



Submission to the National Transport Commission

Issues Paper: *A risk-based approach to regulating heavy vehicles*

31 May 2019

Introduction

1. The National Road Transport Association (NatRoad) is pleased to make comments on the Issues Paper entitled *A risk-based approach to regulating heavy vehicles*¹ released by the National Transport Commission (NTC) in late March 2019. The Issues Paper is the first in a series that informs the current review of the Heavy Vehicle National Law (HVNL).²
2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, car carriers, as well as tankers and refrigerated freight operators.
3. This submission responds to the questions posed in the Issues Paper, after initially setting out some of the NatRoad responses to the findings in the Issues Paper, particularly the problems with the HVNL set out in Chapter 4. The responses to the problems identified by the NTC may assist to inform later Issues Papers. We indicate in bold the specific questions from the Issues Paper that we have answered.

The Problem: Consistency

4. The Issues Paper at Chapter 4 sets out the problems with the HVNL.
5. NTC notes that the law is not nationally consistent both in its geographic reach and between the participating jurisdictions. The latter inconsistency arises from the way in which the jurisdictions have enacted the law to change its provisions or to omit some of the provisions. NatRoad agrees that this is a real problem.
6. In this context, we note that the NTC states that "In addition to inconsistent application, there are varied enforcement approaches between participating jurisdictions."³ NatRoad submits that enforcement approaches within jurisdictions is also a pressing problem. Differences arise between the way the Police enforce the law compared with road authorities so that even within jurisdictions there is an inconsistent approach. NatRoad frequently handles matters for members that are based on a problematic assessment of the law by Police.
7. A recent example will illustrate the point just made. In March this year, the Police issued defect and infringement notices for a bug deflector which had been installed on the relevant heavy vehicle since purchase as a new vehicle. The notices were issued about a non-existent offence.
8. As stated, the Penalty Notice was issued in respect of a non-existent offence. Roads and Maritime Services NSW (RMS) liaises with NatRoad regularly and agrees with that assessment. RMS requested the Police to review the issue of the Penalty Notice. In that context, an extract from the RMS email to the Police is as follows (deidentified):

Attached is a defect and infringement issued to XXX Pty Ltd and the driver and this information has been forwarded to me from (name) from NatRoad to which XXX Pty Ltd is

¹ [https://www.ntc.gov.au/Media/Reports/\(36FCC036-E3B4-F885-CBE5-CB9DF08E308D\).pdf](https://www.ntc.gov.au/Media/Reports/(36FCC036-E3B4-F885-CBE5-CB9DF08E308D).pdf)

² <https://www.ntc.gov.au/heavy-vehicles/safety/review-of-the-heavy-vehicle-national-law/>

³ Above note 1 at p 31

one of their members and I have cc'd (name) into this email. The issue is related to a bug deflector attached to the front of a heavy vehicle:

ADR 42/04 and specifically ADR42.12.1 that says: Motor vehicle must not be so constructed or equipped nor must anything be affixed thereto in such a manner as to prevent the driver from having an adequate view of traffic on either side of the vehicle and in all directions in front of the vehicle to enable the vehicle to be driven with safety.

The reference to the 11m view in the defect notice comes from VSB14 which only relates to Light Vehicles and there's nothing in VSB 6 and or the Heavy Vehicle Inspection Manual which relates to the 11m view. (I have provided the link to VSB 14). From July 2019 there will be a new ADR93 and hopefully the NHVR might release an industry update on these changes. I also note that the Truck Industry Council (TIC) has a Voluntary of Practise to Ensure Adequate Field of View (at the request of Victorian Police) and in this code bug deflectors are not recommended. Can you please review the attached infringement and defect? I have recommended that NatRoad also contact the SDRO on behalf of its member and seeks a review of the attached.

9. NatRoad sought a review of the Offence and Penalty notices with the NSW State Debt Recovery Office (SDRO) in accordance with the RMS recommendation in the quoted email. That process revealed another issue with enforcement practices that show they are in need of reform. RMS has clearly stated that bug catchers are not "recommended." But their installation does not currently attract an offence. However, the relevant operator has had the expense of having the heavy vehicle defected, the defect "cleared" (by removing the bug catcher) and having the vehicle off the road whilst this process occurred.
10. Not only was this offence generated illegitimately, when NatRoad went to complete the review form electronically, the system did not recognise the penalty notice number. SDRO officers informed NatRoad that the notice was "not yet in our system." The Police had yet to indicate to the SDRO that a Penalty Notice was issued despite the fact that three weeks had elapsed from its physical issue. Therefore, NatRoad was asked to put all salient details in an online form. But that form only accepts 400 characters. Hence there was an email communication to a general SDRO inbox which was provided after a series of phone calls. Plus, if, as had been suggested by SDRO officers, NatRoad awaited the penalty to be properly referred to SDRO, there would be no indication that had occurred i.e. there would be no contemporaneous notification to NatRoad or to its member once the "system" was updated. If NatRoad awaited a reminder notice to be forwarded to the member, then the date for payment would have clicked over and any request for a review would likely be too late to avert a fine reminder and/or payment being required. Alternatively, we could have made a daily check of the upload of the system, again adding administrative time and cost.
11. Following NatRoad's and RMS representations, the infringement notice has been withdrawn. The exercise, however, epitomises the frustration that members regularly confront in the enforcement space. It also shows the administrative hurdles that members must jump and how the complexity of the HVNL has confounded the authorities, not only industry representatives. It also shows that even in circumstances of the kind described no

apology of compensation is given. Instead an email was received which inter alia said: "NSW Police considered the issues you raise and have decided to cancel the penalty notice." This attitude frustrates members as there is never an admission of error.

12. Enforcement issues are also dealt with elsewhere in the Issues Paper.⁴ That discussion emphasises that road-side enforcement is unlikely to be efficient. NatRoad agrees and questions the utility of so-called roadside "blitzes". The NSW Police appear to have a different view.⁵ The issue appears to be that a reduction in road deaths has been correlated by NSW Police with the conduct of blitzes. This is despite the recognition by the NSW Police in the report on this view as follows:

*NSW Police confirmed to ATN that while non-compliance found to be "very low", "on road enforcement activity" was a key focus of the authorities lately to ensure industry standards were maintained at a high level.*⁶

13. The attitude taken by the Police seems to be based on the classic misinterpretation of correlation as cause. NatRoad agrees with the view expressed in the Issues Paper that audit-based enforcement is a more effective enforcement approach.
14. NatRoad understands why the police decide to undertake blitzes on road safety. We have the greatest respect for the police. The tragic loss of life on the nation's roads is a problem that must be addressed. But the premise on which many such exercises proceed is flawed. This came to a head when Operation Rolling Thunder was undertaken in February 2018.⁷ The road toll is a community concern. But the heavy vehicle industry should not be painted as the enemy. The use of the name Operation Rolling Thunder for example evokes the massive bombing attack on North Vietnam undertaken by the Johnson administration during the Vietnam War. It was not appropriate as a label for enforcement operations in the 21st century. The metaphors of history should not be forgotten. As part of the media commentary on this issue Commander of NSW Police Traffic & Highway Patrol Command, Assistant Commissioner Michael Corboy said, "We simply cannot not stand by and accept that dangerous trucks are on our roads and are causing people to die." With respect, that is not the point.
15. The road toll is not going to be reduced in a context of blaming the industry for the regrettable deaths that occur on Australia's roads especially when the data shows a different outcome. The latest data, reflecting details from 2017, shows that in multi-vehicle fatal crashes, the third party driver was at fault 83% of the time. This is a slight reduction compared to 2015 data (93%). In the ten year's the relevant research organisation has been

⁴ Id at p 40

⁵ <https://www.fullyloaded.com.au/industry-news/1903/compliance-blitzes-having-positive-effect-nsw-police-says> Compliance Blitzes Having Positive Effect: NSW Police ATN 13/3/19

⁶ Ibid

⁷ <https://www.ownerdriver.com.au/industry-news/1802/anger-building-over-operation-rolling-thunder-point-scoring>

reporting this statistic, it has always been greater than 80%. In 2017, all of the third party vehicles were cars.⁸

16. Blitzes are not good long term policy responses to the road toll or HVNL compliance.
17. Enforcement is also a critical issue in the context of the new chain of responsibility (COR) laws. The way the new enforcement regime is applied is a highly important element in its success. Parties must know that enforcement up the chain is likely and therefore regulators must allocate enough resources to this aspect of the law and publicity must be given to successful prosecution of those in the chain who are not transport operators or drivers. Those prosecutions must be given publicity so that the industry is aware that prosecutions of those up the supply chain are being undertaken. Otherwise COR laws will not succeed.
18. NatRoad has taken some time to highlight issues of enforcement. This is because members give us feedback that this is one of the most pressing issues and one that needs reform attention.

The Problem: Derogations

19. A further complex case study is attached at Attachment A that also highlights difficulties for operators when the relevant notices are not placed in the offence system in a timely manner. It also reinforces inconsistent enforcement of the HVNL between agencies in the same jurisdiction. It also highlights that compliance with an Australian Design Rule does not necessarily lead to compliance with other aspects of the law. The substantive issues in the attached case study are still under consideration and we have been informed that the Police, RMS and at least two truck manufacturers met about this issue in early May 2019 but we are not aware of the outcome. The case study also highlights a further area of problems with the HVNL set out in the Issues Paper in that NSW has derogated from the principal law in respect of speed limiters.
20. The first person to review Attachment A that was not involved in the detail of the case stated that “The language seems clear, but the issue is a complete mess.” NatRoad agrees.
21. Inconsistent application of the HVNL because of, amongst other things, derogations means that the idea of a national law is set aside. Rules should not change for heavy vehicles merely because the heavy vehicle has crossed a State or Territory border.

The Problem: Too Prescriptive

22. The HVNL focusses on the safety of a heavy vehicle on a road while the harmonised work health and safety (WHS) laws cover all work-related hazards and risks. This means there is a significant overlap. Multiple duty holders with concurrent and overlapping duties are a common feature of many work activities, particularly in the transport industry dominated

⁸ <https://www.nationaltransportinsurance.com.au/supporting-trucking/2019-ntarc-report>

by supply chains. The approach set out in the WHS laws is now being applied in the HVNL, for example with the recent COR changes from 1 October 2018. There is an increased emphasis on shared responsibility and broader risk-based duties being introduced in the HVNL, a matter that NatRoad supports.

23. The WHS laws are structured so that the principal statute contains higher order obligations, with most of the prescriptive requirements set out in regulations or regulator produced Codes of Practice. This system works. The HVNL registered industry Codes of Practice, however, are not initiated by the regulator. In contrast to the better WHS system, under the HVNL, the NHVR must establish guidelines about the preparation and content of an industry code of practice that may be registered under the HVNL, per section 705 HVNL.⁹ A registered Code of Practice is one that has been developed in accordance with the guidelines and assessed as qualifying for registration by the NHVR under section 706. The current Master Industry Code of Practice¹⁰ was prepared by a joint venture company sponsored by two industry associations. Just as with WHS Codes of Practice, the Master Code may be used by a court as evidence of what is known about a hazard or risk, risk assessment, or risk control, to which the code relates; and members may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.
24. NatRoad submits that the WHS model of how Codes of Practice are developed and implemented should also be followed in the HVNL jurisdiction. This would assist with updating Codes of Practice as technology changes and other developments occur, one of the main problems with the prescriptive nature of the HVNL at present that should not be replicated in the way Codes of Practice are developed. The current HVNL system for Code of Practice development is “clunky” and relies on industry to have sufficient funds and impetus to develop Codes.
25. In addition, no matter the prescriptive elements of the HVNL, the primary duty established by s26C HVNL is to ensure, so far as is reasonably practicable, the safety of the party’s transport activities relating to a heavy vehicle. This means that an enterprise must consider its broad responsibilities in regard to safety duties, a matter that is appropriately guided by the regulator. Currently, compliance with prescriptive HVNL requirements does not necessarily equate with meeting the broad safety duty and is not even equated with being safe. This proposition is particularly pertinent in the context of fatigue related offences under the HVNL which are in large part based on administrative issues that do not directly relate to the notion of driving whilst impaired. NatRoad would prefer that prescriptive requirements are minimised in the law and only included where essential to meet the broader duty. But clearly framed only to meet that intent. In this context, we prefer the Western Australian fatigue regime to that under the HVNL.

⁹ <https://www.nhvr.gov.au/files/201807-0460-industry-codes-of-practice-guidelines.pdf>

¹⁰ <https://www.nhvr.gov.au/safety-accreditation-compliance/industry-codes-of-practice/master-industry-code-of-practice>

The Problem: Paper Focus

26. As indicated in the Issues Paper, changes to technology occur more quickly than changes in the prescriptive requirements of the HVNL as primary legislation. One of the ways to deal with that issue is to have in place a system of regulations and Codes of Practice as mentioned earlier in this submission.
27. With the introduction of the registration services module on the NHVR Portal¹¹ there exists the sort of computer database that would be accessible to the Police and other enforcement agencies that could set out approvals, permits and relevant accreditation status. This should be planned to supersede any paper system. We also note that because State and Territory transport authorities manage and administer transactional heavy vehicle registration services under a yet to be fully harmonised system, this area of the law is also crying out for reform. The decision to have a heavy vehicle national plate without the underlying administration relating to heavy vehicle registration being vested in the NHVR was puzzling and something which detracts from having a truly national registration system.

The Problem: Focus on Administration

28. NatRoad supports a move away from the approach of mere compliance with specific rules; the newly framed HVNL should be concerned with the management of risk. This is especially the case with the fatigue management provisions of the HVNL which contain a vast array of highly prescriptive elements, many about mere administration, but which do not lead to the identification and control of impairment based on being fatigued.¹²
29. A risk-based approach to regulation enables a regulator to tailor regulatory responses so that they are commensurate with the relevant risks. It is a useful approach where the regulator has a large number of regulated entities to oversee, resourcing is limited and, consequently, prioritisation may be difficult. This contrasts with the style behind the “blitzes” mentioned earlier that may target a number of vehicles on the roadside at a particular point in time but which do not, we submit, lead to systemic change.
30. NatRoad appreciates that the NTC has published the provided NatRoad case study on fatigue record keeping that is in large part unrelated to real risks of fatigue.¹³ The current reliance on prescriptive work and rest hours and on-road enforcement using work diaries is not the most effective way to manage fatigue. The current law can lead to a perverse outcome of being compliant but not always safe. It also adds to the perception that enforcement of the law has little to do with reinforcing the objects of the HVNL but more to do with revenue raising, as illustrated in the published NatRoad case study.

¹¹ <https://www.nhvr.gov.au/road-access/registration/nhvr-portal-registration-services-module>

¹² But note the Cooperative Research Centre for Alertness, Safety and Productivity (Alertness CRC), in partnership with the National Transport Commission (NTC), is conducting field research to analyse the impacts of the Heavy Vehicle National Law (HVNL) on work and rest hours on heavy vehicle driver fatigue: [https://www.ntc.gov.au/Media/Reports/\(6F28129B-4CF2-14EB-78E6-BB981C0BD38A\).pdf](https://www.ntc.gov.au/Media/Reports/(6F28129B-4CF2-14EB-78E6-BB981C0BD38A).pdf).

¹³ Above note 1 at p 35

The Problem: Law Unresponsive and Change Difficult

31. The HVNL is unresponsive and difficult to change. By way of example, NatRoad for some time has been concerned that in the HVNL there is no clear guidance on compliance with driving hour requirements when transitioning between solo and two-up driving and back again. The issue appears to be one where if moving from two up driving to solo, enforcement agencies treat the two up hours as solo hours for subsequent calculations. This matter was referred to the NHVR and to the NTC by NatRoad, seeking a solution.
32. The NTC proposed amendments to the Fatigue Management Regulation¹⁴ to allow drivers transitioning from a two-up to a solo driving arrangement, to take a 7 hour rest break in an approved sleeper berth of a moving vehicle. The NTC's view was that the proposed change would incentivise two-up driving and provide a productivity benefit. Given that the Fatigue Management Regulation already allows two-up drivers to take 5 hour rest breaks in a moving sleeper berth, the NTC's view was that amendments to allow transitioning drivers to also rest in a moving sleeper berth did not present a safety risk. Jurisdictions did not agree, stating that changes to fatigue management provisions in the HVNL and regulations should be dealt with as a part of the HVNL review.¹⁵ In NatRoad's view this lacuna should have been dealt with speedily and changes to the law made. That did not happen, and the law remains deficient. Why the delay was proposed is unclear. This matter should be resolved as soon as possible.
33. The Intelligence Access Program (IAP) came under particular fire when NatRoad was seeking member feedback about how the HVNL was non-responsive. Two main issues were that IAP does not deliver first and last mile access and the IAP approach is more about asset protection than it is about providing greater productivity gains for the industry. In that regard it is seen as too expensive with technology that is imposed for little benefit. It is an example of technology not being market driven and therefore a scheme which has failed.
34. The Productivity Commission cited the following case study in its report on the regulation of agriculture¹⁶ relating to IAP which resonates for members:

(A) vertically integrated horticultural business based in Shepparton, Victoria, operates a fleet of heavy vehicles transporting fruit from their packing shed to a number of interstate wholesale markets and supermarket distribution centres. Their B Doubles [under Victorian laws] are able to operate up to a 68[.5] tonne gross vehicle weight ... However, to access the Brisbane Market and Brisbane distribution centres the trucks must use NSW roads, and the NSW State regulations stipulate that without operating the Intelligent Access Program (IAP) the maximum allowable weight under the Concessional Mass Limit (CML) is 64.5 tonnes.

¹⁴ Heavy Vehicle (Fatigue Management) National Regulation
<https://www.legislation.qld.gov.au/view/pdf/inforce/current/sl-2013-0078>

¹⁵ See NTC HVNL Fatigue Issues Consultation Report July 2018
[https://www.ntc.gov.au/Media/Reports/\(93AAC9E7-9CF8-2882-2A0F-8732DBBEA1FF\).pdf](https://www.ntc.gov.au/Media/Reports/(93AAC9E7-9CF8-2882-2A0F-8732DBBEA1FF).pdf)

¹⁶ <https://www.pc.gov.au/inquiries/completed/agriculture/report/agriculture.pdf>

Consequently, all trucks departing Shepparton to either NSW or Queensland must use the lower maximum weight of 64.5 tonnes, which reduces efficiencies and sales volumes, and adds to both costs and extra vehicles on the roads ... to gain the higher 68 tonne permit for NSW the company would have to invest in additional hardware and systems in order to comply with the requirements of the NSW IAP. Investment of this kind is seen as wasteful and duplicates the costs already invested to achieve Victorian Accreditation.¹⁷

The Problem: One Size Fits All

35. There is no doubt that regulations made for larger enterprises under the HVNL are often challenging for smaller operators. We agree, however, with the comment that the HVNL does not resolve the tension between certainty by way of prescriptive requirements and the adaptability of performance based requirements. We also agree with the comment in the Issues Paper that “The HVNL seems to have a bet each way, forcing all operators and regulated parties to run a safety management system in a prescriptive regulatory environment.”¹⁸
36. NatRoad has proffered the solution contained in the WHS law. Prescriptive solutions are available through regulations or regulator developed Codes of Practice where an enterprise does not wish to introduce a far-reaching performance based solution but seeks specific guidance on how to comply with the WHS law. This model should be emulated in a revised HVNL.

Problem: The Law is not Risk-Based or Proportionate

37. The proposition the HVNL is neither risk-based or proportionate is best illustrated by two examples. The first relates to the heavy vehicle recovery sector, an example that also shows how over-regulation is rampant. The second to the requirement to keep a work diary.
38. First, the HVNL regulates heavy vehicle recovery vehicles to some extent e.g. for an access permit.¹⁹ Yet there is a plethora of other State-based regulation that applies to this sector, as communicated to an officer of the NTC by email on 21 March 2019. That regulation is inconsistent and overlapping. It is far from optimal and not risk-based. The HVNL requirements add to rather than detract from this State-based legislation and the consequences of breaching the State-based regulation far outweigh the mischief sought to be regulated. Further, in NSW the sector is not governed by RMS NSW but by NSW Fair Trading. This makes it more difficult to deal with regulators and has resulted in confusion about licence requirements following different policy stances being taken by Fair Trading from that taken by RMS when jurisdiction transitioned from 1 July 2017.
39. The issue that is of most concern that has manifested itself in NSW recently relates to the meaning of “tow truck” in section 4 of *Tow Truck Industry Act, 1998 (NSW)* (Tow Truck Act)

¹⁷ Id at p 353

¹⁸ Above note 1 at p 38

¹⁹ <https://www.nhvr.gov.au/road-access/access-management/applications/tow-truck-permit>

and the broad definition of “motor vehicle” which, under that Act, includes a trailer. Consequently, the Tow Truck Act can be interpreted to apply to a wide range of trucks and trailers used to transport equipment and therefore unintentionally captures businesses outside the vehicle recovery sector. These definitions are also inconsistent with the meaning of “tow truck” and “motor vehicle” in the HVNL. Fair Trading is now applying a strict interpretation of the poorly drafted Tow Truck Act and requiring members to be licensed who do not operate businesses that the Tow Truck Act is established to regulate. Fair Trading is requiring them to get a costly licence that has nothing to do with risk management or the objects of the Tow Truck Act.

40. Secondly, the example of the requirement to keep a work diary under the fatigue management laws being “confused” in the HVNL is supported. Harsh sanctions for administrative errors in a work diary are inappropriate as a means to better regulate driving whilst fatigued. The correct completion of a work diary does not guarantee that a driver is fit to drive just as administrative errors in a work diary are not evidence that a driver is unable to drive safely or is fatigued.

Problem: The Law Has Not Achieved its Original Goals

41. We are aware that the Australian Trucking Association (ATA) has commissioned Deloitte Access Economics to prepare a report that sets out the economic benefits to the Australian economy of introducing a set of policies that promote efficiency and consistency in the regulation of heavy vehicles.²⁰

42. We understand that report has been available from 5 April 2019. We commend its findings.

Question 1: Have we covered the issues with the current HVNL accurately and comprehensively? If not, what do we need to know?

43. The answer to this question is yes. However, having said that, part of the rationale for the comments made under the above headings for each identified problem area is to inform the NTC of issues where we believe greater emphasis in the review should be made. This is particularly the case with respect to enforcement. It is also the case in respect of fatigue management which is a principal area that needs an overhaul. There is also a need to consider a referral of powers from the States to the Commonwealth so that the law is applied consistently as a result of the enactment of Commonwealth legislation, a matter not raised in the Issues Paper.

Question 2: What does the current HVNL do well? What should we keep from the current law? What do non-participating jurisdictions’ regulations, or comparable regulations from other sectors, do better than the current HVNL that we might incorporate in the new law?

44. NatRoad raised with a number of members the question of what the HVNL currently does well and what should be retained. Not one item of the law in its present form was

²⁰ <https://www2.deloitte.com/au/en/pages/economics/articles/economic-benefit-improved-regulation-australian-trucking-industry.html>

considered worthy of retention. Members have told us that the HVNL is a law that has little utility. We will be better able to answer this question in the context of the topics that will be explored by the NTC in subsequent issues papers.

45. We refer to the comments made about the three layers of regulation under the harmonised WHS law made earlier in this submission. The harmonised WHS law is much better as a scheme of regulation than the current law relating to heavy vehicles.

Question 3: Do you support using the proposed risk management approach to test current policy and to develop and test policy options? How can the proposed approach be improved?

46. A risk management approach has been introduced into the HVNL currently via the COR provisions that came into force on 1 October 2018. The approach has been misconstrued by a number of enterprises up the chain. Members have alerted us to concerns about customers up the chain using COR as a means of getting information and applying excessive audit requirements. This issue was recently given coverage in the media²¹ where the NHVR said that it had received “several reports of unnecessary pressure to disclose additional information from larger customers beyond that required under the current provisions.”²²
47. This misuse of power has made many members wary of the COR laws and the approach represented. Where there is a risk-management approach applied, it would also be useful for Codes of Practice or other instruments to have provisions that guided members who are looking for a prescriptive solution to comply with the law. Accordingly, a risk management approach can work well for smaller operators if there is an alternative prescriptive approach established in the law, albeit that a proactive safety management system is the optimal means to comply with safety duties.

Question 4: Does the object or scope of the HVNL need to change? If so, how?

48. The scope of the HVNL should change. NatRoad believes that all heavy vehicle specific road rules should be placed in the revised HVNL. There are road rules which are specific to heavy vehicles that would be better placed in the HVNL. By way of example, we refer to Road Rule 127.²³ This rule relates to minimum following distances between heavy vehicles. It is highly prescriptive. It differs from the more preferable test in Road Rule 126 which is that a safe distance behind a vehicle is a distance in which a driver can stop safely. Performance based tests of this kind are more appropriate to a system where technology may intercede to make the prescriptive distances in the Road Rule a nonsense e.g. with platooning. The road rules need to cater for light vehicles with separate regulation for aspects of heavy vehicle driving being better placed elsewhere. This requirement will become more pressing when technology advances so that there is an even greater schism between the engineering fundamentals of the two sectors.

²¹ https://www.fullyloaded.com.au/industry-news/1904/nhvr-moves-against-customer-cor-overreaction?utm_source=Sailthru&utm_medium=email&utm_campaign=ATN%20eDM%2001%2004%202018&utm_term=list_fullyloaded_newsletter

²² Ibid

²³ http://www5.austlii.edu.au/au/legis/nsw/consol_reg/rr2014104/s127.html

49. We refer to the submission NatRoad made to the NTC about driver distraction.²⁴ We reiterate the point made in that submission that development of different approaches to regulation relating to driver distraction for light vehicles when compared with heavy vehicles should be a priority. We reinforce the submission there made that the regulations relating to driver distraction for heavy vehicles would best be placed in the HVNL.
50. In turn, ideally driver licensing inconsistencies for heavy vehicle licensing should be regulated nationally under the HVNL. The defects in the current system have been well articulated by Austroads.²⁵ The HVNL should contain consistent and better formulated licensing requirements. Establishment of mandated training time and the substance of driver training should be set to ensure a minimum standard of skill development. An approach that recognises competency rather than time served in a lower licence class must be introduced.

Question 5: Do you agree that national consistency is a goal that we should strive for, acknowledging it may mean compromise for participating and non-participating jurisdictions alike to be nationally agreeable?

51. This question is not able to be answered definitively. NatRoad values national consistency. But not at any cost. Each reform proposed should be weighed against whether it will assist the productivity, safety and efficiency of the industry. Rules that were nationally consistent but detracted from these goals would not be viewed favourably.

Question 6: Do you agree we should simplify the law by placing obligations as low in the legislative hierarchy as we can? How do we balance agility and flexibility in the law with suitable oversight when deciding where obligations should reside?

52. As indicated earlier, NatRoad would support the three-tiered approach adopted for the harmonised WHS law. The structure used in that context permits agile changes in approach to be made via updates of or new Codes of Practice or through regulations.

Question 7: How do we encourage the use of technology and data for regulatory purposes? What do operators, regulators and road managers need or want?

53. Operators will continue to introduce technology that assists them in their business. Where the installation of that technology also has the ability to meet performance based criteria then they should be given the freedom to use the technology to that end. If an operator is, for example, satisfied that a fatigue monitoring system they have installed in heavy vehicles acts appropriately to ensure that drivers do not drive whilst fatigued then the law should be sufficiently flexible for those operators to act on that proposition. So long as the operator has objective evidence that the technology is able to effect the particular performance

²⁴ <https://www.ntc.gov.au/media/1940/ntc-issues-paper-developing-technology-neutral-road-rules-for-driver-distraction-warren-clark-national-road-transport-association-natroad-feb-2019.pdf>

²⁵ Report accessible here <https://roadsafewestgate.org.au/review-national-heavy-vehicle-driver-competency-framework/>

requirement then the law should not be concerned about the means but about the ends i.e. the meeting of the standard.

54. Technological innovation should not be stifled by the rewrite of the HVNL. The way that the fatigue management law clings to the written work diary is an example of where there would be a better focus on the outcome required and much less focus on the minutiae of keeping diaries and recording entries in a pedantic and strict manner. It is these laws that in part have forced a very large volume of resources towards maintaining a system that is outmoded rather than focusing on controlling the risk. So, the answer lies in introducing technology neutral laws that permit operators to use technology to meet performance-based targets. This is a polite way of saying that Governments should stay out of the way as much as possible when it comes to the use of technology. The law should support and be able to adapt to various technological solutions. There should be no repeat of IAP where expensive technological solutions are imposed on operators for little benefit.

55. In more scholarly terms, the following has been said:

(W)hile the solution will sometimes be 'technology regulation' in the form of restrictions on particular products or particular processes, this is not always optimal from a design perspective. We need to think more broadly about how to regulate to protect values and minimise harm in light of an evolving socio-technical landscape rather than simply asking how technology ought to be regulated.²⁶

Question 8: What areas of the current law are particularly problematic because they are process or administration focused? Can you detail the impacts?

56. There are a large number of offences under the HVNL with a range of penalties and infringements. The NHVR produces a summary document of the penalties and infringements that is 27 pages long.²⁷ Together with breaches of the road rules and the fact that most offences are strict liability, the cost of these penalties is often considered a cost of doing business because they are often pedantic or unrelated to "real world" risk. The penalty amounts are indexed.

57. The way in which the law is enforced, and many aspects of its pedantic application engenders cynicism in members, especially when tied with difficult enforcement processes as explained in the context of the discussion on enforcement in this submission. This phenomenon has been described thus:

(P)rescription can give rise to a compliance mentality on the part of employers, which, paradoxically, may be detrimental to safety. The point is that some employers may seek to comply with the letter of the law without any real sensitivity to the risks that these rules are

²⁶ Lyria Bennett Moses, "How to Think about Law, Regulation and Technology: Problems with "Technology" as a Regulatory Target" (2013) 5(1) Law, Innovation and Technology 1-20 at p 18

²⁷ <https://www.nhvr.gov.au/files/201812-0956-hvnl-penalties-and-infringements-2018-19-dec-update.pdf>

*designed to control. Such employers are not motivated to find more effective or efficient ways of controlling risk. In short, prescriptive rules can discourage innovation in risk management.*²⁸

58. The entire prescriptive regime with penalties that are indexed every year is seen by members as a hindrance rather than a framework within which their businesses might thrive. The regime is also viewed as a massive disincentive to recruitment of drivers and others who suffer from pedantic but costly fines for minor record keeping or other minor offences.

Question 9: How could the law regulate heavy vehicles in a way that accommodates diversity, while retaining consistency and harmonisation across Australia?

59. The WHS laws again provide an appropriate model in this context. The range of diverse risk profiles that the WHS laws govern shows that this model may be used to deal with the issues confronting the heavy vehicle industry.

Question 10: In a broad sense, what tools do the regulator and enforcement agencies need to respond appropriately to compliance breaches? What recourse and protections do regulated parties require?

60. Part of draft regulatory principle 5 in the Issues Paper is that “enforcement decisions must be able to be reasonably challenged.” At present this is difficult. Not only are most offences strict liability but they must be challenged in court or a plea in mitigation made in a court where, for example, the event occurred during a journey e.g. a number plate became obscured because of a collision with a kangaroo. These pleas are costly because even though the penalty might be reduced, the member must pay court costs and/or lawyer’s fees. These latter costs are likely to exceed the original penalty amount fuelling cynicism about enforcement and reinforcing the perception that the heavy vehicle industry is a revenue cash cow. An independent early review process should be established so that paying up or going to court are not the only lose/lose options.
61. The regulator and enforcement agencies above all need a consistent and well expressed education course that ensures enforcement is conducted in a consistent and professional way. The course should be developed with industry input. The contents of that course, as with the National Heavy Vehicle Inspection Manual, should be made public so that, for example, offences relating to motor vehicle standards are able to be assessed transparently.

Question 11: How can the new HVNL help to improve safety, productivity and regulatory efficiency?

62. First, the legislation should be modelled to the extent possible on the harmonised WHS law.

²⁸ Hopkins A New Strategies for Safety Regulators: Beyond Compliance Monitoring National Centre for OHS Regulation (2005) p5 http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/WorkingPaper_32_0.pdf

63. Secondly, a new enforcement regime with an initial independent review system of offences must be introduced.
64. Thirdly, those who enforce the law, including the Police, must have passed the education course mentioned earlier.

Question 12: Do you agree with the six draft regulatory principles? If not why? Are there other principles we should consider?

65. The regulatory principles are agreed save for where in Draft principle 2 it is said that the law should be “nationally agreeable and set us on a path to improved consistency.” NatRoad would like this to be altered to read “that introduces national consistency.”

Case study of enforcement – Police and Road Agency Discrepancies

Two new Kenworth trucks K200s were purchased from a dealer in rural NSW. The operator ran a new combination prime mover and refrigerated trailer. The prime mover tyres were Michelin 305 drive tyres, and these are low energy tyres which assist fuel consumption. They also assist with an anti-drag feature. They also added an auto shift road ranger, 18 speed and 3.73 differentials on the prime mover. This was to get the revolutions down as low as possible at 100km per hour as a fuel reduction measure. 1450 revs were considered by the operator to achieve this aim. The revolutions per minute (RPMs) are an indicator of the setting of the truck's required speed limiter.

One effective solution to prevent speeding in heavy vehicles is to equip them with a road speed limiter system, which restricts maximum road speed to the required speed limit without loss of engine power. This is realized by limiting the required fuel demand according to a set speed limit. The maximum speed limit is set using an electronic control unit or via gearing.

Vehicle Standard (Australian Design Rule 65/00–Maximum Road Speed Limiting for Heavy Goods Vehicles and Heavy Omnibuses) 2006 sets out a maximum road speed capability limited by selection of drive train gearing calculated by the formula appearing in this ADR. More likely for a heavy prime mover is the use of a road speed governor in accordance with this ADR.

An engineer operating in the industry has said that the nub of the current issue is that “ADR compliance theoretically allows a maximum of 103.3 km/h as being compliant, whereas with road rules (HVNL) 100km/h is 100 km/h.”

Trucks were purchased and registered on 19 October 2018 and 21 October 2018 respectively. One truck was randomly inspected on 20 March 2019 at Tarcutta heading north to Sydney and a defect notice dated 20 March 2019 was issued. The defect notice indicated that the defect was major and said the defect was the engine being non-compliant and permitted the vehicle to reach a speed 101.4 km per hour and needed to have the motor set at 1480 rpm to comply. The vehicle was taken immediately to the selling agent and was immediately rectified. The clearance was produced at Marulan heavy vehicle check-in station and inspected as compliant by Roads and Maritime Services NSW (RMS) on the same day.

RMS couldn't clear the defect formally as the Police had not entered the defect notice in the compliance computer system, albeit that the truck was considered compliant by RMS officers as evidenced by a clearance stamp. The next day the company CEO sought to register 2 trailers and checked on the status of the defect notice in the NSW compliance system at an NSW Services Centre in Young. A staff member sought to clear the clear defect but found that the defect was not in the system. Service NSW entered the defect into the system but could not lift it because it required a station number, and none was evident on the police notice. Defect could not be cleared. The staff member could not contact the Marulan check in station, and neither could the operator. Nothing further could be done.

The truck was in Sydney at this point and the operator was concerned that the defect had not been lifted. This meant the operator was required to divert one of his other trucks to Marulan to directly obtain the details that were needed for the computer system to recognise the clearance process.

Meanwhile the second truck was sent to the dealer for rectification of the rpm setting reduced from 1500 rpm to 1480 rpm to the Police required level.

Truck left dealership and continued on its way to Melbourne. Truck was intercepted at random at Yerong Creek by the Police. Plugged into engine management which showed engine was set @ 1480 rpm. and said that setting should be 1450 rpm and that they were going to issue a defect.

The driver was aware of what had happened with the truck and spoke with the officer and explained about the other truck.

The driver was given a verbal formal warning and told that the 1480 rpm was incorrect (based on the actual tyre size) and the engine rpm should be set at 1450 rpm. The driver explained to inspectors what had happened with the other truck as it had been intercepted the previous day, defected yellow sticker applied and directed to have engine RPM reduced from 1500 rpm to 1480 rpm. After some deliberation it was realised, they had used the wrong tyre size.

A copy of the defect notice and clearance certificate is attached.

The operator said to NatRoad: "We now have to go back to the dealership with both trucks to engine RPM adjusted to 1500,1480 or 1450. It appears nobody in authority knows.

"By my calculation 1450 rpm is the correct setting, but if it is not the same setting as police & RMS have it is considered to be a defect even if the truck is travelling at less than 100 kms/hr.

"We have had this happen in the past where truck was set lower than 100 kms/hr but because Police didn't have the ability to recognise that RPM setting was for less than 100 kms/hr.