



NATIONAL ROAD TRANSPORT ASSOCIATION

**Submission to the National Transport Commission**

**HVNL Review: Consultation Regulation Impact Statement: Regulatory Tools**

**18 August 2020**

## Introduction

1. The National Road Transport Association (NatRoad) is pleased to make comments on the *HVNL Review Consultation Regulation Impact Statement (CRIS)*<sup>1</sup> prepared by Frontier Economics and published by the National Transport Commission (NTC) on 25 June 2020. This is the third submission in a series of submission, with the first being dated 31 July 2020 and provided to the NTC on that date and the second also dated today.
2. We also note the publication of the NTC document *HVNL 2.0 A Better Law Scenario*.<sup>2</sup> (Better Law) That document sets out one possible scenario for a future law.
3. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, car carriers, as well as tankers and refrigerated freight operators.
4. This submission responds to some of the issues raised in Chapter 5. It is not structured around the questions posed. This is because, as we have mentioned in prior submissions, we believe they do not provide a good structure for a narrative response.

## Tailored regulation

5. As NatRoad indicated in the submission<sup>3</sup> made to the Heavy Vehicle National Law (HVNL) review arising from the Issues Paper entitled *A risk-based approach to regulating heavy vehicles*:

*A risk-based approach to regulation enables a regulator to tailor regulatory responses so that they are commensurate with the relevant risks. It is a useful approach where the regulator has a large number of regulated entities to oversee, resourcing is limited and, consequently, prioritisation may be difficult.*<sup>4</sup>

6. The approach reflected in the extract in the prior paragraph was advanced in all of the submissions made by NatRoad during the course of the review process to date and also shapes our views in responding to the CRIS.
7. In Chapter 5 the CRIS sets out a proposed regulatory structure that would permit the National Heavy Vehicle Regulator (NHVR) and others to make statutory codes of practice. The structure set out in the CRIS, which we support, is articulated as follows:
  - *The primary law would focus on primarily high-level principles and fundamental duties which define a standard or outcome linking to the objects of the law. For example, the primary duty under s 26C of the HVNL requires parties in the chain of responsibility (CoR) to ensure the safety of transport activities relating to heavy vehicles. This duty may be complemented by other, more specific duties.*
  - *Supporting regulations would prescribe specific requirements for complying with duties under the primary law. For example, the regulations might prescribe certain*

---

<sup>1</sup> [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.ntc-hvnlawreview.files/5715/9304/9833/HVNL\\_RIS\\_25\\_June.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.ntc-hvnlawreview.files/5715/9304/9833/HVNL_RIS_25_June.pdf)

<sup>2</sup> <https://www.ntc.gov.au/sites/default/files/assets/files/HVNL-2.0.pdf>

<sup>3</sup> [https://www.ntc.gov.au/submission\\_data/535](https://www.ntc.gov.au/submission_data/535)

<sup>4</sup> Id at para 29

*driver fitness for work checks to support an overarching duty under the primary law to ensure drivers are fit for duty.*

- *Codes of practice would serve to provide further clarity on how to comply with duties under the HVNL. Standards would generally cover technical, sector specific requirements and rules. Codes of practice would provide tailored guidance and set minimum expectations for business practices to comply with the law.<sup>5</sup>*

8. As stated, we support this structure being adopted in a revised HVNL. This structure would permit the performance-based or outcomes based focus that should be at the heart of Commonwealth regulation. As stated in Principle 5 of the Commonwealth government's guidance on best practice regulation<sup>6</sup>:

*Regulation should have clearly identifiable outcomes and unless prescriptive requirements are unavoidable in order to ensure public safety in high-risk situations, performance-based requirements that specify outcomes rather than inputs or other prescriptive requirements should be used.<sup>7</sup>*

9. We support the development of Codes of Practice where specific requirements to meet a generalised performance based duty are able to be set out for those who do not wish to tailor their own regulatory response. Much of the discussion in Chapter 5 relates to the issue of the development of Codes of Practice and how that would occur in a revised HVNL.

#### **Codes of Practice**

10. As we have indicated throughout the review process, the model for further development that works (and which currently separately applies to NatRoad members in any event) is that adopted under the harmonised WHS laws.
11. These Codes of Practice are principally governed by the provisions of section 274 and 275 of the model harmonised WHS law.<sup>8</sup> The WHS Codes are both useful in a practical sense and are admissible in proceedings under the WHS Act as evidence of whether or not a duty or obligation under the WHS Act has been complied with. NatRoad has previously endorsed this process and this outcome as superior to the current provisions of the HVNL and we reiterate that position.
12. To be clear, the HVNL registered industry Codes of Practice are not initiated by the regulator. In contrast to the better WHS system, under the HVNL, the NHVR must establish guidelines about the preparation and content of an industry code of practice that may be registered under the HVNL, per section 705 HVNL. A registered Code of Practice is one that has been developed in accordance with the guidelines and assessed as qualifying for registration by the NHVR under section 706. Compared with the WHS system it is a slow and expensive process. It should be abandoned. The CRIS would have been better informed if it had contained empirical data assessing the cost of devising and implementing the Master Code under the HVNL with a comparative cost under the WHS harmonised legislation. We submit that it would have shown expense for industry and the regulator at unwarranted levels.

---

<sup>5</sup> Above note 1 at page 52-53

<sup>6</sup> <https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation>

<sup>7</sup> Ibid

<sup>8</sup> <https://www.safeworkaustralia.gov.au/system/files/documents/2003/model-whs-bill9-december2019.pdf>

13. The essence of what is proposed in the CRIS is set out in the Better Law document. Better Law says:

*Most CoPs might be made by the NHVR, but government agencies could also develop CoPs. Consultation on CoPs would be required. CoPs would be signed off by ministers before taking effect.*<sup>9</sup>

14. We agree that consultation with stakeholders should be mandated. Where agencies other than the NHVR (what would they be – another unknown?) developed Codes of Practice, we believe that for proper co-ordination and for centralised input, they should proceed to stakeholders and to Ministers under the auspices of the NHVR. There should not be a separate stream of development. With that minor modification, we support Option 5.1.
15. We do not see the need for the development of safety standards, breach of which would be an offence. If Codes of Practice are developed that have at least one endorsed path for meeting a performance based duty then the development of safety standards should be unnecessary. Those who wish to follow a different, tailored path to meeting their performance based obligations should be able to do so. Alternatively, the relevant Code would comprise a means to meet a relevant duty for those who did not wish to tailor compliance. So, those who want prescription could embrace it via the Code whilst others would need to demonstrate that the path chosen is in compliance with the broad-based duty expressed in the main statute.
16. Further, this option of creating a plethora of standards seems to have the capacity to generate a very large number of pedantic offences similar to the way that the HVNL is currently populated with problematic offences, as we have discussed throughout the review. That would be a far-from-desirable outcome and one which could cause uncoded, higher levels of compliance and a system based on ex post facto punishment which is opposed. Such a regime is viewed suspiciously by members as a revenue raising system rather than one which preferences safety. There is no need for these standards to be in place if Codes are properly developed.

### **Remote Zone**

17. NatRoad supports the creation of a remote zone where more flexible rules might apply. We will take up discussion of this issue further when we deal with Chapter 8 of the CRIS in a later submission. But there is a suspicion amongst members that creation of this zone is a Trojan Horse for getting the Northern Territory and Western Australia (WA) to form part of the national scheme for heavy vehicle regulation.
18. The NatRoad preference is for the national system to contain more of the elements of the WA system, particularly relating to fatigue. Whether a remote zone is workable is an issue we raise in a subsequent submission.

### **NHVR to Get Other Agencies' Data**

19. NatRoad supports the Option 5.4 but we note that the option is limited in scope. There should be a greater emphasis on data exchanges more generally. It should flow both ways. Data should flow from other agencies to the NHVR and vice versa but that should not be the end of the information flow.

---

<sup>9</sup> Above note 2 at p8

20. As NatRoad indicated in the submission made to the HVNL review about safe people and practices<sup>10</sup>:

*NatRoad members find it difficult to obtain data about offences and other licensing details from employees and subcontractors. We are concerned that there is no uniformity in Australian law for operators to securely access driver records and on road breaches of their drivers. A legislative change that brings in the right of all operators to access the driver records that forms part of the revised HVNL would assist industry safety.<sup>11</sup>*

21. NatRoad maintains the policy set out in the extract set out in the prior paragraph.
22. Yet, the CRIS focuses only on reciprocal data sharing between agencies. It therefore begs the question of which agencies, other than NHVR, will be enforcing the HVNL in the future? We note that if the police remain vested with that capacity, they should be subject to the same constraints as the NHVR, a matter we raised in the HVNL review in the context of enforcement.<sup>12</sup> We reiterate the criticism of the CRIS set out in the first submission that enforcement is not analysed in the CRIS, albeit a further review is anticipated.

### **Conclusion**

23. NatRoad supports the development of Codes of Practice within an HVNL structure that is shaped along the lines set out in paragraph 7 of this submission.
24. NatRoad also supports a reciprocal mechanism for data sharing between agencies that administer laws which impinge on the enforcement of the revised HVNL. We would further support the right of employers of drivers to have access to records that especially related to their fitness to drive or their driving record. That data should be able to be shared as of right with operators.

---

<sup>10</sup> [https://www.ntc.gov.au/submission\\_data/561](https://www.ntc.gov.au/submission_data/561)

<sup>11</sup> Id at para 54

<sup>12</sup>See [https://www.ntc.gov.au/submission\\_data/704](https://www.ntc.gov.au/submission_data/704) especially at para 55