



NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the National Transport Commission

**HVNL Review: Consultation Regulation Impact Statement: Primary Duties and
Responsibility**

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)*¹ prepared by Frontier Economics and published by the National Transport Commission (NTC) on 25 June 2020. This is the second submission in a series of submission, with the first being dated 31 July 2020 and provided to the NTC on that date.
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. The current subject area is set out at page 9 of Better 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 questions raised in Chapter 4, although it is not structured around them as we believe they do not provide a good structure for a narrative response. In addition, we emphasise that the policy position set out in NatRoad's submission³ to the review arising from the Issues Paper entitled *A risk-based approach to regulating heavy vehicles* stands as representative of our policy position in relation to the primary duties discussion set out in Chapter 4 of the CRIS.

Productivity Commission's findings

5. Despite the discussion in the CRIS about the purported contribution of the Heavy Vehicle National Law (HVNL) to the industry's improved safety record⁴ the material proffered in the CRIS is speculative and relies on correlation as cause. Its commencing assumptions are therefore flawed. There is no evidence that the HVNL has contributed to the industry's safety record, as the ensuing discussion shows. All assumptions in the CRIS that therefore support the current law on this basis should be set aside. As we underlined in the first submission, the CRIS is a flawed document.
6. The analysis of the Productivity Commission (PC) in Chapter 5 of its relevant Draft Report⁵ (noting its draft status) is that to date the national transport reforms do not appear to have had a significant impact on safety. Appendix B to the Draft Report that was published on 16 December 2019⁶ shows "there is insufficient evidence to link the substantial improvements in heavy vehicle crash rates in the post-reform period to the HVNL."⁷ Any statements to the contrary in the CRIS are therefore entirely speculative.

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/535

⁴ Above note 1 at p16

⁵ <https://www.pc.gov.au/inquiries/completed/transport/draft>

⁶ <https://www.pc.gov.au/inquiries/current/transport/draft/transport-draft-appendixb.pdf>

⁷ Id at p 13

7. Many of the CRIS' proposals are therefore viewed by NatRoad as advancing the so-called "incremental improvements"⁸ that are proposed rather than preferred reform which would change the statute from an instrument that is not fit for purpose to a reformed platform for safety and productivity.

Chain of Responsibility: the fundamentals

8. The PC draft finding about chain of responsibility (COR) laws is noteworthy:

*CoR laws not only recognise that safety outcomes are influenced by many factors, but that driver behaviour can be influenced significantly by external factors such as unreasonable schedules and incentives to bend the rules, take risks and cut corners to secure a freight contract with a low ball bid. Both the introduction and amendment of CoR laws appear to have extended legal accountability to parties up the chain such as contracting businesses for freight services. This is likely to have positive implications for improving safety outcomes.*⁹

9. Hence, the extension of the COR laws to those who influence or control transport activities has been NatRoad policy for some time because the extension of legal accountability to those other than the driver or operator is essential in having better safety outcomes. The PC finding that should guide the current process is as follows:

*While CoR laws are a legal mechanism to shift the focus of enforcement up the supply chain, it has not yet demonstrated a change in regulatory focus and accountability beyond the driver and transport operator.*¹⁰

10. This shows the need to shift the emphasis of enforcement (unfortunately not discussed at length in the CRIS, as we mentioned in the first submission) from operators and drivers to other parties in the chain of responsibility. It also reinforces the view now proffered that **the driver should remain outside of the ambit of the broader duty and be subject to a separate, tailored duty.** It also shows, as does the evidence presented in NatRoad submissions to the review¹¹, that the parties caught by the duty should be expanded to capture everyone who influences **or** controls the safety of transport activities in the supply chain¹².
11. Question 4.7 in the CRIS relates to seeking evidence about those who might be caught in this expansion "currently acting in ways that are impacting on the safety of heavy vehicle transport activities." There is comprehensive evidence and discussion of this point in prior NatRoad submissions.¹³ Further, we showed in that discussion the shifting of responsibility to operators and others via unfair contract terms. This problem has increased during the current pandemic with some customers seeking to expand payment times, unilaterally. Having said that, it is a perennial problem.
12. Indeed, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) encapsulated the trend that members discern where she stated that:

⁸ Above note 1 esp at p 16

⁹ Above note 6 at p141

¹⁰ Ibid

¹¹ Submission at above note 3 and the following on the Issues Paper *Safe People and Practices* https://www.ntc.gov.au/submission_data/561

¹² See second submission at above note 11 for an extensive discussion of the NatRoad view

¹³ Ibid in particular

(S)mall businesses were more frequently falling victim to the unscrupulous payment practices of some big businesses and governments: From stipulating unfair payment terms in contracts, to simply not honouring agreed payment times, a number of big businesses are effectively treating the little guys as banks by forcing them to provide interest free-loans in the form of late paid or unpaid invoices.¹⁴

13. In the previously mentioned NatRoad submissions to the HVNL review, we highlighted that current section 26E HVNL proscribes parties entering into contracts that would cause a driver to breach fatigue and other laws. But the main issue has been that the provision has not been tested via enforcement. Hence the comments in the CRIS that we now quote in NatRoad's view reflects the **illegitimate, untested use of the law** in the manner indicated rather than being reflective of a deliberate policy choice determined by law makers:

Operators, employers, and prime contractors are understandably nervous that under the HVNL they effectively bear responsibility for the actions of other parties outside the CoR. However, mechanisms do exist to enable parties in the CoR to shift responsibility to parties outside the chain such as through their contractual arrangements.¹⁵

14. Further, the CRIS, when assessing the costs of the proposed expansion of the duty to parties who influence transport activities, says inaccurately that increased compliance costs could arise as an expansion of COR:

This option has the potential to drive an increase in compliance costs for industry. This could come in the form of additional third-party audits of other parties within the CoR looking to discharge their responsibilities. This is an issue in the base case and has the potential to worsen in a scenario with more parties in the CoR.¹⁶

15. Audits of others do not have the effect of discharging the initiating party's duty. They, at best, reveal that the party audited is complying with their obligations under COR laws. As NatRoad indicates in the work we have published in this area¹⁷ the primary question asked, and which an audit might verify is:

How do you monitor that your business practices and those of other parties in the chain of responsibility do not cause or encourage the driver of the heavy vehicle or another person to contravene the HVNL, or the driver to exceed a speed limit?¹⁸

16. The need to challenge or question the information received by a person contracting up or down the chain might mean that a party asks for evidence and/or audits procedures but it does not mean that an audit discharges the liability of the inquiring party.
17. NatRoad notes that under the current law control exercised by a party in the chain may arise from the legal ability to take control of the work activity, for example, under the terms of a contract, or from the practical ability to do so under that contract. What a party does and what they are able to do will determine if they have control. The extension of that responsibility by having influence over the work tasks, the transport activity, is supported by

¹⁴ Comments made to Sky New 16/11/2016 by the ASBFEO for detailed commentary on payment times practices see the ASBFEO final report
https://www.asbfeo.gov.au/sites/default/files/ASBFEO_Payment_Times_and_Practices%20Inquiry_Report.pdf

¹⁵ Above note 1 at p43

¹⁶ Ibid

¹⁷ https://www.natroad.com.au/sites/default/files/uploaded-content/field_f_content_file/natroad_cor_handbook_fa.pdf

¹⁸ Id at p24

NatRoad. The COR law is currently limited to specific parties and only to the extent each party has the capacity to “influence and control” rather than “influence or control” the safety of the transport activity. It is long-held NatRoad policy that this limits the law to a list of defined parties that is construed narrowly and which does not optimise the effect of the COR laws.

Preferred Option re COR

18. From the foregoing discussion, it is clear that NatRoad supports the expansion of the COR laws per Option 4.1(b) with the main difference being that the current exhaustive list of parties would be an inclusive list. The Better Law document says “An extra category may be added to the chain of responsibility (CoR) list, in effect applying the primary duty to all parties with influence on heavy vehicle safety.”¹⁹ The list should be defined as an inclusive list by reference to the influence test instead of having an exhaustive list expanded to include an inclusive criterion.

19. The CRIS says:

*There is very little evidence to suggest whether or not this option would be effective. Therefore, stakeholder feedback is sought on whether the additional parties that may be captured under this option already have their obligations specified in other mechanisms and whether this option would drive a change in regulation or enforcement.*²⁰

20. This extract misses the point: there will be greater compliance and greater clarity about the reach of the law when prosecutions up the chain occur. There will be a reduction in the unfair contract practices that we have outlined in the submissions previously mentioned when there is the more widespread application of s26E of the HVNL through its proper enforcement. When properly enforced, the COR laws have cut through and provide market disciplines on all parties that influence transport activities.

21. The latter point was recognised in the 2011 Regulation Impact Statement (2011 RIS) where it was said:

*Chain-of-responsibility provisions in effect impose a type of due diligence requirement on all those involved in the transport task.*²¹

22. It is NatRoad’s aim to ensure that drivers and operators no longer are the only parties who bear the brunt of enforcement or who are required to apply appropriate principles of due diligence.

Driver’s Duty

23. The 2011 RIS said the following:

It is acknowledged that drivers and operators often take the brunt of enforcement practices because they are the most visible party in the chain.

24. NatRoad members’ perception is that this proposition remains true nearly a decade later. From NatRoad’s perspective, the discussion in Chapter 4 also focuses too much on drivers’ culpability and responsibility. The CRIS lacks an analysis of prosecutions taken by regulators that show the offences under the HVNL, the perpetrator (driver, operator etc) and the

¹⁹ Above note 2 at page 9

²⁰ Above note 1 at p43

²¹ <https://www.ntc.gov.au/sites/default/files/assets/files/HVNL-RIS-Sept-2011.pdf> at p25

outcome. Surely this data could be compiled from regulator records building on the information that the NHVR publishes by way of examples of court outcomes?²² The compilation of such data would have been helpful. Without that data, again much of what the CRIS says is speculative.

25. NatRoad policy is that the specific offences that apply to drivers currently are profligate and highly prescriptive. Drivers already have a duty to look after their own safety and the safety of others. The duty under the harmonised WHS legislation requires “workers” (which also embraces contractors) to take reasonable care of their own safety and health (and that of others), to work safely and follow safety procedures and rules, to report any WHS hazards or other problems to the PCBU, and to cooperate with WHS inspections, investigations and training. The application of WHS laws to drivers and to fatigue operates in Western Australia and should be replicated in the HVNL. Why was that not proposed as a regulatory option? There, regular medical checks are required and WHS standards applied to fitness to drive. That model works well. Despite the discussion in Chapter 4 that regulatory choice should remain on the table.
26. Arising from the prior discussion, it is evident that NatRoad supports any separate driver duty to be in the same terms as applies under the model WHS law, that is option 4.2. We do not, however, support the proposition that the general duty extends to all of the matters set out in Box 7 of the CRIS, especially in relation to loading and unloading. For example, many containers are sealed and the driver is only aware of the relevant declared weight. “Checking and re-balancing the load on route”²³ is not possible. That is one of many examples where extending the driver duty would be unrealistic.

Conclusion

27. NatRoad supports a modified form of Option 4.1(b) in that an extra category should be added to the chain of responsibility list, in effect applying the primary duty to all parties with influence on transport activities. To be a better form of regulation than currently exists and better than what is proposed the list should be defined as an inclusive list by reference to the influence test instead of having an exhaustive list expanded to include an inclusive criterion.
28. Drivers are currently in the front line of enforcement with a large corpus of highly specific, pedantic and, in many instances, unrealistic offence provisions. The focus of enforcement under the HVNL should be on other parties in the chain of responsibility. There must be a review of all prescriptive offences, particularly getting abolition of those which focus on administration that is unrelated to safety. The driver’s duty should reflect the current law. We do not, however, object to a replication of current WHS law in relation to drivers that could be set out in a revised HVNL.

²² <https://www.nhvr.gov.au/law-policies/court-outcomes>

²³ Above note 1 at p39 Box 7