

Toll Group submission on “*Effective Enforcement*” and “*Assurance Models*”, National Transport Commission August/September

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Purpose

To articulate Toll’s perspective on the existing and potential legal framework for assurance under and enforcement of the HVNL

Introduction

With over 125 years' experience, Toll Group, proudly part of Japan Post, operates an extensive global logistics network across 1,200 locations in more than 50 countries. Our 40,000 employees provide a diverse range of transport and logistics solutions covering road, air, sea and rail to help our customers best meet their global supply chain needs.

Toll Group welcomes the opportunity to provide feedback on the two most recent papers released as part of the Review into the Heavy Vehicle National Law (HVNL): *Assurance Models* (August 2019) and *Effective Enforcement* (September 2019). As the issues raised in the papers are intertwined, Toll will respond in a single submission.

Toll considers that enforcement and assurance are central to road safety outcomes and to promoting the road freight industry's social licence to operate. Following advice at the Industry Advisory Group meeting of 13 September to move beyond critique of the existing system towards envisioning what the future might look like, Toll is not answering the structured questions posed by the National Transport Commission in its papers.

Instead, we make a case for how enforcement and assurance should operate in the revised HVNL.

Recommendations

1. The HVNL must be reviewed to ensure the right motivators are in place to achieve true Chain or Responsibility (CoR). If there is no mechanism to hold customers to account, operators will be price-takers. For CoR to work customers must:
 - a. have a genuine commitment to safety,
 - b. be protective of their reputation and fearful of negative press exposure or,
 - c. view financial or other legal sanctions as sufficiently possible/probable that they are motivated to comply.
2. Toll recognises that the NTC has no power to affect the volume, approach or outcomes of enforcement. But we must have a frank national conversation about whether enforcement bodies are prepared to commit resources to CoR investigations or not. To this end, we recommend that the Police Minister sit on the Transport Infrastructure Council.
3. The performance of the HVNL should be measured on its ability to enforce CoR. Chapter 9 of the HVNL (Enforcement) should include a requirement for enforcement bodies to supply annual data to the NHVR for publication on:
 - a. Type and volume of sanctions issued,
 - b. Parties against which the sanctions are issued, and
 - c. Outcomes of the sanctions (e.g. infringement paid or contested, outcome of prosecutions etc).
4. The objects of the law should include industry sustainability and viability at section 3.
5. Telematics must be leveraged to drive compliance and sustainability.
6. Toll proposes the HVNL set out a new multi-tiered assurance system with two tiers of regulation. Tier 1 should be a mandatory point of entry compliance scheme so that regulators can promote baseline compliance. Tier 2 would be optional and cater for specific regulatory assurance.

Objects of the Law and their Enforcement

The keystone of the present system is chain of responsibility: the idea that poor on-road outcomes occur not just because of what drivers and operators do (or don't do), but because of the influence and control of parties along the chain. The law stipulates that this influence can be direct or indirect, benign or malignant depending on how and where it is deployed.

Chain of responsibility (CoR) was first enshrined in the Compliance and Enforcement Bill of 2003 and replicated, largely unchanged, in the Heavy Vehicle National Law in 2014. It operates on an assumption of shared responsibility and accountability. The law infers, though doesn't explicitly state, that customers must select their freight carriers on factors other than price alone. Through the primary obligations and other provisions customers must assess the capacity of their carriers to manage the risks inherent in the transport task and make purchasing decisions accordingly.

For CoR to work, at least one of three pre-conditions must be met. Customers must (1) have a genuine commitment to safety, (2) be protective of their reputation and fearful of negative press exposure or, (3) view financial or other legal sanctions as sufficiently possible/probable that they are motivated to comply.

None of the papers released to date grapple with whether these preconditions are met. The forthcoming *Regulation Impact Statement* must speak to it as a matter of urgency. If chain of responsibility is not deeply and consistently influencing the decisions that customers make then the system is fundamentally flawed and must be constructed afresh.

Toll works with some customers for whom safety is top-of-mind. For them, "value for money" incorporates safety and wellbeing. These are the customers with whom genuine safety partnerships form that benefit the entire road network. Equally, there are customers for whom safety is performative. Words are spoken and questions asked that give the impression that CoR obligations are factored into decision-making when price and delivery in full on-time (DIFOT) are the sole motivating factors. Then there are customers that dispense with the theatre altogether and are solely interested in the bottom line.

It is difficult to ascertain the extent to which CoR is influencing behavior along the supply chain. More certain is that compliance and enforcement attention remains disproportionately directed towards drivers and operators. It is therefore open to debate whether reputational and legal risks are deeply felt by consignors and consignees.

A 2013 study found that in New South Wales the majority of CoR offences (nearly 47%) were targeted at operators, 21.35% against consignees and nearly 16% against consignors.¹ Since then, NSW has unfortunately ceased publishing CoR sanctions and the party to whom they are directed. The most recent Roads and Maritime Services (RMS) heavy vehicle compliance report does not mention supply chain investigations at all, focusing exclusively on vehicle defects, fatigue, mass and load restraint breaches directed at drivers.²

¹ National Transport Commission, *Heavy Vehicle Compliance Review Consultation Draft*, September 2013, p. 62

² Roads and Maritime Services, *Heavy Vehicle Compliance Snapshot*, June 2019 <<https://www.rms.nsw.gov.au/documents/about/corporatepublications/statistics/heavy-vehicle-compliance-snapshot-q2-2019.pdf>>

Yet NSW is easily the most active jurisdiction in the CoR space. A search on the legal website Jade reveals nine prosecutions under chain of responsibility provisions occurred in Australian courts since February 2014, eight of them in NSW.³

VicRoads does not appear to have been actively involved in a CoR prosecution for several years and has previously been criticised for cutting chain of responsibility resources.⁴ VicRoads' compliance page on its website states that:

Compliance encourages heavy vehicle operators to comply with the requirements of operating a heavy vehicle by way of monitoring, registration, investigation and ultimately prosecution with the objective being voluntary compliance.⁵ [author emphasis]

There is no discussion of how parties other than heavy vehicle operators are encouraged to comply. Transport and Main Roads (QLD) directs compliance and enforcement queries to the National Heavy Vehicle Regulator (NHVR).⁶

To its credit the NHVR produces educative materials and delivers seminars designed to inform and upskill parties in their CoR obligations. It also publishes court outcomes in respect of HVNL offences, which Toll strongly supports. We note, however, that as of 23 September 2019 none of the offences is against consignors, consignees, loading managers or any of the parties likely to be customers.⁷ They are all against drivers, operators, companies and company directors. The NHVR is yet to bring a CoR prosecution. If it is actively engaged in CoR investigations along the supply chain it has not divulged that information.

Of the eleven principles underpinning the NHVR's approach to compliance and enforcement none of them speaks to the need to identify the party whose behavior/practice most requires modification to influence on-road outcomes, a principle that might be summarized as "targeted".⁸

At the Industry Advisory Group held 13 September to discuss new approaches to enforcement and assurance Toll asked how many CoR sanctions had been issued against which parties since the HVNL took effect. We were advised that the data is not available.

Where is the evidence that customers are being – or expect to be – held to account for their role in on-road outcomes?

³ A search was conducted under "chain of responsibility". Prosecutions under the Fair Work Act, Environmental Protection Authority, Building and Heritage and other non-transport related actions were excluded from the search.

⁴ Steve Skinner, "Vicroads cuts chain of responsibility staffing", OwnerDriver, April 2015, <https://www.ownerdriver.com.au/industry-news/1503/vicroads-cuts-chain-of-responsibility-staffing>

⁵ See <https://www.vicroads.vic.gov.au/business-and-industry/heavy-vehicle-industry>; <https://www.vicroads.vic.gov.au/business-and-industry/heavy-vehicle-industry/registration-permits-curfews-and-compliance/about-transport-safety-services>

⁶ <https://www.tmr.qld.gov.au/business-industry/Heavy-vehicles/Compliance-and-enforcement>

⁷ <https://www.nhvr.gov.au/law-policies/court-outcomes>

⁸ National Heavy Vehicle Regulator, *National Compliance and Enforcement Policy*, November 2018, p.5

If there is no mechanism to hold customers to account, operators will almost inevitably be price-takers. They will cut and fudge until the transport activity can be delivered within the price envelope. Most road transport costs are fixed, i.e. labour (when paid at Award rates) and fuel. The sole opportunities to squeeze a margin from an unrealistic price are in vehicle maintenance deferral, speeding, and working while impaired by fatigue or in defiance of work and rest rules. The industry then becomes embroiled in a “race to the bottom”.

Toll strongly believes that the objects of the law should include industry sustainability and viability as follows:

s. 3 Object of Law

The object of this Law is to establish a national scheme for facilitating and regulating the use of heavy vehicles on roads in a way that –

- (a) Promotes public safety; and
- (b) Manages the impact of heavy vehicles on the environment, road infrastructure and public amenity; and
- (c) Promotes industry productivity, efficiency and **viability** in the safe road transport of goods and passengers by heavy vehicles; and
- (d) Encourages and promotes productive, efficient, innovative, **sustainable** and safe business practices.

Further, enforcement must be prepared to take action against supply chain parties that are indifferent to safety when making their purchasing decisions.

To be clear: Toll does not support price setting. Operators and drivers with innovative techniques and streamlined practices should be rewarded for their efficiency in the market. But customers that demand unrealistic and unsustainable prices must be considered as indirectly compromising the safety of the transport task.

If CoR mechanisms do not hold customers accountable then the HVNL cannot and does not function as intended. The *Regulation Impact Statement* must consider if and how the law is changing customer behavior.

Toll recognises that the NTC has no power to effect the volume, approach or outcomes of enforcement. But we must have a frank national conversation about whether enforcement bodies are prepared to commit resources to CoR investigations or not. To this end, we recommend that the Police Minister sit on the Transport Infrastructure Council.

Further, chapter 9 of the HVNL (Enforcement) should include a requirement for enforcement bodies to supply annual data on:

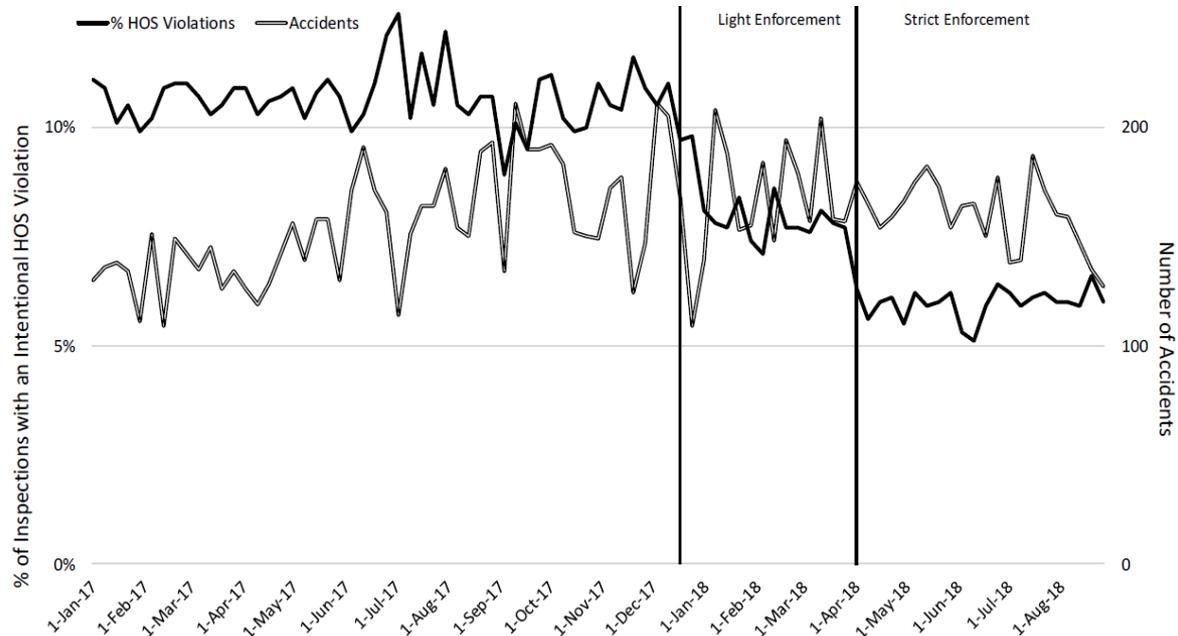
- Type and volume of sanctions issued
- Parties against which the sanctions are issued
- Outcomes of the sanctions (e.g. infringement paid or contested, outcome of prosecutions etc).

The NHVR should be required to publish the data.

Telematics has considerable potential to assist in industry sustainability and viability because of the operational and regulatory transparency it brings. Section 26C of the HVNL recognises that fatigue and speed can be “traded off” against each other. Indeed, the experience in the United States is that the introduction of mandatory electronic work diaries, whilst massively increasing compliance with legislated hours of work and rest, led to an

increase in unsafe driving behaviours such as speeding.⁹ Perversely, this actually led to an increase in the number of accidents involving smaller operators as shown in figure 1 below:¹⁰

Figure 1: Hours of Service (HOS) violations and number of accidents for independent owner-operators in the United States



Researchers speculate that the upswing in unsafe driving practices such as speeding was in direct response to the loss of productivity caused by compliance with the law. This suggests both that non-compliance was widespread and undetected and that the perverse consequences of EWDs can be headed-off by the use of GPS monitoring. Telematics can “level the playing field” by giving the non-compliant and unscrupulous nowhere to hide. Further, it forces attention on the unrealistic competitive pressures that drive these behaviours in the first place.

Assurance

The existing accreditation schemes pre-date the introduction of general duties and, in the case of the National Heavy Vehicle Accreditation Scheme (NHVAS), even the HVNL itself. There have been significant safety failures by accredited operators, including Cootes/McAleese (enrolled in NHVAS) and Lennons (enrolled in TruckSafe). Accreditation has not resulted in alternative compliance in the form of reduced road-side enforcement. Nor

⁹ The percentage of inspections with an intentional violation dropped from 6% to 3.8% during a light enforcement period (a 36.7% reduction) and further to 2.9% during a strict enforcement period (a 51.7% reduction). Scott, Balthrop and Miller, “Did the Electronic Logging Device Mandate Reduce Accidents?”, January 2019, <https://static1.squarespace.com/static/5ab0205e4cde7a7c70e79e67/t/5ca61bab9140b74b435dc4dd/1554389933862/Did+the+ELD+Mandate+Reduce+Accidents+Study+January+2019.pdf>, downloaded 1/11/19

¹⁰ The same was not true for larger operators who had largely adopted the EWD voluntarily before it was mandated. See Scott, Balthrop and Miller p. 23

does it provide customers and prime contractors with “deemed compliance” that hiring accredited operators meets their obligations.

Consequently, customers seeking confidence that they have met their obligations as consignors are increasingly seeking refuge in third party audits, some that only partially cover the requirements of the HVNL such as ISO 4801. Savvy consultants, seeing a market opportunity, are offering assurance services of varying quality. Operators are subject to multiple audit regimes with limited (if any) mutual recognition as customers deploy their tool of choice. This is costly and wasteful.

The role of industry codes in providing this assurance is confused. The HVNL provides that a registered industry code of practice is “admissible as evidence of whether or not a duty or obligation under this Law has been complied with” (s.632A), but is not a “safe harbor”. None of the existing arrangements speak to the industry’s social licence to operate as there are no barriers to entry.¹¹ The Western Australian Heavy Vehicle Accreditation System (WAHVAS) probably comes closest, but it captures only 10% of the heavy vehicles operating in the state.¹² Its limitation in this regard was a key topic of discussion at the recent Transafe WA forum¹³ where Main Roads WA would not commit to expanding coverage of the scheme within the next five years.

In light of these structural weaknesses Toll proposes a new multi-tiered assurance system as follows:

Tier 1: entry level (mandatory)

The entry level would be mandatory for *all* transport operators and would, therefore, approximate an operator licensing scheme. It would provide baseline assurance of legal, safe operating systems. At the moment, there are no barriers to entry in the heavy vehicle industry. Operators with a registered vehicle and drivers with a valid licence can commence business with no further regulatory assurance.

If such operators do not operate a Restricted Access Vehicle (RAV) in WA or seek regulatory concessions (fatigue and mass) in the HVNL states then they may never be visible to regulators and enforcement unless they are stopped by roadside enforcement. In 2013 the NTC noted that

more than 11 billion vehicle tonnes kilometre were travelled by heavy vehicles but only 332,214 on-road intercepts occurred. By 2030 the total national road freight task is expected to be 1.8 times its 2008 level. By 2050 the freight task is expected

¹¹ “The term “social license,” or “social license to operate,” generally refers to a local community’s acceptance or approval of a project or a company’s ongoing presence. It is usually informal and intangible, and is granted by a community based on the opinions and views of stakeholders”. Brian Yates and Celesa Horvath, “Social License to Operate: how to get it, and how to keep it”, Pacific Energy Summit, 2013 Working Summit Papers, https://www.nbr.org/wp-content/uploads/pdfs/programs/PES_2013_summitpaper_Yates_Horvath.pdf

¹² National Transport Commission, *Assurance Models*, August 2019, p. 27

¹³ Held 18 September 2019

to treble. It is unrealistic to expect that enforcement resources will double to keep pace with this expansion.¹⁴

By moving assurance and enforcement “upstream” to point of entry Regulators can promote baseline compliance and redress some of the weaknesses of the present system. Among the assurances that operators might be required to give are:

- Insurance certificates
- Passing a “fit and proper person” test
- Confirmation that drivers hold valid licences, are paid at award rates and are legally able to work in Australia
- Confirmation that the fleet is registered, insured and subject to a repairs and maintenance regime consistent with the Heavy Vehicle Inspection Manual
- Confirmation that policies and procedures covering fatigue management, loading and unloading, load restraint, load planning, journey management, and speed limiter calibration are in place

This could be done via simple document upload and self-certification. In the near future Blockchain technology can be used.

Subsequent audits would confirm implementation of all policies and procedures and be conducted via scheduled and triggered regimes, similar to the existing Western Australian system.

Tier 2: regulatory assurance (optional)

Tier two assurance would cater for specific regulatory assurance. Presently, that would include:

- (1) customers and prime contractors seeking assurance that operators meet their obligations at 26C in exchange for custom.
- (2) governments seeking assurance in exchange for regulatory concessions.

Ideally, the assurance scheme would be so robust and rigorous that customers and prime contractors could rely on it to confidently hire operators, either directly or as subcontractors. As the Medlock report pointed out:

“an effective system of operator accreditation provides a mechanism to ensure heavy vehicle operators have processes in place to meet their obligations under the Primary Duty provisions and, at the same time, provide assurance to clients and others in the industry.”¹⁵

Enrolment in such a scheme would provide “deemed compliance” or a “safe harbor” to the hirer in the event of a breach or incident.

The scheme would cover all the elements in the primary duties, including:

- Risk identification and tracking mechanisms
- Policies, procedures and standards that speak to identified risks
- Risk mitigation, prevention and elimination systems

¹⁴ National Transport Commission, *Heavy Vehicle Compliance Review Consultation Draft*, September 2013, p. 38

¹⁵ Fellows Medlock and Associates, *Analysis of Heavy Vehicle Safety Accreditation Schemes in Australia*, February 2018, p.48

- Business systems, including contracts, that do not incentivise, encourage, require or direct unsafe behaviours
- Drug and alcohol testing regimes
- Fitness for duty processes

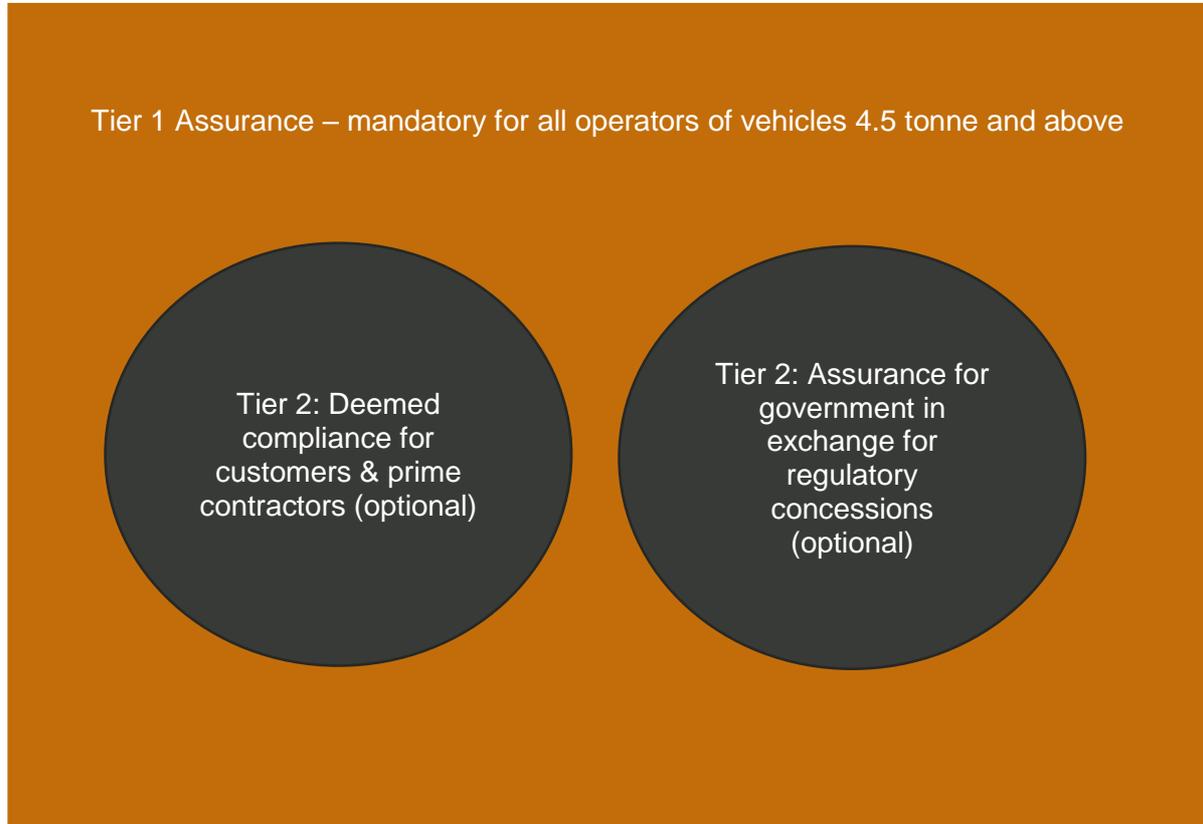
The government assurance for regulatory concession would be similar to the assurance for customers but go further in requiring systems that manage the risk posed by the specific concession. Unlike existing regulatory concession schemes, operators *and* customers would be bound by the scheme. (Presently, customers receive all the benefits of concessions while bearing none of the risks or responsibilities).

For example, a scheme that went beyond standard hours would require a comprehensive fatigue safety management system. The system would be developed by the operator and reflect their operating circumstances and specific risks. In the case of a large operator such as Toll, the system might include fatigue monitoring technology, purpose-built residential facilities, cabs fitted with sleeper berths, electronic work diaries and corroboration of work and rest records. Customers would be required to guarantee the availability of amenities at their premises and to demonstrate time-slotting systems that do not, directly or indirectly, promote or cause fatigue or speeding.

A mass concessions scheme would similarly require a mass safety management system. In the case of a large operator such as Toll, the system might include fitment of on-board mass, calibrated weighbridges, load plans for multi-drop runs, and vehicles within a specified age or kilometre range. Customers might be required to provide advanced warning of cargo mass, access to scales or weighbridges and safe areas to reorganize non-compliant freight.

The model is illustrated in figure 2 below:

Figure 2: Proposed assurance model



Toll strongly believes that government must own and run the Tier 1 assurance system. It should be the final “endorser” of Tier 2 schemes, albeit the systems/schemes themselves might be developed and managed by other parties (so, for example, TruckSafe would continue to be operated by the ATA but would be recognized by government as fulfilling the assurance necessary for regulatory concessions). The advantage to this model is that cargo or route-specific assurance schemes can be developed by the relevant experts, for example, livestock or Dangerous Goods.

Regardless of who operates the scheme the essential elements are that they must be robust, have the confidence of all parties (including the wider community) and do not subject operators to multiple, competing audit regimes. Any system that results in a proliferation of schemes with which operators must comply will be strongly resisted by industry.