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Title:	Primary duties for chain of responsibility parties and executive officer liability
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1. About the Australian Trucking Association

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, along with their related provisions, should be consolidated into a single chapter and structured on the basis of who holds the duty.

Recommendation 2

The NTC should not progress its plan to have a primary duty applying to operators, prime contractors and employers, and role-specific duties applying to other chain parties. Instead, the primary duty should apply to all chain parties, with the role-specific duties in draft policy proposals 2-6 redesignated as further duties.

Recommendation 3

As a starting point for discussion, the NTC should adopt the definition of 'road transport operations' set out in this submission, with the addition of provisions relating to passenger operations developed in consultation with the Bus Industry Confederation.

Recommendation 4

In line with the ALRTA submission to this review, the definition of 'consignor' in s 5 of the HVNL should be amended so it:

- extends to cover all the other parties currently listed as alternatives if no consignor is named
- extends, in the case of livestock, to the responsible parties stipulated in the Land Transport Standards or the mandatory National Vendor Declaration.

Recommendation 5

The proposed role-specific duty for consignors and consignees should be redesignated as a further duty, with consignors and consignees also subject to the primary duty. For clarity, the further duty should be written to expressly cover vehicle roadworthiness, as well as MDLR, speed and fatigue.

Recommendation 6

In line with the ALRTA submission, the definition of packer should be amended to:

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

Recommendation 7

The proposed role-specific duty for loaders should be redesignated as a further duty, with loaders also subject to the primary duty. For clarity, the further duty should be written to expressly cover speeding as well as MDLR and fatigue.

Recommendation 8

The HVNL should include a further duty for drivers. The duty should cover the requirements of s 228 of the HVNL in relation to fatigue, as well as the broader requirements of s 28 of the model WHS Act.

Recommendation 9

Sections 215, 216, 240 and 241 of the HVNL should be consolidated, expanded to cover MDLR and vehicle roadworthiness and relocated to proposed Chapter 1A, along with s 742, which prohibits chain parties from contracting out of their CoR obligations.

Recommendation 10

The HVNL should be amended to include shared responsibility provisions along the lines of ss 13-16 of the model WHS Act and ss 50-51 of the RSNL, with appropriate modifications to reflect the specific characteristics of the road freight transport industry. The amendments should not include a provision equivalent to s 50(4) of the RSNL.

Recommendation 11

Section 18(3) of the HVNL should be amended to provide that complying with the HVNL fatigue provisions and duties is evidence that a person has complied with their work health and safety obligations relating to fatigue.

Recommendation 12

Section 18 of the HVNL should be amended to include a double jeopardy provision to make it clear that offenders cannot be punished under both the HVNL and work health and safety law for the same offence.

Recommendation 13

The term 'all reasonable steps' should be retired from the HVNL and replaced with 'so far as is reasonably practicable.' The HVNL should use a definition of 'reasonably practicable' that is consistent with the definition used in the model Work Health and Safety Act.

Recommendation 14

If recommendation 13 is not adopted, the term 'all reasonable steps' should be defined in the HVNL. The definition should provide that 'all reasonable steps' means the steps that were reasonably able to be taken, taking into account and weighing up all relevant matters including–

- the likelihood of the hazard or the risk concerned occurring
- the degree of harm that might result from the hazard or the risk
- what the person concerned knows, or ought reasonably to know, about–
    - the hazard or the risk; and
    - ways of eliminating or minimising the risk
- the other steps already taken to eliminate or control the risk
- the availability and practicability of ways to eliminate or minimise the risk
- 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.

Recommendation 15

Section 229 of the HVNL would be replaced by the primary and further duties recommended in this submission. It should therefore be repealed.

Recommendation 16

The intermediate duties in the HVNL would be replaced by the primary and further duties recommended in this submission. They should be repealed.

Recommendation 17

The provisions imposing deemed liability for chain of responsibility contraventions (ss 183, 219 and 261) should be removed from the HVNL.

Recommendation 18

Sections 620, 622, 623 and 624 of the HVNL should be removed, as should regulations 26 and 27 of the *Heavy Vehicle (Fatigue Management) National Regulation*.

Recommendation 19

If the NTC recommends an increase in maximum penalties:

- the penalties should be categorised on a similar basis to those in the model WHS Act and the RSNL
- all chain parties found guilty of committing an offence should face the same maximum penalty in each category, with the s 596 multiplier applying to corporations.
- the penalties should be set out in a common, single division of chapter 1A.

Recommendation 20

If the NTC goes ahead with its proposal to increase maximum penalties, draft proposal 14 (requiring the prosecution to bear the burden of proof for all executive officer liability offences) should be adopted.

Recommendation 21

Regardless of how it is implemented, the executive officer liability provision in the HVNL should be located in chapter 1A.

Recommendation 22

If the NTC goes ahead with draft proposal 14 (requiring the prosecution to bear the burden of proof for executive officer liability offences), the package of recommendations prepared for ministers should include a cautious increase in investigative powers. Any rewrite of the powers in the HVNL should:

- make it clear that the powers must be exercised reasonably
- clarify that enforcement officers must provide a receipt for documents taken or copied
- include appropriate provisions about self-incrimination
- require interviews to be conducted, or documents provided, at a time and place that is reasonable in the circumstances.

The ATA and its members should be consulted on the details of the recommendation before it goes to ministers.

Recommendation 23

As soon as possible, the NHVR should issue guidelines under Part 13.2 of the HVNL for approving industry codes of practice. Approved codes of practice should be available for use before the new system of duties comes into effect.

Recommendation 24

The NHVR and state road transport agencies should work to ensure that enforcement officers can provide trucking businesses with best practice CoR and safety advice.

Recommendation 25

The NTC should commission a case study analysis of its proposed reform package to provide a degree of certainty about the likely impact of the reforms.

Recommendation 26

The NTC should, if necessary, ask for and be provided with additional time to complete the development of the HVNL reforms.

3. Introduction

In May 2015, Australia's transport ministers agreed there was a need to change the current chain of responsibility (CoR) regime. The ministers agreed that the Heavy Vehicle National Law (HVNL) should include a primary duty of care for heavy vehicle operators and specific duties for other chain parties. The primary duties would be restricted to existing chain parties and the current subjects of the law with the addition of vehicle roadworthiness.

The ministers also agreed that the current structure of the duties should be reviewed to consolidate existing provisions, remove duplication, remove unnecessary provisions and improve consistency of construction.

In July 2015, the National Transport Commission (NTC) released a discussion paper about the details of the reforms.[1] The NTC has been asked to provide detailed recommendations to ministers for their meeting in November 2015, with draft legislation to be considered in May 2016.

This submission provides a detailed view about the introduction of primary or general duties (section 4), including a possible outline of a new chapter for the HVNL that would consolidate those duties and related provisions in one place (table 1). The ATA considers that the introduction of these duties would improve safety, without increasing compliance costs.

The submission examines the standard of care that should be applied to the new duties (section 5) and recommends that the WHS standard, so far as is reasonably practicable, be adopted. The recommendation is, in part, based on original research carried out by the ATA for this submission (Attachment A).

The introduction of general duties would also open the way for large numbers of complex, duplicated and overlapping provisions to be removed from the HVNL, with red tape reduction benefits for industry, regulators and the courts. Section 6 of the submission considers the provisions that could be removed and the potential benefits.

Section 7 argues that maximum penalties, executive officer liability and the investigative powers of enforcement agencies must be considered and put to ministers as a package because they are interconnected.

Meanwhile, section 8 considers codes of practice, industry information and the need for better information and training for enforcement officers. It argues that the availability of evidentiary codes of practice is an integral part of best practice safety regulation, and recommends that approved codes of practice should be available before the new system of duties comes into effect.

The reforms proposed by the NTC, and the recommendations in this submission, are complex. Section 9 recommends that the NTC should commission a review of previous CoR cases so the industry, regulators and ministers can fully understand the effects of the proposed reforms. It also argues that the reforms should not be rushed. The NTC should ask for, and be provided with, additional time if it is needed to develop the reforms properly.

[1] National Transport Commission, *Primary duties for chain of responsibility parties and executive officer liability: discussion paper*, July 2015.

4. Primary duties

The introduction of primary or general duties is an accepted part of best practice safety regulation. These duties define the broad scope of a duty holder's responsibilities and require them to consider their own business risks and how they can reasonably be eliminated or minimised. The model Work Health and Safety (WHS) Act and the Rail Safety National Law (RSNL) are based on this approach.

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

What a primary duties chapter could look like

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

Table 1 sets out a possible division-level structure for the new chapter. It is an update of the chapter outline that the ATA originally proposed; it reflects the issues raised in the NTC paper and the recommendations in this submission.

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

Division	ATA recommendation
Division 1: Introductory	
Subdivision 1: Who is a party in the chain of responsibility	
Subdivision 2: Principles that apply to duties	10
Subdivision 3: Relationship with primary work health and safety laws	11, 12
Subdivision 4: What is reasonably practicable or What are all reasonable steps	13 (preferred) or 14
Division 2: Primary duty of all parties in the chain of responsibility	2, 3
Division 3: Further duties of parties in the chain of responsibility	
Subdivision 1: Further duties of consignors and consignees	2, 4, 5
Subdivision 2: Further duties of outsourced vehicle maintainers	
Subdivision 3: Further duties of schedulers	2
Subdivision 4: Further duties of packers	2, 6
Subdivision 5: Further duties of loading managers	2
Subdivision 6: Further duties of loaders	2, 7
Subdivision 7: Further duties of unloaders	2
Subdivision 8: Further duties of drivers	8
Division 4: Executive officer liability	20, 21
Division 5: Requests, contracts and contracting out	9
Division 6: Penalties	19

As the ATA argued in its CoR duties review submission, a structure like this would be more straightforward than the existing one, because the duties applying to each chain party would be easier to find. In line with good drafting practice, the important concepts in the law would be stated as its central elements, instead of being buried in a morass of detail. [2]

Recommendation 1

The CoR duties in the HVNL, along with their related provisions, should be consolidated into a single chapter and structured on the basis of who holds the duty.

[2] Office of Parliamentary Counsel (Cwlth), *Reducing complexity in legislation*, 2011, 8.

One primary duty should apply to all chain parties

The NTC discussion paper argues that the CoR duties in the HVNL should be replaced by a primary duty of care for trucking operators, prime contractors and employers, and narrower, role-specific duties for other chain parties.[3]

For example, the duty of a consignor or consignee would be limited to mass, dimension and load restraint (MDLR), speed and fatigue management.[4]

The NTC proposal is based on the structure of duties in the RSNL. The RSNL imposes a primary duty on rail transport operators (s 52) and other, entirely separate duties on designers, manufacturers and suppliers (s 53), and loaders and unloaders (s 54).

The ATA does not believe the primary duty/role-specific duty model is appropriate for the HVNL.

The entire rationale of chain of responsibility is that the trucking industry has contracting chains where consignors and consignees in particular can have a broad influence on the safety of road transport operations.

For example, one of the chief objectives of the model fatigue law, now Chapter 6 of the HVNL, was to help drive a cultural change through the industry by addressing some root causes of driver fatigue, including unfair pressure from consignors.[5]

NTC research in 2012 confirmed the existence of this unfair pressure. The research concluded that:

> A significant operational problem that companies and drivers associated with working hours was around pressure of deadlines and 'time slots', where delays negatively impact on work/rest times.[6]

Given the broad influence of chain parties like consignors and consignees, it would be counterproductive to exclude them from the primary duty. Excluding them would most likely have a considerable impact on their perceived legal responsibility, with the effect that those parties would have enforcement action taken against them even less frequently, and lower penalties applied.

A more appropriate structure would be to have a primary duty that applied to all chain parties. This primary duty could be supplemented by imposing further duties on specific parties to spell out their responsibilities in more detail.

This approach was adopted in the model WHS Act. The Act imposes a primary duty on all businesses (s 19), and then a series of further duties on specific categories of businesses. These further duties are in addition to the primary duty.

The National Review into Model Occupational Health and Safety Laws argued that this approach would clarify that the specific businesses had duties, and would allow for the inclusion of detailed requirements that would not be appropriate in the primary duty.[7]

The ATA acknowledges that some chain parties do not have the same influence on transport operations as others. A small business consignor dealing with a large trucking business has much less influence over safety than a large consignor dealing with a small trucking business.

The appropriate way of addressing this disparity of influence is through the reasonableness qualifier in the safety duty, whether that qualifier is 'all reasonable steps' as at present or 'so far as is reasonably practicable' as the ATA recommends.

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[3] NTC, 2015, 14.

[4] NTC, 2015, 19

[5] NTC, *Heavy vehicle driver fatigue – final regulatory impact statement*. NTC, Melbourne, 2006. 18.

[6] NTC and AMR, *Reform evaluation in the road transport industry, 2012: survey on driver fatigue*, 46.

[7] National Review into Model Occupational Health and Safety Laws, first report, October 2008, 81. Available at: http://docs.employment.gov.au/node/1657

Recommendation 2

The NTC should not progress its plan to have a primary duty applying to operators, prime contractors and employers, and role-specific duties applying to other chain parties. Instead, the primary duty should apply to all chain parties, with the role-specific duties in draft policy proposals 2-6 redesignated as further duties.

Defining 'road transport operations'

The NTC proposes that the primary duty on operators, prime contractors and employers should be restricted to 'road transport operations.'[8] The approach is consistent with the RSNL, which applies only to the 'railway operations' of rail transport operators.[9]

The definition of 'road transport operations' used in the HVNL is critical. It would need to be broad enough to capture all the business activities covered by the law now, while not inappropriately extending its reach. It would also need to fit in with the ATA's recommendation to extend the primary duty to cover all chain parties.

As a starting point for discussion, the ATA considers that the definition of road transport operations should include the following:

- Driving or carrying out another task relating to the use of a heavy vehicle
- Directing, employing or contracting a driver to drive or carry out another task relating to the use of a heavy vehicle
- Scheduling or routing a heavy vehicle
- Modifying, inspecting, servicing or repairing a heavy vehicle[10]
- Engaging another person to modify, service, inspect or repair a heavy vehicle[4]
- Consigning goods for transport on a heavy vehicle
- Packing goods or preparing livestock for transport on a heavy vehicle
- Checking or adjusting the load on a heavy vehicle while in transit
- Managing the loading or unloading of goods or livestock from a heavy vehicle
- Loading goods or livestock on to a heavy vehicle
- Receiving goods or livestock from a heavy vehicle as a consignee
- Unloading goods or livestock from a heavy vehicle
- Unpacking goods transported on a heavy vehicle, including any process (such as weighing or certifying the quality of goods) that results in the vehicle and its driver being detained
- The business practices of any chain party that are relevant to road transport operations, including its:
    - operating policies and procedures
    - human resource and contract management arrangements
    - arrangements for managing safety.

The definition would also need to cover passenger operations. This part of the definition should be developed in consultation with the Bus Industry Confederation.

Recommendation 3

As a starting point for discussion, the NTC should adopt the definition of 'road transport operations' set out in this submission, with the addition of provisions relating to passenger operations developed in consultation with the Bus Industry Confederation.

[8] NTC, 2015, 16.

[9] RSNL s 52(1). See also RSNL s 4 (definition of 'railway operations').

[10] The RSNL definition of railway operations also covers the design and commissioning of rolling stock. This is not needed in the HVNL; the certification and supply of new heavy vehicles to the market is already regulated by the *Motor Vehicle Standards Act 1989* (Cth).

Consignors and consignees

The NTC proposes that consignors and consignees should have the following role-specific duty:

> To ensure safety by specifying terms of consignment for delivery of goods and passengers such that it will not result in, encourage or provide incentive to breach:
>
> - the vehicle's mass, dimension and load restraint requirements; and/or
> - speed or fatigue requirements by the driver.[11]

The ATA considers that this duty should be redesignated as a further duty, and should apply to consignors and consignees in addition to the primary duty as a way of clarifying their obligations.

In addition, consignors and consignees would be subject to the requirements of the HVNL relating to requests, contracts and contracting out. This is important, because 'terms of consignment' is not, in the ATA's view, broad enough to cover the whole range of interactions between influential consignors/consignees and trucking businesses.

Definition of consignor

In its submission to this review, the Australian Livestock and Rural Transporters Association (ALRTA) argues that the definition of a consignor in the HVNL should be amended so it is not exhausted once a consignor is named in the transport documentation. ALRTA argues that:

- the definition should extend to cover all the other parties currently listed as alternatives if no consignor is named
- provision should be made so that, in the case of livestock, the responsible parties can be identified as those stipulated in the Land Transport Standards or the mandatory National Vendor Declaration.[12]

Transport for NSW (TfNSW) raised similar concerns about the definition in its submission to the CoR duties review. It said:

> The hierarchical definitions of a consignor, for example, means that it is not possible to identify the most culpable person (ie: responsible for the safety risk) but only the person who is most accessible (ie: who meets the prescriptive definition) (…) if a person is named in transport documents as the consignor, there is no obligation on any other person to consider compliance with the HVNL.[13]

Recommendation 4

In line with the ALRTA submission to this review, the definition of 'consignor' in s 5 of the HVNL should be amended so it:

- **extends to cover all the other parties currently listed as alternatives if no consignor is named**
- **extends, in the case of livestock, to the responsible parties stipulated in the Land Transport Standards or the mandatory National Vendor Declaration.**

Limitation of the proposed duty to MDLR, speed and fatigue

Even if the proposed duty is redesignated as a further duty, its limitation to MDLR, speed and fatigue is too narrow.

There is no doubt that the commercial relationship between consignors and operators can influence the fleets they use and how they are maintained. For example, it is possible to imagine a consignor setting rates or seeking supply

[11] NTC, 2015, 21.
[12] Robins, G. *Primary duties for chain of responsibility parties and executive officer liability*. ALRTA response to NTC discussion paper, August 2015. 9.
[13] Reardon, T. *NTC chain of responsibility duties review: Transport for NSW response to the NTC's discussion paper*. February 2015, 11.

chain efficiencies that it knew, or reasonably ought to have known, could only be achieved by underspending on maintenance or equipment.

Recommendation 5

The proposed role-specific duty for consignors and consignees should be redesignated as a further duty, with consignors and consignees also subject to the primary duty. For clarity, the further duty should be written to expressly cover vehicle roadworthiness, as well as MDLR, speed and fatigue.

Packers

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

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

In its submission to this review, ALRTA recommends that the definition of 'packer' should be amended to:

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

The ATA agrees.

Recommendation 6

In line with the ALRTA submission, the definition of packer should be amended to:

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

Loaders

The NTC proposes that loaders should have the following role-specific duty:

> To ensure safety by loading and/or packing a heavy vehicle such that it will not result in or encourage breach of:
> - the vehicle's mass, dimension and load restraint requirements; and
> - fatigue requirements by the driver.[14]

The proposed duty does not extend to speeding, even though loading delays could obviously contribute to speeding if drivers and businesses then have to meet inflexible deadlines.

Recommendation 7

The proposed role-specific duty for loaders should be redesignated as a further duty, with loaders also subject to the primary duty. For clarity, the further duty should be written to expressly cover speeding as well as MDLR and fatigue.

[14] NTC, 23.

Drivers

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

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

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

The Victorian *Occupational Health and Safety Act* includes a similar provision (s 25).

The NTC paper does not propose a duty for drivers. In the ATA's view, there is a strong case for including such a duty, which should combine the existing s 228 fatigue duty with the worker duties under the model WHS Act.

The s 228 duty covers situations where:

- a driver is fatigued and not fit for duty at the start of their shift or
- a driver becomes fatigued during their shift, even if they are compliant with their work and rest hours option.

These situations are a serious and continuing safety issue for the trucking industry. For example, NTI research shows that the majority of serious truck crashes occur in the initial five hours of any journey.[15]

The duty is also an important protection for drivers. A driver who is fatigued and needs to take a rest can point to this section as a legitimate reason to take a break.

Section 28 of the model WHS Act has important features that should be included in any driver duty. This section recognises that safety is the shared responsibility of everyone in the workplace by making it clear that:

- workers must take reasonable care of their own health and safety
- workers must take reasonable care not to adversely affect the health and safety of others (for example, by failing to report a vehicle fault)
- workers must comply with reasonable safety instructions, processes and procedures. This last requirement is particularly important in the trucking industry, because many company CoR policies are entirely dependent on drivers for their implementation.

Recommendation 8

The HVNL should include a further duty for drivers. The duty should cover the requirements of s 228 of the HVNL in relation to fatigue, as well as the broader requirements of s 28 of the model WHS Act.

[15] National Truck Accident Research Centre, *2015 major accident investigation report*. NTI, Brisbane, 22. Available at: http://www.nti.com.au/files/files/NTARC/2015_Major_Accident_Investigation_LR.pdf. Accessed 23 July 2015.

Requests, contracts and contracting out

The interactions between upstream chain parties and trucking businesses can involve:

- written agreements or internal company policies where trucking operators are penalised for missing deadlines[16]
- downward auctions that result in unsustainable freight rates[17]
- contracts that require operators to pay CoR fines incurred by other parties. Even though these contract terms are banned under the HVNL, operators may feel compelled to make the payments to continue their commercial relationship.

The HVNL has a series of provisions (ss 215-216 in relation to speed and ss 240-241 in relation to fatigue) that prohibit requests or contracts that would encourage or cause drivers to speed or drive while fatigued. Meanwhile, s 742 bans parties from contracting out of their obligations or requiring others to pay CoR penalties, although it is buried in the back of the law amongst provisions giving the regulator the power to approve forms and set cost recovery fees.

These provisions are important. They should be consolidated, expanded to cover MDLR and vehicle maintenance and relocated to proposed Chapter 1A so the obligations of chain parties are clear.

Recommendation 9

Sections 215, 216, 240 and 241 of the HVNL should be consolidated, expanded to cover MDLR and vehicle roadworthiness and relocated to proposed Chapter 1A, along with s 742, which prohibits chain parties from contracting out of their CoR obligations.

Principles applicable to primary duties

Sections 13-16 of the model WHS Act and s 51 of the RSNL set out common principles to guide duty holders, regulators and the courts on how to interpret and apply duties of care. Section 50 of the RSNL provides that rail safety is a shared responsibility. NTC draft proposal 12 (p 32) recommends that similar principles be included in the HVNL.

Experience has shown that shared responsibility provisions are likely to increase cooperation and communication between businesses in the transport chain. In the rail context, the ATA is aware of examples that include:

- a rail maintenance contractor interacting with a rail infrastructure manager about the content of both their safety management systems to confirm their systems interact consistently.

- a principal contractor communicating comprehensively and transparently with other contractors and the developer of a project during a contract dispute to resolve safety matters where there was a shared safety responsibility, rather than the parties digging into their commercial positions and ignoring the areas where their safety responsibilities overlapped.

Accordingly, the ATA supports the inclusion of similar principles in the HVNL, subject to the development of drafting instructions that reflect the specific characteristics of the road freight transport industry. The ATA is concerned, in particular, that including a provision similar to s 50(4) of the RSNL[18] could result in an inappropriate transfer of responsibility from influential off-road parties to trucking businesses.

[16] Skinner, S. "RMS compliance chief Endycott calls for customer contracts," ATN, 10 November 2014. Available at: http://www.fullyloaded.com.au/industry-news/1411/rms-compliance-chief-endycott-calls-for-customer-contracts
[17] Skinner, S. "Endycott blames greed for chain of responsibility problems," ATN, 28 April 2015. Available at: http://www.fullyloaded.com.au/industry-news/1504/greed-at-the-heart-of-chain-of-responsibility-breaches-endycott/
[18] s 50(4)—Managing risks associated with the carrying out of rail infrastructure operations or rolling stock operations is the responsibility of the person best able to control those risks.

Recommendation 10

The HVNL should be amended to include shared responsibility provisions along the lines of ss 13-16 of the model WHS Act and ss 50-51 of the RSNL, with appropriate modifications to reflect the specific characteristics of the road freight transport industry. The amendments should not include a provision equivalent to s 50(4) of the RSNL.

Interaction with work health and safety laws

NTC draft proposal 12 (p 32) proposes that the relationship between the HVNL and work health and safety legislation be further clarified. The ATA agrees.

Compliance with prescriptive work and rest hours

Under the HVNL, drivers of fatigue regulated heavy vehicles are required to work under one of three work and rest hours options. Under standard hours, drivers can work for a maximum of 12 hours in any 24 hour period. Drivers must take a 15 minute rest break no more than 5¼ hours after starting work, and other rest breaks later in their shift.[19]

The model WHS Act does not prescribe working hours, but guidance material issued by Safe Work Australia recommends that shifts involving monotonous, dangerous or safety critical work such as truck driving should be limited to eight hours.[20]

As a technical legal matter, the wording of s 18(3) of the HVNL means it would be possible for a WHS regulator to prosecute an operator complying with the one of the prescriptive fatigue schemes.

This would be unlikely, because it would conflict with the broad legal policy that prosecutions should not bring the law into disrepute. Nonetheless, the inconsistency is a source of legal uncertainty; it should be clarified.

Recommendation 11

Section 18(3) of the HVNL should be amended to provide that complying with the HVNL fatigue provisions and duties is evidence that a person has complied with their work health and safety obligations relating to fatigue.

Double jeopardy

The HVNL includes a number of internal provisions prohibiting double jeopardy. For example, s 634 provides that a person is only liable to be punished once for a given contravention, even if the person is liable in more than one capacity (for example, the person is both an employer and a scheduler).

The HVNL does not, however, include a provision to make it clear that a person cannot be prosecuted under both the HVNL and work health and safety law for the same offence.

In contrast, s 49 of the RSNL provides that:

> Where an act or omission constitutes an offence—
> (a) under this Law; and
> (b) under the occupational health and safety legislation, the offender is not liable to be punished twice in respect of the offence.

NTC draft proposal 12 (p 32) recommends that the relationship between the HVNL and work health and safety legislation be further clarified to expressly address double jeopardy. The ATA agrees. In the absence of such a provision, a defendant faced with prosecution under both the HVNL and work health and safety law would need to seek a separate hearing about how the common law principle of double jeopardy would apply. This would be highly technical and costly.

[19] *Heavy Vehicle (Fatigue Management) National Regulation*, sch 1.
[20] Safe Work Australia, *Guide for Managing the Risk of Fatigue at Work*, November 2013, 14. Available at: http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/guide-fatigue-at-work

Recommendation 12

Section 18 of the HVNL should be amended to include a double jeopardy provision to make it clear that offenders cannot be punished under both the HVNL and work health and safety law for the same offence.

5. Standard of care

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.[21]

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. These three provisions are discussed further in section 6 of this submission.

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
- the term does not include any reference to the practicability of implementing those steps.

Because of the problems with the term, the ATA recommended in January 2015 that it should be replaced with the model WHS Act duty of care, 'so far as is reasonably practicable.'[22] TfNSW[23] and the National Heavy Vehicle Regulator (NHVR)[24] put forward similar recommendations.

So far as is reasonably practicable

The model WHS Act and the RSNL 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 OHS Review pointing to case law going back to 1949.[25]

The model WHS 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.

[21] s 618. Alternatively, the person could seek to prove there were no steps they could reasonably be expected to have taken to prevent the contravention.
[22] ATA, *Chain of responsibility duties review*. Submission to the National Transport Commission, January 2015, 12.
[23] Reardon, 25.
[24] National Heavy Vehicle Regulator (NHVR), *Submission on COR discussion paper*. February 2015, [20].
[25] *Edwards v National Coal Board* [1949] 1 KB 704.

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.

Trucking businesses have to comply with work health and safety laws as well as the HVNL. It would seem reasonable, then, to conclude that aligning the HVNL duty of care with the WHS standard would reduce the compliance burden on businesses and their staff, because they would be able to integrate their CoR and WHS systems.

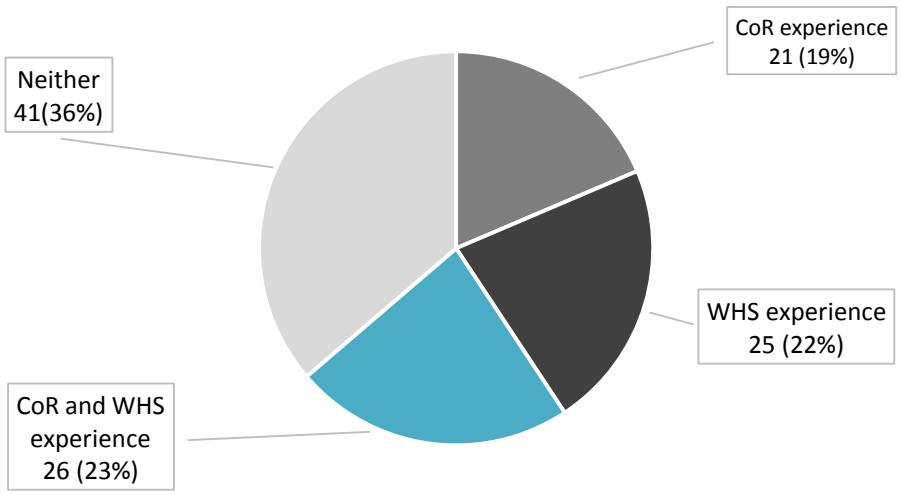
To test this hypothesis, the ATA conducted original research in June-July 2015 to determine if combining the requirements of the CoR and WHS legislation would reduce the compliance burden on management-level heavy vehicle transport employees.

The ATA analysed 113 management level job advertisements posted on three major job search websites during a 34 day period. Figure 1 summarises the results of the research; the details are in attachment A.

The figure shows that:

- 72 of the road freight management positions advertised (64 per cent) required either CoR experience, WHS experience or both
- 26 of the positions (23 per cent) required experience in both CoR and WHS. Aligning the two regimes would significantly reduce the compliance burden on the managers in these positions.
- the managers taking up the 21 positions that required CoR experience would benefit from the reduction in complexity proposed in this submission, and would also benefit from the alignment if they moved, in future, to a role requiring WHS skills. Similarly, the managers in the 25 positions that required only WHS skills would be able, in future, to apply those skills readily to CoR compliance.

Figure 1: Experience requirements for road freight managers, June-July 2015 (n=113)



Based on these results, and extensive member consultation, the ATA continues to be of the view that the duties in the HVNL should use 'so far as is reasonably practicable' as the standard of care, and that the definition should be consistent with the one used in the model WHS Act.

Recommendation 13

The term 'all reasonable steps' should be retired from the HVNL and replaced with 'so far as is reasonably practicable.' The HVNL should use a definition of 'reasonably practicable' that is consistent with the definition used in the model Work Health and Safety Act.

Defining 'all reasonable steps'

If recommendation 13 is not adopted, the ATA recommends that the term 'all reasonable steps' be defined in the HVNL.

The definition should parallel the definition of 'as far as is reasonably practicable' in the model WHS Act, but should include the following additional qualifiers to reflect the practical issues that the industry and regulators have experienced:

- *Other steps already taken to eliminate or control the risk:* As page 15 of this submission points out, the ordinary meaning of the word 'all' suggests there is a list of reasonable steps somewhere that must all be implemented.

  For example, the ATA has previously expressed the concern that an aggressive enforcement agency could argue, in a chain of responsibility case, that a trucking business should have installed EWDs despite having systems to monitor its drivers' written work diaries, on the grounds that installing an EWD could be seen as a reasonable step when considered in isolation from the other steps taken by the business.[26]

  This would be absurd, given that a business with an effective WWD system can achieve what the operational pilot into EWDs described as sound compliance rates.[27]

- *The practicability of ways to eliminate or minimise the risk*: Unlike 'so far as is reasonably practicable,' the ordinary meaning of 'all reasonable steps' does not convey any notion of practicability, which is an essential part of the WHS duty of care.

Recommendation 14

If recommendation 13 is not adopted, the term 'all reasonable steps' should be defined in the HVNL. The definition should provide that 'all reasonable steps' means the steps that were reasonably able to be taken, taking into account and weighing up all relevant matters including–

- **the likelihood of the hazard or the risk concerned occurring**
- **the degree of harm that might result from the hazard or the risk**
- **what the person concerned knows, or ought reasonably to know, about–**
  - **the hazard or the risk; and**
  - **ways of eliminating or minimising the risk**
- **the other steps already taken to eliminate or control the risk**
- **the availability and practicability of ways to eliminate or minimise the risk**
- **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.**

[26] ATA, *Heavy Vehicle National Law Amendment Bill 2015*. Submission to the Queensland Parliamentary Infrastructure, Planning and Natural Resources Committee, 24 June 2015. 6. Available at http://www.truck.net.au/advocacy/submissions/heavy-vehicle-national-law-amendment-bill-2015-submission

[27] Transport Certification Australia, *Operational pilot of electronic work diaries and speed monitoring systems: final report*, TCA, Melbourne, 2013. Report prepared for NSW Roads and Maritime Services. 45. Available at http://roadsafety.transport.nsw.gov.au/stayingsafe/drivers/heavyvehicledrvers/electronic_work_diaries_oct2013.pdf.

6. Removing complex and inconsistent provisions

The ATA has long argued that the complexity and inconsistency of the existing CoR provisions is a problem for both industry and regulators.

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. The duties imposed on specific chain parties are spread across multiple chapters; there are overlapping duties covering the same conduct.

It is not surprising that recent Safe Work Australia research shows that businesses in the transport industry spend markedly more time keeping safety compliance records and finding out information about their WHS obligations than other businesses.[28]

It has been argued that the HVNL does not need to be changed, because the complexity and inconsistency of the law could be addressed by providing better guidance material. It has also been argued that businesses do not consult legislation anyway. At first glance, this view is supported by the Safe Work Australia research, which shows that only 18 per cent of transport employers source safety information from government documents and publications.[29]

It is undeniably true that businesses need better guidance material. Section 8 of this submission sets out recommendations about how this could be done. In the ATA's experience, though, complex and inconsistent legislation leads to complex, inconsistent or incomplete guidance material. Reducing the complexity of the law would increase the quality of the guidance material available and make the law more accessible for businesses that do consult it.

The complexity of the law creates problems for regulators and the courts, as well as operators. In its submission to the CoR duties review, TfNSW pointed out that:

> The tension between the underlying policy that recognises risks to safety and the narrow and rules-based approach at times undermines the ability to act effectively in the public interest. In these types of proceedings the scale of the charging becomes the focus, rather than the seriousness and ongoing nature of the conduct. Enforcement agencies are in a difficult position where they are perceived as either charging too many offences and abusing the court process; or as letting offenders get a free ride.[30]

The complexity also increases the chance that enforcement activity will fail because of technical legal problems. The ATA submission to the CoR duties review cited *Damorange*, where the NSW Supreme Court rejected an appeal against the sentence imposed by a local court judge for a series of speed limiter offences. The court found that the prosecutor had misunderstood the 'intricate legislative regime.'[31]

The establishment of general duties within the HVNL is an opportunity to remove these complex and inconsistent provisions from the HVNL and reduce the red tape facing operators, regulators and the courts.

The general fatigue duty

At present, the only general duty in the HVNL is s 229, which provides that:

> (1) A party in the chain of responsibility (a party) for a fatigue-regulated heavy vehicle must take all reasonable steps to ensure a person (the other person) does not drive the vehicle on a road while the other person is impaired by fatigue.
> Maximum penalty—$10000.

While this section is highly appropriate, it demonstrates the current level of inconsistency in the law. There is no similar general duty for speeding, even though NTI's biennial statistics show that a higher proportion of the serious truck accidents involving its insured vehicles are caused by inappropriate speed than by fatigue.[32]

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[28] Safe Work Australia, *Transport industry: synthesis of research findings*, July 2015. 12.
[29] Safe Work Australia, 2015, 14.
[30] Reardon, 10.
[31] *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 [91].
[32] National Truck Accident Research Centre, 9.

Section 229 would be replaced by the primary and further duties recommended in this submission, and should therefore be taken out of the law.

Recommendation 15

Section 229 of the HVNL would be replaced by the primary and further duties recommended in this submission. It should therefore be repealed.

Intermediate duties

The HVNL includes a large number of intermediate duties that between them prescribe exactly how trucking businesses must operate. For example, s 231 states that:

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

These intermediate duties 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. They also block innovation, because they lock in the business practices that were current at the time the model laws were first developed.

In its submission to the CoR duties review, TfNSW pointed out that:

> innovation can never thrive when the law contains prescriptive requirements that extend to the smallest detail.[33]

The ATA agrees. The establishment of primary and further duties in the HVNL would open the way for the intermediate duties to be repealed. Offences against these sections could instead be prosecuted under the relevant general duty.

Recommendation 16

The intermediate duties in the HVNL would be replaced by the primary and further duties recommended in this submission. They should be repealed.

Deemed liability provisions

Sections 183, 219 and 261 of the HVNL are deemed liability provisions. Under these sections, chain parties are held to have committed an offence each time a driver contravenes a mass, dimension, and load restraint provision (s 183), a prescriptive work and rest hours provision (s 219) or a speed limit applying to the vehicle (s 261). For example, s 183(2) says:

> (2) If a relevant offence is committed in relation to a heavy vehicle, each of the following persons is taken to have committed an offence against this subsection—
> (a) an employer of the driver of the vehicle if the driver is an employed driver;
> (b) a prime contractor of the driver of the vehicle 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;

[33] Reardon, 15.

(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 for any goods in the vehicle;
(g) a loader of any goods in the vehicle.
Maximum penalty for an offence against this subsection—an amount equal to the maximum penalty for the relevant offence.

In each case, the person has access to the reasonable steps defence (s 618).

The deemed liability provisions are problematic, because:

- the prosecution procedures of each HVNL jurisdiction require officers to consider whether the defendant could mount a reasonable steps defence before commencing prosecution.[34] This process is not always followed, particularly with respect to prosecutions involving speeding offences in urban areas where vehicles are travelling at less than 100 km/h.

- the deemed liability provisions provide businesses with a strong incentive to impose tight controls on the minor contraventions with less serious safety consequences that are likely to be the subject of these prosecutions, rather than developing risk management systems to address major safety risks.

For these reasons, the deemed liability provisions should be removed from the HVNL. Prosecutions should instead be mounted under the primary duty or a further duty, as appropriate.

Recommendation 17

The provisions imposing deemed liability for chain of responsibility contraventions (ss 183, 219 and 261) should be removed from the HVNL.

Sections 620, 622, 623 and 624

Section 623 of the HVNL sets out a way that operators can demonstrate that they have taken 'all reasonable steps' in relation to speed and fatigue.

In the ATA's view, s 623 should be removed from the law, because:

- the establishment of a primary duty with a well-defined duty of care, together with evidentiary codes, would provide operators with better guidance about how to comply with their obligations

- the section requires operators to take action in relation to substantial risks, but does not recognise that risk assessment involves assessing consequences as well as risk. As the Hatcher review pointed out, a strict reading of the steps required in s 623 would lead to an operator ignoring low probability but potentially catastrophic safety consequences.[35] Conversely, it could be seen as requiring an operator to implement extensive measures to control substantial risks with low or trivial consequences.

- the section is overly bureaucratic. An operator that kept records for three years and one day would be deemed to comply with its chain of responsibility obligations. An operator who implemented exactly the same control measures but only kept its records for two years and 364 days would not be able to rely on the section.

Accordingly, the ATA agrees with NTC draft proposal 10 that s 623 should be removed. This would involve the consequential removal of s 624 (which is a regulation-making power for s 623, but only relates to fatigue offences) and regulations 26 and 27 of the *Heavy Vehicle (Fatigue Management) National Regulation*.

Sections 620 and 622 of the HVNL set out matters that courts can consider when deciding if a person took all reasonable steps.

[34] *Chain of Responsibility Review Assessment of Options Paper*: Appendix H (Consideration of Defences), November 2013
[35] Hatcher, 37 [53.2]

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; the ATA is aware of cases where customers have presented trucking operators with compliance paperwork based entirely on their provisions.

Sections 620 and 622 are not a definition of 'all reasonable steps.' They are not even a comprehensive list of matters that courts can consider. They are misleading and should be removed from the law.

Recommendation 18

Sections 620, 622, 623 and 624 of the HVNL should be removed, as should regulations 26 and 27 of the *Heavy Vehicle (Fatigue Management) National Regulation*.

7. Maximum penalties, executive officer liability and investigative powers

The most challenging issues in the NTC paper relate to maximum penalties and executive officer liability. The paper does not consider the investigative powers of enforcement agencies, but the ATA has cautiously come to be of the view that these powers must also be addressed in this review.

The three issues need to be considered together and put to ministers as a package, because:

- increasing maximum penalties raises issues for the burden of proof in executive officer prosecutions, particularly if an offender could be subject to a very high financial penalty or imprisonment
- at the same time, changing the burden of proof so the prosecution must prove its case beyond reasonable doubt would undoubtedly make it more difficult to mount prosecutions
- enforcement agencies have argued credibly that the limitations on the investigative powers in the HVNL already make it difficult for them to take action, particularly against upstream chain parties.

Maximum penalties

NTC draft proposal 11 (p 30) proposes that the maximum penalties for breaching the primary duties in the HVNL could be amended to align better with the maximum penalties available under the national safety laws. It says a hierarchy of penalties could be adopted, based on the nature of the actual harm or damage caused.

Table 2 in the paper (pp 29-30) sets out the maximum penalties available under the model WHS Act and the RSNL. These penalties are dramatically higher than the maximum penalties currently available under the HVNL and include imprisonment for the most serious offence category, which involves reckless conduct that exposes an individual to the risk of death, serious injury or illness.

In considering the issue of maximum penalties, it should be noted that:

- The model WHS Act/RSNL penalties were developed on the basis that a single charge could seek to show a pattern of conduct involving many duty breaches.[36] In contrast, every single breach of the HVNL is charged as a separate offence. This can lead to prosecutions involving hundreds of charges, each with a relatively lower penalty.[37]
- Maximum penalties are not defaults that automatically apply to each offence. They are a yardstick that helps sentencers compare between the worst possible case in a category and the case before them.[38] Sentencers apply a range of principles to arrive at the penalty applicable to a specific case.

[36] National OHS Review, first report, 165.
[37] NTC, 2015, 16.
[38] Markarian v R [2005] HCA 25, [31].

- The current WHS Act penalties were increased as a result of the National OHS Review. One of the justifications for the increased penalties was the shift in the burden of proof required in NSW and Queensland.[39]

If the NTC recommends an increase in maximum penalties, the ATA considers that the increased penalties should be categorised on a similar basis to those in the model WHS Act and the RSNL. As the National OHS Review pointed out, this approach allows for penalties to be differentiated to take culpability and risk into account. It also avoids the impression that all offences are potentially liable to the same maximum penalty.[40]

All chain parties should face the same maximum penalty in each penalty category, with the s 596 multiplier applying to corporations. A corporate consignor found to have acted recklessly should be subject to the same maximum penalty as a corporate trucking operator. A director of the consignor should face the same maximum penalty as the trucking company's CEO.

To reinforce the message that all chain parties face the same maximum penalty in each category, the penalties for duty breaches should be set out in a common, single division of chapter 1A, instead of each duty having its own penalty provision.

Recommendation 19

If the NTC recommends an increase in maximum penalties:

- **the penalties should be categorised on a similar basis to those in the model WHS Act and the RSNL**
- **all chain parties found guilty of committing an offence should face the same maximum penalty in each category, with the s 596 multiplier applying to corporations.**
- **the penalties should be set out in a common, single division of chapter 1A.**

Executive officer liability

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

- the prosecution should always bear the burden of proving, beyond reasonable doubt, that executives have not undertaken some sort of reasonable or due diligence to prevent a corporate offence. This approach is in line with the fundamental principles of criminal law, and is known as type 1 liability. It is the approach used in the model WHS Act, and is the default approach required under the COAG principles and guidelines for corporate fault.[41]

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

    - the executive officer knew or reasonably ought to have known of the conduct constituting the offence; or
    - the executive officer knew or reasonably ought to have known that there was a substantial risk that the offence would be committed.[42]

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

    The explanatory notes for the Heavy Vehicle National Law Bill 2012 justify this approach on the basis that:

[39] National OHS Review, first report, 155

[40] National Review, first report, 129.

[41] Council of Australian Governments (COAG), *Personal liability for corporate fault—guidelines for applying the COAG principles*. 2012.

[42] HVNL, s 636.

- all parties in the supply chain should be able to demonstrate they have taken reasonable action to secure safety
- how an executive has undertaken reasonable diligence lies peculiarly within the executive's knowledge. It is difficult for the prosecution for prove, beyond reasonable doubt, that the executive has not been suitably diligent
- HVNL offences have relatively low penalties compared to other laws that impose criminal responsibility on managers. Extending liability to managers therefore does not expose them to excessive financial risk.[43]

A case can be made for either viewpoint, provided penalties are kept relatively low.

NTC draft proposal 14 recommends that the burden of proof for all executive officer liability offences should rest with the prosecution. The ATA considers that draft proposal 14 should be adopted, if the NTC goes ahead with its proposal to increase maximum penalties. It is not acceptable, in the ATA's view, to require a person exposed to the risk of a crushing financial penalty or, conceivably, imprisonment to have to prove any aspect of their defence.

The ATA does not have a view on whether executive officer liability should be implemented through a suitably amended version of s 636 or through an explicit due diligence regime comparable to s 27 of the model WHS Act. Either way, the provision should be located in chapter 1A of the HVNL rather than buried in Part 10.4.

Recommendation 20

If the NTC goes ahead with its proposal to increase maximum penalties, draft proposal 14 (requiring the prosecution to bear the burden of proof for all executive officer liability offences) should be adopted.

Recommendation 21

Regardless of how it is implemented, the executive officer liability provision in the HVNL should be located in chapter 1A.

Investigative powers

The proposed change in the burden of proof would inevitably make it more difficult for prosecutors to prove their cases against executive officers. When the National OHS Review recommended the same change in the burden of proof, it accompanied the change with a recommendation that work health and safety regulators should have strong and wide ranging investigative powers.[44]

Compared to the model WHS Act, the HVNL imposes significant constraints on the power of regulators to investigate potential breaches. In particular:

- ss 155 and 171 of the model WHS Act give WHS regulators the power to compel people to answer questions and provide documents. Individuals do not have the right to silence; however, nothing they say can be used as evidence in proceedings against them for a substantive WHS offence (s 172). The comparable sections of the HVNL (ss 569 and 570) are more limited. For example, regulators can only compel the production of business process documents if they are investigating a possible offence under ss 204 or 230. These offences only apply to operators, employers and prime contractors.

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

[43] Heavy Vehicle National Law Bill 2012: explanatory notes. 14-15.

[44] National OHS Review, first report, 155.

In its June 2014 submission to the CoR Taskforce, the ATA argued that the investigative powers available under the HVNL were adequate. Since then, however, road transport agencies have provided evidence that they do not have the powers they need to pursue upstream chain parties in particular.

In its submission to the CoR duties review, TfNSW noted:

> …prosecutions against off-road parties are uncommon unless an investigator happens to obtain a crucial and compelling piece of evidence through good fortune. The issuing of an improvement notice is also restricted by the same factors. The shortcomings in investigative powers significantly impact on the ability to enforce the chain of responsibility laws.[45]

And the Queensland Department of Main Roads has pointed out that its ability to require evidence and information from third parties is narrower under the HVNL than under s 50AA of the former *Transport Operations (Road Use Management) Act* (Qld).[46]

In discussions with the ATA, the NTC has argued that investigative powers could be amended through the HVNL maintenance process rather than this review. The ATA does not agree. The HVNL maintenance process is aimed at collating and approving minor amendments to the law, such as clarifying the definition of a B-triple or prohibiting a person from defacing or removing a modification plate.[47] These amendments are not unimportant, but no-one would argue that they are as significant as changing the powers of investigators.

If the NTC goes ahead with draft proposal 14 (requiring the prosecution to bear the burden of proof for executive officer liability offences), the ATA considers that the recommendations prepared for ministers could include an appropriate – and suitably cautious – increase in investigative powers.

The ATA's support for increased investigative powers is not unqualified. Any rewrite of the powers in the HVNL should:

- make it clear that the powers must be exercised reasonably
- clarify that enforcement officers must provide a receipt for documents taken or copied
- include appropriate provisions about self-incrimination
- require interviews to be conducted, or documents provided, at a time and place that is reasonable in the circumstances. In the ATA's experience, regulators often underestimate the volume of documents that businesses generate due to regulatory requirements and the time it takes to collate them. For example, the ATA is aware of a case where a WHS regulator asked a national trucking business to produce all its risk assessments. The regulator was advised that this would involve the production of *thousands* of documents and take several months.

The ATA and its members should be consulted on the details of the recommendation before it goes to ministers.

Recommendation 22

If the NTC goes ahead with draft proposal 14 (requiring the prosecution to bear the burden of proof for executive officer liability offences), the package of recommendations prepared for ministers should include a cautious increase in investigative powers. Any rewrite of the powers in the HVNL should:

- **make it clear that the powers must be exercised reasonably**
- **clarify that enforcement officers must provide a receipt for documents taken or copied**
- **include appropriate provisions about self-incrimination**
- **require interviews to be conducted, or documents provided, at a time and place that is reasonable in the circumstances.**

The ATA and its members should be consulted on the details of the recommendation before it goes to ministers.

[45] Reardon, 12.

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

[47] These amendments are both in the Heavy Vehicle National Law Amendment Bill 2015 (Qld).

8. Codes of practice, guidance material and training

Codes of practice and industry information

In its CoR duties review submission, the ATA pointed out that the availability of codes of practice with evidentiary status is an integral part of best practice safety regulation.

The vast majority of trucking businesses are small businesses. On the whole, and there are notable exceptions, they do not have the resources to determine how to comply with general duties. They need guidance material.

As Bluff and Gunningham note, this issue was anticipated under the original Robens-based WHS reforms, and addressed through the mechanism of approved codes of practice. These codes identify one way of complying with the law, while enabling more sophisticated businesses to achieve compliance in other ways.[48]

Codes of practice are not a nice-to-have that can be developed when the regulator's other priorities permit. They must be seen as an integral part of the model.

The development of the model WHS Act followed this approach. The first tranche of work health and safety codes was released before the state and Commonwealth legislation based on the model WHS Act came into effect.[49] Safe Work Australia and the state WHS regulators have also published an extensive array of non-code guidance material.

In contrast, there are no codes of practice available under the HVNL, apart from transitionally registered codes in Victoria and South Australia. The NHVR has not even published guidelines under s 705 of HVNL to enable codes of practice to be approved. These guidelines should have been developed in the twelve month period between the establishment of the regulator in February 2013 and the commencement of the substantive provisions of the HVNL in 2014.

The ATA therefore reiterates its view that the NHVR needs to prioritise the development of the guidelines for approving codes of practice. Approved codes of practice should be available for use before the new system of duties comes into effect.

Recommendation 23

As soon as possible, the NHVR should issue guidelines under Part 13.2 of the HVNL for approving industry codes of practice. Approved codes of practice should be available for use before the new system of duties comes into effect.

Information and training for enforcement officers

The success of the NTC's proposed approach to reforming CoR duties will depend critically on the training of enforcement agency staff. Although evidence is sparse, research in the WHS space shows that for small businesses, in particular, contact with an enforcement officer is critical because the inspector may be the key person who provides them with specific information about how to manage hazards and apply controls for their business.[50]

The Queensland DTMR echoed this conclusion in its submission to the CoR duties review, where it noted:

> Jurisdictions and the NHVR would be well served in becoming pseudo consultants and promoting what 'as far as reasonably practicable' means. Of course, this would only work for companies willing to comply—enforcement, prosecution and court orders would necessarily prevail for deliberate offenders.[51]

[48] Bluff, E and N Gunningham, "Principle, Process, Performance or What? New Approaches to OHS Standards Setting," Working Paper 9, National Centre for OHS Regulation, July 2003, 30. Available at http://regnet.anu.edu.au/publications/wp-9-principle-process-performance-or-what-new-approaches-ohs-standards-setting. Viewed 21 January 2015.
[49] Dunn, C. et al, *Australian Master Work Health and Safety Guide*, 2nd edition. CCH, North Ryde, 79-80.
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[51] DTMR (Qld), [8(b)]

The ATA agrees.

Recommendation 24

The NHVR and state road transport agencies should work to ensure that enforcement officers can provide trucking businesses with best practice CoR and safety advice.

9. Completing the review

The need for a full case study analysis

In its CoR duties review submission, the ATA argued that the CoR reform package 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.

The ATA continues to hold this view.

The case study analysis would need to involve more than summarising court results. It would, in the ATA's view, need to include a full review of some of the key prosecutions under the CoR laws so far, to show how the reforms could have changed the results.

This approach would be the best way to provide ministers, regulators and the industry with a degree of certainty about the likely impact of the reforms.

Recommendation 25

The NTC should commission a case study analysis of its proposed reform package to provide a degree of certainty about the likely impact of the reforms.

The HVNL reforms should not be rushed

The recommendations in this submission will take time to consider and develop. As the NTC paper points out, adopting the 'so far as reasonably practicable' standard would require considering its effect on all HVNL offences.[52] A consideration of investigative powers would take time, as would the completion of the case study analysis in recommendation 25.

The ATA believes that these steps are all needed to get the reforms to the HVNL right. If necessary, the NTC should ask for and be provided with additional time to complete the review.

Recommendation 26

The NTC should, if necessary, ask for and be provided with additional time to complete the development of the HVNL reforms.

[52] NTC, 2015, 26.

Attachment A: COR and WHS requirements in road freight transport management positions
Harber, S.H and Horne, K.H.

Objective

To determine if combining the requirements of the Chain of Responsibility (CoR) and Work Health and Safety (WHS) legislation would reduce the compliance burden on management-level heavy vehicle transport employees.

Methodology

Online job search websites www.seek.com.au, www.jobs.com.au and www.careerone.com.au were searched using the following job titles:

- Fleet controller
- Operations supervisor
- Operations coordinator
- Operations manager
- Transport allocator
- Transport scheduler
- Transport supervisor

The resulting job advertisements were assessed to see if they called for applicants to have experience in dealing with CoR legislation, WHS legislation, both, or did not call for this experience.

Results

113 applicable job advertisements were found. All advertisements were posted between 24 June and 27 July 2015.

	CoR experience	WHS experience	CoR and WHS	Neither	Total
No. advertisements	21	25	26	41	113
%	18.6%	22.1%	23.0%	36.3%	100%

Analysis

Within the 34 day posting period, 113 job advertisements were identified as management-level positions within the heavy vehicle transport industry.

63.7% of positions specifically mentioned a requirement for applicants to have experience or expertise in dealing with CoR or WHS regulations, with more than a third of these requiring both.

For positions requiring both CoR and WHS expertise, streamlining these requirements could be expected to significantly reduce the compliance burden. In addition, it seems likely that positions requiring one of these would still benefit from removal of duplicate and prescriptive provisions.

It should be noted that many of the job advertisements that did not specifically request CoR or WHS expertise still listed duties that fall under these areas. These included driver scheduling, driver training, and “managing loads to ensure compliance with relevant legislative requirements”.

Conclusions

Streamlining the Chain of Responsibility and Work Health and Safety work requirements would be of immediate benefit to 23% of management-level heavy vehicle transport positions identified in this research, with a further 40.7% likely to experience some benefits from such action.

It seems likely that the number of affected positions is higher than indicated through this study. This is a reflection of very general compliance duty statements outlined in several job advertisements, which could not be determined as CoR or WHS based requirements without further investigation.