

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 308

**Issued by the Authority of the Minister for Infrastructure, Transport, Regional
Development and Local Government**

Motor Vehicle Standards Act 1989

Motor Vehicle Standards Amendment Regulations 2009 (No. 1)

Section 42 of the *Motor Vehicle Standards Act 1989* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act establishes a range of schemes to control the supply to the market of new and used imported road vehicles. In particular, the Act establishes a scheme of uniform, national standards for road vehicles. These standards are designed to make road vehicles safe to use; control the emission levels of road vehicles; secure road vehicles against theft; and promote the saving of energy. Vehicles complying with the standards are permitted to be supplied to the market.

The Act generally prohibits the importation and supply to the market of vehicles that either do not comply with the standards, or which have not been demonstrated as complying with the standards; however several concessional schemes have been established to allow limited numbers of these vehicles to be imported and supplied to the market in prescribed circumstances.

The purpose of the Regulations is to amend the *Motor Vehicle Standards Regulations 1989* (the Principal Regulations) to make changes to arrangements for the following schemes:

- the small trailer scheme;
- the personal imports scheme;
- the letter of compliance scheme; and
- the registered automotive workshops scheme.

The objectives of the significant amendments are set out below, with specific details set out in the Attachment.

For the small trailer scheme, the Regulations provide a streamlined certification system as well as enhanced certainty of standards. The scheme applies to road trailers with an aggregate trailer mass not exceeding 4.5 tonnes. While the scheme has been operating since before the introduction of the Act in 1989, there has been a recent trend of some importers supplying non-compliant vehicles to the market. The relevant standards

document is *Vehicle Standards Bulletin 1 (Revision 5, June 2009)—National Code of Practice—Building Small Trailers*, which has recently been updated in consultation with importers, manufacturers, industry bodies and the state and territory Vehicle Registration Authorities. The Regulations incorporate this document into the Principal Regulations. As a result, industry members are able to rely on these standards when applying for approval to import small road trailers. In addition, the Regulations provide stronger incentives and powers to encourage industry members to ensure that trailers comply with the standards.

For the personal imports scheme, the Regulations limit the ability of individuals to import nonstandard vehicles by extending the eligibility period so that each applicant is only entitled to import one vehicle every five years rather than one vehicle every 12 months. The purpose is to more accurately focus the scheme onto the original policy intent. The scheme allows migrants and expatriate Australians returning from long periods overseas to bring their personal vehicles with them. Previously, the scheme was open to applicants who had only stayed a relatively short period of time overseas (12 months). Similarly, the scheme was also open to expatriate Australians regularly importing a vehicle every year whilst remaining overseas. These vehicles by-passed normal certification standards. The Regulations prevent abuse of the scheme without impacting upon migrants and Australian citizens returning permanently to Australia.

For the remaining schemes, the Regulations clarify requirements and correct inconsistencies between the Principal Regulations and Determinations made under the Act.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instrument Act 2003*.

Consultation has been undertaken in relation to Vehicle Standards Bulletin 1. The Regulations themselves have not been subject to formal consultation as they are of a minor or machinery nature, clarify existing provisions, close loopholes and ensure that the original policy intent of the schemes is given effect.

Most of the provisions commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments. However, the provisions related to new content for consumer information notices commence six months after the day the Regulations are registered on the Federal Register of Legislative Instruments. The notices are required to be affixed onto used imported vehicles by registered automotive workshops, so the delayed commencement will allow workshops sufficient time to use up existing stocks of notices and to obtain new stocks of notices.

Details of the *Motor Vehicle Standards Amendment Regulations 2009 (No. 1)*

Administration

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Motor Vehicle Standards Amendment Regulations 2009 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that Schedule 2 to the Regulations commences six months after the day the Regulations are registered on the Federal Register of Legislative Instruments. The remainder of the Regulations commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of the *Motor Vehicle Standards Regulations 1989*

This regulation provides that the *Motor Vehicle Standards Regulations 1989* (the Principal Regulations) are amended as set out in Schedules 1 and 2.

Regulation 4 – Transitional

This regulation provides transitional arrangements for items [10] to [15] of Schedule 1 to the Regulations.

Item [14] has a 12 month transitional period. The item extends the qualification period for personal vehicle imports under paragraph 13(e) of the Principal Regulations, from 12 months to five years. The current qualification period will continue to apply to applications that are made up to 12 months after the commencement of Schedule 1. Item [14] will only apply to applications made more than 12 months after the commencement of Schedule 1.

In relation to other amendments to regulation 13, the current version of the regulation will continue to apply only to applications (for personal vehicles) that are made but not finally determined at the commencement of Schedule 1 to the Regulations. These amendments are provided under items [10] to [13] and [15].

Schedule 1 – Amendments commencing on the day after registration

Amendments to the Small Trailer Scheme

Item [1] – Regulation 3, before the definition of *approved form*

This item is consequential to item [5] and item [16] of Schedule 1 to the Regulations. The item inserts a new definition of *aggregate trailer mass* into regulation 3 of the Principal Regulations. The item adopts the definition used in the *Vehicle Standard*

Australian Design Rule—Definitions and Vehicle Categories) 2005. In effect, the Regulations define *aggregate trailer mass* as having the same meaning as used throughout the Australian Design Rules (ADRs).

Item [4] – Regulation 3, after the definition of *vehicle inspection certificate*

This item inserts a new definition of *Vehicle Standards Bulletin 1* into regulation 3 of the Principal Regulations. This definition is consequential to item [5] and item [16] of Schedule 1 to the Regulations. In particular, the definition incorporates by reference an existing document published by the Department of Infrastructure, Transport, Regional Development and Local Government (the Department). The full title of the document is *Vehicle Standards Bulletin 1 (Revision 5, June 2009)—National Code of Practice—Building Small Trailers*. Vehicle Standards Bulletin 1 is a non-mandatory code of practice; it has been updated by the Department in close consultation with small trailer importers, manufacturers, industry groups and state and territory Registration Authorities. The bulletin was published on 9 June 2009, and is available from the Department’s website at www.infrastructure.gov.au/roads/vehicle_regulation/bulletin/vsb1/index.aspx.

Item [5] – Before regulation 8

This item is consequential to item [16] of Schedule 1 to the Regulations. The item inserts a new regulation 8A into the Principal Regulations. New regulation 8A prescribes circumstances for paragraph 16(1)(d) of the *Motor Vehicle Standards Act 1989* (the Act), authorising the first supply of used imported vehicles to the Australian market. The purpose of new regulation 8A is to authorise the supply of used small trailers imported under item [16].

In particular, new regulation 8A establishes the prescribed circumstances as follows:

- the used small trailer has an aggregate trailer mass (ATM) that does not exceed 4.5 tonnes;
- the applicant provides to the Minister for Infrastructure, Transport, Regional Development and Local Government (the Minister) a written statement from the original manufacturer of the trailer stating that, at the time of manufacture, the ATM of the trailer did not exceed 4.5 tonnes; and
- the used small trailer complies with Vehicle Standards Bulletin 1.

This new regulation formalises the provision in Vehicle Standards Bulletin 1 for the supply to the market of Used Imported Trailers. The power limits the supply to those trailers that were originally manufactured overseas with an ATM not exceeding 4.5 tonnes. This allows the Minister to require that trailers originally manufactured with an ATM greater than 4.5 tonnes be approved under other arrangements provided for in the Act, and to take action against those importers who choose to ignore this requirement.

Item [16] – Regulation 21

Currently importation of small road trailers is approved under discretion (regulation 11) with existing regulation 21 setting out circumstances in which an identification plate

can be placed on such vehicles. This item replaces existing regulation 21 of the Principal Regulations with a new regulation 21.

The item provides an explicit basis for the approval of applications to import small road trailers, linked to Vehicle Standards Bulletin 1, as a concessional set of vehicle standards for small road trailers. These standards operate as an alternative to the ADRs and provide clear standards, concrete guidance and simplified compliance processes that are more suited to small businesses. Trailers that comply with the bulletin are approved for supply to the market under the new prescribed circumstance set out at item [5] above for used imported trailers that were originally manufactured with an ATM not more than 4.5 tonnes, or alternatively under separate approval instruments issued under paragraph 14A(1)(b) of the Act for new vehicles.

New subregulation 21(1) prescribes circumstances for paragraph 20(1)(b) of the Act, authorising the approval of applications to import nonstandard road trailers and road trailers that do not have an identification plate. In particular, new subregulation 21(2) establishes the prescribed circumstances as follows:

- the Minister has approved the import of the trailer under subregulation (3);
- the person complies with any conditions to the approval determined by the Minister;
- the trailer has an ATM that does not exceed 4.5 tonnes;
- the applicant provides to the Minister a written statement from the original manufacturer of the trailer stating that, at the time of manufacture, the trailer had an ATM that does not exceed 4.5 tonnes; and
- the Minister is satisfied that the trailer is capable of being modified to comply with Vehicle Standards Bulletin 1.

New subregulation 21(3) provides the Minister's power to approve the import of the trailer. New subregulation 21(4) provides that the Minister's approval under subregulation (3) is subject to any written conditions determined by the Minister.

Amendments to the Personal Imports Scheme

Item [2] – Regulation 3, after the definition of *approved form*

This item is consequential to items [10] to [15] of Schedule 1 to the Regulations. The item inserts a new definition of *Australian citizen* into regulation 3 of the Principal Regulations. The item adopts the definition used in the *Australian Citizenship Act 2007*.

Item [3] – Regulation 3, after the definition of *old approval*

This item is consequential to items [10] to [15] of Schedule 1 to the Regulations. The item inserts a new definition of *permanent resident* into regulation 3 of the Principal Regulations. The item adopts the definition used in the *Australian Citizenship Act 2007*.

Item [4] – Regulation 3, after the definition of vehicle inspection certificate

In addition to the definition of *Vehicle Standards Bulletin 1* discussed under the small trailer scheme above, this item also inserts a new definition of *visa* into regulation 3 of the Principal Regulations. The item adopts the definition used in the *Migration Act 1958*. Under section 29 of the *Migration Act 1958*, a *visa* is defined as a permission issued by the Minister for Immigration and Citizenship to travel to and enter Australia or remain in Australia. This definition is consequential to items [10] to [15] of Schedule 1 to the Regulations.

Item [10] – Regulation 13

Items [10] to [15] amend regulation 13 of the Principal Regulations. Regulation 13 is an existing exemption under the Act; the exemption is generally called the “personal imports scheme”. The purpose of the exemption is to enable migrants and expatriate Australians returning from long periods overseas to bring their vehicles with them.

The personal imports scheme has been open to abuse as it allows applicants to import one vehicle each year with no requirement for the applicant to return to Australia so long as the applicant can demonstrate continuous ownership and use overseas over a 12 month period. For example, organised vehicle syndicates can ship exempt vehicles to Australia (ostensibly on behalf of expatriate Australians) and thereby bypass normal certification arrangements for used vehicles under the registered automotive workshop scheme.

Item [10] replaces “The Minister must” with “The Minister may”. The purpose is to ensure that the exemption remains within power and (in particular) within the terms of the regulation-making power of paragraph 20(1)(b) of the Act. Legal advice has been received that the expression “The Minister must” is potentially outside the scope of subsection 20(3) of the Act, which requires that there be some discretion on the part of the Minister in issuing approvals.

Item [11] – Regulation 13

Item [10] replaces “if:” with “if the Minister is satisfied that:”. The purpose is to clarify that the Minister must be satisfied as to the criteria before issuing an exemption under regulation 13 of the Principal Regulations. This represents an improvement in drafting style.

Item [12] – Paragraph 13(a)

This item replaces existing paragraph 13(a) of the Principal Regulations with new paragraphs 13(aa), (ab), (ac), (ad) and (a). The purpose is to clarify the ownership and use requirement of the scheme. In particular, the item separates the constituent elements of the requirement and clarifies each of these elements. In order to qualify, a vehicle must be owned and used overseas by the applicant for a continuous period of at least 12 months. This ensures that the vehicle is the personal vehicle of the applicant migrant or expatriate Australian. Abuse of the scheme thereby is prevented, by

preventing temporary ownership being assigned to the applicant (by a third party scheme) purely to achieve concessional import of the vehicle.

New paragraph 13(aa) clarifies that the applicant must own the vehicle at the time the application is made.

New paragraph 13(ab) clarifies that the applicant must have acquired ownership of the vehicle overseas.

New paragraph 13(ac) clarifies that the applicant must have owned the vehicle (while overseas) for a continuous period of at least 12 months immediately before arriving in Australia. Arrival in Australia must be for the purpose of remaining in Australia indefinitely. This closes a loophole that has allowed people to temporarily import a vehicle and use the vehicle in Australia to become eligible for a personal import approval.

New paragraph 13(ad) clarifies that, during the period of ownership, the vehicle must be available to the applicant for use in transport. This replaces the requirement that the vehicle must be “used by the applicant for a continuous period of at least ... 12 months”. For example, the new paragraph confirms that the vehicle does not have to be used (i.e. driven) seven days a week, 24 hours a day. The new paragraph adopts rules of practical interpretation that have been developed following decisions by the Administrative Appeals Tribunal when reviewing individual cases under the personal imports scheme. This interpretation was first expressed in *Anthony and Department of Transport and Regional Services* [2001] AATA 543 (15 June 2001). Mr R D Fayle, Senior Member, made the following comments on regulation 13 (previously regulation 9D):

In so far as the word “use” is defined to mean “drive”, common sense dictates that Reg. 9D cannot mean that the vehicle must be driven unabatedly ... A common sense approach is that the vehicle should be available to the applicant to be driven in the ordinary course of that person’s usage. It is ... a matter of fact and degree ... not only should the vehicle be continuously available to be driven, that is, in this instance, registered and garaged proximate to the applicants’ home, but also, that the driver be in a situation where he or she could, if needed, continuously drive the vehicle. If either condition is not satisfied then, in the Tribunal’s opinion, those prerequisites of Reg. 9D are not met.

New paragraph 13(a) clarifies that the application must not be made later than six months after the applicant arrives in Australia. Again, arrival in Australia must be for the purpose of remaining in Australia indefinitely. This closes another loophole where importers have been opportunistically importing vehicles that they owned many years before arriving in Australia, again ensuring that the vehicle is the applicant’s genuine possession.

Item [13] – Paragraph 13(b)

This item replaces existing paragraph 13(b) of the Principal Regulations with a new paragraph 13(b). The purpose is to clarify the applicant's status as a migrant or expatriate Australian.

New paragraph 13(b) clarifies that, at the time the application is received by the Minister, the applicant must:

- be an Australian citizen or permanent resident, and must provide evidence to the Minister that he or she intends to remain in Australia indefinitely;
- have applied to become an Australian citizen or permanent resident, and must provide evidence to the Minister that he or she intends to remain in Australia indefinitely (that is, if granted citizenship or permanent residency);
- be a person entitled to remain in Australia indefinitely, and must provide evidence to the Minister that he or she intends to do so (this provision enables applications from migrants from New Zealand to be considered in the same way as applications from migrants from other countries rather than under a discretionary provision); or
- be the holder of a visa (that entitles him or her to apply to become a permanent resident), and must provide evidence to the Minister that he or she intends to remain in Australia indefinitely.

Item [14] – Paragraph 13(e)

This item extends the qualification period under regulation 13, from 12 months to five years. Applicants may only import one vehicle (exempted under regulation 13) every five years. The purpose is to prevent abuse of the scheme, without compromising genuine migrants and expatriate Australians returning from long periods overseas.

Item [15] – Regulation 13

This item inserts new subregulation 13(2) into the Principal Regulations. New subregulation 13(2) provides that the Minister's approval under regulation 13 is subject to any written conditions determined by the Minister.

Amendments to the Letter of Compliance Scheme

Item [6] – Regulation 12

Items [6] to [9] amend regulation 12 of the Principal Regulations. Regulation 12 is an existing exemption under the Act. The purpose of the exemption is to enable a road vehicle to be imported where it can be established that the vehicle complied with the ADRs when it was originally supplied to the market overseas. For example, it provides for schemes run by some European manufacturers (such as Mercedes-Benz and BMW) to allow vehicles to be collected direct from the factory, driven around Europe (e.g. on a vacation) and subsequently imported into Australia. Compliance is confirmed by a letter of compliance prepared by the manufacturer stating that the vehicle met all relevant ADRs when manufactured.

Item [6] replaces “The Minister must” with “The Minister may”. The purpose is to ensure that the exemption remains within power and (in particular) within the terms of the regulation-making power of paragraph 20(1)(b) of the Act. Legal advice has been received that the expression “The Minister must” is potentially outside the scope of subsection 20(3) of the Act, which requires that there be some discretion on the part of the Minister in issuing approvals.

Item [7] – Paragraph 12(a)

This item replaces existing paragraph 12(a) of the Principal Regulations with new paragraphs 12(aa) and 12(a). The purpose is to clarify arrangements concerning the letter of compliance. The letter of compliance establishes that the vehicle complied with all relevant ADRs when manufactured. Under new paragraphs 12(aa) and 12(a), criteria for the exemption are amended to become more specific, as follows:

- the vehicle type is certified for the Australian market;
- the application is accompanied by a letter of compliance from the manufacturer or the manufacturer’s authorised representative in Australia; and
- the letter of compliance states that the vehicle complied with the national standards (in force for the vehicle) when the vehicle was first manufactured and delivered for use in transport.

In effect, these criteria establish that the manufacturer is able to make such a certification, and that the letter of compliance is accurate. The Regulations enhance certainty and prevent abuse of the scheme, by ensuring that the original policy intent of the scheme is given effect.

Item [8] – Paragraph 12(c)

This item replaces existing paragraph 12(c) of the Principal Regulations with a new paragraph 12(c). The purpose is to clarify the 12 month qualification period. Applicants may only import one vehicle (exempted under regulation 12) per year. New paragraph 12(c) provides a more certain method of determining the 12-month period, based on the day the application is received by the Minister. Previously, the period was based on the day the vehicle landed in Australia (which, at times, has been difficult to determine).

Item [9] – Regulation 12

This item inserts new subregulation 12(2) into the Principal Regulations. New subregulation 12(2) provides that the Minister’s approval under regulation 12 is subject to any written conditions determined by the Minister.

Schedule 2 – Amendments commencing 6 months after registration

Amendments to the Registered Automotive Workshops Scheme

Item [1] – Schedule 1

This item replaces existing Schedule 1 to the Principal Regulations with a new Schedule 1. The schedule sets out the form of consumer information notices; the notices are required to be affixed onto used imported vehicles by registered automotive workshops. In particular, this item prescribes new content for the consumer information notices. The purpose is to remedy minor provisions that have become out-of-date, to align the notices with current requirements – following the issue of the *Motor Vehicle Standards (Approval to Place Used Import Plates) Guidelines 2006 (No. 1)* – and to make other minor editorial changes.