) definition of ‘measuring instrument’ with the *National Measurement Act 1960* (Cwlth) definition consistent with the commencement of new national arrangements on 1 July 2010.

Part 5 Road Transport (Offences) Regulation 2005**Clause 52 Legislation amended—pt 5**

This clause provides that the part amends the *Road Transport (Offences) Regulation 2005*.

Clause 53 Schedule 1, part 1.6, items 37 and 38

This clause updates the regulation consequent on existing section 108 of the *Road Transport (Driver Licensing) Regulation 2000* being split into new sections 108, 108A and 108B (see clause 18).

Clause 54 Schedule 1, part 1.6, items 44 and 45

This clause updates the regulation consequent on existing section 115 of the *Road Transport (Driver Licensing) Regulation 2000* being split into new sections 115 and 115A (see clause 22).

Clause 55 Schedule 1, part 1.8A, item 1, column 2

This clause corrects a typographical error for a section reference to the *Road Transport (Mass, Dimensions and Loading) Act 2009*.

Clause 56 Schedule 1, part 1.8A, item 2, column 2

This clause corrects a typographical error for a section reference to the *Road Transport (Mass, Dimensions and Loading) Act 2009*.

Clause 57 Schedule 1, part 1.8A, item 3, column 2

This clause corrects a typographical error for a section reference to the *Road Transport (Mass, Dimensions and Loading) Act 2009*.