AUSTRALIAN TRUCKING ASSOCIATION

28 September 2016

Research Director
Transportation and Utilities Committee
Parliament House
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HEAVY VEHICLE NATIONAL LAW AND OTHER LEGISLATION AMENDMENT BILL 2016

For the committee's consideration, I have attached the Australian Trucking Association's submission on the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016.

The ATA is the peak body representing the Australian trucking industry. Its members include state and sector-based trucking associations, leading transport companies and businesses with expertise in transport and truck technology.

The submission is made on behalf of the ATA nationally.

Please contact me on 02 6253 6900 or bill.mckinley@truck.net.au if you require any further information about this submission.

The ATA would be available to give evidence about the Bill at a committee hearing if requested.

Yours sincerely

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SUBMISSION TO THE QUEENSLAND TRANSPORTATION AND UTILITIES COMMITTEE

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28 SEPTEMBER 2016

Introduction

The Heavy Vehicle National Law (HVNL) is a co-operative national legislative scheme hosted by the Queensland Parliament. The other states in the HVNL system (NSW, Victoria, South Australia, Tasmania and the ACT) have passed legislation adopting the HVNL as their own heavy vehicle law. In general, HVNL amendments passed by the Queensland Parliament take effect automatically in the other participating states.

The HVNL implements an important principle called chain of responsibility. Under chain of responsibility, participants in the road transport chain – including consignors and consignees – can be held to account for safety issues on the road. The HVNL also provides that directors and executives of chain parties can be held personally liable for safety issues under some circumstances.

The Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 would make important changes to the chain of responsibility provisions in the law. These changes are in chapter 2 of the Bill.

Chapter 3 would implement a number of maintenance amendments to the HVNL. The ATA has been consulted on these amendments and considers them uncontroversial.

Chapter 4 is the 'other legislation' part of the Bill and would amend the *Transport Operations (Passenger Transport) Act 1994* (Qld). As could be expected, the ATA does not have a view on this chapter.

The policy issues

The Bill would address a number of policy issues with the law, as follows:

Extension of the CoR concept to vehicle maintenance

In 2013, the then Chairman of the ATA, David Simon, called on governments to extend the chain of responsibility principle to vehicle maintenance, as part of a five point plan for improving truck maintenance, safety and the way Australia investigates road accidents.[1]

The ATA's subsequent submission to the NTC Heavy Vehicle Roadworthiness Review drew on Australian and US research to confirm that poor truck maintenance is an issue that needs to be addressed.[2]

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[1] Simon, D. Make businesses accountable for truck maintenance. ATA media release, 28 October 2013.
[2] ATA, Heavy vehicle roadworthiness review. Submission to the NTC, 19 September 2014.

Complexity and inconsistency

The HVNL was assembled from a series of model laws. As a result, it is unnecessarily difficult for businesses, managers and employees to understand and comply with their legal obligations. For example:

- the duties imposed on specific chain parties (for example, schedulers) are spread across multiple chapters
- there are overlapping duties covering the same conduct
- the obligations of company owners and senior managers are buried on page 603 of the law in a division entitled 'Other provisions about liability.'

The complexity of the law is increased by its large number of prescriptive requirements. For example, s 231 states that:

> (1) An employer of an employed driver of a fatigue-regulated heavy vehicle must not cause the driver to drive the vehicle unless—
> (a) the employer has complied with section 230; and
> (b) the employer, after making reasonable inquiries, is satisfied each scheduler for the vehicle has complied with Division 4.
> Maximum penalty—$4000

These requirements do not take into account the wide diversity of business circumstances in the industry and prevent chain parties from developing measures that suit their own risk profile. They also block innovation, because they lock in the business practices that were current at the time the model laws were first developed.

The complexity of the law creates problems for regulators and the courts, as well as operators. The ATA submission to the NTC CoR duties review cited *Damorange*, where the NSW Supreme Court rejected an appeal against the sentence imposed by a local court judge for a series of speed limiter offences. The court found that the prosecutor had misunderstood the 'intricate legislative regime.'[3]

Consistency with best practice safety regulation

The HVNL is not consistent with best practice safety regulation, which involves:

- general or primary duties to establish the broad goals of the safety regulation and to fill in the cracks that will inevitably appear
- a requirement that businesses have processes to systematically manage safety risks
- evidentiary standards to provide guidance on how compliance can be achieved, while allowing for alternative actions that achieve an equivalent of better standard of care
- specification standards where there are specific, significant risks.[4]

How the Bill would address these issues

The ATA is satisfied that the Bill would address the industry's policy concerns. The Bill would make far reaching changes that would restructure the law, introduce a primary safety duty in

[3] Bimson, Roads and Maritime Services v Damorange Pty Ltd [2014] NSWSC 734 [91].
[4] Bluff, E and N Gunningham, "Principle, Process, Performance or What? New Approaches to OHS Standards Setting," Working Paper 9, National Centre for OHS Regulation, July 2003, 30. Link

line with best practice, extend the CoR concept to maintenance and eliminate a large number of unnecessary legislative provisions.

Maintenance amendments to the law will continue to be needed, particularly to remove any obsolete assumptions that compliance information required to be furnished by a driver will always be in that driver's immediate possession and held in the form of either a tangible paper or static electronic document.[5]

Commencement

In November 2015, the Transport and Infrastructure Council noted that a 12 month implementation period would be required between the passage of the Bill through parliament and the commencement of the chain of responsibility amendments in chapter 2.[6]

The ATA strongly endorses this implementation period, which is necessary to give the industry and regulators sufficient time to communicate the new requirements, develop guidance material and carry out training.

The chain of responsibility amendments are expected to come into force in January 2018. This timeframe should be extended if the Bill's passage through parliament is delayed to 2017.

Restructuring the CoR provisions of the law

In its CoR duties review submission,[7] the ATA argued that a new chapter, chapter 1A, should be added to the HVNL to consolidate the duties of chain parties by duty holder, rather than by subject.

The ATA argued that a structure like this would be more straightforward because the duties applying to each chain party would be easier to find. In line with good drafting practice, the important concepts in the law would be stated as its central elements, instead of being buried in detail. [8]

The Bill substantially implements the ATA recommendation.

Introduction of a primary duty

Primary duties define the broad scope of a duty holder's responsibilities and require them to consider their own business risks and how they can reasonably be eliminated or minimised. The model Work Health and Safety (WHS) Act and the Rail Safety National Law (RSNL) are based on this approach.

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[5] For example, see s 82 Keeping relevant document while driving under vehicle standards exemption. This section applies to a vehicle standards exemption (notice) that the driver of a heavy vehicle must keep a relevant document in their possession.

[6] NTC, Primary duties for chain of responsibility parties and executive officer liability. Policy paper, November 2015. 51.

[7] ATA, Chain of responsibility duties review. Submission to the NTC, January 2015. 9.

[8] Office of Parliamentary Counsel (Cwlth), Reducing complexity in legislation, Reissued June 2016, 6.

Proposed s 26C would introduce a primary duty into the HVNL, which would apply to the safety of the transport activities carried out by chain parties. The approach is consistent with the RSNL, which applies only to the 'railway operations' of rail transport operators.[9]

The ATA supports the inclusion of this primary duty. It would improve safety, because it would require duty holders to consider their operations as a whole rather than ticking off compliance boxes. The obligations on businesses and staff would be clear, instead of hidden in concepts like deemed liability.

Extension of CoR to cover vehicle maintenance and repairs

The term 'transport activities' in the primary duty would be defined in amended s 5 of the HVNL, and would include contracting, directing or employing a person to carry out another activity associated with the use of a vehicle, such as maintaining or repairing it.

This definition of transport activities would effectively include vehicle maintenance and repairs within the chain of responsibility, but only for parties in the chain of responsibility.

In the consultation process leading up to the Bill, the ATA argued that outsourced vehicle asset and maintenance management providers should also be included the chain. When used, these providers have a critical role in managing a business's maintenance management systems and compliance obligations.[10]

Replacing all reasonable steps with so far as is reasonably practicable

The duties in the HVNL require chain parties to take all reasonable steps to prevent a contravention of the law. Under some provisions of the law, a person may have access to the reasonable steps defence, which can require the person charged to prove they took all reasonable steps to prevent a contravention from occurring.[11]

The HVNL does not anywhere define the meaning of all reasonable steps. Experience has shown that the term has serious practical problems:

- the ordinary meaning of the word 'all' suggests there is a list of reasonable steps somewhere that must all be implemented, even if some of those steps cover the same ground or are unnecessary given the risk profile or other characteristics of the business
- the term does not include any reference to the practicability of implementing those steps.

Because of the problems with the term, the ATA recommended in January 2015 that it should be replaced with the model WHS Act duty of care, 'so far as is reasonably practicable.'[12] TfNSW and the National Heavy Vehicle Regulator (NHVR) put forward similar recommendations.

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[9] RSNL s 52(1). See also RSNL s 4 (definition of 'railway operations').
[10] ATA, September 2014, 8.
[11] s 618. Alternatively, the person could seek to prove there were no steps they could reasonably be expected to have taken to prevent the contravention.
[12] ATA, January 2015, 12.

As a qualifier for safety duties, 'reasonably practicable' has a long history of consistent interpretation by the courts, with the National OHS Review pointing to case law going back to 1949.[13]

Businesses have embraced the model WHS Act concept of 'so far as is reasonably practicable,' invested significantly in understanding how to apply it, and then implemented it. The clarity of the definition and its application to the work health and safety duties in the Act has meant that businesses can achieve a clear understanding of their obligations and how to satisfy them. The same businesses struggle to understand their duties under the HVNL and how to comply with them.

The Bill would replace the current HVNL duty qualifier, 'all reasonable steps,' with the model WHS Act qualifier, 'so far as is reasonably practicable.' The definition of the term is consistent with the definition used in the model WHS Act and the RSNL.

The ATA supports and welcomes this change.

Executive officer liability

Executive officer liability for corporate safety offences was the subject of strong debate in the development of both the model WHS Act and the HVNL. There are two competing viewpoints:

- The prosecution should always bear the burden of proving, beyond reasonable doubt, that executives have not undertaken some sort of reasonable or due diligence to prevent a corporate offence. This approach is in line with the fundamental principles of criminal law, and is known as type 1 liability. It is the approach used in the model WHS Act, and is the default approach required under the COAG principles and guidelines for corporate fault.[14]

- The alternative approach is that executives should have to prove on the balance of probabilities that they have undertaken reasonable diligence. This is known as type 3 liability. The HVNL currently imposes a modified type 3 liability on executive officers. The prosecution must first prove, beyond reasonable doubt, that

    - the executive officer knew or reasonably ought to have known of the conduct constituting the offence; or
    - the executive officer knew or reasonably ought to have known that there was a substantial risk that the offence would be committed.[15]

    Once this point is reached, the executive officer must prove his or her defence.

Proposed s 26D would impose explicit due diligence obligations on executives comparable to s 27 of the model WHS Act. The prosecution would bear the burden of proof. The ATA supports this approach.

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[13] *Edwards v National Coal Board* [1949] 1 KB 704.
[14] Council of Australian Governments (COAG), Personal liability for corporate fault—guidelines for applying the COAG principles. 2012.
[15] HVNL, s 636.

Maximum penalties

The Bill would dramatically increase the maximum penalties available under the HVNL. The maximum penalty for a category 1 offence (involving reckless conduct that exposes an individual to a risk of death, serious injury or illness) would be $3 million for a corporation or, for an individual, $300,000 or five years' imprisonment or both.[16] A category 3 duty contravention would carry a maximum penalty of $500,000 for a corporation or $50,000 for an individual.[17]

The HVNL would continue to include offence provisions with lower penalties to cover, for example, work diary offences.

The maximum penalties in the Bill are consistent with the penalties under the model WHS Act and the RSNL. In considering the proposed increase in maximum penalties, it should be noted that:

- The model WHS Act/RSNL penalties were developed on the basis that a single charge could seek to show a pattern of conduct involving many duty breaches.[18] In contrast, every single breach of the HVNL is currently charged as a separate offence. This can lead to unwieldy prosecutions involving hundreds of charges, each with a lower penalty.[19]

- Maximum penalties are not defaults that automatically apply to each offence. They are a yardstick to help sentencers compare between the worst possible case in a category and the case before them.[20] Sentencers apply a range of principles to arrive at the penalty applicable to a specific case.

The ATA supports the penalties in the Bill. They are a necessary deterrent to the recalcitrant minority of trucking operators who disregard their safety obligations. The increased penalties are only acceptable, however, because of the shift in the Bill to type 1 liability.

Investigative powers

The shift to type 1 liability would inevitably make it more difficult for prosecutors to prove cases against executives. When the National OHS Review recommended the same change in the burden of proof, it accompanied the change with a recommendation that work health and safety regulators should have strong and wide ranging investigative powers.[21] The explanatory notes for the Bill also make this point.[22]

Compared to the model WHS Act and the former *Transport Operations (Road Use Management) Act* (Qld), the HVNL imposes significant constraints on the power of regulators to investigate potential breaches. In particular:

- ss 155 and 171 of the model WHS Act give WHS regulators the power to compel people to answer questions and provide documents. Individuals do not have the right to silence; however, nothing they say can be used as evidence in proceedings against them for a substantive WHS offence (s 172). The comparable sections of the

[16] Proposed s 26F.
[17] Proposed s 26H.
[18] National OHS Review, first report, 165.
[19] NTC, 2015, 16.
[20] Markarian v R [2005] HCA 25, [31].
[21] National OHS Review, 155.
[22] Heavy Vehicle National Law and Other Legislation Amendment Bill 2016: Explanatory Notes. 6.

HVNL (ss 569 and 570) are more limited. For example, regulators can only compel the production of business process documents if they are investigating a possible offence under ss 204 or 230. These offences only apply to operators, employers and prime contractors.

- The relevant sections of the model WHS Act apply to any person who may have information. In contrast, the HVNL provisions only apply to 'a responsible person for a heavy vehicle.' This means that investigators may have difficulty obtaining information from organisations that are not covered by the definition, such as toll road operators and fuel companies.

- In addition, the Queensland Department of Main Roads pointed out in the NTC review process that its ability to require evidence and information from third parties was narrower under the HVNL than under s 50AA of the former *Transport Operations (Road Use Management) Act* (Qld).[23]

Clauses 91 of the Bill would insert a new section, 570A, to enable authorised officers to require information and documents from any person in relation to a possible contravention of the primary duty. The provision is based on s 155 of the model WHS Act. Importantly, the proposed section would:

- require authorised officers to act on a reasonable belief that a person was capable of providing the necessary information
- require interviews to be conducted, or documents provided, at a time and place that was reasonable in the circumstances
- provide evidential immunity to individuals (but not companies) responding to a notice to provide information.

The ATA considers that the increase in investigative powers is appropriate, but does have one proposed amendment (see below).

Proposed amendments to the Bill

Definition of packer

The load restraint of animal effluent is an important issue faced by the livestock transport sector. The issue is exacerbated when off-road parties do not correctly apply feed and water curfews prior to transport.

It could be argued that a person or business that feeds or waters livestock before transport is a packer; however, the situation is ambiguous. It is not clearly covered by the definition of 'packer' in s 5 of the HVNL.

The ATA considers that the definition of 'packer' in s 5 should be amended to:

- make specific reference to live animals
- more clearly include those who directly influence the preparation of the goods for transport.

[23] Department of Transport and Main Roads (Qld), *Chain of responsibility duties review: response to stakeholder questions*. November 2014, [6(h)]

Duties of drivers

Under s 228 of the HVNL, drivers have a duty to avoid driving while fatigued. This duty is in addition to their obligation to comply with the prescriptive work and rest hours in Part 6.3.

Workers (including drivers) have a much broader duty under s 28 of the model WHS Act:

> While at work, a worker must:
> (a) take reasonable care for his or her own health and safety; and
> (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
> (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and
> (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

The *Occupational Health and Safety Act* (Vic) includes a similar provision,[24] as does the RSNL.[25]

In the ATA's view, there is a strong case for including a general duty on drivers in the HVNL, which should combine the existing s 228 fatigue duty with the worker duties under the model WHS Act.

Such a duty would recognise that safety is the shared responsibility of everyone in the workplace by making it clear that:

- drivers must take reasonable care of their own safety and must not drive while impaired by fatigue, even if that fatigue was caused by events outside work
- drivers must take reasonable care not to adversely affect the health and safety of others (for example, by failing to report a serious vehicle fault)
- drivers must comply with reasonable safety policies, procedures, processes and instructions. This last requirement is particularly important in the trucking industry, because many company CoR policies are entirely dependent on drivers for their implementation.

Voluntary production of information

Proposed s 570A(7) would protect individuals from criminal or civil proceedings arising from information they provide in response to a notice.

The protection would not apply to information that individuals provide voluntarily, perhaps because they were not aware of the powers of authorised officers or because they accepted assurances that no action would be taken against them personally if they co-operated.

[24] s 25.
[25] s 56.

As a result of the way s 570A is drafted:

- investigations could be slowed and made more complex by individuals exercising their right to insist that notices be issued before they provide information
- individuals may inadvertently expose themselves to legal risk by providing information without insisting on a formal notice.

Accordingly, the ATA recommends that proposed s 570A(7) should apply to any information provided by an individual, whether voluntarily or in response to a notice. Existing s 588 should be amended on a similar basis.

Interaction of the HVNL with other safety laws

A truck accident can lead to investigations by a number of agencies with overlapping responsibilities, including police, the state work health and safety regulator, the state transport department, the state environmental protection agency and possibly Comcare if a multi-state employer is involved.

These investigations can result in repetitive requests for the same information, often based on an underestimate of the volume of documents that businesses generate due to regulatory requirements and the time it takes to collate them. For example, the ATA is aware of a case where a WHS regulator asked a national trucking business to produce all its risk assessments. The regulator was advised that this would involve the production of *thousands* of documents and take several months.

The proposed amendments to s 18 would help clarify the relationship between the HVNL and primary WHS law, and make it clear that a person cannot be prosecuted under both the HVNL and WHS law for the same offence.

Nonetheless, considerable uncertainties remain, particularly in relation to the interaction between WHS law and the prescriptive work and rest hour options in chapter 6 of the HVNL.

The NHVR should be encouraged to work closely with its state transport agency partners, WHS regulators and other enforcement agencies to establish stronger lead agency arrangements for investigations and to minimise regulatory inconsistency.

Recommendations

Recommendation 1

Chapters 2 and 3 of the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 should be passed.

Recommendation 2

The definition of ‘packer’ in s 5 should be amended to:

- make specific reference to live animals
- more clearly include those who directly influence the preparation of the goods for transport.

Recommendation 3

A new section, 26DA, Duty of drivers, should be added. The section should be based on s 28 of the model WHS Act and the existing s 228 fatigue duty, to make it clear that drivers must not drive while impaired by fatigue, even if that fatigue was caused by events outside work.

Recommendation 4

Proposed section 570A(7) should be amended so it applies to information provided voluntarily by individuals as well as under notice. Existing s 588 should be amended on a similar basis.

Recommendation 5

The NHVR should be encouraged to work closely with its state transport agency partners, WHS regulators and other enforcement agencies to establish stronger lead agency arrangements for investigations and to minimise regulatory inconsistency.