



SOUTH AUSTRALIAN FREIGHT COUNCIL



21 October 2019

Via electronic submission:

www.hvnlreview.ntc.gov.au

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RE: 'Effective Enforcement' Issues Paper

On behalf of the South Australian Freight Council's (SAFC) Executive Committee and Membership I thank you for the opportunity to comment on the 'Effective Enforcement' Issues Paper.

As you may be aware, SAFC is the State's peak, multi-modal freight and logistics industry group that advises all levels of government on industry related issues. SAFC represents road, rail, sea and air freight modes and operations, freight services users and assists the industry on issues relating to freight logistics across all modes.

Industry realises that effective enforcement is critical to ensuring safety through a new Heavy Vehicle National Law.

However, we are disappointed with the level of analysis of the effectiveness of current enforcement provisions within this paper. It also appears to provide comprehensive coverage of regulator, enforcement agency and road agency views, but a lower level of analysis of industry views, which are not secret and have been made clear many times over many years.

It contains many questionable statements as if they were fact, without providing proof. Specific examples are outlined below.

Responses to the individual questions posed in the paper are below. Should you wish to discuss any element of this submission further, please feel free to contact me on (08) 8447 0664 or via email knapp.evan@safreightcouncil.com.au.

Yours Sincerely,

Evan Knapp
Executive Officer,
SA Freight Council.

Question 1: Which compliance obligations in the HVNL that do not link to safety and efficiency are most important for us to remedy as part of this review?

While compliance and enforcement are acknowledged as providing safety benefits, there is a 'shadow goal' or hidden objective that permeates through action taken by agencies in this area, namely asset protection.

Some programs that nominally exist to provide safety benefits, like IAP, provide little safety benefit but rather primarily asset protection benefits that accrue to governments, not industry. Figure 3 should be amended to include this 'shadow goal'.

Question 2: How can the law better support a risk-based regulatory approach to enforcement? How can the law support consistency, predictability and proportionality in enforcement responses?

There are several fundamental misunderstandings within the issues paper in these sections.

- the paper states that *'effective enforcement helps empower operators to comply (through education, for example) and offers a proportionate deterrence to those who might be willing to do the wrong thing'* (p15). This is false. Education is not enforcement, it is compliance assistance. Enforcement does not empower, it *forces* – and therefore is disempowering. It's direct intention is to take away the option of doing the 'wrong' thing, as determined by the law.
- Figure 4: Enforcement Pyramid. 'Compliance responses aim to promote full voluntary compliance' should read 'Enforcement responses...'.
Figure 4: Enforcement Pyramid. 'Don't want to comply' – wants and thoughts are irrelevant, only actions are – the NHVR is not the thought police.
- Section 2.2.3 – Industry forums and toolbox talks are not 'roadside enforcement'.
- Section 2.2.3 – References to 'offenders' should be 'alleged offenders' – guilt is not determined at the roadside.

One methodology of achieving the goals of the law is through consistency in the various capacities/training of 'Authorised officers' under the HVNL, and a standardised enforcement culture.

NHVR compliance officers and all sworn police officers are considered 'authorised officers' for the purposes of the law. NHVR and specialist heavy vehicle branch police officers are trained to a high standard, and have the inbuilt experience benefit of operating with the law every day. General duties police officers do not – while they may have had some training, they are not specialists and road interceptions of heavy vehicles likely constitute only a small portion of their work duties. Reports from industry members indicate that these officers are more likely to charge for technical (non-safety related) breaches, and may interpret the law incorrectly.

SAFC believes the NHVR should have a compliance and enforcement manual (or similar document) to detail appropriate responses to various breaches, and there should be a requirement in the law that these are followed by all officers acting under the powers in the Law. This goes to the aim of consistent enforcement, and a consistent enforcement culture.

SAFC also suggests that general duties police officers should not be automatically recognised as ‘authorised officers’ under a revised HVNL – rather that a HVNL specific training and assessment program must be completed before this status is conferred.

In making these suggestions, we cast no aspersions on general duties police officers – we are sure they are doing their best. However the HVNL is so complex that even operators who work in this environment every day make mistakes – enforcement by non-specialised officers without specific training all but guarantees costly and time consuming errors. The case study on page 35 clearly makes this point, by detailing the case of a NSW police officer who issued a defect and infringement for a non-existent offence. This page also correctly identifies the need for adequate training and expertise for efficient enforcement – but the law does not require any training before authorised officer status is conferred.

The paper provides a glowing reference for data generation and related technology for enforcement purposes (at 2.1.3). It does not make any mention that industry bears the costs of this enforcement tool, and usually receives few benefits in return.

The law needs better methods for challenging fines and sanctions in the interests of administrative justice/procedural fairness. As noted in 2.2.2, the costs of challenging a fine – both monetarily and in terms of time – are currently so much greater than the fine itself as to make it impractical to challenge even the most obviously incorrect decision. Given their particular focus, the Jurisdictional-based Administrative Appeals Tribunals (also known as Civil and Administrative Tribunals) may be the most appropriate external review entities.

Question 3: Are all enforcement tools being used effectively? If not, why not? Could a different set of enforcement tools give us better compliance outcomes?

Errors/issues in this section:

- On page 21 the paper notes ‘there is no privacy legislation in Western Australia or South Australia’. In SA there is however a Cabinet instruction (PC012 – Information Privacy Principles) that covers the same ground for government agencies, and has been in operation since the 1980’s.
- The list of other compliance obligations in section 3.1.1 omits the Australian Road Rules, the most basic requirement for operating on roads.
- p25 ‘Limitations on Authorised officer powers under the HVNL don’t apply to police. For example, authorised officers don’t have the power to use force against a person (s491 of the HVNL) but this limit doesn’t apply to police officers’. This is incorrect – it does apply to police officers, however they use their other unique powers in relation to force – see s491(2).

EWDs are not currently operational as none have been approved – therefore they are not ‘effective’.

There is certainly a question as to whether court enforced penalties (with the potential exception of fines) are being used effectively – there are very few reports of these tools being used at all. If certain higher order penalties are never used, then they have little deterrent power. If some industry members fall into the ‘determined recidivism’ category (as contended without proof on page 23), then either these are not being used effectively, or the contention about determined recidivism is wrong.

SAFC suggests that the HNVR's enforcement guidelines are not truly effective if they are not used by all authorised officers – including police. The HVNL should impose obligations on all authorised officers to promote a single enforcement culture based on risks to safety.

Question 4: How can data and information be better used to support enforcement under the HVNL? Who should own the data, who should be able to access it, and how should privacy and security concerns be managed?

Errors/issues in this section:

- Section 3.3.1 is fundamentally flawed in that it contains no discussion of the negative qualities of the IAP program – it's high cost for industry, limited information related benefits that are hard to access and questions as to the accuracy of some non-conformance reports.
- Section 3.3.2 is fundamentally flawed in that it discusses EWDs as if they were operational, which they are not. It also contains no discussion of industry's serious concerns with the practical application of EWDs, such as potentially being 'breached' for under-recording a rest break by seconds, which has no impact on safety.
- Section 3.4.2 – 'fatigue monitoring and detection technology was in its infancy when the current HVNL was written. This is no longer the case'. While fatigue monitoring technology has come a long way since the HVNL was enacted, it is still in its infancy. It is not accepted for compliance purposes, and its take up by industry is very limited. It does not (yet) have a comprehensive and statistically sound history of improving safety.

This aside, there is certainly a role for data and information to support better safety outcomes within a revised HVNL. As noted in our response to the fatigue paper, SAFC would like to see the revised law written in such a way that fatigue monitoring technologies can be used for compliance purposes, when they have been appropriately assessed.

When data is used for purely enforcement purposes and/or asset protection purposes the benefits accrue to the government and public, i.e. they are 'public goods'. Therefore, any costs associated with these data collection/capture systems should be borne by governments. If the data is shared in a format that is useable for compliance purposes, then the benefits are also shared – and so too should the costs.

There is a need for common underpinning data standards and protocols for all enforcement related data collection. If the data is 'owned' by industry, then it should be provided to industry in two ways – (1) all data collected and supplied by each company to that company, if they do not have the option of accessing it directly from the data collection system themselves; and (2) in an aggregated 'trend' form for whole of industry analytical purposes.

If governments mandate data provision, they should also keep in mind the costs to industry of providing the data. High cost systems that provide more data than is absolutely required for safety purposes should be ignored in favour of low cost options that deliver on the primary purpose of the law only – safety. If governments want more data for their own purposes, they should pay for it.

Question 5: Have we covered the issues relating to supporting compliance through effective enforcement, technology and data accurately and comprehensively? If not, what do we need to know?

There are many issues with accuracy within the paper – these have been outlined in the answers to questions above.

Question 6: What are some options for the future law to improve the current compliance and enforcement approach? How can the law best support enforcement strategies aligned to a risk-based approach to regulation?

SAFC does not support the mandatory use of IAP for any purposes. It is a high cost system, not open to competition to lower costs. Information is not readily shared with operators, making it useless for internal compliance purposes. Its accuracy is debateable. It is primarily an asset protection tool, not a safety tool.

In a recast law, any system that provides robust location data should be able to seek approval from the regulator to fill this function (if actually required). The regulatory ‘closed shop’ for IAP must not carry over to the new HVNL. Draft regulatory principle 4 supports this position.

In discussion under draft regulatory principle 2, the paper notes the new law should ‘contain prescriptive, performance based **or** principles based compliance options’ (emphasis added). This is not a question of ‘pick one of the three’ – industry has clearly said that it wants a ‘prescriptive plus’ system. This involves a base prescriptive option for small/unsophisticated operators; PLUS additional options for those who wish to invest in higher order safety systems and controls in return for greater operational flexibility.

Under draft regulatory principle 4, the paper states that ‘if safety is the primary goal of the law...’ – this is not up for debate. Safety is the primary goal of the law.

As an aspiration, the revised law should consider if there is a position that can be reached where assurance, compliance and enforcement systems are robust enough that via a risk based approach they can completely eliminate certain types of enforcement for a particular operator.

Take the following example:

Company A is fully accredited and regularly audited under all modules of an approved safety assurance system, including speed, mass, maintenance and fatigue. It has an approved safety management system, including a drug and alcohol management plan (with regular random testing). It has a telematics system in all its trucks that supplies speed, location and dynamic on-board mass information to enforcement agencies. It has an EWD system that automatically provides all information to regulators, it has an electronic fatigue management system, and is willing to supply this information to regulators. It has no applicable history of any offences, and the regulator has no intelligence information that there are any issues with the company.

Under a risk based approach, what risk does this company pose to safety? Is there any need for random roadside enforcement at all for this company? Given the myriad costs they have accumulated to get their safety systems to this point, can the regulator afford to provide some payback through improved schedule accuracy by not randomly stopping them on route?