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Dear Mr Coonan
NTC Penalties Document

As requested we have looked at the NTC penalty documents.

There are a number of factors that affect the issue of penalties and a final decision as to level.

The overall difficulty with heavy vehicle law reform is reflected in the still stark jurisdictional differences over approach reflected in the documents.

The heavy vehicle national scheme requires more than national consistency – it requires uniformity.

The Australian Law Reform Commission's Report 95 (December 2002): *Principled Regulation Federal Civil & Administrative Penalties in Australia* made it clear that a penalty regime should have 2 objectives, deterrence and punishment:

> *3.4 Penalties seek to punish undesirable behaviour and thereby to promote desired behaviour. The form and level of penalty applied will depend on its purpose as well as on the area of activity, the type of wrongdoer and the nature of the wrongdoing. Several purposes, not all of which may be consistent, can often be discerned in any one penalty but the deterrence of wrongdoing is ultimately an aim of all penalty regimes.*[1]

In considering penalties it is not the level of penalty alone that needs to be taken into account. The whole regime needs to be considered – monetary penalties are but one factor in the enforcement and liability powers in the *HVNL*. Other factors are relevant:

[1] *ALRC* 95 para 3.4 at page 104

- the availability of alternative orders such as commercial benefits penalty orders, supervisory intervention orders, prohibition orders and compensation orders[2]
- the reverse burden of proof on defendants and company officers[3]
- enforcement and prosecution policy and action
- the scope and number of penalties which may be infringeable
- the 5 times penalty for corporations[4]

These aspects of the *HVNL* are self-explanatory – that does not mean they are considered as fair and reasonable and this has been the subject of previous advice and submissions. We make the point that the legislative scheme as a whole needs to be evaluated.

We have the following comments to make about certain aspects of the *National Penalties Framework Paper for Industry Consultation*

Heavy Vehicle National Law
With Western Australia not joining, at least for the present, it can't be a true national scheme. WA could join subsequently but, until it does, the scheme will not be national. It is also possible, and foreshadowed by the stark jurisdictional differences over content and approach, that some jurisdictions may adopt the *Heavy Vehicle National Law* with amendments.

Model Laws
The traditional responsibility of each State and Territory to implement an agreed reform and to determine the appropriate penalties for offences has resulted in considerable differences in penalties across jurisdictions in the heavy vehicle reform area. This reflects jurisdictional approaches to national reforms in this and a number of reform areas. This not only affects heavy vehicle law reform. It is a feature of national law reform in Australia.

There is reluctance by jurisdictions to alter their approach or compromise to accommodate national laws. This reluctance just hampers the process and defeats its objectives.

National Penalties
The need for uniform penalties is compelling as the *Framework Paper* and the National Transport Commission's *Fact Sheet*[5] make clear.

However, the term "consistent" is used here and tends to suggest that jurisdictional differences may be contemplated.[6] Whilst some minor jurisdictional differences might be acceptable, substantive uniformity must be there. Quite rightly the *Framework Paper* points out that developing national penalties is important for the purposes of fairness, consistency and equity

[2] *Heavy Vehicle National Law Bill 2011* Chapter 10 Part 10.3 Divisions 3,5,6 and 7
[3] *HVNL* clauses 161-163 for example and clause 576
[4] *HVNL* Clause 537
[5] *National Heavy Vehicle Law Penalties*
[6] The *Fact Sheet* uses the expression "same penalties"

across all States and Territories in enforcing the *HVNL*. We would go further than the *Framework Paper* and say that it is not acceptable, rather than not advantageous, to have different penalties across States and Territories.

The Way Forward
We will discuss the penalties framework below. It does need a constructive solution.

Proposed penalty regime
It will be useful to have the penalty for each offence included in the section that creates the offence. This has a number of advantages. It places an immediate focus upon the seriousness with which the offence is treated by the legislature and avoids the sometimes difficult search for penalties where they are located in schedules or elsewhere in the legislation[7].

The penalty for corporations should also be set out alongside the maximum penalty for individuals to make it quite clear that bodies corporate are exposed to a penalty of an amount equal to 5 times the maximum fine for an individual. In clause 21(1) for example the penalty would read:

Maximum penalty - $10,000 for an individual - $50,000 for a body corporate

This might also provide some deterrent effect.

Categories of penalties
We note that all jurisdictions agree that categorisation is the best approach for the penalties framework but that there is not unanimous agreement as to the placement of certain offences in categories. Without knowing what these disagreements are we cannot comment. However as the Proposed National Categories are based upon similar characteristics, we are not sure how fundamental the lack of agreement may be. In the end result it is important that the penalty is appropriate for the offence – appropriate for deterrence and punishment.

Categorisation may not be fundamental to the national penalties framework. We make some further comments about categorisation when discussing Attachment 2.

Describing Quantum
Although there is no national penalty unit it would still be possible to use a penalty unit approach within the *HVNL.* The use of a penalty unit means that penalties overall can quite readily be altered without the need to amend each individual amount. This may not be seen as an issue of significance, but the use of a penalty unit as a method of calculation does provide some flexibility. A penalty unit can also be increased by regulation or other method. [8]

[7] eg *Corporations Act 2001* where the penalties are located in Schedule 3
[8] In Victoria, for example, the *Monetary Units Act 2004* provides that the value of a penalty unit is the amount fixed with respect to a financial year by the Treasurer by notice published in the Government Gazette. It is currently $122.14.

We recommend that this approach should be considered or kept under review.

Second and subsequent offences
The proposal is that "there will be **no** higher offences for subsequent offending". We are not entirely certain what this means but take it that there will be no increased penalties for second or subsequent offences and those penalties will be left to the discretion of the judiciary.

The *HVNL* already contemplates different penalties for first, second or subsequent offences[9] although it does not appear that there is any clause in the *HVNL* which provides for different penalties for such offences.

In our opinion specifying different penalties for second or subsequent offences provides a deterrent effect and a useful sentencing tool for the judiciary.

Proceedings for offences against the *HVNL* are to be heard in courts of summary jurisdiction.[10] Given the number and spread of these courts and to provide a more certain approach nationally, we believe that specifying different penalties for second or subsequent offences is the better way to go.

Corporate multiplier
The corporate multiplier of 5 provided for by the *HVNL*[11] has been used for a number of years and is, for example, reflected at Commonwealth level in the *Crimes Act 1914.*[12]

Without going into the genesis of the multiplier, it is based on an assumption that corporate defendants are of greater financial substance than individuals and should therefore be exposed to higher penalties.

There are some very large companies operating in the transport industry but most companies in the industry would be in the small to medium category, particularly the large number of subcontractors who operate on an incorporated basis.

It should be emphasized that it is not possible for a company that has been the subject of a penalty to avoid payment of that penalty by going into liquidation if it is solvent and able to pay the penalty.

It would have been useful if the corporate penalties had been included in Attachments 1 and 2 to make the liability of a corporate defendant quite clear. We have already recommended that the penalties for individuals and bodies corporate should be included in the *HVNL.*

[9] *HVNL* clause 538
[10] *HVNL* Clause 647
[11] *HVNL* Clause 537
[12] Section 4B(3) provides that a body corporate convicted of an offence against a Commonwealth law is liable to a pecuniary penalty not exceeding 5 times the maximum penalty payable by an individual

Infringements
As is pointed out there are different methods for setting infringement fines across Australia.

The Australian Law Reform Commission recommended that the amount payable under an infringement notice should not exceed 20% of the maximum penalty payable.[13]

As the recommended amount is up to 15% of the maximum penalty, which falls between the mid-point of the Australia wide range, we believe it is acceptable. As the amount is up to 15% it is not yet known if some offences will attract a lower percentage or if 15% will be the standard. For the sake of certainty and consistency we believe 15% should be the standard.

However the *ALRC* made it clear that any system of infringement notices and penalties should only apply to offences of "a less serious nature".[14] The *ALRC* also used the expressions "low-level" and "relatively minor".[15] Nevertheless, infringement penalties have always been considered as suitable for the "parking infringement" type of offence.

The *Framework Paper* states that only minor and substantial risk offences will attract infringements. However, not all offences under the *HVNL* are in the minor or substantial risk category. Most of them fall outside that category. By our calculations, of the 180 offences listed as infringeable in Attachment 1, only 11 are listed as falling within the minor or substantial category. In effect, the penalties for a breach of the speeding provisions provide for a graded category of offence so that might be included and bring the number to 12.[16]

The mass, dimension and load restraint offences are classed as minor risk, substantial risk and severe risk.[17] Until the definitions of "mass requirements", "dimension requirements" and "loading requirements" are finalized, it is not possible to determine with certainty which breaches of the provisions of Chapter 4 will fall within the minor, substantial or severe risk category.[18]

In the fatigue area the categories of minor risk, substantial risk and critical risk only apply to a contravention of a maximum work requirement or minimum rest requirement.[19]

We have the following questions and comments:

[13] ALRC 95 12.49 page 443
[14] *ALRC 95* 12.49 page 443. That expression was meant to be defined in resulting legislation, but no legislation resulted.
[15] *ALRC 95* 4.71 and 4.73 page 157
[16] *HVNL* clause 189(1)
[17] *HVNL* Clauses 80-82, 86-88 and 93-95. The definitions of these terms in clause 5 refer to these clauses.
[18] *HVNL* Clauses 77, 83 and 91 provide that the national regulations may prescribe these requirements. See also the definition of *risk category* in clause 5
[19] *HVNL* clause 192. See also the definition of *risk category* in clause 5

- Of the 168 offences not falling within the minor or substantial risk category how is it to be determined whether or not the offence against the provision should be infringeable?
- On what basis has it been determined that offences carrying a maximum penalty of $10,000, and therefore regarded as the most serious, qualify as infringeable?
- Why are some offences with the maximum penalty of $10,000 infringeable and others not?
- On the face of it the imposition of the maximum penalty of $10,000 for offences which are infringeable is inappropriate as against those which are not infringeable
- Some offences seem to us as serious enough of themselves not to warrant infringeable status eg clauses 302, 303, 317(2), 317(3), 320(1) and 320(2). These are just some examples.
- There seems to be an imbalance – why are some offences with a maximum penalty of $6000 infringeable and others not?

We strongly recommend that the infringement notice provisions in the *HVNL* should apply only to minor risk offences or others that might be classed as less serious, low level or relatively minor. We will have more to say about this in our comments about Attachment 1.

No reason is given for applying the infringement notice procedure for extended liability offences to drivers/operators only. As long as the amount is capped as proposed and limited to minor risk or equivalent offences only, we do not consider this unreasonable.

Our main concern is with the use of existing jurisdictional law to implement the *HVNL* infringement system. It is not clear how this will work and whether or not it may detract from national system uniformity.[20]

Demerit Points
We express reservations about certain *HVNL* offences being subject to the national schedule with others being subject to existing jurisdictional law.

Mass Offences Over 120%
The Proposal looks straightforward

Critical Risk Breach Category
The Proposal looks acceptable

Attachment 1 Infringement Table
The guiding suitability principles are very broad and have resulted in a large number of offences being classed as infringeable. For reasons already stated we consider this to be far too many as they move well beyond offences of a minor risk, less serious, low-level or relatively minor category.

[20] *HVNL* clause 533 appears to be the only provision dealing with infringement penalties. The definitions of *infringement notice* and *Infringement Notices Offences Law* in clause 5

The use of an infringement notice system contemplated here runs a real risk that it would be used by the regulator as the main tool of enforcement without the need to go to court, with a strong level of compulsion upon the defendant to pay the penalty without contesting it.[21] This assumes that an individual would be able to pay the penalty.

Even with the cap at 15%, the corporate multiplier means that for the greatest maximum penalty, $15,000, a company would be subject to a maximum penalty of $75,000 and therefore to an infringement notice penalty of $11,250 – not an inconsiderable amount for the majority of small to medium companies that largely comprise the industry.[22] Many subcontractors would be unable to meet such a penalty.

We have assumed that the percentage is calculated upon the maximum penalty for the offence taken at the critical risk level.

At a maximum penalty of $10,000 the maximum penalty for a company becomes $50,000 with an infringement penalty of $7,500. The same considerations as mentioned above also apply here.

We emphasise our recommendation that only minor risk or equivalent offences be made infringeable.

The Commonwealth Attorney General's Department's Guidelines provide as follows:

> Principle
> An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. The offences should be such that an enforcement officer can easily make an assessment of guilt or innocence.
> An infringement notice scheme should generally only apply to strict or absolute liability offences[23]

For reasons already stated the proposed infringement scheme for the *HVNL* falls well outside the *ALRC* and Attorney–General's Department recommendations or guidelines.

An infringement notice scheme is neither suitable nor appropriate as an across the board approach as proposed here.

In our view those offences with a maximum penalty of, $15,000, $10,000, $6,000 and $4,000 should not have infringeable status. In our opinion these offences and the imposition of penalty are more appropriately determined by a court.

[21] *ALRC* 95 para 12.54 page 445 refers to this problem
[22] The amount would be $7,500 for a maximum penalty of $10,000.
[23] *A Guide to Framing Commonwealth Offences ,Infringement Notices and Enforcement Powers* para 6.2.1 page 58

Attachment 2: Categorisation Table
As the categories largely follow the *HVNL* categories we see them as relatively straightforward. As already mentioned it is a matter of establishing an appropriate level of penalty rather than categorization.

We note that categories B1 and B2 refer to fraud. The clauses within these categories do not refer to fraud. The clauses in the *HVNL* which refer to fraud deal with heavy vehicle accreditation and administration.[24]

Categories G1, G2 and G3 deal with substantial, severe and critical offences. This may not be a major issue, but we query why a category of minor offences does not appear.

In looking at the proposed penalties as against those presently in the *HVNL,* some remain the same, some have relatively minor increases and some have significant increases. It is not possible to assess increases as there is no information provided about the bases of calculation. It would have been most helpful to have had the tabulation of minimum and maximum penalties across all jurisdictions, referred to in the NTC Fact sheet, included in the documents. This would enable a full comparison of the range of present penalties as against the proposed penalties. Significant increases require explanation and justification.

Summary

- To be effective the *HVNL* must be seen to be fair and reasonable in content, penalty and enforcement.
- Uniformity across all jurisdictions in content and penalty is essential. Minor jurisdictional differences might be acceptable, but only minor and minor should not be allowed to become major. We have concerns about jurisdictional differences not only generally but in the mandated infringement notice and demerits points areas
- There should be differing penalties for second and subsequent offences
- The effect of the corporate multiplier should be made clear in the *HVNL* with corporate penalties set out beside the penalties for individuals – this should also apply to infringement penalties
- The proposed level of up to 15% for infringement penalties is acceptable provided it is at that level, or on a lower level, but not on differing levels.
- The proposed infringeable provisions go well beyond the minor or low-level category and could form the substantive enforcement regime. The infringeable provisions should be few in number and relate to minor risk or low-level offences only.
- Infringement penalties should not apply for offences with maximum penalties of $15,000, $10,000, $6,000 and $4,000. Of course, these maximum penalties go to $75,000, $50,000, $30,000 and $20,000 for companies.

[24] *HVNL* clauses 41193), 412(6), 425(1) and 632

- The levels of maximum penalty which involve increases cannot be assessed in the absence of full jurisdictional comparative data and some explanation and justification.
- With that qualification in mind, the allocation of penalty seems to have an imbalance in many cases. The penalty must match the offence. This needs to be looked at.
- The level of penalty should be kept under review – the use of a penalty unit mechanism may be helpful here and should also be considered.
- Enforcement and prosecution, consistent across all jurisdictions, will be essential. The *NHVR* needs to produce comprehensive enforcement and prosecution guidelines to be observed by all jurisdictions. As existing jurisdictional regulators will act as the delegate of the *NHVR* such guidelines would ensure that jurisdictional differences are not maintained or extended

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We would be pleased to discuss any of these issues with you.

Yours faithfully,

Lord Commercial Lawyers