

Submission to: National Transport Commission

Title: Chain Of Responsibility Discussion Paper

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1. Introduction

The ATA provides this submission in response to the National Transport Commission's discussion paper examining if the chain of responsibility (COR) can be made more effective and fairer.

2. Australian Trucking Association

The ATA is the peak body that represents the trucking industry. Its members include state and sector-based trucking associations, some of the nation's largest transport companies, and businesses with leading expertise in truck technology.

3. Recommendations

Recommendation 1

The ATA recommends a chain of responsibility framework that is fair, reasonable and places real accountability upon off-road parties and entities who do, or should, exercise influence over on-road incidents and behaviours. COR law should fully enable investigations and enforcement, where appropriate, to be targeted directly upon the entity of influence whose act or omission directly relates to the offence associated with their duty.. It should not be necessary for drivers and operators to be charged (and found guilty) before others in the chain of responsibility are charged.

Recommendation 2

The ATA recommends that the points and policies raised in this response be given careful consideration by the COR review taskforce.

4. ATA Comments

A) How effective are the categories of duties and the COR provisions in securing compliance with transport laws?

There is no doubt that currently the COR framework is clumsy for both enforcement staff and parties subjected to these laws. The provisions are often poorly framed, for example using deeming provisions that deem a group of chain parties automatically guilty.

Yet, this is a relative thing. Compared with no COR embedded in law, it is an improvement. There is also no doubt that the NTC's model COR package created change in the right direction. This is all about influence equalling accountability. No one wants to lose that positive influence.

However, far too much emphasis remains on drivers and operators which has diminished the potential for positive change in compliance outcomes.

The policy intended in the original C&E model was to go beyond the drivers and apply appropriate accountability on other chain parties whose acts or omissions have an influence on on-road incidents and offences. Charges did not have to be laid on lower chain parties in order to address higher chain parties. The offences were specific to a role and influence, and liability was proportionate to party's proximity to the actual offence.

The creation of the HVNL brought changes to the COR provisions that in the ATA's view further eroded fairness and reasonableness.

Although the roles of chain parties were defined in model COR provisions, and a reverse onus of proof with a 'reasonable steps' defence has generally applied, the lack of clarity, certainty, and unwillingness to pursue behaviour change by entities in several areas of enforcement have considerably diminished the expected outcome. There are many more benefits to be had by an effective COR.

Importantly, the NHVR and HVNL provides the opportunity to apply a better structured COR nationally and generate enforcement able to target the entities that influence behaviour in negative way, while improving fairness and robustness of the COR process.

Whilst it is expected that there is a prosecution focus on the driver/operator any regulator charged with the administration, investigation and enforcement of a statute has an obligation to do so fully and not selectively. Unfortunately the focus is on ease of prosecution in the existing laws and the *HVNL*. The *NHVR* has the following obligations under section 659(2) (b) (c) and (d):

- (b) to monitor compliance with this Law;
- (c) to investigate contraventions or possible contraventions of provisions of this Law, including offences against this Law;
- (d) to bring and conduct proceedings in relation to contraventions or possible contraventions of provisions of this Law, including offences against this Law;

In our view this gives NHVR a clear obligation to investigate beyond driver/operator and in appropriate cases prosecute other chain parties. This will need to be reflected in the NHVR's own activities and those of its service providers and others administering the HVNL in order to meet its objectives in section 3.

The NHVR Board is charged with controlling the affairs of the NHVR and ensuring it exercises its functions in a proper, effective and efficient way (section 664). The main function of the NHVR is to achieve the object of the HVNL (section 659). These include promoting public safety, managing the impact of heavy vehicles on the environment, road infrastructure and public amenity and efficient, innovative and safe business practices (section 3).

Each member of the Board must act impartially and in the public interest in the exercise of the member's functions (section 670). This obligation of impartiality and public interest should filter down to the CEO and all those who exercise functions under the HVNL. All those exercising such functions must also:

- act honestly and with integrity
- exercise functions in good faith and with a reasonable degree of care, diligence and skill

(Section 697)

Under section 698 this includes delegates, such as a State or Territory authority, which may provide services to the NHVR under section 658.

An investigation and prosecution policy, stated or unstated, which has the focus upon drivers and operators, arguably does not meet the impartiality and public interest test. Nor, arguably, does it meet the good faith, care, diligence and skill test.

Excluding investigation/prosecution of other chain parties misses the opportunity to alter and improve conduct in line with the object of the HVNL.

This ATA submission proposes six areas of improvement:

1. To provide better compliance guidance through a positive duties approach, allowing operators and clients to apply quality systems approach to compliance – a proactive approach.
2. To allow "people of influence" to be targeted directly as the duties approach creates offences that stand alone and are related to their acts or omissions with regard to those duties. There is no need to gather evidence through enforcement of other chain parties.
3. To provide a robust framework in which influence equals duties, which equals obligations with accountability, which means enforcement can directly focus on entities influencing undesirable or unsafe behaviours. Current deeming provisions do not focus attention on the parties that cause or induce a breach.
4. To be fairer to people who have applied a systems approach to compliance that generates evidence but the important tenet of our English law system the "onus of proof is on the prosecution" is reinstated. In effect, positive efforts will be rewarded with a more balanced situation if enforcement is occurring. The enforcement agencies (no matter how poor they claim to be) have more resources to pursue evidence in a case than a small operator has to mount a defence in reverse onus of proof circumstance. So we are seeking a fairer law in scope and application that is fairly enforced.

5. For COR to work to its full potential, information about incidents involving trucks and drivers need to be available to the primary vehicle operator. This requires agencies to inform registered vehicle operators of enforcement incidents that occur in or around the vehicle. Otherwise, operators' duties to conduct review and improvement processes cannot reasonably be met.
6. So the NHVR provides a national infringement review capacity to ensure that service agreement obligations are being delivered to the 'same outcomes same circumstances' standard.

B) Are the COR provisions applied consistently in and across all jurisdictions?

No.

NHVR's COR investigative capacity, with an improved HVNL COR package and appropriate service level agreements will be needed to improve the impact of COR and achieve better behavioural change and hence the fairness, safety and efficiency gains. It is inappropriate to put enforcement efficiency before fairness. There should be balance, and an explicit recognition of respective costs and process limitations. For example, an interstate party's access to local courts in another jurisdiction is more expensive and inconvenient than a local party.

C) Are there difficulties for regulators in applying the COR framework and/or difficulties for parties adhering to the COR framework? What are these difficulties?

Clarity and fairness in law is generally considered important to improve compliance.

The COR framework is currently clumsy for both enforcement staff and parties subjected to actions under these laws. Some provisions are poorly framed, for example deeming provisions that treat a group of chain parties as automatically guilty. These provisions also give no guidance on the relevant duty a chain party has in regard to the apparent on-road offence.

Further, this inherent unfairness remains untested in higher courts (That is, courts of authority) but we believe it will be problematic. This may lead to inaction by enforcement agencies. That would be an undesirable outcome, as we have established that the very existence of the COR and potential for enforcement has produced positive gains in behavioural change. Hence, a fair and transparent COR has more chance to generate positive change, acknowledging that enforcement resources will be required. The potential for a positive change in on-road outcomes by influencing a chain party's behaviour is far higher than continuing to focus on drivers and operators. Drivers and operators are essentially "consumables" in the eyes of some undesirable chain parties.

Using reverse onus is trading enforcement ease against a tenet of English law that holds parties innocent until proven guilty. Reverse onus should only apply in narrowly prescribed circumstances, such as when enforcement action is applied using a certified and calibrated device to measure or determine a physical attribute such as axle group mass or vehicle speed and the party responsible is beyond doubt.

Making a limited "reasonable steps" defence available to a defendant does not correct the enforcement bias of a 'reverse onus'. Establishing "reasonable steps" defences is costly and is also costly to run in the courts. There is not even any duty on the prosecution to consider if a party may be likely to run such a defence before proceeding with prosecution or infringements. Further, even the least resourced enforcement agency still has more resources to investigate offences than the road industry which predominately comprises individuals with one truck, or small fleet operators. It is grossly unfair when costs cannot be awarded against enforcement agencies whose proceedings against a party have been dismissed due to a successful reasonable steps defence.

The need to avoid duplication of obligations under different laws also needs consideration. We have raised this with WHS and HVNL, particularly in the fatigue area. However, it is also relevant to Corporations laws as some duties in the Corporations Act are akin to the duties in the HVNL (for example section 697). Corporations law duties should not be partially replicated in the HVNL. NHVL should deal with specific transport related duties.

D) Should aspects of the existing categories of duties or COR provisions be changed? If so, why and what shape would these new duties/provisions take?

E) Are there new duties/provisions required to enhance the COR framework? If so what changes are required and why?

F) Should there be a positive duty placed upon executive officers to prevent offending conduct performed by corporations instead of section 636 provision?

The ATA wants a COR that is fair, reasonable and places real accountability upon off-road parties and entities who do, or should, exercise influence over on-road incidents and behaviours. COR law should fully enable investigations and enforcement, where appropriate, to be targeted directly upon the entity of influence. It should not be necessary for drivers and operators to be charged (and found guilty) before others in the chain of responsibility are charged.

This requires the applied law provisions to be updated in line with the principles agreed by the Council of Australian Governments (COAG) regarding personal criminal liability; of corporate fault and the clarification of the positive duty to take reasonable steps. The ATA submission to the Queensland Parliamentary committee in January 2012 provides further details. Please see Attachment A. Further, the reality is transport law and work health and safety laws both apply concurrently and their co-existence requires consistency. By ensuring that this update reduces current inconsistencies, the NHVL could deliver further efficiency gains for industry, by reducing regulatory overlap.

Specifically for 'Directors' Liability', COAG has agreed on the following principles:

- where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself,
- personal criminal liability of a corporate officer for the misconduct of the corporation should generally be limited to situations where the officer encourages or assists the commission of the offence (accessorial liability), and
- in exceptional circumstances, where there is a public policy need to go beyond ordinary principles of accessorial liability, a form of deemed liability could be imposed on a corporate officer only using a 'designated officer' approach (for minor offences) or a 'modified accessorial' approach (for more serious offences).

It is commonly understood that the model C&E provisions required parties to take reasonable steps. In fact, the reference to "reasonable steps" is about the ability of a relevant party to establish a defence in some circumstances. ATA legal advice from Tony Hulett, senior transport lawyer states:

"One identified anomaly in the *C&E Bill* was that it provided no positive duty upon any party in the chain of responsibility to comply with *mdlr* requirements by taking reasonable steps or otherwise. Despite this it was often incorrectly stated that parties in the chain had to take reasonable steps to comply with the requirement. The *HVNL* still does not impose a positive duty upon chain parties to comply with *mdlr* requirements. In the event of any *mdlr* offence, nominated parties in the chain of responsibility are automatically guilty of the offence."

The public draft of the HVNL did not reflect the model C&E provisions or the COAG directives. In fact, it provided that chain parties were automatically guilty of the same offence as the driver. This was unacceptable. Simplification in the current HVNL draft has not worked. Explanation by the Project Office of subsequently revised provisions present in the SCOTI version, or intended through amendment by Bill 2, also fails to meet industry expectations. For example, the NHVR Project Office explanation includes in some cases, that it is a pre-condition that the driver is convicted of an offence before chain parties are pursued. This is unacceptable.

The law needs to have a range of offences that relate to the incident, for the driver/operator and the parties of influence, and have these linked to the role. For example, retail store inventory managers currently influence supply chain behaviour greatly but are not accountable under COR provisions.

The Australian legal presumption of innocence must be appropriately applied. It is one thing to measure a speed and apply a penalty to the driver based upon measured speed, and apply liability where on immediate evidence the driver is guilty. It is another to suggest that similar automatic liability should apply to a more remote party. What the ATA desires is a prescribed positive duty for each remote party to take reasonable steps and for incidents to be investigated to establish if the party failed to take such reasonable steps to satisfy their duty. Such transparency would be expected to improve compliance.

Andrew Ashworth, a leading criminal law academic, defends the presumption of innocence on several bases. These include (a) given the possible sanction of removing someone's liberty, it is right that a high threshold is needed for that to happen; (b) there is always a risk of error in fact-finding in trials, and it is better that the Crown bear this risk; (c) police have far-reaching powers to conduct investigations and that these powers must be exercised in a way that properly respects human rights and freedoms; (d) typically the state's resources far exceed that of any individual; and (e) the presumption of innocence is logically coherent with the principle of proof of a criminal charge beyond reasonable doubt.

Similarly, there are opportunities to introduce new options to improve relationships, co-regulation, and common understanding. Perhaps dispute resolution options should be considered to enhance shared understanding between NHVR, its service providers, the police and the industry.

Industry seeks better relationships with enforcement staff at the roadside – ideally inspectors' enforcement activities would be generally considered by industry as "just desserts" for the "cowboys. Further, enforcement activities would attract accolades for the efforts in reaching up the chain to the "right" party.

Registered codes of practice are meaningful aids to compliance and evidence of their application should be taken as prima facie evidence of compliance. TruckSafe, for example, is shown to produce good safety outcomes, but only one jurisdiction provides any automatic recognition of TruckSafe's risk-based systems approach as forming a legitimate part of a defence.

Similarly, the person who issues a weighbridge docket should be directly accountable for its accuracy (within reason); a driver acting reasonably and in good faith should be able to rely upon this docket. Thus an enforcement officer should not automatically issue an infringement at the roadside if a mass offence exists, if the driver has a weighbridge docket that indicates compliance. Further investigation should be required to prove which party/ies should be charged. For the HVNL to be effective, and for the regulator to meet its obligations, it is important that the correct chain party is identified. Weighbridge certificates should be able to be relied upon in the same way container weight declarations can be. Qualifications placed on such reliance, of course, should be limited to a person 'knowing' or who 'ought to reasonably have known' such a certificate is false or in error.

Further, a receiver of goods who timeslots operators should have duties to schedule these in accordance with reasonable and legal travel time for the freight task in hand and this duty should be able to be investigated in its own right independent of any action against any driver or carrier. If non-compliance is proven, the responsible party should be held accountable. In the case of a corporation, offences should be linked to the corporation not an individual in the first instance, except where inappropriate influence by a director can be proven.

A load owner who understates load mass should face the consequences of that understatement, similar to what should happen if they demand a journey time from a driver that cannot be legally completed.

There are also opportunities to reclassify breaches to improve fairness and clarity. For example, an operator of a 9 axle B-double off route under a HML permit *can* be treated harshly by a provision that treats the total mass as if it was only being carried by the first 6 axles. This makes the applicable offence a high range, severe overload that attracts a very large penalty, yet the cause may simply have been a wrong turn by driver dealing with difficult traffic and unfamiliar roads.

Companies should have a positive duty under COR to take reasonable steps and should be held to account for this. However, where prosecutors want to take action against a director or executive officer the burden of proving an offence relates to actions of an individual director, executive and/or manager should rest with the prosecution. This is what COAG intended to ensure, i.e. that the burden on directors and like parties is fair and reasonable to encourage responsible corporate management.

Corporate officers under this model would still be liable for prosecution but the model would provide the level of fairness expected in Australian law.

This requires the C&E provisions to be reviewed in conjunction with industry and the regulators, and appropriate penalties constructed. We do not believe this approach requires a regulatory impact statement as it simply implements what the model laws intended and accounts for the broad whole of government policies applied since that time.

This is about changing the culture of freight clients to include a compliance factor so that negative influences on driver and operator safety are mitigated before they exist. Importantly, while an extended COR concept poorly implemented has made a positive safety difference. COR implemented as intended will be significantly more effective.

A point also worth making is that the reasonable protection provided to officers under Section 698 contrasts with the assumed guilt of the staff of chain parties under current deeming provisions of the HVNL. The law appears to treat these parties differently and potentially in a discriminatory fashion.

G) Is the obligation to exercise reasonable diligence appropriate?

H) Should section 636 be reframed to align with the model WHS Act's 'due Diligence' provisions?

I) Do the executive officer liability provisions in the NHVL need to be changed to maintain consistency with the COAG principles and guidelines for assessment of directors' liability provisions?

The general reasonable diligence and due diligence duties should not be duties for directors, partnerships or unincorporated bodies under road transport law. These parties attract such duties under WHS laws already. Industry would prefer road transport laws provided clarity with prescribed and positive duties to take reasonable steps in the circumstances, wherein the director, partner or manager of an unincorporated body is able to exert influence within the circumstances. This will also avoid duplication of the same obligations in WHS and transport laws. Compliance with road transport law must count towards compliance with WH&S. The onus and burden of proof must rest with the prosecution. Further COAG principles and guidelines must be met with a policy approach in which fairness prevails.

J) Do you believe that differences between jurisdictions and agencies in the resourcing of COR investigations and prosecutions impacts upon fairness and effectiveness of the COR regime?

K) How would you suggest these differences might be managed to achieve greater effectiveness, appropriateness and fairness within the COR regime?

L) Do you believe there are impediments to COR investigations pushing up the chain? If so what are these impediments and how might they be managed under the HVNL?

Current COR is limited by resources investment, willingness to change enforcement culture, inconsistency and poor legal structure. For example, reaching across state boundaries is problematic. An imbalance in expenditure is also apparent on the surface (NSW spends far more than others) but if claims of travel distribution are correct (more freight moves in NSW than elsewhere) this distortion may be moderated. It appears to us that freight movements and, hence, truck movements should be factored in NHVR's design of enforcement activities of the service providers. NHVR should direct all enforcement efforts towards heavy

vehicles, except General Duties police officers, who should be free to apply general road rules provisions to all road users be they HV drivers or cyclists.

Clearly, the NHVR having a capacity to conduct the significant COR investigation is one part of a better way forward. Other essential aspects include giving clear directions through Service Level Agreements about which parties to take action against in relevant circumstances, using enforcement guidelines.

NHVR has the opportunity to use education as well as enforcement. The use of infringements, warnings, and improvement notices and co-regulation approaches like accepting safe harbour codes of practices in COR activities should be provided for and encouraged.

Further, in the public arena, there currently appears to be a scatter-gun approach to some COR enforcement activities - shoot enough offences at a few operators or receivers and some offences are sure to stick so that will frighten the rest. In our view this approach is not effective for many reasons.

The ATA has already outlined above many views on how things can be improved and we look forward to working with the NTC and NHVR to improve COR's effectiveness.

In particular, we have made strong suggestions on how accountability and associated enforcement can be effectively applied to chain parties through a better COR framework under a revised HVNL through sound definitions of all roles, each with positive duties and appropriate fairness regimes.

M) Consideration (note variation of this question as discussed at 5/8/2013 meeting) of the potential for a shift towards alignment with WHS, should the HVNL be equipped with similar compliance and enforcement measures currently available to courts and authorised officers under the WHS Act? If so what measures would you suggest are required under the HVNL and why?

This matter was discussed in considerable detail at an industry working group meeting of 5/8/13 with NTC staff and the COR Taskforce Chairman. The clear message from industry is we have a good toolkit in the HVNL, but we should consider the educational tool of training orders (see table page 30 of discussion paper).

Yet the most important message was, we believe, that many useful tools are still pristine and largely unused, for example, formal warnings and improvement notices.

Similarly the co-regulation potential of successful working accreditation schemes such as TruckSafe and other registered codes of practice have not been adequately utilised or explored. NHVR has opportunities to make significant improvements in safety and legal outcomes by positive action in these areas.

NHVAS was found wanting by the industry due largely to poor administration and ineffective audit/auditors. This view is shared by independent expert opinions provided to USA authorities who reviewed schemes available globally.

N) Are the right parties included in the COR provisions? If not why not?

O) Are there particular issues/problems for any/all classes of persons? If so how could these issues/problems be managed/resolved?

We have given good guidance on these matters in the earlier part of this submission. Generally the definitions of parties are adequate, but the legal construction of their obligations in relevant circumstances is not. However, one example of a responsible party who is currently omitted is the store inventory manager.

As noted earlier, the deeming provisions are particularly problematic and require replacement with more specific positive duties for each party in each stream of activity. For example, what is required of an operator, scheduler, load owner, loader, dispatching/receiving party to manage speed compliance? How would those duties be assessed?

P) Are the defences provided under the HVNL effective, appropriate and fair? If not why not?

Q) Are there impediments to mounting defences under the HVNL? How could these defences be changed to minimise/manage these impediments?

R) Should industry codes of practice provide the same level of protection under the HVNL as they do under WHS Act? If so why? If not why not?

Reverse onus with statutory or implied defences is always less fair than the foundation tenet of law that a person is innocent until proven guilty. There is a strong case that reverse onus should only be applied in very specific circumstances where a physical factor is measured, and there is no doubt about the accountability of the most relevant party.

Registered Codes of Practice and robust accreditation schemes such as TruckSafe should be afforded the status of a complete defence unless the prosecution proves non-compliance within the code, or that the code was not applied in relevant circumstance or there is a defective standard in the code.

Similarly, weighbridge certificates or other loading declarations should be treated as valid evidence of reasonable steps until proven otherwise. Therefore operators and drivers should be able to rely upon such certificates and statements. This is about moving accountability to align with the influencing of actions. A weighbridge operator should be issuing accurate certificates that can be relied upon. If these are inaccurate the weighbridge operator should be accountable. A loader in a freight owner's business who loads and secures a load on a trailer should be accountable for load restraint compliance and aspects of mass compliance. A simple provision, requiring a statement of load restraint compliance by the loader to be provided to the operator/driver collecting the load, would offer a great opportunity to enhance accountability, as it does with container weight declarations.

The regulator and its enforcement providers must be required to consider if a reasonable steps defence might be mounted and sustained before proceeding with any prosecution action beyond formal warnings, improvement notices and/or infringement notices. Further, costs should be awarded against the prosecution where a reasonable steps defence is sustained. To do otherwise is grossly unfair.

Further, mistakes of fact and other defences should be considered for HVNL offences that are not critical safety offences and where accountability may not be immediately and clearly apparent.

There are geographical and administrative issues that significantly distort costs for defending parties. It is common to simply pay breaches, that operators and drivers know are erroneously issued, mischievously issued, incorrect in material fact, simply issued in an attempt to induce attitude adjustments, or would require significant travel to appear before the relevant court.

Further, operators' experiences with internal review or requests of leniency to current administering agencies appear to be generally poor. The considered view is that acceptable mitigating circumstances are few, and in many cases even the application forms imply potential escalation of a penalty in addition to own costs and potential to have to pay the prosecution costs as well, if a challenge is mounted. The process is essentially intimidating.

These circumstances result in perverse outcomes in some cases, i.e. operators simply load the freight rate with a cost of doing business in 'x' state or another state associated with infringements that are not worth defending in a simplistic business case sense.

Where multiple infringements continue to flow for less serious breaches the enforcement is not effective as it does not change behaviour either within industry or by regulatory service providers, which may lead to claims of a revenue related agenda. In effect, we see a “milking the cows” approach to enforcement.

Accordingly, upon request by a party to the offence, formal warnings, improvement notices and infringements should be subjected to review by NHVR to assess if regulatory policy has been followed and if compliance with enforcement guidelines occurred. This must be readily accessible, very low cost, and in effect stop the enforcement clock until the review is completed and reported. Such a review must be able to cancel, vary or continue the enforcement action.

Enforcement guidelines should be public documents and developed with both industry and regulatory service provider inputs. The UK provides a document that is informative and sets a quality benchmark the NHVR should be achieving.

S) Should aspects of the HVNL’s COR offences and penalties be changed? Why are these changes required?

As already stated, significant change is required to address earlier commentary above. In addition, infringements, improvement notices, and formal warnings should all be part of the penalty response options for chain parties, and the offence structure should be based upon prescribed duties for each role. Further, different offences should be cast for circumstances with different elements to the offence, like ‘ought reasonably to know’, knowingly and ‘negligently’, etc.

For HVNL offences, where a range of responses are intended, the offences should be recast as several offences taking into regard escalation of response with regard to intent and circumstances; for example, ‘use unregistered vehicle’ where every response from a warning to a \$10,000 fine is intended should be split into several offences.

T) Is guidance required either in legislation, policy, or other materials, regarding securing compliance with the COR provisions under HVNL? If so, what form should this guidance take and why?

Yes, in all three areas. Enforcement guidelines are required and these should be public documents of good scope and standard. A good model is the enforcement guidelines published in the United Kingdom for road transport. Clarity in the law and regulations about obligations improves knowledge, willingness to comply and aids education. It also enables chain parties and operators to have informed discussions about respective responsibilities and how they will work together. It is important that parties are aware their responsibilities cannot be delegated or contracted away.

Also in the fatigue area, there is reference to practice as being related to the ‘body of knowledge’ but then no connection to the NTC’s own body of knowledge which was a fatigue management guide. The NTC work should be referenced for the benefit of operators, chain parties and enforcement staff alike.

U) Are there any problems or advantages arising from overlapping obligations (eg transport laws, WHS laws, dangerous goods laws, industrial relations laws and animal welfare laws)?

In the 5/8/13 meeting under this section, industry raised the problem of overlapping obligations e.g. WHS, MRRS Contract Determination and Safe Rates. It was agreed more regulation wasn’t necessarily helpful, particularly if it is inconsistent with National Heavy Vehicle Law (which the draft RSRO is). Indeed, industry representatives went on to say another set of inconsistent obligations could lead to a very perverse outcome, i.e. which law takes precedence? Is one piece of legislation compromised by another?

Industry gave the NTC the strong message that it believed COR is working but could be improved by paying greater attention to the responsibilities of 'other parties'. Specifically, the Retail Supply Chain was mentioned and the consequences for time slot bookings and queuing.

The ATA's stance is additional laws and regulations can be counterproductive and may lead to a worse outcome, especially where there are conflicts and inconsistencies. It is our strong view that bodies of law should ideally be separate and areas of potential overlap clearly delineated and responsibilities and obligations carved out. However, where this is not possible, compliance with one body of law must count and be consistent with another. For example, compliance with RT fatigue driving hours must be a positive and significant component of meeting the broader WH&S obligations around whole of workplace fatigue.

V) Which aspects of the related chain of responsibility framework in other laws should be adopted in the HVNL to improve consistency across regimes?

W) Which aspects should not be adopted and why?

Generally we see no reason to import COR practices from these other laws. However, the concept of limiting accountability through a 'where reasonably practicable' test may be arguably useful in some areas of the HVNL; but its widespread adoption would add vagueness and reduce clarity around obligations. We believe clarity around obligations is an essential aid to compliance. However, the 'where reasonably practicable' test can also be helpful in aiding fairness. The circumstances of each proposed offence provision needs to be considered in this light.

5. Conclusion

The ATA makes the following recommendations:

Recommendation 1

The ATA recommends a chain of responsibility framework that is fair, reasonable and places real accountability upon off-road parties and entities who do, or should, exercise influence over on-road incidents and behaviours. COR law should fully enable investigations and enforcement, where appropriate, to be targeted directly upon the entity of influence whose act or omission directly relates to the offence associated with their duty. It should not be necessary for drivers and operators to be charged (and found guilty) before others in the chain of responsibility are charged.

Recommendation 2

The ATA recommends that the points and policies raised in this response be given careful consideration by the COR review taskforce.