



Transport for NSW Response to:
A risk-based approach to regulating heavy vehicles

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1 Introduction

NSW welcomes the National Transport Commission's (NTC) review of the Heavy Vehicle National Law (HVNL) and the opportunity to provide comment in response to the upcoming issues papers.

Improving the safety of heavy vehicles will remain a priority while heavy vehicles continue to be over-represented in road fatalities. Heavy vehicles make up 2.4 per cent of NSW motor vehicle registrations and 8.3 per cent of kilometres travelled by all NSW vehicles, but are involved in about 17 per cent of all road fatalities.

2 A risk-based approach to regulating heavy vehicles

Since 2011, there has been considerable reform to the regulation of heavy vehicles, including the establishment of a single national law and a single national regulator. The HVNL consolidated legislation in relation to mass and loading, the Intelligent Access Program and heavy vehicle driver fatigue.

Further, the reformulation of the Chain of Responsibility (CoR) provisions in late 2018, as an overarching and positive duty of care consistent with the duty of care approach adopted in other safety laws, was an important step towards adopting a risk-based regulation approach for heavy vehicles.

There is now an opportunity to further move the regulation of heavy vehicles from a prescription or rules-based approach to an outcomes-focussed and risk-based approach consistent with previous Council decisions. The NSW Government Guide to Better Regulation suggests that where possible, regulation should adopt an outcome-focused approach, rather than being prescriptive¹.

The approach to regulation described in the *Issues Paper: A risk based approach to regulating heavy vehicles* is also largely consistent with the guidance² the NSW Productivity Commission has issued to regulators. A move towards outcomes and risk-based regulation will enhance the community's collective economic and social wellbeing by:

- reducing unnecessary regulatory burden on regulated entities;
- increasing the productivity of regulators and regulated entities, and
- driving flow-on economic and social benefits.

Adopting a risk-based approach to regulating heavy vehicles has the potential to ensure that regulations are effective in targeting significant risks, and ensures regulators' resources and regulatory tools are effectively used based on the severity of potential risks. For industry, a risk-based approach to regulation enables businesses to control risks to safety, encouraging innovation and the adoption of technology to better manage risks.

However, to adopt a risk-based approach to regulating heavy vehicles, there must be a clear and agreed understanding of the outcomes sought. The NSW Government's Better Regulation Principles require that in developing regulation the objective of government action should be clear³.

While the current Heavy Vehicle National Law (HVNL) describes these outcomes at a high level in terms of safety and productivity, a more granular understanding of these outcomes, and their relative priority, will assist in assessing the risks and developing the most appropriate measures, which may include non-regulatory measures, to address those risks.

¹ <https://www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf>

² [http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance for regulators to implement outcomes and risk-based regulation-October 2016.pdf](http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance%20for%20regulators%20to%20implement%20outcomes%20and%20risk-based%20regulation-October%202016.pdf)

³ <https://www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf>

The review of the HVNL provides the opportunity to more clearly define these outcomes, and consequently consider whether the law is effective in achieving those outcomes. The NTC asks whether the object of scope of the HVNL needs to change. Key considerations in responding to this question are outlined below.

3 Scope of the HVNL

3.1 Safety and Productivity

Further analysis is required in respect of the conflict (real or perceived) between the safety and productivity outcomes the law is seeking to achieve. There would be merit in the NTC exploring this dual role in more detail so that there is a common understanding of whether one of these objectives can be achieved without detriment to the other.

In 2008, at the time the HVNL reforms were initiated, the productivity benefits of establishing a single national law for the regulation of heavy vehicles and a sole national regulator were expected to be the result of reduced regulatory red tape from interstate freight operators and improved road access for higher productivity vehicles. Further benefits were attributed to harmonised standards for heavy vehicles manufacturers working across state borders⁴.

However, unlike rail safety national law and maritime safety national law which focus on safety (with efficiency gains a potential by-product of improved safety), more consistent regulation and reduced compliance costs, the HVNL also includes objects to:

- promote industry productivity and efficiency in the road transport of goods and passengers by heavy vehicles; and
- encourage and promote productive, efficient, innovative and safe business practices.

The HVNL provides that these objects are to be achieved by:

- allowing improved access to roads in certain circumstances, including by allowing heavy vehicles, that would otherwise be prevented from being used on roads, provided public safety is not compromised, and the impact on the environment, road infrastructure and public amenity is managed; and
- providing for accreditation schemes allowing operators of heavy vehicles who adopt best practices to be subject to alternative requirements more suited to the operators' business operations.

The HVNL provides that the NHVR's main function is to achieve the object of this Law. The NHVR states that its number one priority is the safety of the heavy vehicle industry and the Australian community, and considers that a safer industry is a more productive one and that unsafe business practices improperly distort the market for transport services⁵.

Relevantly, the Productivity Commission is in the process of reviewing the long-run economic impacts of nation transport regulatory reforms⁶. As part of that Review, the Commission is seeking to understand what impacts contracting practices and competitive pressures have on safety outcomes and how might these be addressed.

⁴ Council of Australian Governments (2008) National Partnership Agreement To Deliver A Seamless National Economy -

http://www.federalfinancialrelations.gov.au/content/npa/other/national-partnership/past/seamless_national_economy_NP.pdf

⁵ https://www.pc.gov.au/data/assets/pdf_file/0004/243094/sub016-transport.pdf

⁶ The Terms of Reference for the Productivity Commission's review are available here: <https://www.pc.gov.au/inquiries/current/transport/terms-of-reference>

In responding to this question, the National Road Transport Association (NatRoads) notes that it does not agree that there is a link between fixing of prices for owner-operators in the industry and improvements in safety⁷. Additionally, the Australian Logistics Council (ALC) noted that any revised HVNL should continue to have improving productivity as an objective, given that it was one of the driving forces for the original introduction of the law.⁸

There is strong evidence to support the separation of the regulation of safety from industry promotion (or promoting industry productivity):

- Lord Cullen's Inquiry into the 167 fatalities on Piper Alpha in 1988 identified the dual mandate of the Department of Environment regarding industry resource management and safety regulation as a problem⁹.
- In the US, the 1996 ValuJet DC9 accident involving 110 fatalities, the dual mandate of the Federal Aviation Administration in the Department of Transportation was a contributory factor as an industry promotion role undercut safety regulation.
- The Seaview plane crash in 1994¹⁰ – a comprehensive coronial inquest, and a full judicial commission of inquiry into the Seaview accident all concluded quite unambiguously that the then-Civil Aviation Authority had failed in its safety responsibility, because it placed the commercial considerations of operators ahead of the safety of passengers.
- The Monarch plane crash in 1993¹¹ - the coroner said had the Civil Aviation Authority paid more attention to the law and been less to 'accommodating' its customers, then Monarch would have been grounded and those deaths avoided.

3.2 Who is captured by the HVNL?

The Issues Paper describes which parties are currently captured, including those parties that are explicitly listed in the chain of responsibility. The paper also notes that there are some parties who can influence the safety of heavy vehicles use who are not subject to the HVNL, for example some third-party heavy vehicle maintenance providers.

The scope of the law, and the entities and activities that it intends to capture, requires further consideration. With the introduction and future potential reliance on technology to manage risks, there may be other parties or activities that have a significant influence on the safety of heavy vehicles. For instance, if certain technology is able to be relied on as an effective control of fatigue of heavy vehicle drivers, consideration should be given to whether the manufacturers or maintainers of that technology have any duties to ensure its safe and effective operation.

Similarly, with increased automation and the potential mass deployment of connected and automated vehicles (CAV), there are other parties that will have influence over the safe operation of heavy vehicles that are not currently captured in the law. It

⁷ https://www.pc.gov.au/_data/assets/pdf_file/0014/243041/sub007-transport.pdf

⁸ <https://www.ntc.gov.au/media/2082/ntc-issues-paper-risk-based-approach-to-regulating-heavy-vehicles-stuart-mckay-australian-logistics-council-may-2019-1.pdf>

⁹ <http://www.hse.gov.uk/offshore/piper-alpha-public-inquiry-volume1.pdf>

¹⁰ A 'Seaview Air' Aero Commander crashed into the sea for the loss of all 9 on board, whilst flying between Sydney and Lord Howe Island (NSW).

¹¹ https://www.atsb.gov.au/publications/investigation_reports/1993/aair/aair199301743/

would be appropriate for the NTC to consider the issues that have been raised and discussed in the development of an end to end regulatory framework for CAVs.

It would be reasonable for all parties that are identified as having influence and control over the safety of heavy vehicle operations, including potentially the automated driving system entity or ADSE, to be captured by the revised HVNL. It is understood that these issues will be considered further in the NTC's Issues Papers - *Safe People and Practices* and *Safe Vehicles*.

3.3 Interaction with other laws

In determining the appropriate scope for the revised HVNL, it will be necessary to consider how it interacts with other laws that also place requirements on the operation of heavy vehicles. Particularly relevant are work health and safety laws, Australian Road Rules, vehicle registration and driver licensing, transport of dangerous goods.

It would be beneficial to clearly define the boundary between the HVNL and Work Health and Safety laws. This could provide regulated entities greater certainty over regulatory requirements and potentially reduce costs of compliance. One possible approach could be to duplicate the general safety duties that are established in work health safety law, as was done for rail safety, and in NSW for point to point transport. Or alternatively, a narrower approach could be adopted to control only for risks that are specific to the operation of heavy vehicles.

It is worth noting that many transport operators now have responsibilities to more than one regulator. This is particularly the case for large transport organisations responsible for multiple modes of freight transport. From a customer centric perspective, it is therefore important for safety systems to complement each other. By providing a consistent framework across modes, operators will be able to apply the same risk management approaches across their entire operations, while applying differing risk treatments, satisfying both their regulatory obligations and broader management goals and outcomes.

The Issues Paper notes that in respect of driver licensing there needs to be capacity to work with state and territory legislation effectively. The Issues Paper also notes that the NHVR can access registration data but cannot see drivers at an individual level, nor others in the chain of responsibility, which makes it difficult to build a clear picture of the industry. Further, there are those in industry that have suggested that heavy vehicle driver licensing and vehicle registration should be regulated under the HVNL, largely in order to achieve better national consistency.

While there would be value in ensuring that these national, state and territorial regulatory frameworks are efficiently integrated, consideration will need to be given to how these jurisdictional frameworks currently also regulate the light vehicle fleet and drivers, and the efficiency that the integration of the regulatory frameworks for heavy and light fleet achieves at a jurisdictional level.

4 How is the risk environment likely to change?

The review of the HVNL presents an opportunity to develop law that is more “future-proof”; that is, the law is able to safely accommodate new business models and emerging technology. For instance, the NSW Government’s Strategy, *Future Transport 2056*, suggests that direct business-to-consumer delivery models and on-demand service models will blur the lines between traditional freight companies and retail businesses, and lead to innovative partnerships. Toll and eBay now offer a business-to-consumer logistics solution to connect Asian businesses to Australian customers purchasing products online. Uber and Amazon are new entrants to the freight market for ‘last mile’ and on-demand deliveries. In the future, drones could also alter the way deliveries are made.¹²

The NSW Government will continue to facilitate trials of emerging technology that can improve the efficiency and safety of freight activities in NSW, such as vehicle-to-infrastructure systems to optimise traffic signal timing and reduce travel times for freight vehicles along key freight corridors¹³. Transport for NSW has also committed¹⁴ to working with the heavy vehicle industry to develop a new heavy vehicle strategy to improve operational safety and increase the uptake of safety technology.

The NTC could draw on the analysis it has already completed in relation to connected and automated vehicles and *Land Transport Regulation 2040*, in addition to the work completed by Austroads and the Department of Infrastructure, Regional Development and Cities (DIRDC). For instance, DIRDC’s recent *Inquiry into National Freight and Supply Chain Priorities* identified technological trends in the road sector which may impact on efficiency and/or productivity of freight services¹⁵:

- Platooning—heavy vehicle platooning, where a single driver is able to control two or more heavy vehicles in a convoy. This will provide more efficient movement of heavy vehicles by minimising the distance between the lead vehicle and trailing vehicles as braking, accelerating and speed are synchronised across the platoon
- Automation—particularly for road and rail vehicles, aerial drones and freight handling equipment. On-road vehicles are moving toward requiring little (or no) human intervention
- Connected vehicles—wireless communications will allow vehicles to work cooperatively by sharing safety and other messages in real-time;
- Network optimisation—including through approaches such as advanced data analysis for planning and operations, predictive maintenance and managed motorway deployments
- Changing nature of demand—consumers are increasingly expecting 24/7, same-day delivery of their orders, directly to their homes or to nearby pick-up sites, potentially resulting in the need for new modes of delivery for freight transport

¹² Page 45, *Future Transport 2056*

¹³ NSW Freight and Ports Plan

¹⁴ NSW Road Safety Plan 2021: Towards Zero

¹⁵ *Inquiry into National Freight and Supply Chain Priorities, Supporting paper No. 3, Road and rail freight, March 2018* © Commonwealth of Australia 2018

- Alternative fuels—falling costs and new storage options are likely to make vehicle electrification more popular in the future. Hydrogen fuel cells and less carbon intensive fuels could also be significant trends.

It would be valuable to understand how these and other trends and technological developments are likely to impact on the risks associated with the operation of heavy vehicles, and the possible impact on business models given that new technology may alter the role of the heavy vehicle industry or the way in which freight is moved on roads. It will be important therefore for the HVNL review to ensure that any revised laws can accommodate new technologies, and energy business models.

5 Functions of the regulator

A key consideration in developing a risk-based approach to regulating heavy vehicles will be in defining the functions of the regulators. For instance, to enable the regulator take a proactive and evidence-based approach to assessing the consequences and likelihood of risks, it may need greater access to data and information. This could be for instance the introduction of a requirement for mandatory reporting for certain safety events, or that the regulator would have access to the data generated through the use of telematic devices, or other technology employed to ensure the safety of heavy vehicles.

A risk-based approach to regulation needs to ensure that the regulator is able to:

- Articulate the outcomes to be achieved to deliver objectives of the law;
- Develop rich and variable sources of data, metrics and evidence;
- Take a proactive and evidence-based approach to assessing the consequences and likelihood of the risks of achieving the outcomes (the harms);
- Choose the appropriate and proportionate instrument for managing the risk;
- Monitor and evaluate the effectiveness of regulatory instruments over time; and
- Be agile in continually reviewing the objectives and risks, and make changes in instrumental choices as necessary, as and when risks or objectives change.

In recognition that there is more than one regulator empowered by the current Heavy Vehicle National Law (HVNL) consideration would need to be given to whether these functions would need to vary between regulators, for instance, the National Heavy Vehicle Regulator (NHVR) and police.

6 Transition to a new law

While adopting a risk-based approach to safety regulation has the potential to deliver improved safety outcomes and productivity gains, it could be a significant challenge for some in industry, particularly the smaller operators.

In Australia, the road freight industry is dominated by small to medium enterprises. Approximately 70 per cent of operators have only one truck, around 24 per cent of operators have between 2 and 4 trucks and less than 0.5 per cent of fleets have more than 100 trucks. Owner/operators account for around 60 per cent of the industry.

As such there may be a need to provide assistance to industry with the transition. By way of example, under the Advanced Fatigue Management (AFM) provisions of the HVNL, operators may already operate with greater flexibility in hours provided they have systems for managing fatigue risks. However, industry is yet to use these provisions, despite general criticisms about the perceived prescriptive regulatory approach to fatigue management. It is expected that this issue will be examined in more detail in the proposed NTC Issues Paper – *Effective fatigue management*, and that this may provide insight into which mechanisms may facilitate industry support for a risk-based approach to regulation.

Similarly in respect of the CoR requirements, the NHVR has been undertaking an engagement and education program with operators to assist them in understanding their obligations under these new provisions, including assisting them in understanding the benefits of having a safety management system to demonstrate that they are complying with their safety obligations under the HVNL. More work is required, however, to transition operators to a risk-based regulatory approach. For instance, it is unclear how many operators currently maintain a safety management system, but it is understood that only around 20 per cent of heavy vehicle operators belong to an accreditation scheme with an associated safety management system.¹⁶

As the Issues Paper notes on page 38, smaller operators may prefer the certainty and relative simplicity of prescriptive regulation to a risk-based regulatory approach. It is expected that these challenges and how it is proposed to address them will be canvassed in more detail in subsequent Issues papers, including the proposed Issues Paper – *Accrediting operators to deliver best practice*.

¹⁶ Final Report, Analysis of Heavy Vehicle Safety Accreditation Schemes in Australia - Undertaken for the National Heavy Vehicle Regulator, Fellows Medlock and Associates, February 2018, page 47.