



## **A RISK BASED APPROACH TO REGULATING HEAVY VEHICLES HVNL REVIEW ISSUES PAPER 1**

### **AUSTRALIAN TRUCKING ASSOCIATION SUBMISSION 31 MAY 2019**

#### **1. About the Australian Trucking Association**

The Australian Trucking Association is the peak body representing the 50,000 businesses and 200,000 people in the Australian trucking industry. Its members include state and sector associations, some of Australia's major logistics companies and businesses with leading expertise in truck technology.

#### **2. Introduction**

In March 2019, the National Transport Commission released its first issues paper for the Heavy Vehicle National Law review, *A risk-based approach to regulating heavy vehicles*.<sup>1</sup>

This submission responds to the paper by setting out the ATA's overall vision for the new HVNL, before providing detailed responses to a number of its questions.

The submission does not respond to every question, but instead focuses on the key issues that need to be addressed at this stage of the review. The ATA will provide more detail about its vision for the law and the changes that are needed as the review continues.

The ATA developed this submission following detailed consultation with our members, as well as collaboration sessions at our national event for industry leaders, Trucking Australia 2019. These sessions brought trucking operators and drivers together to form a strong foundation for our submissions to the review.

The **Queensland Trucking Association** has asked that this submission be taken as its own.

#### **3. The ATA's vision for the new HVNL**

The Australian trucking industry is diverse. It ranges from businesses with one truck to international logistics chains; from livestock transporters that never leave rural areas to local delivery trucks that never leave the cities.

The issues paper points out that many smaller operators prefer prescriptive rules that provide certainty. Many operators, however, now have comprehensive safety management systems, some backed by technological solutions. Despite their systems, these operators are required to comply with the prescriptive rules – particularly on fatigue – as well.

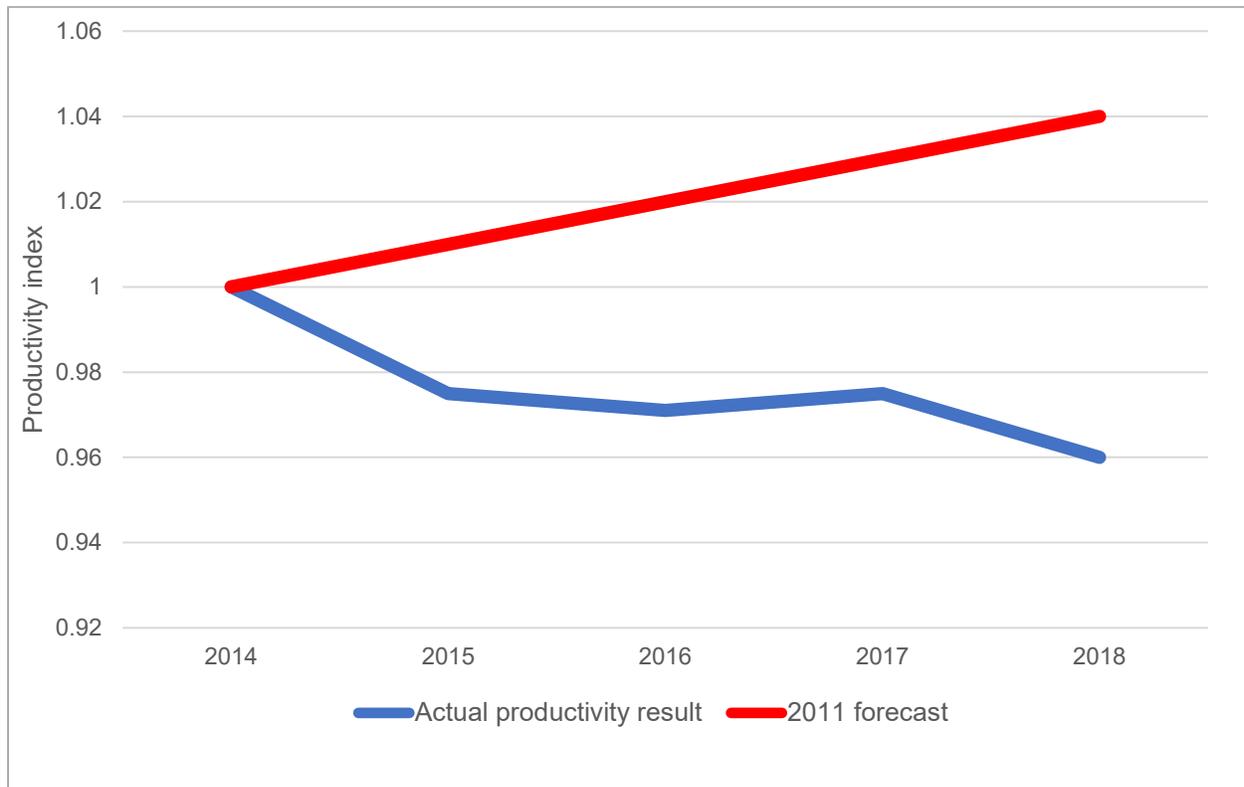
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<sup>1</sup> NTC, [A risk-based approach to regulating heavy vehicles](#). March 2019.

Meanwhile, the HVNL has failed to deliver the productivity gains that were predicted when it was developed.

In 2011, it was predicted that the law would deliver up to \$12.4 billion in economic benefits.<sup>2</sup> Figure 1 shows the reality. The productivity of the transport, postal and warehousing sector has fallen steadily since the law came into force in 2014.<sup>3</sup>

Figure 1: forecast and actual changes to industry productivity, 2014-2018



Source: Deloitte Access Economics.

The ATA's vision for the new HVNL is a law that has:

- **primary safety duties and executive officer due diligence obligations for all regulated parties.** These duties require businesses to take a systematic and thoughtful approach to safety, which could be through formal safety management systems.

<sup>2</sup> NTC, [Heavy Vehicle National Law regulation impact statement](#). September 2011. 16

<sup>3</sup> Deloitte Access Economics, [Economic benefits of improved regulation in the Australian trucking industry](#). Report commissioned by the ATA, March 2019. 21.

- **simplified and more flexible prescriptive rules**, particularly on fatigue, for operators whose business practices and risk profile do not warrant more complex systems. In developing the simplified rules, the review should apply a filter to the law to retain only the rules that provide tangible safety benefits and those administrative requirements that are essential to delivering those benefits.
- a **separate, voluntary, safety-based system** for operators that need even more flexibility. Operators in this system would need to be accredited under an approved accreditation scheme. The NHVR would regulate scheme providers (including private sector providers like TruckSafe) and auditors. Operators in any approved accreditation scheme would be entitled to appropriate concessions from the prescriptive rules. The system would recognise the efforts of operators that adopt a systematic approach to safety, possibly by using proven technology solutions.
- a **completely different approach to enforcement**. There is a perceived lack of action by road agencies and the regulator on serious breaches of the law, including by off-road parties. There is too much focus on fishing expeditions against compliant operators, work diary errors and low risks that cannot be controlled.<sup>4</sup> Operators and customers that invest large amounts of time and money to meet their obligations are forced to compete against firms whose business model is to avoid being caught.

As part of this new approach to enforcement, the recourses and protections for regulated parties need to be improved (page 16).

- a more streamlined and integrated approach to **heavy vehicle access and productivity** to deliver the productivity gains that the industry and customers need. To date, the HVNL review process has focused primarily on safety. The forthcoming issues papers on access and vehicle standards will need to switch that focus to productivity.

The HVNL would need to be substantially redrafted to deliver this vision, although some key elements – most notably chapter 1A of the current law – would be retained.

The ATA's answers to issues paper questions 6, 7 and 9 set out the changes to the structure of the law that would be needed to deliver this vision, as well as the corporate governance and accountability reforms that must be an integral part of this approach.

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<sup>4</sup> For example, see NTC, [Effluent and load restraint: consultation report](#). July 2018. 3.

#### 4. Responses to issues paper questions

**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?**

##### Elements to retain from the current HVNL

Chapter 1A of the HVNL came into force on 1 October 2018 and represents the best efforts of governments and industry to review the available evidence and introduce WHS primary duty and executive officer due diligence concepts into the road transport law.

The ATA considers that **the revised law should retain the primary duties in Chapter 1A**; however, the chapter should be amended to replace the **prescriptive list of parties in the chain of responsibility**<sup>5</sup> with an expanded list of examples that recognise the industry's concerns about effluent and load restraint, as well as freight brokers and the growing role of online freight matching platforms.

The NTC pointed out in 2014 that a fundamental problem with the prescriptive approach to CoR was that if a party or a party's responsibility could not be identified or exactly described, the law would not recognise them in the chain.<sup>6</sup>

As specific examples:

- In its submission to the NTC on effluent and load restraint, ALRTA noted that government policy makers could not agree on whether livestock effluent was already covered by the list of chain of responsibility parties, even though all jurisdictions agreed in principle that the matter should be covered by the HVNL.<sup>7</sup>
- The ATA has argued that online freight matching platforms are not adequately covered by the prescriptive list of parties. Our concern is all the greater because of the past conduct of online rideshare platforms and their use of gamification to encourage drivers to work longer.<sup>8</sup> In its submission to the Victorian on-demand workforce inquiry, NatRoad argued that online freight platforms should be covered by the HVNL to the extent they have influence or control over the freight task. This would distinguish a platform that is a marketing service from one that participates in transport transactions.<sup>9</sup>

The current HVNL's approach to **executive officer due diligence should also be retained.**

<sup>5</sup> See HVNL s 5, definition of 'party in the chain of responsibility.'

<sup>6</sup> NTC, [Chain of responsibility: duties review discussion paper](#). November 2014. 15

<sup>7</sup> ALRTA, [Submission in response to NTC discussion paper: effluent and load restraint](#). July 2018, 10.

<sup>8</sup> Scheiber, N. "How Uber uses psychological tricks to push its drivers' buttons," in [New York Times interactive](#), 2 April 2017.

<sup>9</sup> NatRoad, [Submission to the inquiry into the Victorian on-demand workforce](#). February 2019. [15]-[17].

Under the current law:

- Executive officers have due diligence obligations with respect to the primary safety duties of their organisations and a defined list of non-chain of responsibility offences.
- The prosecution bears the burden of proving its case.

Executive officer liability for HVNL offences was the subject of intense debate from 2012 – when the ATA and the Queensland Law Society raised concerns about the issue – to 2016, when the NTC released its decision RIS on the extension of the due diligence obligation.<sup>10</sup>

The current approach is consistent with the Australian tradition that people are innocent until proven guilty. It is consistent with the COAG principles and guidelines for personal liability for corporate fault, as well as the requirements placed on executive officers under the Rail Safety National Law (RSNL) and the Model WHS Act.<sup>11</sup>

In addition, the current HVNL's approach to **double jeopardy with respect to primary work health and safety law offences** should be retained and strengthened.

Many offences under the HVNL are also offences under primary work health and safety laws.

Section 18(3A) provides that if an act, omission or circumstances constitute an offence under the HVNL and a primary WHS law, an offender is not liable to be punished twice for the act, omission or circumstances.

In the absence of such a provision, a defendant faced with prosecution under both the HVNL and work health and safety law would need to seek a separate hearing about how the common law principle of double jeopardy would apply. This would be highly technical and costly.<sup>12</sup>

Later in the review process, the ATA will put forward detailed arguments about the operation of s 18 of the HVNL and the changes that are needed.

### **Drawing on the WA fatigue management and road access arrangements**

The ATA considers that the new HVNL should draw on Western Australia's successful fatigue management and road access arrangements.

Western Australia regulates the fatigue of commercial heavy vehicle drivers under its occupational health and safety law, rather than road transport law. The WA fatigue requirements feature:

- mandatory medicals for all commercial drivers, not only those operating under accreditation

<sup>10</sup> NTC, [Heavy Vehicle National Law – Extension of executive officer due diligence obligation decision regulatory impact statement](#), November 2016.

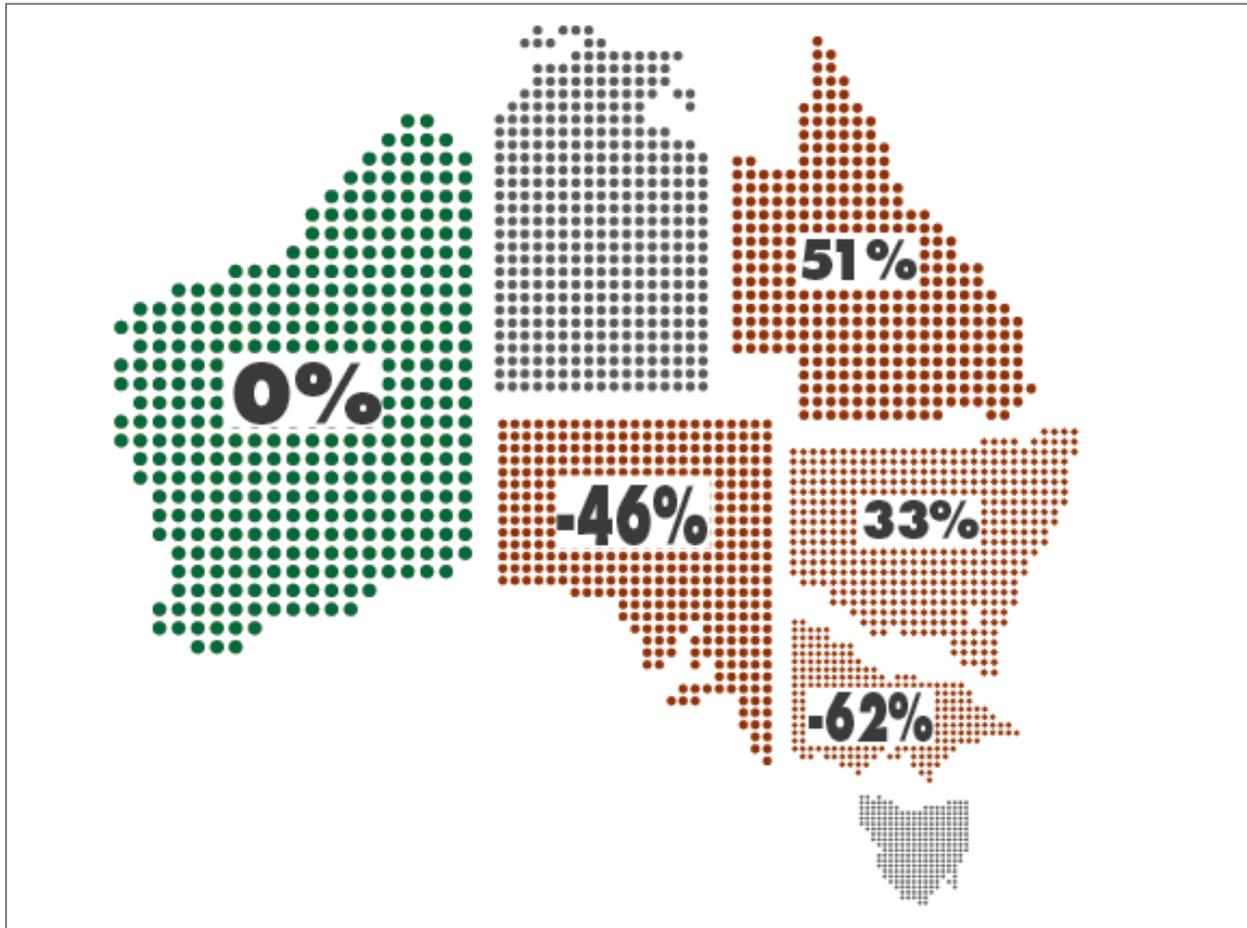
<sup>11</sup> ATA, [Executive officer due diligence obligation consultation RIS: Australian Trucking Association response](#), April 2016.

<sup>12</sup> ATA, [Primary duties for chain of responsibility parties and executive officer liability: ATA submission](#), August 2015, 14.

- more flexible work and rest hours
- non-prescriptive record keeping requirements.

Western Australia's flexible fatigue system has not resulted in a greater number of fatigue crashes. In fact, the latest NTI crash research shows that WA had a lower relative risk of fatigue related truck crashes than NSW or Queensland in 2017.<sup>13</sup>

Figure 2: relative risk of fatigue incidents by state corrected for freight volume, 2017



Source: NTI. No NTI insured trucks were involved in fatigue incidents in the NT or Tasmania in 2017. An incident was defined as one that incurred costs of more than \$50,000.

Western Australia also offers much faster turnarounds on road access applications.

- permit approvals are often granted within 48 hours
- the principles for assessing a restricted access vehicle approval include considering whether the route meets the relevant Route Assessment Guidelines and then adding it to the RAV network.

<sup>13</sup> NTI, [2019 major accident investigation report](#). April 2019, 18.

## Operator licensing should not be considered further

The issues paper notes that the HVNL does not set out requirements for operators to enter and exit the industry, and that barriers to entry are low compared with other transport modes.<sup>14</sup>

The low barriers to entry are often said to be a justification for licensing operators, with proponents pointing to the way other transport modes are regulated or overseas models.

In 2003, the National Road Transport Commission (NRTC) compared what was then a new approach to compliance – chain of responsibility – to operator licensing.

The NRTC rejected operator licensing in favour of chain of responsibility. It concluded that operator licensing was anti-competitive, heavy handed and risked regulatory capture, where regulatory decisions favour incumbents and not the public as a whole.<sup>15</sup>

The international history of operator licensing schemes illustrates its anti-competitive roots.

In New Zealand, operator licensing originated with the *Transport Licensing Act 1931*, which was designed to protect government owned railways from competition. It included limits on the distance that freight could be moved by road.

In the United Kingdom, operator licensing is established under the *Goods Vehicles (Licensing of Operators) Act 1995*, which consolidated regulations introduced in 1984 (in part to implement obligations under the European common transport policy) and Part V of the *Transport Act 1968*.<sup>16</sup> The 1968 legislation set out a system of quantity and quality licensing, where a rail operator could object to a road transport quantity licence if they could carry the goods as efficiently and at similar cost. The purpose of the scheme was to maximise the use of rail for freight.<sup>17</sup>

The ATA agrees with the NRTC's findings. Operator licensing should not be considered in this review.

### **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?**

The issues paper proposes a risk management approach to testing and informing policy options. It puts forward a draft regulatory principle (principle 1) specifying that the future HVNL should be risk based.<sup>18</sup>

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<sup>14</sup> NTC, March 2019, 38.

<sup>15</sup> NRTC, [Road Transport Reform \(Compliance and Enforcement\) Bill regulatory impact statement](#). November 2003, 50.

<sup>16</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 15 May 1995, [vol 564, col 297 \(The Lord Chancellor\)](#).

<sup>17</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 11 June 1968, [vol 293, col 17 & 18 \(Lord Shepherd\)](#).

<sup>18</sup> NTC, March 2019, 43.

The ATA supports the proposed risk management approach to developing policy options. It has already proved its worth as a way of identifying uncontrolled fatigue management risks.<sup>19</sup>

The ATA considers that the proposed approach could be improved by emphasising that it is being used for policy development, and that trucking operators would not – for example – be required to undertake a risk assessment for each truck journey.

Accordingly, we propose that draft principle 6 should be amended to specify that that the new law must reduce the regulatory burden on businesses, without compromising safety (page 19).

We further consider draft principle 1 should be amended to reflect the legitimate need for prescription to ensure that vehicles are interoperable and that components are compatible.

These prescriptive requirements cannot be replaced by duties-based provisions, because they are needed to ensure that equipment is compatible and interoperable.

For example, r 25 of the *Heavy Vehicle (Vehicle Standards) National Regulation* prescribes that:

- (1) A kingpin used in a B-double or road train must—
  - (a) be a 50mm kingpin, 75mm kingpin or 90mm kingpin; and
  - (b) have a D-value complying with AS 2175-1990 'Articulated Vehicles—Kingpins'.

There is no room for vehicle manufacturers or operators to adopt different kingpin dimensions: the prescriptive requirement is necessary to make sure equipment can be connected.

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

The object of the HVNL is:

- ...to establish a national scheme for facilitating and regulating the use of heavy vehicles on roads in a way that—
- (a) promotes public safety; and
  - (b) manages the impact of heavy vehicles on the environment, road infrastructure and public amenity; and
  - (c) promotes industry productivity and efficiency in the road transport of goods and passengers by heavy vehicles; and
  - (d) encourages and promotes productive, efficient, innovative and safe business practices.<sup>20</sup>

In the ATA's view, this object is appropriate. The scope of the HVNL is not, however, wide enough to achieve the public safety goal in s 3(a) or the productivity goal in s 3(c).

The issues paper points out that the elements of a safe and efficient heavy vehicle journey include a driver who is safe, authorised, competent and fit for duty.<sup>21</sup> Under the current law, the NHVR does not have sufficient authority to administer these elements.

<sup>19</sup> NTC, [Effective fatigue management issues paper](#). May 2019.

<sup>20</sup> HVNL, s 3.

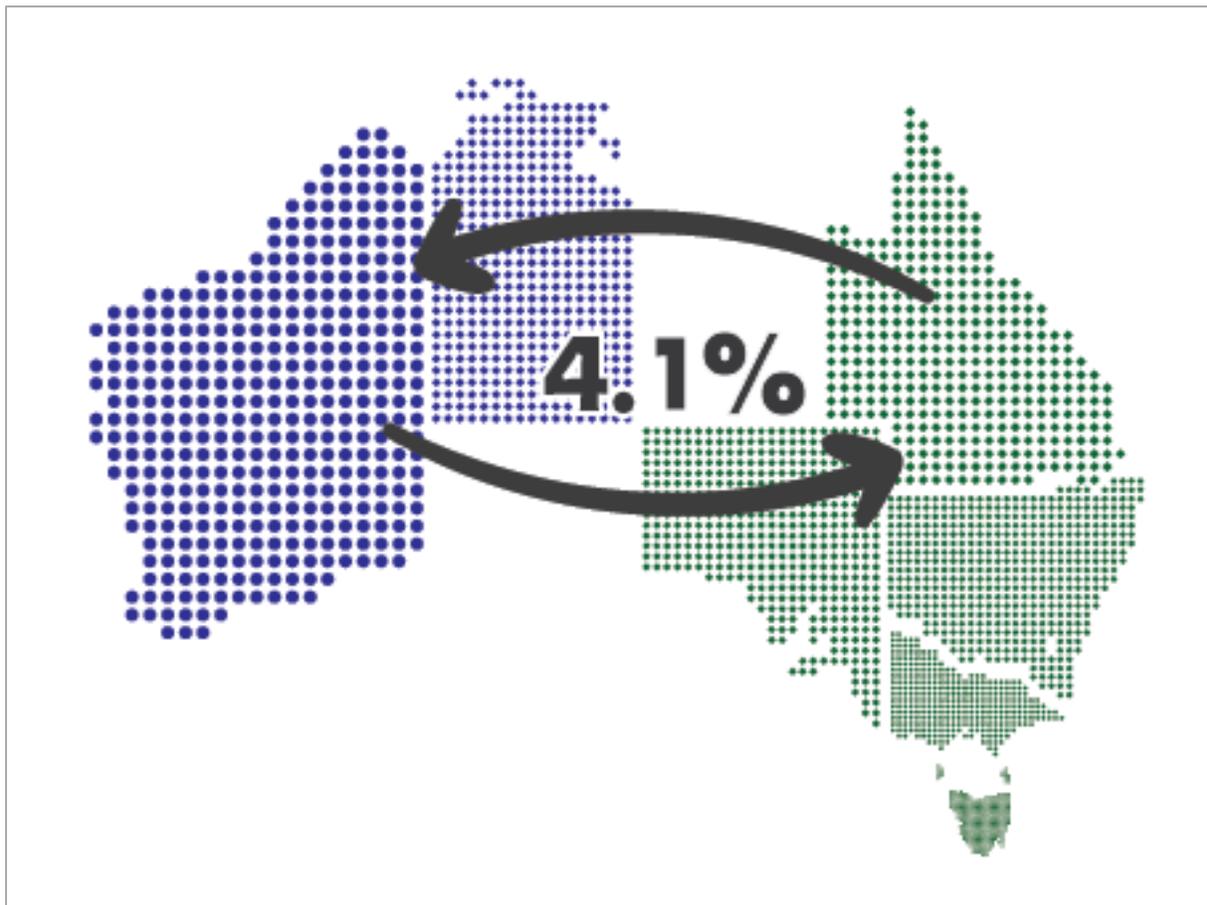
<sup>21</sup> NTC, March 2019, 27.

The NHVR also does not have the scope to make productivity decisions that are in the wider national interest, despite s 3(c).

**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?**

The ATA agrees that consistency between participating and non-participating jurisdictions is an important goal. Figure 3, however, shows that only **4.1 per cent** of Australia's total road freight task in tonne-kilometre terms occurs between WA/NT and the HVNL jurisdictions.<sup>22</sup> It follows that the economic gains from achieving national consistency would be small. They could even be negative, if striving for consistency reduced the productivity of the WA and NT industries.

Figure 3: Inter-system road freight as a share of total tonne-kilometres, 2017-18



Source: BITRE.

<sup>22</sup> Unpublished BITRE O/D data in tonne-kilometre terms, 2017-18. The ATA would like to thank BITRE for its assistance.

Instead, most of the economic gains from truck law reform would come from:

- eliminating or at least minimising the inconsistencies between HVNL jurisdictions
- reducing red tape and increasing productivity for all operators within the HVNL jurisdictions, including intrastate operators, without compromising safety.

In the short term, the inconsistencies between the WA/NT and HVNL systems could best be addressed through:

- bottom-up negotiations about specific productivity issues, rather than seeking to impose consistency from the top
- the development of mutual recognition agreements to reduce the cost of holding the multiple accreditations that interstate operators need to operate in Western Australia. This process could also be used to resolve the issues with s 245 of the HVNL, which are to be addressed as part of this review.<sup>23</sup>

**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?**

**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?**

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

As the issues paper points out, the HVNL is more than twice the size of the RSNL and the model WHS Act.<sup>24</sup> It is highly prescriptive. Even straightforward amendments to the primary legislation take more than a year to progress through the Transport and Infrastructure Council and the Queensland Parliament.<sup>25</sup>

The primary legislation is supported by five sets of regulations and a host of guidelines, approvals, policies and manuals of uncertain legal standing.

As a result, it is onerous and time-consuming to change the detail of the law, which means that it cannot keep up with changing technology or the needs of our diverse industry.

### **A new, three-tier structure for the HVNL**

The ATA considers that adopting the sound legislative practice of moving as much regulatory detail as possible to regulations or legislative instruments would help address these issues.

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<sup>23</sup> NTC, [HVNL fatigue issues consultation report](#), July 2018, 9.

<sup>24</sup> NTC, March 2019, 33.

<sup>25</sup> NTC, March 2019, 36.

In our view, the new HVNL should be restructured as follows:

- the **primary legislation** would comprise the amended version of Chapter 1A; other key offences such as the s 93 prohibition on speed limiter tampering; overarching principles about enforcement, sanctions, reviews and appeals; corporate governance; and regulation and order/rule making powers.
- the **regulations** would provide more detail, including sanctions for lesser regulatory offences.
- There would be a new tier of **orders and standards**, which would be made by the regulator. To the extent they needed to be retained under the proposed risk management model, the current guidelines, policies and manuals would be remade as legislative instruments in this tier. The orders and standards would generally be disallowable. All persons exercising powers under the HVNL (including police and local governments) would be required to comply with them.

There would continue to be a key role for registered industry codes of practice and accreditation schemes under this new structure.

Industry codes would continue to be developed by industry and considered by the NHVR against registration standards.

The NHVR would also be responsible for developing registration standards for accreditation schemes and auditing registered schemes against those standards. Operators in registered schemes would all be able to access appropriate concessions, as discussed on page 3.

### **Corporate governance, oversight and accountability**

The legislative model we are proposing would increase the workload and discretion of the regulator. This increase in the regulator's authority would need to be matched by corresponding improvements in its corporate governance, oversight and accountability.

The ATA and its members would only support the adoption of a three-tier model if these reforms were adopted.

#### *A statutory consultation and best practice regulation obligation*

The HVNL does not require the NHVR to consult with industry or set out how these consultations should be carried out.

In contrast, s 12 of the *Australian Maritime Safety Authority Act 1990* (Cth) provides:

In the performance of its functions and the exercise of its powers, the Authority must, where appropriate, consult with government, commercial, industrial, consumer and other relevant bodies and organisations.

The *Civil Aviation Act 1988* (Cth) has a similar provision.<sup>26</sup>

The *Rail Safety National Law* goes further. It requires a 28 day consultation period for changes to accreditation conditions.<sup>27</sup> It also requires ONRSR to conduct cost-benefit analyses before it makes a range of decisions.

Although the RSNL approach has the appeal of embedding a fixed consultation period and some elements of best practice regulation in the law, it is unnecessarily prescriptive for a primary Act.

Accordingly, the ATA proposes an alternative approach to including a consultation obligation in the HVNL.

The NHVR is a national standard setting body. It should develop rules and consult with industry in accordance with COAG's best practice regulation requirements. The current (2007) version requires regulators to:

- establish a case for action before addressing a problem
- consider a range of feasible policy options and assess their costs and benefits
- adopt the option that generates the greatest net benefit to the community and
- consult effectively with affected key stakeholders at all stage of the regulatory cycle.<sup>28</sup>

We propose that the new HVNL should include a two-part consultation and best practice regulation obligation:

- a statement of principle that the NHVR must consult, where appropriate, with government, commercial, industrial, consumer and other relevant bodies and organisations
- a specific requirement that the NHVR must comply with COAG policies on best practice regulation, including on competitive neutrality.

### *Strengthening the role of the NHVR board*

Under s 664 of the HVNL, the NHVR board controls the affairs of the regulator. Its functions include deciding the regulator's policies (subject to any directions by ministers) and ensuring the regulator exercises its functions in a proper, effective and efficient way.

The board's functions appear to be broad, but in practice are highly constrained.

Sections 653 and 654 of the law reserve the function of approving a host of guidelines and approvals to ministers. Under s 655A, the only delegation of this function that ministers can make to the board is to approve minor amendments, including for 'clerical reasons.'

These limits on the board's authority are not consistent with best practice, which is that statutory authority boards should have the full power to act within their area of responsibility, subject to

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<sup>26</sup> s 16.

<sup>27</sup> RSNL, s 72(2). The affected person can agree to a shorter period.

<sup>28</sup> Council of Australian Governments (COAG), [Best practice regulation: a guide for ministerial councils and national standard setting bodies](#). October 2007, 4.

ministerial oversight through a statement of expectations/corporate plan approval process and a broad power of direction.

These limits are also inconsistent with our proposed legislative model, which would see the NHVR making orders and standards in a responsive way.

As a result, the functions set out in current ss 653 and 654 should be transferred to the NHVR board or the CEO.

The functions of the board should also be amended to include:

- ensuring the NHVR complies with the consultation and best practice regulation obligation proposed in this submission and, more broadly
- ensuring the NHVR complies with policies agreed by responsible ministers or COAG.<sup>29</sup>

### *Board membership and skills*

The NHVR board consists of five members, including the Chair and Deputy Chair. The members of the board must consist of:

- (a) at least 1 member who has expertise in transportation policy; and
- (b) at least 1 other member who has expertise in economics, law, accounting, social policy or education and training; and
- (c) at least 1 other member who has experience in managing risks to public safety arising from the use of vehicles on roads; and
- (d) at least 1 other member who has financial management skills, business skills, administrative expertise or other skills or experience the responsible Ministers believe is appropriate.<sup>30</sup>

As table 1 shows, the NHVR board is small by the standards of comparable regulators. NHVR Chair Duncan Gay is a former trucking operator, but there is no requirement for the board to include even one member with experience operating a business regulated under the law.

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<sup>29</sup> For example, see *National Health Reform Act 2011* (Cth), s 5 and s 133.

<sup>30</sup> HVNL, s 663(1)

**Table 1: Size and composition of typical regulatory boards**

<b>Regulator</b>	<b>Members</b>	<b>Member with industry background</b>
NHVR	5	Yes – current Chair, but not required by the HVNL
Australian Maritime Safety Authority	9	Yes – required under s 13 (4A) of the Australian Maritime Safety Authority Act
Civil Aviation Safety Authority	7	Yes – 3 members, including the chair, have direct industry experience
Safe Work Australia	15	Yes – required that two members represent the interests of workers and two members represent the interests of employers
Australian Communications and Media Authority	8 (can be up to 9)	Yes – 3 members have direct industry experience.

In 2003, the Uhrig review concluded that a governance board should have between six and nine members. It noted that boards with fewer than six members may have difficulty meeting their statutory responsibilities due to workload pressures and their potential lack of breadth.<sup>31</sup>

Similarly, the AICD's governance advice on board size notes – as a rule of thumb for considering board size – that public sector boards of between six and 12 members are not unusual.<sup>32</sup>

Given that this submission proposes a substantial increase in the NHVR board's responsibilities and workload, it would be appropriate to:

- increase the size of the board from five to nine, and
- require that at least two of those members have recent experience operating a truck or bus business, either as a director or as an employee. Consistent with the recommendations of the Uhrig review, the members would not be appointed as industry representatives but as individuals for their experience and judgement.<sup>33</sup>

<sup>31</sup> Uhrig, J et al. [Review of corporate governance of statutory authorities and office holders](#). June 2003. 96.

<sup>32</sup> AICD, [Number of directors – board size](#). Fact sheet, 31 October 2017.

<sup>33</sup> Uhrig, 98.

### *Limiting delegation powers*

Section 683 of the HVNL enables the chief executive officer to delegate his or her powers (other than the power of delegation) to:

- (a) an appropriately qualified member of the staff of the Regulator; or
- (b) the chief executive of an entity, or a department of government, of a participating jurisdiction.

The proposed change to the structure of the law would require changing these delegation powers.

In the ATA's view, the power to make instruments or standards should only be delegable to a member of the staff of the Regulator. It may be appropriate to limit the delegation of these powers to SES equivalent officers.

### *Requirements on persons exercising powers*

An ongoing issue with the HVNL is that NHVR policies and guidelines are not binding on all the individuals and organisations who have authority under the law.

Under our proposed approach, many of the current policies and guidelines would become legal instruments. It is essential that all individuals and organisations with powers under the law be required to exercise their powers in accordance with those instruments, as well as the NHVR's other policies.

### *Parliamentary scrutiny*

The HVNL adoption legislation in each participating jurisdiction provides that the parliament of the jurisdiction can disallow national regulations made under the HVNL as if they were regulations of that jurisdiction.

The disallowance provisions only apply to national regulations and not to guidelines, policies or standards made under the law.

In the ATA's view, the use of third tier legislation in the new HVNL would need to be matched by an increased level of parliamentary scrutiny.

As a result, third-tier legislation made under the law should be disallowable in the same way, for example, that orders and standards issued by CASA are disallowable.

**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 HVNL now has a comprehensive range of enforcement powers and sanctions and substantial maximum penalties, including potential imprisonment for individuals convicted of a category 1 primary duty offence.<sup>34</sup>

The Heavy Vehicle National Law Amendment Bill 2019 (Qld) would also provide the NHVR with the specific power of providing advice, information and education to persons with duties or obligations under the law.<sup>35</sup>

Although these enforcement tools cover the whole of the enforcement pyramid identified in the issues paper,<sup>36</sup> the increased use of safety management systems proposed in this submission means that the attitude of enforcement officers will need to change.

All too often, enforcement officers evaluate risk-based safety management systems according to what could have been done with perfect foresight, rather than testing a business's systems against the legislated standard of reasonable practicability.

**Recourses and protections for regulated parties**

Two important recourses and protections that regulated parties need are already in the law. These are the requirements that the prosecution prove its case and the section 18(3A) protection against double jeopardy.

In the ATA's view, the requirement that the prosecution prove its case is so fundamental that it should be added to draft regulatory principle 5 (page 18).

In addition, there remains a need to address the investigation powers under the law and appeals against authorised officer and road manager decisions.

*Investigation powers*

The NTC reviewed the investigation powers in the law in 2017. In its findings, it noted that the current HVNL review would be an appropriate opportunity to consider the complexity of the HVNL information gathering powers, as well as the entry, inspection, search and seizure powers.<sup>37</sup>

The most important protections that need to be added to the information gathering powers in the law are:

- a requirement that requests for information must be directly relevant to the investigation being carried out and reasonable. The ATA is aware of cases where fishing exhibitions

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<sup>34</sup> HVNL, s 26F

<sup>35</sup> Heavy Vehicle National Law Amendment Bill 2019 (Qld), cl 33, Amendment of s 659 (Functions of Regulator)

<sup>36</sup> NTC, March 2019, 22.

<sup>37</sup> NTC, [Review of HVNL investigative and enforcement powers](#). Policy paper, May 2017. 43.

for business records have effectively halted day to day operations, or where it has become so expensive for a regulated party to deal with the endless requests for information and appeals that it has become less expensive to settle.

- a mandatory warning provision. The incorporation of such a provision in the HVNL would elevate any operational procedures that are in place to the status of a codified legal requirement, and would deal with the known cases where enforcement officers bypass the law by asking for voluntary statements without giving a warning.

#### *Appeals against authorised officer decisions, offences and defect notices*

The NatRoad submission on this issues paper points out that most offences under the HVNL must be challenged in court or a plea in mitigation made in a court. These pleas are costly because even though the penalty might be reduced, the operator or driver must pay court costs and/or lawyer's fees. These latter costs are likely to exceed the original penalty amount.<sup>38</sup>

Similarly, there is no straightforward way of appealing a defect notice, even though they are issued inconsistently.

The ATA considers that the new HVNL should include an early review process to address these issues.

#### *Appeals against road manager decisions*

Sections 643 and 644 of the HVNL enable an applicant to seek an internal review of a road manager's access decision. The decision by the reviewing officer is not subject to external appeal.<sup>39</sup>

The Australian Government's Administrative Review Council<sup>40</sup> has identified a host of problems with internal reviews. These include:

- inconsistent appeal outcomes. One of the objectives of an appeals system is to make sure that people in the same circumstances are treated in the same way, regardless of the primary decision-maker. This means that appeals need to be considered centrally, not by a review officer located in the same organisation as the primary decision-maker
- the failure of internal reviews to consider whether an organisation's approach to applying external standards is appropriate. Internal reviews only consider if a primary decision maker applied an organisation's own policies correctly; they are most unlikely to consider whether those policies are consistent with external standards. This is a particular concern given the ATA's proposal to recast the guidelines, including the access guidelines, as enforceable standards (page 11).

<sup>38</sup> NatRoad, [Submission to the National Transport Commission: A risk-based approach to regulating heavy vehicles](#). May 2019, [60].

<sup>39</sup> HVNL, s 647(1)

<sup>40</sup>Administrative Review Council, [Internal review of agency decision making](#). Report 44, 2000.

In the ATA's view, the new HVNL should enable road manager access decisions to be appealed to relevant appeal bodies. The need for this additional recourse should be recognised in draft regulatory principle 5 (page 19).

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

To support its input to this review, the ATA commissioned Deloitte Access Economics to make suggestions about potential reforms to the HVNL and then model their economic benefits.

According to its modelling, the new HVNL could:

- save the trucking industry \$1.8 billion a year by 2050
- reduce vehicle operating costs by 3.7 per cent
- reduce the costs of Australian industries by \$900 million a year
- save a typical Australian household more than \$400 per year on their everyday household purchases.<sup>41</sup>

These economic gains do not depend on extending the HVNL to non-participating jurisdictions. In fact, as this submission argues (page 9), extending the HVNL to Western Australia and the NT could reduce the productivity of trucking operations in those states.

In addition to these potential economic gains, the new HVNL must reduce the compliance burden faced by trucking businesses and drivers.

For example, one mid-size national trucking business estimates that its staff are required to manage 14 different industry, standards or customer audit processes, most covering the same issues. This proliferation of audits requires some 40 days of staff time per year to manage.

The ATA's proposed amendment to draft regulatory principle 6 (page 19) would embed, in the review process, the importance of reducing the compliance burden.

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

As set out in this submission, the ATA recommends amendments to draft regulatory principles 1, 5 and 6.

As discussed on page 8, draft regulatory principle 1 should be amended to read:

The future HVNL should be risk-based. The law should be developed by identifying, analysing, evaluating and establishing controls for material risks or for ensuring the compatibility and interoperability of equipment. 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.

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<sup>41</sup> Deloitte Access Economics, March 2019. v.

And as discussed on pages 16 and 17, draft regulatory principle 5 should read:

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. The new law should be based on a conventional burden of proof. Enforcement and access decisions must be able to be reasonably challenged, including through external appeal processes.

Draft regulatory principle 6 should read:

The future HVNL should deliver better safety, productivity and regulatory efficiency outcomes and lead to continual improvement across these key performance areas. The new law must reduce the regulatory burden on businesses, without compromising safety.