



## ASSURANCE MODELS HVNL REVIEW ISSUES PAPER 6

### AUSTRALIAN TRUCKING ASSOCIATION SUBMISSION 23 OCTOBER 2019

#### 1. About the Australian Trucking Association

The Australian Trucking Association and its member associations collectively represent 50,000 businesses and 200,000 people in the Australian trucking industry. Together we are committed to safety, professionalism and viability.

#### 2. Introduction

In August 2019, the National Transport Commission (NTC) released its sixth issues paper for the Heavy Vehicle National Law review, *Assurance models*.<sup>1</sup>

The ATA has 28 years of experience in running the industry's leading accreditation scheme, TruckSafe, and is a strong supporter of accreditation as a way of improving safety in the trucking industry.

Section 3 of this submission summarises how TruckSafe works and compares it to the National Heavy Vehicle Accreditation Scheme (NHVAS), run by the National Heavy Vehicle Regulator.

Section 4 sets out the ATA's model for how the new HVNL should handle accreditation. The submission closes with chamber-ready legislative drafting to give effect to our proposals (attachment A).

#### 3. Background

##### About the ATA's TruckSafe program

The ATA, then known as the Road Transport Forum, established the initial pilot of TruckSafe in 1992, when 15 operators participated in a 12 month program to validate the concept.<sup>2</sup> Some of the companies in the pilot, including Roadmaster, K&S and Nolan's Interstate Transport are still TruckSafe members.

TruckSafe has strengthened its accreditation standards repeatedly since it was established. The 2019 TruckSafe standards are aligned to the master registered code of practice and, as a result, are a strong way of complying with the safety duties in Chapter 1A of the Law.

The TruckSafe audit process is notable for its robustness.

- TruckSafe assigns and pays its auditors, so there is no financial relationship between auditors and the companies they audit

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<sup>1</sup> NTC, [Assurance models](#). August 2019.

<sup>2</sup> Roche, P. et al. *Putting safety first: a history of the Australian Trucking Association*. Focus Publishing, Sydney, 2011. 98.

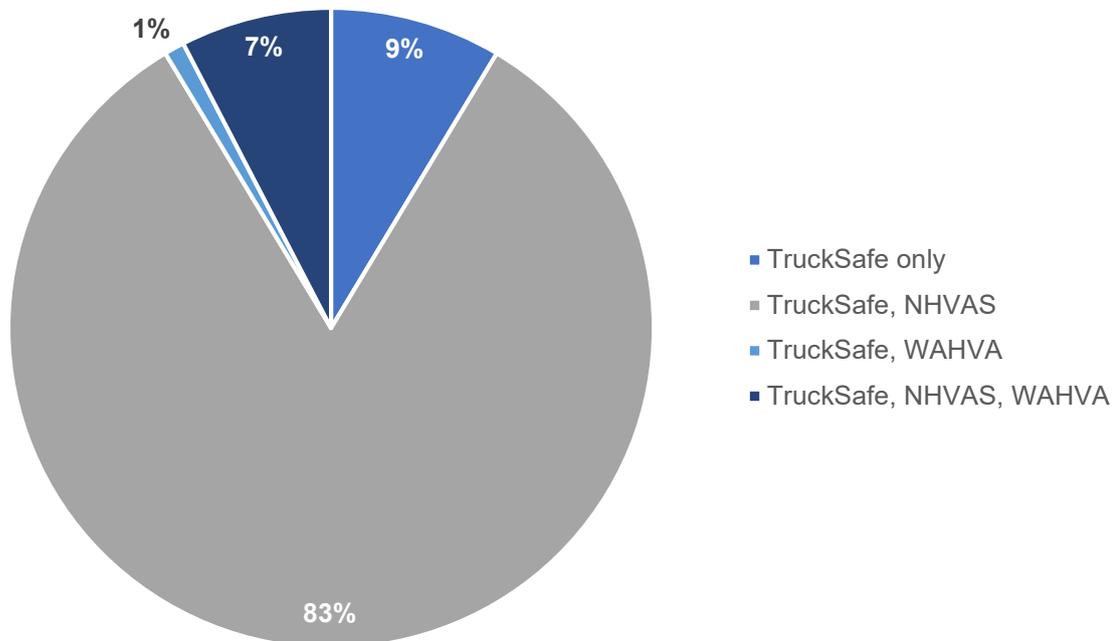
- TruckSafe audits are reviewed by the independent Trucksafe Industry Accreditation Council (TIAC), which sits outside the TruckSafe management structure.

The Medlock review of heavy vehicle safety accreditation schemes noted in 2018 that operators who were accredited under both TruckSafe and NHVAS found the TruckSafe audits to be, at times, more rigorous.<sup>3</sup>

Despite the rigour of the TruckSafe program, TruckSafe accredited operators do not have access to the alternative compliance arrangements available to NHVAS operators. The arrangements for TruckSafe operators were withdrawn in 2004 as part of the expansion of NHVAS.<sup>4</sup>

As figure 1 shows, 90 per cent of TruckSafe operators are also accredited under NHVAS – an unnecessary compliance burden that adds cost without improving safety.

**Figure 1: TruckSafe members in multiple accreditation schemes**



Source: internal TruckSafe data as at 1 October 2019.

The availability of alternative compliance arrangements to NHVAS accredited operators but not TruckSafe operators does not only result in operators paying to belong to multiple accreditation schemes: it also breaches governments' competition policy obligations.<sup>5</sup>

<sup>3</sup> Fellows Medlock and Associates. [Analysis of heavy vehicle safety accreditation schemes in Australia](#). Report prepared for the NHVR. February 2018, 50.

<sup>4</sup> Roche, 2011, 104.

<sup>5</sup> ATA, [Review of the Australian Government's competitive neutrality policy](#). April 2017. 3.

## About the National Heavy Vehicle Accreditation Scheme (NHVAS)

The National Heavy Vehicle Accreditation Scheme (NHVAS) was offered to the industry in 1999.<sup>6</sup> It was initially run by the state transport agencies, before being transferred to the NHVR in 2013.

NHVAS consists of four modules:

- Maintenance management
- Mass management
- Basic fatigue management
- Advanced fatigue management.

Operators can choose to be certified under one, some or all the modules. Operators in NHVAS maintenance management can choose to nominate only some of their vehicles.<sup>7</sup>

The NHVAS modules are not up to date and do not reflect the current HVNL. NHVAS does not cover, for example:

- fatigue management under standard hours
- speed management
- speed limiter tampering
- mass management for vehicles operating at GML
- management of vehicle dimensions or
- load restraint.

NHVAS accreditation does not deliver compliance with the safety duties in Chapter 1A of the HVNL, with the extraordinary result that the NHVR is operating a scheme that does not meet the requirements of its own Law.

The 2014 NTC/NHVR heavy vehicle roadworthiness review concluded that NHVAS could be improved by adopting aspects of TruckSafe.<sup>8</sup>

The review noted that the TruckSafe requirement for ‘in one – in all’ was a particular strength that required its members to make a comprehensive commitment to bringing a systematic approach to a broad range of business operations that may be relevant to safety.

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<sup>6</sup> NTC, August 2019, 22.

<sup>7</sup> NHVR, [National Heavy Vehicle Accreditation Scheme: business rules and standards](#). Version 2.4, August 2019. 31.

<sup>8</sup> NTC/NHVR, *Heavy vehicle roadworthiness review phase 2 – integrity review of the national heavy vehicle roadworthiness system*. August 2014. 64.

The review identified two specific opportunities:

**Opportunity 37:** consider adopting an “In one – In all” approach to accreditation against the NHVAS modules. This could be required either:

- a) at the first point of entry to the scheme whereby accreditation must be against all modules; or
- b) sequentially, with accreditation against each successive module being a prerequisite for the next (for example, maintenance management could be a precondition to accreditation for mass management or fatigue management).

**Opportunity 38:** consider expanding the NHVAS accreditation modules and/or standards to ensure that similar, important safety issues to those covered by TruckSafe are suitably addressed.

The NPRM for the NHVAS business rules and standards review did not address the deficiencies in the scheme or these opportunities.<sup>9</sup>

### Findings about the effectiveness of heavy vehicle accreditation

The Medlock review into heavy vehicle accreditation schemes examined ten years of government reports about the effectiveness of heavy vehicle accreditation.

The review concluded that the available evidence pointed to improvements in operator safety performance through membership of an accreditation scheme or multiple schemes. This was evident in terms of:

- lower crash rates
- lower insurance claim rates
- lower incidents of non-conformities
- lower rates of major defects.<sup>10</sup>

The final report of the review made nine recommendations, which included:

- the development of single national accreditation framework
- within the context of the single national framework, the extension of regulatory concessions to operators in any scheme that meets the required standards
- changing the NHVR’s role so it supervises alternative providers of accreditation services rather than providing these services itself.<sup>11</sup>

The findings of the report were referred to a joint government-industry working group for development.

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<sup>9</sup> NHVR, [NHVAS business rules and standards review](#). Viewed 23 October 2019.

<sup>10</sup> Fellows Medlock, 46.

<sup>11</sup> Fellows Medlock, 89-90.

#### 4. The ATA model for heavy vehicle accreditation

The ATA's vision for the new HVNL is set out in our submission on risk-based heavy vehicle regulation. Relevantly, the ATA considers that the new HVNL should have:

- simplified and more flexible prescriptive rules, particularly on fatigue, for operators whose business practices and risk profile do not warrant more complex systems.
- 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.<sup>12</sup>

Of the four assurance models in the issues paper,<sup>13</sup> the **ATA's preferred option is therefore model 2**: a market for regulatory certification.

Model 1 (vertical integration, where operators are certified only by governments) is the current system and would carry its deficiencies forward into the new law. In particular, model 1:

- would not provide governments or the NHVR with any incentive to bring NHVAS up to date or maintain it
- would not address the proliferation of customer and certification audits and
- would continue to be in breach of governments' competition policy obligations.

The ATA agrees with the issues paper that model 3 (outsourcing accreditation to JAS-ANZ or a similar body) would be the most complex option and the most expensive to administer.<sup>14</sup>

Model 4 (eliminating heavy vehicle accreditation and relying on performance-based standards) would reduce heavy vehicle safety. There would no systematic, regulated assurance carried out on businesses purporting to operate under the performance-based system.

None of the models proposed by the NTC would involve mandatory accreditation. The ATA welcomes this approach.

Mandatory accreditation is effectively another form of operator licensing. The NTC's forerunner, the NRTC, concluded in 2003 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>

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<sup>12</sup> ATA, [A risk-based approach to regulating heavy vehicles](#). May 2019. 2-3.

<sup>13</sup> NTC, August 2019, 35-40.

<sup>14</sup> NTC, August 2019, 39.

<sup>15</sup> NRTC, *Road Transport Reform (Compliance and Enforcement) Bill regulatory impact statement*. November 2003, 50. Cited in ATA, May 2019, 7.

## Purposes of accreditation

The ATA considers that the accreditation chapter in the new HVNL must start with a statement of its purpose. The current purpose of accreditation is set out in s 456. It says:

### 456 Purpose of Ch 8

The purpose of accreditation under this Law is to allow operators of heavy vehicles who implement management systems that achieve the objectives of particular aspects of this Law to be subject to alternative requirements under this Law, in relation to the aspects, that are more suited to the operators' business operations.

Given the ATA model of accreditation and the concerns that have been raised about the existing accreditation system, we consider that **the statement of purpose in s 456 should be amended:**

### 456 Main purposes of accreditation

The main purposes of accreditation under this Law are to—

- (a) Allow operators of heavy vehicles who are certified under an approved accreditation scheme that achieves the objectives of particular aspects of this Law to be subject to alternative requirements under this Law;
- (b) Enable operators of heavy vehicles to demonstrate their compliance with the duties and obligations under this Law;
- (c) Reduce the regulatory burden created by the unnecessary duplication of accreditation and customer audits; and
- (d) Improve the safety, efficiency and productivity of operators of heavy vehicles.

This amendment is also set out in attachment A.

## Role of ministers

At present, the NHVAS standards and business rules are approved by ministers, not the NHVR.<sup>16</sup>

The issues paper suggests that ministers could continue to have a role in the standard setting process.<sup>17</sup>

The ATA does not agree with this suggestion. In our view, the requirement for ministerial approval is one of the reasons the NHVAS standards are so out of date.

The role of ministers should be to set the NHVR's strategic priorities and hold its board to account, not to engage in the detail of third tier regulation.

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<sup>16</sup> HVNL, s 654(1)(b)

<sup>17</sup> NTC, August 2019, 37.

As a result, **section 654 should be repealed**. The power to make those approvals should be transferred to the NHVR.

The ATA submission on risk-based heavy vehicle regulation includes detailed recommendations about reforming the NHVR's governance, oversight and accountability.<sup>18</sup> The new HVNL will not be a success unless these reforms are implemented.

## Role of the NHVR

Under the ATA's proposed model, the NHVR would:

- regulate accreditation scheme providers and auditors
- approve certified operators to enter the alternative compliance system.

### *Regulation of accreditation scheme providers and auditors*

The ATA proposes that **the NHVR should have the power to make heavy vehicle accreditation scheme standards**, which would set out broad requirements about the establishment, approval, operation and exit of approved accreditation schemes (Attachment A, draft s 458).

The ATA would expect that the accreditation standard would be aligned, wherever possible, with the relevant Australian and international standard, AS/NZS ISO/IEC 17021.<sup>19</sup>

**The NHVR would be able to approve heavy vehicle accreditation schemes as approved schemes for the purposes of the law**, if they met the requirements of the standards (Attachment A, draft s 459).

If required, the NHVR could insource certification scheme expertise through staff hires, a consultancy agreement or the inclusion of JAS-ANZ as a member of the scheme assessment panel.

One potential concern about this approach is that it could result in the establishment of very small accreditation schemes that could suddenly close.

The ATA considers that this concern could be addressed through **strong entry conditions for accreditation schemes** in the standards, in the same way that the NHVR's guidelines for industry codes of practice are helping deliver strong, well-written industry codes.<sup>20</sup>

In addition to the AS/NZS 17021 requirement, the entry conditions should require that:

- accreditation schemes be structured as not-for-profits or majority owned by not-for-profits
- schemes have enough members, and sufficiently strong management systems, to remain in operation indefinitely
- they comply with the *Competition and Consumer Act* and particularly its prohibition on exclusive dealing.<sup>21</sup>

<sup>18</sup> ATA, May 2019, 11-15.

<sup>19</sup> AS/NZS ISO/IEC 17021.1:2015 [Conformity assessment - Requirements for bodies providing audit and certification of management systems](#).

<sup>20</sup> NHVR, [Guidelines for preparing and registering industry codes of practice](#). 2017.

<sup>21</sup> *Competition and Consumer Act 2010* (Cth), s 47.

A second potential concern is that industry schemes may not operate with the same level of rigour as a government-owned scheme, despite the findings of the NTC/NHVR roadworthiness review (page 3) and the Medlock review (page 2).

In the ATA's view, this potential concern should be addressed by ensuring that the accreditation scheme standards include an **assurance framework based on AS ISO/IEC 17011**.<sup>22</sup> The standards should require:

- a scheme review and reaccreditation process at intervals of no longer than five years<sup>23</sup>
- regular sample-based assessments, including NHVR participation in a sample of operator audits<sup>24</sup>
- documented procedures and criteria for suspending or withdrawing the approval of a scheme<sup>25</sup>
- documented processes for receiving, evaluating and making decisions about complaints and appeals.<sup>26</sup>

#### *Approval of certified operators to enter the alternative compliance system*

The NHVR's second role under this model would be to approve certified operators to enter the alternative compliance system.

The NHVR holds confidential enforcement information. It cannot share this information with industry schemes. As a result, an approved scheme could, at least hypothetically, certify an operator with enforcement red flags to enter the alternative compliance system.

The ATA proposes that:

- approved accreditation schemes would be responsible for certifying members but
- the NHVR would validate certified operators to enter the alternative compliance system against clear standards, with the presumption that operators would be validated automatically unless the NHVR held serious adverse information about them.

Previous breaches of the law should not necessarily be a reason to prevent an operator from entering the alternative compliance system. An operator may wish to become certified and enter the system to improve their legal and safety compliance – including under an enforceable undertaking or a supervisory intervention order.

#### **Role of approved accreditation scheme providers**

Approved accreditation schemes would be responsible for maintaining their own certification standards and business rules, as well as certifying operators against their standards.

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<sup>22</sup> AS ISO/IEC 17011:2018. [Conformity assessment – Requirements for accreditation bodies accrediting conformity assessment bodies.](#)

<sup>23</sup> AS ISO/IEC 17011, 19 [7.9.1].

<sup>24</sup> AS ISO/IEC 17011, 19 [7.9.3].

<sup>25</sup> AS ISO/IEC 17011, 20 [7.11.1].

<sup>26</sup> AS ISO/IEC 17011, 20 [7.12] - 21 [7.13].

## Advantages of being certified

The ATA recommends that certification should carry the following advantages for trucking businesses and their customers:

### *All certified trucking businesses*

- All businesses certified by an approved scheme would be **deemed to comply with the safety duties under the HVNL**. Attachment A includes a new section of the Law, s 26I in new Part 1A.4, that would give effect to this approach. The proposed section would align with the Victorian OHS Act approach to compliance codes<sup>27</sup> and the findings of the Maxwell Report.<sup>28</sup>
- **Customers and other chain parties, including prime contractors, would be able to rely on a trucking business's certification as evidence that the business was compliant with its safety duties and obligations** (attachment A, draft s 26J). The customer would be able to focus on meeting its own obligations rather than second guessing the trucking operator's systems.

### *Certified trucking businesses validated for alternative compliance*

- As proposed in the ATA's fatigue management submission, certified businesses validated by the NHVR would be able to **access the alternative fatigue management regime**.<sup>29</sup>
- Certified and validated businesses would be **exempt from yearly vehicle inspections in NSW, Queensland and South Australia**.
- Certified and validated businesses could be subject to a **lower level of roadside enforcement**, although it should be noted that this claimed advantage of the NHVAS maintenance module has not been delivered.<sup>30,31</sup>
- Certified and validated businesses would be **pre-credentialled for the current NHVAS access arrangements and mass concessions**.

## What would happen to NHVAS?

There would be no place or reason for NHVAS to continue under this model.

It would not be appropriate – or consistent with AS ISO/IEC 17011 – for NHVAS to remain under the management of the NHVR.<sup>32</sup> There would be an obvious conflict of interest between the NHVR approving accreditation schemes and running its own scheme,

<sup>27</sup> *Occupational Health and Safety Act 2004* (Vic), s 152.

<sup>28</sup> Maxwell, C. *Occupational Health and Safety Act Review*. March 2004. 359.

<sup>29</sup> ATA, [Effective fatigue management](#). August 2019. 12-13.

<sup>30</sup> NHVR, [Maintenance management accreditation guide](#). January 2013. Viewed 21 October 2019. 4.

<sup>31</sup> NTC, August 2019, 32.

<sup>32</sup> AS ISO/IEC 17011, 8 [4.4.11].

particularly since the NHVR would also validate individual operators to access alternative compliance.

To address this conflict, the Medlock review entertained transferring NHVAS to a separate government organisation or allowing it to be taken over by a private entity.<sup>33</sup>

But the NHVAS does not have a separate corporate existence to the regulator. It is not a subsidiary company that could be transferred.

Accordingly, the ATA considers that the simplest approach would be to **close NHVAS when the new HVNL comes into force.**

NHVAS accredited operators would be invited to select their new accreditation provider from a list of approved schemes, in the same way that vehicle owners are invited to transfer to private CTP providers when states deregulate their CTP systems.<sup>34</sup>

### **Eliminating the need for multiple accreditations**

The ATA considers that adding sections 26I and 26J would go a long way toward removing the perceived need for customers to conduct their own chain of responsibility audits.

The sections would not, however, prevent a customer from requiring operators to be certified under their preferred scheme, even though other approved schemes would meet the same standards and offer the same level of legal protection.

Accordingly, **a new section should be added to the HVNL to ban requests or contracts that would require or encourage businesses to be certified under a particular approved scheme.**

A draft of this proposed new section, s 26K, is in attachment A.

The section would ban persons from making prohibited requests or entering into prohibited contracts relating to heavy vehicle accreditation. The maximum penalty, \$10,000, would be in line with s 26E of the Law.

The section would define a prohibited request or contract as one that requires or encourages an operator to obtain certification from a particular approved accreditation scheme.

The section would not apply to:

- a request or contract that relates to aspects of an approved accreditation scheme that are in addition to the parts of the scheme that cover duties and obligations under the HVNL. The ATA envisages that some approved schemes may choose to offer additional certification services. It would, in our view, be entirely reasonable for a customer to select a certification scheme because it provided those additional, non-HVNL services
- requests or contracts between related bodies corporate.

Proposed subsection (6) would make it clear that the provision does not prevent requests or contracts from encouraging or requiring operators to be certified under any approved scheme, as long as the operator does not have to be certified under a particular scheme.

<sup>33</sup> Fellows Medlock, 88.

<sup>34</sup> See CTP Regulator (SA), [Why your CTP is now your choice](#). Viewed 18 October 2019.

It should be emphasised that s 26K would only apply to accreditation schemes approved under the HVNL, and not WAHVAS.

The ATA argued in our risk-based regulation submission that mutual recognition agreements should be used to reduce the cost of holding the multiple accreditations that interstate operators need to operate in Western Australia.<sup>35</sup>

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<sup>35</sup> ATA, May 2019, 10.

## Legislative drafting for key ATA proposals

### New Part 1A.4: Use of heavy vehicle accreditation to comply with safety duties

#### **26I Compliance with heavy vehicle accreditation scheme requirements**

If—

- (a) An approved heavy vehicle accreditation scheme under this Law makes provision for or with respect to a duty or obligation imposed by this Law; and
- (b) A person is certified under the scheme—

The person is taken to have complied with this Law in relation to that duty or obligation.

#### **26J Entitlement to rely on heavy vehicle accreditation**

If—

- (a) An approved heavy vehicle accreditation scheme under this Law makes provision for or with respect to a duty or obligation imposed by this Law; and
- (b) A person is certified under the scheme—

Then—

- (c) Another person, including another party in the chain of responsibility, is entitled to rely on that person's certification as evidence that the person has complied with this Law in relation to that duty or obligation; and
- (d) To the extent that the other person has a duty or obligation under this Law in relation to the conduct of that person, the other person is taken to have complied with this Law in relation to that duty or obligation.

#### **26K Prohibited requests and contracts relating to heavy vehicle accreditation**

- (1) Subject to this section, a person must not make a prohibited request or enter into a prohibited contract relating to heavy vehicle accreditation.

Maximum penalty—\$10000

- (2) A person makes a prohibited request relating to heavy vehicle accreditation if that person asks, directs or requires (directly or indirectly) an operator or a party in the chain of responsibility to do or

not do something that the person knows, or ought reasonably to know, would have the effect of causing the operator, or would encourage the operator, or would encourage a party in the chain of responsibility to cause the operator to obtain certification from any particular approved accreditation scheme.

- (3) A person enters into a prohibited contract relating to heavy vehicle accreditation if the person knows, or ought reasonably to know, that the contract would have the effect of causing the operator, or would encourage the operator, or would encourage a party in the chain of responsibility to cause the operator to obtain certification from any particular approved accreditation scheme.
- (4) A person does not make a prohibited request or enter into a prohibited contract merely because a request or contract asks, directs, requires, causes or encourages an operator to obtain certification from any particular approved accreditation scheme in relation to aspects of that approved accreditation scheme that are in addition to those aspects which make provision for or with respect to any duty or obligation imposed by this Law.
- (5) This section does not apply to requests or contracts between two or more bodies corporate that are related bodies corporate within the meaning of section 50 of the *Corporations Act 2001* (Cth).
- (6) This section does not prevent a person from making a request or entering into a contract that asks, directs, requires, causes or encourages an operator to be certified under any approved accreditation scheme, without specifying any particular approved accreditation scheme.

## New and replacement provisions for Chapter 8: Accreditation

### 456 Main purposes of accreditation

The main purposes of accreditation under this Law are to—

- (a) Allow operators of heavy vehicles who are certified under an approved accreditation scheme that achieves the objectives of particular aspects of this Law to be subject to alternative requirements under this Law;
- (b) Enable operators of heavy vehicles to demonstrate their compliance with the duties and obligations under this Law;
- (c) Reduce the regulatory burden created by the unnecessary duplication of accreditation and customer audits; and
- (d) Improve the safety, efficiency and productivity of operators of heavy vehicles.

### 457 Definitions for Ch 8

In this Chapter—

***approved accreditation scheme***, means a heavy vehicle accreditation scheme approved by the Regulator under section 459.

***heavy vehicle accreditation scheme standards***, means the heavy vehicle accreditation scheme standards approved by the Regulator under section 458.

Note— A copy of the heavy vehicle accreditation scheme standards is published on the Regulator's website.

### 458 Heavy vehicle accreditation scheme standards

- (1) The Regulator may make heavy vehicle accreditation scheme standards about the establishment, approval and operation of approved accreditation schemes for the purposes of this Law.
- (2) The standards, and any instrument amending or repealing the standards, must be published in the Commonwealth Gazette.
- (3) The Regulator must ensure a copy of the standards in force under subsection (1) are—
  - (a) made available for inspection, without charge, during normal business hours at each office of the Regulator; and
  - (b) published on the Regulator's website.

**459 Approval of heavy vehicle accreditation schemes**

- (1) A person may apply to the Regulator for approval of a heavy vehicle accreditation scheme.
- (2) An application under subsection (1) must—
  - (a) be in the approved form;
  - (b) provide details, as reasonably required by the Regulator, of the applicant's accreditation scheme; and
  - (c) be accompanied by the prescribed fee for the application.
- (3) The Regulator may, by notice given to the applicant, require the applicant to give the Regulator any additional information the Regulator reasonably requires to decide the application.
- (4) The Regulator must decide the application as soon as practicable after receiving it.
- (5) If the Regulator is satisfied that the applicant's accreditation scheme will comply with the heavy vehicle accreditation scheme standards, the Regulator must—
  - (a) approve the applicant's application; and
  - (b) give notice of its decision to the approved accreditor that must include any—
    - (i) conditions on which the approved accreditation scheme may operate;
    - (ii) the period for which the Regulator's approval of the approved accreditation scheme applies.
- (6) If the Regulator is not satisfied that the applicant's accreditation scheme will comply with the heavy vehicle accreditation scheme standards, the Regulator must give the applicant an information notice for the decision.