



AUSTRALIAN LOGISTICS COUNCIL

NOVEMBER 2013

ALC RESPONSE TO NATIONAL COMMISSION OF AUDIT



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

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The Australian Logistics Council (**ALC**) welcomes the opportunity to provide a submission to the National Commission of Audit.

The Commission is asked to consider:

- (a) the split of responsibilities between and within the Commonwealth Government and State and Territory Government, including areas of duplication;
- (b) the current architecture of Commonwealth – State relations; and
- (c) identify options for a clearer delineation of responsibilities for policy and service delivery.

ALC would like to make a few observations that are relevant to these areas of inquiry.

Direct collision of regulatory schemes

Parliament has passed the *Road Safety Remuneration Act 2012*.

Despite the title of the legislation, ALC notes that a road safety remuneration order made under the Act can govern not only remuneration matters, but also **related conditions**.

It would therefore be open for the Road Safety Remuneration Tribunal (effectively a division of Fair Work Australia) to make a decision relating to, for instance how trucks should be loaded and unloaded as well as managing fatigue, without necessarily referring to remuneration.

At the same time, the Heavy Vehicle National Law (**HVNL**) has also commenced operation in all jurisdictions except Western Australia.

It specifically manages speeding and fatigue management – the areas of greatest safety concern in the sector.

Finally, generally applicable workplace health and safety law requires a person conducting a business or undertaking (PCBU) to take all reasonably practicable steps to *protect the safety of workers*.

ALC has strongly argued that safety issues are best dealt with by specialist laws – in the case of heavy vehicles the HVNL, administered by specialist regulators – in the case of heavy vehicles the newly established National Heavy Vehicle Regulator.

However, the *Road Safety Remuneration Act* will prevail over all other laws.¹

That would mean that a road operator would have to follow any road safety remuneration order made by the Road Safety Remuneration Tribunal specifically dealing with (for instance) truck loading or fatigue, notwithstanding the obligations of operators under nationally consistent heavy vehicle and WHS/OHS laws.

This is a recipe for inefficiency, derived from duplication of statutory obligations that will impact on productivity without commensurate safety outcomes.

¹ Subdivision A of Division 3 of Part 1 of the *Road Safety Remuneration Act 2012*

The Government has announced a review of the *Road Safety Remuneration Act 2012* and the Road Safety Remuneration Tribunal.

However, efficiency would be assisted if there was only one set of laws to regulate a particular subject matter.

This area is a case study of this proposition.

Recommendation

The National Commission of Audit should recommend the establishment of a rule requiring government to conduct a ‘direct collision’ analysis before proposing regulatory change so as to determine whether the subject matter is already the subject of regulation, and then be required to make a case why the additional layer of regulation is needed in any regulatory impact statement that is required to be made.

In that way:

- (a) government will be obliged to determine the best suite of laws, and most suitable regulator, to regulate a particular subject matter;
- (b) industry will only have one set of laws to manage compliance mechanisms; so therefore:
 - i. efficiency should rise and compliance costs fall; and
 - ii. the overall size of government and level of red tape will fall.

National responsibilities

When considering the national regulation of health professionals, the Queensland Parliament’s Scrutiny of Legislation Committee said:

6. In *The Constitutional Systems of the Australian States and Territories*, Professor Gerard Carney provides a summary of concerns regarding the legislative scrutiny of national scheme legislation:

A risk of many Commonwealth and State cooperative schemes is ‘executive federalism’; that is, the executive branches formulate and manage these schemes to the exclusion of the legislatures. While many schemes require legislative approval, the opportunity for adequate legislative scrutiny is often lacking, with considerable executive pressure to merely ratify the scheme without question.

Thereafter, in an extreme case, the power to amend the scheme may even rest entirely with a joint executive authority. Other instances of concern include, for example, where a government lacks the authority to respond to or the capacity to distance itself from the actions of a joint Commonwealth and State regulatory authority. Public scrutiny is also hampered when the details of such schemes are not made publicly available. For these reasons, a recurring criticism, at least since the Report of the Coombs Royal Commission in 1977, is the tendency of cooperative arrangements to undermine the principle of responsible government. A further concern is the availability of judicial review in respect of the decisions and

actions of these joint authorities. Certainly, political responsibility must still be taken by each government for both joining and remaining in the cooperative scheme.

Some blurring of accountability is an inevitable disadvantage of cooperation – a disadvantage usually outweighed by the advantages of entering this scheme. But greater scrutiny is possible by an enhanced and investigative role for all Commonwealth, State and territory legislatures.

COAG has established an 'executive federalism' scheme to administer the operation of heavy vehicles in Australia.

The Queensland Parliament has passed the *Heavy Vehicle National Law*, which has, or will be, applied in all jurisdictions (except Western Australia).

This reform is estimated to provide the Australian community with \$12bn in productivity savings, following the creation of a single national regulator (NHVR) administering one rule book.

ALC is a strong supporter of the law, as it will eliminate many of the cross border inconsistencies that impact on supply chain efficiency and add to compliance costs.

However, ALC is concerned that Australian governments are not funding the regulator in a manner that will permit it to perform all the tasks allocated to it under law.

ALC also notes that many services will be provided by state jurisdictions under service agreements.

ALC hopes that the National Regulator will, over time, be fully responsible for establishing the priorities and practices of the Regulator.

Should this not occur, rather than one regulator exercising one rule book, there will be nine separate regulators.

Indeed, there is a case for making one tier of government responsible for a particular area of regulation.

In circumstances where the activity is central to the efficient operation of a national economy (such as the movement of freight), the Commonwealth should have full responsibility referred to it, so there is a single political (and funding) entity

Recommendation

The National Commission of Audit should review 'executive federalism' schemes, such as the scheme establishing the National Heavy Vehicle Regulator and make recommendations as to whether responsibilities should be referred to the Commonwealth given its role in the management of the national economy.

National Transport Commission

What is now the National Transport Commission grew out of the microeconomic reform process commenced during the special premiers' conferences of 1990 and 1991, that

established what was called national competition policy which had, as one of its goals, uniformity and consistency in road transport regulation.²

Clause 5 of the 2002 *Inter-governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport* subsequently set out the modern functions of NTC.

Responsibilities conferred under this agreement include (amongst other things) the development of uniform or nationally consistent regulatory and operational arrangements for road, rail and intermodal transport.

It also confers on the NTC the responsibility to develop road use charging principles, until such a time as the (then existing) Australian Transport Council decides that another organisation should undertake the function.³

Since then:

- (a) COAG adopted the *Intergovernmental Agreement on Rail Safety and Investigation Reform*. The National Rail Safety Regulator (**the NRSR**) is now in operation;
- (b) COAG also adopted the *Intergovernmental Agreement on Heavy Vehicle Regulatory Reform*. The Queensland Parliament is anticipated to pass the Heavy Vehicle National Law to implement its terms. The National Law will be administered by the National Heavy Vehicle Regulator (**the NHVR**); and
- (c) the Heavy Vehicle Charging and Investment Reform is considering reforms to the current road charging mechanism; and
- (e) NTC has signed a memorandum of understanding with Austroads, itself an association of Australian and New Zealand road transport and traffic authorities which conducts many projects that are similar in nature to those conducted by NTC..

An examination of the national agreements reveal the development of a sophisticated system of decision making at the intergovernmental level, based on advice on specialist regulators for each mode of transport.

Moreover, the Standing Council on Transport and Infrastructure (**SCOTI**) has been established under the modern COAG structure.

As spelt out in detail in the Council's terms of reference, SCOTI's objective is to achieve a coordinated and integrated national transport and infrastructure system that is efficient, safe, sustainable, accessible and competitive.⁴

Finally, all Australian transport ministers are represented on SCOTI, who are supported by advice from the relevant jurisdiction's transport department.

It follows that the Australian federation is on the cusp of a truly 'cooperative federalism' model of administering heavy vehicles and rail.

² Discussed generally in Moore and Starrs *Road Transport Reform in a Federal System* presented at 18th Australasian Transport Research Forum, 29 September – 1 October 1993

³ See particularly paragraphs 5(1)(a) and 5(1)(c)(i) of the intergovernmental agreement.

⁴ The terms of reference can be found at:

http://www.scoti.gov.au/about/files/Standing_Council_on_Transport_and_Infrastructure.pdf

As ALC understands it, the primary argument for the retention of NTC is to ensure a division between policy and delivery of services.

This is a practice once very much in vogue in New Zealand.

The argument is that:

Policy advice was separated from the operational units responsible for the administration of that policy. In practice, administrative agencies are expected to provide advice and their practical experience is valuable, but it was seen as undesirable to have the Government's advice on policy and resources coming primarily from parties with a direct interest in the service delivery.⁵

In this context the current model is said to serve the purpose of ensuring that policy is not captured by safety regulators.

However, there is less support for this administrative construct.

In 2007, the UK House of Commons Public Administration Select committee said:

Reviews of the New Zealand experience have noted that the emphasis on defined agreements between ministers and officials have led to departments taking a narrow view of their responsibilities, and have reduced the extent to which there is a sense of what the Government as a whole is trying to achieve. Most of our witnesses felt that the separation of policy from operations was fraught with problems. Sir David Omand called it a "gigantic category error". Professor Christopher Hood and Dr Martin Lodge point out that "in the real world of politicking and blame-avoidance, the pressures for each side to cheat on such a deal, exploiting the ragged edges between policy and administration, are very strong"⁶

whilst a 2005 review of international food standards said:

The often blurred distinction between policy and operations is important here, as standard setting and enforcement cannot be treated in isolation from each other. After HC's inspection responsibilities and its 300 food inspectors were transferred to CFIA, HC is setting policies and standards in isolation from the practical field related to the inspection activities. This separation of policy and operational responsibilities can be problematic. As one informant put it; "Food inspection was the knowledge base for the food safety regulators, and HC is, to an increasing degree, setting policy standards without knowing exactly what the risks are and whether they will be complied with". Further, the CFIA also has direct responsibility for certain standard setting activities, which should be seen as policy rather than administration/enforcement.⁷

Most relevantly, the House of Lords Public Service Committee said in a 1998 report:

The Committee also questions the opinion that it is desirable to separate policy from operations. The focus on operations in agencies may have raised standards of service; but

⁵ Scott, G C, *Government Reform in New Zealand*, International Monetary Fund, 1996 cited in State Services Commission (NZ) *Pieces of the Puzzle, Machinery of Government and the Quality of Policy Advice* http://www.ssc.govt.nz/publications-and-resources/2621/all-pages#P191_29638 accessed 22 June 2012

⁶ House of Commons Public Administration Select Committee on Politics and Administration – *Ministers and Civil Servants* (2007): 19

⁷ Ugland and Veggeland *New Public Management, Policy Integration and the Organization of Cross-Cutting Issues: Food Inspection Reforms in Canada and the European Union* (2005):10

those who point out the benefits of isolating operations from policy equally protest that agency staff are deeply involved in policy decisions. **An acknowledgement that policy and operations must inform each other in a continuous loop cannot be accompanied by a dogmatic assertion that it is best to separate them. The Committee has heard no serious argument for the separation of policy from operations other than the opportunity it affords to improve standards of service. The Committee considers that standards might have been improved within the existing, unaltered Civil Service. The Committee does not accept the view that it is possible effectively to separate policy from operations, or the view that such a separation is desirable⁸.** (emphasis added)

ALC believes this 'continuous loop' leads to better policy.

A clearer delineation of responsibilities for policy and service delivery would be achieved by:

- Abolishing the NTC;
- Distributing policy responsibilities to the relevant national agencies responsible for service functions; and
- Vesting responsibility for the delivery of national services to the Commonwealth.

Recommendations

The National Transport Commission be abolished

That direct responsibility for the National Heavy Vehicle Regulator and the National Rail Safety Regulator be referred to the Commonwealth

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⁸ House of Lords Public Service Committee *Public Service – Report* (1998) para. 348

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