

## The National Transport Commission

The National Transport Commission (NTC) welcomes the opportunity to make a submission to the Productivity Commission study into regulator engagement with small business. The NTC is an independent statutory body responsible for the development and implementation of transport reforms as directed by the Council of Australian Governments (COAG). It has a legislative and policy role in rail, heavy vehicle and maritime freight.

The maritime and rail industries tend to be dominated by larger corporate interests. In contrast the heavy vehicle industry has a significant proportion of small businesses in the form of owner-operators. This submission will therefore focus on the heavy vehicle industry.

The NTC is not, itself, a Regulator. Rather, it develops transport law and policy for implementation by the states and territories as directed by COAG. It also plays a role in monitoring and assessing the effectiveness of national transport reforms.

## The heavy vehicle industry

Around 246 000 people are employed in the road transport industry in Australia.<sup>1</sup> The industry tends to be male dominated with women concentrated in the administrative side of the workforce. Fewer than 10% of current heavy vehicle drivers are under 35 years of age.<sup>2</sup>

Entry requirements are low. The road transport industry is somewhat unusual in that it is the only major goods delivery mode in Australia that is not subject to licensing with air freight, shipping and rail freight operators all captured by substantial licensing requirements. Australia is in a minority of OECD countries in not imposing a licensing requirement on road freight operators.

The heavy vehicle industry is characterised by a high proportion of owner-operators, accounting for 60% of the road transport industry but only around 11% of the income.<sup>3</sup> The profitability of the non-employing owner-operator segment of the industry can be quite low.<sup>4</sup> Owner-operators interviewed for a recent project state that margins are tight and competition can be fierce, encouraging some to either overload their vehicles or speed up their trips to enhance profitability. Dr Jann Karp's research indicates that owner-drivers can be vulnerable to significant financial stress.<sup>5</sup> Threat of repossession of financed vehicles and loss of the family home where it is offered as collateral are real concerns for owner-drivers.

In an industry where profit margins can be slim, owner-drivers will naturally do as many trips as they can. Typically, drivers work long hours when compared with the Australian full-time equivalent (FTE) average of 43 hours per week. A 2008 study suggested that truck drivers in NSW work an average 62-hour week,<sup>6</sup> while another study suggested that owner-drivers work an average of 58 hours per week.<sup>7</sup>

Despite significant improvements in road safety since the 1960s, the transport industry remains relatively hazardous. The Australian Safety and Compensation Council reports that the transport and storage industry has the largest number of compensated fatalities of any industry at 41, followed by construction at 33, manufacturing at 28 and property and business services industries with 27.<sup>8</sup>

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<sup>1</sup> BITRE, *Australian Transport Statistics Yearbook 2009*, p.12

<sup>2</sup> C. Walker, 'Pushing the Policy Boundaries: Regulatory Accreditation Schemes, Policy Flexibility and Options for Delivering a Two-Track Regulatory System for the Heavy Vehicle Sector', March 2010, p.2

<sup>3</sup> NTC with The Hon. Lance Wright QC and Professor Michael Quinlan, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, p. 11

<sup>4</sup> *ibid.*

<sup>5</sup> Karp, Jann, 'Conversations with Truckies: Looking at Life through Glass', presentation to the National Transport Commission, 8 August 2012.

<sup>6</sup> Australian Rotary Health Research Fund 'Health Survey of the NSW Transport Industry', 2008 quoted in NTC with The Hon. Lance Wright QC and Professor Michael Quinlan, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, p. 8

<sup>7</sup> ACIL Tasman, 'Freight rates and safety performance in the road freight industry – a report prepared for the SCOT working group', quoted in Wright and Quinlan 2008 p. 12

<sup>8</sup> NTC with The Hon. Lance Wright QC and Professor Michael Quinlan, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, p.5

## The importance of compliance with heavy vehicle law

There are clear links between noncompliance with heavy vehicle laws and undesirable safety outcomes.<sup>9</sup> Vehicles that are loaded beyond mass limits are likely to be less manoeuvrable in an emergency and therefore more difficult to control. Fatigue and speeding are also associated with higher crash rates.<sup>10</sup> A recent study found that an individual was three times more likely to die in a crash where a heavy vehicle was involved.<sup>11</sup> The grief and trauma occasioned by these crashes is incalculable. The purely economic cost is estimated at around \$3.8 billion per year.<sup>12</sup> The risks make compliance with the heavy vehicle law essential.

## Regulators

On the 21<sup>st</sup> of January 2013 the new National Heavy Vehicle Regulator commenced operation. The Regulator is responsible for administering the Heavy Vehicle National Law (HVNL) and associated compliance and enforcement tasks. The Regulator will assume the responsibilities currently undertaken by state-based transport agencies.

The Regulator, in replacing individual state and territory laws with one national law, will significantly reduce the compliance burden on the heavy vehicle industry. The nature of that burden was summarised in a Regulation Impact Statement as follows:

*The lack of a single administering body leaves operators to navigate a maze of government bodies for important decisions around registration, accreditation, vehicle conditions and access. There is no single repository of expertise for industry to refer to. Hence, operators seeking road access often face ambiguity when identifying appropriate decision makers and where to lodge an application. The divergent roles of transport agencies and the road manager may be unclear, and operators may face long delays in determinations. Rights of review have not been enshrined in law, and administrative mechanisms are inconsistent. Consequently, letters of complaint are often addressed to ministers, chief executives and other officials thought to be relevant, in the hope of a favourable response. Operators may 'shop around' within and between departments in search of advice and information that best suits them.<sup>13</sup>*

The current pre-Regulator costs of compliance are considerable. NatRoad (a peak industry body with significant owner-driver representation) estimates that the typical driver of heavy trucks receives approximately three days of compliance training per year. With 44 000 interstate drivers, this equates to 132 000 days of compliance training, at a total cost of \$17 780 000.<sup>14</sup> An operator wishing to cross a border into Western Australia may be a member of up to three accreditation schemes, all with fees and entry requirements (although efforts have been made to streamline the associated auditing and compliance regimes).

Variations in regulations have direct impacts on productivity for operators in cross-border regions. A study into the Sunraysia region (with borders in New South Wales, Victoria and South Australia) explored how wine producers in the region are, in effect, forced to comply with the 'lowest common denominator' regulation. The most efficient vehicle for transporting the grapes would be a road train, but these are not currently permitted on a stretch of highway linking two of the states and used by the

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<sup>9</sup> See Jaguar Consulting Pty Ltd, *Road Transport Reform (Compliance and Enforcement) Bill Regulatory Impact Statement*, November 2003; Brooks, Chris, 'Speed and heavy vehicle safety', National Heavy Vehicle Safety Seminar, Melbourne, October 2002; Willis, K & Gangell, S, 'Profiling heavy vehicle speeding', *Trends and Issues in Crime and Criminal Justice*, no. 446, October 2012

<sup>10</sup> NTC with The Hon Lance Wright QC and Professor Michael Quinlan, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, p. 7; Brooks, Chris, 'Speed and heavy vehicle safety', National Heavy Vehicle Safety Seminar, Melbourne, October 2002, p. 43; Standing Committee on Transport, *National Road Safety Strategy 2011-2020*, Draft, December 2010, p. 8

<sup>11</sup> New South Wales Auditor General, *Improving road safety—heavy vehicles*, May 2009, p. 14

<sup>12</sup> Centre for International Economics, *Benefit-cost analysis for the Regulation Impact Statement on the Heavy Vehicle National Law*, 2011, p. 51

<sup>13</sup> National Transport Commission, *Heavy Vehicle National Law Regulation Impact Statement*, September 2011, p. 5

<sup>14</sup> *ibid.*, p. 20.

carrier. Consequently, wine producers use less efficient semitrailers, leading to more trips, more emissions and higher consumer prices. 'If it is assumed that 50 per cent of grapes sourced need to cross borders and are using semi-trailers rather than more efficient road trains, then the cost to the wine industry, in the region, is around \$1.6 to \$2 million per annum'.<sup>15</sup>

The 2011 Regulation Impact Statement estimated that net benefits in the order of \$12 billion over 20 years will accrue from the development and administration of a truly national law.

## Regulatory Postures

### *Responsive Regulation*

For much of their existence heavy vehicle transport regulators have adopted a 'command and control' approach to compliance. This approach focussed on detecting and punishing directly observed non-compliant behaviour with an assumption that penalties would have a deterrent effect. Because of the necessity to directly observe the breach the focus was generally on the driver rather than on other participants in the supply chain. Larger firms would typically absorb infringements and fines into a cost of doing business while owner-operators might struggle to defray these costs.<sup>16</sup>

From the 1990s transport regulators began to move away from command and control postures and instead adopted responsive regulation techniques, an approach characterised by two key elements. Firstly, responsive regulation takes account of what *motivates* noncompliant behaviour. It recognises that if the goal is sustained behaviour modification then the regulator's responses should be at least partly contingent on the offender's *reasons* for noncompliance rather than bluntly punitive. For example, if a driver is noncompliant because they are ignorant of the laws or simply incompetent, a fine will do little or nothing to change the root cause of the noncompliance. In this instance an educative approach is more likely to produce the desired behaviour than an infringement. Secondly, in addition to the question of what motivates noncompliance responsive regulation advocates intervention *proportionate* to the risk presented by the behaviour. It recognises a distinction between, say, a failure to write down a vehicle registration number at a rest break in a work diary and a repeated severe mass breach. A proportionate compliance response, of necessity, therefore requires a *suite* of intervention strategies applicable to the circumstances.

Responsive regulation introduced the concept of the 'enforcement pyramid' whereby the full, punitive force of the law is directed towards those few who have actively decided not to comply. This group at the top of the pyramid would be characterised by a pattern of recidivism and a systemic 'culture of noncompliance'. In contrast, more educative or persuasive strategies are directed towards those at the 'base' of the pyramid who are inclined to comply but have made an inadvertent mistake or misinterpreted the rules and their implications. If the intervention fails to induce compliance then the regulator invokes an escalated penalty and so on until the offender complies.

Influenced by the work of Ayres and Braithwaite and others the theory of responsive regulation heavily influenced the Compliance and Enforcement (C&E) Bill introduced in Australia in 2003.<sup>17</sup> The legislation enabled a far more nuanced and contingent approach than was possible under the previous legislation. It was introduced in NSW, Victoria, South Australia and Queensland and has been incorporated into the Heavy Vehicle National Law (HVNL) that the Regulator will administer.

The C&E bill introduced a suite of regulatory postures that ranged from advisory and persuasive to out-rightly punitive depending on the severity of the noncompliance. The penalties applicable under the Bill made the severity of the penalty proportionate to the seriousness of the offence. Thus the Bill distinguished between three levels of mass, dimension and loading breach as follows: minor risk,

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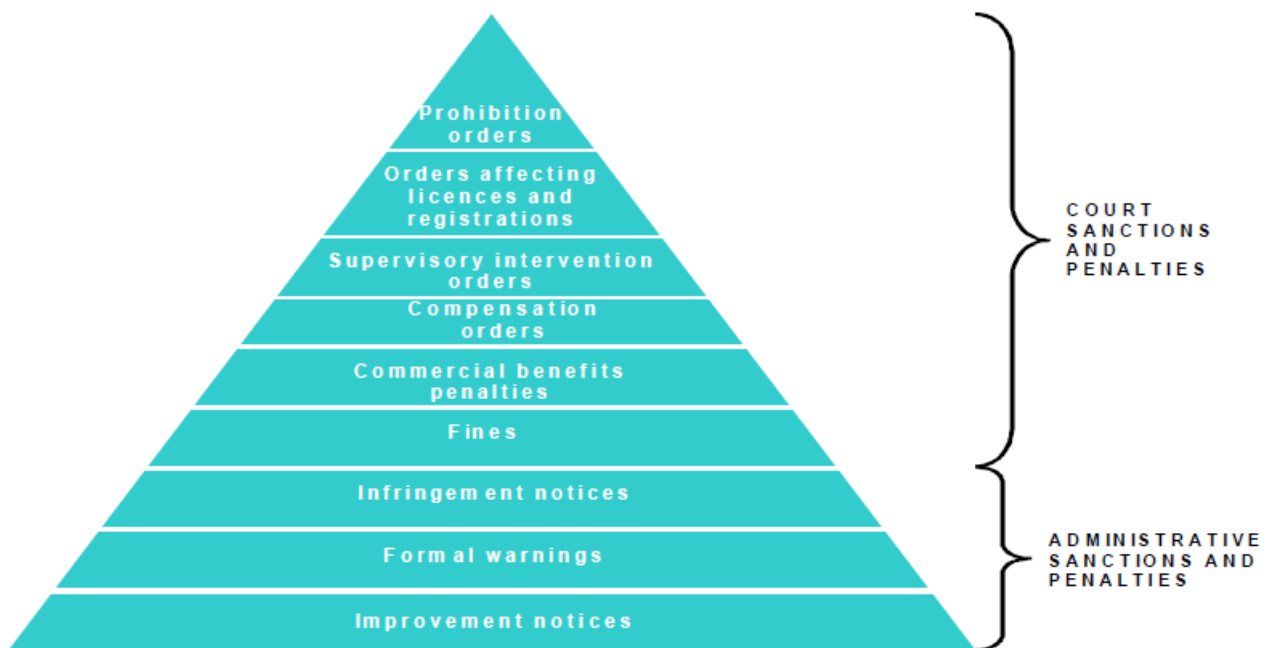
<sup>15</sup> Australian Logistics Council, *The cost impact of regulation disparity in cross border regions—a study encompassing the 'Sunraysia/Riverland region'*, March 2009, p. 18.

<sup>16</sup> NRTC, *Compliance with the Road Transport Law – Principles, Objectives and Strategies*, June 1994, p. 10

<sup>17</sup> The enforcement pyramid was initially developed by Ayres and Braithwaite and then further refined by Ayres. See Ayres, I & Braithwaite, J, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, p. 35 quoted in OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, 2000, p. 44. Braithwaite, Valerie, 'Ten things you need to know about regulation but never wanted to ask', Regulatory Institutions Network, ANU, Occasional Paper 10, 2006.

substantial risk and severe risk.<sup>18</sup> The maximum penalties for severe risk breaches were substantially greater than those available in the preceding legislation. The enforcement pyramid in the C&E legislation is illustrated in Figure 1.

**Figure 1. Responsive regulation in the C&E legislation<sup>19</sup>**



Many transport authorities have an overt 'education services' function designed to promote compliance across the industry and provide a forum for advice and assistance. VicRoads estimates that around 30% of its transport safety services effort goes towards education and advice. Similarly the RMS 'warning procedure' is clear that the warning 'provides Authorised Officers with the opportunity to educate and encourage voluntary compliance of a person who has breached minor or administrative provisions of road transport laws relating to heavy vehicles'.<sup>20</sup>

A recent study conducted by the NTC found that drivers were generally positive about transport authorised officers, crediting their knowledge, professionalism and educative approach.<sup>21</sup> They were less positive about the police, whom they perceive as less educative, less knowledgeable about the law and more 'infringement driven'.

### ***Chain of responsibility legislation***

The heavy vehicle freight industry is characterised by a long supply chain and extensive use of sub-contracting along the chain. As with the textile industry the length of the supply chain means there can be 'accountability distance' between the contracting body and the contracted party. Bargaining power tends to dilute along the chain and the initial contracting party may be able to abrogate responsibility for untoward outcomes. The power differential between owner-operators and large companies that contract their services is frequently cited in the literature as a reason why larger

<sup>18</sup> There was also a 'critical' breach not included in the HVNL.

<sup>19</sup> McIntyre, Kirsty & Moore, Barry, 'National Road Transport Compliance and Enforcement Reforms: on the Road to a New National Culture of Compliance', paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference, Melbourne, September 2002.

<sup>20</sup> RTA, *Warning Procedure*, v1, 26 October 2009, p. 4

<sup>21</sup> The study is as yet unpublished.

parties in the supply chain are able to exert pressure on contracted parties to undertake work that may be unsafe.<sup>22</sup>

The C&E Bill attempted to redress this pressure by introducing the concept of chain of responsibility (CoR). The Bill extended the reach of regulators and enforcers beyond drivers to the rest of the supply chain including packers, loaders, vehicle operators and consignees. In addition, directors and senior managers of corporations involved in the industry were subject to liability for breaches of the road law. In effect this meant that every party along the supply chain was answerable for compliance outcomes. So, for example, a consignee that unloaded over-mass vehicles or a scheduler that forced drivers to speed to meet deadlines would be just as culpable for the noncompliance as the traditional target of enforcement: the driver.

The 'reasonable steps' defence permitted under the C&E Bill encouraged each party to do their bit to promote compliance and to prove their conscientiousness, even where other parties were in breach. Reasonable steps applied to consignors, loaders, packers, operators and drivers. It required a defendant to show that appropriate steps were taken to prevent an on-road breach from occurring and was applicable to mass, dimension and load-restraint offences. 'This requires that the person did not know and could not reasonably have been expected to know of the breach of the law and that either they had taken all reasonable steps to prevent such a breach or there were no such reasonable steps that they could have taken'.<sup>23</sup> Prior to the C&E Bill most jurisdictions had no reasonable steps defence.

Unlike the typical infringement, which sits at around \$600, the fines imposed for CoR breaches run into the tens of thousands. The monetary penalty is designed to be sufficiently high that it cannot be dismissed as a cost of doing business, to deter similar practices among other companies and give comfort to those that do the right thing that the 'bad guys' will be suitably punished. In two recent Victorian cases penalties of \$74,000 and \$95,000 were issued to corporations.

There is credible evidence that CoR has fundamentally changed the way the industry works.

## **Effectiveness of regulatory approaches for small business:**

The NTC offers the following observations about the effectiveness of current regulatory approaches for small business:

- The National Heavy Vehicle Regulator represents a significant improvement for small business because it will provide a 'one stop shop' for the heavy vehicle industry. This will be particularly important for the interstate freight industry (a growth industry) which will no longer need to negotiate with multiple agencies, local councils and utilities for permits. Instead, the Regulator will co-ordinate interstate routes on the applicant's behalf. The Regulator will also act as a training and advice repository for all enforcement bodies thereby promoting consistency in the application of the law and delivering certainty of outcomes to the industry.
- The deployment of advisory and educational tools such as improvement notices and warnings made possible under the C&E Bill will be greater. The NTC has recommended that the Regulator develop guidelines on the use of these tools by enforcement officers.
- The promotion of 'a culture of compliance' requires laws that clearly and unambiguously articulate what compliant behaviour looks. It is recognised that in some instances the heavy vehicle law, particularly fatigue law, has not achieved the requisite clarity and certainty. Work continues to remedy this.
- The NTC recognises that if achieving and demonstrating compliance is too onerous or expensive there is a risk that it will be ignored. The NTC is encouraging compliance through user-friendly, affordable tools that clearly articulate *what compliance looks like*. For example, the NTC recently developed a simple, automated tool called CheckMyTruck to take the guesswork out of wheelbase and axle spacing configurations. Electronic Work Diaries (EWD)

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<sup>22</sup> See Jaguar Consulting, 2003; Department of Education, Employment and Workplace Relations, *Safe Rates, Safe Roads Directions Paper*, 2010; Neil Gunningham, *NTC Compliance Strategy: Regulatory Compliance Best Practice Review*, December 2010; OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, 2000 et al

<sup>23</sup> Jaguar Consulting Pty Ltd, *Road Transport Reform (Compliance and Enforcement) Bill Regulatory Impact Statement*, November 2003, p. 17

also have significant potential to reduce compliance stress by taking the guess work out of the complex fatigue legislation. The NTC is involved in the pilot study of EWD being run by the New South Wales Roads and Maritime Services (RMS) looking at how EWD can be most effectively deployed.

- Technology tools (such as those mentioned above) can make a significant difference in education and improving compliance, through translating legislation into practical steps. These tools are likely to be particularly valuable for small businesses that lack specialist resources to devote to compliance. Some new technology, such as telematics devices, can favour larger operators due to economies of scale and the ability to purchase in bulk, ensuring better unit prices. However, as particular components become commoditised, they typically become more accessible for small businesses. A recent example is new smart phone applications, costing only a few dollars, which allow drivers to check their compliance with fatigue laws governing work and rest hours. It is important that regulatory policy governing or incorporating the use of technology takes into account the differing needs of small and large operators.
- Despite the positive cultural change effected by CoR, industry believes that investigations remain focused on drivers and operators rather than the wider supply chain. It seems CoR has successfully moved the focus away from drivers and onto operators but may not have pushed far enough along the rest of the chain.<sup>24</sup> In the absence of comprehensive data it is difficult to empirically analyse this claim. However, based on the data published by RMS the claim appears sound.<sup>25</sup> Of the 3209 CoR charges laid from 2005 to June 2012, nearly 47% were against operators. Of the individuals charged, 55% have been operators. This suggests that operators are over-represented as the focus of enforcement along the supply chain. (However, it should be noted that the figure is trending downwards: it was 65% in May 2011)
- Despite the availability of alternative sanctions afforded by the C&E Bill and the evidence that CoR is a key driver of structural and cultural change, the enforcement tool of choice overwhelmingly remains infringement. Only a tiny proportion of infringements (less than 1%) are directed towards responsible entities. Overwhelmingly, it is drivers that bear the brunt of infringements as they are the observable entity at the point of breach. The weakness of this enforcement tool is that it has limited impact on the other parties in the CoR. These parties may influence and even induce the noncompliant behaviour of drivers and operators but incur no punishment or deterrent. It is arguable, therefore, that infringements disproportionately impact owner-operators.
- The NTC recognises that compliance can be particularly challenging for SMEs that lack the resources and the know-how to develop and sustain their compliance. Research into alternative compliance models suggests that investing in SME's ability to comply can yield significant safety benefits. Studies into the Motor Carrier Safety Program in the US found that operators with one to five vehicles that entered into mandatory accreditation schemes could experience crash reduction rates of 50%.<sup>26</sup> Similar investment in safety management systems was mooted in the 2009 accreditation review led by the NTC.<sup>27</sup> The NTC will shortly release its Compliance Framework which discusses the use of incentives, concessions, subsidies and grants to promote compliance.
- A challenge also remains for Regulators and other government bodies in effectively consulting with small businesses, who often lack the time and resources to become involved in such processes. Industry bodies in some sectors can at times be overly representative of larger companies. Reform projects must actively seek out small businesses in order to ensure that the impacts of potential reforms on these businesses are understood.
- The NTC recognises the burden placed on small business by different but related sets of legislation. The heavy vehicle industry is bound not just by the Heavy Vehicle National Law but the Safe Rates legislation, Occupational Health and Safety legislation and, potentially, Dangerous Goods and Animal Welfare legislation. Opportunities to streamline the different compliance burdens would be welcomed by industry.

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<sup>24</sup> NTC, AMR, *Reform Evaluation in the Road Transport Industry, 2012: Survey on Compliance and Enforcement*, v3, June 2012, pp. 10, 14

<sup>25</sup> See [http://www.rta.nsw.gov.au/heavyvehicles/cor/enforcement\\_statistics/](http://www.rta.nsw.gov.au/heavyvehicles/cor/enforcement_statistics/)

<sup>26</sup> Austroads, *Analysis of the Safety Benefits of Heavy Vehicle Accreditation Schemes*, 2008, p. 38

<sup>27</sup> NTC, *Accreditation Policy Review*, June 2009, p. 38