AUSTRALIAN LOGISTICS COUNCIL

MARCH 2015

ALC SUBMISSION

ON THE HEAVY VEHICLE ROADWORTHINESS PROGRAM CONSULTATION REGULATION IMPACT STATEMENT

THIS SUBMISSION HAS BEEN PREPARED WITH THE ASSISTANCE OF KM CORKE AND ASSOCIATES, CANBERRA.

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ALC VIEW AT A GLANCE

Administrative reform

The proposed development by the NHVR of:

» A national heavy vehicle compliance and surveillance strategy:

» Greater standardisation in how inspections are conducted;

» Clearer and more precise criteria for assessing defects as being of major or minor severity;

» Greater standardisation requirements for clearing defects; and

» A harmonised education and training package

should proceed as a matter of priority.

More substantive amendments to the HVNL can only be considered:

» after these projects are finalised;

» when there is confidence that any standards produced have quality; and

» that any standards developed are being interpreted the same way across the country.

ALC accordingly recommends that a mechanism involving regulators and industry be established to develop the following documents:

» The criteria for assessing and clearing defects;

» National Heavy Vehicle Inspection Manual (the **NHVIM**)

» The Independent Audit Framework, Audit Matrix and reporting template accompanying the NHVAS maintenance accreditation module;

» The *Maintenance Management Accreditation Guide*;

» A matrix to determine when a vehicle should be selected for inspection to underwrite the preferred ALC outcome of inspections only on a targeted basis;

» A hierarchy of documents (that includes OEM documentation) that will be used to determine the roadworthiness of a particular vehicle; and

» (if the proposal proceeds) the criteria to be used to determine when a Regulator can accept an enforceable undertaking.

Given that documents are either new (in the case of the NHVIM) or, in the case of the criteria for clearing defects, don't exist yet, it is inappropriate for these instruments to be referenced in legislation until there is a stakeholder confidence in the effectiveness of the documents.

However, as an interim step, ALC would expect that compliance with the NHVIM would be a condition of any service level agreement made between the NHVR and jurisdictions for the provision of enforcement services as well as any other arrangements made between the Regulator and those providing services for the purposes of the NHVR.

Inspection periods

Any changes to circumstances by which a heavy vehicle is inspected arising from this RIS should be in substitute for, and not additional to, the current laws.

ALC expects adoption of the recommendations of this RIS would lead to the repeal of existing jurisdictional laws. It does not support a circumstance where a further inspection scheme is created on top of existing schemes.

Substantive amendments to the HVNL

The RIS does not support the introduction of any further intrusive regulations on heavy vehicles. In particular:

1. Any insertion into the HVNL of a capacity to force a particular class of operator to use a safety management system should:
   a. be for a limited period of time;
   b. should only be renewed if an independent review shows that continuing the proposal is cost-effective and provides the community with a net public benefit.
2. Any change to the chain of responsibility laws should only be made through the general duties review process currently being managed by the National Transport Commission, and should only be made after an appropriate cost benefit analysis that takes account of the costs as a whole imposed on operators of all the proposed changes to the chain of responsibility.

Enforceable undertakings

The implementation of an enforceable undertakings scheme into the HVNL, especially a scheme to serve as an alternative to prosecution, should not be introduced until:

» enforcement officers are employed by the NHVR; and

» the administrative steps proposed to be taken under Option 2, particularly the publication of criteria of what constitutes a defect as well as the creation of the proposed harmonised education and training package have been concluded.

More generally, if an enforceable undertakings scheme is to be introduced into the HVNL, ALC believes that an undertaking should only be issued and then subsequently take effect:

» after a regulator has followed the guidelines for the issuing of an enforceable undertaking;

where a court is satisfied that the terms of the undertaking were genuinely entered into on a voluntary basis and is suitable to the circumstances (that is, the undertaking would only take effect **after** a court has given approval, and **not** when accepted by a regulator); and

» regulators have tried other measures in the so-called 'Braithwaite enforcement pyramid' such as education to change the behaviour of the relevant freight chain participant.

Operator Licensing

The National Transport Commission (**NTC**) should consider adopting as a project the concept of the introduction of operator licensing in Australia.

Duplication of regulation

The NTC and the HVNR must ensure that regulations managed by those bodies are aware of, and do not duplicate provisions contained in other enactments, including in particular Road Safety Remuneration Orders.

Introduction

The Australian Logistics Council (**ALC**) welcomes the opportunity to respond to the Heavy Vehicle Roadworthiness Program Consultation Regulatory Impact Statement (**RIS**) and its accompanying cost benefit analysis prepared by Frontier Economics (**the Frontier analysis**).

ALC members operate heavy vehicles across Australia. They suffer unnecessary compliance costs incurred by:

» the different Australian jurisdictions having the different practices set out in Table 15 of Appendix D of the RIS; and

» The different approaches that enforcement officers have to enforcement discussed on page 12 of the RIS and page 9 of the Frontier analysis.

ALC has therefore supported the concept of a National Heavy Vehicle Regulator (**NHVR**) enforcing a single rule book in a consistent manner and therefore supports the proposed administrative changes designed to standardise the way in which the roadworthiness of heavy vehicles are determined.

That said, ALC notes that page vi of the Frontier analysis suggests:

» the paucity of data has limited the ability to quantify the net present value of all the cost and benefits associate with the options;

» it would be difficult to establish whether the differences between the options will lead to differences in risks associated with defect related crashes and incidents relative to the baseline;

» it is difficult to establish a causal link between defects and heavy vehicle crashes, in isolation from other safety and non-safety factors; and

» there is limited evidence on the extent to which, differences in the form of enforcement (specifically, between accreditation and inspection approaches), had an impact on defect-related risk.

It is noted that page v of the RIS says that the document does not extend to analysis of how the options would be implemented in practice, including developing detailed implementation policy and plans, and developing and implementing regulatory amendments.

However, the devil in any legislative reform is in its detail.

Finally, the RIS does not try in any meaningful way to ascertain the additional costs imposed on operators from implementing, in particular, proposed changes to the chain of responsibility laws proposed in Options 3 and 4.

The document is therefore scarcely the basis for supporting a significant change to a more intrusive regulatory environment (cf. the administrative improvements proposed) given:

» the improved safety performance of the industry generally set out on page 3 of the RIS; and

» the limited role that mechanical issues play in causes of serious heavy vehicle issues set out in Figure 11 of the RIS, on page 52.

In particular, the RIS does not appear to support a proposition that the additional expenditures on compliance arising from the full application of Option 3 is equal to the marginal social cost, which is the touchstone for reform set out on page 19 of the RIS.

The RIS nevertheless publishes four options for the consideration of (ultimately) the Transport and Infrastructure Council of COAG.

Option 1 is the status quo, which effectively leaves states and territories to determine when vehicles are to be inspected and defect notices issued and cleared, with enforcement services purchased by the NHVR from jurisdictions under service level agreements.

The new National Heavy Vehicle Inspection Manual (the **NHVIM**) will be increasingly used as a guideline to determine roadworthiness by inspectors whilst the NHVAS will remain broadly in its current format.[1]

This option is called the ‘baseline’.

Option 2 contains a number of measures described as constituting ‘administrative and operational actions’ that can be undertaken under the HVNL currently in force.

They include:

» A national heavy vehicle compliance and surveillance strategy:

1 As amended on 1 March 2015, and including the enhanced rules relating to auditors.

» Greater standardisation in how inspections are conducted;

» Clearer and more precise criteria for assessing defects as being of major or minor severity;

» Greater standardisation requirements for clearing defects; and

» A harmonised education and training package.

The RIS indicates Option 2 'will effectively form a future status quo' and is already on the work programme of the NHVR.[2]

It can be assumed that these things will happen anyway in the short to medium term, and are changes that ALC support.

Option 3 includes the actions set out under Option 2 as well as:

» A chain of responsibility obligations for operators, employers and prime contractors to take all reasonable steps to ensure that their business practices do not cause a heavy vehicle to be used on a road that is unsafe, unroadworthy or non-compliant with vehicle standards;

» Referring to (but not including) the defect criteria (mentioned in Option 2 above) in regulations;

» Standardised inspection types, practices and defect clearance processes, including the recognition in law of guidance material such as the NHVIM;

» Scheduled inspections - a number of different options have been suggested as to when an inspection should occur. They include:

  – Inspecting a vehicle each year once the vehicle is over 20 years of age;

  – Inspecting a vehicle each year once the vehicle is over 15 years of age;

  – Annual inspections with some state-based exemptions in New South Wales, Queensland and the Northern Territory (with inspections of dangerous goods vehicles over 20 years of age in the other states);

  – Scheduled inspections of dangerous goods vehicles only;

  – Scheduled inspections of dangerous goods vehicles and those with poor compliance records;

  (The costs of these five options are tested in the RIS)

  – Inspections conducted at a default interval (for example, every three years, or based on vehicle age or type of load, or a combination of these factors) or as the result of triggering events (for example) change of ownership, or entry or recertification into accreditation scheme); or

  – Inspections based on the determination of the risk of a particular operator industry sector or other relevant sector.

  The RIS suggests that criteria describing how the NHVR would select heavy vehicles to be inspected and the nature (frequency) of the scheduling for those inspections should be developed

» Amending the HVNL to provide for enforceable undertakings in relation to heavy vehicle roadworthiness;

» Requiring participation in the NHVAS maintenance management module as a prerequisite for the NHVAS mass management module; and

» Restricting heavy vehicle accreditation to operators having in place a safety management system; and a new power to make aspects of (one assumes the amended) maintenance management accreditation system mandatory for some classes of vehicles or classes of operators based on risk or operator roadworthiness performance. It is understood that such operators would have to comply with the NHVAS mass management module.

Option 4 largely adopts Option 3, with the inclusion of a general duty on chain of responsibility participants to ensure that vehicles under their 'influence' are roadworthy or compliant with vehicle standards.

It is clear intention is to give effect to a mix of Options 2 and 3, with Options 1 and 4 published for the purposes of comparison.

Comments contained in this submission are made on this basis.

2 www.nhvr.gov.au/files/201405-0159-nhvr-corporate-plan-2014-17.pdf

Administrative changes

As page 17 of the Frontier Analysis says:

> The consultative process revealed concerns about some operators' capacity to effectively maintain their vehicles. It also suggested that the quality of inspections varies across jurisdiction depending on the tools available and individual inspector's capacity and capability.

and, at page 31:

> However, it is possible that an operator's compliance costs will be affected by the subjectivity of the process. By this we mean situations where an operator is uncertain of what information is required to satisfy the regulator or police of its compliance.
>
> It should be noted that the subjectivity of the process is likely to be a function of the regulatory system's clarity and the capacity of operators, regulators and police to understand the system rather than of the form of regulation itself.

It is therefore no surprise for the need to have standardised:

» The process through which inspections conducted

» The criteria for assessing and clearing defects; and

» education and training practices.

ALC believes that these documents should be prepared as a matter of priority.

The NHVR should convene an industry/regulator mechanism to develop documentation that is both workable for stakeholders whilst delivering improved roadworthy outcomes intended.

The *NHVIM*

ALC understands that:

» what constitutes roadworthiness will generally be determined by the Heavy Vehicle (Vehicle Standards) National Regulation 2013; with

» the NHVIM intended to be a standardised procedure setting out the steps to be taken by relevant people attempting to ascertain the roadworthiness of a vehicle.

Whilst the document is new, ALC members report the NHVIM is a suitable starting point as a 'step through' document assisting those making decisions with regards to roadworthiness.

The joint industry/regulator mechanism, discussed earlier should therefore consider the further development of the NHVIM so that it is an even better guide to roadworthiness.

This is because the use of a central control document by enforcement officers, particularly in relation to the interpretation of sections 89, 525 and 526 of the HVNL (which must necessarily be broad for road safety reasons) will allow for the easy identification of inconsistent practices, thus reducing compliance costs on operators.

Subject to observations made below, the NHVR should use both the terms of service level agreements with jurisdictions as well as contracts with other service providers to ensure that the NHVIM is used as the basis of making roadworthiness decisions.

That said, ALC members also report that the Original Equipment Manufacturer (OEM) manual offers a better guide as to whether a particular vehicle is in fact roadworthy.

This is because the Australian Design Rules (ADR), which are called up in both the NHVIM and the *Heavy Vehicle (Vehicle Standards) National Regulation* are of general application. Moreover, these rules are slow to change, and so older and less effective practices are locked into law

As can be appreciated, it would be best practice to service a heavy vehicle under the guidance provided by the OEM. It would be unusual for these people to use either the NHVIM or for the ADR.

The joint industry/regulator mechanism should therefore also consider the desirability of establishing a hierarchy of documents when considering the roadworthiness of a particular heavy vehicle so that, for example, where the terms of an OEM covers the subject area of a regulation or a method of inspection covered by the NHVIM, then the terms of the OEM material will determine whether or not a particular vehicle is roadworthy.

As the NHVIM is relatively new, ALC would not support the document being called up, or being prescribed, into regulation.

However, as an interim step ALC would expect that compliance with the NHVIM would be a condition any service level agreement made between the NHVR and jurisdictions for the provision of enforcement services as well as any other arrangements made between the regulator and those providing services for the purposes of the NHVR.

Finally, ALC does not support the criteria for clearing defects being called up, or prescribed into regulation, which is a possibility discussed in Options 3 and 4.

This is because the document currently doesn't exist; therefore, there can be no confidence as to its quality.

Once stakeholders have confidence that the instruments are documents of integrity, consideration can then be given to referencing the instrument in legislation.

Inspection periods

The RIS and the Frontier analysis reviews at length the costs imposed when a heavy vehicle is inspected.

Age is the usual criterion used to trigger an inspection.

However, ALC members report that age (in particular) is not a particularly helpful predictor of whether a vehicle is roadworthy.

It follows that a decision should not be made to require the inspection of either a particular class of heavy vehicle on an arbitrary basis.

Rather, a matrix approach which includes considering:

» OEM recommendations;

» use to which the vehicle is put;

» hitching cycles;

» road conditions;

» load types configurations; and

» driver behaviour

would be a better approach.

This would go towards developing an outcome generally set out in sub option 3E in the RIS-targeted inspection - the ultimate preference of ALC.

Page 33 of the RIS suggests that criteria describing how the NHVR would select heavy vehicles to be inspected and the nature (frequency) of the scheduling for those inspections should be developed for the endorsement of the Transport and Infrastructure Council.

The joint industry/regulator mechanism referred to earlier should develop this instrument.

However, ALC makes clear that any changes to circumstances by which a heavy vehicle is inspected arising from this RIS should be in substitute for, and not additional to, the current laws. ALC is concerned that page 63 of the RIS says:

As these two state-based inspection schemes (NSW and Queensland) are not conducted under the NHVR regime, it is as yet unclear whether commencement of a national system of heavy vehicle roadworthiness regulation would mean these state schemes would cease.

ALC expects adoption of the recommendations of this RIS would lead to the repeal of existing jurisdictional laws. It does not support a circumstance where a further inspection scheme is created on top of existing schemes.

The findings of the RIS would indicate this circumstance will simply add cost without improving roadworthiness outcomes.

More intrusive regulatory proposals

ALC remains less convinced of the utility of imposing more intrusive regulation proposals.

As page 47 of the RIS says:

> A challenge for this RIS assessment is that there is little quantitative evidence linking changes to the compliance and enforcement of roadworthiness with crash risk-reduction benefits, *relative to the baseline*, for several reasons.
>
> First, it is difficult to establish a causal link between defects and heavy vehicle crashes, in isolation from other safety and non-safety factors. By extension, establishing a causal connection between changes in practices (that result from changes in the methods used to assess compliance) to changes in risk is even more difficult.
>
> Second, there is limited evidence on the extent to which differences in the form of enforcement (specifically, between accreditation and different inspection approaches) had an impact on defect-related risks.
>
> Because of this, the cost-benefit analysis does not attempt to quantify the impact of the different policy options on the crash risk relative to the baseline. Instead, where there are material changes to implementation and compliance costs, the assessment considers the plausibility, rather than the likelihood, of the risk reduction that would have to result to counteract any additional costs created.

Noting this, ALC makes the following comments:

Safety management schemes

There is an intention to require operators who:

- wish to possess mass management accreditation under the NHVAS;
- are perceived as having a poor safety record; or
- operate a particular class of vehicle e.g. dangerous goods vehicles

to have in place a safety management system 'underpinned' by standards contained in the NHVAS maintenance accreditation module.

The intention is to embed a safety risk management approach, with page 38 of the RIS drawing comfort from the performance of aircraft operators regulated by the Australian Transport Safety Bureau.

ALC understands that regulators see it as desirable to gain access to data contained in business documentation that will allow them to, over time, improve the targeting of enforcement activities.[3]

However, as ALC has said previously[4]:

> ALC believes that the case for the insertion of mandatory 'safety management systems' within the National Law has yet to be made out.
>
> As Gunningham and Johnstone indicated in *Regulating Workplace Safety: Systems and Sanctions*:
>
> …the practical obstacles to successfully implementing a legislative approach are considerable. In terms of effectiveness, the most substantial problem is that firms who are unwilling to develop a management system voluntarily may respond to compulsion by complying with the letter of the law rather than its spirit. That is, they may simply adopt 'paper systems' which appear to meet the legal requirement, but which in practice are little more than empty shells.

3 Although one possible outcome is that the Regulator may receive a skewed data sample if requiring participation in the Maintenance Management module means that some marginal operators choose to drop out of the NHVAS, leaving only relatively compliant operators in the scheme.

4 ALC Submission to Phase2 Report of the Heavy Vehicle Roadworthiness Review (2014)

Moreover, as just mentioned, there is scant evidence in the RIS to support the proposition that the implementation of such a safety system would of itself lead to better roadworthy outcomes, particularly in an atomised industries such as the road transport industry.[5]

In particular, it is noted the RIS mentions a number of occasions that one of the main benefits of the reforms discussed in the RIS is a reduction in the crash risk from the operational improvements to NHVAS and NHVIM.[6]

However, as indicated on pages 30-31 of the RIS:

> In November 2014, ministers agreed to mendments to the Business Rules that underpin the operation of the NHVAS. The changes strengthen the auditor requirements and will come into effect on 1 March 2015. Under Option 2, the NHVR will revise the Independent Audit Framework and the Audit Matrix (which provide a consistent framework for items to be covered in each audit) for maintenance management and other modules to reflect changes to the NHVR role, the Business Rules and the standards.
>
> It is also proposed to update the maintenance management standards, Independent Audit Framework, Audit Matrix and reporting template to ensure they reflect steps involved in risk management and continuous improvement. The *Maintenance Management Accreditation Guide* will also be revised to clearly sequence the risk analysis or continuous improvement steps necessary for building and implementing a maintenance management system. The comprehensive model in the *United Kingdom Guide to Maintaining Roadworthiness* is suitable for consideration for the NHVAS.

The NHVIM is a new document, whilst the Independent Audit Framework, Audit Matrix and the revised *Maintenance Management Accreditation Guide* have yet to be fully published.

It is therefore difficult to claim an expectation that the operation of the Module will necessarily lead to a reduction in crash risk.

Moreover, it is both the auditing matrix and the quality of auditors interpreting the matrix that will govern the effectiveness of a safety management regime in reducing the number of unroadworthy vehicles on the road.

One of the reasons that new NHVAS Business Rules were commenced on 1 March 2015 was concern about the quality of auditors providing NHVAS services.[7]

Given the concerns about auditor quality and that the major supporting documentation to support the maintenance accreditation model has yet to be published it would be premature to mandate any class of operator to have to comply with a safety management system based on the module.

However, If this proposition is to proceed:

- any relevant amendment to the HVNL should be subject to a sunset provision that limits the amount of time the provisions operates; and
- the life of the provisions should not be extended unless an independent review can conclude the continuation of the requirement provides a net public benefit.

5 As opposed industries with fewer and more sophisticated participants such as the aviation industry

6 Although no assessment net present value in monetary terms of these perceived operational improvements has been attempted-see page 55 of the Frontier analysis.

7 See Part 8.5 of the Integrity Review of the National Heavy Vehicle Roadworthiness System (2014)

Amendments to the chain of responsibility

Page 32 of the RIS proposes the imposition of a specific duty on business practices in the vehicle standards chapter (Chapter 3 of the HVNL) requiring operators, employers or prime contractors to take all reasonable steps to ensure that their business practices will not cause a heavy vehicle to be used on a road in a condition that is unsafe, unroadworthy or non-compliant with vehicle standards.

As ALC said in its 2015 submission to the *Chain of Responsibility Duties Review Discussion Paper*:

> ALC is also aware the Regulatory Impact Statement circulated for the purposes of the Roadworthiness Review being jointly conducted by the NTC and the HVNR is proposing to create a chain of responsibility duty for parties to:
>
> > take reasonable steps to ensure that business practices will not cause a heavy vehicle could be used on a road in a condition that is unsafe, unroadworthy or non- compliant with vehicle standards.
>
> ……..
>
> It is unfortunate that this general duties review remains at the discussion paper stage whilst the Roadworthiness Review is at the regulatory impact statement stage of development.
>
> Businesses address their regulatory obligations in a holistic manner. It follows that all of the changes to be proposed in the chain of responsibility (if any) should be presented together so that:
>
> > The workability of the proposed legislation can be tested;
> >
> > compliance costs determined; and
> >
> > changes to operational procedures designed and implemented.
>
> It follows that whatever changes to heavy vehicle regulation are made as a result of the Roadworthiness Review, final consideration of any changes to the chain of responsibility legislation should be considered as part of the general duties review.
>
> Moreover, for the reasons set out above it will be insufficient if any draft legislation proposing changes to general duties is sent to the Transport and Infrastructure Council of COAG without the legislation first being tested by industry.
>
> Any legislation prepared with a view of amending the HVNL as a result of considering submissions made to this discussion paper (or anything arising from the Roadworthiness Review as it relates to amendments to the law dealing with the chain of responsibility), must form part of the Regulatory Impact Statement.[8]

ALC is concerned by the observation contained in page 38 of the Frontier analysis, which says that there is a lack of available data to quantify the benefit of amending the HVNL Chain of Responsibility provisions.

Instead, the consultancy merely **believes** there will be a positive benefit.

It therefore follows that a claim contained on page 32 of the RIS that just because the speed and fatigue chapters of the HVNL require relevant parties to ensure business practices do not cause drivers to breach the law, then therefore a similar duty within the vehicle standards chapter 'should not create significant additional costs' is an observation that is made without supporting evidence.

Finally, as discussed previously, there are concerns enforcement officers are uncertain as to what constitutes a roadworthy vehicle.

This is the reason why the administrative steps described in Option 2 are being implemented.

Until all the relevant guidance has been prepared and there is confidence that enforcement officers know what they are looking for when examining the 'business practices' of operators and there is confidence that the interpretation of the law will be implemented in a uniform fashion throughout the country, it is premature to consider inserting this provision into the HVNL.

Any change to the chain of responsibility laws should only be made through the general duties review process currently being managed by the National Transport Commission. Furthermore, it should only be made after an appropriate cost benefit analysis that takes account of the costs as a whole imposed on operators of all the proposed changes to the chain of responsibility.

8 Pages 13 and 14

Enforceable undertakings

Page 37 of the RIS proposes that enforceable undertakings should be available to allow an alleged offender to enter into a binding agreement to perform tasks to settle a contravention of the law.

The RIS seems to suggest adoption of the enforceable undertakings scheme contained in the *Environment Protection Act 1970* (Vic).[9]

The issue of enforceable undertakings in the HVNL was a matter discussed during the Chain of Responsibility Review managed by NTC during 2013 and 2014.

In its August 2014 submission to the Chain of Responsibility Task Force Discussion Paper, ALC said:

> Principles 1 and 3 of the Principles of Best Practice Regulation published in the COAG Guide for Ministerial Councils and National Standard Setting Bodies require the establishment of a case for action before addressing a problem as well as the adoption of the option that generates the greatest net benefit for the community.
>
> It is noted that safety standards are improving.
>
> For that reason, ALC sees no reason to include, for its own sake, additional powers, additional penalties or the creation of additional duties simply for the sake of 'harmonisation' with either WHS law, or for that matter laws regulating the rail and domestic commercial vessel environments.
>
> This is particularly the case where, as paragraph 111 of the 2013 Discussion Paper for the Chain of Responsibility Review indicates:
>
> > Preliminary research conducted as part of the Heavy Vehicle Compliance Framework project suggests that enforcement officers empowered to use the 'CoR toolkit' are less likely to issue infringements than those not so empowered. That toolkit consists of CoR investigations and the suite of intervention strategies made possible by the C&E legislation such as improvement notices and warnings. This is in contrast to previous OH&S experience, which suggests that where infringement and warning options coexist, warning options tend to reduce because of the comparative ease of infringements
>
> It is of some concern that a burgeoning 'toolkit' could lead to the abandonment of discretion.
>
> No additional powers should be conferred unless a case can be made out that any new power or offence will increase compliance and safety outcomes and that the powers of regulators, when taken as a whole, are not seen to be disproportionate in those jurisdictions possessing charters of rights.[10]

ALC notes the current limited use of improvement notices, a device currently in the HVNL, to remedy the matters **or activities** that could lead a person to contravene the HVNL.[11]

This could be in part because of a lack of technical knowledge on behalf of enforcement officers identified the RIS and discussed in this submission previously.

More generally, in its January 2015 submission to the Chain of Responsibility Duties Review, ALC said:

- ALC is of the view that an extension of a duty based regulatory regime cannot be supported unless and until the HVNR has full-time employees actively involved in the enforcement of the HVNL.
- As discussed above, whether or not a particular chain of responsibility participant has taken all reasonable steps to avoid non-compliance, is somewhat subjective.

9 See footnote 33, page 37 of the RIS.

10 Page 3. This response was also given in the ALC response to Proposals 1-4 contained within Part 13 (Enforcement Measures) of the March 2014 *Chain of Responsibility Review-Assessment of the Options Paper*-see pages 28 and 29 of the ALC response.

11 Scheme created by Division 5 of Part 9.4 of the HVNL. See particularly section 572. It would appear the improvement scheme contained in the Law is drawn sufficiently wide to confer on regulators much of the same sort of powers much of the same sort of powers as would be granted under a scheme of enforceable undertakings.

» The NHVR must currently rely on enforcement services provided by jurisdictional regulators under service agreements.

» However these regulators not only discharge duties on behalf of the NHVR but also discharge responsibilities according to priorities established by the jurisdictions that employ them.

» Therefore, after due consideration, ALC members have concluded that it is undesirable to create broad general duties as would occur through the adoption of either Option 1 or 2 (as expressed in the Chain of Responsibility Discussion Paper), unless and until enforcement powers are exercised by employees of the HVNR.[12]

ALC therefore believes that it would be premature to introduce something as powerful as an enforceable undertakings scheme into the HVNL, especially a scheme to be implemented as an alternative to prosecution, until:

» enforcement officers are employed by the NHVR; and

» the administrative steps proposed to be taken under Option 2, particularly the publication of criteria of what constitutes a defect as well as the creation of the proposed harmonised education and training package have been concluded.

More generally, if an enforceable undertakings scheme is to be introduced into the HVNL, ALC believes that an undertaking should only be issued and then subsequently take effect:

» after a regulator has followed the guidelines for the issuing of an enforceable undertaking[13];

» where a court is satisfied that the terms of the undertaking were genuinely entered into on a voluntary basis and is suitable to the circumstances (that is, the undertaking would only take effect after a court has given approval, and not when accepted by a regulator); and

» regulators have tried other measures in the so-called 'Braithwaite enforcement pyramid' such as education to change the behaviour of the relevant freight chain participant.

Operators Licensing

Some ALC members have expressed concern that even the current proposals are insufficient to capture marginal operators who 'cut corners' to maintain viable vehicles, to the commercial detriment to those operators who 'play by the rules', including those relating to vehicle safety.

They point to the fact that it is largely the financial capacity of the operator that governs how well the vehicle is maintained.

It is also noted that pages 7 and 8 of the Frontier analysis observed the presence of capability constraints (of a technical and informational nature) and cognitive biases (particularly in the presence of financial and managerial constraints) in some operators.

In that context, the introduction of operator licensing could be considered.

Using the United Kingdom as an example, an operator would have to display that they:

» are of good repute and fit to hold a licence;

» have sufficient financial standing to run a business;

» have good enough facilities or arrangements to maintain vehicles; and

» are capable of ensuring that the company and its staff obey all laws

before they can be licensed.[14]

Operator licensing has effectively been scoped out of consideration in this RIS process.

Given this, it may be appropriate for NTC to consider adding to its work program the issue of the desirability of operator licensing of heavy vehicles in Australia.

12 Page 10

13 following the model contained in the Victorian environmental protection legislation.

14 Vehicle and Operator Services Agency (2011) *Goods Vehicle Operator Licensing- Guide for Operators:* 11 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193518/Goods_Vehicle_Operator_Licensing_Guide.pdf

Road Safety Remuneration Orders

Finally, as ALC recently observed in its submission to the Productivity Commission review of workplace relations systems in Australia[15], Subdivision A of Division 3 of Part 1 of the *Road Safety Remuneration Tribunal Act 2012* is drafted in a manner so that Road Safety Remuneration Orders made by the Tribunal override all other legislative instruments, including the HVNL.

This means a road operator would have to give precedence to any Order made by the Tribunal where there is 'direct collision' with nationally consistent heavy vehicle and WHS/OHS laws.

This duplication will lead to the imposition of regulatory costs and have consequential impacts on productivity and efficiency without any improvement of either community safety or in the enhanced roadworthiness of vehicles.

An example is Part 6 of the (proposed) Road Transport (Oil, Fuel and Gas Sector) Remuneration Order, designed to regulate maintenance and vehicle standards issues.

It is **attached** to this submission.

It is also noted that WHS agencies are continuing to develop the *Australian Work Health and Safety Strategy 2012-2022* which is targeting (amongst other areas) supply chains and networks.

It is imperative there is some coordination between regulators to ensure that the same subject matter is not regulated through different statutory instruments administered by different regulators.

More particularly, regulators must not ignore the effect of regulations made by other regulators in other policy silos, just because they are made by other regulators.

Operators must take regard of all relevant regulations. It follows, therefore, so too should regulators. Otherwise, duplication and inefficiency occurs.

Australian Logistics Council
March 2015

15 http://austlogistics.com.au/wp-content/uploads/2015/03/ALC-Submission-on-Productivity-Commission-Inquiry-into-the-Workplace-Relations-Framework-March-2015.pdf

ATTACHMENT

Extract from proposed Road Transport (Oil, Fuel and Gas Sector) Remuneration Order[16]

Part 6 - Protective Clothing, Maintenance and Vehicle Standards

16 Protective clothing

16.1 An employer must provide its employee road transport drivers with appropriate protective clothing and personal protective equipment for the work the road transport drivers are performing.

16.2 Any item of protective clothing or equipment provided to an employee road transport driver will be replaced by their employer on a fair wear and tear basis.

16.3 The employer may require that the new clothing or equipment be exchanged for the worn items.

16.4 A hirer must ensure that any contractor drivers that it engages to perform a road transport service has and utilises appropriate protective clothing and personal protective equipment for the work the contractor driver is performing.

16.5 Any protective clothing or equipment provided to a road transport driver will remain the property of the employer or hirer, and the road transport driver will be liable for the cost of replacement of any article of protective clothing or equipment which is lost, destroyed or damaged through the negligence of the road transport driver.

17 Maintenance and vehicle standards

17.1 An employer must ensure that any vehicle that it uses in the course of performing a road transport service is maintained to the standard set out in the National Heavy Vehicle Regulator Maintenance Management Accreditation Guide.

7.2 A hirer must:

a. ensure that it is a condition of any road transport contract into which it enters with a contractor driver that the contractor driver maintain their vehicle to the standard set out in the National Heavy Vehicle Regulator Maintenance Management Accreditation Guide; and

b. take all reasonable steps to audit compliance by the contractor driver with this obligation.

17.3 An employer or hirer must ensure that a vehicle maintenance log is maintained for each vehicle and ensure that the vehicle maintenance log is made available to road transport drivers operating the vehicle and is reviewed on a fortnightly basis by the employer or hirer.

17.4 An employer or hirer must ensure that pre-trip inspections of vehicles, trailers and associated equipment are conducted by an appropriately qualified and competent person, sufficient to satisfy the employer or hirer and the road transport driver that the vehicle or combination is roadworthy and safe to drive.

17.5 For the purposes of clause 17.4, an employer or hirer must:

a. establish a procedure that includes, at a minimum, the following:

i. who conducts the pre-trip inspections;

ii. when pre-trip inspections are to be conducted;

iii. how pre-trip inspections are to be conducted;

iv. what is to be inspected as part of the pre-trip inspections;

v. what records are to be maintained for pre-trip inspections; and

vi. allocates time in a road transport driver's roster or schedule to participate in pre-trip inspections.

16 www.rsrt.gov.au/default/assets/File/RSROapps/F2_RTO2014_2.pdf

b. communicate the procedure to the relevant road transport drivers;

c. if the pre-trip inspection is undertaken by a road transport driver, ensure that the road transport driver is competent in conducting pre-trip inspections;

d. provide suitable inspection locations and space, and sufficient time within shifts and schedules to conduct inspections;

e. ensure compliance by road transport drivers with these requirements through periodic reviews and inspections.

17.6 If a road transport driver has genuine concerns as to the maintenance standard or roadworthiness of a vehicle, the driver is entitled to refuse to undertake work driving the vehicle and shall suffer no loss of remuneration or other penalty by reason of refusing to drive the vehicle.

17.7 An employer or hirer shall ensure that an audit of the roadworthiness and maintenance standard of all vehicles utilised in the transportation of oil, fuel, gas and petroleum products is undertaken by an independent entity at least every 12 months at a minimum and that a report is prepared recording the outcome of the audit.

17.8 A consignor shall make it a condition of any contract for the transportation of oil, fuel, gas and petroleum products that the employer or hirer ensure that an audit of the roadworthiness and maintenance standard of all vehicles utilised under the contract is undertaken at least every 12 months and a copy of the report recording the outcome of the audit is provided to the consignor.

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