



Primary Duties for Chain of Responsibility Parties and Executive Officer Liability

Policy Paper
November 2015

Report outline

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| Title | Primary Duties for Chain of Responsibility Parties and Executive Officer Liability |
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| Purpose | For Information - Approved by the Transport and Infrastructure Council on 6 November 2015 |
| Abstract | This policy paper details the policy recommendations for legislative amendments to the HVNL to reformulate the existing obligations of current chain of responsibility parties as a primary duty of care to ensure, so far as reasonably practicable, the safety of road transport operations, and including the formulation of the proposed primary duty on executive officers as a positive due diligence obligation. |
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Foreword

Australia's transport ministers have agreed that the Chain of Responsibility (CoR) obligations in the Heavy Vehicle National Law (HVNL) should be reformed to better align with national safety laws, improve compliance and simplify enforcement. These reforms are intended to provide a more outcomes-based approach to CoR, focused on primary duties.

These reforms are limited to the existing regulatory framework of the HVNL and to current CoR parties—including executive officers—and are not designed to extend the scope of obligations for CoR parties.

The intent of these reforms is to restructure and consolidate existing obligations to ensure current CoR parties adopt a performance-based approach to their responsibilities.

These reforms are also an opportunity to remove existing more prescriptive obligations and to better clarify the roles and responsibilities of each party in the supply chain.

This policy paper sets out detailed policy recommendations for amendments to the CoR and executive officer liability provisions of the HVNL. These recommendations were informed by stakeholder feedback on the National Transport Commission's (NTC) *Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Discussion Paper*, released for public consultation in July 2015.

The NTC is an independent statutory body, established by the *National Transport Commission Act 2003* (Cth). The NTC has ongoing responsibilities to develop and maintain uniform or nationally consistent road, rail and intermodal reforms to improve safety, productivity and environmental outcomes.

I would like to thank the jurisdictions, stakeholders and the NTC for their work in preparing this paper.



David Anderson PSM

Chairman

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Executive summary

The National Transport Commission (NTC) *Chain of Responsibility Duties Review* (2014), *Executive Officer Liability Assessment* (2015) and *Heavy Vehicle Roadworthiness Review* (2015) seek to identify legislative change to improve road safety and compliance. These reviews also aim to encourage a proactive culture of safety by clarifying and restructuring current obligations for Heavy Vehicle National Law (HVNL) off-road parties.

In May 2015, Australia's transport ministers endorsed the recommendations of the Chain of Responsibility (CoR) Review and Executive Officer Liability (EoL) Assessment and agreed these matters be addressed as a single reform package.

In July 2015, the NTC published the *Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Discussion Paper* and sought stakeholder input on key issues relating to the proposed policy approach. The NTC received 23 stakeholder submissions in response to the discussion paper.

This policy paper is the culmination of this review process. It provides detailed recommendations for amendments to the HVNL. In particular, this paper outlines recommendations to:

- reformulate existing CoR obligations with a proactive, primary duties approach for all CoR parties
- align the standard of care for the primary duties with the 'so far as reasonably practicable' standard of care applied in other national safety laws
- set principles for applying those primary duties
- set appropriate penalties for breaches of those primary duties
- ensure executive officers are held appropriately accountable.

The recommendations in this paper were endorsed by ministers at their November 2015 meeting.

The NTC will work with jurisdictions and the Parliamentary Counsel's Committee to develop a draft Bill to implement these recommendations. The Bill will be provided to ministers for consideration at their May 2016 meeting.

Reformulating existing obligations as primary duties

The NTC recommends that existing CoR obligations are reformulated as primary duties to improve safety by ensuring a more proactive outcomes-based approach to CoR by all parties and that enforcement agencies can hold CoR parties accountable without some harm or incident having to occur first.

Recommendation 1 – Primary Duty of Care

- That the HVNL be amended by reformulating the existing prescriptive HVNL obligations on current chain of responsibility parties so that each party in the chain of responsibility has a primary duty of care to ensure, so far as is reasonably practicable, the safety of road transport operations (Primary Duty of Care or Primary Duties), consistent with the objects of the HVNL; and*
- That the Primary Duty of Care applies to all current chain of responsibility parties based on the role they perform within the chain, limited to the existing regulatory framework of the HVNL, and to the extent such persons:*
 - *manage or control road transport operations, and/or*
 - *engage in conduct that will result in, encourage or otherwise provide incentives in relation to the conduct of road transport operations; and*
- That, to the extent possible, the Primary Duty of Care replaces the existing chain of responsibility obligations of all current chain of responsibility parties; and*
- Note that, in recognition of the fact that the role of each current party in the responsibility chain carries certain role specific safety risks, recommendations 2-8 detail how the Primary Duty of Care is to apply to each current chain of responsibility party.*

Recommendation 2 – Primary Duty of Care – Operators, prime contractors and employers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on operators, prime contractors and employers so that each operator, prime contractor and employer has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for operators, prime contractors and employers requires such persons to ensure:*
 - *the safety of:*
 - *their heavy vehicles;*
 - *drivers; and*
 - *the operation of their heavy vehicles;*
 - *public safety is not put at risk by their road transport operations; and*
 - *against the specific safety risks posed to road transport operations by breaches of speed, fatigue, MDL and vehicle standards requirements.*

Recommendation 3 – Primary Duty of Care – Schedulers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on schedulers so that each scheduler has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for schedulers requires such persons to ensure that the scheduling of:*
- c) *the transport of goods and/or passengers is such that it will not result in, encourage or provide incentive to breach speed requirements by the driver; and*
- d) *driver's work and rest times are such that they will not result in, encourage or provide incentive to breach fatigue requirements by the driver.*

Recommendation 4 – Primary Duty of Care – Consignors and consignees

That the HVNL be amended by reformulating the existing chain of responsibility obligations on consignors and consignees so that each consignor and consignee has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for consignors and consignees requires such persons to ensure that their conduct does not result in, encourage or provide incentive to breach:*
 - *the vehicle's mass, dimension and load restraint requirements;*
 - *speed requirements by the driver; or*
 - *fatigue requirements by the driver.*

Recommendation 5 – Primary Duty of Care – Loading managers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on loading managers so that each loading manager has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for loading managers requires such persons to ensure that the arrangements for the loading and unloading of vehicles are such that they will not result in, encourage or provide incentive to breach:*
 - *the vehicle's mass, dimension and load restraint requirements;*
 - *speed requirements by the driver; or*
 - *fatigue requirements by the driver.*

Recommendation 6 – Primary Duty of Care – Loaders

That the HVNL be amended by reformulating the existing chain of responsibility obligations on loaders so that each loader has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for loaders requires such persons to ensure that the loading of a heavy vehicle is such that it will not result in, encourage or provide incentive to breach:
 - the vehicle's mass, dimension and load restraint requirements;
 - speed requirements by the driver; or
 - fatigue requirements by the driver.

Recommendation 7 – Primary Duty of Care – Packers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on packers so that each packer has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for packers requires such persons to ensure that the packing of goods is such that it will not result in, encourage or provide incentive to breach the vehicle's mass, dimension and load restraint requirements.

Recommendation 8 – Primary Duty of Care – Unloaders

That the HVNL be amended by reformulating the existing chain of responsibility obligations on unloaders so that each unloader has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for unloaders requires such persons to ensure that the unloading of a heavy vehicle is such that it will not result in, encourage or provide incentive to breach:
 - the vehicle's mass, dimension and load restraint requirements;
 - speed requirements by the driver; or
 - fatigue requirements by the driver.

General considerations for primary duties

The following recommendations address a range of general matters relevant to the proposed primary duties. These recommendations seek to ensure the proposed primary duties:

- have clearly defined key terms
- relate directly to road transport operations
- use a standard of care consistent with that for other national safety laws
- are underpinned by principles that guide their implementation
- carry appropriate penalties
- are supported by appropriate investigative and prosecution powers.

In addition, and to reduce complexity and avoid duplication, the introduction of the proposed primary duties will result in the removal of existing CoR offences from the HVNL.

Recommendation 9 – General considerations for Primary Duties regime – Definition of 'road transport operations'

That the HVNL be amended to include a definition of the term 'road transport operations'. The policy intent of this amendment is to clarify the meaning of the term 'road transport operations' and not to expand either the scope of duties beyond the existing regulatory framework of the HVNL, or the chain of responsibility parties, beyond the current chain of responsibility parties.

Recommendation 10 – General considerations for Primary Duties regime – Definition of ‘chain of responsibility parties’

- a) That the HVNL be amended to better clarify that any person who performs any of the functions of any of the chain of responsibility parties, whether exclusively or occasionally, will determine whether the person falls within the definitions, rather than the person’s job title or contractual description. This should be a substantive provision of the HVNL.
- b) This amendment may also require consequential amendments to s.5 definitions of chain of responsibility parties, including clarifying the definition of ‘consignor’.

Recommendation 11 – General considerations for Primary Duties regime – Standard of Care

- a) That the standard of care to be adopted for the primary duties regime is the ‘so far as reasonably practicable’ standard consistent with the standard of care used in other national safety laws.
- b) That the term ‘reasonably practicable’ be defined in the HVNL, consistent with the definition used in other national safety laws.
- c) That for consistency and to reduce complexity in compliance and enforcement, the HVNL be amended so that all offences in the HVNL apply the same standard of care as an element of the offence (consistent with national safety laws). The current standard of ‘all reasonable steps’ be replaced with the ‘so far as reasonably practicable’ standard throughout the HVNL.

Recommendation 12 – General considerations for Primary Duties regime – Consequence of failure to discharge primary duties

That the failure to discharge the primary duties is an offence with penalties.

Recommendation 13 – General considerations for Primary Duties regime – Maximum penalties

That the maximum penalties for breach of the primary duties be better aligned with the maximum penalties available under the national safety laws, including adoption of a hierarchy of penalties based on the risk and the nature the actual harm or damage caused.

Note: it is not proposed to change other penalties in the HVNL.

Recommendation 14 – General considerations for Primary Duties regime – Expansion of investigative powers

As a corollary to the introduction of primary duties on chain of responsibility parties which imposes greater onus on authorised officers and the National Heavy Vehicle Regulator when investigating alleged breaches of the primary duties, it is recommended the HVNL be amended to strengthen information-gathering powers. This could include:

- a power modelled on s.155 of the Model Work Health Safety Bill or s.9 of the Victorian OH&S Act to require any person not limited to a person responsible for a heavy vehicle, to give information, provide documents or give evidence about relevant matters;
- addressing the investigative power issues currently listed in the NTC’s HVNL maintenance log concerning s.569 power to require production of documents generally and s.570 power to require information;
- ensuring appropriate safeguards; and
- making such other consequential amendments to the investigative powers provisions of the HVNL necessary to ensure the effective enforcement of the Primary Duties regime, consistent with the investigative powers provided in the national safety laws (e.g. Model Work Health Safety Bill, Rail Safety National Law).

Recommendation 15 – General considerations for Primary Duties regime – Alternative Remedies

Consistent with the recommendations proposed in relation to the NTC’s Roadworthiness Review it is recommended the HVNL be amended to enable the use of voluntary enforceable undertakings for parties who agree to be bound to take specified steps to ensure compliance with the HVNL.

Note: the effect of this recommendation is to add to the suite of remedies currently available under the HVNL, which includes improvement notices, formal warnings, infringement notices, supervisory intervention orders, prohibition orders and compensation orders.

Recommendation 16 – General considerations for Primary Duties regime – Evidentiary status of codes of practice

That the HVNL be amended to clarify the evidentiary status of codes of practice consistent with s.275 of the Model Work Health and Safety Bill which provides that an approved code of practice is admissible in proceedings as evidence of whether or not a duty or obligation has been complied with.

Note: the effect of this recommendation is that the existing HVNL s.625, which provides that proof of compliance with a registered industry code of practice is evidence that the person took all reasonable steps, would be repealed.

Recommendation 17 – General considerations for Primary Duties regime – Principles applicable to the Primary Duties and interaction with national safety laws

- a) *That the HVNL be amended to include general principles applicable to the primary duties, similar to the principles set out in the Model Work Health Safety Bill, and include principles of shared responsibility and accountability similarly to the Rail Safety National Law.*
- b) *That the HVNL be amended to better clarify the relationship between the HVNL and occupational health and safety legislation as applied in each jurisdiction, in particular that the HVNL be amended to:*
 - *make clear that the HVNL primary duties are complementary to the existing occupational health and safety duties, but focus specifically on the safety of road transport operations, including the safety of vehicles, drivers and the public;*
 - *expressly provide that to the extent of any inconsistency between a provision of the HVNL and jurisdiction occupational health and safety legislation, the provision of that jurisdiction's occupational health and safety legislation prevails to the extent of that inconsistency, similarly to s.48 of the Rail Safety National Law;*
 - *clarify that where an act or omission constitutes an offence under both the HVNL and a jurisdiction's occupational health and safety legislation, the offender is not liable to be punished twice in respect of the offence.*

Recommendation 18 – General considerations for Primary Duties regime – Relationship of Primary Duties to existing CoR offences

- a) *That, so as to reduce complexity and to avoid duplication, the Primary Duties should replace existing chain of responsibility offences where the subject matter of the offence is covered by the Primary Duties and there is not a clear policy rationale for retaining the existing offence.*
- b) *That where existing chain of responsibility offences are to remain that these be reframed as positive specific duties, with the standard of care applicable consistent with the standard of care for the primary duties.*
- c) *That the s.623 deemed compliance provision be removed from the HVNL, on the basis deemed compliance provisions are prescriptive, encourage a 'tick-a-box' mentality, and are incompatible with a positive duty and outcomes-based approach to the management of safety risks.*

Executive officers

Executive officers of corporations must be able to be held accountable under the HVNL. However, the burden of proof must also be consistent with principles of natural justice and procedural fairness.

Recommendation 19 – Application of the proposed Primary Duties regime to executive officers – Due Diligence Obligation

- a) *That the Primary Duties regime be applied to executive officers through the reformulation of the existing executive officer liability provision in s.636(2) of the HVNL as a positive due diligence obligation.*
- b) *Noting a phased approach is to be adopted to the implementation of this recommendation, as follows:*
 - a) *Phase 1: a limited due diligence obligation being introduced for executive officers to ensure chain of responsibility parties comply with their primary duty;*
 - b) *Phase 2: extension of the executive officer due diligence obligation to include any persons with a duty or obligation under the HVNL, subject to the outcomes of a regulation impact statement.*

Recommendation 20 – Burden of Proof for Retained EoL Offences

That the burden of proof for the retained non-CoR executive officer liability offences rests on the prosecution, consistent with COAG Personal Liability for Corporate Fault Principles.

Structuring of the HVNL

The reforms must also ensure the HVNL makes the primary duties on all CoR parties clear. The NTC recommends the following:

Recommendation 21 – Proposed amendments to be included as new chapter of the HVNL

That for clarity for both industry and regulators, and subject to parliamentary counsel's advice, the proposed amendments in relation to both Primary Duties and executive officer liability be included as a separate chapter of the HVNL.

Recommendations for implementation activities

The following recommendations are designed to ensure appropriate guidance and training for both industry and enforcement officers, together with an adequate implementation period to allow industry and regulators sufficient time to adapt to the changes.

Recommendation 22 – Development of guidance materials

Note that these recommendations on both the introduction of Primary Duties and executive officer liability will require detailed guidance materials and codes of practice for both industry and regulators, including all authorised officers, with the NHVR to lead the development of these documents, with support from the NTC.

Recommendation 23 – Training of authorised officers, regulators and industry

Note that these recommendations on both the introduction of Primary Duties and executive officer liability will require comprehensive training for both industry and regulators, including all authorised officers, with the NHVR to lead the development of a training package, with support from the NTC.

Recommendation 24 – Implementation Period

Note that an implementation period will be required to allow industry and regulators, including all authorised officers, sufficient time to adjust to these amendments. It is suggested a 12-month period from the date the amending legislation is passed by the Queensland Parliament (as host jurisdiction for the HVNL) would be an appropriate time period.

Recommendations for further work

As a second phase of the CoR and EoL reforms, the extension of the executive officer due diligence obligation to ensure all persons with a duty or obligation under the HVNL comply with that duty or obligation will be progressed by the NTC as a separate project in 2016/17. This further reform will be subject to the outcomes of a regulation impact statement and process.

In addition, the NTC proposes a future reform is added to its forward work program to undertake a comprehensive review of the HVNL's investigative and enforcement powers to ensure the HVNL continues to maintain an effective investigation and enforcement regime.

Recommendation 25 – Extension of Due Diligence Obligation

That the Primary Duties regime be applied to executive officers through the reformulation of the existing executive officer liability provision in s.636(2) of the HVNL as a positive due diligence obligation with Phase 2: extension of the executive officer due diligence obligation to include any persons with a duty or obligation under the HVNL, to be subject to the outcomes of a regulation impact statement, and to be completed by the NTC as a separate project in 2016/17.

Recommendation 26 – Review of HVNL investigative and enforcement powers

That arising from this chain of responsibility and executive officer liability review, a comprehensive review of the HVNL investigative and enforcement powers, including the use of alternative remedies such as prohibition notices by authorised officers, be considered by the NTC as a future project for inclusion as part of its forward work program, subject to a business case, on the basis such a review is necessary to ensure the HVNL continues to retain an effective investigation and enforcement regime.

1 Context

Key points

- The NTC *Chain of Responsibility Duties Review* (2014), *Executive Officer Liability Assessment* (2015) and *Heavy Vehicle Roadworthiness Review* (2015) seek to identify legislative change to improve road safety and encourage a proactive culture of compliance, by clarifying and restructuring current chain of responsibility and executive officer obligations.
- In May 2015, ministers endorsed the recommendations of the Chain of Responsibilities Review and Executive Officer Liability Assessment and agreed these matters be addressed in a single reform package.
- In July 2015, the NTC published the *Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Discussion Paper* for public comment on key issues relating to the proposed policy approach endorsed by ministers. There were 23 submissions received in response to the discussion paper.
- This policy paper provides detailed policy recommendations for amendments to the HVNL informed by stakeholder submissions received.

1.1 Preferred approach as endorsed by ministers in May 2015

In May 2015, transport ministers endorsed the recommendations of the NTC *Chain of Responsibilities Duties Review* (2014) and *Executive Officer Liability Assessment* (2015). Ministers also agreed the NTC should develop detailed policy recommendations for consideration in November 2015 on the formulation of primary duties for current CoR parties, including executive officers, limited to the existing regulatory framework of the HVNL.

In particular, ministers agreed the:

- a) development of primary duties in the HVNL on CoR parties will improve consistency, clarity, alignment with national safety laws and provide appropriate coverage of all key parties that influence heavy vehicle road safety
- b) current provisions on EoL in the HVNL are inconsistent with the *COAG Principles and Guidelines on Directors Liability*
- c) outcomes should be addressed as a single, integrated reform initiative.

1.2 Objectives

In accordance with the decision of ministers in May 2015, this paper provides detailed policy recommendations to clarify and restructure current CoR obligations—including on executive officers—to ensure the HVNL:

- improves road safety and encourages a proactive culture of safety and compliance
- retains an effective CoR regime, capable of holding current identified parties accountable for the control and influence they have over the compliance and safety of the transport task
- is more consistent with the Model Work Health and Safety Act (Model WHS Act), the Rail Safety National Law (RSNL) and the Marine Safety (Domestic Commercial Vessel) National Law (MSNL)
- promotes a greater understanding of obligations and responsibilities and reduces complexities within the current structure
- promotes proactive enforcement so that obligations are not dependent upon harm, incident or injury needing to occur before action can be taken
- holds executive officers appropriately accountable, in line with the *COAG Principles and Guidelines on Directors Liability*.

These recommendations were approved by ministers at the Transport and Infrastructure Council meeting held on 6 November 2015.

1.3 Background

Australia's heavy vehicle laws have included the concept of CoR since 1997.

CoR is designed to ensure that any party in a position to control and influence on-road behaviour is identified and held accountable. In simple terms, CoR recognises the on-road effects of the actions, inactions and demands of off-road parties in the transport and supply chain and provides a mechanism for holding these parties accountable.

Initially, CoR was included in the Heavy Vehicle Model Laws. The drafting of these model laws occurred at different times and in different ways, and incorporated CoR provisions particular to specific regulatory areas, such as speed and fatigue. In 2012, the model laws were consolidated into the HVNL as separate chapters and were not reviewed for consistency. Accordingly, the HVNL contains a number of differing constructions and approaches to CoR and adopts a more prescriptive approach than other transport safety laws.

1.4 Issues with the current CoR regime

Although the current approach to CoR has significantly improved safety in transport and logistics, industry and regulatory stakeholders have identified a number of limitations. The most important of these limitations are described below.

Meeting the objectives of the HVNL

Section 3 of the HVNL provides that the object of the law is to:

establish a national scheme for facilitating and regulating the use of heavy vehicles in a way that:

- a) promotes public safety; and*
- b) manages the impact of heavy vehicles on the environment, road infrastructure and public amenity; and*
- c) promotes industry productivity and efficiency in the road transport of goods and passengers by heavy vehicles; and*
- d) encourages and promotes productive, efficient, innovative and safe business practices.*

However, the HVNL does not adopt a principles-based approach to manage the risks associated with heavy vehicle use. Instead, the HVNL prescribes detailed and specific requirements on CoR parties based on the type of risk involved. This means the HVNL does not have a holistic and unified approach to achieving its legislative objects.

By reframing the CoR provisions of the HVNL to reflect a principles-based approach, it is intended to refocus the law on the outcomes that parties in the supply chain must achieve. This approach allows flexibility for each party in determining how to achieve these outcomes in a way that best suits their business needs.

Inconsistency with national safety laws

The intent of the CoR provisions of the HVNL is to promote a proactive approach to compliance. However, the current CoR provisions are not conducive to this. CoR parties must address each obligation applicable to them on a provision by-provision, chapter-by-chapter basis. This prescriptive approach is inconsistent with the best-practice approach to regulation undertaken in other national safety laws, such as the Model WHS Act and the RSNL, which impose a positive general obligation on duty holders to ensure safety.

Preventative approach to enforcement

There are 186 CoR offences in the HVNL's Vehicle Standards, Mass, Dimension and Loading (MDL), and Speed and Fatigue chapters, with 95 of these offences dependent on some harm, incident or injury first occurring.

However, the HVNL's reactive approach to many CoR offences does not promote a proactive and systematic approach to risk identification, assessment and management. In addition, the approach adopted in the HVNL

is inconsistent with the best-practice approach to regulation adopted in other national safety legislation, such as the Model WHS Act, which imposes positive obligations on key parties to identify and prevent foreseeable incidents and harm.

Cost to industry

Inconsistent and overly prescriptive legislation creates additional compliance costs for industry.

Currently, the HVNL applies different duty constructions to different CoR parties with differing and prescriptive requirements. For example the MDL chapter of the HVNL extends liability to CoR parties through an extended liability offence under section 183 of the HVNL, which deems CoR parties liable if the driver commits an MDL offence. Similarly, although the HVNL chapters dealing with speed and fatigue adopt deemed liability offences, these chapters also include specific duties on CoR parties to manage the risks associated with their specific roles and interaction with road transport operations, such as scheduling and loading.

The differences in the construction of duties within the HVNL make a coordinated approach to compliance difficult for CoR parties to achieve, particularly where obligations cross different risk areas. These differences in obligations increase compliance costs.

Greater consistency with the Model WHS Act and other national transport safety laws, particularly in terms of the construction of CoR obligations as performance-based outcomes, is intended to enable industry to comply with the HVNL in the same way they comply with other such national safety laws. This approach is also intended to foster better integration of transport-related compliance systems, particularly in intermodal operations, making compliance more effective and less costly for industry.

Internal inconsistency in the HVNL

The chapters of the HVNL dealing with fatigue, speed, MDL and vehicle standards contain various duty types and constructions of CoR obligations, related to specific identified risks. Safety is not dealt with in an integrated way that accounts for all the risks that may endanger safety in the context of heavy vehicle operations. Consequently, there are gaps in the obligations which apply to CoR parties.

Difficulties may also arise from the fact that under the HVNL, CoR parties must comply with multiple duties for separate areas such as speed and fatigue rather than focusing on the minimisation of all safety risks. For example, the speed and fatigue chapters contain similar duties on the operator to ensure that business practices do not cause breaches of speed or fatigue. However the MDL and vehicle standards chapters do not adopt a duty structure. Instead, operators are deemed liable for a driver's breach of MDL requirements and are covered under the definition of 'a person' for permitting breaches of the vehicle standards requirements. This may lead to confusion about which parties are responsible for particular obligations, how different obligations are related, and how these obligations are to be met.

Reliance on individual offences when mounting a prosecution

Due to the prescriptive requirements of the HVNL, the regulator and enforcement agencies are often required to prosecute many minor offences, each with relatively low penalties, in order to address serious and often systemic safety risks. This places an unreasonable burden on the regulator and enforcement agencies, as well as the courts.

Quantum of penalties

The maximum penalties prescribed by the HVNL are significantly lower than those for other safety-based legislation (such as the Model WHS Act and RSNL) despite the outcomes of safety breaches being just as serious. This conveys mixed messages to industry and the courts about the importance of compliance with the HVNL.

1.5 Reviews informing this policy paper

Industry request for review of the CoR provisions and the CoR Taskforce Review

On 14 September 2012, the Australian Trucking Association (ATA), Australian Logistics Council (ALC) and Australian Livestock and Rural Transporters Association jointly wrote to Commonwealth and state ministers requesting that CoR and EoL provisions in the HVNL be re-drafted based on affirmative duties, consistent with the approach adopted by the Model WHS Act.

In November 2012, ministers established a taskforce to review the HVNL CoR provisions (CoR Taskforce Review). The taskforce comprised representatives from industry, regulators, the Transport Workers Union and Safe Work Australia and reported to ministers in May 2014.

The CoR Taskforce Review recommended further investigation of both the existing duties regime and EoL. Ministers accepted this recommendation and asked the NTC to conduct the investigation.

CoR duties review

In November 2014, the NTC released the *Chain of Responsibility: Duties Review Discussion Paper* (2014 Discussion Paper) for public consultation. The paper acknowledged the stakeholder view that although CoR was achieving its objectives, there was opportunity to improve the regime to remove inconsistencies and allow regulators to target all behaviours that might adversely influence road safety. There were 25 written submissions received in response to the discussion paper.

Most stakeholders supported the need for legislative reform to remove inconsistencies and ensure that off-road behaviours are appropriately managed with significant and broad support for a more general, less prescriptive approach to duties. Based on this stakeholder feedback, the NTC recommended that a primary duties regime be developed for CoR parties. In the NTC's view this option would best clarify existing responsibilities and ensure regulators can target behaviours that might adversely influence road safety better. Ministers endorsed this recommendation in May 2015.

Executive officer liability (EoL) review

In 2014 the NTC assessed the HVNL's EoL provisions (section 636 and schedule 4) against consistency with the *COAG Personal Liability for Corporate Fault Principles and Guidelines*.

The NTC found the HVNL was not consistent with COAG principle 4, which provides that the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

- there are compelling public policy reasons for doing so
- liability of the corporation is not likely on its own to sufficiently promote compliance
- it is reasonable in all the circumstances for the director to be liable.

In particular the NTC found that many of the underlying offences in schedule 4 of the HVNL did not appear to have been assessed against all the elements of principle 4 and the guidelines as COAG requires. In addition, the NTC found the HVNL was not consistent with COAG's principles 5 and 6, which provide that where principle 4 is satisfied and directors' liability is appropriate: directors could be liable where they have encouraged or assisted in the commission of the offence or have been negligent or reckless in relation to the corporation's offending. Principles 5 and 6 also provide in some instances that it may be appropriate to require directors to prove they have taken reasonable steps to prevent the corporations offending if they are not to be held personally liable.

In May 2015, ministers agreed that 58 of 129 executive officer liability offences under section 636 of the HVNL should be retained, including key safety offences in the area of vehicle standards, MDL speeding and driver fatigue where executive officers may have direct responsibility. These offences are listed at Appendix A.

Roadworthiness review

In October 2013, the New South Wales Minister for Roads and Ports requested that the NTC and National Heavy Vehicle Regulator (NHVR) jointly consider a national approach to heavy vehicle maintenance and roadworthiness, and review the National Heavy Vehicle Accreditation Scheme (NHVAS) to improve the effectiveness of roadworthiness assurance systems.

The NHVR and NTC established the *Heavy Vehicle Roadworthiness Program Roadworthiness Review*. In January 2015, the two agencies released a consultation regulatory impact statement, in response to which 29 written submissions were received.

As one of the measures to improve heavy vehicle roadworthiness, the Roadworthiness Review recommended CoR obligations be extended to include vehicle standards offences for employers, operators and prime contractors, and that enforceable undertakings also be introduced into the HVNL as an alternative remedy. These recommendations were agreed by ministers in November 2015.

July 2015 discussion paper

The NTC published the *Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Discussion Paper* in July 2015 as the next stage in both the CoR and EoL review processes. This paper provided draft proposals for restructuring and consolidating existing CoR obligations in the HVNL to include a primary duty on operators, prime contractors and employers, with specific role-based duties placed on other CoR parties.

The paper included discussion of draft general principles and penalties for failing to discharge the primary duties, the standard of care to be applied, and the relationship of primary duties to existing CoR offences. These proposals sought to clarify and simplify existing CoR obligations and were not intended to impose a greater burden on CoR parties or regulators.

The NTC sought stakeholder feedback on these proposals, including through workshops, and received 23 written submissions.

The detailed policy recommendations outlined in this paper are the culmination of this review process and are based on NTC research, stakeholder consultation and submissions to the discussion paper.

1.6 Consultation process

There has been extensive stakeholder consultation on CoR and EoL reform, beginning with the CoR Taskforce Review in 2012 and continued by the NTC from 2014 onwards, as the following table summarises.

CoR Taskforce Review

- July 2013 Issues Paper
- Feb 2014 CoR Assessment of Options Paper (18 submissions received)
Regulators Survey conducted
- Mar 2014 Workshop held for regulatory agencies and police
- May 2014 CoR Taskforce Review Report provided to ministers

NTC

- July 2014 Assessment of EoL undertaken in conjunction with jurisdictions and industry stakeholders
- Nov 2014 CoR Discussion Paper (25 submissions received)
- Jan 2015 Heavy Vehicle Roadworthiness Review Consultation Regulatory Impact Statement (29 submissions received)
- May 2015 EoL Assessment report provided to ministers
CoR Duties Review Stage 1 Report provided to ministers
- July 2015 Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Discussion Paper (23 submissions received)

2 Proposed primary duties regime

Key points

- The majority of stakeholders support the reformulation of existing CoR obligations as a primary duty of care applicable to all current CoR parties to ensure the safety of road transport operations, as limited by their role in the chain.
- The adoption of a primary duties regime is consistent with the approach of other national safety laws.
- These reforms are intended to reduce the complexity and duplication of the existing CoR regime.

In May 2015, ministers endorsed the development of primary duties for all current CoR parties, based on their role in ensuring the safety of road transport operations, limited to the existing regulatory framework of the HVNL.

Ministers agreed the reformulation of existing obligations as primary duties would best address the limitations of the current CoR regime as identified by industry, regulators and the NTC. Ministers also agreed the primary duties regime should apply to executive officers.

The adoption of a primary duties regime is therefore intended to improve the consistency and clarity of obligations for each CoR party and to better align the HVNL with the Model WHS Act and other national transport safety laws.

These reforms are not intended to increase the compliance burden for CoR parties, but to clarify existing obligations and enable a more flexible outcomes-based approach to compliance.

Benefit of primary duties

Primary duties are sometimes known as ‘general duties’, ‘principle based duties’ or ‘effects-based duties’. Primary duties define the duty holders and the broad scope of their responsibilities. Primary duties are concerned with influencing attitudes and creating an overall safety culture by requiring duty holders to consider a wide range of hazards and risk in complying with their statutory obligations.

The flexibility inherent in a primary duties approach to regulation allows for innovation and adaptation in risk management, tailored to the circumstances of the party to whom the duty applies, their role within the supply chain, the nature of the risk to be addressed, and the reasonableness of the party’s use of resources to meet the risk. This was the primary rationale behind the use of primary duties as the fundamental basis for workplace and occupational, health and safety, and rail safety legislation.

The inclusion of primary duties in the HVNL therefore has significant benefits including:

- requiring CoR parties to consider how to mitigate, or better still, eliminate a wide range of hazards and risks
- requiring duty holders to determine what actions are needed to mitigate the specific risks their operations face and allowing them to tailor policies and systems to them
- being outcomes-focused – in accordance with regulatory best practice and reflecting the positive duties that currently exist in the Model WHS Act, the RSNL and the MSNL
- being preventative – failing to discharge the primary duty creates sufficient evidence that an offence has occurred.

Primary duties under the Model WHS Act

The Model WHS Act is designed to provide for a balanced and nationally consistent framework to secure the health and safety of workers. To achieve this objective, the Model WHS Act is structured around primary duties of care covering a range of parties, including persons conducting a business or undertaking (PCBU), officers, workers and other persons.

In addition, the Model WHS Act includes specific health and safety duties for certain identified types of PCBUs, including designers, manufacturers, suppliers, importers of plant, substances or structures. Officers, as defined to include officers of a corporation, also have a positive duty under the Model WHS Act to exercise due diligence to ensure PCBUs comply with their obligations under the Model WHS Act.

Primary duties under the RSNL

The main purpose of the RSNL is to provide for safe railway operations in Australia. To achieve this purpose, the RSNL imposes an affirmative and overarching duty of care on rail transport operators to ensure, 'so far as is reasonably practicable, the safety of the operator's railway operations'. Similarly to the Model WHS Act, the RSNL also imposes rail safety duties on other persons involved in railway operations, including designers, manufacturers and suppliers. In addition, the RSNL also imposes a duty on officers to exercise due diligence to ensure that a person with a duty or obligation under the RSNL complies with that duty or obligation.

Discussion paper proposal

Consistent with the ministers' decision in May 2015, the July 2015 Discussion Paper proposed amending the HVNL to:

- include a primary duty on operators, prime contractors and employers to ensure safety, limited to the existing regulatory framework of the HVNL
- include role-specific duties for other CoR parties reflecting their differing roles, responsibilities and spheres of control and influence
- extend the primary duty to executive officers of CoR parties.

Stakeholder feedback

Primary duty on all parties

Most industry and government stakeholders did not support the approach proposed in the July 2015 Discussion Paper of a primary duty of care on operators, prime contractors and employers, with role-specific duties for other CoR parties. Instead, the majority of stakeholders considered the current CoR obligations should be reformulated as a primary duty of care for all current CoR parties.

There was wide support for this alternative approach, including from representatives from the transport industry, including the ATA, the South Australian Road Transport Association (SARTA), the South Australia Freight Council, NatRoad and Toll Group, the NHVR and government departments and agencies, including Transport for NSW, Transport Safety Victoria (TSV), VicRoads, the Department of Transport and Main Roads (TMR), South Australia Police and Victoria Police.

For example, the ATA stated:

... given the broad influence of chain of responsibility 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.

Similarly, Transport for NSW, considered the primary duty should apply to all CoR parties, but that in addition, 'these duty holders should continue to have prescribed obligations to address specific safety risks'. Transport for NSW stated:

The current prescriptive approach focuses the attention of parties in the CoR on complying with the detailed requirements of the HVNL, rather than on ensuring risks to safety arising from road transport operations are effectively managed. Addressing this issue through ensuring all parties in the chain of responsibility have clear obligations for managing the risks to the safety of road transport operations should promote a safety culture which leads to greater compliance and less need to focus on enforcement.

...

The application of primary duties across various parties in the CoR is consistent with the approach taken in the Model WHS Act and the RSNL [... and] would leave no room for doubt that the operator, prime contractor, employer and other parties in the CoR must manage all foreseeable risks to the safety of road transport operations.

NatRoad also supported a general duty, guided by common principles, applicable to all CoR parties. Similarly to Transport for NSW, NatRoad considered the primary duty should be supplemented by specific additional duties on individual CoR parties, reflecting their particular responsibilities.

The Commercial Vehicle Industry Association of Queensland supported extending primary duties to all current CoR parties, but did not support extending the CoR to vehicle standards and roadworthiness, or to any person or business outside of existing CoR parties outlined in the HVNL.

However, the Australian Logistics Council (ALC) did not consider changes to the current CoR regime were justified. In its view:

No party advocating change has provided any evidence that changes to the Chain of Responsibility (CoR) contained in the Heavy Vehicle National Law (HVNL) will improve productivity or safety outcomes.

In this context, the ALC did not consider the existing HVNL precluded the targeting of poor performers. As an alternative to legislative change, the ALC suggested additional guidance and training was required to enable enforcement officers to better perform their functions. However, the ALC conceded that if a primary duty was to be imposed, the appropriate duty holders would be operators, prime contractors and employers, as proposed in the July 2015 Discussion Paper.

Similarly to the ALC, Gas Energy Australia and Cement Concrete Aggregates Australia did not support change to the existing CoR provisions on the basis any such change would create confusion and complications for existing CoR parties.

Conclusions

There is significant support from the majority of industry, jurisdictions, enforcement agencies and the NHVR for reformulating existing CoR obligations as a primary duty of care applicable to all current CoR parties.

However, there is concern about the construction of the primary duties regime as detailed in the July 2015 Discussion Paper, which proposed placing a primary duty on operators, prime contractors and employers, and role-specific duties for other CoR parties.

For most stakeholders, a primary duty that rests only with operators, prime contractors and employers was not sufficient. Instead, most stakeholders preferred a primary duty of care applicable to all CoR parties, supplemented by role-specific duties to take into account the different risks applicable to different roles.

The NTC acknowledges these stakeholder concerns and has reformulated the proposed primary duties to require all current CoR parties to ensure, so far as is reasonably practicable, the safety of their road transport operations, as limited by each party's role and responsibilities in the chain. This approach recognises the degree of influence and control of each CoR party over the transport task and is consistent with the existing regulatory framework of the HVNL.

Recommendation 1 – Primary Duty of Care

- a) *That the HVNL be amended by reformulating the existing prescriptive HVNL obligations on current chain of responsibility parties so that each party in the chain of responsibility has a primary duty of care to ensure, so far as is reasonably practicable, the safety of road transport operations (**Primary Duty of Care** or **Primary Duties**), consistent with the objects of the HVNL; and*
- b) *That the Primary Duty of Care applies to all current chain of responsibility parties based on the role they perform within the chain, limited to the existing regulatory framework of the HVNL, and to the extent such persons:*
 - *manage or control road transport operations, and/or*
 - *engage in conduct that will result in, encourage or otherwise provide incentives in relation to the conduct of road transport operations; and*
- c) *That, to the extent possible, the Primary Duty of Care replaces the existing chain of responsibility obligations of all current chain of responsibility parties; and*
- d) *Note that, in recognition of the fact that the role of each current party in the responsibility chain carries certain role specific safety risks, recommendations 2-8 detail how the Primary Duty of Care is to apply to each current chain of responsibility party.*

3 Primary duty on operators, prime contractors and employers

Key point

- That the existing CoR obligations on operators, prime contractors and employers be reformulated as a primary duty of care to ensure, so far as is reasonably practicable, the safety of road transport operations.

Issues

The introduction of a primary duty on operators, prime contractors and employers is intended to better clarify existing CoR obligations, promoting an outcomes-based, proactive approach to managing safety risks that better aligns with regulatory best practice and other national transport safety laws.

Consistent with the existing CoR provisions, the policy rationale underlying the proposed primary duty on operators, prime contractors and employers is that the parties with greatest control over the safety of the driver and the vehicle, and the most influence over the way the road task is performed, should ensure it is undertaken safely. This approach is consistent with the RSNL and MSNL. The NTC proposes that introducing primary duty provisions to the HVNL will more clearly identify the duty holder (i.e. the operator, prime contractor and employer), the duty owed by them, and how they must comply, as occurs in the RSNL and MSNL.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed that the key obligation of a primary duty holder should be to ensure the safety of road transport operations, vehicles, drivers and the general public. In addition, it proposed that a primary duty holder should be required to address the specific safety risks posed by breaches of speed, fatigue, MDL and vehicle standards.

Consistent with the Model WHS Act and the RSNL, the July 2015 Discussion Paper also proposed that a focus on specific safety risks, such as speed and fatigue, should not limit the measures the primary duty holder can take to ensure the safety of their road transport operations. The paper also noted that the primary duty was not intended to impose any greater regulatory burden than the obligations that operators, prime contractors and employers currently have under the HVNL. These reforms are not intended to extend to matters not currently regulated by the HVNL, such as drug-and drink-driving.

The paper also proposed that the primary duty on operators, prime contractors and employers address the existing offences of the HVNL (to the extent they apply to operators, prime contractors and employers), allowing these to be removed.

Finally, the paper proposed the standard of care to discharge the primary duty could be 'all reasonable steps', as currently used in the HVNL, or 'so far as reasonably practicable', which is consistent with the standard applied in other national transport safety laws. The issue of standard of care is considered in Part 5.2 of this policy paper.

Stakeholder feedback

The majority of industry, jurisdictions and enforcement agencies support the introduction of a primary duty of care for operators, prime contractors and employers. However, most also agreed the primary duty should extend to all CoR parties, as discussed above.

Conclusions

Consistent with the stakeholder feedback received, the NTC recommends the existing CoR obligations on operators, prime contractors and employers be reformulated as a primary duty of care to ensure the safety of road transport operations.

Recommendation 2 – Primary Duty of Care – Operators, prime contractors and employers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on operators, prime contractors and employers so that each operator, prime contractor and employer has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for operators, prime contractors and employers requires such persons to ensure:*
 - *the safety of:*
 - *their heavy vehicles*
 - *drivers*
 - *the operation of their heavy vehicles*
 - *public safety is not put at risk by their road transport operations; and*
 - *against the specific safety risks posed to road transport operations by breaches of speed, fatigue, MDL and vehicle standards requirements.*

4 Primary duty of care on other CoR parties

Key points

- Consistent with stakeholder feedback, the NTC proposes the existing CoR obligations on schedulers, consignors, consignees, loading managers, loaders, packers and unloaders be reformulated so each CoR party has a primary duty of care to ensure the safety of road transport operations, limited to the degree of control they have over the transport tasks.

The July 2015 Discussion Paper proposed that schedulers, consignors, consignees, loading managers, loaders, packers and unloaders have role-specific duties to ensure safety, which are tailored to their responsibilities and cover the specific areas they are able to influence.

However, as already noted, stakeholders consider that the proposed primary duty of care to ensure the safety of road transport operations should apply to all CoR parties and not just to operators, prime contractors and employers. Accordingly, and consistent with this feedback, this part details how the proposed primary duties regime will apply to other CoR parties.

4.1 Schedulers

Issues

Section 5 of the HVNL defines a scheduler as ‘a person who schedules the transport of any goods or passengers by the vehicle or who schedules the work times and rest times of the vehicle’s driver’.

Given the role of schedulers in setting schedules for driver work and rest times and transporting passengers and goods, the HVNL includes specific obligations for schedulers relating to speed and fatigue.

Under section 207 of the HVNL, the scheduler must ensure a driver’s schedule will not cause the driver to exceed speed limits. Likewise, section 233 of the HVNL provides that a scheduler must ensure the schedule will not cause a driver to drive while fatigued. Although these provisions deal with two separate key risk areas, the primary obligation is the same – to ensure the driver’s schedule does not result in safety breaches relating to speed or fatigue.

In addition to their direct obligations, the HVNL also deems schedulers liable under section 261 of the HVNL if a driver contravenes a maximum work requirement or minimum rest requirement.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed that to reduce the complexity of the HVNL and to better clarify the existing CoR obligations for schedulers, the HVNL be amended to include a role-specific duty for schedulers so that driver schedules do not result in, encourage or provide incentive to breach speed or fatigue requirements.

Stakeholder feedback

As already noted, most industry and government stakeholders considered the primary duty of care to ensure the safety of road transport operations should apply to all CoR parties, acknowledging this duty should be limited to the extent to which each party can influence the transport task. For schedulers, this means that in performing their role, they will need to specifically consider fatigue and speed risks.

In addition, Transport for NSW noted the HVNL’s current definition of ‘scheduler’ does not refer to a person who is named in the transport documentation. Transport for NSW considered it appropriate to include such a definition to encourage all relevant people to consider the risks involved in the transport task and ensure a consistent approach to the definition of parties in the CoR. This issue is considered later in this paper.

Conclusions

Recognising stakeholder views, the NTC recommends the CoR obligations of schedulers be reformulated so they have a primary duty of care to ensure the safety of road transport operations, limited to the degree of control they have over the transport tasks. This includes ensuring the scheduling of:

- the transport of goods and/or passengers will not result in, encourage or provide incentive to breach speed requirements by the driver
- a driver's work and rest times will not result in, encourage or provide incentive for them to breach fatigue requirements.

In the NTC's view, this reformulation of scheduler obligations will reduce complexity in interpreting and complying with CoR obligations, and improve road safety.

Recommendation 3 – Primary Duty of Care – Schedulers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on schedulers so that each scheduler has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for schedulers requires such persons to ensure that the scheduling of:*
 - the transport of goods and/or passengers is such that it will not result in, encourage or provide incentive to breach speed requirements by the driver; and*
 - driver's work and rest times are such that they will not result in, encourage or provide incentive to breach fatigue requirements by the driver.*

4.2 Consignors and consignees

Issues

Section 5 of the HVNL defines a 'consignor' as a 'person who engages an operator of the vehicle to transport the goods by road' and a 'consignee' as 'a person who receives the goods after completion of their road transport'.

Consignors and consignees of goods are often end customers who engage third parties to transport their goods. This means they have a level of control that can directly influence the mass of a heavy vehicle and the timing of the transport task. Accordingly, and in recognition of their level of control and influence, the HVNL imposes obligations on consignors and consignees relating to fatigue, speed and MDL.

Under sections 212 and 213 of the HVNL, a commercial consignor or consignee must ensure the terms of consignment or any demands made do not cause the relevant driver or a relevant party for the driver to cause the driver to exceed a speed limit.

Likewise under sections 235 and 237 of the HVNL, a consignor or consignee must ensure the terms of consignment or any demands do not result in, encourage or provide an incentive to the vehicle's driver or to a relevant party for the driver to drive whilst fatigued or in breach of their work or rest hours.

Although these provisions deal with separate key risk areas (i.e. speed and fatigue) the primary obligation to ensure the driver or a relevant party does not breach speed and fatigue requirements is the same.

In addition to these specific obligations for consignors and consignees, section 261 of the HVNL deems that both are liable if a driver contravenes a maximum work requirement or minimum rest requirement. The consignor is also deemed liable under section 183 of the HVNL if a person drives a heavy vehicle that does not comply with MDL requirements.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed that, to reduce the complexity of the HVNL and to better clarify the existing CoR obligations for consignors and consignees, the consignor and consignee obligations of the HVNL be reformulated as role-specific duties so that the terms of consignment do not cause, result in, encourage or provide an incentive to the driver or a relevant party to breach speed and fatigue requirements.

The paper also proposed that role-specific duties for consignors and consignees require them to ensure safety by specifying consignment terms for delivery of goods and passengers so they will not result in, encourage or provide incentive to breach the vehicle's mass, dimension and load restraint requirements, or driver speed or fatigue requirements.

Stakeholder feedback

Most stakeholders supported reformulating the existing CoR obligations on consignors and consignees as a primary duty of care, limited to the extent to which consignors and consignees can influence the transport task.

Several submissions raised concerns about the specifics of the proposed duty on consignors and consignees. These included the issue of 'terms of consignment', the definition of consignor or consignee, and the proposed obligations on these parties.

The ATA considered that a duty of care on consignors and consignees should be formulated as a further duty, and should apply in addition to the primary duty of care, as a way of better clarifying the obligations of consignors and consignees. Similarly, Toll Group also saw value in extending the primary duty beyond operators, prime contractors and employers to include consignors and consignees.

The ATA also noted that consignors and consignees are subject to requirements relating to requests, contracts and contracting out as specified in sections 215, 216, 240 and 241 of the HVNL. In the ATA's view, these provisions should be retained in the HVNL, as the discussion paper proposal and particularly its use of the phrase 'terms of consignment' is not broad enough to cover all interactions between consignors/consignees and trucking businesses.

NatRoad also supported the ATA position. In addition, NatRoad supported extending CoR for consignors and consignees to vehicle standards and maintenance on the basis that consignors and consignees influence spend on maintenance or equipment.

SARTA also expressed some concern about the proposed duty for consignors and consignees. In particular, SARTA considered the proposed duty would not allow practices such as distribution centres requiring truck drivers to remove all load restraints to be addressed.

Stakeholders also raised concerns relating to the definition of 'consignor'. In particular, Transport for NSW raised concerns that:

...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.

In this context, Transport for NSW considered the classes of person in the definition of consignor should be inclusive rather than mutually exclusive, and that these definitions should reflect the principles of shared responsibility, accountability and integrated risk management, similarly to the principles detailed for duty holders under the RSNL. Transport for NSW also raised concerns regarding the two different definitions of 'consignee' in the HVNL. These issues are considered later in this paper.

Conclusions

Having regard to stakeholder views, the NTC considers that reformulating existing CoR obligations on consignors and consignees as a primary duty of care to ensure the safety of road transport operations will help to reduce complexity and promote a more proactive approach to compliance.

Recommendation 4 – Primary Duty of Care – Consignors and consignees

That the HVNL be amended by reformulating the existing chain of responsibility obligations on consignors and consignees so that each consignor and consignee has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for consignors and consignees requires such persons to ensure that their conduct does not result in, encourage or provide incentive to breach:
 - the vehicle's mass, dimension and load restraint requirements;
 - speed requirements by the driver; or
 - fatigue requirements by the driver.

4.3 Loading managers

Issues

Loading managers control, supervise and manage sites where goods are loaded or unloaded and are therefore directly involved in the on-road operations of heavy vehicles that transport goods.

Section 5 of the HVNL defines a loading manager as the 'person who is responsible for supervising, managing or controlling, directly or indirectly, activities carried out by a loader or unloader of goods at the premises'.

Under section 209 of the HVNL loading managers must ensure loading arrangements will not cause a driver to exceed the speed limit. Similarly, section 238 of the HVNL requires loading managers to ensure that loading arrangements will not cause a driver to drive while fatigued. Section 239 of the HVNL also imposes a duty on loading managers to ensure the driver is able to rest while waiting during loading and unloading.

In addition, section 183 of the HVNL deems the loading manager liable if a person drives a heavy vehicle in contravention of MDL requirements. Similarly section 261 of the HVNL deems a loading manager liable if a person drives a vehicle in breach of maximum work or minimum rest requirements.

Although these provisions address separate key risk areas (i.e. speed and fatigue) the fundamental obligation is the same – to ensure loading arrangements do not result in safety breaches.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed that, to reduce the complexity of the HVNL and better clarify the existing CoR obligations for loading managers, the HVNL be amended to include a role-specific duty for loading managers.

Specifically, the paper proposed this duty would require loading managers to ensure safety by managing the arrangements for the loading and unloading of a vehicle so it does not result in, encourage or provide incentive to breach the vehicle's MDL requirements, or for the driver to breach speed or fatigue requirements.

Stakeholder feedback

Most stakeholders supported a primary duty applying to all parties within the chain to ensure the safety of road transport operations, acknowledging this be limited to the extent they can influence the transport task.

Some stakeholders raised concerns about the definition of loading manager. Transport for NSW noted the current definition of loading manager as set out in section 5 of the HVNL is too narrow due to the requirement that loading or unloading occurs at 'regular loading or unloading premises, which requires a minimum of five heavy vehicles a day to be loaded'. Transport for NSW proposed that a more appropriate definition would be one that simply identified the loading manager as the person who is responsible for managing or controlling the activities carried out by a loader or unloader. This issue is considered later in this paper.

Conclusions

Having regard to stakeholder views, the NTC considers that reformulating existing CoR obligations on loading managers as a primary duty of care, supported by specific obligations, will help reduce complexity and promote a more proactive approach to compliance.

Recommendation 5 – Primary Duty of Care – Loading managers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on loading managers so that each loading manager has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for loading managers requires such persons to ensure that the arrangements for the loading and unloading of vehicles are such that they will not result in, encourage or provide incentive to breach:*
 - *the vehicle's mass, dimension and load restraint requirements;*
 - *speed requirements by the driver; or*
 - *fatigue requirements by the driver.*

4.4 Loaders

Issues

Like loading managers, loaders are directly involved in on-road operations of heavy vehicles that transport goods.

Section 5 of the HVNL defines a loader as a 'person who loads the vehicle or container with the goods for road transport or who loads the vehicle with a freight container'.

Section 183 of the HVNL deems loaders liable if a person drives a heavy vehicle that does not comply with MDL requirements.

In addition, loaders are deemed liable under section 229 of the HVNL for not taking all reasonable steps to ensure a driver does not drive while fatigued, and under section 261 if a driver contravenes a maximum work or minimum rest requirement.

Although loaders have a limited range of responsibilities that are covered through the various deemed liability provisions, it is considered that similarly to other parties in the CoR, the roles of loaders and packers should be better clarified.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed amending the HVNL to include a role-specific duty for loaders.

The paper proposed the duty require loaders to ensure safety by loading vehicles such that it does not result in, encourage or provide an incentive for the driver to breach MDL or fatigue requirements.

Stakeholder feedback

Most stakeholders supported reformulating CoR obligations on loaders as a primary duty of care to ensure the safety of road transport operations, limited to the extent to which they could influence the transport task.

The ATA suggested the proposed duty for loaders should also extend to speeding, on the basis that loading delays could contribute to speeding if drivers had to meet inflexible deadlines. Toll Group, TMR, Transport for NSW and NatRoad also supported this proposal.

In addition, a number of stakeholders raised concerns relating to the definition of 'loader'. In particular, Transport for NSW considered the HVNL's current definition of 'loader' was inadequate as it did not refer to a

person named in the transport documentation as the 'loader', and therefore did not encourage all relevant people to consider the risks involved in the transport task. This issue is considered later in this paper.

Conclusions

Having regard to stakeholder views, the NTC considers that reformulating the existing CoR obligations on loaders as a primary duty of care will help reduce complexity and promote a more proactive approach to compliance.

Under the HVNL, loaders currently have a role in ensuring compliance with MDL and fatigue requirements, but have no obligations to ensure compliance with speed requirements. Loaders have a liability under the fatigue provisions because loading delays could lead a driver to breach a fatigue duty. In the same way, loading delays could lead a driver to speed to meet the delivery schedule. Accordingly, and in addition, the NTC considers the primary duty of care for loaders should include an obligation to ensure the loading of a heavy vehicle will not result in, encourage or provide incentive to breach speed requirements by the driver.

In the NTC's view this requirement does not expand the obligations of loaders.

Recommendation 6 – Primary Duty of Care – Loaders

That the HVNL be amended by reformulating the existing chain of responsibility obligations on loaders so that each loader has:

- a) *a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) *without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for loaders requires such persons to ensure that the loading of a heavy vehicle is such that it will not result in, encourage or provide incentive to breach:*
 - *the vehicle's mass, dimension and load restraint requirements;*
 - *speed requirements by the driver; or*
 - *fatigue requirements by the driver.*

4.5 Packers

Issues

Like loading managers, packers are directly involved in on-road operations of heavy vehicles that transport goods.

Packers put goods into packaging or assemble packaged goods in an outer packaging. As such, they have some responsibility for the safety of road transport operations, principally through compliance with MDL requirements. They do not have a role in speed or fatigue requirements.

Section 5 of the HVNL defines a packer as a 'person who puts the goods in packaging or who assembles the goods as packaged goods in an outer packaging'.

Section 183 of the HVNL deems packers liable if a person drives a heavy vehicle that does not comply with MDL requirements. In addition, packers commit an offence if the container weight exceeds the maximum gross weight marked on it or on its safety approval plate or if the transport documentation relating to the MDL of the goods is false or misleading (see sections 186 and 193 of the HVNL).

Although packers have a limited range of responsibilities that are covered through the various deemed liability provisions, it is considered that similarly to other parties in the CoR, the roles of packers should be better clarified.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed amending the HVNL to include a role-specific duty for packers.

This duty would be to ensure safety by packing goods so it will not result in, encourage or provide incentive to breach the MDL sections of the HVNL.

Stakeholder feedback

Most stakeholders supported reformulating CoR obligations on packers as a primary duty of care to ensure the safety of road transport operations, limited to the extent to which they could influence the transport task.

Stakeholders also raised concerns relating to the definition of 'packer'. In particular, Transport for NSW considered the definition was a subset of the definition of loader and could therefore be removed from the HVNL. This issue is considered later in this paper.

Conclusions

Having regard to stakeholder views, the NTC considers that reformulating CoR obligations on packers as a primary duty of care will help reduce complexity and promote a more proactive approach to compliance.

Recommendation 7 – Primary Duty of Care – Packers

That the HVNL be amended by reformulating the existing chain of responsibility obligations on packers so that each packer has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for packers requires such persons to ensure that the packing of goods is such that it will not result in, encourage or provide incentive to breach the vehicle's mass, dimension and load restraint requirements.*

4.6 Unloaders

Issues

Section 5 of the HVNL defines an unloader as a 'person who unloads goods from a heavy vehicle or container on a heavy vehicle'.

People who unload goods from heavy vehicles can cause or contribute to fatigue requirement breaches by delaying the unloading process. Unloading delays, especially if the vehicle is queued, can cause the driver to breach work and rest requirements or cause driver fatigue.

Accordingly, section 229 of the HVNL provides that an unloader is liable if they do not take all reasonable steps to ensure a driver does not drive while fatigued. In addition, section 261 of the HVNL provides that an unloader is deemed liable if a driver contravenes a maximum work requirement or minimum rest requirement.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed amending the HVNL to include a role-specific duty for unloaders to ensure safety by unloading a heavy vehicle so that it will not result in, encourage or provide incentive for a driver to breach fatigue requirements.

Stakeholder feedback

The majority of stakeholders supported reformulating CoR obligations on unloaders as a primary duty of care to ensure the safety of road transport operations, limited to the extent to which they could influence the transport task.

Stakeholders including ATA, Toll Group, TMR, Transport for NSW and NatRoad considered the proposed primary duty of care for loaders should also extend to speeding on the basis that unloading delays could contribute to speed and fatigue breaches if drivers had to meet inflexible deadlines.

Conclusions

Having regard to stakeholder views, the NTC considers that reformulating CoR obligations on unloaders as a primary duty of care will help reduce complexity and promote a more proactive approach to compliance.

Under the HVNL, unloaders currently have a role in ensuring compliance with fatigue requirements, but have no obligations for compliance with speed requirements. Unloaders have a liability under the fatigue provisions because delays in unloading could lead a driver to breach a fatigue duty. In the same way, loading delays could lead a driver to speed to meet their schedule.

Accordingly, and in addition, the NTC considers the primary duty of care for unloaders should include an obligation to ensure the unloading of a heavy vehicle will not result in, encourage or provide incentive to breach speed requirements by the driver. In the NTC's view this requirement does not expand the obligations of unloaders.

Recommendation 8 – Primary Duty of Care – Unloaders

That the HVNL be amended by reformulating the existing chain of responsibility obligations on unloaders so that each unloader has:

- a) a Primary Duty of Care to ensure, so far as is reasonably practicable, the safety of road transport operations, and*
- b) without limiting (a), and so far as is reasonably practicable, the Primary Duty of Care for unloaders requires such persons to ensure that the unloading of a heavy vehicle is such that it will not result in, encourage or provide incentive to breach:*
 - the vehicle's mass, dimension and load restraint requirements;*
 - speed requirements by the driver; or*
 - fatigue requirements by the driver.*

5 General considerations

Key points

The reformulation of existing CoR parties obligations as a primary duty of care requires consideration of the following matters:

- definitions
- consequences of failing to discharge a duty
- the standard of care to apply
- relationship of primary duties to existing CoR offences
- maximum penalties
- general principles applicable to the primary duties.

5.1 Definition of ‘road transport operations’

Issues

The July 2015 Discussion Paper proposed introducing an obligation on primary duty holders to ensure the safety of road transport operations. However, while the HVNL defines ‘operate’, ‘operator’ and ‘road transport’, it does not define ‘road transport operations’.

July 2015 Discussion Paper draft proposal

The phrase ‘road transport operations’ is a key term used in the proposed primary duty. However, the July 2015 Discussion Paper did not define this term and instead asked stakeholders to consider how it should be defined.

Stakeholder feedback

There was broad stakeholder agreement on the need to define the term ‘road transport operations’ in the HVNL if a primary duty was to be introduced.

However there were differing views on the construction of the definition. A number of stakeholders suggested the term should capture the driving of a heavy vehicle and activities directly related to that task, as well as the movement of freight or passengers. Others suggested the definition should be constructed similar to the definition of ‘railway operations’ as is used in the RSNL—that is listing all activities relevant to those operations:

Railway operations means any of the following:

- (a) the construction of a railway, railway tracks and associated railway track structures;
- (b) the construction of rolling stock;
- (c) the management, commissioning, maintenance, repair, modification, installation, operation or decommissioning of rail infrastructure;
- (d) the commissioning, use, modification, maintenance, repair or decommissioning of rolling stock;
- (e) the operation or movement, or causing the operation or movement by any means, of rolling stock on a railway (including for the purposes of construction or restoration of rail infrastructure);
- (f) the movement, or causing the movement, of rolling stock for the purposes of operating a railway service;
- (g) the scheduling, control and monitoring of rolling stock being operated or moved on rail infrastructure.

The ATA proposed the definition should be broad enough to capture all the business activities currently covered by the HVNL, and include:

- *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*
- *engaging another person to modify, service, inspect or repair a heavy vehicle*
- *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 ATA also considered the definition should cover passenger operations and should therefore be developed in consultation with the Bus Industry Confederation.

Similarly to the ATA, Transport for NSW also proposed a broad definition, consistent with the RSNL, and including the following matters:

- i) the management, maintenance, repair, modification, or operation of heavy vehicles to transport passengers or goods (including truck-based plant) on a road or road related area*
- ii) the scheduling, loading, unloading, control and monitoring of heavy vehicles used to transport things/goods/freight/people on a road or road related area*
- iii) any other activity that is prescribed by the regulations to be a road transport operations.*

The NT Department of Transport also supported a broad definition.

Consistent with these views, the NHVR suggested that any definition must be broad enough to encompass any relevant action (or inaction), within the parameters of the HVNL, that directly or indirectly affects the freight task.

Other submissions provided examples of what the definition could contain. Suggestions consistently included driving the vehicle, repairs, maintenance, and loading and unloading activities related to the vehicle. In addition, VicRoads included references to control, communications and location systems and technology, information, and other systems and equipment including speed limiting technology, as well as administration, research and marketing activities.

The NSW Police Force said the definition should specifically eliminate activities that are agreed not to be included.

South Australia Police said any definition of 'road transport operations' should be sufficiently broad to ensure all activities associated with heavy vehicles and the transport of freight were included. Victoria Police proposed the following definition, dependant on what context the term would be used in:

The use of a heavy vehicle, or tasks, systems and business practices associated with the use of a heavy vehicle, for purposes associated with the transportation of goods or passengers, the provision of services, or the movement/operation of specialised machinery or equipment.

In contrast, TSV suggested a narrower definition restricted to any use of a heavy vehicle on a highway or a road.

TMR said it was difficult to consider whether ‘road transport operations’ needed defining further without first determining the context in which it would be used.

Conclusions

Having regard to stakeholder views, the NTC considers the HVNL should include a definition of the term ‘road transport operations’ and that this definition should capture matters such as the driving of a heavy vehicle, and other activities directly related to that task, as well as the movement of freight or passengers. In addition the definition will need to distinguish the conduct of off road parties and their on-road and safety impacts.

The particulars of this definition will be finalised during the drafting instruction process.

Recommendation 9 – General considerations for Primary Duties regime – Definition of ‘road transport operations’

That the HVNL be amended to include a definition of the term ‘road transport operations’. The policy intent of this amendment is to clarify the meaning of the term ‘road transport operations’ and not to expand either the scope of duties beyond the existing regulatory framework of the HVNL, or the chain of responsibility parties, beyond the current chain of responsibility parties.

5.2 Definitions of CoR parties

The definitions of CoR parties was not specifically canvassed in the July 2015 Discussion Paper.

However, as noted earlier, a number of stakeholders have raised concerns with the existing definitions of CoR parties, with most stakeholders emphasising the need for the CoR parties to be defined in clear and unambiguous terms, and for the definition to focus on the party’s role and road safety function rather than on their title.

In this context, concern has also been expressed regarding the definition of ‘consignor’, and the requirement that ‘the person has consented to being, and is named or otherwise identified as a consignor’ in the transport documentation. For both the ATA and Transport for NSW, this definition is a real impediment to ensuring that all CoR parties with responsibility for road safety may be brought to account.

In addition, Transport for NSW also considered that the HVNL’s current definition of ‘loading manager’ was too narrow due to the requirement that the loading or unloading occurs at ‘regular loading or unloading premises’ which requires a minimum of five heavy vehicles a day to be loaded.

Having regard to the stakeholder views expressed, the NTC considers the HVNL should be amended to better clarify that any person who performs any of the functions of any of the CoR parties, whether exclusively or occasionally, will determine whether the person falls within the definitions, rather than the person’s job title or contractual description. Whilst the HVNL already contains an explanatory note to this effect, it is considered this should be a substantive provision of the law.

In addition, the NTC considers the definition of key parties in the chain, including the definition of ‘consignor’, should be further considered to remove any confusion and to better clarify the definitions. The particulars of the definitions will be finalised during the preparation of drafting instructions.

Recommendation 10 – General considerations for Primary Duties regime – Definition of ‘chain of responsibility parties’

- a) *That the HVNL be amended to better clarify that any person who performs any of the functions of any of the chain of responsibility parties, whether exclusively or occasionally, will determine whether the person falls within the definitions, rather than the person’s job title or contractual description. This should be a substantive provision of the HVNL.*
- b) *This amendment may also require consequential amendments to s.5 definitions of chain of responsibility parties, including clarifying the definition of ‘consignor’.*

5.3 Standard of care to apply

Issues

Under the HVNL, CoR parties and others with obligations are required to meet the standard of 'all reasonable steps'. The 'all reasonable steps' standard has been a component of road transport law since 1999. It is used under the HVNL for both CoR and non-CoR offences. In addition, for CoR offences, the 'all reasonable steps' standard is used in two ways, as both:

- an element of the defence where the onus of proof is on the prosecution
- an available defence where the defendant has the onus of proving they took all reasonable steps.

However 'all reasonable steps' is not defined in the HVNL.

In contrast, the Model WHS Act, the RSNL and the MSNL apply the standard of 'so far as is reasonably practicable'. Unlike the HVNL, the Model WHS Act, RSNL and MSNL standard of 'so far as is reasonably practicable' is used only as an element of the duty, with the effect that the prosecution bears the burden of proof. A definition of the term is provided within the Model WHS Act, RSNL and MSNL and extensive guidance material is also available to help parties understand and meet this standard.

In law and practice, both standards of care are broadly the same, as both require a duty holder to take into account matters such as:

- their role and capacity
- the likelihood of the contravention, hazard or the risk occurring
- the degree of harm that might result from the hazard or the risk
- the availability of avenues to eliminate or minimise the risk.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed the standard of care applicable to the primary duties could be either 'so far as reasonably practicable', consistent with the national safety laws, or 'all reasonable steps' as currently used in the HVNL.

The discussion paper also proposed that all offences in the HVNL should apply the same standard of care and that the standard of care should also be defined in the HVNL to better assist CoR parties in understanding their obligations.

Finally the discussion paper proposed that if the 'so far as reasonably practicable' standard was to be adopted, then it could be included as either an element of the offence with a burden of proof on the defendant, consistent with other national safety laws, or as a defence, reflecting the existing application of the 'all reasonable steps' standard in the HVNL.

Stakeholder feedback

Stakeholders generally supported adopting the 'so far as is reasonably practicable' standard on the grounds it was more consistent with the standard of care applied in other national safety legislation and would provide for better integration of transport-related compliance systems.

Transport for NSW noted the importance of the standard of care in guiding the application of primary duties. Whilst Transport for NSW preferred the 'so far as reasonably practicable' standard, it considered either option would provide certainty the operator, prime contractor, employer and other parties in the CoR must manage all foreseeable risks affecting the safety of road transport operations.

In addition, Transport for NSW, TMR and the NHVR noted the 'so far as is reasonably practicable' standard had been the subject of extensive judicial consideration and was well established as having a particular meaning. In the views of Transport for NSW, TMR and the NHVR this judicial consideration provides greater certainty and helps industry and enforcement agencies understand and apply the law, promoting productivity and efficiency.

VicRoads also supported the adoption of the 'so far as is reasonably practicable' standard throughout the HVNL, but noted the making of these amendments would be a large undertaking and would affect other areas of the HVNL. Nevertheless, VicRoads was of the view these amendments were necessary to ensure

an integrated primary duties regime. However, information and training materials would need to be developed to assist authorised officers and enforcement agencies in complying with the new regime.

Alternative views were also received. For example, the NSW Police Force sought a better understating of the impact on court matters and on the measurement of expected safety benefits of such a change in the standard of care to apply.

Victoria Police was of the view the 'so far as reasonably practicable' standard must be underpinned by a form of risk categorisation to provide greater clarity for both industry and enforcement about the types of risks and levels of harm to be mitigated. In addition, Victoria Police was concerned, for example, that a change in the standard of care might introduce cost as a mitigation factor for duty holders' not installing safety-related systems or implementing risk-management processes.

In contrast, the ALC was of the view the current standard of 'all reasonable steps' made it clear a duty holder must do everything that could reasonably be required to discharge the relevant obligations contained in the HVNL. However, the ALC also acknowledged there was a clear desire to more closely align with WHS law.

Conclusions

Having regard to the stakeholder feedback received, and consistent with the standard of care adopted for duties under the Model WHS Act, the RSNL and the MSNL, the NTC recommends adopting the 'so far as is reasonably practicable' standard of care for the primary duties. In the NTC's view the adoption of this approach will help improve consistency with other national safety laws, provide for better integration of transport-related compliance systems and reduce complexity of compliance and enforcement.

Recommendation 11 – General considerations for Primary Duties regime – Standard of Care

- a) *That the standard of care to be adopted for the primary duties regime is the 'so far as reasonably practicable' standard consistent with the standard of care used in other national safety laws*
- b) *That the term 'reasonably practicable' be defined in the HVNL, consistent with the definition used in other national safety laws.*
- c) *That for consistency and to reduce complexity in compliance and enforcement, the HVNL be amended so that all offences in the HVNL apply the same standard of care as an element of the offence (consistent with national safety laws). The current standard of 'all reasonable steps' be replaced with the 'so far as reasonably practicable' standard throughout the HVNL.*

5.4 Consequence of failure to discharge duty

The July 2015 Discussion Paper proposed that for the primary duties, a breach of the duty is in itself an offence and is not dependent on some harm, incident or injury having already occurred.

Stakeholders did not make any comment on this proposal in their responses to the discussion paper.

Recommendation 12 – General considerations for Primary Duties regime – Consequence of failure to discharge primary duties

That the failure to discharge the primary duties is an offence with penalties.

5.5 Maximum penalties

Issues

The purpose of penalties is to encourage desirable behaviour and punish undesirable behaviour. It is important the maximum penalty adequately reflects the serious nature of the offence being committed and is at a level that appropriately balances fairness with deterrence.

Model WHS Act and Rail Safety National Law

Unlike the HVNL, the Model WHS Act and the RSNL grade breaches of the duties based upon the risk of death or serious injury or illness posed by non-compliance. This paper describes these as 'offence categories', with each category imposing a maximum penalty proportionate to the seriousness of the risk.

Both the Model WHS Act and the RSNL apply the same three offence categories for breaches of the health and safety duties under sections 19-29 of the Model WHS Act and sections 52-56 of the RSNL respectively. However there are differences in the quantum of fines, with maximum fines of up to \$600,000 under the Model WHS Act, and \$300,000 under the RSNL for an individual's breach, and \$3 million for a body corporate's breach, for the most serious offences, as the below table illustrates.

Penalties, including imprisonment for the most serious cases under offence category one, are therefore a key component of deterrence and complement other types of enforcement action, such as improvement notices. Maximum penalties reflect the level of seriousness of the offences and have been set at levels high enough to cover the most extreme instances of non-compliance.

Current HVNL penalties

By contrast with the Model WHS Act and the RSNL, the penalties for offences under the HVNL are of a significantly lesser magnitude, with maximum penalties of \$20,000 for individuals and \$100,000 for corporations.

The HVNL penalties have been inherited from the original model road transport laws or were set through negotiation with jurisdictions and industry stakeholders taking into account factors such as equity, safety, proportionate punishment and deterrence.

Table 1 Offence categories and maximum penalties

| | Category 1 – Breach of duty creating risk of death or serious injury or illness (Reckless) | Category 2 – Breach of duty creating risk of death or serious injury or illness | Category 3 – <u>Other breach of duty</u> |
|--|---|---|--|
| Conduct | A person engages in conduct that exposes an individual to whom the duty is owed to a risk of death or serious injury without a reasonable excuse | A person fails to comply with the safety duty and that failure exposes an individual to a risk of death or serious injury or illness | A person fails to comply with the safety duty |
| Fault element (intent) | The person is reckless as to the risk to an individual of death or serious injury or illness | N/A (strict liability) | N/A (strict liability) |
| Burden of proof | The prosecution must prove: (a) the person had a safety duty; and (b) the person, without reasonable excuse, engaged in conduct that exposed an individual to whom that duty is owed to a risk of death or serious injury or illness; and (c) the person was reckless as to the risk to an individual of death or serious injury or illness. | The prosecution must prove: (a) the person had a safety duty; and (b) the person failed to comply with that duty; and (c) the failure exposed an individual to a risk of death or serious injury or illness. | The prosecution must prove: (a) the person had a safety duty; and (b) the person failed to comply with that duty. |
| Model WHS Act maximum penalties | Individual (other than as a person conducting a business) – \$300,000 and/or 5 years' prison Individual as a person conducting a business – \$600,000 and/or 5 years' prison Body corporate - \$3 million | Individual (other than as a person conducting a business) – \$150,000 Individual as a person conducting a business - \$300,000 Body corporate – \$1,500,000 | Individual (other than as a person conducting a business) – \$50,000 Individual as a person conducting a business – \$100,000 Body corporate – \$500,000 |
| RSNL maximum penalties | Individual – \$3 million or 5 years' prison or both Body corporate – \$3 million | Individual – \$150 000 Body corporate – \$1 500 000 | Individual – \$50,000 Body corporate – \$500,000 |

In May 2015, ministers endorsed the NTC *Penalties Matrix* as a tool to be used in the setting of penalties for new and amended offences under the existing framework of the HVNL. The matrix is intended to help ensure maximum penalties for new and amended offences under the HVNL are consistent with the policy objects and intent of the law, and also in terms of penalty quantum, with the HVNL as well as other state and territory transport laws.

However, the matrix was not designed to set penalties for offences of a broader nature than existing offences under the HVNL, such as a primary duty. As such, the NTC *Penalties Matrix* does not allow for penalty amounts higher than the current HVNL levels.

Nonetheless, the matrix establishes a number of principles for setting maximum penalties that it is also relevant when considering the penalty levels for the primary duties regime:

- *maximum penalty levels should be set at a level that gives courts the ability to tailor a particular penalty to a level that will deter and punish a worst case offence, including repeat offences*
- *maximum penalty levels should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme*

- *maximum penalties should reflect the degree of seriousness of the violation in safety, equity and infrastructure degradation terms*
- *a higher maximum penalty will be justified where there are strong incentives to commit the offence, or where the consequences of the commission of the offence are particularly dangerous or damaging. Safety risks should attract the most serious penalties*
- *a maximum penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness.*

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed that maximum penalties for breaching the primary duties should better align with the maximum penalties available under national safety laws, including the adoption of a hierarchy of penalties based on the nature of the actual harm or damage caused. However, the discussion paper also acknowledged that penalty quantum could not be agreed until the primary duty regime was settled.

Stakeholder feedback

Most stakeholders supported a move to higher maximum penalties under the proposed primary duties approach.

Transport for NSW considered the primary duties should be complemented by significantly higher penalties as adopted under the Model WHS Act and RSNL, to allow courts flexibility to impose a penalty of appropriate gravity for the most exceptional cases. Transport for NSW also proposed that if higher penalties were adopted for primary duties, then penalties applying to prescriptive requirements should be reduced to reflect the less serious nature of those offences.

TMR also favoured the adoption of the Model WHS Act and RSNL offence categories and noted this would need to be accompanied by the development of appropriate guidance materials to educate industry. However TMR also noted the adoption of the Model WHS Act and RSNL offence categories would also require clear justification as to why the current HVNL penalties regime was not appropriate.

Similarly, the ATA supported higher penalties for breaches of the primary duties. In this context the ATA also proposed all CoR parties should be subject to the same penalties. In the ATA's view, this approach would reinforce the message that all CoR parties have the same obligation to ensure road transport safety. NatRoad also supported this position.

Other industry groups also supported a move to higher penalties under a primary duties approach but raised concerns regarding the need to protect smaller operators, being the majority of the industry, from unduly harsh penalties.

However, Toll Group considered a shift to a primary duties approach should bring a dramatic shift in maximum penalties and that maximum penalties should reflect the very serious risks that arise from non-compliance with the HVNL. Similarly to TMR, Toll Group also raised the need for and importance of an HVNL compliance and enforcement strategy and CoR guidance materials to help industry understand its obligations and to help ensure consistent enforcement practices.

Conclusions

Having regard to stakeholder views, the NTC considers that primary duties penalties should better align with those under other national safety laws, including adopting a hierarchy of penalties based on the nature of each risk and the actual harm or damage caused. Including higher penalties will act as a deterrent to breaches of CoR obligations and signify the seriousness posed by contraventions.

Recommendation 13 – General considerations for Primary Duties regime – Maximum penalties

That the maximum penalties for breach of the primary duties be better aligned with the maximum penalties available under the national safety laws, including adoption of a hierarchy of penalties based on the risk and the nature the actual harm or damage caused.

Note: it is not proposed to change other penalties in the HVNL.

5.6 Investigative powers

The issue of investigative powers was not considered as part of the July 2015 Discussion Paper. However, a number of stakeholders, including industry, enforcement agencies and jurisdictions, made submissions on the need for the proposed CoR primary duties regime and the removal of the reverse onus of proof to be complemented by a strengthening of investigative powers for the NHVR and enforcement agencies.

Background

The decision to initiate a CoR investigation can be based on internal factors within the regulator or an enforcement agency or on external factors.

Internal factors and triggers within the NHVR or an enforcement agency might include resource availability, organisational capability, government priorities, changing strategic focus, or opportunities to improve compliance and education or to be more proactive or reactive.

External factors and triggers might include the number of offences, severity of offences, location of responsible parties, location of offences, likely existence of evidence, strength of opposing legal argument, ability to influence improved compliance behaviours as a result of the investigation, statute of limitations and risk of time overrun, evidence of systemic and habitual breaches, evidence of unfair commercial advantage as a result of breaches, road crashes resulting in damage or posing safety or infrastructure risks and evidence of unreasonable demands and pressures on parties in the supply chain to breach the laws.

Chapter 9 of the HVNL, concerning enforcement, empowers authorised officers to stop, move and inspect heavy vehicles to check compliance, inspect premises of 'responsible persons' to check compliance, enter and search heavy vehicles and premises and seize evidence amongst other things. Of particular relevance, however, are sections 569 and 570 of the HVNL.

Section 569 of the HVNL empowers an authorised officer to require the production of certain documents, devices and other things, including transport documentation and documents in a person's control relating to any business practices, from a 'responsible person' for a heavy vehicle.

In addition, section 570 of the HVNL empowers an authorised officer to require a 'responsible person' for a heavy vehicle to provide certain information about the vehicle, its equipment or load or personal details known to the person about any other responsible person for the vehicle. However authorised officers may only exercise the powers under section 569 for 'compliance purposes', defined in the HVNL as 'monitoring purposes' or 'investigation purposes'.

'Responsible person' is defined in the HVNL as an exhaustive list of persons and includes persons additional to CoR parties and drivers.

In contrast, section 155 of the Model WHS Act provides the regulator with a broad power to compel the provision of information, documents and evidence from any person, where the regulator has reasonable grounds to believe the person is capable of providing information, documents or evidence in relation to a possible contravention of the Model WHS Act or that will assist the regulator to monitor or enforce compliance with the Model WHS Act.

Issues

Sections 569 and 570 of the HVNL limits both the type of documents and information that may be requested by authorised officers, as well as limiting the persons from whom such information and documents can be obtained to those persons defined as 'responsible persons'.

With the introduction of a primary duties regime it is possible, if not probable, that the persons who may have information relevant to a breach of a primary duty are not 'responsible persons' within the meaning of the HVNL, but are others, such as third-party maintenance providers, fuel companies and tolling companies.

Similarly it is possible, if not probable, that the type documents and information required to investigate a potential breach of the primary duty is broader than the type of documents and information authorised officers can currently request under the HVNL.

Stakeholder feedback

Despite not being considered as part of the July 2015 Discussion Paper, investigative powers were expressly raised by a number of stakeholders, including the NHVR, Transport for NSW, the ATA and police agencies.

Government stakeholders, such as Transport for NSW, TMR and VicRoads considered the investigative power provisions of the HVNL should be amended to ensure authorised officers have the necessary enforcement tools and that these powers should be consistent with the investigative powers provided under other national safety laws.

In particular, Transport for NSW considered a move to a primary duties regime, and a burden of proof for all offences that rests with the prosecution, would require a broadening of investigative powers to enable authorised officers to gather necessary information to prove contraventions. VicRoads held a similar view and noted that type 3 liability may need to be retained for these offences if investigative powers were not strengthened.

In this context the NHVR noted the strengthening of investigative powers is fundamental to ensuring the safety objectives of the primary duties reforms. Likewise, Victoria Police and the NSW Police Force considered it imperative that authorised officers have more extensive investigative powers to ensure they can access the necessary records held by businesses and other third parties.

Victoria Police, as well as a number of other submissions considered that amendments to the investigative power provisions of the HVNL should be made at the same time as amendments to CoR and EoL provisions. The ATA also considered that investigative powers must be addressed as part of the CoR reform package.

In addition, the ATA concurred with enforcement agencies that current limitations on investigative powers in the HVNL would make it difficult for such agencies to enforce the primary duties, particularly against upstream chain parties. However, the ATA also suggested that any amendments to the investigative powers of the HVNL should:

- *make 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 this context, the ATA noted that in their experience, regulators often underestimated the volume of documents that businesses generate due to regulatory requirements and the time it takes to collate them, with the effect that a response to a request for information may involve the production of thousands of documents that take several months to compile.

NatRoad also supported the position of the government agencies and the ATA, that maximum penalties, EoL and investigative powers should be considered as a package.

The ALC did not address this issue.

Conclusions

Based on stakeholder submissions received, and the NTC's review of the investigative powers contained in the other national safety legislation, the NTC recommends the existing information-gathering powers of the HVNL be strengthened but the law also amended to include appropriate safeguards to ensure justice and human rights issues.

Details of the investigative powers provisions will be finalised during the development of drafting instructions. However, one option is to include a new broad power to require the giving of information or production of documents. This provision could be modelled on, for example, section 155 of the Model WHS Act, which empowers the regulator, by written notice, to require any person the regulator reasonably believes has relevant information, documents or evidence to provide it to the regulator. Issues to consider with this approach include whether:

- the power should be exercised by the regulator, consistent with the Model WHS Act, or by all authorised officers, consistent with the other investigative powers of the HVNL
- the power should be exercised for monitoring and investigation purposes or confined to investigation purposes
- the privilege against self-incrimination or the evidential immunity of section 588 of the HVNL should apply.

Alternately, or in addition, amendments could be made to sections 569 and 570 of the HVNL to allow authorised officers to require information or documents from any person with relevant information or documents, and to expand the type of information or documents that authorised officers may require. Issues to consider include whether:

- there should be any restrictions on the range of people from whom information or documents can be required
- the power should be exercised for monitoring and investigation purposes or confined to investigation purposes.

In addition, some stakeholders considered there should be a broader review of investigative and enforcement powers under the HVNL to ensure appropriate powers are provided for authorised officers. Accordingly, it is recommended that a comprehensive review of the HVNL's investigative and enforcement powers be considered by the NTC as a future project for inclusion as part of the NTC's forward work program. This recommendation is noted later in this paper at Part 10: *Future work*.

Recommendation 14 – General considerations for Primary Duties regime – Expansion of investigative powers

As a corollary to the introduction of primary duties on chain of responsibility parties which imposes greater onus on authorised officers and the National Heavy Vehicle Regulator when investigating alleged breaches of the primary duties, it is recommended the HVNL be amended to strengthen information-gathering powers. This could include:

- *a power modelled on s.155 of the Model Work Health Safety Bill or s.9 of the Victorian OH&S Act to require any person not limited to a person responsible for a heavy vehicle, to give information, provide documents or give evidence about relevant matters;*
- *addressing the investigative power issues currently listed in the NTC's HVNL maintenance log concerning s.569 power to require production of documents generally and s.570 power to require information;*
- *ensuring appropriate safeguards; and*
- *making such other consequential amendments to the investigative powers provisions of the HVNL necessary to ensure the effective enforcement of the Primary Duties regime, consistent with the investigative powers provided in the national safety laws (e.g. Model Work Health Safety Bill, Rail Safety National Law).*

5.7 Alternative remedies

Issues

Alternative remedies were not considered as part of the July 2015 Discussion Paper. However, a number of stakeholders made submissions on the need for additional alternative remedies so as to provide the NHVR and enforcement agencies with greater flexibility, particularly in circumstances where a monetary penalty might be considered inappropriate to induce compliance.

The HVNL currently provides the courts and authorised officers a range of measures to address regulatory non-compliance such as formal warnings, improvement notices, prohibition notices and supervisory intervention orders. By providing these measures, the HVNL recognises that different compliance and enforcement tools are needed to regulate entities with diverse operations, objectives and compliance capabilities. Equally, different tools may be needed to manage different forms and degrees of non-compliance.

Stakeholder feedback

Despite not being considered as part of the July 2015 Discussion Paper, both Transport for NSW and TMR supported the introduction of an enforceable undertaking remedy to strengthen the existing remedies already provided in the HVNL.

Under section 216 of the Model WHS Act, a person may offer the regulator an undertaking about a contravention or alleged contravention by the person. An enforceable undertaking is a legally binding agreement in which a person or organisation undertakes to carry out specific activities to improve health and safety and deliver benefits to workers, industry and the broader community. It provides an opportunity for

lasting organisational change at the workplace through developing and maintaining an occupational health and safety management system and implementing specific health and safety improvements.

In this context, Transport for NSW noted the Model WHS Act and the RSNL each provide a suite of alternative remedies, including enforceable undertakings, and that these mechanisms helped to minimise the impost on the court system. In addition, Transport for NSW emphasised its view that a primary duty offence would typically only be prosecuted in serious cases involving the risk of serious injury or death, and introducing alternative remedies such as those available under the Model WHS Act would give regulators a genuine alternative to prosecution in suitable cases.

Conclusions

In response to the stakeholder submissions received, and consistent with the recommendations of the NTC's Roadworthiness Review, the NTC recommends the HVNL be amended to enable the use of enforceable undertakings.

Alternative remedies, such as enforceable undertakings, are consistent with the Model WHS Act and the RSNL, reduce impacts on the courts and provide practical and workable alternatives to prosecutions for CoR breaches that do not involve the risk of serious injury or death.

Recommendation 15 – General considerations for Primary Duties regime – Alternative Remedies

Consistent with the recommendations proposed in relation to the NTC's Roadworthiness Review it is recommended the HVNL be amended to enable the use of voluntary enforceable undertakings for parties who agree to be bound to take specified steps to ensure compliance with the HVNL.

Note: the effect of this recommendation is to add to the suite of remedies currently available under the HVNL, which includes improvement notices, formal warnings, infringement notices, supervisory intervention orders, prohibition orders and compensation orders.

5.8 Evidentiary status of codes of practice

Issues

The evidentiary status of codes of practice was not considered in the July 2015 Discussion Paper.

However, the issue was raised by a number of stakeholders who noted that codes of practice have an important role in assisting industry to understand and comply with their HVNL obligations.

In addition, and as discussed below both the HVNL and the Model WHS Act accord registered codes of practice with different evidentiary status.

Under section 625 of the HVNL, in deciding in a proceeding for an offence against the HVNL whether a person took all reasonable steps to prevent the contravention, proof that a person complied with all relevant standards and procedures under a registered industry code of practice is evidence that the person took all reasonable steps.

In contrast, section 275 of the Model WHS Act provides that an approved code of practice is admissible in proceedings as evidence of whether or not a duty or obligation under the Bill has been complied with. Under this section, the courts may regard a code of practice as evidence of what is known about managing a hazard, risk or control and may rely on the code to determine what is reasonably practicable in the circumstances to which the code relates. However section 275 of the Model WHS Act also provides that nothing prevents a person from introducing evidence of compliance in a manner different from the code but provides a standard of work health and safety that is equivalent to or higher than the standard required in the code.

Stakeholder feedback

Notwithstanding that codes of practice were not considered in the July 2015 Discussion Paper, both industry and regulators consider the availability of codes of practice as critical for industry compliance with the proposed primary duties regime.

As the ATA stated ‘...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’. In this context, the ATA also noted that approved codes of practice should be available before changes to the HVNL came into effect.

Similarly, the ALC considered that industry code registration guidelines must be developed so that industry codes of practice could be prepared before the primary duties regime began. NatRoad also held a similar view, as did Toll Group:

... regimes where such penalties are in place tend to emphasise responsive regulation approaches that give regulatees every chance to comply through advice on what compliance and good practice looks like. We note that the NHVR has still yet to release a Compliance and Enforcement Strategy or issue CoR guidance material.

Conclusions

Having regard to the stakeholder feedback received, the NTC recommends the HVNL should be amended to clarify the evidentiary status of codes of practice consistent with the approach detailed in section 275 of the Model Work Health Safety Bill.

In the NTC’s view the existing approach of the HVNL as provided for in section 625 of the HVNL encourages a tick-a-box mentality and is inconsistent with the outcomes-based approach embodied in the primary duties.

Recommendation 16 – General considerations for Primary Duties regime – Evidentiary status of codes of practice

That the HVNL be amended to clarify the evidentiary status of codes of practice consistent with s.275 of the Model Work Health and Safety Bill which provides that an approved code of practice is admissible in proceedings as evidence of whether or not a duty or obligation has been complied with.

Note the effect of this recommendation is that the existing HVNL s.625, which provides that proof of compliance with a registered industry code of practice is evidence that the person took all reasonable steps, would be repealed.

5.9 Principles applicable to the primary duties and interaction with national safety laws

Issues

Sections 13-16 of the Model WHS Act and section 51 of the RSNL both provide the following common principles to guide duty holders, regulators and the courts on the interpretation and application of the duties of care:

- *A duty under this Law cannot be transferred to another person.*
- *A person can have more than 1 duty under this Law by virtue of being in more than 1 class of duty holder.*
- *More than 1 person can concurrently have the same duty under this Law and each duty holder must comply with that duty to the standard required by this Law even if another duty holder has the same duty.*
- *If more than 1 person has a duty for the same matter, each person—*
 - (a) retains responsibility for the person's duty in relation to the matter; and*
 - (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter (or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity).*

In addition, section 50 of the RSNL details principles clarifying that rail safety is the shared responsibility of everyone who has a role at any point in the rail system. Under these principles, each party has a duty to work with others to ensure that everything reasonably practicable is done to ensure the safety of assets

throughout their life cycle. However, the degree to which a person is accountable for rail safety is dependent on the risk their activities might pose to rail safety. Thus, the management of risks associated with railway operations is the responsibility of the person best able to control them. The principles are as follows:

(1) Rail safety is the shared responsibility of—

(a) rail transport operators; and

(b) rail safety workers; and

(c) other persons who—

(i) design, commission, construct, manufacture, supply, install, erect, maintain, repair, modify or decommission rail infrastructure or rolling stock; or

(ii) supply rail infrastructure operations or rolling stock operations to rail operators; or

(iii) in relation to the transport of freight by railway—load or unload freight on or from rolling stock; and

(d) the Regulator; and

(e) ONRSR; and

(f) the public.

(2) The level and nature of responsibility that a person referred to in subsection (1), or falling within a class of person referred to in that subsection, has for rail safety is dependent on the nature of the risk to rail safety that the person creates from the carrying out of an activity (or the making of a decision) and the capacity that person has to control, eliminate or mitigate those risks.

(3) The persons and classes of persons referred to in subsection (1) should—

(a) participate in or be able to participate in; and

(b) be consulted on; and

(c) be involved in the formulation and implementation of, measures to manage risks to safety associated with railway operations.

(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.

(5) If approaches to managing risks associated with any particular railway have potential impacts on any other railway or a railway network of which the railway is a part, the best practicable rail safety outcome should be sought.

In contrast, the HVNL does not include any general principles such as those detailed in section 50 of the RSNL and only provides limited guidance at section 634 of the HVNL, in relation to duty holders:

a person may be punished only once in relation to the same contravention of this Law by the person or a heavy vehicle, even if the person is liable in more than 1 capacity.

However, section 18 of the HVNL addresses the interaction of the HVNL and the jurisdictions WHS laws providing that compliance with the HVNL is not, in itself, evidence of compliance with the 'primary WHS law'.

In contrast, section 48 of the RSNL provides:

(1) If a provision of the occupational health and safety legislation applies to railway operations, that provision continues to apply, and must be observed, in addition to this Law.

(2) If a provision of this Law is inconsistent with a provision of the occupational health and safety legislation, the provision of the occupational health and safety legislation prevails to the extent of any inconsistency.

Note—

For example, if a provision of this Law deals with a certain matter and a provision of the occupational health and safety legislation deals with the same matter and it is impossible to comply with both provisions, a person must comply with the occupational health and safety legislation and not with this Law. If provisions of both this Law and the occupational health and safety legislation deal with the same matter but it is possible to comply with both provisions, a person must comply with both.

As the above discussion illustrates, the RSNL is subordinate to a jurisdiction's WHS laws, so that if a provision of the RSNL is inconsistent with a provision of a jurisdiction's WHS law, the jurisdiction's WHS law prevails.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed amending the HVNL to include general principles applicable to the primary duties, similarly to the principles set out in other national safety laws. These would include principles regarding shared responsibility and accountability detailed in section 50 of the RSNL.

The discussion paper also proposed that the relationship between the HVNL and WHS legislation should be further clarified to expressly address inconsistencies between the HVNL and the WHS laws of participating jurisdictions, particularly those relating to double jeopardy.

Stakeholder feedback

The inclusion of general principles applicable to the primary duties, similar to the principles set out in the Model WHS Act, and including principles of shared responsibility and accountability, similar to the RSNL was supported by both government and enforcement agencies and some parts of industry.

However the ATA expressed some concern about the inclusion of principles of shared responsibility and accountability, noting these principles may result in the inappropriate transfer of responsibility from influential off-road parties to trucking businesses. SARTA and NatRoad also shared this concern. The ALC did not support the inclusion of any general principles applicable to primary duties and in particular considered the RSNL principles of shared responsibility and accountability were not appropriate in the context of the road transport industry.

Concern was also expressed by some stakeholders about the inclusion of principles addressing the interaction of the HVNL and the WHS laws of jurisdictions, in particular that the WHS laws should take precedence where there is any inconsistency between the HVNL and a jurisdiction's WHS law. In this context, Victoria Police noted the HVNL was developed to specifically address the risks applicable within the heavy vehicle industry. Similarly the ALC was of the view that section 18 of the HVNL provided sufficient clarification about the relationship between the HVNL and WHS laws.

Conclusions

Having regard to stakeholder views, and notwithstanding the concerns expressed by some stakeholders, the NTC considers that as a corollary to the introduction of a primary duties regime, the HVNL should also be amended to include both common principles to guide duty holders, regulators and the courts on the interpretation and application of the primary duties of care, as well as principles regarding shared responsibility and accountability.

The NTC considers that, similarly to other national safety laws, these principles will provide greater direction to the courts when interpreting and applying the primary duties and will promote a greater understanding of duty holder obligations and responsibilities.

In addition, the NTC recommends the HVNL be amended to clarify the relationship between the HVNL and WHS legislation. In particular, amendments are needed to clarify double jeopardy issues and to specify that the Model WHS Act will prevail in the unlikely event of any inconsistencies between the regimes. Not doing this would risk causing uncertainty and confusion for CoR parties who might, in the event of any inconsistencies, falsely interpret the HVNL primary duties as the applicable legal obligations and risk inadvertently breaking the primary duties under the Model WHS Act. This could potentially result in parties facing prosecution and high penalties for breaches of the primary duties under both regimes.

Recommendation 17 – General considerations for Primary Duties regime – Principles applicable to the Primary Duties and interaction with national safety laws

- a) That the HVNL be amended to include general principles applicable to the primary duties, similar to the principles set out in the Model Work Health Safety Bill, and include principles of shared responsibility and accountability similarly to the Rail Safety National Law;
- b) That the HVNL be amended to better clarify the relationship between the HVNL and occupational health and safety legislation as applied in each jurisdiction, in particular that the HVNL be amended to:
- make clear that the HVNL primary duties are complementary to the existing occupational health and safety duties, but focus specifically on the safety of road transport operations, including the safety of vehicles, drivers and the public
 - expressly provide that to the extent of any inconsistency between a provision of the HVNL and jurisdiction occupational health and safety legislation, the provision of that jurisdiction's occupational health and safety legislation prevails to the extent of that inconsistency, similarly to s.48 of the Rail Safety National Law;
 - clarify that where an act or omission constitutes an offence under both the HVNL and a jurisdiction's occupational health and safety legislation, the offender is not liable to be punished twice in respect of the offence.

5.10 Relationship of primary duties to existing CoR offences

The July 2015 Discussion Paper proposed that primary duties should replace existing CoR offences where the subject matter of the offence was covered by the primary duties and there was no clear policy rationale for retaining the existing offence.

In addition, the discussion paper proposed that where existing CoR offences remain, they could be either reframed as positive specific duties or retained in their current form, and should have a standard of care consistent with the standard of care for primary duties.

The paper also proposed removing the deemed compliance provision in section 623 of the HVNL on the basis that such provisions are prescriptive, encourage a box-ticking mentality and are incompatible with a positive duty and outcomes-based approach to managing safety risks.

Stakeholder feedback

Most government and industry stakeholders supported the removal of the existing CoR offences where possible as part of introducing a primary duties regime for CoR parties.

VicRoads, Transport for NSW and TMR also supported the adoption of the 'so far as is reasonably practicable' standard as an element of the offence rather than a defence for those CoR offences, if any, that were to remain.

Similarly the ATA considered the CoR Duties review was an opportunity to remove the more complex and inconsistent provisions from the HVNL and reduce the red tape facing operators, regulators and the courts.

TMR also supported the removal of section 623 of the HVNL on the basis the deemed compliance provisions limited the approach towards risk identification, assessment and management sought by the primary duty and might result in a standard of responsibility lower than required under the Model WHS.

Similarly, VicRoads also supported the removal of section 623 of the HVNL on the basis that introducing a primary duty would render the deemed compliance provisions unnecessary.

Consistent with the views expressed by TMR and VicRoads, Transport for NSW considered the retention of a deemed compliance provision in the HVNL to be inconsistent with a positive duty to ensure safety as it encouraged a 'tick a box' mentality to compliance.

Similarly, SAFC agreed that section 623 of the HVNL should be removed on the basis that retaining such provisions within the law would weaken safety outcomes and create enforcement issues.

Conclusions

Consistent with the stakeholder feedback received, the NTC considers the introduction of a primary duties regime is an opportunity to remove a large number of complex and overlapping provisions to be removed from the HVNL, thereby reducing red tape for industry, regulators and the courts.

However, there are some existing CoR offences that may need to remain in the HVNL as they relate to specific subject matters, such as record keeping requirements, and they cover other non-CoR offences. However, the NTC recommends that should any of these remaining CoR offences reverse the burden of proof to the defendant, they should be restructured as positive duties with the burden of proof resting with the prosecution. This is consistent with best-practice safety regulation and the Model WHS Act and RSNL.

Recommendation 18 – General considerations for Primary Duties regime – Relationship of Primary Duties to existing CoR offences

- a) *That, so as to reduce complexity and to avoid duplication, the Primary Duties should replace existing chain of responsibility offences where the subject matter of the offence is covered by the Primary Duties and there is not a clear policy rationale for retaining the existing offence.*
- b) *That where existing chain of responsibility offences are to remain that these be reframed as positive specific duties, with the standard of care applicable consistent with the standard of care for the primary duties.*
- c) *That the s.623 deemed compliance provision be removed from the HVNL, on the basis deemed compliance provisions are prescriptive, encourage a 'tick-a-box' mentality, and are incompatible with a positive duty and outcomes- based approach to the management of safety risks.*

6 Executive officer liability

Key points

- All stakeholders support reformulating the existing obligations of executive officers as a due diligence obligation on the basis it will require executive officers to proactively focus on managing safety risks rather than ensuring compliance with specific safety-related obligations.
- A phased approach is to be adopted to the introduction of a due diligence on executive officers, with:
 - a limited due diligence obligation being introduced, in the first instance, for executive officers to ensure CoR parties comply with their primary duty
 - the extension of the executive officer due diligence obligation to include an obligation to ensure any persons with a duty or obligation under the HVNL comply with that duty or obligation be progressed as a second phase of work by the NTC in 2016/17, subject to the outcomes of a regulation impact statement.

Background

In 2008, COAG agreed to implement regulation and competition reforms under the National Partnership Agreement to Deliver a Seamless National Economy. This included agreement that jurisdictions would implement a coordinated national approach for directors' liability by auditing their legislation against the COAG *Personal Liability for Corporate Fault Principle and Guidelines* (COAG Principles and Guidelines).

In May 2014, and as part of considering the CoR Taskforce Review Final Report, ministers resolved:

To ask the NTC to provide advice to the Council by November 2014 on the consistency of the executive officer liability provisions in the national law with the COAG Principles and Guidelines relating to duties of company directors.

Consistent with this agreement, in July 2013, the NTC undertook an assessment of executive officer liability (EoL) in section 636 of the HVNL against the COAG Principles and Guidelines. The NTC found that many of these provisions did not satisfy the COAG Principles and Guidelines.

Following consultation with jurisdictions, in May 2015 ministers agreed that 58 (from 129) offences attracting EoL under section 636 should be retained in the HVNL, and that these offences should require a burden of proof consistent with the COAG Principles and Guidelines (i.e. that the onus of proof will rest with the prosecution).

6.1 Application of the proposed primary duties regime

Issues

Extending liability for the proposed primary duties to executive officers could be achieved by using the existing EoL mechanism under section 636 of the HVNL or alternatively by reformulating the existing obligation on executive officers as an obligation to exercise due diligence to ensure compliance with the HVNL.

Section 636 mechanism – Existing EoL mechanism

Section 636 of the HVNL extends liability for certain HVNL offences to executive officers of a corporation where an offence has been committed against the HVNL by that corporation, and the executive officer either:

- knowingly authorised or permitted the conduct constituting the offence or,
- knew or ought reasonably to have known:
 - of the conduct constituting the offence or
 - that there was a substantial risk the offence would be committed.

The existing EoL regime could therefore be used to extend liability to the executive officer for a corporation's breach of the primary duties.

Due diligence duty mechanism

Adopting a due diligence approach would reflect the Model WHS Act and RSNL. The RSNL provides an example of how a due diligence obligation on executive officers could be applied:

If a person has a duty or obligation under this Law, an officer of the person must exercise due diligence to ensure that the person complies with that duty or obligation.

A due diligence obligation would hold officers and senior managers accountable for managing and influencing behaviour without the corporation first having to commit an offence, as is the current requirement under the HVNL.

The due diligence obligation would also provide clarity to executive officers around their responsibility to be aware of the hazards and risks associated with their business and ensure safe work practices, ongoing compliance and continual improvement.

However, having two different regimes concurrently covering the behaviour of executive officers under the HVNL (i.e. the existing regime and a new due diligence obligation) would not be appropriate as it would duplicate obligations and cause confusion. Accordingly, a due diligence obligation on executive officers would require removal of the existing EoL regime. This would fundamentally change the structure of the current approach to EoL.

July 2015 Discussion Paper draft proposal

The July 2015 Discussion Paper proposed extending the primary duties regime to executive officers by using the existing section 636 EoL regime.

Stakeholder feedback

Stakeholders unanimously agreed on the importance of holding executive officers liable for managing and influencing the behaviour of corporations.

However, neither government nor industry supported the NTC's proposal in the paper to apply the primary duties regime to executive officers using the existing EoL mechanism under section 636 of the HVNL to extend liability to executive officers for a corporation's breach of the primary duties.

Instead, stakeholders considered that a positive obligation should be imposed on executive officers to exercise due diligence to ensure compliance with the HVNL on the basis this would shift executive officer focus to managing safety risks rather than ensuring compliance with specific safety-related obligations.

Transport for NSW said the primary duties approach presented a unique opportunity to improve the CoR regime but it must be supported by greater obligations on executive officers. It maintained that a due diligence obligation on executive officers was integral to a primary duties approach and to improving compliance. In its view, a due diligence approach would shift executive officer focus to managing safety risks rather than managing liability risks. In addition, a due diligence approach would enable officers and senior managers to be held accountable for their leadership and for managing and influencing behaviour without the corporation first having to commit an offence as is the current requirement under the HVNL.

Similarly, the NHVR said a due diligence obligation for executive officers, consistent with the Model WHS Act, would enhance the way in which the primary duties were applied and ensure that safety is actively pursued by executive officers.

VicRoads considered the reformulation of EoL offences as a due diligence obligation would achieve better safety outcomes as it would allow regulators to take action against executive officers for poor safety practices without the need for a serious incident to have first occurred.

Victoria Police was also strongly in favour of introducing a due diligence obligation on executive officers to see safety managed with greater personal leadership, accountability and proactivity.

TMR also supported a due diligence obligation for executive officers.

Conclusions

Having regard to stakeholder views, the NTC proposes reformulating the existing EoL provisions in the HVNL as a positive due diligence obligation.

The inclusion of a due diligence obligation is therefore a key component of the primary duties regime, holding executive officers accountable for the control and influence they have over CoR parties in complying with the HVNL and ensuring the safety of the transport task. This approach is also consistent with the approach to EoL in the Model WHS Act and RSNL.

A due diligence obligation will hold executive officers accountable without the corporation first having to commit an offence as is the current requirement under the HVNL.

However in May 2015, ministers agreed to limit the CoR and EoL amendments to the HVNL as part of this review to current CoR parties 'limited to the existing regulatory framework of the HVNL'.

Accordingly a phased approach is recommended for implementing the due diligence obligation, with:

- Phase 1: a limited due diligence obligation being introduced for executive officers *to ensure chain of responsibility parties comply with their primary duty*, with the effect that the existing section 636 mechanism for executive officer liability will be retained for the 28 non-CoR executive officer liability offences. (Appendix B lists the non-CoR offences to be retained during this first phase).
- Phase 2: extension of the executive officer due diligence obligation *to include any persons with a duty or obligation under the HVNL*, subject to the outcomes of a regulation impact statement. The effect of this second phase is that the non-CoR executive officer liability offences will be removed. Further consideration of this second phase, including timings is discussed in Part 9: Implementation.

Recommendation 19 – Application of the proposed Primary Duties regime to executive officers – Due Diligence Obligation

- a) *That the Primary Duties regime be applied to executive officers through the reformulation of the existing executive officer liability provision in s.636(2) of the HVNL as a positive due diligence obligation.*
- b) *Noting a phased approach is to be adopted to the implementation of this recommendation, as follows:*
 - *Phase 1: a limited due diligence obligation being introduced for executive officers to ensure chain of responsibility parties comply with their primary duty;*
 - *Phase 2: extension of the executive officer due diligence obligation to include any persons with a duty or obligation under the HVNL, subject to the outcomes of a regulation impact statement.*

6.2 Burden of proof for existing EoL offences

Issues

In May 2015, ministers endorsed (in-principle) the following recommendation:

That these 58 executive officer liability offences in section 636 of the HVNL will require a burden of proof consistent with COAG principles, that is, that they will attract Type 1 liability, unless evidence is provided for Type 3.

The NTC's proposal in its July 2015 Discussion Paper was to use the existing EoL mechanism under section 636 of the HVNL to extend liability to executive officers for a breach of the primary duty on operators, prime contractors and employers.

The paper also noted that if ministers agreed to this proposal, the issue of consistency between the type of liability under section 636 and the *Personal Liability for Corporate Fault Principles* (COAG 2012) would need to be resolved.

Stakeholder feedback

Most stakeholders supported adopting an evidentiary burden of proof for all EoL offences that rest with the prosecution rather than the defendant, consistent with the COAG Principles and Guidelines.

Conclusions

As noted above, the NTC recommends that existing EoL offences contained in section 636 of the HVNL are reformulated as a positive due diligence obligation and that a phased approach is adopted to introducing these reforms.

As part of phase one of the EoL due diligence reforms the current EoL mechanism under section 636 of the HVNL is to be retained for the 28 non-CoR EoL offences that will not be covered by the proposed due diligence on executive officers.

Accordingly, and consistent with the ministers' decision in May 2015, the NTC recommends the evidentiary burden of proof for the retained non-CoR EoL offences under section 636 would rest with the prosecution (Type 1 offence) and not the defendant.

Recommendation 20 – Burden of Proof for Retained EoL Offences

That the burden of proof for the retained non-CoR executive officer liability offences rests on the prosecution, consistent with COAG Personal Liability for Corporate Fault Principles.

7 Structuring of proposed amendments

Although not canvassed in the July 2015 Discussion Paper, the structure of the CoR provisions in the HVNL is important for those who must comply with or enforce these requirements.

Currently, the CoR provisions are contained in each of the HVNL chapters that deal with vehicle standards, MDL, speed and fatigue. This structuring arrangement is complex and does not enable CoR parties to easily identify their duties, obligations and tasks.

The ATA raised this issue in its submission to the discussion paper, and proposed that ‘a new chapter [should] be added to the HVNL to consolidate the duties of chain parties by duty holder, rather than by subject’. In the ATA’s view, such a structure would be more straightforward than the existing CoR structure, ‘because the duties applying to each chain party would be easier to find’. The ATA also considered this approach would enable important concepts as central elements within the law rather than having them buried in detail.

The NTC supports the structuring of the CoR and EoL provisions as a stand-alone chapter in the HVNL on the basis this would remove complexity in interpreting CoR duties and obligations. In particular, this would:

- simplify and improve the accessibility of the CoR regime
- allow CoR parties to easily locate their duties, obligations and tasks
- minimise complexity and difficulty in interpretation of CoR obligations
- improve consistency in CoR obligations
- enable greater consistency with the Model WHS Act, RSNL and MSNL.

In the NTC’s view such a restructure should be similar to the structure adopted in the Model WHS Act and RSNL, where provisions are structured according to the roles and functions of duty holders.

In the NTC’s view, this approach would streamline and improve accessibility to the CoR provisions of the HVNL and allow a systematic approach to addressing risks under the HVNL.

However, the NTC notes that structuring of the HVNL is a matter to be determined by parliamentary counsel.

Recommendation 21 – Proposed amendments to be included as new chapter of the HVNL

That for clarity for both industry and regulators, and subject to parliamentary counsel’s advice, the proposed amendments in relation to both Primary Duties and executive officer liability be included as a separate chapter of the HVNL.

8 Additional matters raised

Although outside the remit of this review, stakeholders have raised a number of further issues, including:

- consideration of an operator accreditation/licencing scheme
- consideration of mandated heavy vehicle safety inspections
- risk categories required to underpin the primary duties.

For completeness, these issues are noted below.

Operator accreditation and licencing

The ALC and the TSV raised the issue of operator accreditation and licencing.

Some of the ALC's members were concerned the proposed CoR and EoL changes are:

...insufficient to capture the marginal operators who "cut corners" to maintain viable vehicles, to the commercial detriment to those operators who "play by the rules" including those rules relating to safety.

In this context, the ALC proposed that:

...if the rail safety model is seen as being something that could be followed in the heavy vehicle sector a licensing regime is probably the more efficient way to mimic the accreditation/safety management system created under the [RSNL] [and that] TIC should task the NTC to consider the implementation of operator licencing in Australia as a matter of priority.

TSV echoed the benefit of an accreditation and licencing scheme in its submission, drawing on its experience in implementing and administering the *Bus Safety Act 2009* (VIC). TSV said operator accreditation and mandated annual inspections (discussed below) were the two matters, additional to primary duties, which underpinned the Victorian commercial bus industry's strong safety record.

It is Victoria's experience that safety management requirements associated with accreditation are operator friendly as they are scalable to the size of the operation, the scope of each operator's service and the risks associated with the particular nature of the bus service. From the regulator perspective, accreditation provides ongoing evidence of operator compliance with their safety duties through audit and compliance practices.

The issue of operator accreditation and licencing is outside the scope of this review.

Mandated heavy vehicle safety inspections

TSV also advocated the introduction of mandated heavy vehicle safety inspections on the basis they provided three safety benefits:

They provide the regulator with an independent assessment of the mechanical "health" of vehicles and the opportunity to identify poor performance where vehicles are found to fail inspection. They provide operators with an independent assessment that can be related back to the operator's own maintenance regime and can assist operators in improving their maintenance practices. Lastly, annual bus safety inspections have provided the bus industry and the regulator – working together – the opportunity to improve the efficiency and effectiveness of vehicle maintenance regimes (both regulated and operator initiated).

This issue is outside the scope of this review.

Risk categories required to underpin the primary duties

Victoria Police proposed that similar to the existing risk categories of 'minor', 'substantial', 'severe' or 'critical' provided in the HVNL for breaches of MDL requirements and fatigue work and rest hours, risk categories should be introduced for the key safety areas of the primary duties, namely in the areas of vehicle standards, MDL, speed and fatigue breaches.

Victoria Police said the including these additional risk categories would assist enforcement by providing agencies with specific categories in which to group breaches, thereby removing ambiguity in a court's interpretation of a breach.

Other jurisdictions did not support this approach.

The NTC considers this is a technical matter more appropriately addressed through the training of authorised officers.

9 Implementation

As recognised in stakeholder submissions, support must be provided to industry and enforcement agencies when implementing the proposed changes to the HVNL.

In particular, stakeholders have reiterated the need for a sufficient period of time to allow industry to understand and adjust to the changes, and that this implementation period must be supported by guidance materials and training.

TSV noted that a five-year transition period was provided for the introduction of the *Bus Safety Act 2009* (VIC), with 18 months of industry consultation beforehand. TSV also emphasised the need for industry to be fully consulted and engaged in the implementation task, and for there to be sufficient information, guidance and training resources available to all segments of the road transport industry.

Stakeholders have also suggested information workshops as a useful way to implement the proposed changes and VicRoads suggested a post-implementation review to evaluate the effectiveness of the arrangements.

Accordingly, this section outlines the activities proposed to support the implementation of the proposed changes to the HVNL.

A detailed implementation plan will also need to be prepared to map and communicate these activities in more detail.

Amendments to the HVNL and the legislative process

Subject to ministers' agreement to the recommendations in this policy paper, a draft Bill to amend the HVNL will be prepared for their consideration in May 2016.

Following ministers' consideration, and if agreed, the amending Bill will likely be considered by the Queensland Parliament (as host jurisdiction for the HVNL) in the second half of 2016 or early 2017, with adoption of the amendments by other jurisdictions party to the HVNL to follow.

Communication of changes to industry and enforcement agencies

As the national regulator, the NHVR has a key role in communicating and promoting awareness of the changes to industry and enforcement agencies. However, industry and enforcement agencies will also have a role to play in communicating the changes.

In particular, transport operators and those in the logistics industry will need to be made aware of the new requirements and how they can comply.

Development of guidance materials and training of authorised officers, enforcement agencies and industry

All stakeholder submissions emphasise the importance of detailed guidance materials and training to support the proposed changes to the HVNL.

As the ATA notes:

...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.

Accordingly, guidance materials and training will also be required for authorised officers and enforcement agencies.

As the national regulator, the NHVR will lead guidance material development and training for authorised officers and industry, with input from enforcement agencies and industry bodies. As per the on-road process guidelines agreed by the NHVR and police agencies, the agreed police applicability provisions will also apply to this guidance material. Police may also develop their own training programs.

Recommendation 22 – Development of guidance materials

Note that these recommendations on both the introduction of Primary Duties and executive officer liability will require detailed guidance materials and codes of practice for both industry and regulators, including all authorised officers, with the NHVR to lead the development of these documents, with support from the NTC.

Recommendation 23 – Training of authorised officers, regulators and industry

Note that these recommendations on both the introduction of Primary Duties and executive officer liability will require comprehensive training for both industry and regulators, including all authorised officers, with the NHVR to lead the development of a training package, with support from the NTC.

Implementation period

As a number of submissions to the July 2015 Discussion Paper emphasised, industry, regulators, authorised officers, road and transport agencies and industry bodies need an adequate implementation period to adjust to the proposed reforms.

As set out recommendation 24, the NTC proposes a 12-month implementation period from the date the amending legislation is passed by the Queensland Parliament.

Recommendation 24 – Implementation Period

Note that an implementation period will be required to allow industry and regulators, including all authorised officers, sufficient time to adjust to these amendments. It is suggested a 12 month period from the date the amending legislation is passed by the Queensland Parliament (as host jurisdiction for the HVNL) would be an appropriate time period.

10 Future work

In recognition of stakeholder concerns regarding the recommendations dealing with investigative powers of authorised officers (Recommendation 14) and adopting a due diligence obligation on executive officers to (Recommendation 19), the NTC proposes further work as follows:

- A second phase of the CoR and EoL reforms to explore expanding the due diligence obligation on executive officers to cover any persons with a duty or obligation under the HVNL, consistent with the approach taken under other national laws, to be completed by the NTC as a separate project in 2016/17.
- A comprehensive review of the HVNL's investigative and enforcement powers so that appropriate powers are provided for authorised officers. As the enforcement of primary duties will involve investigating a broader range of matters than those covered by more prescriptive obligations with the prosecution bearing a greater onus of proof, there needs to be sufficient power to gather evidence to prove breaches.

Recommendation 25 – Extension of Due Diligence Obligation

That the Primary Duties regime be applied to executive officers through the reformulation of the existing executive officer liability provision in s.636(2) of the HVNL as a positive due diligence obligation with Phase 2: extension of the executive officer due diligence obligation to include any persons with a duty or obligation under the HVNL, to be subject to the outcomes of a regulation impact statement, and to be completed by the NTC as a separate project in 2016/17.

Recommendation 26 – Review of HVNL investigative and enforcement powers

That arising from this chain of responsibility and executive officer liability review, a comprehensive review of the HVNL investigative and enforcement powers, including the use of alternative remedies such as prohibition notices by authorised officers, be considered by the NTC as a future project for inclusion as part of its forward work program, subject to a business case, on the basis such a review is necessary to ensure the HVNL continues to retain an effective investigation and enforcement regime.

Appendix A: Executive Officer Liability Offences

In May 2015, ministers endorsed the recommendation that:

58 offences attracting executive officer liability should be retained under section 636 of the Heavy Vehicle National Law (including two new offences).

These offences include:

- 47 offences that are already contained with Column 3 Schedule 4 of the HVNL, and were assessed as consistent with the COAG principles
- 2 offences (in regard to tampering with speed limiters) to be added to the Schedule
- 9 vehicle standards and roadworthiness offences to be retained pending the outcomes of the Heavy Vehicle Roadworthiness Review.

The 58 offences include key safety offences in the areas of vehicle standards, mass, dimension and loading, speeding and driver fatigue where executives may have direct responsibility and are provided below.

| Ref | Chapter | Section/Heading |
|-----|--|---|
| 1 | Chapter 2: Registration | 30(1) Registration requirement |
| 2 | Chapter 3: Vehicle Operations – standards and safety | 89 (1) Safety requirement – A person must not use, or permit to be used, on a road a heavy vehicle that is unsafe. |
| 3 | | 93 (1) Person must not tamper with speed limiter fitted to heavy vehicle |
| 4 | | 93 (2) Person must not tamper with speed limiter fitted to heavy vehicle* |
| 5 | | 93 (3) Person must not tamper with speed limiter fitted to heavy vehicle* |
| 6 | Chapter 4: Vehicle Operations – mass, dimension and loading | 129(1) Contravening condition of mass or dimension exemption generally |
| 7 | | 129 (2) Contravening condition of mass or dimension exemption generally |
| 8 | | 129 (3) Contravening condition of mass or dimension exemption generally |
| 9 | | 137 Using class 2 heavy vehicle |
| 10 | | 150(1) Contravening condition of class 2 heavy vehicle authorisation |
| 11 | | 183 (2) Liability of employer etc. for driver's contravention of mass, dimension or loading requirement |
| 12 | | 186(2) False or misleading transport documentation for goods |
| 13 | | 186(3) False or misleading transport documentation for goods |
| 14 | | 186(4) False or misleading transport documentation for goods |
| 15 | | 186(5) False or misleading transport documentation for goods |
| 16 | | 187(2) False or misleading information in container weight declaration |
| 17 | | 187(3) False or misleading information in container weight declaration |
| 18 | | 194 (1) Conduct of consignee resulting or potentially resulting in contravention of mass, dimension or loading requirement |
| 19 | Chapter 5: Vehicle operations - speeding | 204 (1) Duty of employer, prime contractor or operator to ensure business practices will not cause driver to exceed speed limit |
| 20 | | 207(1) Duty to ensure driver's schedule will not cause driver to exceed speed limit |
| 21 | | 209(1) Duty to ensure loading arrangements will not cause driver to exceed speed limit |
| 22 | | 212 (1) Duty to ensure terms of consignment will not cause driver to exceed speed limit |
| 23 | | 212(2) Duty to ensure terms of consignment will not cause driver to exceed speed limit |

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| 24 | | 215 Particular requests etc. prohibited |
| 25 | | 216 (1) Particular contracts etc. prohibited |
| 26 | | 216 (2) Particular contracts etc. prohibited |
| 27 | | 219 (1) Liability of employer etc. for speeding offence |
| 28 | Chapter 6: Vehicle operations – driver fatigue | 229 (1) Duty of party in the chain of responsibility to prevent driver driving while fatigued |
| 29 | | 230 (1) Duty of employer, prime contractor or operator to ensure business practices will not cause driver to drive while fatigued |
| 30 | | 233 (1) Duty to ensure driver's schedule will not cause driver to drive while fatigued |
| 31 | | 235 (1) Duty to ensure terms of consignment will not cause driver to drive while fatigued |
| 32 | | 235 (2) Duty to ensure terms of consignment will not cause driver to drive while fatigued |
| 33 | | 237(1) Duty not to make a demand that may result in driver driving while fatigued |
| 34 | | 238 (1) Duty to ensure loading arrangements will not cause driver to drive while fatigued |
| 35 | | 240 Particular requests prohibited |
| 36 | | 241 (1) Particular contracts prohibited |
| 37 | | 241 (2) Particular contracts prohibited |
| 38 | | 261(2) Liability of employer etc. for driver's contravention of maximum work requirement or minimum rest requirement |
| 39 | | 335 (1) Person must not tamper with approved electronic recording system |
| 40 | | 336 (1) Person using approved electronic recording system must not permit tampering with it |
| 41 | | 337 (2) Intelligent access reporting entity must not permit tampering with approved electronic recording system |
| 42 | Chapter 7: Intelligent access | 454 (1) Offence to tamper with approved intelligent transport System |
| 43 | | 454 (2) Offence to tamper with approved intelligent transport system |
| 44 | Chapter 8: Accreditation | 467 Compliance with conditions of BFM accreditation or AFM Accreditation |
| 45 | | 470 (2) General requirements applying to operator with heavy vehicle accreditation |
| 46 | | 470 (3) General requirements applying to operator with heavy vehicle accreditation |
| 47 | | 470 (4) General requirements applying to operator with heavy vehicle accreditation |
| 48 | Chapter 9: Sanctions and provisions about liability for offences | 604 Contravention of supervisory intervention order- A person to whom a supervisory intervention order applies must comply with the order, unless the person has a reasonable excuse. |
| 49 | | 610 Contravention of prohibition order - A person to whom a prohibition order applies must comply with the order, unless the person has a reasonable excuse. |

* Column 3, schedule 4 of the HVNL currently only extends executive officer liability to section 93(1) 'Tamper with a speed limiter' and not to sections 93(2) or (3). All jurisdictions consider that sections 93(2) and (3) satisfy all the elements of principle 4 as identified in the COAG Guideline criteria.

Offences to be retained for assessment based on the outcomes of the Roadworthiness Review**

| Ref | Chapter | Section/Heading |
|-----|--|--|
| 1 | Chapter 3: Vehicle Operations – standards and safety | 60(1)(a) Compliance with heavy vehicle standards |
| 2 | | 60(1)(b) Compliance with heavy vehicle standards |
| 3 | | 81 (1) Contravening condition of vehicle standards exemption |
| 4 | | 81(2) Contravening condition of vehicle standards exemption |
| 5 | | 81(3) Contravening condition of vehicle standards |
| 6 | | 85 (1) Modifying heavy vehicle requires approval |
| 7 | | 85 (2) Modifying heavy vehicle requires approval |
| 8 | Chapter 4: Vehicle Operations – mass, dimension and loading | 185(2) Requirements about coupling trailers |
| 9 | Chapter 9: Enforcement | 529 Using defective heavy vehicles contrary to defect vehicle Notice |

**Note: S. 85 (1) ('Modifying heavy vehicle requires approval') does not currently attract executive officer liability, but should be reviewed with the above offences for potential inclusion.

Appendix B: Existing Non-CoR Executive Officer Liability Offences to be Retained During Phase 1

As part of the phased approach to the introduction of a due diligence obligation on executive officers, the following 28 non-CoR executive officer liability (EoL) offences are to be retained under section 636(2) of the HVNL during Phase 1.

These 28 non-CoR offences (detailed below) are to be retained on the basis these offences apply to persons other than just CoR parties, and therefore includes individuals who would not be covered by the proposed Primary Duty of Care regime.

An assessment of the case law relating to prosecutions against executive officers under the HVNL available to the NTC indicates that no executive officers have been prosecuted for an alleged breach of any of the 28 non-CoR EoL offences.

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| Chapter 2: Registration |
| 30 (1) Registration requirement |
| Chapter 3: Vehicle Operations – standards and safety |
| 60(1)(a) Compliance with heavy vehicle standards* |
| 60(1)(b) Compliance with heavy vehicle standards* |
| 81 (1) Contravening condition of vehicle standards exemption* |
| 81(2) Contravening condition of vehicle standards exemption* |
| 81(3) Contravening condition of vehicle standards* |
| 85 (2) Modifying heavy vehicle requires approval* |
| 89 (1) Safety requirement * |
| 93 (1) Person must not tamper with speed limiter fitted to heavy vehicle* |
| 93 (2) Person must not tamper with speed limiter fitted to heavy vehicle* |
| 93 (3) Person must not tamper with speed limiter fitted to heavy vehicle* |
| Chapter 4: Vehicle Operations – mass, dimension and loading |
| 129 (2) Contravening condition of mass or dimension exemption generally* |
| 129 (3) Contravening condition of mass or dimension exemption generally* |
| 137 Using class 2 heavy vehicle |
| Chapter 5: Vehicle operations – speeding |
| 215 Particular requests etc. prohibited* |
| 216 (1) Particular contracts etc. prohibited* |
| 216 (2) Particular contracts etc. prohibited* |
| Chapter 6: Vehicle operations – driver fatigue |
| 240 Particular requests prohibited* |
| 241 (1) Particular contracts prohibited* |
| 241 (2) Particular contracts prohibited* |
| 335 (1) Person must not tamper with approved electronic recording system* |
| 336 (1) Person using approved electronic recording system must not permit tampering with it* |
| 337 (2) Intelligent access reporting entity must not permit tampering with approved electronic recording system. |
| Chapter 7: Intelligent access |
| 454 (1) Offence to tamper with approved intelligent transport System* |
| 454 (2) Offence to tamper with approved intelligent transport system* |
| Chapter 9: Enforcement |
| 529 Using defective heavy vehicles contrary to defect vehicle Notice* |

| Chapter 10: Sanctions and provisions about liability for offences |
|---|
| 604 Contravention of supervisory intervention order |
| 610 Contravention of prohibition order |

* Of the 28 non-CoR offences, 24 (marked with an *) are offences that cover the behaviour of both CoR parties (i.e. operator, prime contractor, employer, consignor, consignee, scheduler, loading manager, loader, unloader, packer), and non-CoR parties and are focused on ensuring safety. As the Primary Duty of Care will cover the behaviour of CoR parties in ensuring safety and additionally, executive officers will have a duty to ensure CoR parties comply with their Primary Duty of Care, it is unlikely that these 24 offences will be used to prosecute an executive officer for breaches by CoR parties. As such, these offences would most likely only be used to pursue executive officers for contraventions by non-CoR parties.

Appendix C: Acronyms, abbreviations and glossary

| Acronym / abbreviation/ term | |
|---------------------------------------|--|
| ALC | Australian Logistics Council |
| ANZPAA | Australia New Zealand Police Advisory Agency |
| ATA | Australian Trucking Association |
| Authorised officer | For the purposes of the HVNL, <i>authorised officer means</i> — (a) a police officer declared by law of a participating jurisdiction to be an authorised officer for the purposes of the HVNL; or (b) a person who holds office under the HVNL as an authorised officer. |
| COAG | Council of Australian Governments |
| COAG Principles and Guidelines | <i>Personal Liability for Corporate Fault Principles</i> (COAG, 2012) |
| Consign and consignor | For the purposes of the HVNL a person <i>consigns</i> goods, and is a <i>consignor</i> of goods, for road transport using a heavy vehicle, if— (a) the person has consented to being, and is, named or otherwise identified as a consignor of the goods in the transport documentation relating to the road transport of the goods; or (b) there is no person as described in paragraph (a) and— (i) the person engages an operator of the vehicle, either directly or indirectly or through an agent or other intermediary, to transport the goods by road; or (ii) there is no person as described in subparagraph (i) and the person has possession of, or control over, the goods immediately before the goods are transported by road; or (iii) there is no person as described in subparagraph (i) or (ii) and the person loads a vehicle with the goods, for road transport, at a place— (A) where goods in bulk are stored, temporarily held or otherwise held waiting collection; and (B) that is usually unattended, other than by the vehicle's driver or someone else necessary for the normal use of the vehicle, during loading; or (c) there is no person as described in paragraph (a) or (b) and the goods are imported into Australia and the person is the importer of the goods. |
| Consignee, of goods | For the purposes of the HVNL <u><i>consignee of goods</i></u> : (a) means a person who— (i) has consented to being, and is, named or otherwise identified as the intended consignee of the goods in the transport documentation relating to the road transport of the goods; or (ii) actually receives the goods after completion of their road transport; |

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| | but (b) does not include a person who merely unloads the goods. |
| CoR | Chain of Responsibility |
| Cth | Commonwealth of Australia |
| Deemed liability | If the offence is committed by a driver then the off-road party nominated in the offence will also be deemed to have also committed the offence unless they can prove that all reasonable steps were taken to prevent the breach from occurring. |
| Double jeopardy | A procedural defence that forbids an accused from being tried for an offence if he or she has previously been acquitted or convicted of the same offence or if the accused could have been convicted at the first trial of the offence with which he or she is charged at the second (Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 2003). |
| Due diligence | A standard of care characterised by the degree of prudence, activity, or attention, to be expected from, and ordinarily exercised by, a reasonable person under the particular circumstances (Office of the Australian Safety and Competition Council, 2008, p. vii). |
| Employer | For the purposes of the HVNL <i>employer</i> means a person who employs someone else. |
| EoL | Executive Officer Liability |
| Executive officer | For the purposes of the HVNL, <i>executive officer</i> , of a corporation, means— (a) a director of the corporation; or (b) any person, by whatever name called and whether or not the person is a director of the corporation, who is concerned or takes part in the management of the corporation. |
| Executive Officer Liability | Refers to provisions that impose individual criminal liability on directors or other corporate officers as a consequence of the corporation having committed some offence (the Underlying Offence), beyond the normal liability that applies to a person who directly commits, or who is an ordinary accessory to, the Underlying Offence (COAG, 2012). |
| Heavy Vehicle National Law | Schedule to the <i>Heavy Vehicle National Law Act 2012</i> (Qld) |
| HVNL | Heavy Vehicle National Law |
| July 2015 Discussion Paper | NTC discussion paper <i>Primary Duties for Chain of Responsibility Parties and Executive Officer Liability</i> released for public consultation in July 2015 |
| Loading manager | For the purposes of the HVNL: A person is a <i>loading manager</i> for goods in heavy vehicles, other than for the purposes of Chapter 4, if— (a) goods are— (i) loaded onto a heavy vehicle at regular loading or unloading premises for heavy vehicles; or (ii) unloaded from a heavy vehicle at regular loading or unloading premises for heavy vehicles; and (b) the person— (i) is the person who manages, or is responsible for the operation of, the |

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| | <p>premises; or</p> <p>(ii) has been assigned by a person mentioned in subparagraph (i) as responsible for supervising, managing or controlling, directly or indirectly, activities carried out by a loader or unloader of goods at the premises.</p> <p>For the purposes of Chapter 4, a person is a <i>loading manager</i> for goods in a heavy vehicle if—</p> <p>(a) the goods are loaded onto the heavy vehicle at regular loading or unloading premises for heavy vehicles; and</p> <p>(b) the person—</p> <ul style="list-style-type: none"> (i) is the person who manages, or is responsible for the operation of, the premises; or (ii) has been assigned by a person mentioned in subparagraph (i) as responsible for supervising, managing or controlling, directly or indirectly, activities carried out by a loader of the goods. |
| Load , when used as a verb, and Loader | <p>For the purposes of the HVNL a person <i>loads</i> goods in a heavy vehicle, and is a <i>loader</i> of goods in a heavy vehicle, if the person is a person who—</p> <p>(a) loads the vehicle, or any container that is in or part of the vehicle, with the goods for road transport; or</p> <p>(b) loads the vehicle with a freight container, whether or not it contains goods, for road transport.</p> |
| Marine Safety (Domestic Commercial Vessel) National Law | Schedule 1 to the <i>Marine Safety (Domestic Commercial Vessel) National Law Act 2012</i> (Cth) |
| Model WHS Act | Model Work Health and Safety Act – has been implemented as law in all jurisdictions except Victoria and Western Australia. As at the date of this paper, Western Australia is currently consulting on options for implementing elements of the model. |
| MSNL | Marine Safety (Domestic Commercial Vessel) National Law |
| National Safety Laws | Collective term used in this policy paper for the Model WHS Act, the RSNL, and the MSNL |
| NatRoad | National Road Transporters Association |
| NHVR | National Heavy Vehicle Regulator |
| NSW | New South Wales |
| NT | Northern Territory |
| NTC | National Transport Commission |
| OBPR | Office of Best Practice Regulation |
| Operate and Operator | <p>For the purposes of the HVNL a person <i>operates</i> a vehicle or combination, and is an <i>operator</i> of the vehicle or combination, if the person is responsible for controlling or directing the use of—</p> <p>(a) for a vehicle (including a vehicle in a combination)—the vehicle; or</p> <p>(b) for a combination—the towing vehicle in the combination.</p> |

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| Pack and Packer | <p>For the purposes of the HVNL a person <i>packs</i> goods, and is a <i>packer</i> of goods, if the person—</p> <p>(a) puts the goods in packaging, even if that packaging is already on a vehicle; or</p> <p>(b) assembles the goods as packaged goods in an outer packaging, even if that packaging is already on a vehicle; or</p> <p>(c) supervises an activity mentioned in paragraph (a) or (b); or</p> <p>(d) manages or controls an activity mentioned in paragraph (a), (b) or (c).</p> |
| Party in the chain of responsibility | <p>For the purposes of Chapter 5 of the HVNL ‘Vehicle operations— speeding’ <i>party in the chain of responsibility</i> means:</p> <p>(a) an employer of the vehicle’s driver if the driver is an employed driver;</p> <p>(b) a prime contractor for the vehicle’s driver if the driver is a self-employed driver;</p> <p>(c) an operator of the vehicle;</p> <p>(d) a scheduler for the vehicle;</p> <p>(e) a loading manager for any goods in the vehicle;</p> <p>(f) a commercial consignor of any goods for transport by the vehicle that are in the vehicle;</p> <p>(g) a consignee of any goods in the vehicle, if Division 4 applies to the consignee.</p> <p>For the purposes of Chapter 6 of the HVNL ‘Vehicle operations — driver fatigue’ <i>party in the chain of responsibility</i> means:</p> <p>(a) an employer of the vehicle’s driver;</p> <p>(b) a prime contractor for the vehicle’s driver;</p> <p>(c) an operator of the vehicle;</p> <p>(d) a scheduler for the vehicle;</p> <p>(e) a consignor of any goods for transport by the vehicle that are in the vehicle;</p> <p>(f) a consignee of any goods in the vehicle;</p> <p>(g) a loading manager for any goods in the vehicle;</p> <p>(h) a loader of any goods in the vehicle;</p> <p>(i) an unloader of any goods in the vehicle.</p> |
| Prime contractor | <p>For the purposes of the HVNL, <i>prime contractor</i>, of the driver of a heavy vehicle means a person who engages the driver to drive the vehicle under a contract for services.</p> <p>For example: a logistics business that engages a subcontractor to transport goods.</p> |
| Rail Safety National Law | Schedule to the <i>Rail Safety National Law (South Australia) Act 2012</i> (SA) |
| Regulator | For the purposes of the HVNL, <i>Regulator</i> means the NHVR |
| RIS | Regulatory Impact Statement |
| RSNL | Rail Safety National Law |
| SA | South Australia |

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| SAFC | South Australian Freight Council |
| SARTA | South Australian Road Transport Association |
| Scheduler | For the purposes of the HVNL, <i>scheduler</i> , for a heavy vehicle, means a person who— (a) schedules the transport of any goods or passengers by the vehicle; or (b) schedules the work times and rest times of the vehicle's driver. |
| Standard of care | The degree of prudence or caution required of an individual who is under a duty of care (Hatcher, 2008). |
| TISOC | Transport and Infrastructure Senior Officials Committee |
| TMR | Queensland Department of Transport and Main Roads |
| Transport Safety Laws | Means the MSNL and the RSNL |
| TSV | Transport Safety Victoria |
| Unload and unloader | A person <i>unloads</i> goods in a heavy vehicle, and is an <i>unloader</i> of goods in a heavy vehicle, if the person is a person who— (a) unloads from the vehicle, or any container that is in or part of the vehicle, goods that have been transported by road; or (b) unloads from the vehicle a freight container, whether or not it contains goods, that has been transported by road. |
| WHS | Workplace health and safety |
| WHS laws | Means the WHS laws of each jurisdiction. |
| | |

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