

**Submission to the National Transport Commission review
of the National Heavy Vehicle Law**

Issues Paper 1: A risk-based approach to regulating heavy vehicles

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The National Transport Commission (NTC) has produced an Issues Paper on A risk-based approach to regulating heavy vehicles as part of their review of the National Heavy Vehicle Law (NHVL). The paper outlines potential regulatory models and poses twelve specific topics for feedback.

Our response to the Issues Paper is informed by our research expertise in safety. We have been conducting research into road freight transport safety since the late 1980's and early 1990's (when the first pilot alternative compliance program, the forerunner to the current risk-based Alternative Fatigue Management regulatory option in the NHVL, was being developed by the Road Transport Forum in Queensland).

In reviewing the Issues paper, we feel some general comments are needed about the current review of the NHVL and issues raised in the NTC paper regarding safety. The Issues Paper discusses regulatory options but reports little supporting data. This raises two issues. First, good regulation (regardless of the model) and enforcement requires good data which are still limited. (It is a sad indictment that after 30 years, we are still asking for adequate industry data to support evaluation of policy and regulation.) Second, without reporting evidence, the Issues Paper makes no compelling case for any particular regulatory approach.

NTC Review Questions

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

Not entirely. The Review does not include an assessment of the performance of the NHVL in meeting the objective: "manages the impact of heavy vehicles on the environment, road infrastructure and public amenity" (p.13). These impacts are important and must not be omitted from any assessment of how the current law has performed and how any, less prescriptive regulatory model might perform. The impacts of heavy vehicle use (including impacts on carbon emissions, noise, and other forms of environmental pollution, health and amenity) need to be included as costs in any safety, productivity and efficiency assessment.

Furthermore, the Review tends towards sweeping generalisations about the NHVL which are not actually supported in reality. These tend to weaken the argument for the need for change. This includes:

- NHVL is not risk-based – this is not true for a number of parts of the law. For example, Fatigue risk management law which includes the Advanced Fatigue Management tier is risk based
- NHVL is prescriptive and inflexible – this is not true for the entire suite of regulations, as the review demonstrates in Figure 13.
- NHVL is challenging to administer enforce and comply – this claim begs the question: relative to what? Prescriptive rules are significantly easier to administer, enforce and comply with as they are clearly specified. Risk-based regimes are much more difficult to manage in practice as the target of enforcement and compliance is less clearly specified. For example, there were some difficulties with administering and enforcing the AFM tier of Fatigue Management law. In the risk-based approach, enforcement can be managed through targeting specified outcomes, such as large fines for crashes and fatalities, as occurs in WHS law. However, this has the significant disadvantage of being too late, occurring after the consequence has already occurred. Compliance and enforcement is much better aimed at eliminating or controlling the threats in a risk-based approach.

Overall, the issues raised in the review regarding the current NHVL relate almost entirely to how the law has been *managed* rather than to the nature and content of the laws themselves. For much of its lifespan, the NHVL has not been implemented as envisaged. In large part this has been because the National Heavy Vehicle Regulator (NHVR) was significantly under-resourced at inception and as a result has been unable to enact its functions fully. To initiate a review under these circumstances is questionable because, a priori, it cannot provide a genuine test of the efficacy of the law but merely a test of its implementation which is known to be compromised.

This means that it has not been possible for the HVNL to achieve its original goals, not due to poor specification of the HVNL regime, but because of the lack of opportunity to implement it properly. A major concern with the current NHVL review, therefore, is that the timing is poor. There is a danger of ‘throwing the baby out with the bathwater’. Implementation needs attention, not necessarily the law itself.

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?

An evidence-based review is needed to answer with confidence the Questions relating to how well the HVNL is performing and how well in comparison with non-participating jurisdictions. Certainly, the answer should not be based only on a popularity contest from submissions to an Issues paper as this would not reflect the experience of all players.

The basic structure of the Safety duties embodied in the law relating to shared responsibilities, primary duties and the relationship between HVNL and WHS law lay down important benchmarks for safety and should all be retained.

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?

It is not clear how the Risk Analysis method will be implemented to develop policy. This makes it impossible to assess the value of the method. To the extent that risk profiles vary across the road transport industry, it is not clear how the review will ensure that all risks are weighed appropriately for all subgroups to ensure the result is suitable for those who are more likely to experience the risks? Some type of representative sampling of operations and drivers would be needed to ensure the process was valid. More generally, the Risk Analysis approach will require comprehensive data on risks, controls and outcomes.

In addition to having data, assessment of risk requires a decision on the point at which the risk is judged as too high to be tolerated. An issue with the description of this method is that the risk appetite and tolerance will be a consideration. However, it is not clear how the risk appetite and tolerance of parties outside the industry (e.g., other road users) will be included in a determination of what is acceptable coverage for the legislation.

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

Not necessarily, and certainly not the whole HVNL. It is likely that some specific aspects of the law would benefit from considering changes and these should be considered in the intended reviews of specific regulatory areas and regulatory style. Any proposed changes to the object or scope of HVNL need to be well supported by evidence.

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?

National consistency is an appropriate goal but it should not be the overarching goal of HVNL. Objectives of safety, management of the impact of heavy vehicles, productivity and efficiency and innovation are all more important. Although when portrayed on a map of Australia it looks like current coverage of HVNL is limited (eg., Figure 11), this is misleading. Non-participation applies to relatively small numbers of heavy vehicles and transport companies because of the sparse distribution of population in WA and NT than in the participating regions. Furthermore, relatively few drivers and heavy vehicles cross between regions on a regular basis. The national consistency problem is much less than portrayed in the review.

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?

Moving specific legislative requirements from higher to lower level legislative instruments will have the administrative benefits of making it easier to change specific requirements in the face of new knowledge and technology. However, the consequences of restructure the law in this way could be good or bad, so the decision should be taken cautiously. There is less risk that important requirements can be watered down if they are in higher level instruments and less likelihood that differences between jurisdictions will increase over time (which might occur if lower level instruments can be unilaterally amended or adopted). For this reason, serious consideration should be given to retaining safety requirements at a higher level in legislation as a precaution against compromised safety outcomes. In this regard, the incorporation into legislation of notes about the intent and interpretation of clauses could improve consistency of application of higher level laws.

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?

Data is the life-blood of any regulatory approaches. Without good data is not possible to know what are the problems, why they occur and whether the strategies you use really are effective. Good data collections are essential for managing and planning strategy to achieve the goals of HVNL.

Technology may be useful where it assists drivers, or provides information to operators or road authorities that they need to improve safety and productivity however technology per se is not necessarily useful. We need to encourage use of technology only where it can be demonstrated to be of added benefit.

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

The evidence-based review of the HVNL described in response to Question 2 could also reveal which aspects of the current law could be made less process-oriented or administratively difficult. As described earlier, many of the process and administrative problems with the HVNL are due to the implementation of the law rather than the law itself. For example, where individual officers from road authorities focus on applying penalties for minor errors in work diaries, the objective should be to work with these organisations to ensure that the targets of enforcement must be the higher priority outcomes specified in the regulation (rest taking compliance) not minor process or administrative issues.

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

With regard to the regulatory approaches of prescription, performance or principles described in section 2 of the Issues paper (page 24) that ‘deliberate use of all three regulatory approaches rather than an imbalanced reliance on one is likely to deliver better overall outcomes’. This means that we do not agree that a focus only on simplification of law is the best approach. In contrast, we think that heavy vehicle law needs a very balanced view of the options for achieving the most important primary objective of safety.

Any further move to “principles-based” regulation is likely to increase the compliance burden on smaller operations that have limited administration staff and resources. As the Issues Paper makes clear, these are the majority of operators in the industry. To adequately incorporate their concerns, the review should ensure that the number of smaller operators making submissions is in proportion to their representation in the industry. To do otherwise will result in conclusions and regulation that favours larger industry stakeholders whose concerns and capabilities are likely to be quite different. The fact that the needs of smaller and larger operators differ has been grappled with previously in the area of fatigue regulation, where the result has been to offer a choice of regulatory options with different levels of prescription. Under less prescriptive regulation, high quality, clear, comprehensive and easily-accessible guidance materials on acceptable controls become vital.

On the issue of diversity and harmonisation in the law, any moves to remove derogation by implementing the least demanding regulation could produce the least effective regulation, so considerable care would be required if this were pursued. It would be preferable to aim high than low and so trying to achieve complete consistency might not be the best outcome. In addition, there is no guarantee the non-participating jurisdictions would start to participate in the NHVL in any case.

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?

The tools of enforcement require valid information to agencies that a compliance breach has occurred. These differ depending on the specific regulation in focus and where enforcement occurs. Mass and dimension breaches can be fairly easily assessed on-road using current tools. Fatigue risk management regulatory breaches are more difficult to assess. We have seen the extensive debate over log book Vs EWD approaches where there are advantages and disadvantages of each as on-road tools. The Advanced Fatigue Management tier of the Fatigue component of the HVNL has transcended the need for such on-road tools, being replaced by operator audits. The effectiveness and adequacy of such audits for determining compliance should be addressed by the NTC review.

With valid enforcement of compliance breaches it should not be necessary for regulated parties to need protections. Nevertheless, if enforcement officers extend their power beyond the specific objective of the law, it must be possible for regulated parties including drivers and anyone in the transport chain of responsibility to challenge the validity of these breaches without fear of recrimination.

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

One of the major issues in implementing a risk-based approach is that requires assessment of risk. As discussed above, this demands analysis of risk using good quality data. Small operators are unlikely to have the resources to do such analyses so a role for road and workplace health and safety authorities will be to provide such information to the industry.

In many other areas (eg., WHS, health care) the risk approach often calls up a decision when risk is 'as low as reasonably practicable' (ALARP). The ALARP decision attempts to balance the level of risk with the cost (time, effort, money) of taking action. Fundamentally, whatever principle is used to make decisions about when (and how) to act to manage risk, the objective is to achieve the outcomes specified in the HVNL. The tolerance for acceptable risk is likely to vary between parties with an interest in the decision-making and this will present a problem for implementing the risk-based approach.

The safety objectives of the HVNL will be of particular concern here due to often major consequences of heavy vehicle crashes for loss of life and environmental damage. If the new HVNL was to become risk-based, there is a strong argument for risk assessment to adopt the Precautionary principle which has been adopted in other safety critical areas. The Precautionary principle is applied in circumstances where the evidence indicates plausible risk but evidence on the level at which action should be taken is not clear. This principle highlights the social responsibility to act to protect the public (in this case road users) from exposure to harm when risk is credible rather than not acting. The protections can be loosened if evidence becomes available of no harm. This means that the risk of harm should be anticipated rather than responding to the negative consequences of a failure to manage risk. The Precautionary principle would be an advisable basis for risk assessment for the proposed new HVNL to ensure safety.

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

The draft principles are feel-good, but there will be difficulties in achieving them in practice especially as a number of them inherently compete. Flexibility and responsiveness, for example, conflict with standardising or harmonising across jurisdictions or sectors of the industry. The order in which they are listed does not reflect the importance or hierarchy of the objectives. In our view, the order should reflect the most important principles first: delivering the better outcomes of safety, productivity and efficiency and targeting the most significant risks. The other principles should be seen as additional attributes of this regulation which may be achieved if the primary principles are met first. This means that some aspects of the HVNL may be risk-based, but other types of regulation may be used where it is the best approach to meeting the primary objectives.