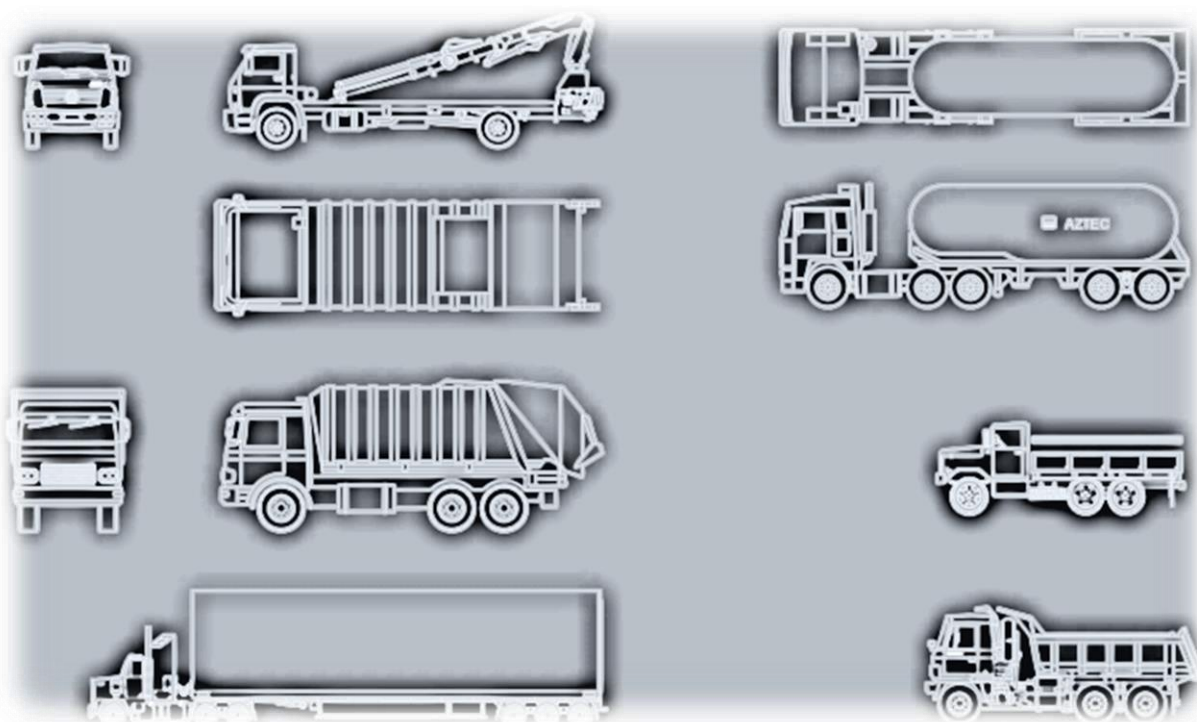


Submission to the National Transport Commission Issues Paper: *A risk-based approach to regulating heavy vehicles*



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1. Introduction

1. I welcome the opportunity to comment on the Issues Paper A risk-based approach to regulating heavy vehicles released by the National Transport Commission (NTC) March 2019.
2. It is incumbent on regulatory agencies to ensure those it regulates understand what it means to comply and in doing so not unduly hinder them in going about their business. The challenge is how best to achieve that aim. A key problem faced by both industry and regulators of the heavy vehicle sector is in defining what it means to be safe. The more complex issue however of striving to be safe is globally a dilemma that is perceived to not yet being achieved. How low can we go – is Zero Harm the goal? Technology presents just one aspect of the solution, the other is in addressing human factors around our propensity to take risks.
3. This submission responds to the questions posed in the paper, after responding to the ‘findings’, particularly the problems put forward with the Heavy Vehicle National Law (HVNL). I hope this will inform later Issues Paper and provides the impetus for the NTC to revisit its work to address significant shortfalls in the analysis presented in the current document.
4. The stated purpose of the paper is to create an entirely new HVNL, is this not somewhat premature? The Terms of Reference makes no reference to the creation of an entirely new law but the simplification of the current one.
5. The paper provides a glowing recommendation of the virtues of risk-based regulation but fails to objectively discuss pitfalls of the approach or examine other regulatory approaches such as smart regulation. There is not a single example provided of what the NTC means when it talks about risk-based regulation. It discusses extensively styles and principles but has not offered up one practical example.
6. The paper is a corollary of assumptions and unsubstantiated statements about the current state of the HVNL. There has been no attempt to objectively analyse, through either facts or evidence, whether the problems with the HVNL are adversely impacting the heavy vehicle industry, the supply chain or the regulator but more importantly productivity and safety outcomes.
7. The cursory analysis attempts to purport to be a factual representation of a HVNL which is both ineffective in delivering safety outcomes and impinging on the productivity of industry. It does so without a skerrick of quantitative and little qualitative evidence to substantiate the position that the law is fundamentally flawed.
8. The suggestion that the regulatory style adopted would be dependent on the type of control developed would mean that the HVNL would be spattered with three regulatory styles. Surely this would be to the detriment of regulated entities and the regulator as they could be unclear as to which parts, sections or clauses were prescriptive, outcomes or principles-based.
9. There is no analysis or discussion of how the current HVNL is being measured or assessed as meeting its objectives and the criteria being applied to that assessment.



10. The importance of addressing risk and harm in law is well accepted, but the paper fails to explore in any depth the issue of what is deemed an acceptable (if any at all) level of risk of harm by either industry, the regulator or the community. Without such an analysis and the reason to support such an approach, an entirely new law, is unwarranted and not supported by evidence it is required.
11. The paper fails to articulate which risks and harms the HVNL should address and the mechanisms by which these risks and harms are identified. More importantly how does the law adjust to the change in risks and harms over time? It is entirely incongruous to discuss a risk-based approach without an understanding of the risks to harm being faced by industry. The paper fails to have this discussion or provide an example relevant to the heavy vehicle industry.
12. There is no fundamental discussion about what it means to be safe or the extent to which meeting the performance measure of 'as reasonably as practicable' (it is assumed this will be a primary performance-based approach). Thus, in demonstrating that you are safe (compliant) can be an extremely low bar in some instances and is a recognised concern of performance and risk-based regulation. The paper does not address what mechanisms will be in place to counter this known problem with the risk-based approach.
13. A risk-based approach to regulation should focus on risks associated with non-compliance with legal rules, rather than the legal rules themselves. The regulator identifies and assesses the risk associated with non-compliance by regulated parties/ entities or with an obligation or group of obligations.
14. A risk-based approach to regulation can:
 - enhance consistency in decision-making because the regulator's response will be dictated by the relative level of risk
 - maximise efficiency by allocating resources to areas of highest risk
 - increase compliance by focusing on areas where the compliance risk is greatest
 - reduce the compliance burden by minimising regulatory intervention where the risks are relatively low.
15. A more useful way of expressing what risk-based regulations aims to do follows. In lay terms an accident is something that is unintended despite best efforts (it was an unforeseeable set of circumstances) to prevent it from eventuating. In such circumstances regulation can only reduce the risk of harm and there is little point in attempting to 'prohibit' accidents. As such entities will only commit an offence if they have not effectively reduced the risk of harm. The harm itself is not the offence it is the entities efforts or lack of effort to reduce harms from occurring that is the offence.
16. Adopting a risk-based approach therefore doesn't necessitate a change in legislation but a change in the way the regulator conducts assessment of harm reduction and resultant compliance and enforcement activities. It requires a fundamental analysis of the data, tools and processes being utilised by the regulator to assess the performance of industry against reducing harm.



17. A specific issues paper is required to deal with the extensive problem of a lack of data not only in the current administration and enforcement of the law but any future approach to the HVNL. The paper failed to highlight the impact the lack of good data currently poses industry and to the NHVR.
18. It is an acknowledged concern of the risk-based approach that many entities simply do not have the wherewithal to determine how to comply. Subsequently they require extensive guidance in the form of codes of practice and Standards. Entities are, in most cases, not bound to comply with these requirements and regulators, in many instances, are unable to enforce them. The NTC has not discussed how a new HVNL will deal with this known problem with risk-based regulation.
19. There is no discussion of the complexity involved in addressing specific entities and activities that pose a higher risk and the stricter controls required to manage these risks. Inevitably risk profiles shift and it is not discussed how a risk-based approach will cater for this shift. It is simply assumed that it will.
20. A significant issue of a risk-based approach is the potential of regulatory capture. This may arise where the relationship between the regulator and industry becomes closer over time. The paper does not discuss how the regulator will avoid this possibility and what regulatory oversights might be put in place to assist monitor for regulatory capture.
21. There is no discussion of willingness to pay or the impact of adopting a risk-based approach in terms of cost benefit to mitigate which risks. That is, what are the expected outcomes – not just broad statements about improving efficiency, productivity and safety. The obvious question arises that if the HVNL targets high-risk entities and activities why should the cost be shared across the entire industry? It is not unreasonable to expect that entities that can demonstrate high levels of compliance may wish to seek additional benefits to those that represent the highest risk. This further adds weight to the possibility of regulatory capture by these entities.
22. The Braithwaite model has several criticisms of its deployment in real world compliance and enforcement scenarios. A primary one being that it assumes a relationship between the regulated entity and the regulator. This realistically occurs very rarely for most of the industry and makes it difficult to undertake assessments about the compliance approach based on so few interactions. A risk-based regulatory approach seeks to identify high risk harms. Is the NTC proposing that the enforcement approach to harms be enshrined within the HVNL?
23. If the focus is only on high risk activities and entities there is no indication of the potential compliance task that might be faced by the NHVR. Nor any data provide as to the potential change in non-compliance rates.
24. It is acknowledged that a failure of risk management is that it discounts the qualitative aspects of risk by taking a very quantitative analysis. There is no discussion of the uncertainty that can be created by undertaking quantitative analysis. Both harm and risk are subject to uncertainty. Uncertainty describes the potential to develop multiple possible outcomes which is greater than the actual number of outcomes and it is impossible to attach probability to each possible outcome. That is risk and uncertainty are not able to be separated. It then makes determining which risks to focus on much harder. There is no discussion as to how this might be mitigated.



25. It is astounding the amount of focus given to rare events like serious injury and death. Yes, they should be of concern but what about the millions of tasks, activities and kilometers that don't result in harm? What is it about these activities that we should be examining and learning from to understand what it means to be safe. Why is there no time given to a discussion on this type of approach to managing risk?
26. At present in Australia there are very few forensic examinations of serious injury and death events in the heavy vehicle industry. The paper fails to discuss this as an out-of-scope matter that requires attention nationally. Heavy vehicles have been considered workplaces for some time now and as such the investigation of such events requires a much sharper focus to assist identify and understand contributing causal factors. The lack of good data in this space continues to prevent building a better understanding of causal factors and therefore preventative approaches to harm minimisation.
27. The discussion of Braithwaite's compliance pyramid adds no weight to the NTC's discussion of harm and risk. The model discusses the propensity for non-compliance by industry and the regulators escalation of responses to non-compliance to achieve behaviour change. It does not seek to categorise harm or risk. Nor does the paper provide guidance as to how this is to be expressed in the HVNL. The model is a tool to assist understand how a regulators compliance and enforcement approaches might be deployed based on identification of a non-compliance. A review of Erik Hollnagel safety culture journey would provide some useful guidance in this space.
28. The paper is meant to be discussing risk-based regulation not the identification of approach models to dealing with non-compliance. The compliance pyramid moves very much into the realms of education, deterrence, rehabilitation and punishment. The discussion would add value if it explored what mechanisms the HVNL will have in place or if it sits outside the law as regulatory tools. These tools are then the mechanism to deal with those least likely to comply or demonstrate persistent offending which may pose significant risk of harm.
29. There is a very cursory discussion of risk categorisation. If the analysis is incorrect and an entity, activity or sector is targeted over another and later the compliance activity was found to be misguided it may open the door to legal action. This will certainly result in reputational damage to the regulator. In 2015 the US Federal Motor Carriers Safety Administration were challenged over the publication of some types of specific carrier safety outcomes and have been forced to remove them from public view.¹ Industry will certainly question risk processes and systems as well as the regulatory approach. It can also ignore low level risks which may be more pervasive within the industry and alone are not a significant harm but cumulatively represent high levels of harm.
30. There is no discussion of how to measure the success (or otherwise) of moving to a risk-based regulatory approach and how it varies from the current measures (also not discussed). There is no reference to global best practice, or how it has been dealt with by other transport or risk-based regulatory agencies.

¹ <https://ai.fmcsa.dot.gov/SMS/>



31. The paper does not provide the reader with an understanding of the extent of the term regulation and whether it only covers formal acts and regulation or whether it encompasses the functions and responsibilities of regulatory entities and the various mechanism, tools, systems and processes used to administer the HVNL.
32. The paper failed to identify the impacts the current HVNL has on diversity. It also proposes the adoption of several regulatory approaches in the development of a future law and doesn't address how this will improve consistency or harmonisation. The NTC proposes no strategy about how a risk-based approach will address consistency and harmonisation other than implying that a risk-based approach will overcome these issues. It is incumbent on the NTC to develop an issues paper on national consistency and harmonisation as it represents a significant hurdle (as it does currently) to the successful implementation of any future law.
33. The paper does not discuss the types of regulatory tools that might be made available to the NHVR or those utilised by other agencies that are risk-based. Nor do they describe some of the protections that are in place for regulated entities under these regulatory regimes. For example, what types of rights to review of regulatory decisions.
34. The scenario of the person falling off the bicycle would have had significantly more weight if it could have been related back to how a risk-based approach would have dealt with reducing the risk of harm. There is a list of controls but these are prescriptive how might these have been expressed in an performance or outcomes-based regulation?



3. Detailed response to paper

Purpose of this paper

- 35. The discussion of first-principles is somewhat misplaced, or the concept misrepresented as there is no discussion of what the self-evident propositions or assumptions are. They are not listed or described. As such the paper fails the first hurdle it set for itself by not adequately testing the assumptions underpinning the HVNL as they are not explicitly identified.
- 36. If the current topics listed in the paper are the assumptions about the failures of the HVNL a large portion of these have nothing to do with risk-based regulation but are a consequence of the regulatory environment the law has been established in. There is no discussion of how a risk-based approach will overcome these ongoing difficulties.

Problems with the current law

- 37. A stated problem with the HVNL is that it is not national. This is not inherent to the law itself but the Council of Australian Governments (COAG) Intergovernmental Agreement on Heavy Vehicle Regulatory Reform under which the law operates. The paper provides no guidance on how a risk-based approach to regulation will overcome this issue.
- 38. It is not clear in the paper how a risk-based approach to regulation will resolve the issue of non-participating jurisdictions adopting the HVNL. The issue is not discussed in the context of a risk-based approach to regulation. Nor how a risk-based approach will address the issue of derogation from the law.
- 39. If it is proposed that a risk-based approach would improve the value proposition and the prospects that non-participating jurisdictions would quickly adopt the HVNL it is not articulated how or what would drive the adoption of the law.
- 40. This section of the paper fails to convincingly provide quantitative or qualitative evidence to support the position that the prescriptive nature of the HVNL contributes to the problems being discussed.

The move to risk-based regulation

- 41. It is assumed that by adopting risk-based regulation it will improve a whole swath of problems with the HVNL. No evidence is provided as to the success this approach has achieved in other transport modes or in other industries where regulators have adopted a risk-based approach. It also does not discuss the many issues that a risk-based regulation introduces to both industry and regulators and how these will be overcome in a new HVNL.
- 42. There is also no discussion of alternative regulatory models to assist the reader assess options as to which regulatory model would be most appropriate as a principle to enhance the HVNL.

Regulatory styles

- 43. In adopting these styles of regulation and moving away from a prescriptive style will require industry to develop systems and processes to adapt their business practices. There is no examination of the associated cost benefit or implementation timeframes that will need to be in place to allow industry suitable time to develop appropriate systems and processes.



44. The proposed wholesale regulatory change will have significant impacts on the NHVR. There is no analysis of the cost benefit of the changes. Will there be a transition period to enable the NHVR time to implement appropriate strategies, systems and tools to accommodate legislative change? An obvious example is the necessity to collect appropriate information on industry participants if the HVNL specifies entry and exit requirements.

The law is not nationally consistent

The law is not national

45. The paper correctly identifies that by area the HVNL only covers half of Australia. It fails to examine what this means in terms of the number of operators or the vehicle population not covered, this would be more meaningful. If we are considering a risk-based approach and how to mitigate harm, a better metric would be to examine the freight task (mass carried) by tonne-kilometres travelled.
46. The paper fails to examine the variation between participating and non-participating jurisdiction regulatory models of their productivity and safety performance against the HVNL.

States and territories have derogated

47. There is no quantitative or qualitative analysis of how derogation has impacted safety, productivity or efficiency. The paper fails to examine what is meant by the 'severity of derogations' and the consequences of the derogation on industry, the NHVR or the community and most importantly safety outcomes. The discussion in the appendix goes somewhat to explaining the impact on consistency but provides no evidence of the cost to industry. By simply stating that it has an impact seems to be justification enough to substantiate that impact. It represents a very poor analysis of the problem of derogation and more importantly how a risk-based approach will deal with inconsistency, derogation and delegations of powers from the HVNL?
48. Another very important issue of the application of the HVNL, through compliance and enforcement activity, is touched on briefly but not explored further in any detail. It draws on commentary from the explanatory notes from the HVNL Bill 2011 but does not discuss any updated evidence about the compliance stress that different compliance and enforcement approaches cause industry.
49. The paper discusses the exercise of judgement by local government in deciding access decisions. Prior to the HVNL many local governments were unaware of heavy vehicle movements on their road networks at all. In some instances operators waited months for access decisions (if provided at all) and if approved may have had a raft of varying and inconsistent conditions imposed – many unrelated to the risks the vehicle or journey may have posed. The HVNL has improved the decision-making framework significantly. It provides certainty in respect to permit conditions and the period for approving or declining a permit by local government. The paper fails to address how a risk-based approach will overcome the issue of local government resourcing and the timing of access decision-making.

The law is prescriptive and inflexible

The law is highly prescriptive

50. The paper uses the term 'comparable laws' but fails to provide an explanation as to how to quantify this comparison. Is it referring to the extent of the objectives, type of industry, size of the regulated entities or the types of risks and harms being addressed by the laws?



51. This is a very cursory analysis based on the size of each respective regulators legislation and provides no analysis of the benefits or costs derived from the prescriptive or performance-based aspects of the comparable legislation. A review of regulatory styles provides very little value as to the effectiveness and efficiency of the legislation in addressing risk and harm nor of the associated regulatory frameworks deployed by those regulators to administer those laws.
52. The paper also fails to articulate how or quantify what improvement a risk-based approach to regulation will make to the HVNL. The most significant failure however is not articulating the magnitude of the benefits that a risk-based approach has brought 'comparable laws' to the respective industry and regulators in terms of efficiency, effectiveness, productivity and safety outcomes.

The law has a paper focus

53. The HVNL does require the carriage of documents but this does not preclude them being on an electronic device. Refer to *Carriage and presentation of documents - Compliance and Enforcement bulletin 5, July 2018*.² To suggest the current law does not accommodate for alternative verification is misleading. What is more concerning is that there is no in-depth analysis of the costs associated with this issue.
54. It is not clear which parts of the HVNL are being referred to when it is asserted that the law would require amendment to adopt advances in safety and productivity. It does not consider that the NHVR has broad ranging abilities to participate in trials and programs to cater for a variety of challenges faced by technology when administering the law. It has a raft of exemption powers that it can exercise.
55. It may have taken more than three years to get EWD's into the HVNL. The technical specification and regulatory framework were required to be settled and involved extensive consultation with an array of stakeholders. There are not many major reforms of this type and significance that do not take this length of time to implement. Identifying one instance of a lengthy process to adopt a technical solution is not evidence of a systematic failure in the HVNL to be flexible. The failure of industry to take advantage of the availability of the EWD's is also not a failure of the law.
56. Simply saying the HVNL is inflexible regarding technology (innovation) does not make it a fact. Refer to the *NHVR submission on Inquiry into Transport Technology - Submission to Queensland Parliament Transport and Public Works Committee on 9 October 2018*.
57. The paper fails to address how moving to a risk-based approach will reduce the requirement for paper. It simply assumes that it will be an inevitable consequence of adopting a risk-based approach. This has inherent problems such as the uptake of technology by industry or if it is proposed that it be made compulsory will create a significant burden on industry and with no discussion of the potential returns, this issue has not been adequately explored.

The law focuses on administration instead of outcomes

58. The permit and gazette system are a risk-based approach to regulation. It allows for diverse high-risk operations under controlled conditions. The paper again fails to address how a risk-based approach will change the process for addressing high-risk vehicle movements (despite acknowledging it will be the subject of a separate paper).

² <https://www.nhvr.gov.au/files/201807-0176-ce5-carriage-of-documents.pdf>



59. I fail to see the relevance of the Case Study to the position that the regulation creates the necessity for 'perversion' of the law. Permits are required to access a specific route for a specified period-of-time. How possibly could applying for 15 permits assist a crane operator meet the needs of a client that they are unaware of where they require the vehicle and when. Potentially the Case Study has not provided a thorough explanation of the scenario.
60. The outcome of a permit application is that the vehicle be assessed as to whether it can safely access the road network. Whether an operator intends to use the permit is a business decision.

The law is unresponsive, and change is onerous

61. Why is there no comparative analysis between the timeframes to progress legislation for the Rail Safety National Law or the Work Health and Safety Act? Stating that the HVNL has been amended nine times in five years is equally supporting the position that the law is a responsive instrument able to cater to change.
62. The position put forward here is not inherent to the HVNL itself but the regulatory framework in which it operates through the Transport and Infrastructure Council (TIC). There is no alternative model proposed here nor a discussion of the responsiveness of the 'comparable laws'. It is assumed a risk-based approach will address this issue, but it is not articulated as to how.

The law applies a 'one size fits all' approach

63. This statement is both untrue and not supported by a cognisant position to demonstrate the point being made. Simply stating something does not make it fact. The HVNL has many mechanisms that cater for the diverse nature of both the heavy vehicle industry and supply chain as well as the transport task. From accreditation schemes, through to permit and gazette notices which consider the various risks of not only moving various commodities but the vehicles and transport task being undertaken. The HVNL provides the NHVR with multiple options for compliance and enforcement including education, warnings and other scaled and risk-based regulatory options. The paper fails to address how a risk-based approach will overcome this purported problem.

Not one but many industries

64. There is no discussion of the breadth or depth of the different needs or risks these industries pose in the operation of the variety of heavy vehicle types. Further it does not articulate how a risk-based approach will address the supposed problem. If legislation is to cater to each 'unique' operator, transport task, vehicle utilised or industry sector it will increase the size and complexity associated with regulation.

Disparate operating domains

65. Given that the two non-participating jurisdictions of Northern Territory and Western Australian are not on the Eastern seaboard it is obvious that the NHVR regulates predominantly vehicles and operators on the Eastern seaboard. However, to suggest that it is predominantly focused on interstate line-haul freight operations is not supported by any data or analysis by the NTC.
66. The paper fails to identify or assess the variety of potential risks, capacities and different business models of these disparate operating domains. The reader is left with no ability to consider the impact the HVNL has on these disparate operations as there is no content to consider or a discussion on which aspects of the HVNL do not cater for these domains.



67. There is no discussion of the differentiation in risks associated with operating in either a rural or metropolitan domain, basic examples of how this might have been further explored. No conclusions can be drawn from the information provided as to how a risk-based approach would address this problem.

Diverse operators

68. A figure of 40,332 operators has been proffered as an example of the diversity of the operators within the industry but are specific to the road freight sector. The ABS indicate it is more likely to be approximately 50,000 businesses.³ Road freight represent a large cohort of operators as a sector with largely the same requirements to be regulated? If not, why is it not further explored as to why the HVNL does not cater for the variety of sub-sectors? What are their requirements? What are the unique risk associated with their operations, operating domains or business models?
69. There is a discussion about entry and exit requirements or operating licensing and the visibility of all regulated parties and that it may give the NHVR visibility of drivers. What the paper fails to discuss are issues of cost of licensing operators and instituting an audit regime. Further it does not discuss the benefits that such visibility will deliver.
70. There is no further breakdown of the remainder of the industry covered by the HVNL and what risks they face and how the HVNL does not appropriately cater for these operators. In relation to the position that it only caters to one sector – presumably interstate - as observed by the NTC, there is no evidence put forward to support how the HVNL increases risk to industry or how a risk-based approach will reduce risk of harm.
71. The dialogue in this section of the paper makes assumptions about small and large operators without any quantitative or qualitative evidence to support the propositions being put forward. It also refers to the HVNL limiting heavy vehicle operations without providing any explanation as to how or what these limitations are or which specific aspects of the HVNL the statement relates to.

The law is not risk-based or proportionate

72. The paper incorrectly states that the HVNL is not risk-based. The law consists of key sections which are focused on maintaining public safety as well as specific requirements related to vehicle standards, mass and dimension, load restraint, speed, driver fatigue, access and the National Heavy Vehicle Accreditation Scheme. To suggest these sections are not focused on addressing the risks associated with the potential harm that heavy vehicles and their operation may cause is misleading. Nor has the paper provided any evidence to support this statement.
73. There is no in-depth examination of the inconsistent rules and a cursory discussion on the disproportionate applications of regulations to those risks. What is of more concern is when examples of the failures of the HVNL are discussed there is no quantitative or qualitative evidence to support the impact on industry, the NHVR or productivity and safety outcomes. There is no discussion what a risk-based approach will deliver as outcomes (other than in broad

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<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8165.0Main+Features1Jun%202013%20to%20Jun%202017?OpenDocument>



terms e.g. improve productivity and safety) nor how it will resolve the issue of proportionate action/ enforcement of the HVNL.

Opaque and out-of-scope risks

74. It is incongruous to posit that the HVNL is forcing all operators and regulated parties to implement safety management systems and then state the law does not set entry and exit requirements. Both place a regulatory burden on industry and the NHVR. To what extent is not clear or discussed in the paper nor the productivity and safety benefits derived from either. Further, requiring industry to develop safety management systems is a risk-based approach to regulation.
75. It is an assumption that increasing entry requirements will provide increased visibility of drivers. More importantly the paper fails to discuss the benefits to productivity and safety of this additional visibility. The COAG *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform, 19 August 2011* makes explicit reference to driver licencing and competency and that at some stage it be part of the HVNL:

Heavy Vehicle driver licencing and competencies

Understanding that all States and Territories are cooperating to work towards producing a single, physical heavy vehicle driver licence and a consistent approach to heavy vehicle driver competency and testing standards and heavy vehicle driver training school recognition, the Parties agree that the outcomes of that work be included within the ambit of the National Law.⁴

76. Driver licencing is not out-of-scope for the HVNL. There appears to be a reluctance by COAG members to advance this aspect of the heavy vehicle reform. The paper does not address how moving to a risk-based regulation will provide the NHVR visibility of drivers and more importantly how the NTC proposes to convince jurisdictions to acquiesce these powers to the HVNL.
77. The paper does not provide an assessment of the benefits or cost associated with visibility of those in the chain of responsibility or how a risk-based approach would provide this visibility. It is also not explained how increasing barriers to entry and exit will improve productivity and safety or the extent to which these are beneficial in other industries or to those regulatory agencies that have risk-based regulations. Is not raising barriers to entry and exit increasing prescription, complexity and could result in less competition?

Disproportionate responses to risks

78. The paper does not discuss in any depth what is meant by proportionality or provide a comparative analysis between other regulatory regimes. The discussion about the number of heavy vehicles is irrelevant. Vehicles are not required to record driving and rest hours – drivers are. The analysis does not specify how many of the vehicles are rigid, prime movers or trailers. Many of these vehicles may be used in a heavy vehicle combination. It would have been useful to understand the rates of harm being caused by those heavy vehicles less than 12 tonnes and those more than 12 tonnes to assist determine variation in risk.

⁴ <https://www.coag.gov.au/content/intergovernmental-agreement-heavy-vehicle-regulatory-reform>



79. Heavy vehicles do not get fatigued drivers do. An examination of the driver fatigues risks related to different vehicle classes or interstate versus intrastate would have been a far better example contributing more to an effective analysis.
80. Disproportionate responses to risk is an extremely broad statement about the perceived failures in the HVNL. There is no comparative analysis between other legislation or other jurisdictions. It also does not indicate on what basis, parameters or measures are used to determine an ideal level of proportionality.

Of more concern is that the discussion does not relate back to the effect of disproportionality on productivity and safety outcomes and the reduction in harm.

81. The paper assumes that the work diary is not used as a control in most cases. Despite a large portion of the industry not using a work diary, these drivers are still required to record driving hours and rest periods. Using fatigued regulated heavy vehicle numbers is a very poor estimation of the driver population not using a work diary. It also doesn't provide evidence that the work diary or that driving hour records are not used as a fatigue control. Simply stating it does not make it a fact.
82. It is not apparent the purpose of stating that road freight is predominantly intrastate. More importantly it is not clear how a risk-based approach will address the issue of freight tonne-kilometres being undertaking intrastate. It would have been of far more value to have provided an analysis of the death and series injury rates associated with interstate and intrastate travel based on tonne-kilometres travelled and associated with which types of vehicles, sectors, operators and domains. This would assist determine a focus for targeting risk of harm operations, entities or vehicles.
83. The issue of use of a work diary within 100 kilometres of a driver's base is not explored regarding the increased risk or otherwise of not recording driving hours in a work diary or its relationship to increased risk of harm between interstate and intrastate travel, nor variations between rural and metropolitan operations. Are these drivers represented more often in crash statistics?
84. I don't believe the NTC's statement that the HVNL has a confused view of the work diary as a control for managing the risks of driver fatigue has been well articulated.
85. There is no examination as to what motivates industry participants/ operators/ drivers to be compliant or non-complaint. How is a prescriptive approach more prone to non-compliance than a risk-based approach? Why is this not explored?

The law is challenging to comply with, administer and enforce

86. There is no context provided to understand the scope of what is meant by comply, administer and enforce. This is a very broad statement and appears to imply that the entirety of the HVNL provides no value in these areas. There is no comparative analysis provided as to the challenges or ease of complying with other regulatory regimes, legislative frameworks or heavy vehicle law in other jurisdictions to assist evaluate the challenges identified in this section of the paper.
87. There is no examination as to what motivates industry participants/ operators/ drivers to be compliant or non-complaint. How is a prescriptive approach more prone to non-compliance than



a risk-based approach other than that the prescriptive approach is more complex, or not depending on which section of the paper you read.

Compliance

88. In previous sections of the paper it is asserted that ‘typically, smaller operators prefer the certainty and the relative simplicity of prescriptive regulation’, but now it is being asserted it is challenging to comply with. The paper’s inconsistent approach provides little confidence in the veracity of the positions being put forward.
89. To suggest operators are limited by the prescriptive nature of the HVNL and not provide an example simply trots out the idiom of over regulation. Innovation is fully embraced by the HVNL through various mechanisms, one of note is the Performance-Based Standards scheme. The NHVR also has methods which enable it to participate in trials and programs to cater for research and innovation by way of exemption to the law.
90. The issue of non-participating jurisdictions is not an inherent consequence of the HVNL and it is not clear how a risk-based approach to regulation will address the issue of non-participation. The HVNL has improved the compliance landscape considerably by reducing the total number of variations in regulation and to improving the consistency in enforcement approaches nationally. This is evidenced by continued joint operations across borders. Participation in the National Heavy Vehicle Roadworthiness Program and adoption of the National Heavy Vehicle Roadworthiness Manual.

Administration

91. The paper asserts that there are challenges for governments and regulators administering the HVNL but provides no details of those challenges. It also provides no discussion as to how a risk-based approach would deal with any challenges to the administration of the law. The paper fails to provide guidance as to the improvements it has brought to other regulatory agencies who have adopted a risk-based approach.
92. There is no discussion of nor evaluation of the consequences of the varied powers across jurisdictions and the impact on the NHVR of administering these variations. The paper fails to articulate how a risk-based approach would overcome these variations in power.
93. Despite the paper discussing the severity of derogation it fails to adequately articulate the outcomes on industry. For example, what is the outcome of forcing drivers to produce a driver licence?
94. As a member of the COAG and TIC, local government were aware of the proposed HVNL and the impact of the changes to the sector. The HVNL has been in operation for five years and to suggest that access consents are a new role in the HVNL is misleading. It is also misleading to suggest that it is a new role for local government. It is not. Many local government authorities previously required consent for heavy vehicle movements on their road network prior to the introduction of the law.
95. The NHVR has invested extensively in educating and providing guidance to local government in creating appropriate decision-making tools and frameworks. Local governments’ inability to resource this function or make timely access decisions is neither quantified or qualified as to the



extent of the problem or its cost to local government. The paper also fails to indicate how a risk-based approach to regulation will address this lack of resourcing.

Enforcement

96. There is no examination of the benefits and costs between roadside enforcement and an audit regime. The cost of having visibility to the NHVR of all regulated parties (on and off road and presumably those in the chain of responsibility). The paper fails to describe why the HVNL is limited in its ability to institute a risk-based audit regime. Simply stating it does not make it a fact.
97. The paper ignores the impact and cost on industry and fails to define the benefits it will bring to industry and the community in any detail. It does not provide examples of other industries where such approaches have been implemented and the costs or benefits derived from it. This is the only section of the paper which discusses motivation for non-compliance. Why has there been no discussion of how a risk-based approach will deal with an entities motivation to comply, the propensity to deter offending and to reduce the opportunity to offend?
98. A feature of most regulatory approaches is to deter people from breaking the rules. For example, to deter people from speeding which in most cases do not result in harm. What the NTC has failed to effectively articulate in this paper is how it intends to move from a prosecuting regulatory violations model to one of prosecuting risk of harm. There is not a single practical example of how this shift in focus will be managed and across what harms? The lack of any discussion of how this new approach will deter harm has also not been explored.
99. The relevance of the reference to the use of technology is not clear as to how a risk-based approach will deal with the use of technology for enforcement (despite indicating it will be addressed in a future paper).

The reform has not fully achieved its original goals

100. It is not clear where these goals have been sourced from but the COAG *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform, 19 August 2011* identifies the following outcomes:

The Agreement will contribute to the following outcomes for the heavy vehicle industry:

- removal of inefficiencies from inconsistent jurisdictional requirements;
- lessened regulatory burden and a reduction in the costs of compliance; and
- enhanced safety, productivity and efficiency.⁵

101. There is no comparison or analysis provided as to the success or otherwise of similar regulators such as the National Rail Safety Regulator or the National Maritime Safety Regulator within their regulatory lifecycle. That is, at five years of age how had these regulators performed in meeting the COAG outcomes set out by their respective intergovernmental agreements? How has adoption of risk-based approach contributed to better outcomes?

Regulatory burden remains high

102. The lack of any detail as to the benefits derived from the introduction of the HVNL is damning. More damning is that no attempt has been made to provide robust evidence of the

⁵ <https://www.coag.gov.au/content/intergovernmental-agreement-heavy-vehicle-regulatory-reform>



impact of derogations, delegation of powers and jurisdiction-specific enforcement has had on industry or the regulator and more importantly productivity and safety outcomes. What has been provided is exceptionally deficient in its breadth and depth.

103. Although the paper provides a comparison of the regulatory styles used by national regulators there is no analysis or evidence of the impact of these styles on reducing regulatory burden or in improving productivity and safety outcomes.
104. That the HVNL has not been adopted nationally is not inherent to the law itself. There are many factors impacting the decision of the Northern Territory and Western Australia in not adopting the law. At no stage has the paper indicated or provided proof that it is because the law is not risk-based that these jurisdictions have decided not to participate. The paper does not indicate how moving to a risk-based approach will result in the adoption of the HVNL in non-participating jurisdictions.
105. There has been no attempt to provide an up-to-date analysis of the compliance training costs of the heavy vehicle industry or supply chain to enable an adequate assessment of the current cost or those costs post the introduction of the HVNL.
106. The paper fails to adequately explain how a veto power of the NHVR creates an inefficiency in decision-making for access permits. The reference to the long and drawn out financial cost and delay of permit applications is not substantiated by any data as to those costs. There is no discussion of how a risk-based approach will address these problems.

Productivity improvements are mixed

107. The paper does not discuss which aspects of the HVNL are an obstacle to improvements in productivity. The acknowledgement that freight productivity has improved marginally is relatively pointless without an understanding of the status of freight productivity improvements prior to the HVNL. It has been well documented that freight would plateau between 2010 and 2030 without some considerable regulatory and other freight productivity investment reform.⁶ Is it being suggested that the law is the cause of a lack of investment in productivity reform. If so, it is not well articulated as to how.
108. Discussing load per laden journey provides no real meaningful information about productivity of the fleet and speaks more to freight demand. It assumes that for these journey's the vehicles were at their maximum laden mass. A more meaningful measure of productivity is freight tonne-kilometres travelled.
109. The comparison between participation and non-participating jurisdictions is deceptive as it does not provide an analysis of the number and types of registered vehicles, e.g. total number of b-doubles and road trains nor total freight tonne-kilometres travelled in these jurisdictions. Deloitte Access Economics has provided an excellent examination of some of the benefits associated with improved regulation in the industry.⁷ This document is widely available. It provides a clear assessment of issues being experienced by several heavy vehicles classes.

⁶ Refer to the Bureau of Infrastructure, Transport and Regional Economics Truck productivity: sources, trends and future prospects Report 123, March 2011. https://bitre.gov.au/publications/2011/files/report_123.pdf

⁷ <https://www2.deloitte.com/au/en/pages/economics/articles/economic-benefit-improved-regulation-australian-trucking-industry.html>



110. Only mass is examined as an example of productivity which is only one aspect of freight productivity there are several other examples, including:

- driving hours
- dimension/ volume
- road network infrastructure improvements
- administration improvement – permits and gazettes.

111. Although vehicles in the Performance-Based Standards scheme represent a small portion of the fleet their contribution to both productivity and safety of higher mass vehicles warrants a discussion. Particularly as a model to increasing fleet productivity and safety in the general fleet. Refer to some excellent work by Adam Gibson on cost per billion tonne-kilometres per employee.⁸

Heavy-vehicle-related road safety must improve

112. Although the paper provides a comparison of the regulatory styles used by some national regulators there is no analysis of the impact of these styles on regulatory outcomes. Particularly their success or otherwise in improving efficiency, productivity, compliance and safety.

113. Examining road deaths involving heavy vehicles provides a very basic view of the problem associated with crashes involving heavy vehicles. Importantly it is not risk-based as it doesn't account for various risk factors associated with road freight. Primarily that of tonne-kilometres which provides a far more meaningful representation of heavy vehicle crash risk. Adam Gibson provides an excellent analysis of freight tonne-kilometres and heavy vehicle involved deaths.⁹

114. The paper provides no guidance as to how a risk-based approach will address heavy vehicle productivity or road safety.

Aspirations for a new law

115. This section of the paper would have to be the most disappointing aspect of this piece of work. It fundamentally fails to adequately articulate what each draft regulatory principle sets out to achieve and is shallow in its depth and breadth of the discussion as to how the proposed principles will overcome the present shortcomings in the HVNL.

116. This section of the paper introduces several new concepts not explored in *The problems* section of the paper. Not all the principles lack clarity of purpose but they do not provide the reader with an in-depth understanding of the intent or outcome being sought by the principles. More importantly the paper fails to explain how they will be expressed in the HVNL e.g. 'the HVNL should be responsive, flexible and readily accommodate changes to technology and business models'. The principle is more a wish list than a clear instruction to the audience or a drafter on how a risk-based regulation will incorporate such topics.

117. Below is some general guidance on effective regulatory principles:

Risk-based regulation

- Regulate to ensure that there is not an unacceptable risk of harm to safety.

⁸ <https://www.linkedin.com/pulse/productivity-squeeze-australian-road-transport-adam-gibson/>

⁹ <https://www.linkedin.com/pulse/trucks-involved-more-people-dying-i-want-know-why-adam-gibson/>



- Licensing, permits and approval decisions, including conditions imposed on approval, will be proportionate to the level of risk (likelihood and consequence) that the activity poses to safety.
- Compliance and enforcement resources and activities will be targeted at entities or activities that present the greatest risks of harm to safety.
- Enforcement action will be proportionate to the magnitude or seriousness of the potential or actual harm to safety, considering the conduct of the responsible parties.

Evidence-based decision-making

- Use the information that it holds or acquires and will require applicants to provide such technical and general information as is necessary, to inform assessment of the risks associated with the proposed activity and in undertaking its regulatory functions.
- Make informed decisions and judgments based on the best available information, noting the limitations often associated with the available evidence.

Application of Standards

- Establish Standards that set out the required levels of performance for regulated entities and activities based on the hierarchy of preventing, controlling, abating and mitigating harm.
- Developed with consideration of the costs and benefits associated with different levels of risk.
- May relate to the operation and monitoring of entities and activities.
- Applicants will demonstrate that they meet the Standards or justify how deviations from them will achieve the same or a higher level of safety.
- As a response to a risk-based assessment, safety regulation that is more stringent than generally applicable Standards may be required in circumstances to protect public safety.
- Applications for licences, permits or approvals that do not demonstrate that the risk of harm can be managed to an acceptable level will be refused.
- Safety performance beyond the Standards will be voluntary and will be encouraged and supported through non-regulatory means.

Appropriate conditions

- Licences, permits and approvals will be subject to conditions that ensure there is not an unacceptable risk of harm to safety.
- Conditions imposed on licences, permits and other approvals will be justifiable, clear and enforceable.
- Conditions will be outcome-based where practical and appropriate.
- Process and management-based conditions will be imposed where it is not reasonable or practical to set outcome-based conditions or where outcome-based conditions do not adequately address the risks to safety.
- Improvement conditions may be included to transition existing entities or activities to safety Standards or to address unacceptable risks to safety.
- Monitoring and reporting conditions will be imposed to: – validate assessment predictions and provide assurance over the effectiveness of outcome, process, management and improvement conditions; and – discharge accountability for public reporting purposes.

Fair and equitable decision-making processes

- Licensing, permits, approvals, compliance and enforcement decision-making should result in consistent outcomes under similar circumstances.



- Consistent processes will guide regulatory functions. The outcome will, however, be dependent on many variables including the circumstances of the situation, the actual or potential impact to safety, and the history and actions of the relevant parties.
- The rules of procedural fairness apply to regulatory functions.
- Determinations of applications and compliance and enforcement actions will be undertaken fairly, without bias or undue delay, and decisions will be documented and based upon findings of fact.

Engagement, consultation and transparency

- Consider all representations made in relation to public advertisements and consultation regarding licensing, permits and approval applications and decisions.
- Consult with stakeholders, and consider submissions made, in relation to proposed regulatory policies, safety Standards and guidelines.
- The process and basis for regulatory decision-making will be documented, transparent, reviewable and publicly available.

Competitive neutrality

- Safety regulation will be administered to minimise unnecessary competitive distortion between industry participants, while noting that applicants' technology, process and operation methods may require different levels of safety performance.

118. The discussion of controls is unclear as to its intent. Developing a risk-based HVNL that identifies performance-based outcomes is less prescriptive. Identifying controls in the law would be a prescriptive approach. Controls are methods applied by both entities and regulators to reduce risk of harm. Are you suggesting that these should be specified in law? What would be more valuable is a discussion about how the NTC are proposing that such controls will relate back to safety outcomes and how they will be dealt with in the law. Where might these controls be placed in the regulatory hierarchy?

119. The suggestion that the regulatory style adopted would be dependent on the type of control developed would mean that the HVNL would be spattered with three regulatory styles. Surely this would be to the detriment of regulated entities and the regulator as they could be unclear as to which parts, sections or clauses were prescriptive, outcomes or principles-based.

Regulation based on risk analysis and control

A law with the right object, coverage and scope

120. The scope of the law should be fit for purpose, if it complements other legislation and in principle it should, and they are also risk-based then the drafters have done their job. The first principle should be to achieve its objective not to being complementary to other legislation.

The right structure

121. How does the paper explore the benefits and costs of the regulatory styles to adoption of a risk-based approach? Which structure provides the best outcomes when adopting a risk-based approach and why, against a prescriptive model?

122. Where is the evidence that performance or outcomes-based styles of regulation create safer environments against the Rail Safety National Law and Work Health and Safety Act which are put up as model examples of the approach being advocated.



4. Response to Draft Regulatory Principles

Draft regulatory principle 1

123. A regulatory framework that was performance-based would allow the NHVR to utilise a variety of suitable policy, compliance and enforcement tools to administer the law, including risk-based approaches. It provides the ability to place, where necessary, more prescribed Standards further down the legislative hierarchy.
124. The problem with the OSOM example provided is that it doesn't discuss the probability of an event. This includes at a given time (hour/ week/ month/ quarter), place (road/ region/ state), load type or industry sector. Load dislodgement events are rare and even rarer do they cause catastrophic harm.
125. When undertaking an analysis of load dislodgement which factor, or combination of factors will determine risk of harm? The analysis is predicated on a highly mathematical analysis that is designed to provide a high predictability in the aggregate not the individual event. It would be very difficult to undertake a meaningful statistical analysis on many harms based on the very low number of significant events and being able to correlate causal factors to those events. On that basis would OSOM load dislodgement be considered a high-risk harm, based on a statistical analysis? I understand this will be the subject of a future paper.

Draft regulatory principle 2

126. The paper fails to discuss adequately how the current objects are not relevant and how a risk-based HVNL might improve productivity and safety. The lack of any discussion on what risks the NTC is proposing the new law will address and through adequate evidence identify good regulatory practice and what it means by improved consistency. The paper has not established how this consistency will be achieved.

Draft regulatory principle 3

127. The paper fails to discuss how the NTC intends to make the HVNL flexible, responsive and accommodate changes to technology and business practices nor what types of oversight is proposed. There are no examples provided nor an examination of what position other risk-based regulators have taken to address these issues.

Draft regulatory principle 4

128. There is no detailed discussion of the supposed diverse risk profile faced by industry or what is specifically meant by flexibility or how an amended HVNL will overcome the current perceived issues with the law.
129. The NTC does not relate harmonisation and consistency back to the risk-based approach to regulation. What is the purpose and meaning of mentioning it if they don't relate it back to the risk-based approach?

Draft regulatory principle 5

130. There are no examples provided as to what a proportional enforcement response to risk of harm in the heavy vehicle industry might look like.



131. The most significant risks are not discussed nor how the NTC propose to deal with how the amended HVNL will direct the NHVR to focus on these risks. Severity of the risk and how it will be categorised is also not discussed in terms of focus nor proportionality.

132. The cursory discussion of sanctions is not linked back to motivations about addressing offending behaviours and how they can be utilised to encourage compliance and deter further offending. There is no discussion of how adoption of a risk-based approach will result in the development of proportional sanctions. What are the proposed improvement targets to be expressed as – numbers or as a percentage of a baseline?

133. There is no discussion of the link to or alignment with the National Road Safety Strategy. In particular, how an amendment of the HVNL and the creation of performance measures should be aligned to and if not then reflect risk-based strategies and performance outcomes.

Draft regulatory principle 6

134. At no stage is it indicated what better safety, productivity and regulatory efficiency might look like by way of quantitative or qualitative analysis or in terms of performance measures or indeed how these and by whom they will be established. What will the baseline data that will be used? Will they be determined by the NHVR and through what mechanisms? Will they be in the HVNL itself? For example, will zero harm be a proposed performance measure?

135. Having good data at the disposal of regulators is essential to not only understanding and rating risk of harm but it can also enable the regulator to move into proactive engagement and education of industry to avoid the need for post incident compliance efforts. Being able to develop trend analysis capabilities is important to the continuous improvement of any safety management system and is not reliant on the regulatory approach. This should be addressed in a specific paper on data management.



5. Response to Questions

Question 1

136. The paper does not adequately make the argument that the HVNL is fundamentally flawed and requires an entire rewrite. The lack of evidence provided to substantiate the NTC's positions or a thorough analysis of the advantages and disadvantages of the proposed regulatory approach has in no way been accurate or comprehensive.
137. Every regulatory agency should be continually assessing its performance in meeting regulatory objectives and developing improvements in efficiency, productivity and safety. The adoption of a risk-based approach is something that the NHVR has advocated for some time now through its *Strategic Directions 2016* and *Setting the Agenda 2016 – 2020* documents.¹⁰
138. A significant failure of the paper is not to have discussed the implications of data on both industry and the regulator. This is particularly pertinent when discussing the use of technology by industry being accessible to the regulator to assist determine compliance and potentially discovery of non-compliance. There is no discussion of the collection, analysis, sharing and evidentiary nature of data associated with the use of technology.
139. Given the broad use and variety of technology installed on heavy vehicles is extremely diverse it raises questions about how to access this data. How does the NHVR interact with these systems? Consideration will need to be given to setting parameters around formats for accessing such data for example at roadside inspections. What other mechanisms such as self-reporting by industry might be considered and will these be in the HVNL? The reluctance of the industry to take up fatigue technology related to concerns around how the data might be utilised for compliance and enforcement purposes.
140. The consideration of appropriate governance arrangements that provides guidance (policies) on the collection, storage, analysis and use of data. This will need to include reporting and transparency requirements around access to the data by industry, researchers and other interested parties such as insurance companies.

Question 2

141. The paper provides very little analysis on the aspects of the non-participating jurisdiction approaches or comparable regulation from other sectors that would improve the HVNL – other than a broad statement that a risk-based approach is better. The paper relies on a belief that a risk-based approach will address perceived issues in the law without providing quantitative or qualitative evidence or demonstrating how better outcomes will be achieved.
142. The NHVR has actively pursued risk-based and outcomes focused approaches since being established, including:
- broad changes to both the Performance-Based Standards and National Heavy Vehicle Accreditation Schemes
 - increased focus on supply chains
 - extensive use of national gazette notices
 - conducting operations, monitoring and sharing information across borders

¹⁰ <https://www.nhvr.gov.au/files/201605-0342-nhvr-strategic-directions-2016.pdf>
<https://www.nhvr.gov.au/files/201608-0329-nhvr-setting-the-agenda-2016-2020.pdf>



- addressing consistency in enforcement approaches by developing national enforcement guidance materials.

Question 3

143. The lack of discussion about any other regulatory approaches makes it difficult to support a single approach to testing the current policy approaches (which has not been clearly identified or expressed). Why is the NTC not testing multiple regulatory approaches? Particularly given the cursory analysis of the risk-based approach in this paper.
144. The paper assumes the reader understands what risk management approach the NTC is discussing as it has not been described adequately in this paper. Principle 1 discusses briefly a mechanism for how the NHVR might translate risk-based regulation into on the ground programs, but it fails to articulate how the HVNL will be amended to accommodate controlling material risks in the heavy vehicle industry. It does not discuss the harms that it is trying to address.
145. There is substantial confusion in the paper about how to draft the HVNL to reflect addressing risk to harm (high-risk) activity and entities with the mechanisms and processes that the NHVR might (assumes this is not in place already) implement to effectively target and enforce high-risk activities and entities.
146. There has been no discussion of the current policy approach put forward in this paper. It is not clearly articulated what the current policy approach is and therefore makes it difficult to make comment in support or otherwise of this question.

Question 4

147. No, but more importantly the NTC has failed to discuss adequately what is insufficient about it at present. The NTC spoke extensively about out of scope risks but failed to articulate how moving to a risk-based approach would enable out of scope risks to be incorporated into the HVNL. Without identifying a strategy to incorporate these out of scope risks it is unfeasible to include them in the current scope and set the NHVR up for failure.

Question 5

148. National consistency should be a goal however the NTC has not indicated what level of compromise would be acceptable/ unacceptable. What would compromise extend to – the categorisation of risk of harm or to the compliance and enforcement approaches? It is not discussed.
149. In the background section of this paper the NTC put forward that compromising to create the HVNL led to inconsistency. The paper fails to address how any future drafting will overcome compromising nor how a risk-based approach will deal with inconsistency in the laws application.
150. No strategy has been proposed as to how to onboard non-participating jurisdictions, deal with derogations or to develop consistent approaches to the HVNL's application, particularly by police.
151. COAG's expectation is that the HVNL be nationally consistent. The question should be what hurdles need to be overcome to ensure national consistency with amendment to the HVNL as



risk-based regulation? What needs to occur to ensure that any future update avoids derogations, delegation of powers and enforcement approaches?

Question 6

152. Yes, moving obligations to as low as possible in the regulatory hierarchy would improve flexibility in the HVNL. However, the paper does not discuss the known inherent issue with a risk-based approach in relation to ensuring that when regulation is moved down the hierarchy that it is enforceable. If the law provides the NHVR with the ability to create Standards, codes of practice, business rules and guidelines they must be enforceable. Regulatory rule making powers will require scrutiny and oversight mechanisms to safeguard against potential regulatory abuse. These are not discussed in the paper.
153. The paper does not discuss who or how technology will be deemed as safe and/ or provide efficiency benefits to operators. What assessment or evidence will need to be offered up? What priority will be given to safety over efficiency?
154. The topic of suitable oversight has been introduced in this question and is not canvased in the paper, despite it being an inherent problem in risk-based regulation. A significant failure of the paper has been no exploration of the issues related to the implementation and ongoing management of risk-based regulation and how it will be measured.

Question 7

155. In discussing a risk-based approach it is incumbent on the NTC to articulate the data required to build an evidentiary position on which harms to address. The paper has failed to discuss this at all.
156. It is difficult to support the use of data for regulatory purposes when there has been no discussion about what type and the extent and availability of the data (particularly that owned by entities) that might be required or demanded from entities. More importantly no discussion of principles around the use of industry collected data and how it is to be shared and used for regulatory purposes or whether and how the law would (if at all) compel it.
157. The consideration of appropriate governance arrangements that provides guidance (policies) on the collection, storage, analysis and use of data. This will need to include reporting and transparency requirements around access to the data by industry, researchers and other interested parties such as insurance companies.

Question 8

158. The NTC has provided very cursory guidance as to which aspects of the HVNL present an issue on this front. Even less evidence has been provided on the impacts of such process or administrative focused regulation on industry, the regulator or the community. The papers purpose was to summarise the current state of the law it fails to do that adequately.
159. A specific issues paper is required to deal with the extensive problem of data not only in the current administration and enforcement of the law but any future approach to the HVNL. The paper failed to highlight the impact the lack of good data currently poses to the NHVR.



Question 9

160. This has not been adequately explored by the paper to make comment. The paper failed to identify the impacts the current HVNL has on diversity. It also proposes the adoption of several regulatory approaches in the development of a future law and doesn't address how this will improve consistency or harmonisation. The NTC proposes no strategy about how a risk-based approach will address consistency and harmonisation other than implying that a risk-based approach will overcome these issues. It is incumbent on the NTC to develop an issues paper on national consistency and harmonisation as it represents a significant hurdle (as it does currently) to any future law.
161. It is acknowledged that the transport task is a diverse one and this extends to the supply chain. What was not discussed in any detail was the ability or appetite of entities to manage risk in an outcomes or performance-based regulatory environment. It does not discuss the capacity of sectors within industry to invest in managing risk. Although the paper discusses that the amended HVNL may have several regulatory approaches including prescribed sections to cater for entities that may find it difficult to develop safety management systems there is no discussion about the cost benefit related to this approach nor timing around its introduction and industry transitioning to the new approach.
162. The paper also fails to deal with the significant issue of how the NHVR will manage moving between these two regulatory approaches in relation to compliance and enforcement.

Question 10

163. This is difficult to comment on given there is no discussion in the paper on the tools utilised in other risk-based regulatory regimes either locally or internationally. This could have been explored by discussion on methods used to:
- be responsive and flexible to new technology and business practices
 - have access to enforceable Standards, codes of practice, business rules and guidelines
 - have visibility of duty holders and their risk management arrangements
 - treat and manage data collection, use (including as evidence) and sharing
 - possess appropriate powers to undertake regulatory functions i.e. inspection, investigation and prosecution
 - review regulatory decisions.

Question 11

164. There is no discussion of the types of improvement that are being sought. No targets have been put forward. No guidance is provided about the current state of the measures or the progress of the NHVR in meeting them – other than a statement that it is not. The measures in the National Road Safety Strategy could have been used as a baseline.

Question 12

165. Refer to previous comments in response to the draft regulatory principles.