



NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the National Transport Commission

HVNL Review: Consultation Regulation Impact Statement: Preliminary Issues

31 July 2020

Introduction

1. The National Road Transport Association (NatRoad) is pleased to make comments on the *HVNL Review Consultation Regulation Impact Statement (CRIS)*¹ prepared by Frontier Economics and published by the National Transport Commission (NTC) on 25 June 2020.
2. We also note the publication of the NTC document *HVNL 2.0 A Better Law Scenario*.² That document sets out one possible scenario for a future law.
3. This submission is the first in a series of submissions on the CRIS and supplements the initial communications with an officer of the NTC about the manner in which the issue of enforcement will be advanced as a notable omission from the CRIS. Enforcement of the Heavy Vehicle National Law (HVNL) was and remains the number one priority of NatRoad members when considering the issues which are at play in a review of the HVNL.
4. 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.
5. This submission responds to some of the issues raised in chapters one, two and three of the CRIS and stands as an answer to the questions posed in the CRIS which seek feedback on problems with the effectiveness of the HVNL not covered in the CRIS and the reforms not outlined in detail.³

National Harmonisation

6. Despite the discussion in the CRIS about the benefits of national harmonisation, there is insufficient material in the CRIS to facilitate that process.
7. In addition, the language in the CRIS obfuscates this issue. There is in particular this passage at page 12 where the accuracy of the second sentence is doubted:

*Interstate trade involving the non-participating jurisdictions (Western Australia and the Northern Territory) is only around 5% of Australia's freight task by tonne-km and these operations may continue to be hampered by a lack of harmonisation. However, it should be acknowledged that for national operators, or transport companies with operations in both participating and nonparticipating jurisdictions, the compliance costs associated with this are likely to be fixed and irrespective of the scale of any cross-border operations.*⁴

8. Where is the evidence that the relevant compliance costs are fixed irrespective of scale? Intuitively, diseconomies of scale occur in respect of heavy vehicles when the time allocated to compliance increases. For example, a Western Australian based firm that wanted to increase the number of drivers who qualify for, say, basic fatigue management (BFM) would have an increasing cost of compliance linked to the number of drivers enrolled in that programme. Diseconomies of scale obviously occur when an increasing number of differences reflected in the participating jurisdictions' law are required to be taken into

¹ https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.ntc-hvnlawreview.files/5715/9304/9833/HVNLR_RIS_25_June.pdf

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

³ Questions set out at above note 1 at p 32 numbered 3.1 and 3.2

⁴ Above note 1 at page 12

account when there is the need have personnel qualified in both regimes. It would be difficult to confine compliance requirements to the relevant jurisdiction.

9. NatRoad reinforces the policy that we have communicated throughout the review. Inconsistent application of the HVNL because of, amongst other things, derogations means that the idea of a national law is set aside. Rules should not change for heavy vehicles merely because the heavy vehicle has crossed a State or Territory border. The CRIS has an inadequate response to this problem. With this and the other responses we make, we will keep this issue in focus.
10. The CRIS discusses the issue with derogations and identifies three problems as follows (with the first issue reflecting the point we make in paragraph 8 above):
 - *increases compliance costs by requiring additional internal management to ensure compliance with the multiple requirements.*
 - *can result in management systems that are compliance focussed rather than risk focussed. At best, this results in inefficiencies and increased costs. At worst, it can reduce the effectiveness of controls and create unnecessary complexity.*
 - *removes flexibility, reducing efficiency and productivity.*⁵

11. Again, after getting the problem statement correct there follows wording which doesn't make sense. The CRIS says:

*(I)t is important to remember that regulatory harmonisation is more likely to reduce costs when the standard/rule/approach being required does not, in and of itself, create unnecessary costs (for example, through being overly prescriptive).*⁶

12. The quoted proposition is given weight by reference to the Productivity Commission draft report on *National Transport Regulatory Reform*.⁷

13. Dismissing the problem of jurisdictional derogations on this basis is rejected. We note the Productivity Commission made the following Draft Finding:

DRAFT Finding 4.2

There are many derogations by jurisdictions to the national laws. There are over 70 derogations from the Heavy Vehicle National Law and over 80 derogations from the Rail Safety National Law. Some derogations create unnecessary costs and complexity for industry and regulators. These derogations are contrary to the objectives of the Council of Australian Government's harmonisation reforms.

14. We note the PC indicates that "In determining whether to remove or retain a particular derogation, governments must consider whether the derogation in question reflects

⁵ Above note 1 at p 19

⁶ Ibid

⁷ <https://www.pc.gov.au/inquiries/completed/transport/draft/transport-draft.pdf>

evidence-based best practice, and whether the value of the derogation is greater than any costs imposed upon industry.”⁸

15. The PC has, accordingly, made a draft recommendation as follows:

DRAFT RECOMMENDATION 4.1

The Transport Infrastructure Council should request that the National Transport Commission undertake a review of significant derogations from the Heavy Vehicle National Law and the Rail Safety National Law, with the aim of reducing regulatory inconsistency.

16. The current review presents an opportunity for assessing, altering and/or recommending the removal of derogations, or altering the national law, to achieve best practice regulation. If that process is not to occur as part of the current review, at the least we would request that the timing of the review coincide with the introduction of a reformed HVNL.

17. In addition, a reform that should be included in the new HVNL is that any derogation should not be permitted without a threshold evidential requirement. The Inter-Governmental agreement around heavy vehicle regulation should reflect that criterion. Change in this context should encompass the PC’s own indication that the process of assessing derogations is important:

*Where State and Territory Governments insist on derogations to the national laws, they should be able to point to evidence supporting that derogation. This process is key, not only to ensure national consistency; it is also important for governments to ensure that the regulations operating in their jurisdictions remain relevant and effective. This evidence base may include the effectiveness of particular policies in achieving their intended outcomes, for example, increased safety.*⁹

18. In seeking feedback from members on an earlier draft of this submission members were adamant that national harmonisation must be a priority objective of the current review. This issue raises temperatures with comments being received from members such as:

The goal of nationally consistent regulation is fundamental to the review of the NHVL and for NTC to seek to negate the significance of non-participation by WA and NT on the basis that cross border services is only 5% of the national freight task is offensive and insulting to this industry.

The Problem: Other legislative instruments

19. The CRIS limits its scope by indicating that there is “the potential need for further work relating to other legislative instruments.”¹⁰

⁸ Id p 117

⁹ Ibid

¹⁰ Above note 1 at p28

20. The CRIS excludes a number of critical areas. The CRIS excludes licensing and registration reform. This is disappointing to say the least. The decision to have a heavy vehicle national plate without the underlying administration relating to heavy vehicle registration being vested in the NHVR was puzzling and detracts from having a truly national registration system. This is integral to the operation of the HVNL.
21. We note that the CRIS states that “licensing and registration are not within the scope of the HVNL.” That is certainly not the case with many provisions in the HVNL turning on the heavy vehicle being properly registered (e.g. section 551 relating to the seizure of number plates) and requires the National Heavy Vehicle Regulator (NHVR) to keep a database of heavy vehicles (s686A) that is dependent on registration data. It is difficult to imagine that the regulator which emerges from the reformed HVNL can properly undertake its work without having timely and up-to-date access to all heavy vehicle licensing records.
22. At the least, the CRIS should indicate where the administrative role of the regulator intersects with some of the proposals. Chapter 11 provides an example: there is clearly a linkage between timing of roadworthiness inspections and renewal of registration. As set out in the CRIS:

Scheduled or event-based inspections (change of ownership, renewal of registration) are currently determined by individual jurisdictions and provided through their vehicle registration authorities.¹¹

23. If there is to be a disconnect between inspection on renewal and registration and the revised regulator’s powers to order an inspection that would create an unnecessary regulatory and administrative burden. So, in other words, where proposals in the CRIS, such as set out in Chapter 11, intersect with matters such as registration and licensing this should at the least be acknowledged and the intersections discussed, analysed and costed.

The Problem: Investigation and Enforcement

24. As mentioned in paragraph 3 of this submission, the disconnect between the CRIS’s reform proposals and the issues of investigation and enforcement is concerning. The CRIS says:

*Once a new framework and approach for the HVNL is settled, the HVNL will need reviewing to adjust investigation and enforcement powers as well as reviewing sanctions where consequences of a breach are less material and conversely increasing penalties where a breach represents a significant risk to road safety. For example, this could involve suspended prison sentences and other sentencing orders such as community service and probationary orders. Potential reforms to these mechanisms are not considered in the Consultation RIS. However, **the NTC is intending to undertake a separate review of penalties and sanctions under the HVNL upon settling policy, but before legislation is finalised.**¹²*

¹¹ Above note 1 p170

¹² Above note 1 p 32

25. As we have otherwise communicated to the NTC, the timeline for this review and the form it will take are critical considerations.
26. As we have emphasised throughout the review process the prescriptive HVNL regime with penalties that are indexed every year is seen by members as a hindrance rather than a framework within which their businesses might thrive. The regime is also viewed as a massive disincentive to recruitment of drivers and others who suffer from pedantic but costly fines for minor record keeping or other minor offences. This led to NatRoad to recently call for the early recommendation that indexing of offences cease.¹³ That is why the timing of the subsequent review is critical.
27. In seeking comments on an earlier draft of this submission one member commented that the entire basis of the review is that the HVNL is not fit for purpose and “that the current HVNL has passed its Use By Date and to continue to escalate fines and penalties based on out-moded regulation is unreasonable.”

Scope of the HVNL: Road Rules to be Incorporated

28. The scope of the HVNL should change. NatRoad believes that all heavy vehicle specific road rules set out in the Australian Road Rules¹⁴ should be placed in the revised HVNL.
29. As described in prior NatRoad submissions to the NTC in the course of this review, there are road rules which are specific to heavy vehicles that would be better placed in the HVNL. By way of example, we refer to Road Rule 127.¹⁵ This rule relates to minimum following distances between heavy vehicles. It is highly prescriptive. It differs from the more preferable test in Road Rule 126 which is that a safe distance behind a vehicle is a distance in which a driver can stop safely. Performance based tests of this kind are more appropriate to a system where technology may intercede to make the prescriptive distances in the Road Rule a nonsense e.g. with platooning. The road rules need to cater for light vehicles with separate regulation for aspects of heavy vehicle driving being better placed elsewhere. This requirement will become more pressing when technology advances so that there is an even greater schism between the engineering fundamentals of the two sectors.

Conclusion

30. NatRoad will now prepare submissions on the individual topics raised in the CRIS. We reject the proposition that incremental reform of the HVNL is sufficient.

¹³ <https://www.natroad.com.au/news/natroad-opposes-hvnl-penalties-set-increase-1-july-2020>

¹⁴ Mentioned in the CRIS at above note 1 p 34, p40, p44, p45 but not analyzed as to the appropriateness of inclusion in the HVNL as suggested or otherwise

¹⁵ http://www5.austlii.edu.au/au/legis/nsw/consol_reg/rr2014104/s127.html

31. We emphasise that the aim of national harmonisation will be pursued by NatRoad in the examination of the matters covered by the CRIS, inclusive of issues of investigation and enforcement.