



## HVNL REVIEW CONSULTATION RIS CHAPTER 5: REGULATORY TOOLS

### AUSTRALIAN TRUCKING ASSOCIATION SUBMISSION 20 NOVEMBER 2020

#### 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 and summary

In June 2020, the National Transport Commission released the Heavy Vehicle National Law consultation regulation impact statement,<sup>1</sup> as well as a scenario setting out what the new law could look like.<sup>2</sup>

This submission responds to chapter 5 of the consultation RIS, which deals with the regulatory tools available to the NHVR,

In the ATA's view—

- Option 5.1 (adopting the WHS approach to developing and making codes of practice) should not be considered further. Instead, **the ability of industry bodies to develop codes for approval by the NHVR should be extended to the NTC and other government agencies** (new option 5.1c).
- The NHVR should not be empowered to make safety standards under option 5.2. Instead, **more provisions of the law should be transferred to the regulations** (new option 5.6).
- Any remote zone established under option 5.3 should be **confined to the HVNL states, but its boundaries extended**.
- The HVNL does not support the NHVR's 'just culture' approach to safety. New option 5.7 would **amend the HVNL to support this proven approach to safety**. In combination with option 5.6, this approach would help deliver **more fairness for truck drivers**.

The submission recommends **a package of governance and accountability reforms** to Chapter 12 of the HVNL, based on recognised best practice for regulators (new option 5.5), and confirms that the **ATA does not oppose data sharing with the NHVR** (option 5.4).

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<sup>1</sup> NTC, [HVNL review consultation regulation impact statement](#). Report prepared by frontier economics. June 2020a.

<sup>2</sup> NTC, [HVNL 2.0: a better law scenario](#). June 2020b.

## **Analysis of option 5.1: establish a code of practice mechanism in the HVNL**

Evidentiary codes of practice are a well-established mechanism for fleshing out the broad general duties in OHS and OHS adjacent legislation. Evidentiary codes provide non-mandatory guidance about how to achieve the principles set out in the general duties.<sup>3</sup>

The RIS argues that the HVNL does not include an effective code of practice mechanism. Under option 5.1, the NHVR, the NTC and other agencies would be empowered to develop codes of practice for approval by transport ministers.<sup>4</sup>

It should be noted that option 5.1 would require amendments to the *National Transport Commission Act 2003* (Cth) and the Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport, as well as to the HVNL and the industry code guidelines.

Row 1 of table 1 (page 6) summarises the assessment of the option in the RIS.<sup>5</sup>

### **ATA assessment of option 5.1**

The ATA strongly disagrees with the assessment of option 5.1 in the RIS.

The RIS makes a compelling case for the HVNL to include a code of practice mechanism, compared to a base case where the HVNL does not allow for codes of practice.

### **But the HVNL already has an effective code of practice mechanism.**

Section 706 of the law empowers the regulator to register industry codes of practice. Under s 632A, a court may—

- have regard to a code as evidence of what is known about a hazard or risk, risk assessment, or risk control, to which the code relates
- rely on a code in determining what is reasonably practicable in the circumstances to which the code relates.

Section 632A is functionally identical to s 275 of the model *Work Health and Safety Act*.

So far, the NHVR has registered one code of practice under s 706, the master industry code of practice developed by the ATA and the ALC. The Crane Industry Council of Australia (CICA) has submitted a second code for assessment, and a further six are under development.<sup>6</sup>

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<sup>3</sup> Bluff, E. and N Gunningham. [Principle, process, performance or what? New approaches to OHS standards setting](#). National Research Centre for OHS Regulation. Working paper 9, June 2003. 9.

<sup>4</sup> NTC, June 2020a, 53.

<sup>5</sup> Sourced from NTC, June 2020a, 47.

<sup>6</sup> NHVR, [Industry codes of practice registers](#). Accessed 4 October 2020.

The ATA's assessment of option 5.1 compared to the existing law is set out in row 2 of table 1. Most importantly—

*Option 5.1 would result in higher compliance costs than the existing CoP mechanism*

The guidelines for preparing and registering industry codes of practice require code developers to consult comprehensively with the relevant industry sector.<sup>7</sup>

The ATA and ALC delivered on this requirement through a consultation program that ran for 12 months from June 2017 to June 2018. As well as sessions at ATA and ALC events, the code development team held technical workshops with organisations including BlueScope, DP World and the Institute of Public Works Engineers.

The result is a code of practice that is thoroughly grounded in industry practice and holds compliance costs to a minimum.

In contrast, WHS codes are developed through a similar process to the one envisaged in the RIS. Safe Work Australia develops draft codes through tripartite consultation; the drafts are then considered and approved by ministers.<sup>8</sup>

The COAG review of the model WHS laws found that:

- model codes developed through the tripartite process tended to be lengthy, complex and legalistic
- new model codes should only be developed if they met rigorous criteria
- future codes should be developed in a simple, easy to understand style to suit the target audience:<sup>9</sup> in other words, the same style used in the master code.

Based on the evidence of the COAG review, it would seem likely that option 5.1 would reduce the quality of industry consultation involved in developing codes and result in more complex, less effective documents.

*Option 5.1 would be slower and less flexible than the current mechanism*

The RIS asserts that option 5.1 would streamline the introduction of, or updates to, regulatory arrangements and would lead to a reduction in government administrative costs associated with implementing amendments.<sup>10</sup>

Option 5.1 proposes that codes of practices would be approved by ministers.<sup>11</sup> But ministerial council approval processes are notoriously slow.

For example, the 2014 COAG review of the model WHS laws found that the WHS code development process could take up to 18 months from the time the content of the material

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<sup>7</sup> NHVR, [Guidelines for preparing and developing industry codes of practice](#). 2017. 5.

<sup>8</sup> Model WHS Act, s 274.

<sup>9</sup> COAG, [Improving the model work health and safety laws: decision regulatory impact statement](#). December 2014. 21-23.

<sup>10</sup> NTC, June 2020a, 58.

<sup>11</sup> NTC, June 2020a, 53.

was settled to when it became an approved model code.<sup>12</sup> In contrast, the NHVR took only five months to approve the master code.<sup>13</sup>

In May 2020, National Cabinet agreed to review the former COAG councils and ministerial forums with a view to rationalising and resetting their structure and work programs.

The review, conducted by the former Director-General of the WA Department of Premier and Cabinet, Peter Conran AM, recommended that—

As a general rule, ministers' forums and meetings should not have their regulatory and standard-setting roles enshrined in legislation.<sup>14</sup>

The review concluded that ongoing regulatory work should largely be taken forward by officials.<sup>15</sup>

National Cabinet accepted the review's findings on 23 October 2020.

*As a result, options 5.1 and 5.1b should not be considered further*

Option 5.1 would be slower and deliver less effective codes of practice than the current HVNL mechanism. It would also be inconsistent with the October 2020 National Cabinet decision.

As a result, it should not be considered further.

Sub-option 5.1b in the RIS would retain the industry's ability to develop codes but would transfer responsibility for approving codes to ministers.<sup>16</sup>

This option would also be slow and inconsistent with the National Cabinet decision.

### **Preferred option**

Although the evidence does not support options 5.1 and 5.1b, there is logic to the argument that a government agency should be able to develop registered codes in parallel with industry.

This would enable codes to be developed on priority issues even if there were no industry groups prepared to lead the development of those codes.

The ATA therefore proposes a new option, option 5.1c. Under this option—

- the NTC or other relevant agencies would be empowered to develop industry codes
- the NHVR would continue to be responsible for registering codes under s 706 of the law.

Like option 5.1, option 5.1c would require amendments to the HVNL, the *National Transport Commission Act 2003* (Cth), the industry code of practice guidelines, and the

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<sup>12</sup> COAG, December 2014, 20.

<sup>13</sup> Safe Trucking and Supply Chains internal records. The code was submitted to the NHVR on 22 June 2018 and registered on 23 November 2018.

<sup>14</sup> Conran, P. [Review of COAG councils and ministerial forums](#). Report to National Cabinet, October 2020. 8.

<sup>15</sup> Conran, October 2020. 29.

<sup>16</sup> NTC, June 2020a. 59.

Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport.

**Impact assessment of the ATA's preferred option**

Row 3 of table 1 summarises the ATA's assessment of proposed option 5.1c.

In our view, the option would deliver the same approval times as the existing code of practice mechanism. Government code developers would be able to fill in areas where industry organisations were not able to develop codes.

Accordingly, we recommend that the NTC adopt option 5.1c.

**Table 1: Qualitative analysis of option 5.1**

Industry		Government and community			Other
Compliance costs	Improvements in operational efficiency	Government admin costs	Enforcement and compliance monitoring costs	Avoided costs associated with reduced crashes	
<b>1. Consultation RIS assessment of option 5.1</b>					
	Clarity around legal obligations may assist parties in more efficiently managing safety	Avoided costs given fewer revisions to regulatory arrangements will need to go through parliamentary processes	There may be an additional cost for the regulator associated with maintaining COPs.	HVNL more able to evolve and become more risk-based and targeted which should improve road safety outcomes	
<b>2. ATA assessment of option 5.1</b>					
Reduced quality of consultation compared to existing mechanism, resulting in higher compliance costs.		Approval times historically worse than existing mechanism.		Greater code complexity due to WHS style process would result in lower code take up and be less effective at delivering safety outcomes.	Inconsistent with October 2020 National Cabinet requirements and the findings of the Conran review.
<b>3. ATA assessment of option 5.1c</b>					
		Approval times the same as existing mechanism.		Government developers could fill in areas where industry organisations are not able to develop codes.	Requires amendments to the NTC Act (Cth) and the relevant intergovernmental agreement.

### 3. Analysis of option 5.2: establish a safety standard mechanism in the HVNL

Option 5.2 would amend the HVNL to empower ministers to make third tier legislation, or safety standards.

The option envisages that safety standards would generally cover technical matters. Compliance with safety standards would be mandatory, and a breach of a safety standard would be an offence.

Under the option as written, the NHVR would not be able to develop safety standards by itself. Consultation and ministerial signoff would be required.<sup>17</sup>

Row 1 of table 2 (page 8) summarises the assessment of the option in the RIS.<sup>18</sup>

#### ATA assessment of option 5.2

The ATA does not support option 5.2, although we acknowledge that we advanced a similar proposal in the issues paper phase of the review.<sup>19</sup>

The RIS proposes that standards under the HVNL would be signed off by ministers.<sup>20</sup>

As this paper points out (page 3), ministerial approval processes have historically involved long delays. The addition of a ministerial approval process to the HVNL would also be inconsistent with the new National Cabinet requirements and the findings of the Conran review (page 4).

Option 5.2 could only deliver increased flexibility and responsiveness if the NHVR was able to make safety orders itself, in the same way that the Civil Aviation Safety Authority (CASA) and the Australian Maritime Safety Authority (AMSA) can make orders.<sup>21</sup>

But CASA and AMSA executives are subject to vigorous questioning in the Senate estimates process; Civil aviation and marine orders can be, and sometimes are, the subject of disallowance motions.<sup>22</sup>

But the NHVR is not and cannot be subject to same level of parliamentary scrutiny as these Commonwealth regulators.

New option 5.6 in this submission is an alternative approach to delivering increased legislative flexibility, with new option 5.5 providing the NHVR with a stronger governance and accountability framework.

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<sup>17</sup> NTC, June 2020a, 54.

<sup>18</sup> Sourced from NTC, June 2020a, 47.

<sup>19</sup> ATA, [A risk based approach to regulating heavy vehicles](#). NTC submission, May 2019. 11.

<sup>20</sup> NTC, June 2020a, 54.

<sup>21</sup> See *Civil Aviation Act 1988* (Cth), s 98(4A); *Navigation Act 2012* (Cth), s 342.

<sup>22</sup> See, for example, Australia, Senate 2014. [Debates](#). 6 March 2014. 1022-1029.

**Table 2: Qualitative analysis of option 5.2**

Industry		Government and community			Other
Compliance costs	Improvements in operational efficiency	Government admin costs	Enforcement and compliance monitoring costs	Avoided costs associated with reduced crashes	
<b>1. Consultation RIS assessment of option 5.2</b>					
	Sector-specific standards may assist industry in identifying how to most efficiently manage safety.	Avoided costs given fewer revisions to regulatory arrangements will need to go through parliamentary processes	There may be an additional cost for the regulator associated with maintaining standards.	HVNL more able to evolve and become more risk-based and targeted which should improve road safety outcomes*	
<b>2. ATA assessment of option 5.2</b>					
		Additional costs to the regulator in maintaining standards.  There would be few avoided costs; revisions to regulatory arrangements would still need to go to ministers.		No real increase in flexibility over existing legislative structure if option 6 adopted.	Inconsistent with October 2020 National Cabinet requirements and the findings of the Conran review.  Reduced parliamentary scrutiny.

#### 4. Analysis of option 5.3: remote zone

Option 5.3 would introduce a remote zone into the HVNL, which would enable a more targeted approach to regulation to be developed for vehicles operating in the remote area.<sup>23</sup>

As figure 1 shows, the RIS envisages that the remote zone could, with the agreement of the WA and NT governments, include most of Western Australia and all of the Northern Territory.

**Figure 1: Proposed remote zone as presented in the RIS**



Operators in the south west corner of Western Australia would evidently be subject to the same level of regulation as operators on the east coast.

#### ATA assessment of option 5.3

There are strong arguments for ensuring the HVNL can deliver an appropriate level of regulatory flexibility to cater for Australia's remote areas. Option 5.6 in this paper would provide governments with the ability to make the regulations needed to make the option work.

<sup>23</sup> NTC, June 2020a. 55.

As drafted, however, option 5.3—

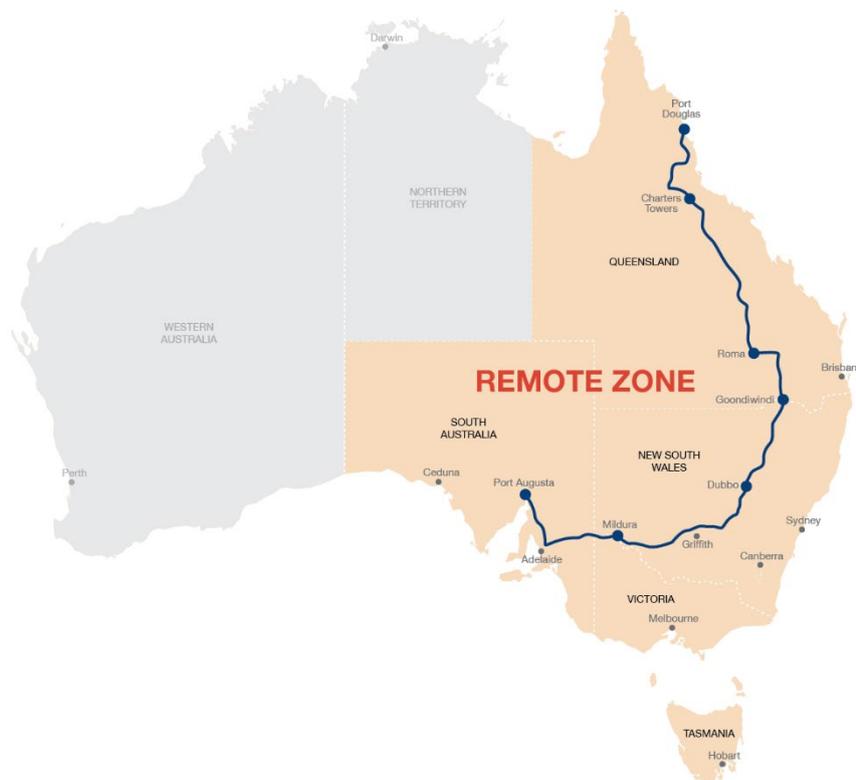
- makes the unwarranted assumption that the WA and NT governments would adopt the HVNL
- would reduce the productivity of trucking operators in the south west corner of Western Australia, as well as splitting the WA wheat zone in half and cutting the state's livestock and related live export road supply lines.
- would not deliver the expected gains in the HVNL states. The zone boundary would be specifically drawn to exclude major freight routes.<sup>24</sup>

Figure 2 sets out the ATA's proposal for the zone boundaries.

The ATA proposal respects the views of the WA and NT governments and industries.

In the HVNL states, it sets a zone boundary that would enable more drivers to benefit from the proposed increase in flexibility, while still maintaining safety.

**Figure 2: ATA remote zone proposal**



<sup>24</sup> NTC, [Introduce a remote zone](#). Suggested policy option SPO-B04. October 2019.

## 5. Analysis of new option 5.5: Improved consultation and accountability

In 2019, the ATA audited chapter 12 of the HVNL against best practice legislation for government regulators. The audit showed that the HVNL fell well short of best practice; this new option, option 5.5, proposes amendments to the law that would bring the HVNL into line with other safety legislation and improve the NHVR's performance.

### *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>25</sup>

The *Rail Safety National Law* goes further. It requires a 28 day consultation period for changes to accreditation conditions.<sup>26</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 the national best practice regulation requirements. In October 2020, National Cabinet agreed to simplify the 2007 COAG requirements,<sup>27</sup> with the result that regulators will be required to:

- establish a case for action before addressing a problem
- consider a range of feasible policy options and assess their costs and benefits
- recommend the most justified option, which may not be the option with the highest BCA<sup>28</sup> and
- consult effectively with affected key stakeholders at all stage of the regulatory cycle.

The NHVR does not do this. Its Notice of Proposed Rule Making (NPRM) process is based on US practice.<sup>29</sup> It does not meet Australian expectations that administrative policymakers consider and assess the costs and benefits of a range of feasible options.

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<sup>25</sup> s 16.

<sup>26</sup> RSNL, s 72(2). The affected person can agree to a shorter period.

<sup>27</sup> Council of Australian Governments (COAG), [Best practice regulation: a guide for ministerial councils and national standard setting bodies](#). October 2007, 4.

<sup>28</sup> Conran, October 2020. 32.

<sup>29</sup> The NPRM terminology and approach are based on 5 US Code § 553.

Under this option, the new HVNL would 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 national policies on best practice regulation.

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

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 the National Cabinet.<sup>30</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:

- at least 1 member who has expertise in transportation policy; and
- at least 1 other member who has expertise in economics, law, accounting, social policy or education and training; and
- at least 1 other member who has experience in managing risks to public safety arising from the use of vehicles on roads; and
- 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>31</sup>

<sup>30</sup> For example, see *National Health Reform Act 2011* (Cth), s 5 and s 133.

<sup>31</sup> HVNL, s 663(1)

As table 3 shows, the NHVR board is small by the standards of comparable regulators. At present, the Chair is a former trucking operator and one director is a current operator, but there is no requirement for the board to include even one member with experience operating a business regulated under the law.

**Table 3: Size and composition of typical regulatory boards**

Regulator	Members	Member with industry background
NHVR	5	Yes – Chair and one other member, 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>32</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>33</sup>

Given this advice, 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>34</sup>

#### *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.

<sup>32</sup> Uhrig, J et al. [Review of corporate governance of statutory authorities and office holders](#). June 2003. 96.

<sup>33</sup> AICD, [Number of directors – board size](#). Fact sheet, 31 October 2017.

<sup>34</sup> Uhrig, 98.

It is essential that all individuals and organisations with powers under the law be required to exercise their powers in accordance with the NHVR's policies.

### **ATA assessment of option 5.5**

The ATA's assessment of the benefits and costs of proposed option 5.5 are set out in row 1 of table 4 (page 19).

In our view, the option could be expected to lead to lower compliance costs and better productivity outcomes, due to its requirements for stronger consultation and more robust regulatory impact assessment.

The option would, however, carry higher costs for the NHVR. Undertaking proper regulatory impact statements in conformance with national requirements would be more costly than its current NPRM process.

The ATA considers that the benefits of better regulation would more than outweigh the increased costs. The NTC should further assess these costs and benefits in the next stage of the review.

## 6. Analysis of new option 5.6: transferring provisions to the regulations

The Heavy Vehicle National Law is top heavy. It is 676 pages long. Because of its origin as a set of model laws, it includes a host of provisions that could and should be regulations rather than sections of a primary act.

The ATA proposes that the NTC consider a new option, option 5.6, that would transfer as many provisions as possible from the law to the national regulations.

Under this model—

- the **primary legislation** would comprise an 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 making powers
- the **national regulations** would provide more detail, including regulatory duties and sanctions for breaching them.

*Option 5.6 would increase the flexibility and responsiveness of heavy vehicle regulation...*

The ATA's proposed approach would increase the flexibility and responsiveness of heavy vehicle regulation, without the loss of scrutiny and accountability associated with option 5.2.

Amendments to the national regulations require ministerial approval, but once they are approved they can be made relatively quickly.

They do not need to go through the slow process of being scheduled for parliamentary consideration, referred to a committee for inquiry and then debated.

A further advantage of the option is that the NTC already has a well-defined process for developing maintenance amendments to the national regulations.

*...and would be another step toward reducing prescriptive penalties for drivers*

Truck drivers already consider that the penalties under the HVNL are unfair, especially for minor paperwork offences of no safety significance.

These penalties do not make the roads safer. They act, instead, as a frustrating maze of random hazards for drivers.

Transferring penalties to the regulations would be an opportunity to reconsider and rescale the penalties for prescriptive offences, especially for truck drivers.

These penalties should be scaled against the maximum penalty for a regulatory offence under the HVNL, \$4,000 for an individual or \$20,000 for a corporation.<sup>35</sup>

For example, the maximum penalty for a minor record keeping offence under s 301 of the law is \$1,500. This could be reset to a more appropriate level, \$400, with the infringement notice penalty set to \$40.

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<sup>35</sup> s 730(3)

In addition, routine use should be made of warnings; there should be policies in place to withdraw infringement notices for matters already dealt with under an employer's SMS (see option 5.7 on page 18)

In our response to chapter 4 of the RIS, the ATA recommended that the HVNL include a general driver safety duty.<sup>36</sup> Systematic breaches of the law would be prosecuted under this duty.

### *Regulatory offences for off-road parties*

Option 5.6 would be an opportunity to establish an appropriate range of regulatory-level offences for off-road parties.

At present, off-road parties are subject to the primary safety duty in Chapter 1A. Breaches of this duty carry very large maximum penalties, with the result that investigations for duty breaches must necessarily be complex and time consuming.

The enforcement regime for off-road parties includes improvement and prohibition notices, as well as the option of accepting an enforceable undertaking.

None of these options, however, deliver the same immediate and effective safety message as issuing an infringement notice. Australian OHS research confirms that on-spot-fines are an effective way of preventing injury, with respondents noting that the fines are—

- treated as a significant 'blot on the record' and for this reason act as a spur to prevention of injuries and
- in larger companies are treated as a performance indicator and a basis for judging the safety performance of site/line managers.<sup>37</sup>

The research emphasised the value of using infringement notices in conjunction with improvement notices. As one inspector put it:

the fine brings the problem directly to their attention, while the improvement notice provides the constructive solutions.<sup>38</sup>

In the ATA's view, the proposed expansion of the regulations should include the addition of specific, targeted duties for off-road parties with associated on-the-spot fines.

Based on the model WHS regulations and the experience of trucking operators and drivers, these specific duties could reasonably include—

- a duty to provide truck drivers with adequate and accessible facilities to manage fatigue, including, so far as is reasonably practicable, with toilets, drinking water, washing and break facilities. This duty could be modelled on r 41 of the model WHS regulations
- a duty to provide drivers with a reasonable opportunity to inspect their load and correct its mass distribution or load restraint
- a duty to curfew livestock before they are presented for transport.

<sup>36</sup> ATA, Primary duties and responsibility. NTC submission, 14 October 2020. 9.

<sup>37</sup> Gunningham, N. *Evaluation of OHS enforcement strategies – efficacy of on-the-spot fines*. NOHSC national solutions project report, 1997-98. 3.

<sup>38</sup> Gunningham, 1997-98, 49.

The maximum penalty for breaches of these regulatory duties would be \$4,000 for an individual or \$20,000 for a corporation.<sup>39</sup> Authorised officers would need to be able to serve infringement notices for these breaches.<sup>40</sup>

Consistent with the ATA's recommended approach to on-road offences, routine use should be made of warnings; there should be policies in place to withdraw infringement notices for matters already dealt with under a business's SMS.

### **ATA assessment of option 5.6**

The ATA's assessment of option 5.6 is set out in row 2 of table 4. In our view, there is good evidence that the option would—

- offer increased flexibility and responsiveness compared to the current regime
- increase the level of compliance by off-road parties, because it would provide authorised officers with a direct way of signalling safety concerns
- help deliver fairer penalties for on-road offences by truck drivers, in conjunction with the ATA's recommendation for a general driver safety duty.

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<sup>39</sup> s 730(3)

<sup>40</sup> s 591.

## 7. Analysis of new option 5.7: reinforcing 'just culture' principles

The NHVR's safety policy appropriately commits the regulator to operating within a just culture environment. An organisation with this approach to safety—

- does not apportion blame or fault where an honest mistake has been made but
- establishes and communicates clear parameters and does not tolerate negligence, recklessness or wilful violation of safety standards.<sup>41</sup>

The NHVR encourages trucking businesses to adopt a just culture approach as part of developing their safety management systems.<sup>42</sup>

The HVNL and road transport law do not, however, support the development of a positive safety culture within businesses.

For example, a truck driver could be issued with an infringement notice for a minor fatigue or record keeping breach long after the breach occurred and long after it ceased to have any safety significance.

In that time, the breach may well have been investigated by the driver's employer and dismissed as a no-blame issue – or alternatively the employer may have already taken disciplinary action.

Under either circumstance, the infringement notice would represent an unfair punishment for a matter that had already been resolved.

Minor speed camera, load restraint and mass breaches could raise similar concerns.

Accordingly, we propose that the HVNL and relevant state road transport laws be amended to allow infringement notices to be withdrawn if they relate to non-conformances that have already been dealt with through an operator's SMS.

### ATA assessment of option 5.7

The ATA's assessment of option 5.7 is set out in row 3 of table 4. In our view, the option would—

- better align the HVNL and road transport law with just culture principles
- encourage the use of safety management systems and
- improve fairness for truck drivers.

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<sup>41</sup> NHVR, [Safety policy](#). December 2018. [29]-[33].

<sup>42</sup> NHVR, [Positive safety culture – quick guide](#). November 2018. 2.

**Table 4: Qualitative analysis of options 5.5, 5.6 and 5.7**

Industry		Government and community			Other
Compliance costs	Improvements in operational efficiency	Government admin costs	Enforcement and compliance monitoring costs	Avoided costs associated with reduced crashes	
<b>1. ATA assessment of option 5.5</b>					
Lower costs due to better regulation.	Better productivity outcomes due to better regulation.	Higher regulatory development costs due to more rigorous RIS requirements.			
<b>2. ATA assessment of option 5.6</b>					
Higher compliance costs for off-road parties due to an increased understanding of their obligations.		Reduced costs and increased flexibility due to the inclusion of more provisions in regulations.		Fewer crashes due to higher levels of compliance by off-road parties.	Improve fairness for truck drivers.
<b>3. ATA assessment of option 5.7</b>					
		Slightly higher costs due to the need to consider requests to withdraw infringement notices.		Fewer crashes due to stronger support for safety management systems.	Improve fairness for truck drivers.