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Dear Ms Pelham

Re: Proposed Heavy Vehicle National Law, Oversight Provisions

I refer to your request for advice regarding the above matter. The following comments are provided in accordance with my power under section 36(2)(g) of the *Privacy and Personal Information Protection Act 1998* (NSW) (PIIP Act) to provide advice relating to the protection of personal information and the privacy of individuals.

You advised that the Council of Australian Governments (COAG) had agreed to establish the National Heavy Vehicle Regulator (NHVR) which would administer the Heavy Vehicle National Law (HVNL) and would be subject to 'oversight' legislation under Commonwealth laws, including the *Privacy Act 1988* (Cth) (the Privacy Act). You also advised that the purpose of the HVNL was to reduce 'the currently excessive burden of compliance when traveling across state borders'. I also note your advice that any advice regarding the HVNL oversight provisions should take into account the COAG proposal to establish a National Rail Safety Regulator. The following comments on the HVNL oversight provisions do not canvass the details of the HVNL or the policy reasons for the establishment of the NHVR, but rather comment on the proposed oversight framework under the HVNL in the DLA Piper Paper (the Paper).

Jurisdictional issues

The Paper proposes that Commonwealth oversight laws including the *Privacy Act 1988* (Cth) be applied to state and territory based NHVRs, their authorised officers and to state agencies acting under delegation from or as contracted service providers to the NHVR. In my view this model raises some jurisdictional issues which are yet to be settled in relation to the way the National regulations apply Commonwealth freedom of information and privacy laws to NSW (and what amendments they make to those laws for NSW) such as:

- whether it would be possible to grant jurisdiction NSW courts and tribunals to review decisions made under Commonwealth laws such as the Privacy Act
- whether it would be possible to grant jurisdiction to NSW courts and tribunals to hear matters relating to the enforcement and review of determinations made under the Privacy Act, and
- whether certain documents that would not be accessible under the *Government Information Public Access Act 2009* (NSW) should remain inaccessible for the purposes of both freedom of information and privacy laws in this scheme.

I suggest that these legal issues considered further before progress is made on the application of Commonwealth law to State agencies operating under a National scheme.

I am pleased to note at point 8 that the Paper makes clear that the various Commonwealth oversight acts 'should not apply to State agencies performing functions conferred on them under the HVNL'. However, as noted below, I am concerned about proliferation of privacy or information Commissioners and in particular the effect of a multiplicity of privacy laws (and other oversight laws) on the day to day work of employees of these State agencies and about the prospect that 'regulation fatigue' could result in privacy breaches or other administrative lapses.

Heavy Vehicle Complaints and Information Commissioner

The Paper suggests that the best oversight model for dealing with compliance matters relating to access to information, record-keeping, administrative practice and privacy, is for a new body to be established, nominally identified as the National Heavy Vehicle Complaints and Information Commissioner (NHVCIC). The Paper proposes that this body would, among other things, investigate complaints in relation to dealings with personal information arising under the administration of the HVNL and that it might initially 'operate through existing State agencies in the early stages of HVNL implementation' and would become a 'stand alone agency' if required.

Notwithstanding the idea that State agencies might be the seat of administration for a NHVCIC, a separate body to deal with privacy matters arising under the HVNL would potentially raise the number of privacy authorities in Australia to more than 11. The current patchwork of privacy laws and the concomitant privacy authorities across Australia is already confusing for individuals. This was recognised by the Australian Law Reform Commission in its Report 'For Your Information: Privacy Law and Practice' (ALRC report 108):

The ALRC ...accepts that there is evidence to suggest that multiple privacy regulators can create confusion for individuals when making complaints, and for organisations

and agencies when seeking advice. Further, it can create a compliance burden for businesses and result in the inefficient use of privacy regulators' resources.¹

Another issue related to complaints is whether individuals who bring privacy complaints to an NHVCIC would be able to seek external review of those matters by the AAT or the Federal Court. As I understand it, individuals who are currently unsatisfied with the way the Australian Privacy Commissioner has dealt with their complaints may proceed to the Administrative Appeals Tribunal for a review of the application of the law, or to the Federal Court if the Privacy Commissioner has made a determination. While I note that the Paper recommends that the HVNL should provide that Commonwealth oversight acts be modified to 'specify relevant state bodies in lieu of the specified Commonwealth bodies' [at point 9.4], it is not certain that mere amendment by way of regulation would be sufficient to establish jurisdiction for the state appeal bodies to hear matters arising under those laws.

If the NSW based NHVR was required to deal with privacy complaints under the PPIP Act or the HRIP Act affected individuals could seek external review by the Administrative Decisions Tribunal (ADT) (for example in NSW) for a merits review. In my view it is preferable that privacy complaints arising the HVNL in NSW be dealt with under the PPIP Act because the external merits review mechanism affords complainants a more robust and a simpler means of resolving privacy complaints. Further, in my view there is no policy reason why individuals who have complaints about the way their personal information should be subject to less favourable treatment in having to have their complaints dealt with under the Privacy Act.

In my view a more workable model would be if existing privacy authorities were to be given the power to deal with privacy complaints arising under the HVNL. In the absence of a privacy law (such as is the case with WA and SA) complaints could be dealt with by reference to either the National Privacy Principles (NPPs) or the Information Privacy Principles in the Privacy Act. The difficulty with this model would be that service providers would be subject to slightly different privacy standards. However it is possible that the mooted harmonisation of privacy laws across Australia if enacted will bind all service providers to the same standard for the protection of personal information.

Privacy principles

Finally I should point out that at 28.2 the Paper incorrectly states that the privacy principles in the PPIP Act are modelled on the National Privacy Principles (NPPs) in the Privacy Act 1998 (Cth). In fact, the Information Protection Principles (IPPs) in the PPIP Act pre-date the NPPs and they differ in many respects. For instance the IPPs

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[http://www.alrc.gov.au/publications/14.%20The%20Costs%20of%20Inconsistency%20and%20Fragmentation/multiple-regulators at 14.32](http://www.alrc.gov.au/publications/14.%20The%20Costs%20of%20Inconsistency%20and%20Fragmentation/multiple-regulators%20at%2014.32)

in the PPIP Act do not include an anonymity principle or limitations on dealings with identifiers (as defined) and there is considerable difference between the exceptions to the principles in both sets of principles. Generally speaking the IPPs offer a higher standard of protection for personal information than the NPPs. The Paper also omits any reference to the *Health Records and Information Privacy Act 2002* (NSW) which also contains privacy principles and which is administered by this Office.

Thank you for the opportunity to provide advice on this matter. I hope my comments have been of assistance to you. Please contact Ms Jenner on (02) 8019 1603 if you would like to discuss the content of this letter.

Yours sincerely

John McAteer
Acting Privacy Commissioner
Information & Privacy Commission