

**Submission to:** Queensland Parliamentary Transport and  
Local Government Committee

**Title:** Heavy Vehicle National Law Bill 2011

**Date:** 3 February 2012



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## 1. Executive summary

The trucking industry is subject to a maze of inconsistent government regulation, despite years of work to harmonise the road freight laws through a model law process.

The economic gains from a single national approach to regulation could total \$12.4 billion in net present value terms.

The ATA supports the Heavy Vehicle National Law Bill 2011, but it will need to be amended extensively before it commences. The ATA and state road agencies have identified 1,020 issues with the Bill, ranging from serious issues of principle to minor drafting errors.

Australia's transport ministers have agreed to prepare a second, amending Bill, and that the amendments should be part of the Heavy Vehicle National Law when it commences on 1 January 2013. This agreement does not have legal effect.

As a result, the ATA recommends the Queensland Parliament should pass the Heavy Vehicle National Bill 2011, but amend section 2 so its substantive provisions do not come into effect until the commencement of the amending Bill.

The Heavy Vehicle National Law recognises that road safety is not just the responsibility of heavy vehicle drivers. It recognises that all the parties in the supply chain – including trucking operators, schedulers and even the industry's customers – must take responsibility for their actions, lack of action, or demands.

ATA strongly supports this chain of responsibility model, which is gradually changing behaviour across the whole road transport supply chain.

This submission proposes six sets of amendments to the chain of responsibility provisions for inclusion in the forthcoming amendment Bill.

These amendments would strengthen the Heavy Vehicle National Law by imposing positive duties on businesses and individuals to prevent mass, dimension and load requirement breaches.

At the same time, the amendments would add fairness to the Bill by bringing it into line with fundamental criminal law principles.

Most importantly, the amendments would ensure that company directors, officers, the members of business partnerships and the managers of unincorporated businesses are innocent of chain of responsibility offences until proven guilty.

The presumption of innocence is the golden thread that runs through our legal system. The ATA believes that trucking business owners and managers should have the same legal rights as other Australians. The submission shows that the arguments advanced in the Explanatory Notes to the Bill for reversing the burden of proof are without merit.

More than half the economic benefits (\$7 billion) of this reform are expected to come from increasing the industry's productivity by improving the use of restricted vehicles on the road network. But the access measures in the Bill are not strong enough to deliver the improvements in local government decision-making necessary to achieve the expected productivity gains.

Unless the Bill is amended, the whole National Heavy Vehicle Regulator project will be a failure, because its success will largely hinge on the regulator's ability to promote better road access decisions.

The submission recommends four sets of amendments to improve the road access provisions, for inclusion in the forthcoming amendment Bill.

Most importantly, the amendments would enable dissatisfied applicants for road access to appeal to an independent, external review body. In Queensland, this would be the Queensland Civil and Administrative Tribunal (QCAT). The submission draws on Australian and international experience to show that the internal appeals model proposed by the Bill is inadequate.

## 2. Recommendations

### Recommendation 1

**The Queensland Parliament should pass the Heavy Vehicle National Law Bill 2011, but section 2 should be amended as follows:**

#### 2 Commencement

- (1) Chapter 12 of this Act commences on a day to be fixed by proclamation.
- (2) Chapters 1-11 and 13 of this Act commence on a day to be fixed by proclamation which shall be the same day as the *Heavy Vehicle National Law Amendment Act 2012* commences.
- (3) The *Acts Interpretation Act 1954*, section 15DA applies to the provisions of this Act as if—
  - (a) the references in subsections (2) and (3) of that section to 1 year were a reference to 2 years; and
  - (b) the reference in subsection (3) of that section to 2 years were a reference to 3 years.

### Recommendation 2

**The forthcoming amendment Bill should delete clause 560(a), in conjunction with the ATA's other chain of responsibility amendments.**

### Recommendation 3

**The forthcoming amendment Bill should include amendments to the HVNL to impose positive duties on supply chain participants in relation to mass, dimension and load restraint, as follows:**

**The definition of 'party in the chain of responsibility' in clause 5 needs to be amended, and a new definition, 'terms of consignment' inserted:**

#### 5 Interpretation

**party in the chain of responsibility—**

- (a) for a mass, dimension or loading requirement-regulated heavy vehicle, for Division 5 of Part 4.7A, has the meaning given by section 152J.
- (b) for a heavy vehicle, for Division 5 of Part 5.2, has the meaning given by section 184; or
- (c) for a fatigue-regulated heavy vehicle, for Chapter 6, has the meaning given by section 197.

**terms of consignment** means any requirement whether verbal or in writing or direct or indirect under which goods are or are to be conveyed by road transport including but not limited to any requirement in relation to loading or delivery times.

**A new part, 4.7A should be added to the Bill, as follows:**

#### Part 4.7A Particular duties and offences

##### Division 1 Employers, prime contractors and operators

**152A Duty of employer, prime contractor or operator to ensure business practices will not cause driver to breach a mass, dimension or loading requirements**

- (1) A relevant party for the driver of a heavy vehicle must take all reasonable steps to ensure the relevant party's business practices will not cause the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10,000.

Notes—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

2 Section 563 sets out 1 method by which an operator can take all reasonable steps for this section.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

(3) In this section—

**business practices**, of a relevant party for the driver of a heavy vehicle, means the practices of the relevant party in running the relevant party's business, and includes each of the following—

- (a) the operating policies and procedures of the business;
- (b) the human resource and contract management arrangements of the business;
- (c) arrangements for managing mass, dimension and loading requirements

**relevant party**, for the driver of a heavy vehicle, means any of the following—

- (a) an employer of the driver if the driver is an employed driver;
- (b) a prime contractor of the driver if the driver is a self-employed driver;
- (c) an operator of the vehicle if the driver is making or is to make a journey for the operator.

#### **152B Duty of employer not to cause driver to drive if particular requirements not complied with**

An employer of an employed driver of a heavy vehicle must not cause the driver to drive the heavy vehicle unless—

- (a) the employer has complied with section 152A; and
- (b) the employer is reasonably satisfied each loader, packer and loading manager for the vehicle has complied with sections 152D, 152E and 152F

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

#### **152C Duty of prime contractor or operator not to cause driver to drive if particular requirements not complied with**

(1) This section applies to—

- (a) a prime contractor of a self-employed driver of a heavy vehicle (the **driver**); and
- (b) an operator of a heavy vehicle that is to be driven by someone else (also the **driver**).

(2) The prime contractor, or operator, must not cause the driver to drive the heavy vehicle unless—

- (a) the prime contractor, or operator, has complied with section 152A; and
- (b) the prime contractor, or operator, is reasonably satisfied each loader, packer and loading manager for the vehicle has complied with sections 152D, 152E and 152F.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

## **Division 2 Packers and Loaders**

### **152D Duty to ensure driver's load will not cause driver to breach a mass, dimension or loading requirement**

(1) A loader or packer for a heavy vehicle must take all reasonable steps to ensure the load of a heavy vehicle will not cause the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Notes—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

### **152E Duty not to cause driver to drive if particular requirements not complied with**

A loader or packer for a heavy vehicle must not cause the vehicle's driver to drive the vehicle unless—

- (a) the loader or packer has complied with section 153C; and
- (b) the driver's load allows or compliance with all laws regulating the vehicle's mass, dimension and load requirements

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

## **Division 3 Loading managers**

### **152F Duty to ensure loading arrangements will not cause driver to breach mass, dimension or load requirements**

(1) A loading manager must take all reasonable steps to ensure that the loading of goods onto and unloading of goods from heavy vehicles will not cause the driver of a heavy vehicle to drive the vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Notes—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

(3) In this section—

**loading manager** means a person who—

- (a) manages, or is responsible for the operation of, regular loading or unloading premises for heavy vehicles; or

(b) has been assigned by a person mentioned in paragraph (a) as responsible for supervising, managing or controlling, directly or indirectly, activities carried out a loader or unloader of goods at the premises.

#### **Division 4 Particular consignors and consignees**

##### **152GA Consignors to whom Div 4 applies**

This Division applies to a consignor who engages a particular operator of a heavy vehicle, either directly or through an agent or other intermediary, to transport goods for the person by road.

##### **152GB Consignees to whom Div 4 applies**

This Division applies only to a consignee of goods—

(a) who has consented to being, and is named or otherwise identified as, the intended consignee of goods in the transport documentation relating to the transport of the goods by road by a particular operator of a heavy vehicle; and

(b) who knows, or who ought reasonably to know, that the goods are to be transported by road.

Note—

See section 572 for the matters a court must consider when deciding whether a person ought reasonably to have known something.

##### **152H Duty to ensure terms of consignment will not cause driver to exceed mass, dimension or loading requirement**

(1) A consignor or consignee of goods must take all reasonable steps to ensure the terms of consignment will not cause the relevant driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

(2) A consignor or consignee of goods must take all reasonable steps to ensure the terms of consignment will not cause a relevant party for the relevant driver to cause the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Notes for subsections (1) and (2)—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

(3) A person charged with an offence against subsection (1) or (2) does not have the benefit of the mistake of fact defence for the offence.

(4) In this section—

**relevant driver**, for consigned goods, means the driver of the heavy vehicle by which the goods are to be or are being transported.

**relevant party**, for the relevant driver for consigned goods, means—

- (a) an employer of the driver if the driver is an employed driver; or
- (b) a prime contractor of the driver if the driver is a self-employed driver; or
- (c) an operator of the heavy vehicle by which the goods are transported if the driver is to make, or is making, a journey for the operator.

### **152I Duty not to make a demand that may result in driver breaching mass, dimension or loading requirement**

A consignor or consignee of goods must not make a demand that affects, or may affect, a mass dimension or loading requirement in relation to a heavy vehicle unless—

- (a) the consignor or consignee has complied with section 152H; and
- (b) the consignor or consignee is reasonably satisfied the making of the demand will not cause a person to contravene sections 72, 84 or 92.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

### **Division 5 Particular requests etc. and contracts etc. prohibited**

#### **152J Who is a party in the chain of responsibility**

(1) For this Division, each of the following persons is a **party in the chain of responsibility** for a heavy vehicle—

- (a) an employer of the vehicle's driver if the driver is an employed driver;
- (b) a prime contractor for the vehicle's driver if the driver is a self-employed driver;
- (c) an operator of the vehicle;
- (d) a loader or packer of any goods in the vehicle;
- (e) a loading manager of any goods in the vehicle;
- (f) a consignor of any goods for transport by the vehicle that are in the vehicle;
- (g) a consignee of any goods for transport by the vehicle that are in the vehicle.

Note—

The exercise of any of these functions, whether exclusively or occasionally, decides whether a person falls within any of these definitions, rather than the person's job title or contractual description.

(2) A person may be a party in the chain of responsibility for a heavy vehicle in more than 1 capacity.

Example—

A person may be simultaneously the driver's employer, an operator and a consignor of goods in relation to a heavy vehicle and be subject to duties in each of the capacities.

#### **152K Particular requests etc. prohibited**

A person must not ask, direct or require, directly or indirectly, the driver of a heavy vehicle, or a party in the chain of responsibility for a heavy vehicle, to do something the person knows, or ought reasonably to know, would have the effect of causing the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Note—

See section 572 for the matters a court must consider when deciding whether a person ought reasonably to have known something.

#### **152L Particular contracts etc. prohibited**

(1) A person must not enter into a contract or other agreement with the driver of a heavy vehicle, or with a party in the chain of responsibility for a heavy vehicle, that the person knows, or ought reasonably to know, would have the effect of causing the vehicle's driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle



Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

(2) A person must not enter into a contract or other agreement with the driver of a heavy vehicle, or with a party in the chain of responsibility for a heavy vehicle, that the person knows, or ought reasonably to know, would encourage or provide an incentive for the vehicle's driver, or a party in the chain of responsibility for the vehicle to cause the vehicle's driver, to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Notes for subsections (1) and (2)—

1 See section 572 for the matters a court must consider when deciding whether a person ought reasonably to have known something.

2 See also section 677, which provides that particular contracts or other agreements are void.

#### **Division 6 Provisions about offences against this Part**

##### **152M Objective reasonableness test to be used in deciding causation**

(1) This section applies in relation to a proceeding for an offence against this Part that may be committed by a person failing to take all reasonable steps to ensure someone else does not drive a heavy vehicle in breach of mass, dimension or loading requirements applying to the vehicle driver (prohibited act).

(2) For subsection (1), a person failing to take all reasonable steps to ensure someone else does not do a prohibited act includes—

- (a) the person failing to take reasonable steps to ensure the other person does not do the prohibited act; and
- (b) the person failing to take reasonable steps to ensure the person's activities, or anything arising out of the person's activities, do not—
  - (i) cause the other person to do the prohibited act; or
  - (ii) result in the other person doing the prohibited act; or
  - (iii) provide an incentive for the other person to do the prohibited act.

(3) Subsection (4) applies if—

- (a) a person does an act or makes an omission; and
- (b) as a result of the act or omission someone else does a prohibited act.

(4) A court may find the person caused the other person to do the prohibited act if the court is satisfied a reasonable person would have foreseen that the person's act or omission would be reasonably likely to cause the other person to do the prohibited act.

#### **Part 4.8 needs to be amended:**

##### **Part 4.8 Extended liability**

##### **153 Liability of employer etc. for driver's contravention of mass, dimension or loading requirement**

(1) If the driver of a heavy vehicle is convicted of an offence against section 78, 84 or 92, each of the following persons is also taken to have committed an offence—

- (a) an employer of the driver if the driver is an employed driver;

- (b) a prime contractor of the driver if the driver is a self-employed driver;
- (c) an operator of the vehicle or, if it is a combination, an operator of a vehicle in the combination;
- (d) a consignor of any goods for road transport using the vehicle that are in the vehicle;
- (e) a packer of any goods in the vehicle;
- (f) a loading manager of any goods in the vehicle;
- (g) a loader of any goods in the vehicle.
- (h) a consignee of any goods for road transport using the vehicle that are in the vehicle.

Maximum penalty—the penalty for a contravention of the provision by the driver of the heavy vehicle.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

(3) However, in a proceeding for an offence against subsection (1), the person charged has the benefit of the reasonable steps defence for the offence.

*Note—*

See Divisions 1 and 2 of Part 10.4 for the reasonable steps defence.

(4) In a proceeding for an offence against subsection (1)—

- (a) evidence a court has convicted the driver of the offence against section 78, 84 or 92 is evidence that the offence happened at the time and place, and in the circumstances, stated in the charge resulting in the conviction; and
- (b) evidence a fine sought by an infringement notice for the offence against section 78, 84 or 92 has been paid is evidence that the offence happened at the time and place, and in the circumstances, stated in the infringement notice.

**Clause 165 (extended liability provisions relating to consignees) should be deleted, since this is now covered in clause 153.**

**And clause 563(1) should be amended:**

**563 Reliance on container weight declaration—offences about mass**

(1) This section applies if a person is charged with an offence involving a contravention of a mass requirement for the vehicle and is seeking to prove the reasonable steps defence in relation to the offence.

**Recommendation 4**

**The forthcoming amendment Bill should reduce the maximum penalties under clauses 78, 84 and 92 as follows:**

**Minor risk breach—\$1,000**  
**Substantial risk breach—\$2,000**  
**Severe risk breach—\$5,000**

**Recommendation 5**

**The forthcoming amendment Bill should delete clauses 157(7) and 157(8).**

**Recommendation 6**

**The forthcoming amendment Bill should amend the HVNL to provide that dockets from a duly licensed and certificated weighbridge, or records from an approved weighing device, are conclusive proof of the weight of a vehicle, as follows:**

## **Schedule**

### **to be inserted between VIN and work in Clause 5**

**weighbridge** means a duly registered and licensed weighbridge in the jurisdiction of its location

**weighbridge certificate** means a certificate issued by the operator of a weighbridge

**weighing device** means an onboard weighing device approved by the Regulator under Clause 563A.

### **563A Reliance on weighbridge certificate or weighing device - offences about mass**

(1) In any proceeding for an offence involving a contravention of a mass requirement the person charged shall, in the absence of any evidence to the contrary, be entitled to rely on the contents of a weighbridge certificate accompanying the heavy vehicle or the records produced by an approved weighing device as prima facie and conclusive evidence of the weight of the load on the heavy vehicle.

(2) The Regulator may approve a weighing device for the purposes of subsection (1) which approval shall take effect upon publication in the Commonwealth Gazette and which approval shall be subject to such terms and conditions as the regulator may impose. The Regulator may vary or revoke any such approval at any time and any variation or revocation shall take effect upon publication in the Commonwealth Gazette.

## **Recommendation 7**

**To restore the basic rights of corporate officers, directors, partners and the managers of unincorporated trucking businesses, the forthcoming amendment Bill should amend clauses 576, 578 and 579 of the Heavy Vehicle National Law as follows:**

### **576 Liability of executive officers of corporation**

(1) If a corporation commits an offence against a provision of this Law, an officer of the corporation who the prosecution proves:

- (a) had the capacity to influence the conduct of the corporation in relation to the offence; and
- (b) there were reasonable steps the officer might have taken to ensure that the corporation complied with the provision; and
- (c) the officer failed to take those steps;

the officer also commits an offence against the provision.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(2) An officer of a corporation may be proceeded against and convicted for an offence against the provision whether or not the corporation has been proceeded against or convicted under that provision.

(3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under the provision.

(4) This section does not apply to an officer acting on a voluntary basis, whether or not the officer is reimbursed for the expenses incurred by the officer for carrying out activities for the corporation.

### **578 Treatment of partnerships**

(1) This Law applies to a partnership as if it were a person, but with the changes set out in this section.

(2) An obligation or liability that would otherwise be imposed on the partnership by this Law is imposed on each partner instead, but may be discharged by any of the partners.

(2) An amount that would be payable under this Law by the partnership is jointly and severally payable by the partners.

(4) An offence against this Law that would otherwise be committed by the partnership is taken to have been committed by each partner.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(5) However, in any proceeding the prosecution must prove that —

- (a) the partner was in a position to influence the conduct of the partnership in relation to the offence; and
- (b) the partner failed to exercise reasonable diligence to ensure the partnership complied with the provision;

(6) For the purposes of this Law, a change in the composition of a partnership does not affect the continuity of the partnership.

### **579 Treatment of unincorporated bodies**

(1) This Law applies to an unincorporated body as if it were a person, but with the changes set out in this section.

(2) An obligation or liability that would otherwise be imposed on the unincorporated body by this Law is imposed on each management member of the body instead, but may be discharged by any of the management members.

(3) An amount that would be payable under this Law by the unincorporated body is jointly and severally payable by the management members of the body.

(4) An offence against this Law that would otherwise be committed by the unincorporated body is taken to have been committed by each management member for the body.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(5) However, in any proceeding the prosecution must prove that—

- (a) the member was in a position to influence the conduct of the body in relation to the offence; and
- (b) the member failed to exercise reasonable diligence to ensure the body complied with the provision.

(6) Also, subsections (1) to (5) do not apply to a management member of an unincorporated body acting on a voluntary basis, whether or not the member is reimbursed for the expenses incurred by the member for carrying out activities for the body.

(7) In this section—

management member, of an unincorporated body, means—

- (a) if the body has a management committee—each member of the management committee; or
- (b) otherwise—each member who is concerned with, or takes part in, the body's management, whatever name is given to the member's position in the body.

unincorporated body does not include an unincorporated local government authority.

## **Recommendation 8**

**The forthcoming amendment Bill should add a new sub-clause (6) to clause 136, as follows:**

### **136 Deciding request for consent generally**

(6) If a relevant road manager does not provide consent or written reasons to the Regulator within the period under subsection (1) (a) or (b) consent shall be deemed to have been given by the relevant road manager.

**Recommendation 9**

**The forthcoming amendment Bill should amend clauses 137(1)(c) and 137(2)(b) to read:**

**137 Deciding request for consent if route assessment required**

(1)(c) the road manager acting reasonably considers a route assessment is necessary for deciding whether or not to give the consent.

(2)(b) the fee payable (if any) for the route assessment under a law of the jurisdiction in which the road is situated which fee shall be reasonable and in any event not more than the cost to the road manager in conducting the route assessment.

**Recommendation 10**

**The forthcoming amendment Bill should make the following amendments to the HVNL to provide for the external review of road manager decisions:**

**Delete subclause 2(b) and the first 2 lines of subclause 2(c) in clause 587, so it reads as follows:**

**Clause 587 Notice of review decision**

(1) The Regulator must, within the prescribed period, give the applicant notice (the **review notice**) of the review decision.

(2) If the review decision is not the decision sought by the applicant, the review notice must state the following—

- (a) the reasons for the decision;
- (b) (i) that the applicant may appeal against the decision under Part 11.3; and  
(ii) how to appeal

**Amend clause 588(1) so an unsuccessful applicant may appeal against a reviewable decision made by a road manager, as follows:**

**Clause 588 Appellable decisions**

(1) A person may appeal to the relevant appeal body against a review decision relating to a reviewable decision made by the Regulator, a road manager for a road or an authorized officer

**Make a consequential amendment to clause 589(1):**

**Clause 589 Stay of review decision**

(1) This section applies if, under this Law, a person appeals to the relevant appeal body against a review decision relating to—

- (a) a reviewable decision made by the Regulator other than on the basis of a public safety ground; or
- (b) a road manager for a road
- (c) a reviewable decision made by an authorised officer.

**Recommendation 11**

**The forthcoming amendment Bill should amend subclauses (2) and (3) of clause 140 as follows:**

**Clause 140 Obtaining consent of road authority if particular road manager refuses to give consent**

(2) The Regulator must review the decision or consent under subsection (1) paragraph (b) (i) or (ii) and if the Regulator is satisfied on reasonable grounds that the decision or consent was made or granted on grounds that do not comply with the Regulator's guidelines or any other guidelines applying under this Law the Regulator must ask the relevant road authority to consent to the grant.

(3) When the Regulator asks the relevant road authority for consent under this section, the road authority must decide to give or not to give the consent—

- (a) within 3 months of the request; or
- (b) within a longer period, of not more than 6 months, agreed to by the Regulator.

### 3. About the Australian Trucking Association

The Australian Trucking Association is the peak body representing trucking operators. The ATA's direct members include state and sector trucking associations, some of Australia's major logistics companies and businesses with leading expertise in truck technology.

In total, the ATA represents many thousands of trucking businesses, both large and small.

### 4. About this submission

This submission was developed with the support of a comprehensive legal advice prepared by the Special Counsel at Lord Commercial Lawyers, Tony Hulett. The ATA would like to acknowledge Mr Hulett's exceptional contribution to the submission. The views expressed in the submission; however, are entirely those of the ATA.

This submission recommends one immediate amendment to the Heavy Vehicle National Law Bill 2011 (recommendation 1). Recommends 2-11 propose amendments to the forthcoming Bill that is intended to amend the Heavy Vehicle National Law before it takes effect.

### 5. The case for national heavy vehicle laws

The trucking industry is subject to a maze of inconsistent government regulation, despite years of work to harmonise the road freight laws through a model law process. These inconsistencies reduce safety and impose additional costs on every Australian business and consumer.

The Heavy Vehicle National Law RIS estimated that the economic gains from a single national approach to regulation could total \$12.4 billion in net present value terms.<sup>1</sup> These gains could include:

#### *Improvements to restricted vehicle access*

More than half the economic benefits from the HVNL (\$7 billion) are expected to come from increasing the industry's productivity by improving the use of restricted vehicles on the road network.<sup>2</sup>

These vehicles, which include B-doubles and B-triples, can only operate on roads where their use is specifically allowed. As the table below shows, they can carry much more freight than rigid trucks or conventional semitrailers. Increasing their use would reduce the growth in the number of trucks on the road, reduce the growth in congestion and improve safety.

	<b>GCM</b>	<b>Trips to deliver 1000 tonnes of freight</b>	<b>Emissions per 1000 tonnes of freight (three axle rigid=100)</b>
Three axle rigid GML	22.5	77	100
Six axle semitrailer GML	42.5	42	92
B-double GML	62.5	26	75
B-triple GML	82.5	20	63

Many trucking operators have not been able to use these vehicles due to decisions by the local authorities that control the 'first and last mile' of the road network. Local government decision-making on road access can be:

- extremely slow, with decisions sometimes taking more than 150 days;
- uninformed by an understanding of the performance characteristics of these vehicles;
- lacking in transparency;

<sup>1</sup> National Transport Commission, *Heavy Vehicle National Law Regulation Impact Statement*, September 2011, p15.

<sup>2</sup> *ibid.*

- inconsistent; and
- lacking in access to appeal mechanisms.

#### *Improvements to the vehicle standard rules*

Improving and harmonising the vehicle standards applying to trucks could save the industry \$100 million in NPV terms.<sup>3</sup>

For example, the vehicle standards currently require B-doubles to be fitted with spray suppression devices, which cost about \$1,500 to fit and \$250 per year to maintain.

Western Australia and the Northern Territory did not adopt the standard. B-double operators in those jurisdictions do not need to fit the devices, but then cannot operate their trucks in any other state.

Meanwhile, international research has shown the devices do not improve safety. They are ineffective.<sup>4</sup>

#### *Consistent speed and fatigue laws*

Most Australian jurisdictions now have broadly consistent speed and fatigue laws, but differences still remain. Eliminating these differences could save the industry \$1.25 billion in NPV terms, the RIS estimates.<sup>5</sup>

These differences include:

- the model fatigue law says that drivers engaged in work beyond a 100 kilometre radius from their home base must carry a work diary. In Queensland, the allowable radius is 200 kilometres; in Tasmania, all drivers must carry a work diary. There is no evidence that links the work diary limit to the incidence of truck crashes.<sup>6</sup>
- New South Wales requires trucking operators to undertake a yearly review of how they manage the risk of fatigue and speed violations. The other states give operators more flexibility in the processes they use to manage fatigue and speed risks.<sup>7</sup>
- the model fatigue law provides a defence, in some circumstances, for drivers who are required to take a 15 minute rest break and cannot find a safe place to stop, provided the driver takes the break within 45 minutes. This defence is not available in Victoria or New South Wales.<sup>8</sup>

Resolving these inconsistencies would not just create cost savings. It would improve safety and compliance as well, because operators and drivers are more likely to comply with fatigue and speed laws that are consistent and clearly based on the safety evidence.

## **6. Heavy Vehicle National Law Bill 2011**

The starting point for the Heavy Vehicle National Law Bill 2011 was the 13 model laws originally developed by the National Transport Commission. The drafters of the Bill also considered the differences in the states' implementation of the model laws, as well as recommendations from an expert panel that did not involve industry.

It was decided to introduce the Bill into the Queensland Parliament, but it is intended to have national effect. The other states and territories in the national scheme are to pass their own legislation specifying that the Heavy Vehicle National Law set out in the schedule to the Queensland law is the law in their jurisdiction also.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*, p73-74.

<sup>5</sup> *ibid.*, p15.

<sup>6</sup> *ibid.*, p27.

<sup>7</sup> *ibid.*, p28.

<sup>8</sup> *ibid.*, p26.



The draft Bill was released in February 2011. The ATA and its legal advisers identified 245 issues with the draft, ranging from serious issues of principle to minor drafting errors. This number increased to 1,020 after the state and territory road agencies scrutinised the draft.

On 4 November 2011, Australia's transport ministers agreed to go ahead with the Bill. They also agreed there would need to be a second, amending Bill to fix the issues with the first.

Many of the amendments required are technical, and can be dealt with through discussions between the ATA and its members, the National Heavy Vehicle Regulator Project Office, and other industry associations and unions.

Other amendments, and especially the ones proposed in this submission, are more fundamental. From the ATA's point of view, it is imperative that they are part of the Heavy Vehicle National Law when it commences on 1 January 2013.

Australia's transport ministers have agreed to this approach, but the agreement does not have legal effect.

Accordingly, the ATA recommends an amendment to section 2 of the Bill, so the substantive provisions of the Heavy Vehicle National Law do not come into effect until the commencement of the amending Bill. Under the ATA's proposed amendment, chapter 12 of the Law, which establishes the National Heavy Vehicle Regulator, could still commence on 1 July 2012 as planned.

## Recommendation 1

**The Queensland Parliament should pass the Heavy Vehicle National Law Bill 2011, but section 2 should be amended as follows:**

### 2 Commencement

(1) Chapter 12 of this Act commences on a day to be fixed by proclamation.

(2) Chapters 1-11 and 13 of this Act commence on a day to be fixed by proclamation which shall be the same day as the *Heavy Vehicle National Law Amendment Act 2012* commences.

(3) The *Acts Interpretation Act 1954*, section 15DA applies to the provisions of this Act as if—

- (a) the references in subsections (2) and (3) of that section to 1 year were a reference to 2 years; and
- (b) the reference in subsection (3) of that section to 2 years were a reference to 3 years.

## 7. Chain of responsibility

The HVNL recognises that road safety is not just the responsibility of heavy vehicle drivers. It recognises that all the parties in the supply chain – including trucking operators, schedulers and even the industry's customers – must take responsibility for their actions, lack of action, or demands.

ATA strongly supports this chain of responsibility model, which is gradually changing behaviour across the whole road transport supply chain.

### 7.1 Recent chain of responsibility cases

The courts in New South Wales, Victoria and Queensland have now heard a series of chain of responsibility cases under existing, state-based legislation.

In NSW, the RTA has brought more than 2,104 charges against 172 individuals, including 685 charges against consignees, 512 charges against consignors, 690 charges against operators and 188 charges against 14 individual company directors.<sup>9</sup>

In one case, the director of a trucking business was held personally liable for 89 mass and dimension offences, and was required to pay more than \$158,000 in fines, court costs and professional fees.<sup>10</sup>

Bartter Enterprises – Steggles – was convicted of inducing or rewarding breaches of road transport law after it negligently accepted substantially or severely loaded trucks on 31 occasions. It was required to pay more than \$54,000 in fines and costs.<sup>11</sup>

In Victoria, bulk-transporter Ag Spread was fined \$95,000 after the Victorian Magistrates' Court upheld 85 fatigue charges against the company, which included 52 counts of exceeding allotted work hours and 19 counts of possessing falsified work diary records.<sup>12</sup>

The only figures available for Queensland are some years old, but they suggest the largest single fine imposed in the state so far is \$165,400 for 306 counts of breaching driving hours regulations.<sup>13</sup>

These high-profile cases show the success of the chain of responsibility concept, and confirm that chain of responsibility offences can carry very high penalties for both businesses and individuals. The penalties for individual offences may be quite low, but road transport prosecutions are normally brought by aggregating large numbers of offences together.

This point is important in considering the burden of proof in chain of responsibility prosecutions (section 7.6).

## 7.2 Implementation of chain of responsibility in the HVNL

The HVNL imposes the chain of responsibility model in three areas:

- mass dimension and load restraint (mdlr);
- fatigue; and
- speeding.

In the speeding and fatigue areas the parties in the chain of responsibility are expressly defined.<sup>14</sup> In addition, the speeding and fatigue provisions impose positive obligations upon certain chain parties to take 'reasonable steps' to make sure a driver does not speed or drive while fatigued. Clause 177 is an example:

### 177 Duty to ensure driver's schedule will not cause driver to exceed speed limit

(1) A scheduler for a heavy vehicle must take all reasonable steps to ensure the schedule for the vehicle's driver will not cause the driver to exceed a speed limit applying to the driver.

Examples of reasonable steps—

- consulting drivers about their schedules and work requirements
- taking account of the average speed that can be travelled lawfully on scheduled routes
- allowing for traffic conditions or other delays in schedules
- contingency planning concerning schedules

Maximum penalty—\$8000.

<sup>9</sup> [www.rta.nsw.gov.au/heavyvehicles/complianceenforcement/cor/enforcement\\_statistics/index.html](http://www.rta.nsw.gov.au/heavyvehicles/complianceenforcement/cor/enforcement_statistics/index.html), viewed 24 January 2012.

<sup>10</sup> [http://www.rta.nsw.gov.au/newsevents/2008/2008\\_10\\_heavyvehicleruling.html](http://www.rta.nsw.gov.au/newsevents/2008/2008_10_heavyvehicleruling.html), viewed 1 February 2012.

<sup>11</sup> Daley, M (NSW Minister for Roads). "Heavy vehicle operators learn from tough prosecutions." Media release, 12 July 2009.

<sup>12</sup> <http://www.fullyloaded.com.au/industry-news/articleid/70983.aspx>, viewed 1 February 2012.

<sup>13</sup> Queensland Transport Chain of Responsibility (COR) Forum, Wynnum Manly Rugby League Football Club, 7 February 2006.

<sup>14</sup> The term is defined in clause 5 and the full definitions appear in clauses 184 (speeding) and 197 (fatigue).

## Notes—

1 Section 564 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

2 Section 565 sets out 1 method by which a scheduler for a heavy vehicle can take all reasonable steps for this section.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

**178 Duty not to cause driver to drive if particular requirements not complied with**

A scheduler for a heavy vehicle must not cause the vehicle's driver to drive the vehicle unless—

- (a) the scheduler has complied with section 177; and
- (b) the driver's schedule for driving the vehicle allows—
  - (i) for compliance with all speed limits; and
  - (ii) for the driver to take all required rest in compliance with all laws regulating the driver's work times and rest times; and
  - (iii) for traffic conditions and other delays that could reasonably be expected.

Examples for subparagraph (iii)—

- the actual average speed able to be travelled lawfully and safely by the driver on the route to be travelled by the heavy vehicle
- known traffic conditions, for example, road works or traffic congestion on the route
- delays caused by loading, unloading or queuing

Maximum penalty—\$4000.

These obligations are positive and any prosecution for failure to take reasonable steps is on the conventional burden of proof basis. However extended liability provisions make chain parties automatically liable if the driver is convicted of an offence against the relevant provisions. The burden of proof is upon the chain party to establish that the chain party took reasonable steps.

The fatigue and speed provisions in the Bill also prohibit requests or contracts that would cause or encourage drivers to drive in excess of the speed limit or while fatigued.<sup>15</sup>

The mdlr provisions are drafted quite differently. They do not impose positive duties – liability simply attaches to the nominated parties if a driver commits an offence against the relevant provisions.<sup>16</sup> They do not prohibit requests or contracts that would cause or encourage mdlr breaches.

It should be noted that it is possible for a person or company to have more than one role in the chain, but people or companies can only be punished once in relation to the same contravention.<sup>17</sup>

It is also possible, although not specifically dealt with, for parties in the chain either to be the company carrying out the chain role or the employee of that company who carries out the particular function comprised in the chain role. For example, the role of a loading manager could be carried out by Transport Company Ltd or Bob Smith who is employed by Transport Company Ltd in that capacity.

**7.3 ATA amendments to the chain of responsibility provisions**

The ATA strongly supports the chain of responsibility model, but this submission makes a number of recommendations about the provisions in the Bill. These would:

- amend the 'reasonable steps' defence (section 7.4)
- recast the mdlr section to impose positive duties on chain participants and prohibit requests or contracts that could cause or encourage mdlr breaches (section 7.5);
- bring the penalties for drivers who breach the mdlr provisions into line with the other penalties in the Bill (section 7.5);

<sup>15</sup> HVNL clauses 185-186 (speeding) and 210-211 (fatigue).

<sup>16</sup> HVNL clause 153 provides liability upon all in the chain for a driver's contravention of an mdlr requirement and clause 154 provides for liability upon all in the chain for a driver's contravention of a mass limit traffic offence.

<sup>17</sup> HVNL clause 184(2) in relation to speeding and clause 197(2) in relation to fatigue. There is no specific clause in the mdlr provisions but it is possible as a matter of interpretation. Clause 574 deals with multiple offences.

- bring the Bill into line with the standards set out by the High Court in Kirk (section 7.5);
- provide a defence against mass charges for operators that rely on weight certificates from certified private weighbridges or weight measurements from approved weighing equipment. (section 7.5); and
- ensure individuals are innocent until proven guilty (section 7.6).

These amendments would strengthen the Bill by imposing positive duties on chain participants to prevent mass, dimension and load requirement breaches. At the same time, the amendments would add fairness to the Bill by bringing it into line with fundamental criminal law principles.

#### 7.4 Reasonable steps

Under the Bill, and the existing state legislation, parties in the chain of responsibility have access to what is known as the reasonable steps defence. The defence is set out in clause 560 of the HVNL:

##### 560 Reasonable steps defence

If, in relation to a provision of this Law, a person has the benefit of the reasonable steps defence, it is a defence to a charge for an offence against the provision for the person charged to prove that—

- (a) the person did not know, and could not reasonably be expected to have known, of the contravention concerned; and
- (b) either—
  - (i) the person took all reasonable steps to prevent the contravention; or
  - (ii) there were no steps the person could reasonably be expected to have taken to prevent the contravention.

To rely on the reasonable steps defence, a person charged must first prove that he or she did not know, or could not reasonably be expected to have known, of the contravention concerned.

The language is rather broad but it seems clear that the intention is to preclude a person involved in a contravention from relying on the defence. But this raises the possibility that:

- (a) a person charged could have been involved in a contravention, but still have taken reasonable steps to prevent it.
- (b) a person could know of a contravention, but may have had no involvement in it and may not have been in a position to take any reasonable steps to prevent it.

As a result of clause 560(a), these individuals would not be able to rely on the reasonable steps defence, even though there was nothing they could have reasonably done to prevent the contravention. This is clearly unfair, and the ATA recommends that clause 560(a) should be deleted in the forthcoming amendment Bill.

#### Recommendation 2

**The forthcoming amendment Bill should delete clause 560(a), in conjunction with the ATA's other chain of responsibility amendments.**

#### 7.5 Mass, dimension and load restraint

As section 7.2 points out, the mdlr provisions of the Bill do not generally impose positive duties on chain parties to take reasonable steps to prevent contraventions.<sup>18</sup>

Instead, each chain party, including the driver, commits an offence if a vehicle is driven in contravention of an mdlr requirement. Parties have the benefit of the reasonable steps defence if they are prosecuted, but do not have an obligation to take reasonable steps to comply with the law.

<sup>18</sup> The only exceptions are in Division 4, and relate to container weight declarations.

The fatigue and speeding sections of the Bill take a different approach. Chain parties have a positive obligation to take reasonable steps to ensure compliance with the relevant provisions. However, these obligations are on a conventional burden of proof basis with extended liability to chain parties only if a driver is convicted of an offence.

### *Imposing positive mdlr duties on chain participants*

In the ATA's view, the mdlr provisions in the Bill should be redrafted to impose positive mdlr duties on chain participants with respect to mass, dimension requirements and load restraint, to match the duties they already have with respect to fatigue management and speeding.

Imposing legislated duties on chain participants would mean they would have to take positive steps every day to comply with the law. As a result, more people and businesses would pay more attention to mdlr compliance.

This approach would also ensure that chain participants were subject to the normal burden of proof, with the prosecution obliged to prove they did not take reasonable steps with regard to their duties.

### **Recommendation 3**

**The forthcoming amendment Bill should include amendments to the HVNL to impose positive duties on supply chain participants in relation to mass, dimension and load restraint, as follows:**

**The definition of 'party in the chain of responsibility' in clause 5 needs to be amended, and a new definition, 'terms of consignment' inserted:**

#### **5 Interpretation**

**party in the chain of responsibility—**

- (a) for a mass, dimension or loading requirement-regulated heavy vehicle, for Division 5 of Part 4.7A, has the meaning given by section 152J.
- (b) for a heavy vehicle, for Division 5 of Part 5.2, has the meaning given by section 184; or
- (c) for a fatigue-regulated heavy vehicle, for Chapter 6, has the meaning given by section 197.

**terms of consignment** means any requirement whether verbal or in writing or direct or indirect under which goods are or are to be conveyed by road transport including but not limited to any requirement in relation to loading or delivery times.

**A new part, 4.7A should be added to the Bill, as follows:**

#### **Part 4.7A Particular duties and offences**

##### **Division 1 Employers, prime contractors and operators**

##### **152A Duty of employer, prime contractor or operator to ensure business practices will not cause driver to breach a mass, dimension or loading requirements**

(1) A relevant party for the driver of a heavy vehicle must take all reasonable steps to ensure the relevant party's business practices will not cause the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10,000.

Notes—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

2 Section 563 sets out 1 method by which an operator can take all reasonable steps for this section.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

(3) In this section—

**business practices**, of a relevant party for the driver of a heavy vehicle, means the practices of the relevant party in running the relevant party's business, and includes each of the following—

- (a) the operating policies and procedures of the business;
- (b) the human resource and contract management arrangements of the business;
- (c) arrangements for managing mass, dimension and loading requirements

**relevant party**, for the driver of a heavy vehicle, means any of the following—

- (a) an employer of the driver if the driver is an employed driver;
- (b) a prime contractor of the driver if the driver is a self-employed driver;
- (c) an operator of the vehicle if the driver is making or is to make a journey for the operator.

### **152B Duty of employer not to cause driver to drive if particular requirements not complied with**

An employer of an employed driver of a heavy vehicle must not cause the driver to drive the heavy vehicle unless—

- (a) the employer has complied with section 152A; and
- (b) the employer is reasonably satisfied each loader, packer and loading manager for the vehicle has complied with sections 152D, 152E and 152F

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

### **152C Duty of prime contractor or operator not to cause driver to drive if particular requirements not complied with**

(2) This section applies to—

- (a) a prime contractor of a self-employed driver of a heavy vehicle (the **driver**); and
- (b) an operator of a heavy vehicle that is to be driven by someone else (also the **driver**).

(2) The prime contractor, or operator, must not cause the driver to drive the heavy vehicle unless—

- (a) the prime contractor, or operator, has complied with section 152A; and
- (b) the prime contractor, or operator, is reasonably satisfied each loader, packer and loading manager for the vehicle has complied with sections 152D, 152E and 152F.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

## **Division 2 Packers and Loaders**

### **152D Duty to ensure driver's load will not cause driver to breach a mass, dimension or loading requirement**

(1) A loader or packer for a heavy vehicle must take all reasonable steps to ensure the load of a heavy vehicle will not cause the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Notes—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

#### **152E Duty not to cause driver to drive if particular requirements not complied with**

A loader or packer for a heavy vehicle must not cause the vehicle's driver to drive the vehicle unless—

- (a) the loader or packer has complied with section 153C; and
- (b) the driver's load allows or compliance with all laws regulating the vehicle's mass, dimension and load requirements

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

### **Division 3 Loading managers**

#### **152F Duty to ensure loading arrangements will not cause driver to breach mass, dimension or load requirements**

(1) A loading manager must take all reasonable steps to ensure that the loading of goods onto and unloading of goods from heavy vehicles will not cause the driver of a heavy vehicle to drive the vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Notes—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

(3) In this section—

**loading manager** means a person who—

- (a) manages, or is responsible for the operation of, regular loading or unloading premises for heavy vehicles; or
- (b) has been assigned by a person mentioned in paragraph (a) as responsible for supervising, managing or controlling, directly or indirectly, activities carried out a loader or unloader of goods at the premises.

## **Division 4 Particular consignors and consignees**

### **152GA Consignors to whom Div 4 applies**

This Division applies to a consignor who engages a particular operator of a heavy vehicle, either directly or through an agent or other intermediary, to transport goods for the person by road.

### **152GB Consignees to whom Div 4 applies**

This Division applies only to a consignee of goods—

(a) who has consented to being, and is named or otherwise identified as, the intended consignee of goods in the transport documentation relating to the transport of the goods by road by a particular operator of a heavy vehicle; and

(b) who knows, or who ought reasonably to know, that the goods are to be transported by road.

Note—

See section 572 for the matters a court must consider when deciding whether a person ought reasonably to have known something.

### **152H Duty to ensure terms of consignment will not cause driver to exceed mass, dimension or loading requirement**

(1) A consignor or consignee of goods must take all reasonable steps to ensure the terms of consignment will not cause the relevant driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

(2) A consignor or consignee of goods must take all reasonable steps to ensure the terms of consignment will not cause a relevant party for the relevant driver to cause the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Notes for subsections (1) and (2)—

1 Section 562 sets out some of the factors a court may consider in deciding whether a person has taken all reasonable steps.

(3) A person charged with an offence against subsection (1) or (2) does not have the benefit of the mistake of fact defence for the offence.

(4) In this section—

**relevant driver**, for consigned goods, means the driver of the heavy vehicle by which the goods are to be or are being transported.

**relevant party**, for the relevant driver for consigned goods, means—

- (a) an employer of the driver if the driver is an employed driver; or
- (b) a prime contractor of the driver if the driver is a self-employed driver; or
- (c) an operator of the heavy vehicle by which the goods are transported if the driver is to make, or is making, a journey for the operator.



### **152I Duty not to make a demand that may result in driver breaching mass, dimension or loading requirement**

A consignor or consignee of goods must not make a demand that affects, or may affect, a mass dimension or loading requirement in relation to a heavy vehicle unless—

- (a) the consignor or consignee has complied with section 152H; and
- (b) the consignor or consignee is reasonably satisfied the making of the demand will not cause a person to contravene sections 72, 84 or 92.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

### **Division 5 Particular requests etc. and contracts etc. prohibited**

#### **152J Who is a party in the chain of responsibility**

(1) For this Division, each of the following persons is a **party in the chain of responsibility** for a heavy vehicle—

- (a) an employer of the vehicle's driver if the driver is an employed driver;
- (b) a prime contractor for the vehicle's driver if the driver is a self-employed driver;
- (c) an operator of the vehicle;
- (d) a loader or packer of any goods in the vehicle;
- (e) a loading manager of any goods in the vehicle;
- (f) a consignor of any goods for transport by the vehicle that are in the vehicle;
- (g) a consignee of any goods for transport by the vehicle that are in the vehicle.

Note—

The exercise of any of these functions, whether exclusively or occasionally, decides whether a person falls within any of these definitions, rather than the person's job title or contractual description.

(2) A person may be a party in the chain of responsibility for a heavy vehicle in more than 1 capacity.

Example—

A person may be simultaneously the driver's employer, an operator and a consignor of goods in relation to a heavy vehicle and be subject to duties in each of the capacities.

#### **152K Particular requests etc. prohibited**

A person must not ask, direct or require, directly or indirectly, the driver of a heavy vehicle, or a party in the chain of responsibility for a heavy vehicle, to do something the person knows, or ought reasonably to know, would have the effect of causing the driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle.

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Note—

See section 572 for the matters a court must consider when deciding whether a person ought reasonably to have known something.

#### **152L Particular contracts etc. prohibited**

(1) A person must not enter into a contract or other agreement with the driver of a heavy vehicle, or with a party in the chain of responsibility for a heavy vehicle, that the person knows, or ought reasonably to know, would have the effect of causing the vehicle's driver to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

(2) A person must not enter into a contract or other agreement with the driver of a heavy vehicle, or with a party in the chain of responsibility for a heavy vehicle, that the person knows, or ought reasonably to know, would encourage or provide an incentive for the vehicle's driver, or a party in the chain of responsibility for the vehicle to cause the vehicle's driver, to drive a heavy vehicle in breach of a mass, dimension or loading requirement applying to the vehicle

Maximum penalty—

- (a) for a minor risk breach—\$3000; or
- (b) for a substantial risk breach—\$5000; or
- (c) for a severe risk breach—\$10000.

Notes for subsections (1) and (2)—

1 See section 572 for the matters a court must consider when deciding whether a person ought reasonably to have known something.

2 See also section 677, which provides that particular contracts or other agreements are void.

## **Division 6 Provisions about offences against this Part**

### **152M Objective reasonableness test to be used in deciding causation**

(1) This section applies in relation to a proceeding for an offence against this Part that may be committed by a person failing to take all reasonable steps to ensure someone else does not drive a heavy vehicle in breach of mass, dimension or loading requirements applying to the vehicle driver (prohibited act).

(2) For subsection (1), a person failing to take all reasonable steps to ensure someone else does not do a prohibited act includes—

- (a) the person failing to take reasonable steps to ensure the other person does not do the prohibited act; and
- (b) the person failing to take reasonable steps to ensure the person's activities, or anything arising out of the person's activities, do not—
  - (i) cause the other person to do the prohibited act; or
  - (ii) result in the other person doing the prohibited act; or
  - (iii) provide an incentive for the other person to do the prohibited act.

(3) Subsection (4) applies if—

- (a) a person does an act or makes an omission; and
- (b) as a result of the act or omission someone else does a prohibited act.

(4) A court may find the person caused the other person to do the prohibited act if the court is satisfied a reasonable person would have foreseen that the person's act or omission would be reasonably likely to cause the other person to do the prohibited act.

## **Part 4.8 needs to be amended:**

### **Part 4.8 Extended liability**

#### **153 Liability of employer etc. for driver's contravention of mass, dimension or loading requirement**

(1) If the driver of a heavy vehicle is convicted of an offence against section 78, 84 or 92, each of the following persons is also taken to have committed an offence—

- (a) an employer of the driver if the driver is an employed driver;
- (b) a prime contractor of the driver if the driver is a self-employed driver;

- (c) an operator of the vehicle or, if it is a combination, an operator of a vehicle in the combination;
- (d) a consignor of any goods for road transport using the vehicle that are in the vehicle;
- (e) a packer of any goods in the vehicle;
- (f) a loading manager of any goods in the vehicle;
- (g) a loader of any goods in the vehicle.
- (h) a consignee of any goods for road transport using the vehicle that are in the vehicle.

Maximum penalty—the penalty for a contravention of the provision by the driver of the heavy vehicle.

(2) A person charged with an offence against subsection (1) does not have the benefit of the mistake of fact defence for the offence.

(3) However, in a proceeding for an offence against subsection (1), the person charged has the benefit of the reasonable steps defence for the offence.

*Note—*

See Divisions 1 and 2 of Part 10.4 for the reasonable steps defence.

(4) In a proceeding for an offence against subsection (1)—

- (a) evidence a court has convicted the driver of the offence against section 78, 84 or 92 is evidence that the offence happened at the time and place, and in the circumstances, stated in the charge resulting in the conviction; and
- (b) evidence a fine sought by an infringement notice for the offence against section 78, 84 or 92 has been paid is evidence that the offence happened at the time and place, and in the circumstances, stated in the infringement notice.

**Clause 165 (extended liability provisions relating to consignees) should be deleted, since this is now covered in clause 153.**

**And clause 563(1) should be amended:**

**563 Reliance on container weight declaration—offences about mass**

(1) This section applies if a person is charged with an offence involving a contravention of a mass requirement for the vehicle and is seeking to prove the reasonable steps defence in relation to the offence.

*Penalties for mass, dimension and load restraint offences*

Clauses 78, 84 and 92 impose penalties on a drivers for breaches of mass (clause 78), dimension (clause 84) and loading (clause 92) requirements.

The maximum penalties range from \$3,000 for a minor risk breach of a dimension requirement to \$10,000 for severe risk breaches of any of the requirements.

These penalties are dramatically out of line with the other penalties in the Bill. It is difficult to see why a driver should be subject to a \$10,000 penalty for a severe risk breach of the mass requirements,<sup>19</sup> while a driver who commits a severe risk breach of the fatigue requirements is subject to a maximum penalty of \$6,000.<sup>20</sup> This is just one example.

The penalties are also excessive because many drivers have little control over the loading process. In many parts of the industry, the days when drivers loaded their own truck or even supervised it are long gone.

The ATA therefore proposes reducing these penalties to more reasonable levels. Drivers who carry out other roles in the supply chain (for example, drivers who are also operators, loaders or packers) could be prosecuted for breaching the positive duties imposed under ATA recommendation 3.

<sup>19</sup> HVNL clause 78(1)(c)

<sup>20</sup> HVNL clause 220(1)(d)

## Recommendation 4

**The forthcoming amendment Bill should reduce the maximum penalties under clauses 78, 84 and 92 as follows:**

**Minor risk breach—\$1,000**  
**Substantial risk breach—\$2,000**  
**Severe risk breach—\$5,000**

### *False or misleading information*

Clauses 157(7) and 158(7) deal with the way in which a proceeding for false or misleading information in transport documentation or a container weight declaration might be pleaded.

Under these clauses, a charge would simply need to specify that a transport document or container weight declaration was ‘false or misleading’ without specifying if it was ‘false’ (which in this context might be a fabricated document) or was ‘misleading’ (for example, a genuine document that was missing relevant information).

In the ATA’s view, these provisions do not comply with the standards set down by the High Court in *Kirk*.<sup>21</sup> In its judgement, the Court pointed out that: ‘a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge.’

This is a basic principle of criminal law: the particular ‘act, matter or thing’ that constitutes an offence must be stated to allow the accused to rely on any defence that may apply to them. This has also been expressed as a duty the prosecution owes to the court so that it can hear the matter fully at first instance.<sup>22</sup> It is sufficient that something specific is identified; the prosecution is not required to provide exhaustive details in its charges.<sup>23</sup>

In *Kirk*, the prosecution failed to fulfil this requirement and merely repeated the relevant provisions of the NSW *Occupational Health and Safety Act* in its charges against the accused.<sup>24</sup> Its failure led to the quashing of the convictions after protracted litigation to the New South Wales Supreme Court of Appeal and the High Court on the grounds that the Industrial Relations Commission (IRC) had no power to hold the accused guilty when there were no offences proved.<sup>25</sup>

Accordingly, the ATA recommends deleting clauses 157(7) and 157(8). It should be noted that it would still be an offence to use a false or misleading transport document or container weight declaration. The amendments would simply require the prosecution to be specific about the details of the offence charged.

## Recommendation 5

**The forthcoming amendment Bill should delete clauses 157(7) and 157(8).**

### *Private weighbridges and on-board weight devices*

One issue regularly experienced by operators in relation to mass offences is the refusal by regulators to recognise weighbridge certificates issued by duly licensed and certified weighbridge operators. Similarly, the

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<sup>21</sup> *Kirk v Industrial Relations Commission of New South Wales* 239 CLR 531 at 532-536. Mr Kirk was the director of a company that owned a farm near Picton, but did not take an active part in running the property. He left the day to day operation of the farm to an experienced farm manager. The farm manager drove an ATV down a steep slope despite the existence of a formed road nearby. The manager was killed. Kirk was charged with failing to ensure the health, safety and welfare at work of the manager.

<sup>22</sup> *Kirk v Industrial Relations Commission; Kirk Group Holding Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) (‘Kirk’ case)* [2010] HCA 1 (3 February 2010) at [26].

<sup>23</sup> *ibid.*

<sup>24</sup> 2000 (NSW). *ibid.*

<sup>25</sup> *ibid* at [73]-[76].

innovative weight devices now available can provide a record of a vehicle's weight, but these devices are not recognised for legal purposes.

The provisions in clause 562 dealing with the matters a court may take into account in determining if an operator has taken reasonable steps are general in scope and, in our opinion, more precise provisions to cover weighbridges and weight devices are warranted.

The ATA suggests there might be included in the HVNL a mirror provision to Clause 563 which deals with reliance on container weight declaration, although that provision is not entirely satisfactory.

Accordingly, the ATA recommends that a weighbridge certificate issued by a duly licensed and certified weighbridge operator or the weight record from an approved weight device should be conclusive proof in the absence of any evidence to the contrary of the matters stated therein.

## Recommendation 6

**The forthcoming amendment Bill should amend the HVNL to provide that dockets from a duly licensed and certificated weighbridge, or records from an approved weighing device, are conclusive proof of the weight of a vehicle, as follows:**

### Schedule

#### to be inserted between VIN and work in Clause 5

***weighbridge*** means a duly registered and licensed weighbridge in the jurisdiction of its location

***weighbridge certificate*** means a certificate issued by the operator of a weighbridge

***weighing device*** means an onboard weighing device or any other device approved by the Regulator under subsection 563A (2)

#### **563A Reliance on weighbridge certificate or weighing device - offences about mass**

(1) In any proceeding for an offence involving a contravention of a mass requirement the person charged shall, in the absence of any evidence to the contrary, be entitled to rely on the contents of a weighbridge certificate accompanying the heavy vehicle or the records produced by a weighing device as prima facie and conclusive evidence of the weight of the load on the heavy vehicle.

(2) The Regulator may approve a weighing device for the purposes of subsection (1) which approval shall take effect upon publication in the Commonwealth Gazette and which approval shall be subject to such terms and conditions as the regulator may impose. The Regulator may vary or revoke any such approval at any time and any variation or revocation shall take effect upon publication in the Commonwealth Gazette.

## 7.6 Liability of directors, executive officers, partners and unincorporated business managers

Clauses 576, 578 and 579 of the Bill impose an extended liability regime on directors, executive officers, partners, and managers of unincorporated businesses. Under the clauses, these individuals automatically commit an offence if their business commits an offence. They are presumed to be guilty, and must prove their innocence.

Clause 576, for example, reads as follows:

### **576 Liability of executive officers of corporation**

(1) If a corporation commits an offence against a provision of this Law, each executive officer of the corporation also commits an offence against the provision.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(2) However, it is a defence for an executive officer to prove—

(a) if the officer was in a position to influence the conduct of the corporation in relation to the offence, the officer exercised reasonable diligence to ensure the corporation complied with the provision; or

(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

(3) An executive officer of a corporation may be proceeded against and convicted for an offence against the provision whether or not the corporation has been proceeded against or convicted under that provision.

(4) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under the provision.

(5) This section does not apply to an executive officer acting on a voluntary basis, whether or not the officer is reimbursed for the expenses incurred by the officer for carrying out activities for the corporation.

Clauses 578-579 impose similar requirements on the partners in business partnerships and the managers of unincorporated businesses. This would include small trucking businesses where one partner drives a truck and the other does the books and organises work from home.

The ATA has serious concerns about these provisions. They breach one of the fundamental principles of our legal system, the presumption of innocence, without adequate justification. The provisions are also inconsistent with the *Work Health and Safety Act 2011* (Qld) and the COAG principles on directors' liability.

#### *Why the presumption of innocence is critical*

The presumption of innocence is the golden thread that runs through our legal system.

The presumption of innocence is critical because the state has much greater resources to prove its case than any defendant. And in any case, it is hard and can be impossible for an individual to prove they have not done something. There is, by definition, no evidence they can produce.

The *Legislative Standards Act 1992* (Qld) recognises that the presumption of innocence is a fundamental legislative principle that should only be reversed with adequate justification.<sup>26</sup>

The Explanatory Notes list four justifications for reversing the onus of proof:

- compelling public policy reasons;
- all parties in the chain should be expected to prove that they take reasonable steps or due diligence to prevent on-road breaches;
- extending liability to managers is fairer as many parties are small businesses where the controlling mind of the manager cannot be distinguished from the business; and
- these prescriptive penalties have relatively low penalties and extending liability to managers does not expose the manager to excessive financial risk.<sup>27</sup>

These justifications are without merit and do not provide a sufficient case for reversing the onus of proof. The first three points – which essentially argue that managers should be liable for their decisions – is not in contention and can be achieved without reversing the onus of proof.

We are left with point four, the argument that managers are not exposed to excessive financial risk because the penalties for offences under the HVNL are relatively low.

This argument is mistaken. Chain of responsibility offences can carry very high penalties for businesses and individuals, as section 7.1 of this submission points out. The penalties for individual offences may be quite low, but road transport prosecutions are normally brought by aggregating large numbers of offences together.

<sup>26</sup> *Legislative Standards Act* (Qld), s4(d).

<sup>27</sup> Explanatory Notes pp14-15

Given the potentially high penalties for chain of responsibility breaches, there is no justification for reversing the burden of proof.

#### *Inconsistency with the Work Health and Safety Act 2011*

The proposed provisions are inconsistent with the approach taken in the *Work Health and Safety Act 2011* (Qld) and the comparable laws now in place in the NSW, ACT, Northern Territory and the Commonwealth.

Under this Act, the burden of proof beyond reasonable doubt rests entirely upon the prosecution in matters relating to non-compliance with duties of care.<sup>28</sup>

The provisions in the *Work Health and Safety Act* reflect the findings of the National Review into Model OHS Laws, which examined the burden of proof issue in detail.

The review was unable to find any substantive evidence that imposing a reverse onus of proof led to better OHS results.<sup>29</sup>

It also rejected the assertion that holders of a duty of care, such as corporate officers, were in a better position than the prosecution to establish what was reasonably practical.

Quoting the High Court's decision in *Chugg*, the review warned against this assumption. It pointed out that enforcement agencies could have a wider knowledge as to the severity of, the state of knowledge about, and the availability of ways to remove or mitigate hazards or risks.<sup>30</sup>

Many safety incidents could be prosecuted under either the *Work Health and Safety Act* or the *Heavy Vehicle National Law*. It would be ludicrous if the same individuals were presumed to be innocent under the work health and safety law and at the same time presumed to be guilty under the heavy vehicle law for the same incident.

#### *Inconsistency with COAG principles*

In 2009, COAG agreed on a set of principles to be adopted nationally in relation to corporate liability and the circumstances in which directors could also be liable for corporate fault.<sup>31</sup> The principles are as follows:

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
3. A "designated officer" approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
  - (a) there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
  - (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
  - (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
    - i. the obligation on the corporation, and in turn the director, is clear;

<sup>28</sup> Explanatory Notes, Work Health and Safety Bill 2011, p35.

<sup>29</sup> *National Review into Model Occupational Work Health and Safety Laws: First Report*, p117.

<sup>30</sup> *ibid.*

<sup>31</sup> Council of Australian Governments, *Business Regulation and Competition Working Group: Report Card*, 7 December 2009, p6.

ii. the director has the capacity to influence the conduct of the corporation in relation to the offending; and

iii. there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

5. Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:

- (a) have encouraged or assisted in the commission of the offence; or
- (b) have been negligent or reckless in relation to the corporation's offending.

6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.

Although the principles refer to 'directors,' it seems clear the principles are meant to include officers as well. The two jurisdictions (NSW and South Australia) that have enacted legislation based on the COAG principles have certainly taken this to be the case.

In the ATA's view, clauses 576, 578 and 579 breach principle 2, the blanket imposition of liability across the entire Act.

#### *The ATA's solution*

The ATA has drafted alternative provisions for clauses 576, 578 and 579 in line with the fundamental principle of the presumption of innocence.

Under the ATA's alternative model, corporate officers, directors, partners and the managers of unincorporated businesses could still be prosecuted personally for chain of responsibility breaches. The prosecution would have to prove, however, that the person:

- had the capacity to influence the conduct of the organisation in relation to the offence;
- there were reasonable steps the person could have taken to prevent the offence from occurring; and
- the person did not take those steps.

#### **Recommendation 7**

**To restore the basic rights of corporate officers, directors, partners and the managers of unincorporated trucking businesses, the forthcoming amendment Bill should amend clauses 576, 578 and 579 of the Heavy Vehicle National Law as follows:**

##### **576 Liability of executive officers of corporation**

(3) If a corporation commits an offence against a provision of this Law, an officer of the corporation who the prosecution proves:

- (a) had the capacity to influence the conduct of the corporation in relation to the offence; and
- (b) there were reasonable steps the officer might have taken to ensure that the corporation complied with the provision; and
- (c) the officer failed to take those steps;

the officer also commits an offence against the provision.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(2) An officer of a corporation may be proceeded against and convicted for an offence against the provision whether or not the corporation has been proceeded against or convicted under that provision.



(3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under the provision.

(4) This section does not apply to an officer acting on a voluntary basis, whether or not the officer is reimbursed for the expenses incurred by the officer for carrying out activities for the corporation.

#### **578 Treatment of partnerships**

(1) This Law applies to a partnership as if it were a person, but with the changes set out in this section.

(2) An obligation or liability that would otherwise be imposed on the partnership by this Law is imposed on each partner instead, but may be discharged by any of the partners.

(4) An amount that would be payable under this Law by the partnership is jointly and severally payable by the partners.

(4) An offence against this Law that would otherwise be committed by the partnership is taken to have been committed by each partner.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(5) However, in any proceeding the prosecution must prove that —

- (a) the partner was in a position to influence the conduct of the partnership in relation to the offence; and
- (b) the partner failed to exercise reasonable diligence to ensure the partnership complied with the provision;

(6) For the purposes of this Law, a change in the composition of a partnership does not affect the continuity of the partnership.

#### **579 Treatment of unincorporated bodies**

(1) This Law applies to an unincorporated body as if it were a person, but with the changes set out in this section.

(2) An obligation or liability that would otherwise be imposed on the unincorporated body by this Law is imposed on each management member of the body instead, but may be discharged by any of the management members.

(3) An amount that would be payable under this Law by the unincorporated body is jointly and severally payable by the management members of the body.

(4) An offence against this Law that would otherwise be committed by the unincorporated body is taken to have been committed by each management member for the body.

Maximum penalty—the penalty for a contravention of the provision by an individual.

(5) However, in any proceeding the prosecution must prove that—

- (a) the member was in a position to influence the conduct of the body in relation to the offence; and
- (b) the member failed to exercise reasonable diligence to ensure the body complied with the provision.

(6) Also, subsections (1) to (5) do not apply to a management member of an unincorporated body acting on a voluntary basis, whether or not the member is reimbursed for the expenses incurred by the member for carrying out activities for the body.

(7) In this section—

management member, of an unincorporated body, means—

- (a) if the body has a management committee—each member of the management committee; or
- (b) otherwise—each member who is concerned with, or takes part in, the body's management, whatever name is given to the member's position in the body.

unincorporated body does not include an unincorporated local government authority.

## 8. Improving road manager access decisions

As section 5 of this submission notes, the principal economic benefits of the national heavy vehicle laws will come from improving road access for vehicles that do not comply with the general access requirements.

In fact, the RIS points out that: “The success of failure of the regulator largely hinges on its ability to promote robust and transparent decisions regarding access, because this is where the greatest productivity benefits are to be had.”<sup>32</sup>

It is therefore imperative that the Heavy Vehicle National Law provides mechanisms to improve decisions about road access. Local authorities manage 80 per cent of the road network, so to a very great extent these mechanisms must focus on improving local authority decision-making.

### 8.1 Provisions of the HVNL

Under the Bill, trucking operators would apply to the National Heavy Vehicle Regulator for the necessary mass or dimension authorities to operate a restricted access vehicle such as a B-double or an oversize vehicle like a crane on a specific route. The regulator would then ask the relevant road managers for consent to grant the authorities.<sup>33</sup>

Road managers must make a decision within 28 days after the request is made or a longer period of 6 months agreed to by the regulator.<sup>34</sup>

A road manager may only refuse consent if it is satisfied the mass or dimension authority will, or is likely to:

- (a) cause damage to road infrastructure; or
- (b) adversely affect public amenity; and
- (c) it is not possible to grant the authority subject to conditions that will avoid, or significantly minimise, the damage or likely damage to road infrastructure or the adverse, or likely adverse effect, on public amenity.<sup>35</sup>

Road managers have the ability to order a formal route assessment of a proposed route, and can charge a fee for the assessment.<sup>36</sup>

There are two mechanisms for reviewing decisions.

Under clauses 584-587, a dissatisfied applicant can apply to the regulator for a review of a decision. The regulator does not conduct the review, however. It must pass the application back to the road manager for an internal, in-house review.

Under clause 585, the review must be conducted by a different officer to the one who made the original decision. The reviewing officer must not be less senior than the original decision-maker.

<sup>32</sup> NTC, op cit, p109.

<sup>33</sup> 'mass or dimension authority' is defined in clause 5 with some other consequential definitions.

<sup>34</sup> Clause 136 (1). Under clause 136(2), the longer period of 6 months is only available if the road manager is required by law to consult with another entity or considers a route assessment necessary.

<sup>35</sup> Clause 136 (3). The road manager must also have regard to approved guidelines for mass or dimension exemptions or class 2 heavy vehicle authorisations.

<sup>36</sup> Clause 137.

Under clause 587, the decision is not subject to further appeal or review.<sup>37</sup> There is no external, merits-based appeal process to a body like the Queensland Civil and Administrative Tribunal, although an applicant could seek judicial review through the courts.

Clause 140 of the HVNL provides a second form of review if a road manager is a local council.<sup>38</sup>

The clause enables the regulator to ask the relevant state or territory road authority (such the Queensland Department of Transport and Main Roads) to provide the consent if the road manager does not provide consent or does so with unreasonable conditions.<sup>39</sup>

The relevant road authority has 3 months or up to 6 months, if agreed to by the regulator, to make a decision.<sup>40</sup>

This right to go to the relevant road authority to obtain consent is conferred on the regulator, not the applicant for an authority and is completely discretionary. The regulator is under no obligation to ask for consent.<sup>41</sup>

The Explanatory Note for clause 140 states that the regulator's power to ask the relevant authority to consent is to prevent "road managers who are not road authorities to frustrate the issuing of authorisation by means of unreasonably withholding appropriate consent."<sup>42</sup>

## 8.2 ATA amendments to the provisions

The ATA welcomes the one-stop shop approach taken in the Bill. It would reduce the complexity of applying to use trucks like B-doubles and B-triples, because the regulator would be responsible for sending applications to individual local councils, not trucking operators.

The decision-making deadlines are also welcome, given the long delays currently experienced by operators.

But these measures are not strong enough to deliver the improvements in decision-making necessary to achieve the expected productivity gains.

Unless the Bill is amended, the whole National Heavy Vehicle Regulator project will be a failure, because – as the RIS points out – its success will largely hinge on regulator's ability to promote better road access decisions.

This submission makes four recommendations to improve the road access provisions of the Bill. These would:

- provide default outcomes if road managers do not meet the decision making deadlines in the Bill (section 8.3);
- require road managers to act reasonably when they require a route assessment, and require route assessment fees to be reasonable (section 8.4);
- enable dissatisfied applicants to appeal decisions to external appeal bodies like QCAT (section 8.5); and
- require the regulator to ask road authorities to reconsider access applications when they are rejected by a road manager on grounds that do not comply with the approved guidelines (section 8.6).

The ATA amendments would benefit the trucking industry, road managers like local authorities, and the communities they represent.

For trucking operators, the amendments would improve the timeliness of road manager decisions. Operators would be able to appeal decisions to the administrative appeals tribunal in each state, which would be able to apply consistent standards.

<sup>37</sup>Clause 587(2)(b).

<sup>38</sup>Clause 140 (1)(a) – a public authority.

<sup>39</sup>Clause 140(1)(b).

<sup>40</sup>Clause 140(3).

<sup>41</sup>Clause 140(2) provides that the Regulator *may* ask the relevant road authority to consent.

<sup>42</sup>p. 96.

The amendments would also have advantages for road managers. The existence of an external appeals process would require them to make better, more defensible decisions. The appeals process would help them do this, because they would be able to consider the judgements handed down in appeals involving other road managers.

Finally, better road access decisions would benefit local communities. Replacing some conventional trucks with B-doubles and B-triples would reduce the growth in traffic on local roads. Because transport costs would go down, local businesses would be more competitive.

### 8.3 Decision-making deadlines

Clause 136 requires road managers to make road access decisions within 28 days of the application, or within six months if agreed by the regulator.

These decision-making deadlines are unlikely to be met, because there are no consequences for road managers that do not meet them. As a result, the deadlines are likely to be seen as aspirational goals that may be met at some time in the future, rather than as legal requirements.

To ensure that road managers make decisions within the timeframes required by law, the ATA recommends that a failure to make a decision about an application within the specified time should be deemed consent.

## Recommendation 8

**The forthcoming amendment Bill should add a new sub-clause (6) to clause 136, as follows:**

### 136 Deciding request for consent generally

(6) If a relevant road manager does not provide consent or written reasons to the Regulator within the period under subsection (1) (a) or (b) consent shall be deemed to have been given by the relevant road manager.

### 8.4 Route assessments

Clause 137 would enable road managers to order route assessments, and charge fees for those assessments.

In the Explanatory Notes, OQPC recommends that limitations should be placed on the ability of road managers to charge those fees. OQPC recommends that fees should be reasonable and no more than is necessary to recover the cost of the route assessment.<sup>43</sup>

The response in the Explanatory Notes to the OQPC recommendation asserts it is reasonable for fees to be recoverable. This is not in contention. It also points out that some route assessment fees could be substantial. This is also not in contention. Finally, it asserts that some jurisdictions do not impose fees. They would not be affected by the OQPC recommendation, which would cap fees, not set a minimum.

The ATA supports the OQPC recommendation, which is in line with other state laws that cap the level of fees chargeable by local authorities.<sup>44</sup>

The ATA proposes a further change to the clause to require road managers to act reasonably when they consider if a route assessment is required. This change would address the possibility that a road manager could demand route assessments as a way of discouraging applications.

<sup>43</sup>Explanatory Notes page 16 under heading *Cost recovery principles*

<sup>44</sup> For example, s97 of the *Local Government Act 2009* (Qld) allows a council to recover a cost recovery fee for an approval. It cannot be more than the cost of taking the action for which the fee is charged. Similarly, s122 of the *Road Management Act 2004* (Vic) enables a council to recover 'reasonable' fees, which cannot exceed a regulated figure.

## Recommendation 9

The forthcoming amendment Bill should amend clauses 137(1)(c) and 137(2)(b) to read:

### 137 Deciding request for consent if route assessment required

(1)(c) the road manager acting reasonably considers a route assessment is necessary for deciding whether or not to give the consent.

(2)(b) the fee payable (if any) for the route assessment under a law of the jurisdiction in which the road is situated which fee shall be reasonable and in any event not more than the cost to the road manager in conducting the route assessment.

## 8.5 Reviewing road manager decisions

Clauses 584-587 would enable an applicant to seek an internal review of a road manager's decision. The decision by the reviewing officer is not subject to external review or appeal.

Australian and international experience shows that an internal review mechanism like this is most unlikely to improve road manager decision-making.

The Australian Government's Administrative Review Council<sup>45</sup> has identified a host of problems with internal reviews. These include:

- the reluctance of senior workers to overturn the decisions of people they supervise closely. This problem is likely to be particularly acute in small organisations like local councils, where the reviewer could be the immediate supervisor or a colleague at the same level as the primary decision-maker;
- a real risk that the internal review will not be objective;
- inconsistent appeal outcomes. One of the objectives of an appeals system is to make sure that people in the same circumstances are treated in the same way, regardless of the primary decision-maker. This means that appeals need to be considered centrally, not by appeal officers located in the same office as the primary decision-maker;
- the failure of internal reviews to consider whether policies are appropriate. Internal reviews only consider if a primary decision maker applied an organisation's policies or interpretation of the law correctly; they are most unlikely to go to back to fundamentals.<sup>46</sup>

Overall, international experience shows that internal review is best suited to cases where an aggrieved person is seeking an explanation for what has been done or an apology for poor service.<sup>47</sup>

Internal review is not an effective substitute for a robust external review process, such as the process adopted by the Queensland Civil and Administrative Tribunal (QCAT).

Under the QCAT model:

- Parties can apply to QCAT for a review of many administrative decisions;
- QCAT is completely independent of the agency that made the original decision, so there are no concerns about bias or influence;
- Because QCAT hears appeals from across the state, it can apply a common set of precedents to applications and generate consistent appeal outcomes;
- QCAT can determine the matter proceeding solely on the basis of documents submitted by both parties;<sup>48</sup>
- QCAT can dispense with as much formality/technicality as it sees fit to determine the matter speedily as long as all matters are properly considered;<sup>49</sup>
- Should expert opinion be required, QCAT has the option of calling witnesses to give independent evidence to help the tribunal and apportion the costs to be paid or contributed by parties, thus

<sup>45</sup>Administrative Review Council, Report No. 44, 2000.

<sup>46</sup>Administrative Review Council op cit [3.23] [3.24] [7.1] [7.3] and [7.10]

<sup>47</sup>Rt Hon The Lord Woolf, Jeffrey Jowell, Andrew Le Sueur ; assistant editor, Catherine M. Donnelly, *De Smith's Judicial Review*, 2007, London, Sweet & Maxwell at [1-061]

<sup>48</sup>*Queensland Civil and Administrative Tribunal Act 2009* (Qld) section 32(2)

<sup>49</sup>ibid section 28(b)

allowing for a consideration of the financial capacity and relevance of evidence to each party's case;<sup>50</sup> and

- QCAT has considerable powers to refer parties to compulsory conferences or mediation to settle the matter before it progresses to a hearing stage and for mediation, does not require the consent of the parties to do so.<sup>51</sup>

OQPC has also raised concerns about the lack of appeal rights in its analysis of the Bill against Queensland's fundamental legislative principles.<sup>52</sup> It does not state which of the *FLPs* this may contravene but the clear implication is that it may affect the rights and liberties of individuals by making road access decisions subject to administrative power only without being subject to appropriate review.<sup>53</sup>

The response justifies any potential breach of the *FLPs* on the following grounds:

- road managers perform a number of functions other than maintaining roads, and being compelled to grant access may have adverse effects on the operations and finances of road managers
- it is not proposed to allow other parties affected, such as road users or occupants of adjoining land, to apply for review of these decisions and to allow applicants for access to do so would give them an advantage over these other parties directly affected by a road manager's decision
- judicial review may be available to a person aggrieved by a decision under the *HVNL* if there is a question of law to be determined. This applies to all those affected by a decision.

These responses are not a sufficient justification to depart from the general principle that administrative decisions should be subject to an external review process.

Just what adverse effects on the operations of the finances of road managers would result from external review is not explained. The RIS argues that councils would be required to source second opinions and legal expertise likely to be outside budgetary reach.

But councils already make many decisions that may be subject to external review and which require them to seek second opinions and legal expertise and which would not fall within any fixed budgetary allocation. As a justification, this claim is clearly inadequate and ignores the very large economic gains that could be generated by the reform.

The suggestion that allowing external review would be unfair to other stakeholders fails to recognise that administrative tribunals such as QCAT have many years of experience dealing with appeals where the interests of other stakeholders need to be considered, and where the merits of expert advice needs to be assessed.

The final point in the response – that judicial review is available – is totally without merit. Administrative appeals tribunals can assess the merits of a case; judicial review only considers legal issues. In any case, judicial review is prohibitively expensive: the reason that governments established administrative tribunals in the first place.

The ATA therefore recommends that road manager decisions should be subject to external, merits-based review. In Queensland, these reviews would be carried out by QCAT, as set out in section 10 of the Bill. The other states and territories in the national scheme would designate their own tribunals or courts to hear appeals as appropriate.

<sup>50</sup> *ibid* sections 97(2) and (4) and 112

<sup>51</sup> *ibid* sections 67, 75(1) and (2)

<sup>52</sup> Pages 9-27. The part dealing with *Review of road manager decisions* is on pages 16-17.

<sup>53</sup> *Legislative Standards Act 1992* section 4(3)(a)

## Recommendation 10

**The forthcoming amendment Bill should make the following amendments to the HVNL to provide for the external review of road manager decisions:**

**Delete subclause 2(b) and the first 2 lines of subclause 2(c) in clause 587, so it reads as follows:**

### **Clause 587 Notice of review decision**

(1) The Regulator must, within the prescribed period, give the applicant notice (the **review notice**) of the review decision.

(2) If the review decision is not the decision sought by the applicant, the review notice must state the following—

- (a) the reasons for the decision;
- (b) (i) that the applicant may appeal against the decision under Part 11.3; and  
(ii) how to appeal

**Amend clause 588(1) so an unsuccessful applicant may appeal against a reviewable decision made by a road manager, as follows:**

### **Clause 588 Appellable decisions**

(2) A person may appeal to the relevant appeal body against a review decision relating to a reviewable decision made by the Regulator, a road manager for a road or an authorized officer

**Make a consequential amendment to clause 589(1):**

### **Clause 589 Stay of review decision**

(2) This section applies if, under this Law, a person appeals to the relevant appeal body against a review decision relating to—

- (a) a reviewable decision made by the Regulator other than on the basis of a public safety ground; or
- (b) a road manager for a road
- (c) a reviewable decision made by an authorised officer.

## **8.6 Requests from the regulator to road authorities**

The Bill provides a second mechanism for appealing road manager decisions, but it is only available to the regulator. Under clause 140, the regulator may ask the relevant state or territory road authority to consent to the grant of a road authority and override the road manager's decision. The regulator is not obliged to make the request. The Bill does not provide any guidance about when the regulator should use this power.

Given the economic importance of improving road access for heavy vehicles, the ATA considers the regulator should be required to ask the relevant road authority for consent when a road manager refuses an application, or consents to an application with unnecessary conditions, on grounds that do not comply with the approved guidelines.<sup>54</sup>

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<sup>54</sup> Clause 594 sets out the procedure for making approved guidelines.

**Recommendation 11**

**The forthcoming amendment Bill should amend subclauses (2) and (3) of clause 140 as follows:**

**Clause 140 Obtaining consent of road authority if particular road manager refuses to give consent**

(2) The Regulator must review the decision or consent under subsection (1) paragraph (b) (i) or (ii) and if the Regulator is satisfied on reasonable grounds that the decision or consent was made or granted on grounds that do not comply with the Regulator's guidelines or any other guidelines applying under this Law the Regulator must ask the relevant road authority to consent to the grant.

(3) When the Regulator asks the relevant road authority for consent under this section, the road authority must decide to give or not to give the consent—

- (a) within 3 months of the request; or
- (b) within a longer period, of not more than 6 months, agreed to by the Regulator.