NATROAD

NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the National Transport Commission

Issues Paper: *Safe People and Practices*

30 August 2019

Introduction

1. The National Road Transport Association (NatRoad) is pleased to make comments on the Issues Paper entitled *Safe People and Practices*[1] released by the National Transport Commission (NTC) in late June 2019. The Issues Paper is part of a series that informs the current review of the Heavy Vehicle National Law (HVNL).[2]

2. 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.

3. This submission responds to the questions posed in the Issues Paper.

Question 1: Have we covered the issues relating to safe people and practices accurately and comprehensively? If not, what do we need to know?

Harsh Contract Terms

4. NatRoad submits that the consideration of safe practices within the road transport industry must encompass the issue of **unfair or oppressive contract conditions**. Members are increasingly concerned that contract conditions in the industry are creating unfairness and are adding to commercial pressures. These practices add to a culture that does not give safety the primary focus.

5. The HVNL deals with this issue in s26E(2) as follows:

   A person must not enter into a contract with the driver of a heavy vehicle or a party in the chain of responsibility that the person knows, or ought reasonably to know, would have the effect of causing the driver, or would encourage the driver, or would encourage a party in the chain of responsibility to cause the driver—

   (a) to exceed a speed limit applying to the driver; or

   (b) to drive a fatigue-regulated heavy vehicle while impaired by fatigue; or

   (c) to drive a fatigue-regulated heavy vehicle while in breach of the driver's work and rest hours option; or

   (d) to drive a fatigue-regulated heavy vehicle in breach of another law in order to avoid driving while impaired by fatigue or while in breach of the driver's work and rest hours option.

6. Members have indicated to NatRoad that the increasingly strict application of "time slot" requirements is having an adverse effect on their businesses. This is where a contract provision provides a very constrained window of opportunity for a driver to complete a

[1] https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.ntc-hvlawreview.files/3115/6161/3618/NTC_Issues_Paper_-_Safe_people_and_practices.pdf
[2] https://www.ntc.gov.au/heavy-vehicles/safety/review-of-the-heavy-vehicle-national-law/

delivery. However, the utility of the HVNL COR provision directed at such practices, set out above, has not yet been formally tested.

7. As has been emphasised in other submissions by NatRoad to the review, NatRoad members believe that poor enforcement practices surround the heavy vehicle industry as illustrated in NatRoad's first submission to the NTC in the context of the HVNL review.[3]

8. We would welcome the National Heavy Vehicle Regulator (NHVR) or a State-based agency taking a case against those parties who insist on allocating tight time-slots which then have harsh contractual consequences attached when not met, as discussed below. This step would reveal that those who enforce the law are not concentrating solely on applying the law to operators, a matter that is a widespread perception within the industry.

9. Recently, NatRoad examined a contract for a member, as part of the regular service we offer members to assess their contractual obligations before they formalise contracts. That member was not a small business for the purposes of the unfair contract terms legislation discussed below. But the contract contained a number of provisions which potentially would cause breach of other provisions of the HVNL as expressed in s26E.

10. Under the particular contract the NatRoad member (Company) would be liable for undefined "missed, delayed or futile" services. The Company would be liable for the prime contractor's costs for these services, would not be entitled to be paid for them and would be required to perform the services in any event at a later date and time set by the prime contractor. A key to missed and futile (but not delayed) services was set out in a schedule to the contract, where one of many "KPIs" required the Company to contact the prime contractor prior to the time-slot/date for the booked service to be delivered and a detailed plan for re-scheduling "for next slot delivery." This provision was to be applied against a very tight timetable for delivery of the goods.

11. The consequences for breaching this illustrative so-called KPI are harsh, inclusive of the Company paying for the cost of delivery during the prime contractor's nominated time slot if the Company could not meet the required delivery schedule. This KPI operates even though there is a further open-ended contractual requirement for the Company to have its vehicles wait at the relevant site for such time as is required for a truck to be loaded or unloaded. Failure to meet a KPI (and there are many more than the one used for illustrative purposes in this submission) means that the Company must pay a "penalty" albeit expressed as agreed liquidated damages when those KPIs are not met. These fines and the requirement to meet strict time slot allocations sets the tone for a culture that is oppressive and detrimental to safety.

12. There are many contracts with similarly harsh provisions in operation in the industry. Indeed, it was a transport industry contract that set the boundaries of the unfair contract law jurisdiction when first litigated, now discussed.

---

[3] https://www.ntc.gov.au/media/2060/ntc-issues-paper-risk-based-approach-to-regulating-heavy-vehicles-warren-clark-national-road-transport-association-natroad-may-2019.pdf

13. Under Australian Consumer Law, terms in standard form contracts that create a significant power imbalance between parties, are not necessary to protect legitimate interests, and which would cause significant financial detriment to a small business if relied on, are unfair and void.[4]

14. To test this provision, the Australian Competition and Consumer Commission took litigation against JJ Richards & Sons P/L. The Federal Court declared, by consent, that eight terms in the standard form contract used by JJ Richards & Sons Pty Ltd (JJ Richards) to engage small businesses were unfair, and therefore void.[5]

15. An ACCC media release[6] summarised the court's findings thus:

    The Court declared by consent that eight terms in JJ Richards' standard form contracts with small businesses, which were entered into or renewed after 12 November 2016, were unfair and consequently void. These terms had the effect of:

    - *binding customers to subsequent contracts unless they cancel the contract within 30 days before the end of the term*
    - *allowing JJ Richards to unilaterally increase its prices*
    - *removing any liability for JJ Richards where its performance is "prevented or hindered in any way"*
    - *allowing JJ Richards to charge customers for services not rendered even when caused by reasons beyond the customer's control*
    - *granting JJ Richards exclusive rights to remove waste from a customer's premises*
    - *allowing JJ Richards to suspend its service but continue to charge the customer if payment is not made after seven days*
    - *creating an unlimited indemnity in favour of JJ Richards*
    - *preventing customers from terminating their contracts if they have payments outstanding and entitling JJ Richards to continue charging customers equipment rental after the termination of the contract.*[7]

16. Whilst the unfair contract terms law has been in force since 12 November 2016, NatRoad is aware that similar contract terms to those impugned and listed above remain in some small business contracts and in contracts of the kind that are made with non-small business members discussed above. This was evident also from subsequent ACCC intervention where three container stevedore companies amended their contracts with transport businesses after the ACCC raised concerns that certain terms in each of the relevant agreements were likely to be unfair contract terms.[8]

---

[4] See Sch 2 to the *Competition and Consumer Act 2010 (Cth)*
[5] *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224
[6] https://www.accc.gov.au/media-release/jj-richards-contract-terms-declared-unfair-and-void
[7] Ibid
[8] https://www.accc.gov.au/media-release/dp-world-hutchison-ports-and-vict-remove-likely-unfair-contract-terms

17. Further, towards the end of 2018 the ACCC intervened again in respect of unfair contract terms in the transport of waste.[9] These interventions show the persistence of unfair contract terms in the transport sector's legal arrangements.

18. NatRoad supports the 2019 announced review of the unfair contract terms law[10] because the law as it currently stands permits the sort of contract terms set out in paragraph 15 of this submission to still be included in contracts.

19. The main defect in the law, which NatRoad believes should be corrected with some urgency, is that whilst a potentially unfair contract term is able to be challenged in a court and hence perhaps declared void, there is no prohibition per se on such a term being included in a contract. This means that small business members are wary of challenging contract terms because of loss of business opportunities and the costs of making a challenge that would result.

20. To be blunt many members are concerned that if they did not accede to the unfair contract terms, they would not be given work and/or victimised if they annoyed the prime contractor.

21. The Chair of the ACCC has set out his support for an overhaul of the law[11] which NatRoad fully supports and would seek to have undertaken urgently.

22. In the context of creating a more level playing field and in more widely improving contract terms and conditions, NatRoad policy for the industry is for the federal Government to introduce a mandatory code for the industry under Part IVB of the *Competition and Consumer Act 2010* (Cth) which would address harsh payment terms in transport industry contracts, including terms of the kind just discussed and inclusive of a "pay when paid" prohibition.

23. A NatRoad submission dated January 2017 which contains the policy rationale for the establishment of a mandatory code is attached at Attachment A. The policy parameters set out in that submission have not changed since it was lodged.

24. As can be seen from the arguments in the document that is Attachment A, a contractual term requiring payment beyond 30 days has all of the hallmarks of an unfair contract term and should be so labelled. On a number of occasions, we have asked the Government to make provisions in small businesses contracts that require payment beyond that period unfair under the legislation, but that call was not heeded.

25. Accordingly, we believe that the introduction of a mandated code as discussed in the prior paragraphs has become an even more urgent necessity, as does a fresh review of the unfair contract terms law.

---

[9] https://www.accc.gov.au/media-release/visy-recycling-cleanaway-and-suez-remove-potentially-unfair-contract-terms

[10] http://srr.ministers.treasury.gov.au/media-release/037-2019/

[11] https://www.accc.gov.au/speech/major-changes-needed-to-get-rid-of-unfair-contract-terms

26. In the context of the current review, it is important that enforcement up the chain occurs and that these unfair contracts are shown to induce poor time practices.

Question 2: What aspects of safe people and practices are currently regulated well? What needs to be regulated better?

27. The chain of responsibility (COR) provisions of the HVNL are extensively canvassed in the Issues Paper. NatRoad supports some elements of the reforms introduced but believes that further change and better enforcement is required.

28. We have spoken about enforcement extensively in this and other submissions that we have lodged in relation to the review. We make the point here that resources should be taken away from fining operators and drivers for pedantic breaches of the HVNL and directed to better enforcement up the chain.

29. Changes were introduced from 1 October 2018 to the HVNL and involve a new chapter of regulation directed at most COR parties and the principle of shared responsibility that NatRoad supports, subject to better enforcement of the obligations as mentioned earlier[12] and in the prior paragraph. They include a proactive primary duty on specified chain of responsibility parties to ensure the safety of transport activities.[13] This proactive duty sits oddly with the vast array of prescriptive offences in the HVNL.

30. The new primary duty supplements the prior provisions where parties were only liable once breaches were detected. The duty is therefore now "proactive," as expressed in the prior paragraph.

31. The new COR provisions also include a 'due diligence' obligation on executive officers of entities with a primary duty and prohibit requests and contracts (canvassed above) that would cause a driver or COR party to breach fatigue requirements or speed limits and the other matters set out in paragraph 5 of this submission.

32. The definition of a 'party in the chain of responsibility' under the HVNL limits the primary duties to specific persons and does not capture everyone who influences **or** controls the safety of transport activities in the supply chain.

33. A party in the chain of responsibility for a heavy vehicle is limited to:

- If the vehicle's driver is an employed driver – an employer of the driver
- If the vehicle's driver is a self-employed driver – a prime contractor for the driver
- An operator of the vehicle
- A scheduler of the vehicle
- A consignor and consignee of any goods in the vehicle
- A packer of any goods in the vehicle
- A loading manager

[12] We do note that the NHVR has some activity underway as reported here: https://www.fullyloaded.com.au/industry-news/1905/nhvr-lifts-lid-on-cor-enforcement-effort

[13] A detailed explanation of the laws appears here: https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/changes-to-cor

- A loader and unloader

34. Although NatRoad welcomed the changes that expand the chain of responsibility provisions, they are 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. Clearly, there is a need to vest responsibility in those persons who influence or control transport activities such as those who promote digital "platforms" for the undertaking of work but who protect themselves from any legal responsibilities related to the transport task.

35. Implementing a broader test of who is a party in the chain would make all parties in the supply chain more responsible for what happens on-road. The introduction of a broader test is recommended by NatRoad: using the test of influence or control. The issue is one of placing responsibility on intermediaries that are able to have influence or control in the supply chain. They must be recognised as being part of the chain of responsibility.

36. In the first submission to the NTC in this review, we recommended greater consistency between WHS laws and the HVNL. Relevantly, the harmonised WHS laws cast a much wider net than the HVNL by applying duties to 'persons conducting a business or undertaking' (PCBU) and to 'workers', broadly defined to capture independent contractors.

37. NatRoad supports the principles in the model WHS Act clarifying that duties are not transferable; a person can have more than one duty and more than one person can have a duty. In relation to the latter, section 16(3) model WHS law states that each person must discharge their duty to "the extent to which the person has the capacity to influence and control the matter…"

38. The Explanatory Memorandum states that the capacity to control applies to both 'actual' or 'practical' control, while the capacity to influence connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances, such as when they require harsh contract terms to be strictly adhered to.

39. In our view ''influence ***and*** control" narrows the duty as both influence and control need to be present. While influence is always a factor of control, influence can be achieved where there is no actual or practical control, for example where digital platforms advertise the work that the transport operator is asked to do and control money flows.[14]

40. We submit that the current HVNL provision should be amended to ''influence ***or*** control" and that this test should also be the test which governs the COR provisions in the HVNL i.e. defines the basis of who is bound.

41. This change would align with the primary duty owed to workers whose activities in carrying out work are influenced or directed by the person (section 19(1)(b) harmonised WHS law).

[14] See the NatRoad submission to the Victorian Inquiry into the Victorian On-Demand Workforce for an elaboration of this point: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7915/5669/1361/NatRoad.pdf

42. Transport operators must comply with the duties under WHS law in addition to the HVNL. Ultimately, and post the current review, transport safety requirements could be rationalised by accommodating specific regulations for heavy vehicles under the WHS laws, inclusive of the laws relating to fatigue management.

43. This step should improve compliance and efficiency where heavy vehicle safety is managed holistically as part of a safe system of work under the WHS laws. It will also ensure that contractors and employees are treated in the same manner when safety obligations are considered.

44. In addition, in the current environment COR is being used by some contracting parties, often through oppressive contract conditions, discussed earlier, to require disclosure of additional information from transport operators beyond that required or even intimated under the current provisions.[15]

45. Applying the NatRoad test of "influence or control" would in fact mean that the relevant contracting party by their own conduct was increasing their influence or control over the transport task/activity and adding to their liability rather than attempting to pass it to the transport operator, as appears to be the current intention in the many requirements that are being imposed in the name of COR.

Question 3: What should the future HVNL do to regulate safe people and practices so heavy vehicle drivers and others are safe? What risks are adequately managed by other regulatory controls? Are there any risks to the safe driver that are not currently regulated at all, and if so, how should these risks be regulated?

46. As discussed when answering Question 2, the revised HVNL should complement work health and safety law.

47. Utilising the three tiered approach to the law that reflects the harmonised WHS law perspective, mentioned in other submissions made by NatRoad in this review, we point again to the need for the regulator to develop Codes of Practice that focus on specific risks.

48. If there are gaps in management of risks that must be shaped by specific means to discharge a broad-based duty, the regulator should develop Codes of Practice that, if followed, contain endorsed controls to manage these risks. Current section 706 of the HVNL is inadequate as we mentioned in the first submission made in this review.

49. NatRoad is aware that the introduction of the flexibilities in relation to fatigue management (particularly the increase in the maximum number of hours that a driver may drive to 17 in a 24 hour period), requires concomitant disciplines.

50. Accordingly, in the NatRoad submission on the fatigue management Issues Paper[16] we have proposed that in the revised HVNL a heavy vehicle driver must hold a current medical

[15] A point made by the NHVR here: https://tmaa.asn.au/on-the-road-issue-56-extra-cor-pressure-not-required-under-law/

[16] https://www.ntc.gov.au/Media/Reports/(4806F7F5-CAC2-8DF8-58C7-EA5F7A8B6ACD).pdf

certificate that confirms his or her fitness to drive a commercial vehicle. The medical assessment should be an annual requirement or on direction by an employer.

51. We note that we have indicated that fatigue management (inclusive of the required medical evidence as to fitness for work) should be regulated through the work, health and safety law as it is in Western Australia. That point applies equally in the current context.

52. NatRoad also notes that a full and free exchange of information between regulators, drivers and operators should be permitted under the law where that information affects the fitness to drive of a driver or their licence status. This does not currently apply and is not a matter regulated by the HVNL.

53. This concern links in with COR reforms. The strengthened COR laws reinforce that operators have a responsibility to prevent or minimise potential injury, danger or loss by ensuring their transport activities are safe. Part of that duty is to ensure that drivers are fit for work and properly licensed to drive the heavy vehicle assigned to them. Operators need to be aware, for example, if a driver has accumulated demerit points so as to lose his or her licence.

54. 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.[17] Those safety considerations override any concerns around privacy breaches.

55. Currently, the law is different in each State and Territory. New South Wales, for example, operates on the basis that the relevant information is able to be released with the consent of the driver following the operator entering into an agreement with Roads and Maritime Services (RMS) and the driver signing a Driver Consent Form. Clause 112 of the *Road Transport (Driver Licensing) Regulation 2017* permits RMS to release driver licence and broad demerit point status information with employee or subcontractor consent but the information is not sufficiently specific to fully assist operators. The agreement that the RMS enters into with the operator must have been the subject of consultation with the Privacy Commissioner.

56. In South Australia police officers have a discretion to provide relevant material about serious offences to operators via Regulation 7(a) of the *Motor Vehicle Regulations 2010*, although camera-based information must not be provided. We are unsure if there has been information provided in this manner. A discretion does not ensure the proper flow of information.

[17] This matter was communicated to the industry via a recent NatRoad opinion piece https://www.fullyloaded.com.au/industry-news/1907/opinion-access-to-driver-records-is-crucial?utm_source=Sailthru&utm_medium=email&utm_campaign=ATN%20EDM%2015%2007%202019&utm_term=list_fullyloaded_newsletter

57. There is a provision in Queensland legislation that is not yet in force but which NatRoad believes would be a good model for Australia. The Queensland Parliament in June 2018 passed an amendment to the *Transport Operations (Road Use Management) Act 1995 (Qld)* that deals with the issue. It covers all traffic history offences, including HVNL offences. The Department of Transport and Main Roads (TMR) will be reporting to the operator. NatRoad understands that TMR will be introducing a system that will permit the reporting to be done automatically.

58. The Queensland provision should form the basis of an HVNL reform. The COR positive safety duties mean that operators must have adequate information available to them that enables them to assess whether a driver does or does not have a current licence or whether, for example, actual or pending demerit points mean that the driver should not be permitted to drive.

59. At the same time, there should be an obligation for heavy vehicle drivers to notify their employer where they have been issued a penalty notice of any kind. This duty combined with more free flowing information from road authorities will assist operators with ensuring that heavy vehicle drivers do not take the wheel when they are disqualified from driving.

Question 4: Does the primary duty and chain of responsibility in the current HVNL comprehensively cover the people who can influence the safe driver and their practices? What improvements are needed?

60. These questions have been answered when we considered question 2 earlier in this submission.

Question 5: How can the HVNL support better training and a higher level of driver competency? How can it support ongoing professional development?

61. This is a very important question. The heavy vehicle licensing system needs urgent reform. The HVNL should govern reformed arrangements.

62. The Issues Paper cites NatRoad's already expressed concern relating to this subject in one regard thus:

    (I)n most jurisdictions the minimum age of a licensed Australian multi combination vehicle driver is 22 years old. In Queensland the minimum age is 20 and in Victoria the minimum age is 21. These states have slightly different graduated licensing arrangements which allow provisional licence holders to apply for a heavy vehicle licence. The heavy vehicle industry has raised concerns about these arrangements. Industry believes they're not conducive to ensuring authorised drivers are competent. This is because drivers can hold a class of licence and pass a basic competency test to get a higher class of licence. They don't have to have any behind-the-wheel experience.[18]

63. We have separately sought Government support for introduction of the recommendations of the Austroads report entitled *Review of the National Heavy Vehicle Driver Competency*

[18] Above note 1 at p36

Framework.[19] The recommendations of that report should be translated into government action and a uniform heavy vehicle licensing system introduced as part of the current reforms.

64. The Austroads' review of the framework evaluated the governance of heavy vehicle driver training and assessment as well as the content of training courses and the competencies required for heavy vehicle driver training and trainers. We commend that report to the NTC.

65. The review identified that the standard of training and assessment is often inadequate, with some drivers obtaining a heavy vehicle licence after undertaking training that ran for less than one day. The Austroads' review recommended that minimum training lengths, including behind the wheel time, be established with stronger regulator input to training content. We agree.

66. The recommendations of the Austroads' review are fully supported. At the same time, we note that licence progression arrangements prevent a person from driving a combination heavy vehicle until several years after leaving school even if they are competent to do so. This factor is a disincentive to attracting young people to the road transport industry, an issue that is pressing and which requires action by all industry participants, given the aging of the truck driver work force.

67. Instead of the current system, NatRoad supports a traineeship or apprenticeship style program so that time holding a licence to drive a car or to drive a heavy rigid vehicle is not the critical factor in progressing to the next licence class. Instead, competency related to the class of licence being applied for would be at the centre of heavy vehicle licence progression.

68. The heavy vehicle licencing system must be appropriately reformed so that national consistency and an emphasis on competency rather than time served for licence progression are put in place. In this way, the standard of driving skills would be increased, and the safety of drivers' practices enhanced.

69. A suitable model for consideration is the Driver Delivery program managed by the Victorian Transport Association (VTA) and supported by the Victorian Government as well as being endorsed by the transport industry in Victoria.[20] This program, based upon an eight day training program, has seen transport companies committed to taking on drivers that have been through a competency based system, emerging with job ready skills. This system should be formalised as a better path to heavy vehicle licensing than that currently in place. NatRoad fully supports the VTA in this endeavour.

[19] https://austroads.com.au/publications/freight/ap-r564-18
[20] See details and a link here http://vta.com.au/training-courses/

Question 6: Is driver health and medical fitness managed as well as it could be? Is there a case for regular medical assessments for drivers (and possibly other parties), similar to those for Safety Critical Workers in the Rail Safety National Law? Is the Rail Health Assessment Standard a good basis for a heavy vehicle medical assessment standard?

70. NatRoad supports more regular health assessments. This policy was outlined in the NatRoad submission relating to the Effective Fatigue Management Issues Paper [21] and mentioned earlier in this submission.

71. While many factors contribute to safety on the road, driver health and fitness to drive is an important consideration that becomes more pressing with the aging of the driver cohort.

72. One study revealed that heavy vehicle drivers younger than 27 years of age demonstrated higher rates of accident/fatality involvement which decline and plateau until the age of 63 years where increased rates were again observed.[22]

73. Drivers must meet defined medical standards[23] to ensure their health status does not unduly increase their crash risk. A requirement for regular medical assessments as outlined in the NatRoad fatigue management submission should replace the process of self-reporting that is now the principal way that health conditions are addressed.[24]

Question 7: Should heavy vehicle driver licences be national? If so, should this be by mutual recognition, nationalisation or some other approach? If licences shouldn't be national, why not? Should licensing progress subject to experience rather than arbitrary timeframes?

74. There must be greater commonality between the States and Territories relating to the standards for and structuring of heavy vehicle licensing, as discussed in the response to question 5 set out above.

75. There should be a system of licensing that is applied equally in both form and substance throughout Australia. This could be achieved through harmonised laws (such as with the WHS model). But NatRoad has no preference for the method of approach to obtaining national consistency, whilst emphasising that it is an essential reform.

---

[21] Issues Paper here: https://www.ntc.gov.au/Media/Reports/(4806F7F5-CAC2-8DF8-58C7-EA5F7A8B6ACD).pdf
NatRoad submission lodged 22 July 2019
22 Duke et al *Age-related safety in professional heavy vehicle drivers: A literature review*
https://www.sciencedirect.com/science/article/abs/pii/S0001457509002644

[23] https://austroads.com.au/__data/assets/pdf_file/0022/104197/AP-G56-17_Assessing_fitness_to_drive_2016_amended_Aug2017.pdf
[24] Id at Appendix 3

Question 8: Should the HVNL do more to help manage drug and drink-driving? For example, should it include a drug and alcohol management program requirement such as the one required in rail? Is on-road enforcement enough?

76. NatRoad has a policy of moving towards a single set of laws across jurisdictions governing workplace health and safety and drug and alcohol testing.

77. It could be argued that under the COR proactive duty requirements most identified COR parties should currently implement drug and alcohol testing regimes, subject only to the test of whether that step is reasonably practicable. To our knowledge, that proposition has not been tested formally. But, on that basis, NatRoad considers that the formalisation of similar arrangements to those which currently operate in the rail industry might not be overly onerous. [25]

78. However, the introduction of such a far reaching obligation should be further studied and a separate detailed regulatory impact statement should be prepared before any mandating of this obligation occurs. This is especially the case given the number of small businesses in the road transport industry and the number of owner/driver operators. About 70% of operators have only one truck in their fleet, and 24% have two to four trucks.[26]

79. As well, producing a detailed RIS is likely to assuage stakeholders who might otherwise resist the introduction of mandatory drug and alcohol testing. [27]

80. In addition, NatRoad believes that greater enforcement of drug driving for all classes of vehicle is warranted with the introduction of higher penalties than currently exist in the law, such as those introduced in New South Wales from May this year.[28]

Question 9: Do the Australian Road Rules do enough to manage driver distraction, speeding and other on-road behaviours? Is the primary duty in the current HVNL rigorous enough to manage the practices of chain of responsibility parties who can influence a driver to operate unsafely?

81. NatRoad has responded at length to the separate NTC Consultation Regulatory Impact Statement on driver distraction (CRIS).[29] A detailed submission was lodged on 14 August 2019.

82. We have strongly opposed the proposed changes to the road rules set out in the CRIS.

---

[25] See a detailed summary of the rail industry requirements here https://www.onrsr.com.au/operators/safety-management-systems/drug-and-alcohol-management

[26] See Infrastructure Australia 2019 audit Freight Transport https://www.infrastructureaustralia.gov.au/sites/default/files/2019-08/Australian%20Infrastructure%20Audit%202019%20-%205b.%20Freight%20Transport.pdf at p 348

[27] See for example a case where the decision of an electrical infrastructure company to introduce random drug and alcohol testing across its workforce was resisted by various unions: https://www.fwc.gov.au/documents/decisionssigned/html/2012fwa1809.htm.

[28] https://www.rms.nsw.gov.au/roads/safety-rules/demerits-offences/suspension-disqualification/drug-driving-reforms-lower-range-offences/index.html

[29] https://www.ntc.gov.au/Media/Reports/(DF7196BE-9EE1-0B23-CEC5-A45C7A5295C5).pdf

83. We would appreciate the opportunity to discuss the NatRoad submission on the issue of driver distraction with officers of the NTC.

84. We have extensively outlined the NatRoad view of necessary reforms to the COR regime earlier in this submission.

Question 10: How can the future HVNL encourage a stronger role for safety management systems in a way that doesn't disadvantage smaller or more seasonal operators? Can registered industry codes play a role in supporting smaller operators to develop safety management systems?

85. NatRoad supports the introduction of safety management systems but does not believe that they should be mandatory. In other submissions in this review[30], and earlier in this submission, we have indicated that the way in which Codes of Practice are developed under the WHS law should be followed in a revised HVNL. In that way smaller operators have a means to establish that they have met the duty in a manner endorsed by the regulator.

86. The way in which Codes are currently developed under the HVNL is far from optimal, as expressed in prior NatRoad submissions[31] and earlier in this submission.

87. NatRoad represents operators. Operators should ideally have systems in place that prevent breaches of mass, dimension, loading, speed and fatigue laws under the HVNL.[32] As an operator, there is an obligation to prevent or reduce potential harm or loss (risks) to the operator, its personnel and others, and to ensure that the operator doesn't ask, require or direct activities they know will breach the law. Having safe systems in place is an important part of how these changes to the law are designed to produce change in the industry but their efficacy needs to be properly studied.

88. A safety management system is a systematic approach to managing safety, including the necessary organisational structures, accountabilities, policies and procedures that are integrated throughout the business. NatRoad advises members that they are able to implement these systems themselves and that there is no need to spend money on consultants who might be using COR to gouge industry participants.[33] An SMS is scalable – in other words, it can be tailored to the size and complexity of an organisation.[34] That is a matter that should be reinforced to small operators.

89. However, if an operator wishes to follow practices and procedures that have been vindicated by the regulator as satisfying aspects of the various safety duties applying to the business then that should be a path which is open to operators to take. The introduction of

---

[30] Above note 3 at paras 23-25

[31] Ibid

[32] The Master Code developed by industry parties and agreed to by the NHVR contains material to assist. But NatRoad members also get this assistance with sample policies https://www.natroad.com.au/resources/developing-chain-responsibility-policy

[33] See NatRoad media release on this subject https://www.natroad.com.au/news/beware-dodgy-advice-chain-responsibility

[34] https://www.nhvr.gov.au/files/201808-0887-cor-and-safety-management-systems.pdf

Codes formulated by the regulator with industry input should be a feature of the reformed HVNL.

90. For operators that wish to meet standards in addition to those that relate solely to meeting their required duties, accreditation is an appropriate mechanism. Operators participating in accreditation report that it helps them improve their safety standards and provides assurance to customers and regulators of their compliance with the HVNL. The NHVAS also provides participants with regulatory concessions such as access to higher mass limits and more flexible work and rest hours.

91. A review of heavy vehicle accreditation schemes was completed in 2018.[35] NatRoad supports a number of these recommendations, in particular:

    - Developing a single national accreditation framework to improve consistency across schemes and allow mutual recognition;
    - Applying a safety management system approach to accreditation, with sufficient flexibility for operators to adapt requirements to suit the nature of their operations; and
    - Extending regulatory concessions to operators across all schemes who meet the required standards.

92. The NatRoad Board is considering the recommendation to establish mandatory accreditation requirements that appears to be one of the long-term outcomes of the 2018 review. In effect this creates an operator licensing system and removes the competitive advantage for those who undergo the effort and expense of becoming accredited. But as a long term goal, it may have merit.

93. In the interim, NatRoad proposes that as an alternative to mandated accreditation there be an "opt-in" system of accreditation. That system could permit those who meet higher standards to be recognised as compliant to the extent that they would not need to comply with multiple customer audit checks, a problem that has arisen in the industry since the COR provisions were strengthened, discussed earlier.

94. However, a move to reliance on the current and future primary duties and the repeal of prescriptive regulations as a likely outcome of the review of the HVNL makes accreditation as an alternative compliance mechanism less attractive.

95. It is therefore necessary to review the role of accreditation under a new legislative framework and the benefits the schemes provide to operators to ensure their viability. This is an ex post facto task after the shape of the new HVNL is known. 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.

[35] https://www.nhvr.gov.au/consultation/2018/02/01/review-of-heavy-vehicle-accreditation-systems

Question 11: How can the future HVNL nurture a culture that places a high level of importance on safety?

96. NatRoad considers that the mind set of customers is best able to be changed by introducing the reforms to contract conditions that were explored in this submission in answering Question 1.

97. It is when customers view the way in which they approach the freight task as integrally involving the operator rather than simply getting the lowest possible cost outcome that a culture of safety will be better able to be promoted.

Attachment A

NATROAD

NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the Small Business and Family Enterprise Ombudsman

Payment Times and Practices' Inquiry

13 January 2017

Introduction

1. NatRoad is pleased to provide input to the *Payment Times and Practices'* Inquiry (Inquiry). We note that the Inquiry is the first self-initiated inquiry undertaken by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). The Inquiry is led by the ASBFEO in partnership with state-based Small Business Commissioners in New South Wales, Victoria, South Australia and Western Australia, and carried out in association with the Council of Small Business Australia and the Australian Institute of Credit Management.

2. The National Road Transport Association Ltd (NatRoad) is Australia's largest national representative road freight transport operators' association and is also a foundation member of the Australian Trucking Association (ATA). NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, express car carriers, as well as tankers and refrigerated operators. 60 percent of NatRoad's members are small businesses in that they own and operate 5 trucks and under as part of their business.

Prior Inquiry

3. NatRoad notes that part of the origins of the current inquiry is from the findings of ASBFEO in its final report entitled *Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses.*[1] Recommendation 11 in that final report is:

   Given the strong support of owner d*rivers, the Australian Small Business and Family Enterprise Ombudsman should inquire into ways to reduce payment terms for owner drivers as part of its Inquiry into Payment Terms*.

   In that final report ASBFEO also records that:

   Payment terms and payment timeframes was a prominent issue in the small transport business industry. Owner drivers reported that they are, on the whole, reliable account payers and they were unanimous regarding an imbalance in payment structure in the industry.[2]

   And:

   Cash flow was a considerable issue for nearly all operators consulted. It was agreed the 30 day payment requirement was a positive aspect of the Tribunal's First Order (issued on 17 December 2013) and should have relieved considerable pressure and made small business more competitive[3]

4. In the context of the evidence then received by ASBFEO and noted in the prior paragraph, the 30 day payment requirement was the only redeeming feature of the Road Safety Remuneration Tribunal's (RSRT) regulatory framework. It was otherwise a disaster, as is evident from the ASBFEO final report and bearing in mind the matters next discussed.

---

1 http://www.asbfeo.gov.au/sites/default/files/documents/RSRT%20Payments%20Order%20Inquiry%20Report%20-%20FINAL.pdf

2 Id at 48

3 Ibid

Problematic Issue

5. The road freight industry has a low market share concentration. The four largest companies accounted for over 15% of industry revenue in 2015-2016.[4] The low market concentration figure belies the market power of the major companies in the road freight industry. This market power is reinforced by the subcontract system within the industry. Larger companies often subcontract work to smaller owner-operators. Those owner operators have little power to influence prices, as was seen in the evidence presented to the prior inquiry. The characteristic which most distinguishes the owner operator area of the market is fragmentation and intense competition.[5] A significant number face business viability issues associated with their lack of power in the market. This includes vulnerability where extended payment terms form part of contractual arrangements.

6. In an industry which has a high proportion of small business operators who maintain their businesses on tight margins, cash flow is king. Our members inform us that late payment increases financial and administrative costs, reduces the potential for investment, damages business relationships and adds to business uncertainty and failure. The latter point was highlighted in a Commonwealth government Discussion Paper[6] where it was noted that, based on Dun & Bradstreet's failure score modelling, small businesses that experience late payments are three times more likely to close down compared to those that receive payments within 30 days.[7]

7. The same paper states that the problem can take on a very human dimension for small business owners, as often their personal and family finances are closely bound to the fate of their small business. This factor was also evident from the tragic reaction that some small business operators had to the uncertainty and potential business loss that flowed from the imminent application of the RSRT 2016 Order, as noted in the ASBFEO final report.

8. Counter-intuitively, the Discussion Paper notes that the three best performing industries in 2012 were agriculture at 50 days and **transportation at 50.3** and services at 50.9 days.[8] This comparatively favourable statistic is, according to member feedback, no longer the status quo. Further, even at 50-60 days members advise that, depending on the billing cycle, cash flow issues arise. Indeed, the ASBFEO encapsulated the trend that members discern where she stated that:

   (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.[9]

---

[4] IBISWORLD Report 14610 *Road Freight Transport in Australia* April 2016 at 18
[5] Ibid
[6] Cth Government, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education Australian Prompt Payment Protocol Discussion Paper July 2013 https://www.industry.gov.au/smallbusiness/Documents/PromptPaymentProtocolDiscussionPaper22July2013.pdf
[7] Id at 9
[8] Ibid
[9] http://www.skynews.com.au/business/business/national/2016/11/16/small-businesses-owed-over--26b.html

The average figure quoted by Dun and Bradstreet is, according to member feedback, invariably skewed by issues specific to the industry's operating environment. For example, under the industry's principal awards, the *Road Transport (Long Distance Operations) Award 2010* and the *Road Transport and Distribution Award 2010*, weekly payment is mandated. In current modern award proceedings,[10] NatRoad is seeking that greater flexibility via fortnightly payment be introduced in the industry's modern awards.

9. Member feedback is that extended payment terms provisions in contracts is not just an issue confined to smaller trucking operations. As reflected in the statistics from Dun and Bradstreet, the feedback that NatRoad has received from members is that in prior years, the industry generally worked on the basis of a 30 day payment from end of month. For example, for all work carried out in (say) January, payment would be made in the first week of March. This averaged about 45-50 days in payment terms. This was generally acceptable and seemed to be the norm for most industries (not just the road freight industry).

10. As the industry became more reliant on computer based accounting packages, it became common for payment terms to be 30 days from the date of invoice, payable weekly. So for invoices issued for (say) the week ended 15 January, payment would be received on about 20 February. Given the invoicing was undertaken weekly, payment would be received each week (as the 30 day period rolled around). Again, this appears to be an acceptable basis for payment.

11. However, member feedback shows that it is now becoming more common for larger businesses which seek to have freight contracts filled(often companies with overseas based parents) to require payment terms of up to 90 days from the end of the month plus 7 days: so averaging up to 110-120 days from when the work was carried out. With these extended payment terms, road freight businesses are expected to carry a greater amount of debt and risk, with the consequences of a greater likelihood of business failure should the large customer default on the contract or further delay payment beyond the contracted date. This development also favours larger road freight operators which are generally more likely to have the capacity to fund the debt created or to fund the weekly wage and fuel costs which comprise the majority of operators' costs in the industry.

12. Member feedback has also highlighted that some principal contractors appear to be deliberately putting in place systems that thwart on-time payment. One member has indicated the following:

There is a growing trend towards automated payment systems where by a 'machine' matches your invoice with the customer's purchase order. These systems are generally manipulated by the customer to extend payment terms. Payment is made x days after receipt of a valid tax invoice. The trick is getting a 'valid' invoice into the system. Many customers insist on an order number being quoted, but the order number provided (if you can actually get one issued) is

[10] AM2016/8 – Payment of wages https://www.fwc.gov.au/awards-agreements/awards/modern-award-reviews/4-yearly-review/common-issues/am20168-payment-wages

often for the goods, not transport of the goods. Your invoice is rejected. Most systems either don't advise rejection or the advice is a bland automated email designed to trigger your spam filter so you are not aware the invoice has been rejected. Invariably, such emails are from an automated 'no-reply' address and simply advise that the invoice has been rejected with no explanation as to why it has been rejected. Reasons can include:

- *No Order number*
- *Invalid order number*
- *incorrect division or entity charged*
- *missing/invalid vendor code*
- *supplier compliance certificate or some other ancillary document is expired or missing.*
- *unmatched price (even if the customer has failed to enter a price into their system)*
- *no proof of delivery document available (even if the customer has not processed correctly)*
- *Invalid invoice format (customer machine cannot read your invoice)*

Increasingly the payment processing centre is overseas and cannot be readily contacted. No one in Australia knows why the invoice has been rejected and the incentive for the customer to figure it out is minimal. The final catch-all is that if a supplier invoice is not submitted within a defined period the customer reserves the right to not pay at all.

The Solution

13. The Discussion Paper referred to in paragraph 6 of this submission proposed the establishment of a voluntary payment protocol. NatRoad, however, submits that the development of a mandatory code for the trucking industry under the *Competition and Consumer Act 2010* (Cth) (**CCA**) covering payment terms is warranted. A voluntary protocol is unlikely to solve the problem given the intense levels of competition that the industry faces and the lack of incentives for companies to take up the protocol. It is already evident from the prior inquiry that the industry is especially vulnerable to extended payment time exploitation. This stance reflects Recommendation 12 from the prior inquiry which is as follows:

    The Australian Small Business and Family Enterprise Ombudsman recommends that the Department of the Treasury and the Australian Competition and Consumer Commission work with the industry to investigate developing a Code of Conduct for the road freight industry under the Competition and Consumer Act 2010 (Cth).[11]

14. As was evident from the prior inquiry, the industry is characterised by tight margins and therefore issues such as extended payment terms present a significant challenge. Research by the ANZ shows that the median EBIT margin for trucking businesses was 4.2 per cent in 2015.[12] The bottom quartile of trucking businesses recorded negative, unsustainable EBIT margins. As we have emphasised throughout this submission, for businesses operating on a tight or negative margin not receiving payment for services for an extended period, including for periods up to 120 days, adversely affects their ability to offer lower prices as well as their ultimate viability. As has been noted by industry analysts, fierce competition in the industry

[11] Above note 1 at 6

[12] Suffield T. "Road transport performance from a bank's perspective." Presentation at Trucking Australia 2016, 24 June 2016.

means that productivity gains over recent years, particularly from the use of larger vehicles, together with savings from lower fuel prices, have been largely passed on to downstream industries through cheaper freight rates. [13] For a sector that is directly involved in the supply chain and the delivery of goods throughout the economy, fair payment terms is an issue which must be addressed.

15. A mandatory code for the industry under Part IVB of the CCA would address the payment terms issues especially those facing small trucking businesses. The provisions of existing industry codes such as those published under State legislation like the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* and the *Owner-Drivers (Contracts and Disputes) Act 2007 (WA),* show it would be feasible to construct a code covering payment terms for small trucking businesses, which could include payment times, a prohibition on set offs and pay when paid arrangements, the latter being similar to the security of payments legislation that operates in the building and construction industry.

16. The introduction of a mandated Code under the CCA would also have the related benefit of providing an instrument which deals with a number of the industry's problematic issues in a consistent manner throughout Australia, as well as taking regulatory steps to assist the industry. The Code would not, of course, include mandated rates that are now being introduced more broadly in New South Wales. As noted in the prior inquiry this misguided process is occurring through the NSW Industrial Relations Commission (IRC) interim determination on the General Carriers Contract Determination (NSW). A decision to extend minimum payment rates to a broader geographic area than has traditionally been the case[14] is not warranted given the findings of the prior inquiry.

17. The introduction of a mandatory Code in the manner proposed would also mean that the need to maintain separate owner driver legislation in the three current jurisdictions which have taken that step would be questionable. Consolidating the protections for the industry through a mandatory code would deliver a potential lessening of red tape.

18. Under Australian Government policy guidelines an industry code is "designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address."[15]

19. Extended payment terms is an identifiable problem that must be addressed. This was clear from the prior inquiry and from developments that members have reported to NatRoad. The introduction of an industry code that includes payment terms would especially improve the viability of small trucking businesses. We urge the ASBFEO to strongly recommend this course of action to Government as it did in the context of the prior inquiry.

[13] Above note 4 at 6
[14] Above note 1 at 29
[15] Commonwealth Treasury, Policy guidelines on prescribing industry codes under Part IVB of the *Competition and Consumer Act 2010*, May 2011