

Submission to: National Transport Commission

Title: Penalties Matrix

Date: 5 December 2014



Contents

1. Introduction	3
2. Australian Trucking Association.....	3
3. Recommendations	4
4. HVNL Penalties	4
5. Penalties Matrix.....	4
6. Demerit points.....	7

1. Introduction

The NTC is undertaking a review of national penalties under the Heavy Vehicle National Law ([HVNL¹](#)) administered by the new National Heavy Vehicle Regulator ([NHVR](#)).

As part of this review, NTC has created a draft 'Penalties Matrix' that will systematically:

- assess the consistency of current penalties, and
- provide a guide for setting penalties for future offences.

Transport ministers agreed to the matrix project in May 2014 in recommending:

..that the NTC work with governments and industry to develop a penalties matrix to ensure penalties are set accurately. This process should occur alongside, or as part of, any chain of responsibility amendment package.

The ATA offers feedback and recommendations in this submission on the design and utility of the draft penalties matrix.

To test the matrix, the NTC has chosen 41 representative or sample HVNL offences and run these through the matrix's three step process to see which penalties these offences would attract using this tool.

The 41 representative offences include 37 (eight with demerit points, and 12 proposed for demerit points) and four proposed EWD-related offences. As the NTC notes, they cover a 'broad suite of offence categories' as well as some offences nominated during the Framework Review.

As part of this project, the NTC has selected 41 'representative HVNL offences' (Appendix A – Representative Offences) including some attracting demerit points, and put them through the matrix. The test results indicated deviations from current penalty amounts for almost a third of these representative penalties:

- 30 offences indicated penalties consistent with those currently in the law
- 4 offences led to indicative penalties higher than those in the law
- 7 offences led to indicative penalties lower than those in the law

The NTC notes this exercise is not a re-consideration of HVNL penalties. The purpose of this consultation round is to assess the ability and integrity of the matrix as a tool for assessing future penalties, their consistency with existing offences, and their ability to meet the object and intent of the HVNL.

In seeking stakeholder feedback on this matrix, the NTC notes:

- the matrix is a subjective exercise as it considers principles and elements that are not objective in nature. In this respect, feedback about the way the sample offences are ranked against each element of the matrix is welcomed; and
- comments should be restricted to the usefulness of the matrix as a tool –not about the appropriateness of the penalty.

2. Australian Trucking Association

The Australian Trucking Association (ATA) is the peak national body representing the heavy vehicle or trucking industry. ATA members include state and industry associations, many of the nation's largest road transport companies, and leading firms in truck technology.

¹ Hyperlinks to relevant external documents are provided for convenience.

3. Recommendations

The ATA recommends that:

1. The matrix is a useful and systematic tool but its design requires further refinement and testing.
2. The object of the HVNL provides a sound starting point to assess the consistency of penalties.
3. The elements in Step 1 be re-worded and re-ordered to adhere more closely to the object of the law.
4. The zero score in Step 3 be removed, so that the range becomes 1 to 5.
5. That consideration of demerit points be detached from the process of consideration of the matrix.

4. Penalties

The ATA’s 2012 [submission](#) to the National Transport Commission (NTC) et al. provides a foundation for understanding the ATA’s overall views on penalties. The following submission represents the views of the ATA, and where noted the particular views of member organisations.

The need for HVNL offences and penalties to be inherently consistent is undeniable. However, in the end, it is essential that the penalty itself is appropriate for the offence (i.e. the punishment fits the crime); that it acts as a deterrent to repetition of that offence (i.e. promotes specific compliance) and it helps reduce identified activity on the road (i.e. improves public safety/protects property).

5. Penalties Matrix

**NTC Question 1: Do You Agree With The Matrix as Proposed?
If not, why not and what improvements do you suggest could be made?**

While the ATA supports the idea of an amended matrix as a systematic method for assessing the consistency of HVNL provisions and penalties, and sees the incorporation of the object of the law as a thoughtful and sound basis on which to design the tool, there is concern regarding its highly subjective nature. The ATA believes that unless this subjectivity is constrained to the greatest extent possible through close attention to the object and purpose of the law itself, the utility of the tool will be limited.

**NTC Question 2: Given the information provided, has the matrix been sufficiently tested?
A. If not, why not and what improvements do you suggest could be made?
B. If you feel the assessment of any of the 37 representative offences and 4 proposed EWD offences is incomplete, please provide detail of why and how the matrix could address this.**

The ATA makes the following comments as follows, on the three step matrix process outlined by the NTC:

Matrix Step 1: The elements of the offence – namely the behaviours and outcomes the offence is seeking to prevent from occurring – are assessed against the primary objects of the HVNL, being:		
	<ul style="list-style-type: none"> • public safety • environment/public amenity • road infrastructure 	
Against each object, a score applicable to the ‘worst case scenario’ for the offence, is applied as per the below table:		
<u>Numerical score</u>	<u>Severity of risk</u>	<u>Risk/Impact</u>
0	N/A	Not applicable to offence
1	Low	Minimal risk/impact
2	Medium	Some/marginal risk/impact
3	High	Appreciable/significant risk/impact
4	Extreme	Critical/serious risk/impact

The object found in HVNL Chapter 1 (copied below) is not the same as in Step 1 above, which conflates various elements probably affecting the overall performance of the matrix:

HVNL Chapter 3. Object of Law

The object of this Law is to establish a national scheme for facilitating and regulating the use of heavy vehicles on roads in a way that—

- (a) promotes public safety; and*
- (b) manages the impact of heavy vehicles on the environment, road infrastructure and public amenity; and*
- (c) promotes industry productivity and efficiency in the road transport of goods and passengers by heavy vehicles; and*
- (d) encourages and promotes productive, efficient, innovative and safe business practices.*

The ATA recommends the elements proposed in Step 1 be re-arranged and re-worded as closely as possible to the original object so as to be consistent with legal intent and meaning. This would then read as follows:

‘Step 1:

The elements of the offence – namely the behaviours and outcomes the offence is seeking to prevent from occurring – are assessed against the primary objects of the HVNL, being:

- a) to promote public safety;
- b) to manage the impact on the environment, road infrastructure and public amenity;
- c) to promote productivity and efficiency in road transport of goods and passengers; and
- d) to encourage and promote productive, efficient, innovative and safe business practices.

In the interests of consistency, Step 1 ought to adhere to the order and wording of the object of the law, and in so doing reflect the currently equal balance between the respective elements a) – d). However, the ATA acknowledges that ALRTA has observed that as element *a) public safety* is a critical matter, it should be treated with much higher importance than the others and be weighted by the matrix accordingly.

It is interesting to note that the object of the HVNL does not, in any part, explicitly identify or discourage the occurrence of anti-competitive behaviour, i.e. No.1 - ‘unfair commercial advantage’ above. Yet, even for a minor breach under section 594 ‘Matters a court must consider when imposing sanction for noncompliance with mass, dimension or loading requirement’, the court must consider if there was *a substantial risk of unfair commercial advantage*.

Matrix Step 2: The offence is then assessed against any further important elements that are applicable, again from a worst case scenario perspective. These elements have been determined to be:

1. Unfair commercial advantage
2. Safe business practices
3. Frustration of enforcement
4. False/misleading/fraudulent conduct
5. Improper use of information
6. Undermines confidence in the regulatory framework

As with Step 1, each element is allocated a numerical score of between zero (not applicable to the offence) and four (extreme).

Element No.5 Improper use of information above, could be absorbed into No. 4, which covers misleading and fraudulent conduct. This could result in an amended list like this:

1. Unsafe business practices
2. Damage to property or public amenity
3. False or misleading conduct
4. Unfair commercial advantage
5. Frustration of enforcement.
6. Undermines confidence in the law

The ATA recommends the table in **Step 3** below be amended as indicated. The hierarchy of scores suggests that awarding a penalty for a ZERO score is a possible outcome which must be an error in the matrix design. Such a result would be unjust of course, but in terms of rationale it would also undermine amended step 1. object (d) to encourage and promote productive, efficient, innovative and safe business practices.

Matrix Step 3: The total numerical score is calculated, which places the offence within the HVNL risk category as outlined below. The risk categories and associated penalties are those already defined within the HVNL.

Total numerical score	Current HVNL risk category	Current HVNL penalty
0-5 1- 5	Minor	\$1000-\$3000
6-8	Substantial	\$4000-\$6000
9-11	Severe	\$8000-\$10000
12+	Critical	\$15000-\$20000

The ATA generally supports the risk categories above and suggests another category for no or low risk ‘administrative’ offences, i.e. \$75. It is apparent from the test outcomes that the penalties that should be lower are administrative in nature, whereas the penalties that could be increased relate directly to safety.

The ATA provides a couple of examples below to demonstrate that the matrix requires refinement:

1: For section 79 (2), the matrix recommends a penalty HIGHER than the large penalty currently in the law.

Section 79 requires the return of a permit and allows for a substantial maximum penalty of \$4000 yet there are no direct risks to object (a) *public safety* or others from its breach. Although the matrix correctly finds the worst case scenario outcome to be “Minor”, it also finds the offence should attract an even higher penalty:

<p>MATRIX TEST RESULT</p> <p>79 (2) Return of permit – The person must comply with the notice within 7 days after the notice is given to the person or, if a longer period is stated in the notice, within the longer period.</p> <p>Maximum penalty – \$4000</p>	Public safety	N/A	0
	Environment/public amenity	N/A	0
	Road infrastructure	N/A	0
	Further important elements	Severity	Numerical score
	Unfair commercial advantage	N/A	0
	Safe business practices	N/A	0
	Frustration of enforcement	Low	2
	Improper use of information	N/A	0
	Undermines confidence in the regulatory framework	N/A	0
	False/misleading/fraudulent conduct	Low	2
Total			4
Outcome			Minor

However constructed, the score for this offence should lead to a Minor penalty with the lower maximum value of \$3000 (which the ATA would argue is too high in itself for a paperwork breach).

1: For section 60 (1) (a) below, the matrix produces a penalty LOWER than the penalty currently in law. This section requires that a person not use, or permit to be used, on the road a heavy vehicle that contravenes a vehicle standard. There is a risk to public safety in using a non-standard vehicle on the road yet the penalty is the same as for section 79 above for a breach in paperwork requirements.

Under the NTC penalties matrix, this risk to public safety attracts an understandable score of 4 (Extreme).

Provision	Primary HVNL Objects	Severity	Numerical score
<p>60 (1)(a) Compliance with heavy vehicle standards – A person must not use, or permit to be used, on a road a heavy vehicle that contravenes a heavy vehicle standard applying to the vehicle.</p> <p>Maximum penalty – \$4000</p>	Public safety	Extreme	4
	Environment/public amenity	Medium	2
	Road infrastructure	N/A	0
	Further important elements	Severity	Numerical score
	Unfair commercial advantage	Medium	2
	Safe business practices	Medium	2
	Frustration of enforcement	N/A	0
	Improper use of information	N/A	0
	Undermines confidence in the regulatory framework	N/A	0
	False/misleading/fraudulent conduct	N/A	0
Total			10
Outcome			Severe

In light of the ATA’s suggested refinements, the ATA suggests instead a score of 4 for *public safety* plus 4 for *safe business practices* plus 4 for *infrastructure, environment and public amenity* which would total **12** and position the worst case scenario for this offence firmly in the Severe category with a concomitant penalty of \$8000-\$10000.

NTC Question 3: Are there any additional offences that should be used to test the matrix?

Yes. The ATA recommends that subject to the stated concerns regarding subjectivity, the matrix be reworked as outlined in this submission, and then tested several times more using both the original ‘representative’ offences and a comprehensive set of untested offences from the HVNL.

6. Demerit points

NTC Question 4: Do you support the assessment of the eight HVNL offences that currently feature demerit points and the 12 potential demerit point offences identified by stakeholders?

The NTC also tested whether current HVNL offences attracting demerit points are appropriate and if others identified during the review warrant them as well.

Eight current offences with demerit points were assessed against Demerit Principles (listed below) and a further 12 offences identified by stakeholders as potential candidates for demerit point penalties.

The assessment found the eight current HVNL offences satisfy all the principles and are appropriate for a demerit point penalty. However, although each of the 12 candidate offences met some of the principles, the NTC found not one offence could satisfy all of them.

The principles for attaching demerit points are as discussed in the Heavy Vehicle National Law Penalties Framework Review Issues Paper & Consultation Guide:

1. The demerit point scheme augments fines for road law offences by providing deterrence for persistent offenders.
2. Heavy vehicle drivers should only accrue demerit points for behaviour-related offences.
3. Demerit points should attach to offences that involve making a deliberate choice to take risks on the road that threaten road safety.
4. Since demerit points have the capacity to severely impact on a driver's livelihood, they should attach to offences that are clearly safety-related.
5. Demerit points should only attach to offences with potentially significant safety consequences, i.e. they should be limited to severe and critical offences.
6. The number of points attached to an offence should reflect the relative seriousness of the offence, in the context of the actual or potential impacts.
7. It may also be appropriate to attach demerit points to offences associated with a particular road safety problem (such as a high volume of vehicles in a poor technical condition).

The ATA concurs completely with the NTC's matrix assessment that none of the 12 stakeholder identified offences should attract demerit points. The ATA specifically requests that s60 (1); s704 (1); 704 (2) and s704 (3) be removed from any further consideration of demerit points. These provisions particularly challenge principle 2 since they also capture non-driving parties elsewhere in the chain for whom a loss of license points would be illogical and unfair no matter how culpable they might otherwise be.

The ATA generally supports principles 1, 2, 3, 4 and 6. It does not generally support principles 5 and 7 for reasons outlined below. Demerit points should not be used for problems better addressed by targeting core operational issues. In the example included in the NTC paper about vehicles in poor technical condition, a more appropriate response might address improvements in inspections and auditing processes.

a. If not, why not and what changes should be made to the assessment process?

ATA member, NatRoad, further notes that although there is merit in the NTC's Demerit Point Principles overall, their consideration in section 6 should be de-coupled from the HVNL Penalties Matrix Project and refined under another process. It finds no compelling reason to consider demerit points as part of the project, and to conflate the two aspects confuses an already complex consideration.

Principle 7 It may also be appropriate to attach demerit points to offences associated with a particular road safety problem (such as a high volume of vehicles in a poor technical condition).

ATA member, ALRTA also noted potential for principle 7 to act to overturn established compliance approaches in favour of an undesirable 'flavour of the month' approach.

Principle 5 Demerit points should only attach to offences with potentially significant safety consequences, i.e. they should be limited to severe and critical offences.

The ATA asks again why demerit point penalties should focus in principle on road transport offences with 'significant safety consequences'.

In its 2012 submission, the ATA pointed out that the Australian Law Reform Commission (ALRC) has made it clear in the past that infringement schemes should apply only to offences of “a less serious nature”. The ALRC has also used expressions such as “low-level” and “relatively minor” in relation to infringement schemes:

(a) It should apply only to strict or absolute liability offences of a ‘less serious nature’ the meaning of ‘less serious nature’ would need to be defined by legislation. It is inappropriate to issue an infringement notice for an offence that requires any detailed forensic analysis, particularly of a state of mind (p416)

Such penalties have always been considered suitable for a “parking infringement” style of offence and this policy rationale was made evident recently on 28 November with the announcement from the NSW Minister for Roads and Freight of the introduction of a demerit point penalty, on top of the existing fine, for anyone found guilty of using disabled car parking spaces to which they were not entitled.

In the report, *Principled Regulation (p194)*, the ALRC observes that a demerit point system was introduced by Australia’s aviation regulator CASA, for ‘airlines for minor breaches of safety regulations’. The different rationales of transport regulators for introducing demerit point schemes are confusing and unexplained.