Submission to:	National Transport Commission
Title:	Chain of responsibility duties review
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AUSTRALIAN TRUCKING ASSOCIATION

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The Australian Trucking Association (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.

2. Summary of recommendations

Recommendation 1

The CoR duties in the HVNL should be consolidated into a single chapter and structured on the basis of who holds the duty. Duplicated provisions should be removed.

Recommendation 2

Chapter 1A of the HVNL should impose duties on supply chain participants in relation to mass, dimension and load restraint.

Recommendation 3

Chapter 1A of the HVNL should require chain parties to ensure, so far as is reasonably practicable, that vehicles are free of defects, safe and maintained in a roadworthy condition. This requirement should be extended to outsourced vehicle maintenance providers.

Recommendation 4

Chapter 1A of the HVNL should build on existing s229 to include general duties requiring parties in the chain of responsibility to ensure, so far as is reasonably practicable, that MDLR, speed, and vehicle safety and standards breaches do not occur.

Recommendation 5

The term 'all reasonable steps' should be retired from the HVNL and replaced with 'so far as is reasonably practicable.' Proposed chapter 1A should include a definition of 'reasonably practicable' that is consistent with the definition used in the model Work Health and Safety Act. Sections 620 and 622 of the HVNL should be removed; their relevant content should be transferred to a fact sheet or examples within the legislation.

Recommendation 6

The intermediate duties set out in table 3 of this submission should be removed from the HVNL.

Recommendation 7

As soon as possible, the NHVR should issue guidelines under Part 13.2 of the HVNL for approving industry codes of practice. In addition, the NHVR and NTC should publish more non-code guidance material about how to comply with the HVNL. In doing this, the NHVR and NTC should:

- make it clear that the material is a guide only and is not authoritative
- have processes to systematically and promptly review the guidance material as the HVNL case law evolves.

Recommendation 8

The reforms to CoR duties should not be rushed. They should be considered and implemented as a package, with any new CoR duties accompanied by a streamlining of the law. The reform package, including related reforms such as the proposed changes to executive officer liability, should be validated by a case study analysis that investigates its impact.

3. Introduction

In May 2014, Australia's transport ministers agreed the NTC should establish a process to investigate the development of broader duties within the chain of responsibility. The decision followed a report by the Chain of Responsibility Taskforce.

In November 2014, the NTC released a discussion paper about the development of those broader duties. The NTC aims to report to ministers in May 2015 on a preferred approach. The NTC will then investigate the detail of the approach agreed by ministers and its potential legislative and operational consequences.

This submission outlines the ATA's issues with the existing CoR provisions in the HVNL (section 4), before assessing the options put forward in the NTC discussion paper (section 5). The submission concludes that the options in the discussion paper would all raise significant problems for industry.

Section 6 of the submission puts forward an alternative approach that would combine the best features of NTC options 1, 2 and 4 with a substantial streamlining of the HVNL.

In its discussion paper, the NTC pointed out that:

> Whichever approach/es are contemplated, it is important that stakeholders recognise, at the outset, that the adoption of any uniform approach to managing CoR duties in the HVNL represents significant reform. A piecemeal approach will be inadequate (…)[1]

The ATA fully agrees. The reform process must not and need not be rushed, because:

- the CoR laws are on the statute books now
- the rate of fatal heavy vehicle accidents is on a downward trend, despite quarterly fluctuations in the number of fatal crashes and fatalities
- notwithstanding the need for the streamlining set out in this submission, the CoR laws are operating reasonably well. They provide an effective means for CoR enforcement and prosecution, except in the known problem area of vehicle standards and safety.

4. Issues with the CoR provisions in the HVNL

The HVNL has a number of objectives, but its most important one is to improve safety. The evidence shows that the CoR provisions in the law have done this.

Statistics compiled by National Transport Insurance (NTI) show that the proportion of fatigue-related crashes involving its insured vehicles halved after the introduction of the fatigue CoR provisions in 2008.[2] The proportion of fatigue-related crashes has increased since then, but still remains much lower than the pre-CoR figure.

The number of heavy vehicle speeding offences recorded in NSW fell more than 90 per cent between March 2011 and March 2014.[3]

[1] National Transport Commission, *Chain of responsibility: duties review discussion paper*, November 2014, p24.
[2] Driscoll, O. *2013 Major Accident Investigation Report*, National Truck Accident Research Centre, Brisbane, 2013. pp8-9.
[3] Gay, D. "Australia's toughest truck compliance regime brings down speeding by more than 90 per cent," Media release, 6 July 2014.

Meanwhile, BITRE figures show:

- the number of fatal crashes involving an articulated truck decreased 36.2 per cent between 2004 and 2013, with the number of fatal crashes involving a rigid truck decreasing 26.1 per cent

- during the same period, the number of registered articulated trucks grew by 37 per cent and the number of registered heavy rigid trucks increased by 19 per cent.[4]

There is no room for complacency in these safety outcomes, but they show the CoR provisions are achieving their broad safety objectives. The exception is vehicle standards and safety. The ATA has previously recommended that the CoR concept should be extended to this area.[5] The recent coronial findings into the deaths of John Posnakidis and James Venning on the South-Eastern Freeway in Adelaide confirm the importance of the ATA's recommendation.[6]

Apart from vehicle standards, there are, in the ATA's view, two areas where the CoR provisions in the HVNL need to be improved. The existing provisions are unnecessarily complex and confusing, and they are not consistent with best practice in safety regulation.

Complexity and inconsistency

The ATA has long argued that the complexity and inconsistency of the existing CoR provisions is a problem for both industry and regulators. The ATA fully agrees with the comment in the NTC discussion paper that:

> As a result of the amalgamation of the model laws, which were drafted at different times and in different ways, the chapters of the HVNL dealing with fatigue, speed, mass, dimension and loading, and vehicle standards contain various duty types and constructions (…)
>
> Difficulties may arise from the fact that industry parties must attempt to comply with multiple duties concerning separate subject matters (ie: speed, fatigue etc) found within different chapters rather than focusing at a higher level on the minimisation of safety risks. This may also lead to confusion and misunderstanding about which parties are responsible for particular obligations, how different obligations are related, and how these obligations need to be met.[7]

From an industry point of view, the lack of clarity and sensible organisation in the law makes it unnecessarily difficult for businesses, managers and employees to understand and comply with their legal obligations.

It creates problems for the regulators and courts too.

In *Damorange*, for example, the NSW Supreme Court rejected an appeal against the sentence imposed by a local court judge for a series of speed limiter offences. The court found that the prosecutor had misunderstood the 'intricate legislative regime.'[8]

Because of the structure of the HVNL, the extra duties contemplated for the law are likely to lead to even more complexity and duplication.

For example, section 215 prohibits persons from making requests that would cause a driver to exceed a speed limit. Section 216 prohibits contracts that would have the same effect. Sections 240 and 241 are similar prohibitions, but apply to fatigue.

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[4] Bureau of Infrastructure, Transport and Regional Economics (BITRE), *Impact of road trauma and measures to improve outcomes*, Report 140, December 2014, p17.

[5] See ATA, *Heavy vehicle roadworthiness review – phase 2 integrity review* (submission to the NTC and NHVR), September 2014, p8.

[6] *Finding of inquest-John Posnakidis* (12 January 2015); *Finding of inquest-James William Venning* (12 January 2015). Available at <www.courts.sa.gov.au/CoronersFindings/Pages/default.aspx>. Viewed 20 January 2015.

[7] NTC, p14.

[8] *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at par 91.

Extending the chain of responsibility concept to vehicle safety and standards would, under the current structure of the law, mean there would need to be two more sections, to prohibit requests and contracts that would breach the requirements of chapter 3. There would need to be another two sections, covering exactly the same ground, if CoR duties were introduced for mass, dimension and load restraint.

The HVNL would have eight sections doing the work of two.

Consistency with best practice safety regulation

As table 1 shows, the HVNL is not consistent with best practice in safety regulation.

Table 1: Consistency of the HVNL with best practice safety regulation

Best practice		HVNL
General duties to establish the broad goals of the safety regulation and to fill in the cracks that will inevitably appear	✗	General duty for fatigue only (s229). No equivalent duties for speed management, MDLR or vehicle standards and safety
Businesses required to have processes to systematically manage safety risks	✗	No requirements, although s623 outlines a risk management approach that may be taken
Evidentiary standards to provide guidance on how compliance can be achieved, while allowing for alternative actions that achieve an equivalent of better standard of care	✗	The HVNL provides for industry sourced codes, but no guidelines have been issued. s624 allows regulations to be made about how to assess and manage fatigue risks, but the regulations are not readily usable
Specification standards where there are specific, significant risks.	✓	Extensive specification standards covering fatigue work/rest hours and vehicle standards

Source: Bluff, E and N Gunningham, "Principle, Process, Performance or What? New Approaches to OHS Standards Setting," Working Paper 9, National Centre for OHS Regulation, July 2003, p30. Available at <http://regnet.anu.edu.au/publications/wp-9-principle-process-performance-or-what-new-approaches-ohs-standards-setting>. Viewed 21 January 2015.

The ATA is particularly concerned about the rollout of evidentiary standards under the HVNL.

Evidentiary standards are a key part of best practice safety regulation: they fill in the detail that is lacking in general duties, but do so in a flexible way. Businesses with sophisticated safety systems can choose not to follow the relevant standard, but must be able to demonstrate that their systems achieve an equivalent or better safety outcome.[9]

The model Work Health and Safety Act implements the evidentiary standards concept through approved codes of practice under Part 14 of the Act. Under this Part, the responsible minister can approve codes of practice. Under section 275 of the Act, an approved code of practice is admissible in proceedings as evidence of whether a duty or obligation under the Act has been complied with. Safe Work Australia has now released 23 model codes of practice that jurisdictions can adopt.

Part 13.2 of the HVNL empowers the NHVR to develop guidelines for registering codes of practice developed by industry. Proof of compliance with an industry code has evidentiary status (s625). The NHVR has not yet released guidelines for registering industry codes, apart from transitional guidelines to allow codes registered under the previous model laws to be rolled over.

Section 624 of the HVNL provides that the national regulations can provide ways, or examples of ways, that a person could identify and assess the risk of a contravention and then reduce its risk. Section 27 of the *Heavy Vehicle (Fatigue Management) National Regulation* sets out these examples. The examples only apply to fatigue management offences, though, and in any case regulations are an inaccessible and inappropriate way of providing guidance to industry.

[9] Bluff, p26.

5. Assessment of the options in the NTC discussion paper

The discussion paper proposes four options for reforming the CoR duties. They are:

Option 1: adding an overarching general duty of care applicable to a wide range of parties, including parties that are not currently in the chain of responsibility
Option 2: adding an overarching duty to each chapter of the HVNL to complement the overarching duty in the fatigue chapter
Option 3: adding additional specific obligations to address specific risks and behaviours
Option 4: providing better operational/policy guidelines and better guidance material to operators.

The discussion paper comments that the options are neither exhaustive nor exclusive of each other. It states that a combination of options may be the most appropriate way forward. The NTC believes that additional guidance and education to help parties comply with their obligations should be provided regardless of the reform option adopted.[10]

In the ATA's view, all four options have significant problems. The ATA instead proposes an alternative approach that would combine the best features of options 1, 2 and 4 with a substantial streamlining of the law.

Option 1 – an overarching duty of care

Option 1 would amend the HVNL to include an overarching primary duty of care. As an example, the discussion paper proposes that the duty could read as follows:

> A person conducting a transport undertaking must so far as reasonably practicable ensure that their actions or omissions do not endanger the health or safety of any person.[11]

The definition of a 'person conducting a transport undertaking' could be:

> Any person whose acts or omissions affect, or exert influence on, on-road activities, or do affect or which are likely to affect the way on-road services are delivered.[12]

The proposed duty would be extremely broad. It would essentially replicate the primary duty of care in the model Work Health and Safety Act. It would generate considerable confusion about where a business's duties would start and stop, because it would impose obligations well beyond fatigue, speed, MDLR, and vehicle standards and safety.

The definition of 'a person conducting a transport undertaking' would also be extremely broad. The definition would go well beyond the current chain of responsibility parties to include, for example, accreditation schemes and registered training organisations providing nationally recognised training in CoR. There is no evidence that extending the chain of responsibility to these additional and undefined parties would improve safety or compliance.

Despite all these problems, option 1 would not reduce the complexity of the law. It would not reduce the level of duplication. On the contrary: it would make the law even more complex and even less consistent.

Option 2 – chapter specific general duties

Option 2 proposes the inclusion of high level duties within the chapters covering speed, fatigue, and mass, dimension and loading. The discussion paper notes that a chapter based duty could also be included in the vehicle standards chapter.[13]

[10] NTC, p17.
[11] NTC, p17.
[12] NTC, p17.
[13] NTC, p19.

The ATA agrees with the discussion paper that this approach would capture much of the advantage of a primary duty of care. It would impose general obligations but restrict the focus of each duty to the specific matters covered by the law.

But the discussion paper also highlights the problems with the option:

> …while chapter based duties can be more specific, numerous such duties can result in repetitive, lengthy legislation that necessitates the creation of complex guidelines (…) The inherent risk of a chapter-based approach is that by duplicating processes throughout different chapters the creation of clear, generic guidelines become progressively more challenging. Further, duplicated provisions increase compliance costs.[14]

As a result, the ATA does not support option 2.

Option 3 – adding additional specific obligations

Option 3 would see the HVNL include additional obligations and provisions to 'address specific risks and behaviours.'[15]

The HVNL is already too complex. In the ATA's view, it needs to be simplified, not made longer and more complicated. Option 3 should not be pursued further.

Option 4 – providing better operational/policy guidelines and better guidance material to operators

There is an urgent need for better CoR guidance material for operators; however, this is not an option that can be implemented by itself and is not an alternative to amending the law.

The production of better guidance material cannot reduce the complexity of the law or address its inconsistencies. In fact, the ATA's experience is that complex and inconsistent legislation leads to complex and inconsistent guidance material.

6. ATA proposal

Section 5 of this submission concludes that none of the options in the discussion paper fully meet the industry's concerns about the HVNL. The ATA recognises the value of including chapter-specific style duties in the law, but adding them to its existing structure would make a complex and inconsistent legislative scheme even more complex.

Accordingly the ATA proposes a more substantial restructuring of the duties in the law.

Restructuring CoR duties by duty holder

The current structure of chapters 3-6 is confusing and inconsistent. Many duties in the speed and fatigue chapters are duplicated almost word for word. Adding general duties, extending CoR to vehicle standards and safety, or restructuring the MDLR chapter would add more complexity, length and inconsistency.

Accordingly, the ATA believes that the duty provisions in chapters 3-6 should be restructured on a more logical basis.

The ATA proposes that the HVNL should be amended by adding a new chapter, chapter 1A, that would set out the CoR duties by duty holder, rather than by subject. Table 2 sets out a possible division-level structure for the new chapter.

[14] NTC, p21.
[15] NTC, p21.

Table 2: Division level structure of proposed chapter 1A: Chain of responsibility duties

Division	Content to include
Division 1: Introductory	
Subdivision 1: Who is a party in the chain of responsibility	ss214, 227
Subdivision 2: What is reasonably practicable	See recommendation 5
Division 2: Duties of all parties in the chain of responsibility	Existing s229 expanded to cover MDLR, speed, and vehicle standards and safety (recommendation 4); existing ss215, 216, 240, 241 with duplication removed
Division 3: Further duties of employers, prime contractors and operators	Existing ss204, 230 with duplication removed
Division 4: Further duties of consignors and consignees	Existing ss194, 212, 213, 235, 237 with duplication removed
Division 5: Further duties of outsourced vehicle maintainers	See recommendation 3
Division 6: Duties of executive officers, partners and managers	Existing ss636-638 with accessorial liability provisions removed. These provisions are misleading and duplicate jurisdictional criminal code provisions
Division 7: Duties of drivers	Existing ss192, 228
Division 8: Duties of schedulers	Existing ss207, 233
Division 9: Duties of loading personnel	Existing ss209, 238, 239

This structure would be more straightforward than the existing one, because the duties applying to each chain party would be easier to find. In line with legislative drafting best practice, the important concepts in the law would be stated as its central elements, instead of being buried in a morass of detail.[16] The duplicated provisions in each chapter could be rationalised, which would further simplify and reduce the length of the law.

The proposed structure would be broadly consistent with the structure of part 2 of the model Work Health and Safety Act. This is deliberate. Trucking industry personnel who deal with chain of responsibility compliance are almost always responsible for work health and safety as well. Aligning the structure of the two laws would make the HVNL more straightforward for them to use.

The ATA believes the restructure should include the creation of new CoR duties covering mass, dimension and load restraint, and also vehicle standards and safety. The ATA has previously recommended that these duties should be created.[17] It should not involve any change to the 12 tonne threshold for applying the fatigue provisions to heavy vehicles.

Recommendation 1

The CoR duties in the HVNL should be consolidated into a single chapter and structured on the basis of who holds the duty. Duplicated provisions should be removed.

[16] Office of Parliamentary Counsel (Cwlth), *Reducing complexity in legislation*, 2011, p8.

[17] See ATA, *Heavy Vehicle National Law Bill 2012* (submission to the Queensland Parliamentary Transport and Local Government Committee), August 2012, p4 and ATA, *Heavy vehicle roadworthiness review – phase 2 integrity review* (submission to the NTC and NHVR), September 2014, p8.

Recommendation 2

Chapter 1A of the HVNL should impose duties on supply chain participants in relation to mass, dimension and load restraint.

Recommendation 3

Chapter 1A of the HVNL should require chain parties to ensure, so far as is reasonably practicable, that vehicles are free of defects, safe and maintained in a roadworthy condition. This requirement should be extended to outsourced vehicle maintenance providers.

Chapter based duties for safety and standards, MDLR and speed compliance

The ATA recognises the value of adding what the discussion paper calls chapter based duties relating to vehicle safety and standards, MDLR and speed compliance to the law. There is already a chapter based duty relating to fatigue (s229), and the ATA envisages that the new duties would be along the same lines. The 12 tonne threshold for applying the fatigue provisions to heavy vehicles should not be changed.

Adding chapter based duties to the HVNL would:

- fill in the gaps in the existing duties and avoid the need for tinkering with additional specific obligations as business practices in the industry change
- enable the removal of some of the existing intermediate duties, because offences against these provisions could be prosecuted under the relevant chapter based duty. This point is discussed further below.

The discussion paper argues that a disadvantage of the chapter based approach to duties is that numerous such duties can result in repetitive, lengthy legislation that necessitates the creation of complex guidelines.[18] The ATA's approach solves this problem by grouping all the duties in one place – division 2 of proposed chapter 1A.

Recommendation 4

Chapter 1A of the HVNL should build on existing s229 to include general duties requiring parties in the chain of responsibility to ensure, so far as is reasonably practicable, that MDLR, speed, and vehicle safety and standards breaches do not occur.

Replacing 'all reasonable steps' with 'so far as is reasonably practicable'

The duties in the HVNL require chain parties to take all reasonable steps to prevent a contravention of the law. Under some provisions of the law, a person may have access to the reasonable steps defence, which can require the person charged to prove they took all reasonable steps to prevent a contravention from occurring.[19]

The HVNL does not anywhere define the meaning of all reasonable steps, although sections 620 and 622 set out non-exhaustive lists of matters that courts can consider when deciding if a person took all reasonable steps. Section 623 sets out a way that persons can demonstrate they took all reasonable steps.

Experience has shown that the term 'all reasonable steps' has serious practical problems:

- the ordinary meaning of the word 'all' suggests there is a list of reasonable steps somewhere that must all be implemented, even if some of those steps cover the same ground or are unnecessary given the risk profile or other characteristics of the business

[18] NTC, p21.

[19] s618. Alternatively, the person could seek to prove there were no steps they could reasonably be expected to have taken to prevent the contravention.

- the term does not include any reference to the practicability of implementing those steps, although s622(h) lists 'the degree of ability' of a person to implement measures as a matter a court can consider in relation to fatigue or speed management offences.

These problems are compounded by sections 620 and 622. The sections are highly confusing to duty holders, because they read like a list of 'all reasonable steps' that must be taken. There is a natural tendency to treat them like checklists, and the ATA is aware of cases where trucking operators have been presented with compliance paperwork based entirely on their provisions.

Sections 620 and 622 are not a definition of 'all reasonable steps,' and it is incorrect to treat them that way. They are not even a comprehensive list of matters that courts can consider when deciding if a person took all reasonable steps. They are dangerously misleading.

The model Work Health and Safety Act and the Rail Safety National Law require duty holders to ensure safety 'so far as is reasonably practicable.' As a qualifier for safety duties, 'reasonably practicable' has a long history of consistent interpretation by the courts, with the National Review into Model Occupational Health and Safety Laws pointing to case law going back to 1949.[20]

The model Work Health and Safety Act defines 'reasonably practicable' as:

> ***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including–
>
> (a) the likelihood of the hazard or the risk concerned occurring; and
> (b) the degree of harm that might result from the hazard or the risk; and
> (c) what the person concerned knows, or ought reasonably to know, about–
> (i) the hazard or the risk; and
> (ii) ways of eliminating or minimising the risk; and
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

This approach to defining 'reasonably practicable' has been extremely helpful for duty holders in interpreting their duties.

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

Accordingly, the ATA proposes that the term 'all reasonable steps' should be retired from the HVNL and comprehensively replaced with 'so far as is reasonably practicable.'

The Hatcher review pointed out that there is probably little difference in the two standards;[21] this proposal would make the HVNL clearer and more understandable without affecting safety.

In the ATA's view, proposed chapter 1A should include a definition of 'reasonably practicable' that is consistent with the definition used in the model Work Health and Safety Act, but adjusted as necessary to reflect the HVNL's focus on compliance.

The ATA further proposes that sections 620 and 622 of the HVNL should be removed. Their content should be included in a fact sheet or guidance note, with an explanation that the content is a list of examples and is not comprehensive. Some of the content could also be included as examples within the legislation.[22]

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[20] *Edwards v National Coal Board* [1949] 1 KB 704.
[21] Hatcher, A. *Review of regulatory approaches to transport safety law*, 2008. p35.
[22] Schedule 1, s10 explains how examples in the HVNL are to be interpreted.

Recommendation 5

The term 'all reasonable steps' should be retired from the HVNL and replaced with 'so far as is reasonably practicable.' Proposed chapter 1A should include a definition of 'reasonably practicable' that is consistent with the definition used in the model Work Health and Safety Act. Sections 620 and 622 of the HVNL should be removed; their relevant content should be transferred to a fact sheet or examples within the legislation.

In developing this submission, the ATA considered a number of alternatives to recommendation 5, such as changing 'all reasonable steps' throughout the law to 'reasonable steps.' This would be our preferred approach if recommendation 5 is not adopted.

Removing intermediate duties from the HVNL

At present, the HVNL includes a large number of intermediate duties that prescribe exactly how businesses must operate. For example, existing section 231 states that:

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

These sections are overly prescriptive. They do not take into account the wide diversity of business circumstances in the industry and prevent chain parties from developing measures that suit their own risk profile.

The establishment of general duties in proposed chapter 1A of the HVNL would open the way for the sections in table 3 to be removed from the law. Offences against these sections could instead be prosecuted under the relevant general duty.

Table 3: Intermediate duties proposed for deletion

205	Duty of employer not to cause driver to drive if particular requirements not complied with
206	Duty of prime contractor or operator not to cause driver to drive if particular requirements not complied with
208	Duty not to cause driver to drive if particular requirements not complied with
231	Duty of employer not to cause driver to drive if particular requirements not complied with
232	Duty of prime contractor or operator not to cause driver to drive if particular requirements not complied with
234	Duty not to cause driver to drive if particular requirements not complied with
236	Duty not to cause driver to drive if particular requirements not complied with

There is a need for specific instructions that tells businesses exactly how they can comply with the law. These instructions belong in registered industry codes that identify one way of complying with the law, while allowing businesses with more sophisticated safety systems to comply in other ways. They also belong in guidance material; they certainly do not belong in an Act.

Recommendation 6

The intermediate duties set out in table 3 of this submission should be removed from the HVNL.

Availability of industry codes of practice and guidance material

The availability of codes of practice with evidentiary status is an integral part of best practice safety regulation. That's why the first tranche of work health and safety codes was released before the state and Commonwealth legislation based on the model Work Health and Safety Act came into effect.[23]

Apart from transitionally-registered codes in Victoria and South Australia, there are no codes of practice available under the HVNL. The NHVR has not yet published guidelines under section 705 to enable them to be approved, even though this section came into effect a year before the substantive duty chapters.

Because of the importance of codes to the best practice safety regulation model, the NHVR needs to publish guidelines for approving industry codes as soon as possible.

There is also a need for better guidance material about how to comply with the HVNL, although guidance material like fact sheets cannot take the place of codes of practice with special legal significance. This is because it would be open to a court to find that a defendant had not satisfied the requirements of a CoR duty even if the defendant had followed the instructions in an official fact sheet.

Nonetheless, the work health and safety regulators have issued guidance material for many years and recognise that providing support to industry is more important than being concerned about the potential embarrassment that could occur if a court found the guidance material was wrong.

Accordingly, the ATA believes the NHVR and NTC should complement the development of industry codes with the publication of a range of non-code guidance material. In doing this, the NHVR and NTC should make it clear that the material is a guide only and is not authoritative. The two organisations would also need to have processes to systematically and promptly review their guidance material as the HVNL case law evolves.

Recommendation 7

As soon as possible, the NHVR should issue guidelines under Part 13.2 of the HVNL for approving industry codes of practice. In addition, the NHVR and NTC should publish more non-code guidance material about how to comply with the HVNL. In doing this, the NHVR and NTC should:

- **make it clear that the material is a guide only and is not authoritative**
- **have processes to systematically and promptly review the guidance material as the HVNL case law evolves.**

These reforms will take time to develop

In its discussion paper, the NTC pointed out that:

> Whichever approach/es are contemplated, it is important that stakeholders recognise, at the outset, that the adoption of any uniform approach to managing CoR duties in the HVNL represents significant reform. A piecemeal approach will be inadequate (…)[24]

The ATA fully agrees. Many of the issues we have with the HVNL originate in the rushed original drafting of the law. There was not enough attention given to drafting the law to minimise its complexity.

The ATA recognises that some decision-makers are concerned about the delays involved in this reform process and want it finished. But the reform process can take as long as is reasonably needed to get the law right, because:

- the CoR laws are on the statute books now
- the rate of fatal heavy vehicle accidents is on a downward trend, despite quarterly fluctuations in the number of fatal crashes and fatalities

[23] Dunn, C. et al, *Australian Master Work Health and Safety Guide*, 2nd edition. CCH, North Ryde, pp79-80.
[24] NTC, p24.

- notwithstanding the need for the streamlining set out in this submission, the CoR laws are operating reasonably well. They provide an effective means for CoR enforcement and prosecution, except in the known problem area of vehicle standards and safety.

The ATA also recognises that the CoR Taskforce recommended that the development of broader duties within the chain of responsibility should be the first step in resolving the outstanding issues with the HVNL.[25] It said the consistency of the drafting of the CoR provisions should not be revisited until after the process to review the possible inclusion of additional duties was complete.[26]

The ATA does not agree with this approach.

It would be highly undesirable for governments to take the piecemeal approach of adding more duties and complexity to the HVNL with the intention of going back and revisiting the complexity and consistency of the law later. Minimising legislative complexity requires planning and a logical structure from the start. The current version of the HVNL represents a missed opportunity to do this; it is important that decision-makers do not miss the opportunity to go back and do it properly now.

The overall reform package, including related reforms such as the proposed changes to executive officer liability, should be validated by a case study analysis that investigates its impact on the compliance obligations of chain parties and the outcomes of real world prosecutions.

Recommendation 8

The reforms to CoR duties should not be rushed. They should be considered and implemented as a package, with any new CoR duties accompanied by a streamlining of the law. The reform package, including related reforms such as the proposed changes to executive officer liability, should be validated by a case study analysis that investigates its impact.

[25] Chain of Responsibility Taskforce, *Chain of responsibility review taskforce report*, June 2014, p25.
[26] CoR Taskforce, p71.