Toll Group submission on "*A risk-based approach to regulating heavy vehicles*", National Transport Commission March 2019

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Purpose

To articulate Toll's perspective on the existing and potential legal framework for heavy vehicle operations in Australia

Introduction

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

Toll Group welcomes the opportunity to provide feedback on the Review into the Heavy Vehicle National law, starting with the National Transport Commission's *A Risk-based approach to regulating heavy vehicles,* Issues Paper, March 2019.

Toll Group takes its compliance obligations very seriously and expends considerable time and resources in ensuring that it understands the rules and responds appropriately to them. We will be closely attentive to the Review and seek to be engaged at all levels of the process.

Our recommendations are summarized as follows:

- A CASA model be considered for heavy vehicle operations whereby the states defer their powers to the Commonwealth
- The NTC publish the HVNL sanctions issued in each state, by targeted party, since 2014
- If the results indicate that CoR has failed to reach beyond driver/operator infringement along the supply chain, then alternative regulatory mechanisms such as operator licensing and/or mandatory telematics for regulatory purposes must be considered. Without a level playing field the long-term sustainability of the industry will be compromised.
- Laws must not be made in the absence of preconditions for compliance
- Comprehensive industry guidance must be available where legal "snookers" are in play
- All of the relevant rules and policies – regardless of which authority is responsible – must be included in a single, easily navigable repository on the NHVR website
- The primary duties and "permit to drive" clauses at s. 96, 102 and 111 be retained
- Fitness for duty standards be introduced for road transport drivers
- A "fit and proper person" test be introduced into the HVNL
- Capacity to conduct a business be included within the HVNL
- A risk management approach be adopted, recognising that prescriptive law is appropriate in some circumstances and that a risk managed approach will require a radical change in enforcement culture and capability
- Vehicle registration be returned to the scope of the HVNL
- The scope of the HVNL recognise that the HVNL and the NHVR are part of a road ecosystem where the component parts needs to talk to each other for maximum effectiveness
- The case for a national approach to heavy vehicle driver licensing be explored
- If the case for a national driver licensing system is not made operators should have access to NEVDIS, with appropriate privacy controls in place, to ensure they can meet with obligations
- The law more explicitly direct attention to the role of driver competency, training, attitude and attribute in driving safety outcomes

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

The *Issues Paper* is timely, lucid and targeted. It accurately captures many of the issues with the HVNL and we commend the NTC on its work. However, we feel that the review does not go far enough in considering the regulatory options and over-looks or under-emphasises some key issues.

The *Issues Paper* states that "Applied law is used to drive national harmonization because the Australian Constitution doesn't give the power to make laws with respect to road, rail and intermodal

transport. Land transport is a matter for the states and territories to regulate".[1] While this is true, there is nothing preventing the states from deferring their power to the Commonwealth as occurs with aviation. Road transport could be conducted under a similar model to the Civil Aviation Safety Authority (CASA). This would deliver national consistency and should be considered.

Toll also questions whether the Paper has sufficiently grappled with:

- The capacity of the regulated to comply with the law
- The capacity of the law to drive customer compliance, and
- The capacity of enforcement to reach along the supply chain.

Compliance with the law is premised on the capacity of the regulated to understand and comply with it. As the *Issues Paper* points out, the Heavy Vehicle National Law is 676 pages long. It is supported by 5 different sets of regulations, guidelines and manuals that are not referenced in law and therefore have an uncertain regulatory status (e.g. the Heavy Vehicle Inspection Manual).

In addition to the HVNL and its subsidiary legislation, transport operators need to comply with workplace health and safety laws, state-based derogations from the HVNL and state-based road rules. Some carriers are also bound by dangerous goods, animal welfare and safe handling of food regulations. Under such circumstances, the extent to which even the well-intentioned can locate and grasp all the rules to which they are subject is questionable.

Supposing this understanding to be possible, there are instances where the pre-conditions for compliance do not exist or are unreasonably onerous. For example, the definition of "transport activities" introduced in the HVNL Amendment Act in October 2018 requires that Toll "ensures" its drivers are appropriately qualified and credentialed.[2] Toll's capacity to access driver information in timely and efficient ways is limited by the processes established by state licensing authorities, state police and state competent authorities for dangerous goods. Like other operators Toll does not have direct access to NEVDIS and must instead navigate driver licence data held in 19 different systems.[3]

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[1] National Transport Commission, *A risk-based approach to regulating heavy vehicles,* March 2019, p.29

[2] The updated law includes contracting, directing or employing persons to drive a vehicle in the definition of "transport activities". Therefore, the primary obligation at 26C to "ensure, so far as is reasonably practicable, the safety of the party's transport activities" includes an obligation to ensure that Toll's drivers are appropriately qualified and credentialed.

[3] WA – Department of Transport (licence status and demerit point check), Police (traffic history), Department of Justice (licence suspension) and Department of Mines, Industry Regulation and Safety (DG licence); NSW – Roads and Maritime Services (driver licence status and demerit point check), Service NSW (traffic history) and EPA (DG licence; VIC – VicRoads (licence status, demerit point check and traffic history), SafeWork (DG licence); QLD – Transport and Main Roads (all records); ACT – Access Canberra (licence status, demerit point check and traffic history) and SafeWork (DG licence); TAS – Registrar of Motor Vehicles (licence status and demerit point check) and Safe Work (DG licence); NT – Motor Vehicle Registry (licence status and demerit point check), NT Police (driver history) and WorkSafe (DG licences); SA – DPTI (licence status, demerit point check and traffic history) and SafeWork (DG licence)

Some jurisdictions recognize the importance of operators' access to licence information and make it automated and accessible (e.g. heavy vehicle licensing authorities in NSW, South Australia and Victoria).[4] Other jurisdictions do not. For example, in Queensland only a person with a Queensland-based licence can apply for operator access. Driver consent then needs to be confirmed by Transport and Main Roads verbally with the driver (potentially compromising fatigue) and all through a paper-based, one-time use system. Appendix A summarises the ease of access to information from an operator perspective across the states and territories.

There are numerous examples where the law "snookers" regulatees seeking to comply. For example, s. 228 of the HVNL imposes an obligation on drivers not to drive while impaired by fatigue. Yet, as the guidelines indicate, one of the effects of impairment by fatigue is a lowered capacity to recognize impairment.[5] How is the driver to manage this strict obligation in the absence of an empirical test for fatigue such as exists for speed or blood alcohol concentration?

Consignees can find themselves similarly "snookered" if they accept an over-mass load. In accepting the load they are potentially in conflict with 26C by tacitly incentivizing non-compliant behavior. Yet if they return the vehicle to the road they are in conflict with sections 60 and 96.[6] The law is silent on how this conflict is to be resolved. Enforcement officers and regulators are often reluctant to offer definitive advice on such matters. This reluctance is understandable given that judges are the ultimate arbiters of what is "reasonable" and therefore compliant under the circumstances. However, it leaves industry in a difficult, precarious situation.

State-based variations to the HVNL have often proven particularly difficult to locate. For example, Appendix B of the Issues Paper notes NSWs' variation to s.93 of the HVNL. In its variation NSW inserts part 6.1 of the *Road Transport Act 2013.* Part 6.1 makes provision for the monitoring of certain heavy vehicles with GVMs or GCMs exceeding 13.9 tonnes, and vehicles carrying dangerous goods. Part 6.1 of the Road Transport Act is easily located. However, neither the Heavy Vehicle (Adoption of National Law) Act 2013 nor Part 6.1 in the *Road Transport Act* link to the relevant exemptions. Nor are the exemptions on the RMS website. Yet these exemptions make a material difference to the application of Part 6.1. How can operators comply when the rules are dispersed, fragmented and difficult to locate?

If prescriptive laws are in use (and they are appropriate in some circumstances), then supporting infrastructure must enable compliance. The current rules around work and rest are premised on

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[4] It should also be noted that South Australia makes it possible for police officers to directly advise operators where their drivers have been found driving recklessly, at excessive speed etc. Regulation 98 of the Motor Vehicles Regulations 2010

[5] National Transport Commission, *Guidelines for Managing Heavy Vehicle Driver Fatigue,* 2007, p.6

[6] S. 60(1) "A person must not use, or permit to be used, on a road a heavy vehicle that contravenes a heavy vehicle standard applying to the vehicle." S. 96(1) "A person who drives, or permits another person to drive, a heavy vehicle on a road must ensure the vehicle, and the vehicle's components and load, comply with the mass requirements applying to the vehicle, unless the person has a reasonable excuse".

mandated rest within set time increments. The most recent Austroads guidelines on heavy vehicle rest areas recommend that they be placed between 15 minutes and 1 hour of driving time apart, depending on the nature of the vehicle.[7] However, there are insufficient rest areas on the road network to enable all drivers who need to take (mandated) rest to park safely.[8] In 2011 NatRoad estimated that shortage to be around 22,000 rest areas.[9] What is more, truck drivers sometimes have to compete with caravan and campervan drivers whose leisure interests can conflict with truck drivers' need for restorative rest.[10] We welcome the recent publication by TCA of rest area location and amenity which provides drivers and operators with much-needed information.[11] However, the fact remains that with insufficient rest stops the capacity of the regulated to comply with fatigue laws is compromised. Competition for, and shortage of, driver rest areas creates stress and frustration,[12] both emotions inimical to safe driving.

Toll Group has invested in residential facilities along key routes both to promote restorative rest and to provide drivers with safe change-over spaces. For example, the Dubbo driver interchange (pictured in figure 1) is a key change-over point for Brisbane to Melbourne runs, and Brisbane to Adelaide runs. It is air conditioned and sound-insulated and provides kitchen and laundry facilities as well as 24 bedrooms. Similar facilities exist in Eastern Creek, Altona, Karawatha and Perth.

Figure 1: BBQ area, Dubbo driver interchange

[7] Austroads, *Guidelines for the Provision of Heavy Vehicle Rest Area Facilities,* AP-R591-19, 2019, p.16
[8] See Austroads, *Audit of Rest Areas Against National Guidelines,* AP-T95-08, 2008
[9] See NatRoad *Response to Heavy Vehicle National Law Draft Regulatory Impact Statement*, 13 May 2011, p. 21.
[10] "How the Rest was Won", http://www.thegreynomads.com.au/lifestyle/featured-articles/res-areas/ <accessed 23/4/19>
[11] https://tca.gov.au/tix-form
[12] American Transportation Research Institute, *Managing Critical Truck Parking Case Study – Real World Insights from Truck Parking Diaries,* December 2016

These investments are not cost-neutral. At least part of the cost must be defrayed by customers in the form of higher prices. But why would a customer elect to hire a more expensive, but safety-conscious, operator over a cheaper, but less conscientious one?

The answer – theoretically - lies in the concept of 'chain of responsibility' (CoR). The HVNL strongly infers that customers must make their choice of carrier on factors other than price alone in order to manage their risk and be legally compliant. Safety investments such as those made by Toll and other responsible carriers should (again theoretically) prompt customers to pay the price for efficient *and* safe freight. But how many of them do? And how effective is the existing enforcement regime in ensuring that they do?

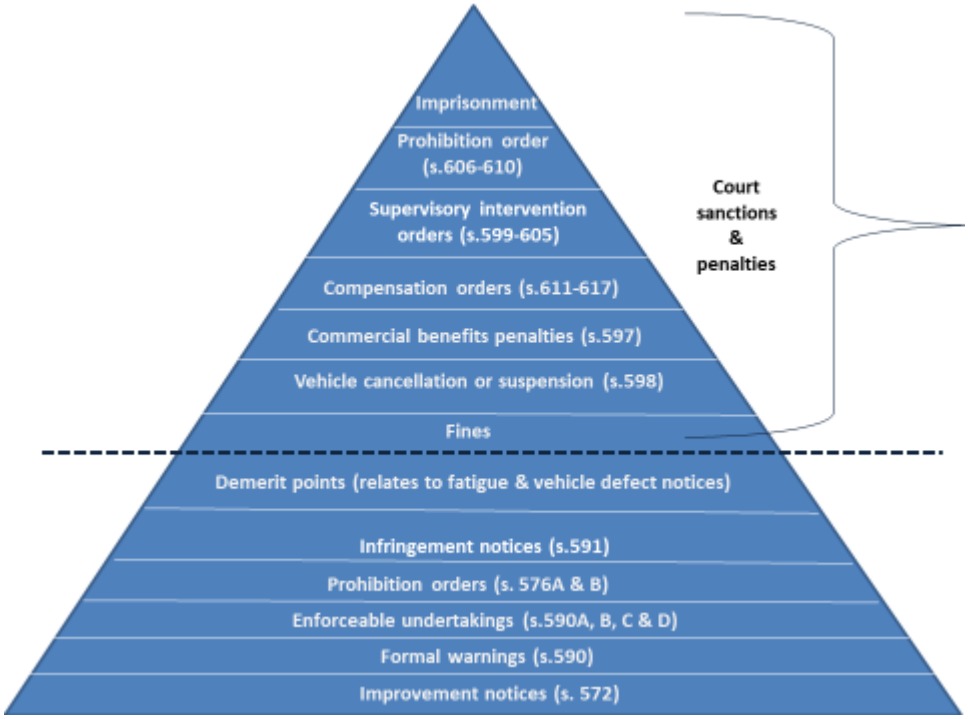
Sharon Middleton, the President of the South Australian Road Transport Association (SARTA) has expressed a view that customers may 'go for the cheapest rates, often regardless of quality and even despite poor compliance and safety of the truck operator'.[13] This may be a financially "rational" decision from the customer's perspective, albeit it contravenes the spirit and the letter of the HVNL.

Similarly Tony Sheldon, former National Secretary of the Transport Workers Union, asserts that of the companies that tendered for the work that led to the Cootes Mona Vale incident, Cootes had the worst lost time injury rates of the tenderers – so why did the customer not take this into account?[14]

There have been numerous attempts to wrangle the tension between safety and price, ranging from the Safe Rates Tribunal to the Five Star Trucking initiative. The former tried to ensure safety through mandating driver wages, including for owner-drivers, while the latter aimed to publicise operators' safety records to customers. For different reasons both initiatives were ultimately abandoned. A useful indicator of the reach and power of CoR's influence over customers would be to publish the sanctions issued against drivers and operators versus those issued elsewhere along the chain.

[13] Sharon Middleton, 'What is road transport doing to deliver the goods re productivity and environment?', Presentation to the Sustainable Supply Chain Solutions Conference, 29 October 2014
[14] Tony Sheldon speech to the Transport Workers Union Safety Summit, St Kilda, 21 May 2015

Figure 2: Sanctions in the HVNL



Sanctions data will indicate how willing and able the existing regime is to push beyond operators and drivers. If, as we anticipate, enforcement activity remains concentrated on drivers via roadside infringement we must accept that the CoR philosophy, though conceptually sound, is not enforced. In the absence of an effective enforcement regime that ensure customers consider safety *and* price, we must consider operator licensing or other means of driving safety outcomes such as mandatory telematics.

While it may appear counter-intuitive for industry to lobby for more enforcement, this is essential if those operators that cannot or will not comply with the law are to be forced out of the system. While non compliant operators persist, they have a competitive advantage over organisations that take safety and compliance seriously. The role of the Regulators is to ensure a level playing field. If they cannot then the rules of the game must change.

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 for other sectors, do better than the current HVNL that we might incorporate into the new law?

Toll welcomes the introduction of the primary duties in October 2018 and strongly supports their retention in the HVNL. As indicated in the attached "26C Explainer" Toll unpacked the implications of

the duties for its operations and conducted a deep, forensic analysis of Toll's road transport risks, the results of which are publicly available.[15]

That analysis directed us to where we were exposed (subcontractor management) and identified hitherto hidden risks including suicide by truck and driver cardiovascular health. The introduction of primary duties for Executive Officers at 26D also prompted us to refine our road safety KPIs and provide standardized reporting so Executive Officers in Linehaul could better understand and respond to their risks.

We also support the "permit to drive" clauses for mass, dimension and load restraint as follows:

> 96(1) A person who drives, or permits another person to drive, a heavy vehicle on a road must ensure the vehicle, and the vehicle's components and load, comply with the mass requirements applying to the vehicle, unless the person has a reasonable excuse.
>
> 102(1) A person who drives, or permits another person to drive, a heavy vehicle on a road must ensure the vehicle, and the vehicle's components and load, comply with the dimension requirements applying to the vehicle, unless the person has a reasonable excuse.
>
> 111(1) A person who drives, or permits another person to drive, a heavy vehicle on a road must ensure the vehicle, and the vehicle's components and load, comply with the loading requirements applying to the vehicle, unless the person has a reasonable excuse.

These provisions emphasise the shared nature of the safety responsibility and that the drivers' judgement should be the "last line of defence" before the vehicle enters a public road.

Our view is that we should adopt fitness for duty standards similar to those in the rail, maritime and aviation sectors. Around 12% of the on-road and road-related fatalities with which Toll is involved are caused by non-work related issues.[16] These principally relate to drivers' cardiovascular health. The approach to cardiovascular health in Assessing Fitness to Drive (AFTD) is flawed in that it largely relies on driver self-report, does not include screening for diabetes or hyperlipidaemia, and does not include an ECG. This may account for why many drivers that die as a result of cardiovascular disease have no prior knowledge of the presence of the condition.[17]

What's more AFTD is purely about the medical and physical capacity to drive a vehicle at a point in time. It does not consider the inherent requirements of the freight cartage task which include loading, unloading, restraining freight etc.

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[15] Dr Sarah Jones, "Webinar: Learning the Lessons: What Ten Years of Fatalities Data at Toll Group Can Teach Us About Road Safety", March 2019, https://www.nrspp.org.au/resources/nrspp-webinar-learning-the-lessons-what-ten-years-of-fatalities-data-at-toll-group-can-teach-us-about-road-safety/

[16] Based on data from 30 June 2007 to 6 February 2019

[17] Routley, Staines, Brennan et al, *Suicide and Natural Deaths in Road Traffic – Review,* MUARC, August 2003, p. 20

Other sectors are better at requiring and confirming that operators have the financial nous and capacity to operate legally and compliantly. Toll welcomes the proposed introduction of a “fit and proper” person test in the recent review of NHVAS Business Rules and Standards. One of the weaknesses of the current legislation is that it has no power to prevent the re-emergence of “phoenix” entities. These are transport entities which dissolve when in fiscal, legal or reputational difficulty only to materialize under a different business name. Introducing a “fit and proper” person test into the HVNL might assist in barring unscrupulous operators from re-entry. However, it will not prevent the entry of operators that do not have a viable business model and may therefore be incentivized to cut corners and run illegally.

Heavy vehicle operators in Australia are legally required to maintain their vehicles to a roadworthy standard. However, they are *not* required to demonstrate the capacity to maintain vehicles *before* the vehicle is on the road. Even the maintenance module in the national heavy vehicle accreditation scheme (NHVAS) only requires an operator to demonstrate that they have maintenance *systems,* not maintenance *capital.*

This is in contrast to the United Kingdom, where operators must demonstrate their ‘financial standing’ before they are permitted to operate. Operators must demonstrate that they have £7400 (AUS $13,894) for the first vehicle and £4100 (AUS $7,698) for each additional vehicle.[18] Although the proportion of heavy vehicle inspections that find major defects is low[19] and it is difficult to extrapolate from defects to crash risk, where mechanical defects do contribute to accidents,[20] the results can be catastrophic and highly visual; generating public and political attention. Capacity to conduct a business should therefore be within the scope of the law.

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?

Where appropriate, yes.

As noted in our response to question 2, the risk management focus introduced through the primary duties has enabled us to critically appraise our risk and exposure and respond accordingly. Risk management directs effort and resources to the areas of most pressing need and potential harm. In contrast, prescriptive law mandates what requires attention and can misdirect. For example, the existing law directs operators’ attention to vehicles 12 tonne and above operating more than 100 kilometres radius from base. It creates a perception that fatigue is principally a risk in larger vehicles

[18] UK Traffic Commissioner Press Release ‘Changes to operator licence financial standing limits to apply from 1 January’, https://www.gov.uk/government/news/changes-to-operator-licence-financial-standing-limits-to-apply-from-1-january

[19] Between 0.46% and 9.75%. National Transport Commission, *Heavy Vehicle Roadworthiness Program Consultation Regulatory Impact Statement,* January 2015, p. 9.

[20] The most recent NTI data places mechanical failure at 6.5% of large losses, a 67% increase year on year.

travelling longer distances. In fact, our data suggests that time on task is not the key variable in fatigue events, with most such events occurring in the first 1 to 2 hours of the shift.

The challenge of a risk management approach is two-fold. As the NTC paper points out, operators may not necessarily have the skills or resources to interrogate their data and experience to develop bespoke risk management interventions. For such operators, prescriptive law may provide certainty and comfort. This is particularly true for owner-drivers.

Further, a risk management approach will also be challenging for regulators and enforcement. After all, the success of a risk management approach is judged not by one's actions (prescriptive), but by the *outcome* of the actions. The outcome sought is the prevention of harm, so in effect regulators and enforcers are being asked to quantify an absence and the contribution the operators' actions make to that absence. This is a different skill set to that required to identify an on-road breach and issue an infringement.

There are instances where a prescriptive approach is the right approach, typically where the outcome sought is measurable and unvarying. For example, stipulating vehicle dimensions, allowable projections, required safety features, mass limits, fatigue outer limits and performance standards for load restraint.

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

Yes.

The law should reflect COAG's original intent by including vehicle registration and driver licensing. It should expand its scope to think about the road network and its users as an ecosystem. It may also need to be more explicit about the obligation to ensure safe drivers and safe driving.

When the HVNL came into effect in February 2014 vehicle registration was deferred before being ultimately abandoned. The NHVR's function regarding registration is now simply to "keep the database of heavy vehicles" (s. 659(2(aa)), leaving the administration of registration to the states and territories.

We therefore continue to have

- State based systems (i.e. no 'one stop shop' through the NHVR)
- Various state based fees
- State-mandated inspection requirements
- State based concessions (e.g. primary producer concessions)

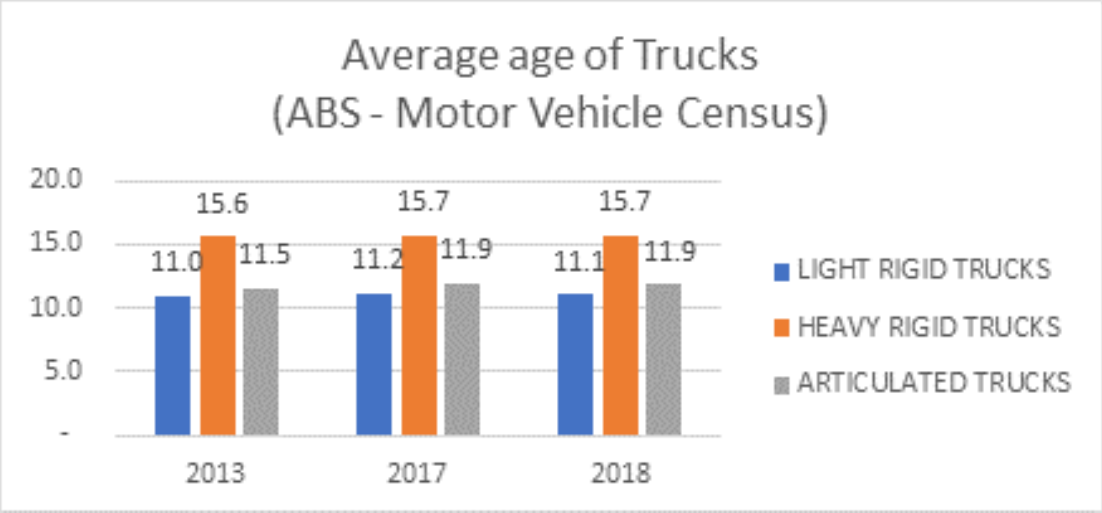
This has a significant impact on productivity. Currently, all heavy vehicles must nominate a garaging address. The state within which the vehicle is garaged is the registering entity. For operators working within a single state, this is not a significant issue. For large fleet operators such as Toll, however, the current system is highly inefficient.

For example, if Toll decides that a vehicle is better deployed in NSW than in Queensland, where it is currently garaged, the vehicle must be presented for inspection in NSW to confirm its roadworthiness.[21] Then we must apply for registration in NSW and cancel the registration in Queensland. Most states require operators to apply for a refund for the portion of unused registration. Operators have three months to advise of changes to garaging address, or face being fined if caught. The opportunity cost of having vehicles off the road while they are inspected as well as other administrative costs of transferring registration are around $3000 per vehicle.[22]

The excision of registration from the law is ironic given that the maxim "the money follows the truck" was an impetus for the reform in the first place. Arguably, the "reform" has left interstate operators worse off from a productivity perspective because of the abolition of the Federal Interstate Registration Scheme (FIRS) and the loss of stamp duty concessions for the purchase of newer, safer, cleaner vehicles. Vehicle registration must be included within scope of the law to achieve the productivity objective.

It is important to note that the average age of the trucking fleet has been flat or static over the last several years (see chart 1 below). There is a disincentive to buy new trucks due to the payload disadvantage of safety equipment. Twin steer and single drive vehicles have different GVMs. It is possible that the inherent safety features in a twin steer vehicle are not being realised because of the productivity barrier. Similar issues exist with bonneted versus cab over trucks.

Chart 1: Average age of trucks in the Australian fleet



Toll's experience is that most of our on-road fatalities are the result of light vehicle/heavy vehicle interaction where the light vehicle driver is found to be at fault. The current scope of the HVNL has no power to address this risk. Nor does the existing scope permit the HVNL to be "in dialogue" with

[21] Unless the vehicle is enrolled in NHVAS maintenance in which case it is exempted from this requirement

[22] National Transport Commission, *Heavy Vehicle National Law Regulation Impact Statement*, 2011, p. 88

mechanisms relating to pricing (mass, distance, location) or the mooted independent safety investigator and new National Office of Road Safety. Yet these bodies are highly interdependent. Expanding the scope of the HVNL to recognize heavy vehicle law as one part of a larger ecosystem will promote safety and productivity along the network and supply chain and produce better outcomes for all road users.

The case for a national approach to heavy vehicle driver licencing should also be considered on productivity and safety grounds. Within Toll Group, nearly 3000 heavy vehicle driver licences and 800 bulk dangerous goods licences are held. Each state and territory administers these licences differently, charges different fees, imposes different triggers for medical assessments and visual tests, has different requirements for reporting driver medical conditions to authorities, and diverges wildly in terms of ease of operator access to information.

A national approach would not only enable operators to meet their new obligations under 26C but might enable a holistic review of the competencies, skills and attributes that are required for each type of heavy vehicle driver and dangerous goods licence. If a RIS does not establish the case for a national approach to driver licensing, then operator access to NEVDIS (with appropriate privacy controls) should be enabled.

The *Issues Paper* points that one of the components of a safe and efficient journey is "a safe driver – one who is well-trained, competent, fit for duty and alert when driving". Yet the existing HVNL is almost entirely silent on what this means. Beyond stipulating the units of competence for BFM there is no mention of driver training and competence. The law does not require drivers to be fit for duty, merely to not drive while impaired by fatigue. It has nothing to say about driving behaviours, leaving this to state-based road rules. Around 15% of Toll's significant safety incidents have driver competency as the primary causal factor.[23] The most recent NTI data finds 1 in 5 crashes is due to driver error.[24]

Admittedly, the post October 2018 version of the law does draw "contracting, directing or employing persons to drive a vehicle" within the scope of the primary duty through including it in the definition of "transport activities". However, this is oblique rather than direct. The importance of driver behaviours, attitudes, competencies and training justifies a more explicit inclusion in the law.

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

Toll Group is firmly in agreement with this point.

[23] Based on April 2018 – March 2019 data for heavy vehicles.
[24] Adam Gibson, National Transport Insurance report to the ATA Conference 2019

The HVNL was premised on the idea of a single rulebook regardless of geographical location within Australia. As the Regulation Impact Statement for the reform made clear, the predicted twelve billion dollars in accumulated net benefit to a single, national law was only possible:

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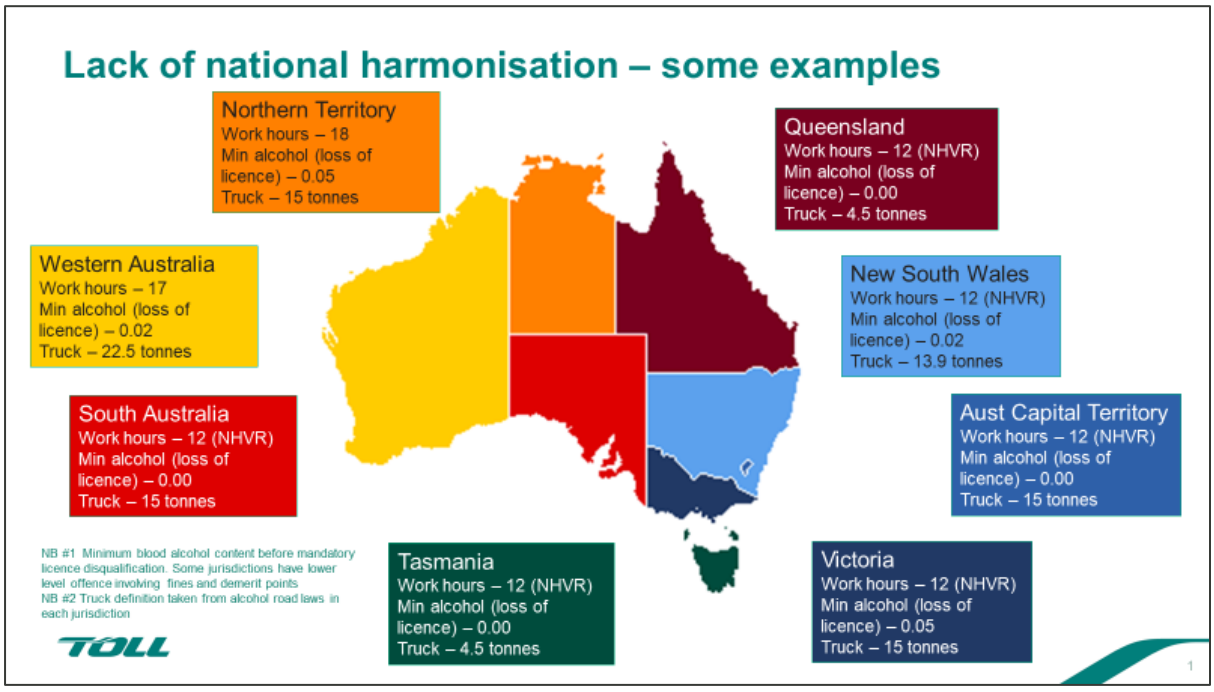
*'[W]here jurisdictions implement the HVNL without change. **Every departure from the pure model represents a reduction in potential gains and a likely increase in costs**'*[25]

While gains have undoubtedly been made, we remain a long way from 'one situation, one rule, one outcome'. The NTC's paper acknowledges this and helpfully publishes a list of the key derogations – one of the few times this information has been made publicly available. Basic inconsistencies remain across Australian jurisdictions in regards to work hours, minimum alcohol levels and the definition of what constitutes a heavy vehicle (see figure 3 below). At Toll we aim for consistency and standardization wherever possible so often operate at a standard above that required in law in some jurisdictions.

Figure 3: Examples of inconsistencies in law across Australia



One of our key frustrations is that there is no single, credible repository which explains all the permutations and variations to the HVNL and to associated policies in one place. The NHVR website

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[25] National Transport Commission, *Heavy Vehicle National Law Regulation Impact Statement*, September 2011, p. 17

is the obvious location for this, notwithstanding that the Regulator may not be accountable for all of the policies and statutes.

A good example of the information such a repository should contain relates to ADR 65/00 which stipulates that vehicles 12 tonne and above are to be speed limited to 100km/hr. The ADRs are made under Commonwealth law, while the HVNL requires that "a person must not use, or permit to be used, on a road a heavy vehicle that contravenes a heavy vehicle standard applying to the vehicle" (s.60). However, each state and territory applies ADR65/00 somewhat differently as follows:

> **NSW variation**: s. 21(2) of the NSW road rules applies the rule to vehicles with a GVM exceeding 4.5 tonnes [Toll's view is that the NSW approach should be applied nationally]
>
> **South Australia variation**: Road trains in South Australia other than in certain parts of the Eyre and Stuart Highways are limited to 90km/h.
>
> **Western Australian variation:** applies the rule to prime movers with a GVM of more than 15 tonne built after 1987 through s. 363 of the Western Australian Road Traffic (Vehicle) Regulations 2014.
>
> **Queensland variation:** A-B triples fitted with mechanical suspension on any trailer axles are restricted to a maximum speed limit of 90km/h (see National Class 2 Heavy Vehicle Road Train Authorisation (Notice) 2015 (No.1))

If all of this information were contained in the one place (NHVR website) it would save industry considerable time and effort in locating the rules to which it is subject. Such a repository should also contain:

- Different state requirements regarding where mass, maintenance and fatigue accreditation are required and in what combination
- Different state requirements regarding which additional regulatory programs apply to accreditation modules (e.g. IAP to access HML in some states)

Another regulatory frustration is that allied laws sometimes do not 'talk' to one another, so it is possible for a load to be compliant in one mode, but non-compliant in another: not ideal in a multi-modal transport environment. For example, containerised freight often moves from road to rail to ship, and vice-versa. The HVNL requires that the load be accompanied by a compliant container weight declaration (CWD) when it is on road.

The CWD is still considered compliant even if it over-states the actual weight of the container (s.187(4)). However, the shipper requires a precise declaration of the container's weight (the 'verified gross mass') with the mass derived from a standard different to that required in the HVNL. Operators may find themselves sandwiched between conflicting laws and disparate regulatory authorities slow to resolve inconsistencies. Again, locating this information in the one place would be helpful.

Question 6: Do you agree that we sould 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?

Yes. Innovation, particularly technological innovation, often outpaces regulation. Placing obligations low in the legislative hierarchy facilitates faster amendment.

However, the importance of keeping all relevant laws and rules in the one place cannot be overstated. As argued in our response to question 5, all rules that relate to heavy vehicles – regardless of which statutory authority they derive from and which body is accountable – must be in the one place for ease of reference by industry.

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?

The approach to technology should have three goals: (1) to encourage/direct the uptake of new fleet and telematics across industry, (2) to provide real-time or close to real-time advice of a pending or actual breach to drivers and operators, and (3) to identify recidivism and patterns of behavior that signal safety risk across the network.

That the Australian vehicle fleet is aging and not modernizing sufficiently fast enough to take advantage of the safety benefits of newer designs is well established.[26]

> *'It would take ten years of year-on-year record sales for the average age of the truck fleet to return to the 2007 level of 14.4 years. When compared to significant overseas markets Australia's truck fleet is twice the age of these countries'.*[27]

Older vehicles are less roadworthy, more polluting and less likely to be fitted with preventative safety technologies.[28]

Regulators at all levels of government have policy levers they can and should deploy to encourage fleet modernization, including:

- Stamp duty concessions for new vehicles, as were employed through the Federal Interstate Registration Scheme
- Discounted/nil registration fees for new vehicles

[26] NHVR, "Age of heavy vehicle fleet and non-conformity – national roadworthiness baseline survey overview", May 2017; Bureau of Infrastructure, Transport and regional Economics, *Impact of Road Trauma and Measures to Improve Outcomes,* Canberra, 2014
[27] Truck Industry Council, "Modernising the Australian Truck Fleet", Budget Submission 2019/20"
[28] Centre for Road Safety, Transport for NSW, *Safety Technologies for Heavy Vehicles and Combinations,* June 2017

- Removing regulatory barriers to the uptake of high productivity vehicles
- Subsidies on appropriate vehicles (e.g. vehicles fitted with Euro VI engines, on-board mass, fatigue monitoring devices, AEBS etc)
- Tying regulatory concessions such as mass and fatigue to the use of modern fleets in order to offset the generally greater TARE mass of trucks manufactured post 2003
- Stipulating fleet requirements as a condition of government contracts through incentive programs or a program like ANCAP for trucks
- Differentiated permit costs on the basis of vehicle age and safety features
- Making demonstrably modern, safe fleets a pre-condition of entry to the industry under accreditation or operator licensing schemes

There is very real danger that leaving technology uptake to the market will result in a two-tiered, inequitable system. Well-intentioned operators will be more visible (and therefore more subject to scrutiny) than operators that refuse to invest in modern fleets and telematics and therefore evade attention. Partly for this reason Toll supports mandatory telematics. Indeed, it is difficult to see how an operator can prove compliance with 26C “as far as is reasonably practicable” without telematics, given how accessible and affordable the technology has become.

Toll also recognizes that in-cab systems need to be carefully designed to prevent driver distraction. Regulators have an important role to play in standardizing the placement, hierarchy, look, sound and haptics of alerts, alarms and advisories designed to promote safer driving. There is also a risk that over-reliance on technologies such as adaptive cruise control and electronic braking systems can lead to driver ‘de-skilling’ and complacency. This can be problematic when drivers operate a mixed fleet, some of which have the latest design features and others which are older and more reliant on driver judgement and experience.

Toll was an early adopter of speed monitoring, driver-state sensing and in-vehicle cameras. Our experience is that technologies that identify breaches or pending breaches in real time or close to real time have a demonstrable impact on breach rates. (For example, from October 2013 when Toll introduced speed monitoring to January 2017 the percentage of vehicles recording moderate speeding events fell from 23.23% down to 6.55%).

We use data to train, coach and educate drivers towards compliance and, less frequently, for disciplinary purposes. It is a source of frustration that an approved Electronic Work Diary is still not available as the complexity of counting time rules would make information about impending breaches particularly helpful.

From a regulatory perspective, the great benefit of technology-derived data is that it can establish patterns of non-compliance that point to systematic, deliberate flouting of the law (as opposed to inadvertent, isolated mistakes that can be rectified by education and training). Technology such as block-chain can ensure visibility of contractual arrangements along the supply chain facilitating early detection of tacit and overt incentivisation for non compliance.

Technology allows regulators a systems-level view. It can potentially identify not just recidivist operators but parties in the supply chain associated with on-road non compliance. This will require a radical reinvention of approach. As noted earlier, the continued paucity of CoR/supply chain investigations suggests authorities struggle to reorient from roadside enforcement. As the NTC points out "Infringements are attractive to enforcement agencies partly because they are quantifiable and lend themselves to demonstrations of productivity".[29] This is not to suggest that there is no role for roadside enforcement, but that the data so collected be used to signal where and how supply-chain investigations should occur.

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

We propose that the law concern itself with harm. If a provision does not relate to the prevention or mitigation of harm then it should be removed from the law.

On this basis we suggest that:

- Provisions that require drivers to carry documents such as permits principally for the purpose of making the enforcement task easier be removed (e.g. S.25A(1), s.152 (1)).[30] Proof of documentation can be demonstrated electronically.
- Provisions that require operators to ensure drivers carry documents as per dot point above be removed (e.g. s.25A(2))
- Provisions that require drivers or operators to return documents or stickers to the regulator be removed (e.g. s. 79(2), s.288(2))
- Administrative errors that do not relate to safety breaches when completing work diary paperwork be removed [31]
- Fatigue offences must relate to a present, immediate risk[32]

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

As consistency and harmonization are far from being achieved, it is perhaps premature to contemplate schemes for diversity.

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[29] National Transport Commission, *Heavy Vehicle Compliance Review Consultation Draft,* September 2013, p.48

[30] As opposed to, for example, being required to take possession of documents that indicate other parties have fulfilled their obligations before the transport task proceeds, such as container weight declarations.

[31] As opposed to maintaining accurate, timely records of work and rest

[32] As opposed to risks incurred 7 or 14 days prior where there is no evidence of continuance

A genuinely risk-managed approach to harm could conceivably deliver diversity by applying the countermeasures philosophy underpinning AFM. An operator wishing to cart outside of accepted norms would need to articulate their reasons for doing so and how potential harms will be managed and outcomes monitored.

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

As outlined in our response to question 1, Toll questions if the full suite of regulatory interventions possible under the HVNL is being leveraged. We recommend that the NTC publish the volumes of the various sanctions at figure 2 and the parties to whom they have been applied. For CoR to work as intended there must be regulatory and enforcement reach along the supply chain.

We strongly recommend that all officers, regardless of whether they are Transport Authorised Officers or Police Officers, be subject to the same enforcement guidelines, principles and training. This will drive consistency of approach.

Toll supports the removal of the reverse onus of proof, as occurred with the Amendment Act. It is appropriate that the burden of proof rest with the prosecutor rather than the defendant.

Toll questions whether it is reasonably possible to challenge enforcement decisions. Paying an infringement is often cheaper than the loss of productivity incurred by preparing for and attending court. At one tenth the possible cost of a court fine, it is often the more prudent decision even if a defendant has a reasonable prospect of having the infringement overturned.

There is a perhaps insoluble tension in on-road enforcement and it is this: a driver that has just received an infringement and then sent on his/her way may feel stressed, aggrieved and worried. If our objective is to keep the road network safe then given the relationship between stress, distraction and road incidents it is questionable if the fine supports the objective.

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

As argued in this submission, Toll Group recommends that:

- A CASA model be considered for heavy vehicle operations whereby the states surrender their powers to the Commonwealth
- The NTC publish the HVNL sanctions issued in each state, by targeted party, since 2014
- If the results indicate that CoR has failed to reach beyond driver/operator infringement along the supply chain, then alternative regulatory mechanisms such as operator licensing and/or mandatory telematics for regulatory purposes must be considered
- Laws must not be made where the pre-conditions for compliance do not exist
- Comprehensive industry guidance must be available where legal “snookers” are in play
- All of the relevant rules and policies – regardless of which authority is responsible – must be included in a single, easily navigable repository on the NHVR website
- The primary duties and “permit to drive” clauses at s. 96, 102 and 111 be retained
- Fitness for duty standards be introduced for road transport drivers
- A “fit and proper person” test be introduced into the HVNL

- Capacity to conduct a business be included within the HVNL
- A risk management approach be adopted, recognising that prescriptive law is appropriate in some instances and that a risk managed approach will require a radical change in enforcement culture and capability
- Vehicle registration be returned to the scope of the HVNL
- The scope of the HVNL recognise that the HVNL and the NHVR are part of a road ecosystem where the component parts needs to talk to each other for maximum effectiveness
- The case for a national approach to heavy vehicle driver licensing be explored
- If the case is not made operators should have access to NEVDIS, with appropriate privacy controls in place
- The law more explicitly direct attention to the role of driver competency, training, attitude and attribute in driving safety outcomes

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

Toll is broadly in agreement with the six draft regulatory principles, though we seek more information on the apparent contraction of “flexibility in a harmonized manner”.

We propose the following additional principle: “The preconditions for compliance with the HVNL will be met and all associated rules and policies will be published in a single repository and kept up to date”.

Principle	Comment
1: The future HVNL should be risk-based. The law should be developed by identifying, analysing, evaluating and establishing controls for material risks. The future HVNL should not attempt to control immaterial risks or have controls that aren’t clearly contributing to risk management. Controls should be specified in terms of suitable regulatory styles.	Agreed. However, prescriptive law is appropriate where outcomes are measurable and unvarying.
2: The future HVNL should have a clear and balanced object, and provide the scope, coverage and visibility needed to manage the risks specific to Australian heavy vehicle operations. The new law should consider good regulatory practice from participating and non-participating jurisdictions, other transport modes, and elsewhere so as to be nationally agreeable and set us on a path to improved consistency.	Agreed.
3: The future HVNL should be responsive, flexible and able to readily accommodate changes to technology and business models while maintaining the right degree of oversight. Operators should be provided with flexibility to choose the most suitable compliance options, where options are appropriate. Obligations should be placed as far down the legislative hierarchy as is tolerable and should preference outcomes, in the form of harm minimisation, over inputs and process.	Agreed.
4: The future HVNL should recognise the diverse risk profile of the industry, operators and regulated parties and provide flexibility (in a harmonised manner) for those operating across vastly different domains and under different business models.	Undecided. “Flexibility in a harmonised manner” is a contradiction in terms.
5: The future HVNL should target the most significant risks associated with heavy vehicle operations. The new law should support sanctions and enforcement tools that reflect the severity of the risk, and enforcement decisions must be able to be reasonably challenged.	Agreed

6: The future HVNL should delivery better safety, productivity and regulatory efficiency outcomes and lead to continual improvement across these key performance areas.	Agreed

Appendix A: Summary of approaches to the provision of information to operators

	HV Licences			Bulk DG Licences		
State	Systems enabled for operator access	Driver consent required	Ease of access to information	Systems enabled for operator access	Driver consent required	Ease of access to information
NSW	√	√	High	√	x	High
SA	√	√	High	√	x	High
WA	√	x	High	x	n/a	Low
VIC	√	√	High	x	n/a	Low
TAS	√	√	Moderate	x	n/a	Low
ACT	√	√	Moderate	√	x	High
NT	√	√	Low	x	n/a	Low
QLD	√	√	Low	x	n/a	Nil