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Submission to the National Transport Commission

**HVNL Review: Consultation Regulation Impact Statement: Assurance and
Accreditation**

20 November 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. This is the ninth submission in a series of submissions.
2. We also note the publication of the NTC document *HVNL 2.0 A Better Law Scenario*.² (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 the issues raised in Chapter 7 of the CRIS entitled *Assurance and Accreditation*. As was anticipated in earlier submissions, this subject is the last to be considered when assessing the CRIS.
5. As was indicated in the submission³ that NatRoad made in this subject area in the earlier stages of the review (First Submission), accreditation should coalesce with the new regulatory regime. Once the framework for the revised HVNL is in place, NatRoad would recommend that the role of accreditation under the new legislative framework and the benefits of any scheme or schemes to operators be revisited. This is necessary also because of the lack of detail and in-depth discussion in Chapter 7 and because of the need to take into account recent Productivity Commission findings, discussed below.
6. Operators are unlikely to join an accreditation scheme if the costs are not offset by clear safety and productivity benefits, including through regulatory incentives and reduced on-road enforcement of accredited operators. Members are also calling for a reduction in the number of customer and other audits they now experience.
7. Chapter 7 contains material which traverses the subject of operator enrolment and licensing. The CRIS contains options for different enrolment and licencing schemes. The Australian Trucking Association (ATA) and NatRoad engaged Deloitte Access Economics (Deloitte) to provide an assessment of costs of implementation and compliance with four of the proposed regulatory options, discussed below. In that regard, a comprehensive report has been prepared and costs of compliance for operators and the regulator have been estimated for the four chosen sub options. The report (Deloitte Report) is attached as Attachment A.
8. NatRoad believes that the analysis shown in the Deloitte Report also stands as a marker for the way in which the options preferred by the NTC in going forward with the review should be costed. The Deloitte Report largely stands on its own terms, clearly demonstrating the unacceptable costs of the proposed options. A clear and distinct value proposition relating to each option is not present in the CRIS and, in light of the assessed costs in the Deloitte

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 https://www.ntc.gov.au/submission_data/693

Report (summarised in table A.2 of Attachment A), NatRoad rejects the options in 7.1 of Chapter 7, as elaborated below. It should be noted that the Deloitte Report does not assess potential benefits from the options. In addition, we have reservations about all of the options expressed in Chapter 7, also discussed below, with a rationale for those reservations.

Productivity Commission findings

9. The Productivity Commission's recently released report on transport regulation⁴ discusses the subject of assurance and related issues. The Productivity Commission recommends that there be a tiered system of regulation under a revised HVNL. The pertinent recommendation is Recommendation 10.1 which is, in part, as follows, with the last quoted paragraph being of particular relevance to the current subject:

The Heavy Vehicle National Law (HVNL) should be amended to provide the National Heavy Vehicle Regulator (NHVR) with sufficient powers to give effect to a tiered system, in which relatively prescriptive regulation operates alongside outcomes-based options. The amendments should establish clear roles and responsibilities for the NHVR, including adequate discretion, decision-making frameworks, and requirements for monitoring, compliance and enforcement activity. The system would need to reflect the varied preferences and capabilities of businesses, such that:

- *businesses seeking certainty or simplicity can rely on prescriptive regulation (to be streamlined as per recommendation 9.1)*
- *businesses seeking flexibility to operate outside of prescriptive regulation, while meeting agreed safety outcomes, can seek assurance from the regulator.*

The NHVR should expand its use of assurance model/s to allow businesses to seek flexibility on individual aspects of their operations or more substantially across their operations. The design should recognise that some businesses will be able to design comprehensive safety management systems, while others will benefit from pre-approved 'off-the-shelf' solutions. To the extent possible, the assurance model/s should avoid subjecting businesses to duplicative audit processes.⁵

10. The Productivity Commission also looked at the relationship between safety and accreditation. It published a finding on that relationship which reinforces the need for better data to be available before definitive decisions are made. The relevant finding and some of the relevant commentary is as follows:

The evidence base for assessing the relationship between accreditation schemes and safety outcomes is outdated and incomplete. The most thorough study of the NHVAS and TruckSafe, carried out by Austroads, used crash data from 2003–2005. The accreditation schemes, heavy vehicle safety regulation, technology and the road network have changed significantly since then, making the results of the study less relevant. More recent studies have focused on indicators of risk, including vehicle defects, rather than crash rates.

Another examination of the relationship between heavy vehicle crash rates and accreditation schemes is overdue. The Commission has been unable to conduct this research itself because the datasets that it was able to access did not indicate whether a heavy vehicle was accredited. Such analysis would provide assurance that the regulatory concessions that are available under the NHVAS are not leading to worse safety outcomes.

⁴ <https://www.pc.gov.au/inquiries/completed/transport/report/transport.pdf>

⁵ Id at p302

*FINDING 6.4 – THE EFFECTS OF HEAVY VEHICLE ACCREDITATION ON SAFETY ARE UNCLEAR Heavy vehicle accreditation schemes create opportunities for operators to implement flexible approaches to some aspects of their business. However, evidence of the safety effects of heavy vehicle accreditation schemes is incomplete. Improving the range and type of data collected is important for effective risk-based regulation and enforcement.*⁶

11. This finding is not good news for evidence based decision-making. The deficiency in the data means that NatRoad is cautious about proposing firm recommendations regarding accreditation and the re-shaping of this area of the law without a proper evidentiary base being established. We bring that perspective to bear in this submission.
12. The NTC should, we suggest, jointly with the NHVR, undertake or commission work in this area so that a more solid evidentiary base on which to make decisions and recommendations is put in place. We also note that there is a direct contradiction here between the Productivity Commission finding and the CRIS finding as follows (noting that NatRoad prefers the Productivity Commission analysis):

*Evidence from a range of published reports suggests accredited operators are safer. There is anecdotal evidence from operators that accreditation improves their efficiency and productivity.*⁷

13. The Productivity Commission analysis is also important because the findings on multiple audits being imposed on operators undermines the basis for assurance schemes as outlined in the CRIS as follows:

*Assurance schemes set out procedures that, if followed, should lead regulated parties to behave consistently with the principles of the law. They give the regulator, operators, suppliers and other parties greater confidence with respect to capacity to manage risk and comply with the law. Assurance schemes can help give operators and others confidence that they are more capable of managing risks and complying with the primary duty.*⁸

14. In contrast the Productivity Commission pointed to a problem that NatRoad highlighted in the First Submission and found:

*Even when operators are accredited under regulatory and industry schemes these mechanisms are failing to provide the level of confidence needed by customers and other stakeholders. Accredited heavy vehicle operators are often required to undertake customer-specific audits which often involve the same onsite auditing that is carried out for the accreditation schemes. As noted by participants to this inquiry, the frequency and intensity of customer audits has increased significantly since COR laws were introduced on 1 October 2018 (chapter 6).*⁹

15. One of NatRoad's foundational concerns in the current context is solving the problem of members being asked to fulfil the requirements of multiple customer and other audits. Some of these audits are extremely intrusive and potentially breach privacy laws. Some audits appear to be motivated so as to consolidate market power rather than to enhance safety or other beneficial industry outcomes.
16. The Productivity Commission addressed one finding and one recommendation to help with a solution to the problem of multiple customer audits as follows:

⁶ Id at p156

⁷ Above note 1 at p76

⁸ Above note 1 at p75

⁹ Above note 4 at p301

FINDING 6.3 – UNCERTAINTY ABOUT CHAIN OF RESPONSIBILITY OBLIGATIONS Many heavy vehicle operators, customers and other supply chain participants are uncertain about their obligations under Chain of Responsibility laws. Some contracting parties are imposing unnecessary and costly requirements on transport operators to minimise their potential liability. These additional requirements may also provide opportunities for large transport purchasers to exercise market power in ways that could reduce competition in the market for transport services.

RECOMMENDATION 6.2 – CLARIFYING HEAVY VEHICLE CHAIN OF RESPONSIBILITY OBLIGATIONS The Council of Australian Governments should endorse amendments to the Heavy Vehicle National Law to clarify the obligations of regulated parties under Chain of Responsibility laws. The amendments to the Heavy Vehicle National Law should empower the National Heavy Vehicle Regulator to: • publish ‘acceptable means of compliance’ with Chain of Responsibility laws for transport operators and other parties in the supply chain • accredit other approaches to compliance, with the costs of accreditation to be borne by the regulated parties.¹⁰

17. NatRoad supports the publication of “acceptable means of compliance” requirements in particular. That material should be shaped so as to reinforce that private audits would not be required and those audits should be proscribed when published standards have been met by members.

Operator Enrolment or Licensing: Disconnection?

18. The problem statement in the CRIS that leads into the discussion of operator enrolment and licensing in Chapter 7 indicates that the National Heavy Vehicle Regulator (NHVR) has “limited awareness of who it is regulating.”¹¹ Yet the potential for data to be harvested from registration particulars currently exists, as opposed to establishing an entirely new regulatory structure for an industry already over-regulated.

19. There should be a great deal of data that is available to the regulator from heavy vehicle registration details. Following discussions with the NHVR earlier this year, NatRoad became aware that the constraints on information are not about its availability to NHVR but relate to publication of data and its disaggregation in a useful form. We made a submission to the NHVR where, amongst other things, we said:

Because of NHVR’s current contractual arrangements with Austroads (who supply vehicle registration data on behalf of the jurisdictions), NHVR is not in a legal position to on-share information. We were and remain concerned about the fact that this information is not able to be released. We ask that you make representations to the jurisdictions and Austroads to enable the NHVR to share data and insights that will benefit industry.¹²

20. NTC should recommend that registration data is not only provided by the jurisdictions to NHVR but that its analysis and subsequent publication be used to benefit both the regulator and industry. There are a myriad of questions that could be answered by reference to registration data which is already accessible on an individual basis currently through the NHVR registration portal.¹³

21. Further, we are aware that camera data throughout the HVNL jurisdictions is available to the NHVR through the Automated National Plate Recognition (ANPR) system. NatRoad has already indicated in prior submissions that camera systems provide ample feedback to

¹⁰ Id at p153

¹¹ Above note 1 at p77

¹² NatRoad letter dated 14 February 2020 to NHVR

¹³ <https://www.nhvr.gov.au/road-access/registration/nhvr-portal-registration-services-module>

regulators and assist with targeting compliance (although consistent technology and transparent regulation of cameras is needed, as we have argued in prior submissions during the course of this review.)

22. Obviously, from these statements we reject the rationale in the CRIS that there is a systemic disconnect between the NHVR and heavy vehicle operators. The issue of operators “making themselves known” to the regulator in the ways proposed in the CRIS is opposed, as the following discussion shows. Better visibility of operators to the NHVR adds nothing to the problems of the industry, especially as there is no indication how those in the supply chain other than operators (who are also regulated by the HVNL) will be better brought to account under any of the options in the CRIS. The CRIS is not sufficiently focused on those further up the supply chain from operators.

Operator Enrolment

23. The CRIS commences the discussion of operators’ possible obligations with Option 7.1a, voluntary enrolment. Here, operators would elect to enrol with the NHVR. They would “identify themselves and provide a high-level picture of their operations.”¹⁴ Enrolees would not have to demonstrate performance against safety standards. Yet the option would be a prerequisite for assurance certification or accessing some provisions of the HVNL, such as access permits and applying for a new PBS vehicle certification.
24. As is evident from page 10 of the Deloitte Report, the “voluntary” aspect of this option is taken away for:
- operators with assurance certification; and
 - operators with access permits (a subset of Restricted Access Vehicles (RAVs)¹⁵, which are vehicles for which there is a requirement to hold a permit or notice to operate on the HVNL road network).
25. The Deloitte Report estimates that a small percentage of operators (11% per table 3.1 in Attachment A) would become enrolled and that the cost would be \$25.9 million in the period up to 2050 per table 3.4. The costs seem excessive for a highly speculative benefit. This is in part because the assessment of the benefits of the option are aggregated rather than dealt with per each sub-option. The benefit of the NHVR getting better “awareness and understanding of operators”¹⁶ through the proposed mechanism is questionable, especially having regard to the current options of analysis of registration data and feedback from the national camera system mentioned earlier. Those currently available options would not impose costs on operators, save where they increased regulator costs which are funded by industry.
26. Option 7.1b is a variant of 7.1a, with enrolment mandatory for operators of RAVs including those operating under notice. Table 3.1 in the Deloitte Report shows that 41% of all operators would be affected at a total cost of \$58.4 million. This is obviously a higher cost than for the first sub option but again without a clear benefit justifying this cost.

¹⁴ Above note 1 at p78

¹⁵ <https://www.nhvr.gov.au/files/201706-0172-ce1-restricted-access-vehicles.pdf>

¹⁶ Id at p85

27. Both of these so-called enrolment options are rejected by NatRoad on the basis that the costs shown in the Deloitte Report are not offset by any benefit that is available to the industry.

Operator Licensing

28. NatRoad is careful in its consideration of the topic of operator licensing. In the past, NatRoad has not outright opposed the notion of the introduction of operator licensing. To be clear, operator licensing involves a government (at whatever level) authorising a business to undertake its operations. That is why mandated accreditation is viewed as the same as operator licensing. However, the way any licence conditions were to be established and imposed affects whether any scheme would be supported or opposed by NatRoad.
29. The NatRoad Board has determined that any licensing scheme, in order to represent a fair and consistent framework for the licensing of transport operators, should exhibit characteristics which do not unduly add costs to the industry, which establish appropriate safety and/or demonstrated productivity benefits and which are transparent and the subject of detailed cost/benefit analysis. Hence, in this latter regard, the analysis in the Deloitte Report guides NatRoad's stance in the current context of considering the CRIS's options.
30. Before considering those options further, NatRoad wants to be clear about the problem that needs to be addressed, covered in the First Submission¹⁷ as follows:

NatRoad members report that appropriate training standards and barriers to entry of untrained operatives entering the industry are not in place. These developments are producing two undesirable outcomes. First, unskilled unsafe 'operators' are hindering the industry's drive towards increased safety objectives and public respect. Secondly, ease of entry is allowing an oversupply of unskilled operators who are not adept at proper costing. This factor is lowering revenue levels to below sustainability for many skilled and compliant operators, particularly those who balk at accepting unfair contract terms...¹⁸

31. Accordingly, NatRoad is open to appropriately balanced policy considerations that would assist to eliminate these problems but, as has been emphasised throughout the review, we believe reform of the unfair contract laws to be a particular priority to ameliorate the second problem. The NTC should consider an examination of the occurrence of this growing malaise in the industry with a view to reinforcing other laws which will make the task of transport operators more efficient and more profitable.
32. The CRIS first expresses Option 7.1c as covering operator licensing for all operators and then indicates that a specific target could be isolated "i.e. those operating under hire-and-reward business models and operating a heavy vehicle 8 tonnes GVM or greater."¹⁹ Because of this division in focus and the general uncertainty of the proposal in the CRIS, we note the assumptions that have been applied in the Deloitte Report as detailed at page 10 of Attachment A. Of particular importance is that operators would be required to demonstrate capability against safety standards in a Safety Management System (SMS) in order to be licensed. This distinction has also led Deloitte's to cost the broader cohort as well as the

¹⁷ Above note 3

¹⁸ Id at para 21

¹⁹ Above note 1 at p 78

targeted operators i.e. treated the somewhat off hand making of a distinction in the chosen manner as requiring a sub option to be considered.

33. In the Deloitte Report this distinction is expressed as option 7.1c(i) and 7.1c(ii). The first sub option would cover 100% of operators in all sectors and cost over \$6.5 billion in total. The second sub option is estimated to cover 36% of all operators at a cost of over \$2.1 billion. The benefits described in the CRIS are as for the enrolment option together with the observation that “licensing would enable the regulator to cancel or withdraw an operator’s licence.”²⁰ The conditions under which this would occur are not clear. Further the CRIS itself remarks that” It is unclear whether the ability to cancel an operator’s licence would be more effective in driving compliance compared to relying on penalties currently enable through the HVNL.” To say the least, there is an unconvincing articulation of benefits from the relevant options in the CRIS sufficient to justify the estimated very large costs.
34. That observation also applies to consideration of Option 7.1(d). This option would be mandatory for operators that the CRIS assumes to be higher-risk but without a statistical analysis, for example, of those sectors of road transport which may in fact be higher risk as reflected in relevant data, something NatRoad touches on in the submission to the review on the roadworthiness chapter of the CRIS. The CRIS says that high risk includes transport of dangerous goods, RAV operations or passenger transport which, by virtue of transporting people, creates a high risk to human life. Empirical data to verify these assumptions (which we challenge) would have been useful.
35. Again because of the uncertainty surrounding the articulation of the option, the Deloitte Report brings to bear certain assumptions. In the Deloitte Report it is assumed that Option 7.1(d) would apply to a subset of operators from Option 7.1(c) with the subset defined according to whether an operator undertakes transport of dangerous goods or RAV operations. There are accordingly two costings associated with this further distinction.
36. In respect of the dangerous goods cohort (7.1d(i)) the Deloitte Report estimates that 2% of operators will be covered at a cost of just under \$175 million. For sub option 7.1d(ii) the coverage is 41% of operators for a total cost of just over \$3.2 billion. These costs when compared to the benefits set out in the CRIS cannot be justified. NatRoad therefore cannot support any of the options expressed in 7.1 of the CRIS.

Option 7.2 -No operator assurance framework

37. Option 7.2 is described as follows:

Option 7.2 removes the NHVAS assurance framework and replaces many of the prescriptive standards in the HVNL with performance-based standards (particularly for mass, vehicle maintenance and fatigue management). The HVNL and associated regulations would continue to identify the risks and the standard to which they are treated, but the risk treatments would be described in terms of performance standards (with specific guidance on prescriptions to meet the performance standards).²¹

²⁰ Id at p85

²¹ Above note 1 at p 88

38. NatRoad supports a system which is risk based. The revised HVNL should permit operators to meet performance based standards. For those operators that did not wish to devise their own systems to meet those standards, they could rely on prescriptive standards, for example as established in recognised Codes of Practice. So, this option fits in with other submissions made by NatRoad that accords with the proposed manner of restructuring the HVNL and it is generally supported. But we would recommend, as a related reform, the ability of the regulator to approve operator specific requirements for meeting the requisite standards, particularly in the manner we set out in the NatRoad submission on fatigue.²²
39. Accordingly, until the final shape of the HVNL and the extent of these foundational changes is known, we recommend that consideration of this option be deferred. That deferral would also enable the proposed work to establish the utility of schemes such as the NHVAS, mentioned in paragraph 12 above, to be undertaken. Again, we contrast the findings of the Productivity Commission with the CRIS's assertion that "There is both anecdotal and quantitative evidence that accreditation improves an operator's risk management."²³ When that evidence as presented in Box 16 of the CRIS²⁴ is examined, the plethora of assumptions reinforces rather than counters the Productivity Commission findings. The data is outdated and inadequate, as found by the Productivity Commission.

Option 7.3 - Enhanced single opt-in regulatory certification scheme

40. This option proposes a revamp of the NHVAS rather than its abolition per the prior discussed option. The CRIS says that this is based on benefiting operators and is described thus:

The proposed changes are intended to enhance the benefits operators would receive from being certified under the NHVAS by: • clarifying the link between certification and compliance with the primary duty and CoR obligations • providing NHVAS accredited operators with greater access to expanded and better-linked modules which should improve operators' flexibility in compliance options.²⁵

41. Clarifying the link between certification and COR compliance accords with the Productivity Commission's recommendation 6.2 set out at paragraph 16 of this submission. It is an aim supported by NatRoad. How that would occur and the extent to which it would alleviate some of the pressure on operators to undergo multiple compliance audits are, however, open questions which would need to be re-assessed once the shape of the substantive provisions of the revised HVNL were known.

42. The discussion of how a reduction in intrusive audits would occur is expressed by reference to matters that would be assured and therefore would not encompass all transport activities. This is the explanation in the CRIS:

(Where) an assurance scheme provides for a matter linking to an obligation under the HVNL, and an operator is certified under that scheme, then - another person is entitled to rely on

²² https://www.ntc.gov.au/submission_data/935 esp paras 35 and 36

²³ Above note 1 p 79

²⁴ Ibid

²⁵ Above note 1 p89

*that accreditation as part of meeting their obligations relating to the conduct of that person (for example, a customer with obligations relating to the conduct of that person).*²⁶

43. NatRoad tentatively supports a provision of this kind but we would want to see much greater detail about how this would work in practice before offering firm support and a clarification of how “entitlement to reliance” as expressed in the extract quoted in the prior paragraph would necessarily stop other means of assurance from being required.

Option 7.4 - Enable multiple regulatory certification schemes

44. As is acknowledged in the CRIS, currently there is no mechanism in the HVNL to recognise assurance schemes other than the NHVAS. This issue has been under consideration by the NHVR through its commissioning of the Medlock Review, commencing with an analysis of all heavy vehicle accreditation schemes in Australia.²⁷
45. Since the publication of the CRIS, the final report from the Medlock review process has been published.²⁸ NatRoad was part of the Working Group which assisted in the formulation of the final report’s recommendations. The report includes consideration of a potential model of permitting multiple schemes, including private sector schemes, to operate under an accreditation framework prescribed by the NHVR. This accords with the basis of Option 7.4 which is that the NHVR would focus on how schemes “will ensure certified operators meet the required standards, rather than assessing operator compliance directly.”²⁹
46. Elements of the proposal from the final report are noteworthy including that the regulator would develop and implement an assurance framework by setting standards for schemes to apply with respect to both the elements of an SMS and the auditing requirements against those standards. The costs of such an audit have not been measured in the CRIS, although alluded to and remain an area which would need further costing dependent on the final recommendation chosen in this subject area.
47. The regulator would approve schemes to offer certification services to industry and monitor their performance through the assurance framework. Any costs associated with this step would need to be assessed in the manner demonstrated in the Deloitte Report for other options.
48. More complex elements of the proposal from the Medlock final report would be that the NHVR would not manage a scheme itself, except as a certifier of last resort (e.g. to ensure operators’ accreditations stay current if an existing certifier scheme winds up). A scheme manager (certifier) would develop specific business rules for the scheme and certify operators against the regulator’s SMS requirements and they would need to be suitable for each scheme so certified. The regulator would consider the operator’s certification, along

²⁶ Above note 1 p 83

²⁷ <https://www.nhvr.gov.au/consultation/2018/02/01/review-of-heavy-vehicle-accreditation-systems>

²⁸ <https://www.nhvr.gov.au/files/202010-1176-final-report-of-the-heavy-vehicle-accreditation-working-group-june2020.pdf>

²⁹ Above note 1 at p84

with other regulatory criteria/intelligence in making regulatory decisions, e.g. to grant an exemption from prescriptive elements of the revised HVNL. How that would work in practice is not clear and would need a great deal of further development.

49. These proposals have the potential for reducing industry administration costs by removing or reducing customer and other audits. But in order to meet that objective, there would also need to be in place rules which stopped particular large customers from erecting their own accreditation schemes, that is using a potential market system to exert their market power in the way that members are experiencing at present. Having market competition between schemes may develop robust systems. But that element of Option 7.4 is unable to be assessed on current evidence. To be clear, what NatRoad members do not want is a large number of customer certification schemes to be in place, under each of which members would be contractually obliged to enrol so that they could obtain work from that firm. Governance or other rules to prevent that outcome would need to be put in place if this option were to be pursued further.

Conclusion

50. This subject area is worthy of revision following the bedding down of further substantive reform options and following the conduct of the work recommended in paragraph 12 of this submission.
51. The Deloitte Report stands as a model of the sort of cost/benefit analysis that should be applied to all the final chosen options for reforming the HVNL.