



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

THIRTY-THIRD REPORT:

Road Traffic Code Amendment Regulations (No. 2) 1997

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

**33
June 1998**

Joint Standing Committee on Delegated Legislation

Members

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Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament; or*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

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Report of the Joint Standing Committee on Delegated Legislation

in relation to

Road Traffic Code Amendment Regulations (No. 2) 1997

1 Introduction

- 1.1 In the exercise of its scrutiny function the Committee reviewed the *Road Traffic Code (Amendment) Regulations (No.2) 1997* ("**Regulations**") made under the *Road Traffic Code 1975* ("**Code**"). A copy of the Regulations are attached and marked "Annexure A". Under the Committee's Joint Rules if the Committee is of the opinion that a matter relating to any regulation or local law should be brought to the notice of the House, it may report that opinion and matter to the House. It is also the function of the Committee to consider and report on any regulation or local law that appears not to be within power.
- 1.2 The broad purpose of the Regulations is to incorporate into Western Australian regulations the "performance standards" as to the securing of loads on a vehicle as formulated by the Federal Office of Road Safety ("**FORS**"), the National Road Transport Commission ("**NRTC**") and industry. A Load Restraint Guide Steering Committee comprising representatives from FORS, NRTC, Queensland Transport, Austroads, Road Transport Forum and the Commercial Vehicle Industry Association of Australia was formed to develop a Load Restraint Guide. The "Load Restraint Guide - Guidelines for the Safe Carriage of Loads on Road Vehicles" ("**Load Restraint Guide**") was published in 1994. At page 127 the Load Restraint Guide sets out the "performance standards" which have been incorporated into the Regulations. Attached and marked "Annexure B" is a copy of page 127 of the Guide.
- 1.3 Enhanced safe carriage and restraint of loads was one of the ten areas of reform identified in the National Heavy Vehicle Reform 10 point package ("**Reform Package**") which is administered by the NRTC. In relation to the restraint of loads, it was considered that standard regulations and a practical guide for the securing of loads throughout Australia would improve safety by ensuring better loading practices. The Commonwealth enacted the *Road Transport Reform (Mass and Loading) Regulations 1995* which the Ministerial Council for Road Transport endorsed for adoption by the States and Territories. The Regulations are in response to this State's commitment to implement legislation to comply with the Reform Package.
- 1.4 The Regulations were published in the *Government Gazette* on 23 December 1997 and tabled in the Parliament on 10 March 1998. Under the provisions of section 42 of the

Interpretation Act 1984 there are 14 sitting days from the date of tabling in which there is power for the Parliament to move for the disallowance for such subordinate legislation. This period ended on 30 April 1998. In the circumstances, the Committee resolved for the Deputy Chairman to table a Notice of Motion of Disallowance over the Regulations in order to protect the initial position of the Committee and to enable sufficient time for the Committee to handle the inquiry. Accordingly, a Notice of Motion was tabled in the Legislative Council on 28 April 1998 which, by virtue of the Legislative Council Standing Orders, moved *pro forma* on 30 April 1998.

2 The Committee's Concerns

- 2.1 Various States and Territories of Australia have already adopted regulations which refer to the Load Restraint Guide and the "performance standards". Attached and marked "Annexure C" are relevant extracts from the Commonwealth *Road Transport Reform (Mass and Loading) Regulations 1995* and regulations in force in New South Wales, Victoria, Queensland and the Northern Territory.
- 2.2 The Committee notes that in all other States and Territories the regulations refer to the load restraint guidelines set out in the Load Restraint Guide. The relevant standards to be complied with in any prosecution for a loading offence are still the "performance standards" yet there is no reference to the guidelines themselves.
- 2.3 The Reform Package specified the adoption of:

"standard regulations *and a practical guide* (emphasis added) for the securing of loads throughout Australia."

The Regulations make no reference to the practical guide which has been developed in conjunction with all State authorities and with industry and which is printed and available as the Load Restraint Guide. The Regulations merely set out "performance standards" which, in the absence of some prescriptive guidance, are not considered readily comprehensible to many who are directly affected. Regulation 1610A(5) of the Regulations is in the following terms:

"(5) In this regulation -

"g" means the force equivalent to the force generated by the rate of acceleration due to gravity, which is to be taken to be 9.81 metres per second per second for the purposes of the performance standards;

"the performance standards" in relation to a system by means of which a load is restrained on a vehicle, means the requirement that the system is capable of restraining the load on the vehicle despite being subjected to each of the following forces separately -

(a) 0.8 g deceleration in a forward direction;

(b) 0.5 g deceleration in a backward direction;

(c) 0.5 g acceleration in a lateral direction;

(d) 0.2 g acceleration, relative to the load, in a vertical direction."

- 2.4 The Committee heard evidence from Mr John Dombrose, Manager, Vehicle Standards and Mr James Stiles, Legislation Officer both from the Department of Transport. Mr Dombrose stressed that WA Transport, the Western Australian Road Transport Industry Advisory Council and industry had all participated in the formulation of the Load Restraint Guide. Mr Dombrose also recognised that before the implementation of the law an education campaign would be required to educate those responsible for enforcing the law, such as police, vehicle examiners and the transport compliance unit as well as the public at large, especially the transport industry. The Committee has been unable to ascertain precisely how many Load Restraint Guides have been sold in Western Australia. However, the Committee has concerns that the education process has not yet reached or been fully understood by some sectors of the industry.
- 2.5 The Committee recommends that reference is made in the Regulations to the Load Restraint Guide. The Committee notes that the video promotion accompanying the Load Restraint Guide includes the following:

"Why Have Guidelines?"

Regulations and technical jargon can be tedious to read; therefore, the guidelines are published to clearly summarise and inform the public about the basic safety principles that should be followed to ensure the safe carriage of loads. The performance standards included in the guide have been endorsed by Australian Transport Ministers and are expected to come into force nationally in 1995 under the *Road Transport Reform (Vehicles and Traffic) Act 1993* of the Commonwealth."

The video promotion itself refers to the fact that compliance with the standards of loading contained in the Load Restraint Guide will satisfy the "performance standards" and states that if vehicles are loaded in ways other than as set out in the Load Restraint Guide it will then be the responsibility of the person loading the vehicle to ensure that the manner of restraining the load is of equal or greater effectiveness to the "performance standards" contained in the Load Restraint Guide. Reference to the Load Restraint Guide also has ramifications where the defendant is seeking to establish compliance with the "performance standards" by demonstrating compliance with the Load Restraint Guide. Regulations in other States specifically provide that the Load Restraint Guide is admissible in legal proceedings. For these reasons, the Committee recommends that the Regulations make reference to the Load Restraint Guide

- 2.6 The Committee has concerns regarding the evidentiary provisions relating to the securing of loads. Regulation 1610 provides that:

"(1) A person shall not drive a vehicle carrying a load that is placed on the vehicle in a way that makes the vehicle unstable or otherwise unsafe.

- (1a) A person shall not drive a vehicle carrying a load unless the load is restrained on the vehicle so that the load, or any portion of it, is unlikely
- (a) to fall from the vehicle; or
 - (b) to become dislodged from the place on the vehicle where it is restrained.
- (1b) A person shall not drive a vehicle carrying a load unless the load is restrained on the vehicle by a system appropriate to the load."

Regulation 1610A sets out the evidentiary provisions relating to securing of loads as follows:

- "(1) In any proceedings for an offence against 1610(1), evidence that the load on the vehicle driven by the defendant was not restrained on the vehicle by a system which complies with the performance standards is evidence that the load was placed on the vehicle in a way that made the vehicle unstable or otherwise unsafe and, *in the absence of evidence to the contrary* (emphasis added), is proof of that fact.
- (2) In any proceedings for an offence against regulation 1610 (1a) (a), evidence that -
- (a) the load on the vehicle driven by the defendant was not restrained on the vehicle by a system that complies with the performance standards; or
 - (b) the load, or any portion of it, on the vehicle driven by the defendant fell from the vehicle,
- is evidence that the load was not restrained on the vehicle so that the load or any portion of it, was unlikely to fall from the vehicle and, *in the absence of evidence to the contrary* (emphasis added) is proof of that fact.
- (3) In any proceedings for an offence against regulation 1610 (1a) (b), evidence that -
- (a) the load on the vehicle driven by the defendant was not restrained on the vehicle by a system that complies with the performance standards; or
 - (b) the load, or any portion of it, became dislodged from the place on the vehicle where it was restrained,
- is evidence that the load was not restrained on the vehicle so that the load or any portion of it, was unlikely to become dislodged from the place of the vehicle where it was restrained and, *in the absence of evidence to the contrary* (emphasis added) is proof of that fact.

- (4) In any proceedings for an offence against 1610(1b), evidence that the load on the vehicle driven by the defendant was not restrained on the vehicle by a system which complies with the performance standards is evidence that the load was not restrained on the vehicle by a system appropriate to the load and, *in the absence of evidence to the contrary* (emphasis added), is proof of that fact.

- 2.7 Averment provisions are relied on in circumstances where it is reasonable for a defendant to provide the evidence. The Committee considers that it is not reasonable in this case.

In evidence to the Committee Mr Dombrose emphasised that the Regulations provide a defence for the defendant in proceedings brought against the defendant. By adducing sufficient *evidence to the contrary*, the defendant is provided with an opportunity to negate the evidence of non compliance adduced by the prosecution. However, this appears to entail a shifting of the evidentiary burden. The burden of establishing all elements of the offence should remain with the prosecution. It is not appropriate to require competing evidentiary standards to be met by the defendant. If the defendant does assert compliance with the "performance standards" it is for the prosecution to convince the court that its evidence establishes non-compliance with the "performance standards" to the level required by law. Evidence of non compliance is only "proof of that fact" if it establishes, to the satisfaction of the Court, non compliance.

It is the Committee's opinion that, with one exception discussed at 2.8 below, the use of the words "*in the absence of evidence to the contrary*" does not provide a defence to the defendant but clouds the evidentiary burden in proceedings alleging breach of the Regulations. The Committee recommends that the wording is changed to clearly show that the prosecution must prove non-compliance with the "performance standards". The defendant would in any event be entitled to assert compliance. But it must remain with the prosecution alone to negate the defendant's assertion and prove to the requisite standard non compliance.

- 2.8 The exception referred to above is in relation to regulations 1610A(2)(b) and 1610A(3)(b). These regulations deal with the situation where the load, or a portion of it, has fallen off the vehicle or has become dislodged from the place on the vehicle where it was restrained. It is appropriate in these circumstances for the burden to be placed on the defendant in these circumstances because the loss or movement of a load is *prima facie* evidence of a breach of the "performance standards". However, the reversal of the onus of proof in this instance alone acts as a legal excuse, not technically a defence, because the defendant has an opportunity to demonstrate that the loss or movement of the load occurred notwithstanding that the vehicle was loaded in accordance with the "performance standards" and that the force which gave rise to the loss or movement of the load was beyond the parameters set out in the "performance standards". However, for the other offences contemplated by the Regulations, the onus of proof must clearly remain with the prosecution to establish non-compliance with the "performance standards" and it is against the principles of sound legislative drafting of provisions which impose an offence to set up a competing evidentiary burden.

- 2.9 The remaining concerns of the Committee relate to the lack of clarity in the terminology of the Regulations. For example, Regulation 1610(1) states:

"A person shall not drive a vehicle carrying a load that is placed on the vehicle in a way that makes the vehicle unstable or otherwise unsafe."

This could be read to refer to the manner of driving the vehicle and not the method of restraining the load. Further, the Regulations do not clearly indicate who is liable for an offence. For example, can proceedings only be taken against the driver of the vehicle or can the owner of the vehicle also be prosecuted (as is provided under the New South Wales regulations shown at "Annexure C").

- 2.10 For the reasons given above the Committee seeks the disallowance of the Regulations.

"Annexure A"

23 December 1997]

GOVERNMENT GAZETTE, WA

7457

ROAD TRAFFIC ACT 1974

ROAD TRAFFIC CODE AMENDMENT REGULATIONS (No. 2) 1997

Made by the Governor in Executive Council.

Citation

1. These regulations may be cited as the *Road Traffic Code Amendment Regulations (No. 2) 1997*.

Principal regulations

2. In these regulations the *Road Traffic Code 1975** is referred to as the principal regulations.

[* Reprinted as at 23 September 1997.]

Regulation 1211 amended

3. Regulation 1211 of the principal regulations is amended in subregulation (3) that begins "A driver is not required" by deleting the subregulation designation "(3)" and substituting the subregulation designation "(4)".

Regulation 1610 amended

4. (1) Regulation 1610 (1) and (1a) of the principal regulations are repealed and the following subregulations are substituted —

"

(1) A person shall not drive a vehicle carrying a load that is placed on the vehicle in a way that makes the vehicle unstable or otherwise unsafe.

(1a) A person shall not drive a vehicle carrying a load unless the load is restrained on the vehicle so that the load, or any portion of it, is unlikely —

(a) to fall from the vehicle; or

(b) to become dislodged from the place on the vehicle where it is restrained.

(1b) A person shall not drive a vehicle carrying a load unless the load is restrained on the vehicle by a system appropriate to the load.

(2) After regulation 1610 (2) of the principal regulations the following subregulation is inserted —

"

(3) In this regulation and regulation 1610A —

"to become dislodged from", in relation to a vehicle, does not include to fall from the vehicle.

Regulation 1610A inserted

5. After regulation 1610 of the principal regulations the following regulation is inserted —

"

Evidentiary provisions relating to securing of loads

1610A. (1) In any proceedings for an offence against regulation 1610 (1), evidence that the load on the vehicle driven by the defendant was not restrained on the vehicle by a system that complies with the performance standards is evidence that the load was placed on the vehicle in a way that made the vehicle unstable or otherwise unsafe and, in the absence of evidence to the contrary, is proof of that fact.

(2) In any proceedings for an offence against regulation 1610 (1a) (a), evidence that —

(a) the load on the vehicle driven by the defendant was not restrained on the vehicle by a system that complies with the performance standards; or

(b) the load, or any portion of it, on the vehicle driven by the defendant fell from the vehicle,

23 December 1997]

GOVERNMENT GAZETTE, WA

7459

is evidence that the load was not restrained on the vehicle so that the load, or any portion of it, was unlikely to fall from the vehicle and, in the absence of evidence to the contrary, is proof of that fact.

(3) In any proceedings for an offence against regulation 1610 (1a) (b), evidence that —

- (a) the load on the vehicle driven by the defendant was not restrained on the vehicle by a system that complies with the performance standards; or
- (b) the load, or any portion of it, became dislodged from the place on the vehicle where it was restrained,

is evidence that the load was not restrained on the vehicle so that the load, or any portion of it, was unlikely to become dislodged from the place on the vehicle where it was restrained and, in the absence of evidence to the contrary, is proof of that fact.

(4) In any proceedings for an offence against regulation 1610 (1b), evidence that the load on the vehicle driven by the defendant was not restrained on the vehicle by a system that complies with the performance standards is evidence that the load was not restrained on the vehicle by a system appropriate to the load and, in the absence of evidence to the contrary, is proof of that fact.

(5) In this regulation —

“g” means the force equivalent to the force generated by the rate of acceleration due to gravity, which is to be taken to be 9.81 metres per second per second for the purposes of the performance standards;

“the performance standards”, in relation to a system by means of which a load is restrained on a vehicle, means the requirement that the system is capable of restraining the load on the vehicle despite being subjected to each of the following forces separately —

- (a) 0.8 g deceleration in a forward direction;
- (b) 0.5 g deceleration in a backward direction;
- (c) 0.5 g acceleration in a lateral direction;
- (d) 0.2 g acceleration, relative to the load, in a vertical direction.

By Command of the Governor,

M. C. WAUCHOPE, Clerk of the Executive Council.

"Annexure B"

I

The following information enables the calculation of the strength required of the vehicle structures, attachments and load-securing equipment for any special application, or for general application to a range of loads. The performance standards and the methods of calculation are generally in accordance with the Association of German Engineers Guidelines VDI 2702 'Restraint of Loads on Vehicles: Lashing Forces' (see Appendix, Section G2).

1 PERFORMANCE STANDARDS

NOTE: Road Transport Reform (Mass and Loading) Regulations approved by the Ministerial Council for Road Transport refer to the performance standards recommended in the Load Restraint Guide. The performance standards in this sub-section of the Guide are the ones referred to.

Loads must be restrained to prevent unacceptable movement during all expected conditions of operation. The load restraint system should therefore satisfy the following requirements:

- (i) The load should not become dislodged from the vehicle.
- (ii) The load should not move relative to the vehicle except for the following loads, which are effectively contained within the sides or the enclosure of the vehicle body.
 - (a) Loads which are restrained from moving horizontally (limited vertical movement is permissible);
 - (b) Very lightweight objects or loose bulk loads (limited horizontal and vertical movement is permissible);
 - (c) Bulk liquids (limited liquid movement is permissible);

provided that, in all cases where movement occurs, the vehicle's stability and weight distribution cannot be adversely affected and the load cannot become dislodged from the vehicle.

To achieve the above, the load restraint system must be capable of withstanding the forces that would result if the laden vehicle were subjected to each of the following separately:

- (i) 0.8 'g' deceleration in a forward direction
- (ii) 0.5 'g' deceleration in a rearward direction
- (iii) 0.5 'g' acceleration in a lateral direction
- (iv) 0.2 'g' acceleration relative to the load in a vertical direction .

Note: 'g' (the acceleration due to gravity), is equal to 9.81 metres/sec/sec for the purpose of these standards.

"Annexure C"

*Road Transport Reform (Mass and Loading) Regulations (Commonwealth)***"Proof of loading offences**

- 9(1) In proceedings for a failure to comply with subclause 3.1 (1), (2) or (3) of the Schedule (relating to loading a vehicle), it is sufficient for the prosecution to prove that the load on the vehicle was not placed, secured or restrained (as the case requires) in a way that met the performance standards recommended in the Load Restraint Guide:
- (a) published by the Australian Government Publishing Service on 12 December 1994; and
 - (b) available from Commonwealth Government Bookshops.
- 9(2) In proceedings for a failure to comply with clause 3.1 of the Schedule, a document purporting to be the Load Restraint Guide referred to in subclause (1) must be taken to be the Load Restraint Guide, unless the document is proved not to be the Load Restraint Guide.
- 9(3) If the prosecution in proceedings for a failure to comply with subclause 3.1 (2) of the Schedule (relating to securing a load on a vehicle) proves that the load, or part of the load, had fallen off the vehicle, the burden of proof is on the defendant to show compliance."

*Road Transport (Mass, Loading and Access) Regulation 1996 (New South Wales)***"35. Loading offences**

- (1) A load on a vehicle must not be placed in a way that makes the vehicle unstable or unsafe.
- (2) A load on a vehicle must be secured so that it is unlikely to fall or be dislodged from the vehicle.
- (3) An appropriate method must be used to restrain the load on a vehicle.
- (4) If a motor vehicle or a load on a motor vehicle does not comply with a loading requirement under this Regulation that applies to it, each of the following persons is guilty of an offence:
 - (a) the owner of the motor vehicle,
 - (b) the driver of the motor vehicle.
- (5) If a trailer or a load on a trailer does not comply with a loading requirement under this Regulation, each of the following persons is guilty of an offence:
 - (a) the owner of the trailer,
 - (b) the owner of any motor vehicle towing the trailer,
 - (c) the driver of any motor vehicle towing the trailer.
- (6) If a combination does not comply with a loading requirement under this Regulation that applies to it, each of the following persons is guilty of an offence:
 - (a) the owner of the motor vehicle included in the combination,
 - (b) the driver of the motor vehicle included in the combination,
 - (c) the owner of a trailer included in the combination.Maximum penalty (subclauses (4) (6)): 30 penalty units
- (7) Subclauses (4) (6) apply to any vehicle to which Schedule 1 applies (or would apply but for any exemption).
- (8) In proceedings for a failure to comply with this clause, it is sufficient for the prosecution to prove that the load on the vehicle was not placed, secured or restrained (as the case requires) in a way that met the performance standards recommended in the Load Restraint Guide Guidelines for the safe carriage of loads on road vehicles published by the

Australian Government Publishing Service on 12 December 1994. Note. Copies of the Load Restraint Guide Guidelines for the safe carriage of loads on road vehicles are available from Commonwealth Government Bookshops, the Federal Office of Road Safety or the Roads and Traffic Authority.

- (9) In proceedings for a failure to comply with this clause, a document purporting to be the Load Restraint Guide referred to subclause (8) must be taken to be the Load Restraint Guide, unless the document is proved by the defendant not to be the Load Restraint Guide.
- (10) If the prosecution in proceedings for a failure to comply with subclause (2) (relating to securing a load on a vehicle) proves that the load, or part of the load, had fallen off the vehicle, the burden of proof is on the defendant to show compliance.
- (11) This clause applies to a vehicle even if it is not a Class 1, 2 or 3 vehicle."

*Road Safety (Vehicles) Regulations 1988 (Victoria)***"Regulation 751 - Load on heavy vehicle or combination**

- (1) If a load on a heavy vehicle or a combination -
 - (a) is placed in a way that makes the vehicle or combination unsafe or unstable; or
 - (b) is secured so that it is likely to fall or to be dislodged from the vehicle or combination; or
 - (c) is restrained by an inappropriate method -

the owner and driver of the motor vehicle or prime mover and the owner of the trailer or semi-trailer, as the case may be, are each guilty of an offence punishable on conviction by a penalty not exceeding 5 penalty units.
- (2) In a proceeding for an offence against sub-regulation (1), evidence of non-compliance with the performance standards recommended in the "Load Restraint Guide Guidelines for the safe carriage of loads on road vehicles", published by the Australian Government Publishing Service in 1994 and issued from time to time, is admissible in evidence."

Transport Operations (Road Use Management) Regulations 1995 (Queensland)

"Proof of loading offences

32. (a) Evidence that a load on a vehicle was not placed, secured or restrained in a way that met a performance standard under the Load Restraint Guide is evidence of a contravention of a loading requirement; and
- (b) evidence that a load, or part of a load, has fallen off a vehicle is evidence that the load was not properly secured, unless the contrary is proved; and
- (c) a court must presume a document purporting to be the load Restraint Guide is the Load Restraint Guide, until the contrary is proved."

Traffic Regulations (Northern Territory)

"129. SECURING OF LOADS

A person shall not drive a vehicle carrying a load -

- (a) unless that load is arranged, contained, fastened or covered in a manner described in the publication entitled "Load Restraint Guide" published by the Australian Government Publishing Service as suitable for the load or in a manner that is of equal or greater effectiveness in restraining the load as the manner described in that publication; and
- (b) if the load flaps, sways, extends or overhangs the sides or the front or back of the vehicle, unless the load is carried in accordance with a law prescribing the manner for carrying the load."