



31 October 2019

National Transport Commission

NHVR Review: Assurance and Enforcement papers

INTRODUCTION

1. Thank you for the opportunity to comment. This submission addresses the issues covered in the *Assurance models* and *Effective enforcement* papers.
2. EROAD is a technology company specialising in regulatory vehicle telematics, providing services in Australia, New Zealand, and North America. We appreciate the opportunity to provide this submission. Representatives of EROAD are available to speak on the submission at your convenience.
3. EROAD believes every community deserves safer roads that are sustainably funded. This is why EROAD develops technology solutions that enable the better management of vehicle fleets, support regulatory compliance, improve driver safety, and reduce the costs associated with driving. EROAD (ERD) is listed on the NZX, and employs almost 300 staff located across Australia, New Zealand, and North America. If you would like to know more about EROAD, you can visit <https://www.eroad.com.au/>

GENERAL COMMENTS

4. The next Heavy Vehicle National Law (HVNL) will be a transitional framework.
5. The current HVNL represents a strong attempt to consolidate, rationalise and harmonise a paper-based approach to heavy vehicle regulation. However, it internalises the assumptions and practical biases that derive from paper-based systems, i.e.:
 - a. That the probability of detecting actual non-compliance is low and, therefore, that tolerances need to be narrow and consequences high for the law to be an effective deterrent.
 - b. That integrating different parts of the system is too hard and, therefore, access and productivity incentives are poorly aligned to operational timeframes, the meeting of duties, and compliance with appropriate standards.
6. The capabilities and affordability of digital supports to compliance, enforcement and governance – the key elements of assurance – have not evolved far enough, and have not achieved the levels of penetration necessary – to allow a complete move away from paper-based systems. Contributing factors may include:
 - a. That existing statutory provisions preclude the use of digital technologies, while policies fail to signal the certainty and consistency of vision and objectives the market needs to push technological development with confidence.
 - b. That the current enforcement culture means digital compliance mechanisms create business risks from vexatious and pedantic enforcement that, in combination with



the procurement and operating costs of technologies, exceed the operational benefits of having them.

7. As such, a new HVNL needs to provide for the coexistence of both paper-based and digital means of achieving, documenting and demonstrating compliance.

ASSURANCE MODELS

8. EROAD considers the second of the four models presented to be the most workable – a market for regulatory certification – both for its advantages and because of the disadvantages of the other three models.
9. In summary, the disadvantages of models one, three and four are that:
 - a. Model one, vertical integration, ignores the reality of the complexity of operations in the heavy vehicle sector. It would be uneconomic in the extreme to resource a regulator to the point where they could see and know what is happening in the sector to the extent that they could tailor rules and interventions effectively. The likely fall-back position is close to the status quo and a 'one-size-fits-all' approach.
 - b. Model three, a market for accreditation, adds an unnecessary level of complexity to the sector. It amplifies principal-agent challenges by creating a dependence on entities that will probably have distracting or conflicting obligations elsewhere, which will tend to delay the pace of evolution relative to changes in the heavy vehicle sector. It will tend to isolate the policy and regulatory bodies responsible for the heavy vehicle sector from important pools of knowledge of what works, and how things work, on the ground.
 - c. Model four, delivering flexibility through performance standards only, ignores the other practical reality in the heavy vehicle sector, which is that many operators, whether through ignorance or economic necessity, will cut costs by accepting lower levels of safety. Model four is, in effect, a reactive one, applying high cost interventions only after the social and economic costs of a trigger-incident have been incurred. Operators that invest in safer practices may feel they are at a competitive disadvantage to those who do not, so the natural incentives in the system will push against continuous improvement.
10. The advantages of model two as we see them are:
 - a. It provides the opportunity to address principal-agent challenges, for example by:
 - i. Properly apportioning responsibilities, including delegating the responsibility for setting performance standards from Ministers to the regulator
 - ii. Removing the regulator's conflicted of interest and improving its role clarity by shifting responsibility for developing the 'how' of complying with performance standards and certifying compliance down to the market
 - iii. Placing the 'educate and inform' roles closer to the sector through certifying bodies that are not conflicted by enforcement and investigation responsibilities, and that are transparently accountable to the regulator



- b. It provides the opportunity to remove unnecessary prescription and duplication, for example by:
 - i. Removing from statute the specific provisions for the Intelligent Access Programme and Electronic Work Diaries and instead having an enabling framework that allows the regulator to identify where performance standards are required and to set these
 - ii. Freeing the regulator from its technology certification responsibilities, allowing this capability to be consolidated within Transport Certification Australia under a single National Telematics Framework.
 - c. It provides the opportunity for the regulator to direct greater attention to managing for outcomes, for example by:
 - i. Reinvesting the public resources released through achieving greater role clarity and focus in core business activities
 - ii. Consolidating its attention and institutional knowledge around a tighter core of complementary functions.
11. The assurance model will not deliver to its full potential if the regulatory, enforcement and compliance cultures are out of step. Information flows also have to be aligned to ensure informed good governance and feedback loops that support continuous improvement at every level. Hair-trigger enforcement action in response to trivial transgressions will significantly undermine progress towards digital supports for better informed compliance and governance.

EFFECTIVE ENFORCEMENT

How can data and information be better used to support enforcement under the HVNL?

12. An appropriate regulatory framework would work backwards through the hierarchy set out in figure 5 (pg 20):
- a. Defining (in statute) the knowledge required by parties to enable the attainment of the law's safety objectives and to govern the safety system
 - b. Providing (in statute) for the authoritative specification (at a sub-statutory level) of the information-generating methodologies that evolving best practice indicates are most effective at creating the desired knowledge
 - c. Providing (in statute) for the authoritative specification (at a sub-statutory level) of the data needed to support these methodologies
 - d. Providing (in statute) for the authoritative specification (at a sub-statutory level) of the standards technology must meet in order to supply data of acceptable quality.
13. Data (and/including information) requirements should align to matters on the intervention logic pathway for the public outcome sought. This logic should also inform the performance standards that underpin any accreditation scheme so that the outcome logics, accreditation standards and minimum data and record requirements all align.



14. Ideally, data needed by the regulator will be kept to the minimum needed for it to perform its role. Data and data collection standards can be used to ensure that minimum dataset is of evidential quality in court, potentially reducing the number of data points needed for triangulation and substantiation. Also ideally, any data required for compliance monitoring should also be data that a business could reasonably be expected to want to gather and use for business management purposes, rather than an additional cost.
15. Data should first be available to regulated parties to inform self-monitoring of compliance and continuous improvement. Data access provisions should be structured to minimise the risks to substantively compliant operators of investing in the means to generate such data and information. Ideally, such operators would be given benefits – e.g. being screened out and allowed to carry on with their business when enforcement actions relevant to where they can show compliance are underway.
16. The logic of chains of responsibility recognises that, although drivers create the immediate transport incidents and outcomes, the roots of any incident often go deep into the surrounding system. Data can open windows to the deeper recesses of the chain of responsibility and provide insight to the wider patterns of operations and behaviour. They can potentially provide insight into whether these patterns are being monitored and acted upon – i.e. support an analysis of the degree to which written procedures are actually applied in practice.
17. This requires a mature approach to enforcement that natures the collection and use of digital data by sector participants.

Who should own the data? Who should be able to access the data?

18. Currently data is not 'owned'. The question of whether to confer property status to data is a much wider question than can (probably) be answered in the narrow context of an HVNL review. It may be more useful to consider who has interests in the data, and the range of the nature of interests. For example:
 - a. The **data subject** (driver, operator, company) has privacy and commercial interests and operating and capital outlays relating to their specific data
 - b. The **data collector-producer** has commercial interests and operating and capital outlays relating to the aggregated data
 - c. The **regulator-enforcer** holds safety and operational efficiency interests on behalf of the public
 - d. The **road owner-manager** holds operational and investment efficiency interests, also on behalf of the public.
19. The principal interests are held by the data subject and the data collector producer. The data subject should obviously have access to all data about them.
20. The data collector-producer would have administrative access to all data but, more importantly, should not suffer infringements on any contractual rights to aggregate and anonymise the sum of the data it gathers it secures from data subjects.
21. A useful working model is that used for road user charges in New Zealand:



- a. The regulator does not have as-of-right access to all data for administrative purposes. Its as-of-right access is to 'RUC information' – i.e. the *processed* data that relates directly and specifically to the particular regulatory compliance question set out in statute. Enforcement officers are limited in the first instance to the information contained in relevant transport documents required to be carried. However, in both cases, where cause has been established and an investigation initiated, court/production orders can then be used to access the wider pool of data pertaining to the subject of the investigation.
- b. Road managers have no as-of-right access to the aggregated and anonymised data. However, the Road User Charges Act 2012 does provide for them to procure such data and pay a reasonable fee to do so. This arrangement provides clarity that the data can be accessed, protects the interest of the data collector-producer, and empowers and requires the data collector-producer to protect the privacy of individual data subjects.

How should privacy and security concerns be managed?

22. Market-based third-party provision is a demonstrably effective means for ensuring the privacy and security of data relating to heavy vehicles. The framework is already in place and governing large scale telematics services in Australia and, in case of EROAD services, New Zealand and North America.
23. Unlike state agencies, private sector data collector-producers are subject to competitive tension and meaningful reputational risk to their market position. There are strong incentives in place to encourage proper management of privacy and security concerns. There are well established best practices for managing these concerns, including independent testing and certification, that can inform the setting of standards to regulate the entry and performance of private data collector-producers in the Australian regulatory telematics market.

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