13 November 2019

The Hon Frank Pangallo
Legislative Council
Parliament House
ADELAIDE SA 5000

By email: Fotina.Woghiren@parliament.sa.gov.au

Dear Mr Pangallo

Statutes Amendment (Suspension of the South Eastern Freeway Offences) Bill 2019

1. I refer to your letter of 22 October 2019 in relation to the Statutes Amendment (Suspension of the South Eastern Freeway Offences) Bill 2019 (“the Bill”).

2. The Bill seeks to address amendments made to the Motor Vehicles Act 1959 (MVA) and the Road Traffic Act 1961 (RTA) and supporting regulations, which were made in response to a number of serious truck crashes on the down track of the South Eastern (SE) Freeway, and the recommendations of the Deputy State Coroner, following the inquest into the death of James Venning (“the amendments”). Mr Venning was killed as a result of a fatal accident involving an out-of-control heavy vehicle on the down track of the South Eastern (SE) Freeway in 2014.

3. The amendments have limited the speed that trucks, vehicles of 4.5 tonnes and buses that seat more than 12 people could travel at on the down track between the Crafers interchange and the tollgate, to 60 km/h. However, the amendments only came into effect on 1 May 2019, as this is when the specialised speed cameras able to detect these offences on that section of the SE Freeway were installed and became operational. These cameras are able to detect trucks and buses, not just vehicles with five or more axles, as was the case previously.

4. The amendments introduced the following significant penalties for truck or bus drivers whose vehicles are not engaged in a low gear, or exceed the relevant speed limit by 10km/h:

4.1 An expiation fee of $1,036 plus six demerit points plus:

   4.1.1 Six-month licence disqualification for a first offence
   4.1.2 Twelve-month licence disqualification for a second offence
   4.1.3 Three-year licence disqualification for subsequent offences

4.2 When convicted by the court, a first offence will attract a maximum fine of $5,000, plus six demerit points and a licence disqualification of no less than 12 months. Subsequent offences will attract six demerit points, a licence disqualification of no less than three years and up to two years imprisonment.
5. Furthermore, new penalties were also introduced by way of a body corporate levy, which applies to businesses who fail to nominate the driver responsible for a camera-detected speeding offence on the SE Freeway down track. The existing levy was increased from $300 to $25,000. In addition, where a driver is not nominated and the body corporate is found guilty of the offence by a Court, a fine between $25,000 and $50,000 will apply. A body corporate that successfully nominates a responsible driver will not incur the body corporate levy.

6. The Society is aware from a number of its Members who practice in this jurisdiction, that while drivers of larger vehicles (five or more axles) have been subject to the legislation since 2014, the drivers of the newly-defined trucks and buses, are largely unaware of the laws that came into effect on 1 May of this year.

7. In addition, while the Department of Planning, Transport and Infrastructure (DPTI) may have advised the registered owners of vehicles of the new laws, there are many drivers of these vehicles who do not own them, and therefore were not notified of the changes. Furthermore, it appears that the commencement of the legislation has been poorly advertised and there was general lack of public awareness as to the changes.

8. The Society is informed that the legislation appears to be having a number of unintended consequences, such as capturing vehicles which were not intended to be subject to the laws. In your Second Reading Speech, you noted a number of examples, including instances where vehicles with less than 4.5 tonnes gross vehicle mass (GVM) have been listed as trucks, or 12-seater buses have been incorrectly registered as having 14 seats. These were not the types of vehicles, or drivers, that the legislation was intended to address.

9. Furthermore, a number of people have been impacted by the recent commencement of the legislation. You make the following comments in your Second Reading Speech:

   In the first two months of its operation, 380 expiation notices were issued under these new laws, 267 of these were for driving at, or more than, 10 km/h over the 60 km/h speed limit, or failing to brake appropriately. The media reported that police issued more than $3.3 million worth of fines in just 61 days. Of those, 122 fines have been sent to companies which face a $26,000 fine unless they name the driver. Those figures are only to 30 June 2019, as figures for the past three months have not been released yet.

Changes proposed by the Bill

10. The Society understands the Bill seeks to address the unintended consequences of the amendments while still improving safety in relation to the down track of the SE Freeway. The Bill proposes the following changes to the current legislative scheme.

10.1 The Bill seeks to suspend section 45C of the RTA for six months after assent. During this time, trucks and buses will be subject to Australian Road Rules (ARR) 20 basic speeding offences (these vehicles are limited to 60kph on the freeway so an affected vehicle detected at 85kph will be given an expiation notice for exceeding the speed limit by 25kph). Demerit points and fines will apply. ARR 108, which has been suspended, will again apply to vehicles using their primary brake during that six month period.

10.2 The Bill amends section 45C of the RTA so it only applies to vehicles with a GVM over 8 tonnes.
10.3 The Bill removes the disqualification of licence for a first offence, and inserts new penalties for the second, third or subsequent offences.

10.4 The Bill provides higher penalties for those who select to be prosecuted for a second, third or subsequent offence (as opposed to expiated).

11. The Society supports the Bill in principle and considers it will address a number of the unintended consequences of the current legislative scheme. The Society makes comment below with respect to proposed amendments.

**Application to vehicles over 8 tonne GVM**

12. The Society notes the Bill seeks to amend section 45C of the RTA, so it will only apply to vehicles with a GVM over 8 tonnes. The Society supports this amendment.

13. Presently in South Australia, drivers are required to have a Medium Rigid (MR) class licence to drive a motor vehicle with 2 axles and a GVM greater than 8 tonnes. As such, it may be reasonable to assume that drivers of vehicles of a GVM of 8 tonnes (or greater), would be aware that their vehicle meets the definition of a truck.

14. The Society is informed that the majority of drivers who have been affected since the legislation commenced are drivers of smaller vehicles who genuinely did not know that their vehicle met the definition of “truck” or “bus”.

15. Since 2014, trucks and buses have been required to adhere to a speed limit of 60kph on that section of the freeway. However, cameras capable of detecting all trucks and buses were only installed in March 2019, so most of the lighter trucks and buses have been travelling that road for five years without realising their vehicle was a “truck” or “bus”. Prior to this time, the cameras were only capable of detecting trucks with five axles or more.

16. The Society would encourage MR licence training providers to ensure that the training includes specific training on the SE Freeway descent, which appears to be a particularly problematic stretch of road. Training should incorporate guidance as to how to descend the SE Freeway as well as information regarding the speed limit changes and requirements.

**Disqualification by court**

17. The Society does not support the Bill in so far as disqualification by a court is greater than disqualification upon expiation.

18. The Society considers the intent of the provision is to dissuade drivers from exercising their constitutional right to have the charge heard by a court. It is further considered that laws that impose greater penalties for those who select to be prosecuted will inevitably be the subject of a High Court challenge.

19. The Society notes a concerning trend to impose greater penalties for a court conviction, to dissuade drivers from challenging their fines. Such measures fail to take into account whether a driver has a valid reason for driving more than 10k over the speed limit or for using their primary brake on the descent. Furthermore, not all drivers will contact a lawyer before they elect to be prosecuted, and many elect to be prosecuted in the hope they will be able to explain their reasons to a Magistrate. They are unaware at the time that they will be subject to a greater disqualification in the circumstances.
20. The Society notes in this regard, a recent update to the SA Government website in relation to the interpretation of the current legislation:

Note: The intent of the low gear offence is not to completely prohibit the use of the primary brake, if considered necessary in the circumstances however, the law requires the driver to use a gear that is low enough to enable the vehicle to be driven safely without relying on the primary brake as the sole means to slow the speed of the vehicle on the descent.¹

21. This reflects a concession by the Government that at least a portion of section 45C of the RTA will be dependent on circumstances. While the Expiation Notice Branch states that drivers can apply for a review, these reviews are very rarely successful and only when a driver can show that they didn't commit the offence. The Society is unaware of any instances where the Expiation Notice Branch has withdrawn an expiation after a driver has given reasons for the offending. Typically, the only way a driver can explain their circumstances is to elect to be prosecuted and have the charge heard by a Court. If prosecution is pursued, and the Court finds the driver guilty of the offence, the driver will be subject to a greater licence disqualification than if they expiated the offence.

22. The Society further notes that the Bill does not distinguish between drivers who elect to be prosecuted and a decision by the South Australian Police (SAPOL) to prosecute a charge. The Society is informed that there is an increasing trend of charges come before the courts where a person is not given an opportunity to expiate an offence. Instead, SAPOL is reporting the offence and then charging the driver. A driver then does not have a choice whether to expiate or elect to be prosecuted. It is unfair that a driver should receive a higher disqualification on this basis.

23. The offence of driving at an excessive speed (more than 45kph over the speed limit) is governed by section 45A of the RTA. It also attracts a mandatory six month licence disqualification for a first offence. However, the penalty is the same, regardless of whether a driver expiates the fine or is found guilty in a court.

24. The Society suggests that the penalties for a section 45C offence should be enforced in the same manner as a section 45A offence, that is, same mandatory minimum penalty regardless of expiation or conviction. A Magistrate will have discretion to impose more than the minimum penalty, which would very much depend on how serious the breach is.

Immediate Licence Disqualification/ Instant Loss of Licence

25. While not part of the proposed amendments, the Society wishes to draw to your attention, concerns about circumstances in which a person can have an application to have a disqualification or suspension lifted under section 45E of the RTA.

26. A person must apply to the Court and give evidence that they have a defence to the charge. A person has to pay a fee for this Application and while the Magistrates Court Criminal Rules² state that the Application must be heard “immediately”, in reality, these Applications sometimes take up to two weeks to be listed. In the meantime, truck drivers will be deprived of their livelihoods until they can have their Application heard in Court.

¹ Department of Planning, Transport and Infrastructure, “South Eastern Freeway – Road Corridor Overview” available at: https://dpti.sa.gov.au/infrastructure/road_projects/south_eastern_freeway_-safety_improvement_program/south_eastern_freeway_-_road_corridor_overview
² Magistrates Court Criminal Rules, Rule 28.03.
27. In addition, section 45E of the RTA has the same method for setting aside an instant loss of licence (ILOL) as for a drink driving charge. The driver has to give evidence on oath satisfying the Court that there is a “reasonable prospect” they would be acquitted of the offence. Because the offence is detected by camera, this is an almost impossible hurdle for a driver. This can be contrasted with a person charged with a prescribed concentration of alcohol, who can give evidence of procedural errors, blood test results etc. A driver charged/expiated for a camera offence, due to the certificates relied on by SAPOL, cannot point to possible procedural errors that would warrant an ILOL being set aside. This means that they would serve the six month disqualification well before any trial occurs, where a driver could possibly be acquitted.

Current prosecutions

28. The Society notes that the Bill will not apply retrospectively. As discussed above, a number of drivers have been unknowingly captured by the existing legislation and face licence disqualification and significant fines.

29. The Society considers it would be appropriate that a direction is given to the Police Commissioner/and or the Minister for Transport to intervene and give a direction not to proceed with current prosecutions. The Society notes a similar action was taken by SAPOL last year in relation to the LIDAR speed detection laser guns.

30. Given the inadequate notice with respect to the commencement of the amendments and the gravity of the consequences the significant penalties, in particular licence disqualification for a first offence, the Society urges the Parliament in conjunction with passing this reform, to advocate for current prosecutions (for first offences) to not be pursued.

Yours sincerely

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