Report to Infrastructure and Transport Ministers Meeting (ITMM) – Ken Kanofski

*This version of the report is for public release. It remains consistent with the version considered by Ministers on Friday 5 August 2022. The views of stakeholders have been made less attributable and more general to respect the basis on which those views were shared.*

In February 2022 I was asked by Infrastructure and Transport Ministers to undertake stakeholder consultation on the Heavy Vehicle National Law (HVNL) Safety and Productivity Program and to report back on:

* Policy settings for a new Heavy Vehicle National Law demonstrating how safety and productivity improvements can be achieved
* Highlight areas where policy positions are unresolved and recommend ways forward
* Outline the forward work required to deliver a new HVNL, including timeframes, process and cost benefit analysis
* Any systemic barriers to national heavy vehicle reform.

The process also involved testing a range of National Transport Commission (NTC) policy proposals with industry. It became clear that many of the issues of most concern for industry did not relate to the law itself but were issues of implementation of systems and processes, and broader road reform.

During the consultation, a range of proposals were explored and discussed with representatives from industry, jurisdictions, the regulator and law enforcement. This included:

* 11 multi-lateral meetings
* 2 all day workshops
* 37 individual stakeholder meetings.

In total 80 people representing industry organisations and jurisdictions were consulted and I thank them for being generous with their time and positive contributions. The details of the consultation undertaken is outlined at Attachment C.

Attachment A provides a package of recommended propositions that have broad support. The document distinguishes between matters pertaining to the law that can be taken forward as part of the NTC law review process and items that should be taken forward via additional work streams.

These propositions, if adopted will lead to improvements in safety and productivity, reduction in red tape and streamlined governance and administration. The following sections provides a high-level summary.

# Policy Propositions to be taken forward as part of the NTC Law reform

The package of policy propositions has been developed after considering work previously developed by the NTC, proposals put forward by the Australian Trucking Association (ATA) and proposals raised during the consultation for this report. The NTC had already developed proposals to improve the structure, purpose and focus of the new HVNL, which were thoroughly tested with industry as part of this process.

Overall, a strong consensus was reached on a package of legislative reforms, which if taken forward by the NTC and implemented will:

* Improve both flexibility for industry and safety through a two-tiered fatigue management system, with a mandatory safety management system a key feature of the second tier, where the NHVR will be able to provide greater flexibility to operators who show greater systemic focus on safety.
* Ensure that safety obligations for drivers, operators and third parties in the chain of responsibility are more clearly articulated and encourage all parties to manage risks so far as is reasonably practical, by prescribing specific obligations on off-road parties and developing specific penalties in the new HVNL.
* Improve safety by examining mandatory risk-based medical screening of drivers via the Assessing Fitness to Drive Guidelines (note that Ministers have already asked the NTC to examine this)
* Re-focus roadside enforcement to be more safety risk-based on deliberate and systemic failures rather than administrative processes.
* Overhaul the Performance Based Standards (PBS) approval process to maximise the opportunities for use of these safer and more productive vehicles
* Consider how to end the multiple and duplicative assurance audits which operators are currently required to do
* Make modest improvements to general access mass and dimension (subject to a cost benefit analysis and regulatory impact assessment)
* Take an outcome-based approach to regulation which encourages and enables innovative practices, while also allowing for prescriptive measures for HV businesses that prefer to follow the rules-based system.
* Provide a more flexible legislative framework that moves many rules down from primary legislation to regulation and other subordinate instruments such as Codes of Practice. This will allow the Regulator to deliver real time safety and productivity improvements and easily adapt to future industry developments.
* Optimise the use of technology and data for both regulatory and road manager purposes by enabling the development of technology and data standards, protections for privacy and security and a certification system, via a new technology and data framework.

This package has broad support, even though individual aspects may not be everyone’s first preference. Substantial compromise and reconciliation of views has been reached through the consultation process between historically entrenched and often competing views of stakeholders. Consideration of matters as a package will allow the reform to move forward maximising the goodwill and momentum that has been built through consultation.

The proposed flexible operator certification scheme based on Safety Management Systems will provide greater flexibility for the NHVR to approve alternative compliance and encourage and reward operators that are more proactive in their risk management and invest in safety and productivity technology. Supported by a technology and data framework that protects privacy and controls on the use of data for compliance purposes, the expanded operator certification scheme will support continuous improvement in the heavy vehicle industry.

Applying the operator certification model to fatigue will allow for a two-tier system with a base tier, that provides simple, easy to follow rules for operators that want simplicity; and a certified tier that provides flexibility for those operators who can demonstrate better risk management. The general schedule, which has been modestly simplified, should be tested in the field with operators and by independent safety experts. This schedule, combined with a more risk-based approach to fatigue enforcement and penalties will provide a fairer, more balanced system that maintains community safety.

Fatigue record keeping (logbooks) should be retained but should be as light-weight and simple as possible. Electronic record-keeping should be encouraged (but not mandated) and many of the proposed enforcement changes would allay industry’s concerns with electronic work diaries. Importantly, there was broad agreement that the use of fatigue detection technology should be encouraged, and that this technology should be adopted when it is proven.

The new law will mean that a one size fits all approach to compliance and enforcement and operator certification will not be appropriate and the regulator will have the opportunity to provide a more tailored approach to performing its duties. To ensure the expectations of ministers are met, certain governance controls, such as the ability to issue ministerial directions and a more robust Statement of Expectations, should be implemented.

# Additional Policy Matters to be taken forward as separate workstreams

It became clear throughout the consultation that industry’s concerns with how heavy vehicle access is regulated are a matter of operational and system deficiencies as opposed to problems inherent in the law. Industry’s productivity concerns also relate to broader road reform issues outside of the scope of the HVNL.

Taking these ‘out of scope’ issues forward as part of an overall policy package is critical to maintaining industry support for the policy propositions that do relate the HVNL. It is recommended that the non-HVNL propositions are taken forward as additional work streams by an appropriate body.

It was universally agreed that moving towards an online access system based on pre-agreed network access similar in concept to the Tasmanian HVAMS is the preferred way forward for improving access. Such a system will require financial investment by jurisdictions, however, will deliver future cost savings for government and substantial benefits for operators. Work should proceed to cost this project as a priority. Such a system would improve decision making and in time negate the need for most access permits as better asset management practices are embedded for road managers.

Other non-HNVL propositions include:

* Measures to encourage more transparency on heavy vehicle productivity issues by road managers
* Overhauling the PBS approval process, and making some changes to the law in this area
* Measures relating to driver health.

# Barriers to Reform

The Productivity Commission Report National Transport Regulatory Reform from October 2020 notes that the HVNL has not achieved the productivity improvements that were envisaged. My observation is that there is a mismatch between the productivity objective and therefore the ambition of the law, and the levers that are contained within the law to impact productivity. The largest drivers for heavy vehicle productivity are likely to be prioritisation of infrastructure spending and efficient road pricing, both of which are matters that are outside the scope of the current or any future Heavy Vehicle National Law.

The law can and should ensure that access decisions are made in an efficient, transparent and accountable way and several recommendations are directed at red tape reduction and more accountability in this area.

A separate but related issue is a tension between the role of the NHVR and the role of road managers in the granting of access to the road network. I recommend that governments make clear their expectations in this regard.

My work also noted that in some cases the philosophical approach to access decision making was one of asset protection in a constrained budget environment. While the budget constraints are real and acknowledged, the interests of the community are maximised if access is seen through the philosophical prism of roads fulfilling a significant economic purpose of moving people and freight. The goal in granting heavy vehicle access should be to maximise the safe use of roads and infrastructure to efficiently move freight rather than protect the asset. The success of the Tasmanian HVAMS system owe as much to this philosophical change as it does to the systems that support the decision making.

The NHVR is now mature in its operation and a new law based on the policy positions put forward in this report will enable them to be more effective. However, the new law on its own this will not address productivity in the heavy vehicle sector and it needs to be coupled with an ambitious micro economic reform policy agenda. Industry sees these issues as highly interrelated.

# Areas of disagreement and a way forward

The consultation showed that the level of agreement on the future direction of the HVNL at principles level was very high; and discussions focussed primarily on policy refinement. However, there are some areas where there are divergent views.

The policy positions included in Appendix A recommend that the new law enable ministers to appoint a technology and data framework administrator, define the role of the administrator for regulatory and non-regulatory purposes and make a range of other related decisions. This proposition has broad support.

Some stakeholders want to go further and have ministers name the Transport Certification Australia (TCA) as the Framework Administrator. Other stakeholders do not support this position. It is outside the scope of this report to nominate roles for particular government bodies.

There is unanimous support for the implementation of an on-line access approval process using a pre-approved network (similar to the Tasmanian Heavy Vehicle Access Management System (HVAMS)). Some jurisdictions and Austroads have commenced projects in this regard and the NHVR has also done considerable work on an on-line access system. There is unanimous support for the NHVR portal being the entry point for customers to access any on-line approval process.

It is likely that the ultimate solution requires improvements to both NHVR and jurisdictional systems working in concert. This report recommends that an implementation plan is developed and costed over the next 6 months to address this issue.

A small minority of stakeholders raised some concerns of ease of enforcement of the more complex two tiered system, however, increasingly technology and a shift to risk based enforcement will inevitably drive change in this area. While prescriptive rules must and should remain in the near term, the focus on these should lessen over time.

Some concerns were expressed about the technology and data framework, however, these concerns can be addressed in the design of schemes that are approved under the technology and data framework.

Road managers generally are concerned about the balance of heavy vehicle access and degradation and funding of roads. An access matter that is within the scope of the legislation and is not agreed is the issue of deemed refusal of access applications when the time limit has expired, combined with a merit-based appeal. Most decisions of government of this type are subject to merit-based appeal and my observation is that heavy vehicle access decisions should be no different. A merit-based appeal combined with a time-based deemed refusal would provide a remedy for operators who at present can simply be left in limbo by a road manager’s failure to decide.

 I have not recommended a merits-based appeals process because there are highly divergent views on this issue and because industry regarded implementing an on-line, pre-agreed network approach to access decisions as a more important reform to be pursued. Deemed refusals without a merit-based appeal do not help anyone and are therefore also not recommended.

In summary, the package of law changes discussed and presented to stakeholders is broadly supported, noting the exceptions above and, on that basis, the NTC’s work program (which is consistent with this report’s position on legislative reform issues) should be progressed. Propositions which are outside the scope of the NTC law review should be progressed as additional work streams

A survey of stakeholders concluded that there is broad support for the package. The full report detailing the support for individual propositions has been distributed to jurisdictions, the summary results are provided in Attachment B.

## The survey highlights:

### Overall Support

* Overall, 78% of stakeholders either support or strongly support the overall package, 13% oppose and 9% are neutral

### Improving Productivity

* 83% of stakeholders agree or strongly agree that the overall package will improve productivity compared to the current system. 4 % disagreed that the package will improve productivity and 13% were neutral.

### Improving Safety

* 57% of stakeholders agree or strongly agree that the package will improve safety compared to the current system, 13% disagree and 30% were neutral

## ATA Proposal

While my work was underway the ATA publicly put forward a set of policy proposals for the new law. This was very helpful for my process and the ATA engaged in a very positive manner with my work. My analysis shows that 13 of 17 ATA proposals are fully or substantially aligned with proposals in this report. Two ATA proposals are out of scope and two are not supported by this report.

### Next steps

The law reform proposals discussed during this process, outlined above and included in full in Attachment A have broad agreement, noting the exceptions above. All stakeholders have participated in discussions in good faith and their contributions have been productive and assisted in refining the policy proposals.

The package needs to be considered as whole, while allowing for multiple implementation pathways. Individual components rely on others and removing an element will undermine support for the package as a whole.

Propositions in appendix A that relate to the law should be progressed.

Propositions in Appendix A which are categorised as outside the NTC law reform project should be progressed by an appropriate body as additional work streams.

In addition, other matters, such as the scope of fatigue regulated heavy vehicles, a new general schedule for fatigue (the basic rules) and potential changes to general mass and dimension (ie increases to height and width) will need to be tested through a regulatory impact process before final positions can be confirmed. Once the analysis is complete Ministers will be able to decide whether they should proceed. Issues requiring a benefit cost assessment as part of the regulatory impact process are also identified in Attachment A.

### The need for ongoing engagement

As previously stated, the stakeholder engagement process over the last few months has been undertaken in a very positive and cooperative spirit. However, there is much detail to still work through and finalise.

As such, most of the arrangements put in place should be maintained over the next 12 to 18 months to deal with both NTC law reform process issues and issues that are identified for additional work streams. More specifically, the enhanced Reform Advisory Committee (a committee of industry, jurisdictions and regulators), which was central to developing broad agreement around the proposed package should continue to play a strong role.

This forum will act as an opportunity to test and refine the practical and implementation impacts of proposals. From an industry perspective these arrangements will also respond to a strong view that there needs to be more transparency in the process. Forums where stakeholders from both industry and jurisdictions and the NHVR share perspectives and develop ideas in tandem will continue to deliver the best results.

# Summary of Recommendations:

1. The propositions outlined in Attachment A should be progressed as a package of reforms.
2. Items identified in the Attachment NTC Law reform should be progressed by the NTC.
3. Items identified in the attachment as non-law reform related should be progressed by an appropriate body.