

# Chain of Responsibility: Duties Review

# Report outline

<b>Title</b>	Chain of Responsibility: Duties Review
<b>Purpose</b>	To advise ministers of stage 1 outcomes and make recommendations to progress the project to stage 2.
<b>Abstract</b>	The Chain of Responsibility Duties Review seeks to review the current approach to chain of responsibility under the Heavy Vehicle National Law. This report makes recommendations about how to improve the regime to better meet the objects of the law.
<b>Key words</b>	Chain of responsibility, CoR, duties review, Heavy Vehicle National Law, HVNL
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# Executive summary and recommendations

In 2012, a taskforce was established by the then Standing Committee on Transport and Infrastructure to review the Heavy Vehicle National Law (HVNL) chain of responsibility (CoR) provisions. While the taskforce acknowledged that CoR had led to improvements in road safety, it recognised the need for further improvement. The taskforce recommended:

*The NTC establish a process to investigate the development of broader duties within the CoR.<sup>1</sup>*

The CoR Duties Review progresses this recommendation.

The NTC consulted stakeholders about issues with the current regime in order to inform the development of options for improvement. Stakeholders identified the following issues with the current CoR regime:

- It does not take a principles-based approach to risk management.
- It does not deal with safety in an integrated way.
- A coordinated approach to compliance is difficult to achieve.
- Duties potentially restrict the extension of liability where the most responsible party does not meet the narrow definition.
- It does not promote a systemic approach to risk identification, assessment and management.
- The maximum penalties are considerably lower than those for other safety-based legislation.

A summary of issues is provided at section 1.3 with stakeholder responses to these issues at section 4.3 of this paper.

Based on stakeholder discussions and research into legislative and regulatory best practice for achieving safety outcomes, the NTC developed four options for reform:

- Option 1: primary (general) duties of care.
- Option 2: chapter-based duties.
- Option 3: additional specific duties.
- Option 4: no legislative change - focus on operational/policy components.

The options are outlined in section 1.4 with stakeholder responses to the four options summarised at section 4.2 of this paper.

Feedback on these options was sought through a discussion paper released in November 2014. The NTC received 25 submissions from government road and transport agencies, enforcement agencies, industry representatives, private organisations and consultancies. Submissions are listed in Appendix 1.

Based on this feedback, the NTC recommends that the primary duties of care option best addresses the issues raised, as they clarify existing responsibilities. Primary duties will be developed for inclusion in the HVNL to simplify and refine existing CoR obligations.

The NTC will also review the current CoR regime with a view to consolidating provisions, reducing duplication, removing unnecessary provision and providing for consistency of construction. The CoR provisions are currently spread throughout the key risk chapters of the HVNL. This means they are

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1. Chain of Responsibility Taskforce, *Chain of Responsibility Review: Taskforce Report*, July 2014, p 3.

siloes from each other, and do not allow for a coordinated approach to ensuring on-road safety. This also does not recognise the potential interplay between risks, such as speed and fatigue, which may each contribute to the same unsafe outcome.

Further consultation will take place as part of stage 2, on the detailed impacts of the preferred option. This will include the construction of any new provisions and the impact on other parts of the HVNL.

## Recommendations

Based on the research and consultation conducted during stage 1 of this review, the NTC recommends.

### Recommendation 1: there is a need to change the chain of responsibility regime

The issues with the current CoR regime are sufficiently serious to require changes to the CoR regime.

### Recommendation 2: develop primary duties of care

#### **Amend the HVNL to include primary duties for parties in the chain of responsibility.**

The amendments will restructure existing chain of responsibility obligations to construct primary duties of care to ensure safety within the existing regulatory framework of the HVNL.

Primary duties will apply to current chain of responsibility parties only. This will include a primary duty on heavy vehicle operators to ensure the safety of their road transport operations for the purposes of the HVNL. It will further include tailored or specific duties on other chain of responsibility parties to manage the risks associated with their role and interaction with road transport operations.

The primary duties introduced will include vehicle safety, consistent with the outcomes of the Heavy Vehicle Roadworthiness Review.

To support the development of these amendments, the next phase of the project will be to examine the following issues:

- the application of primary duties to existing parties
- chain of responsibility obligations and parties for vehicle standards, to be aligned with the recommendations of the Heavy Vehicle Roadworthiness Review
- whether the applicable standard of care should be 'all reasonable steps' or 'reasonably practicable', and the effect of this on other HVNL provisions
- associated penalties for new duties
- the application of primary duties to executive officers and the effect on the current executive officer liability provisions.

Restructuring the existing obligations is aimed to help clarify obligations and increase consistency, whilst not increasing the existing burden on compliant parties.

### Recommendation 3: review the current chain of responsibility duties

The NTC will review the current structure of chain of responsibility duties in the HVNL to consolidate existing provisions, remove duplication, remove unnecessary provisions, and improve consistency of construction.

# 1. Context and outcomes

## Key points

The CoR Duties Review aims to assess whether the current CoR regime is effective in meeting the HVNL's objects, identify the deficiencies of the regime, investigate reform options proposed by stakeholders, and consider the broader impact of changes to CoR.

Stakeholders identified the key issues with the current regime, which informed the proposed options for improvement. The NTC sought feedback on the options through a discussion paper released in November 2014.

## 1.1 Objectives of the Duties Review

The NTC is currently investigating the development of broader duties within the Heavy Vehicle National Law's (HVNL) chain of responsibility (CoR) regime. The CoR Duties Review aims to assess:

- the effectiveness of the CoR regime in achieving the objects of the HVNL
- perceived deficiencies of the current regime
- reform options proposed by stakeholders
- potential flow-on effects of any preferred options.

The discussion paper published in November 2014 established issues with the current CoR regime, options for addressing these, and compared CoR to similar regimes. The discussion paper included options for improving CoR derived from discussions held during the CoR taskforce process.

The NTC asked government, industry and independent stakeholders to address a number of targeted questions to draw out their experience with the CoR regime.

The recommendations about how to progress the CoR Duties Review are based on research completed by the NTC, consultation with stakeholders, and submissions received in response to the discussion paper.

## 1.2 Background to the Duties Review

CoR has long been part of road transport policy and law. The drafting of the model laws occurred at different times and in different ways, and incorporated CoR provisions particular to the specific regulatory areas. The model laws were amalgamated into the HVNL as separate chapters and were not, at the time, reviewed for consistency of approach. As a result, the HVNL contains a number of constructions and approaches to CoR.

In 2012, a taskforce made up of industry and government participants reviewed the HVNL's CoR provisions and recommended that the NTC investigate the development of broader duties for inclusion within CoR. This recommendation was endorsed by the Transport and Infrastructure Council in May 2014.

The NTC met with key stakeholders and in November 2014, released a discussion paper for public consultation. The paper acknowledged the broad opinion of stakeholders that while CoR is working, there is an opportunity to improve the regime. The discussion paper contained a number of issues with the current regime and options for resolving these concerns.

### 1.3 Issues with the current chain of responsibility regime

During the taskforce process and at the workshop convened by the NTC in October 2014, stakeholders identified the following issues with the current approach to CoR.

#### Meeting the objects of the Heavy Vehicle National Law

Section 3 of the HVNL outlines the objects of the law, which are the outcomes the law aims to achieve.

*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.<sup>2</sup>*

Because the HVNL does not take a principles-based approach to risk management, instead opting for prescriptive requirements, it does not create a holistic and unified approach to achieving these objects.

A principles-based approach focuses on the ultimate outcome to be achieved rather than defining processes and discrete undertakings to be complied with. The principles-based approach allows regulated parties to determine how they go about achieving these outcomes as best suits their business and available resources.<sup>3</sup>

#### An integrated approach to safety

The amalgamation of the model laws into the HVNL means the chapters containing CoR provisions – those dealing with speed, fatigue, mass, dimension and loading, and, to an extent, vehicle standards – contain various duty types and constructions. The result is that safety is not addressed in an integrated way that accounts for all safety risks.

#### Identification of parties in the chain

The HVNL applies different duty constructions to different parties with differing requirements. This makes a coordinated approach to compliance difficult to achieve, particularly where obligations stretch across risk areas. Further, parties may have difficulty complying where obligations are ambiguous.

Stakeholders identified clarity about obligations, to whom they apply and how they may be complied with were identified as key concerns with the HVNL's approach to CoR.

#### Promoting proactive compliance

CoR is clearly intended to promote proactive approaches to compliance, however, the prescriptive nature of its construction in the HVNL does not achieve this. CoR provisions are currently siloed by risk category – speed, fatigue, mass, dimension and loading – which does not promote a systematic approach to risk identification, assessment and management.

#### Quantum of penalties

The maximum penalties prescribed by the HVNL are considerably lower than those for other safety-based legislation, such as the model Work Health and Safety Act. This may lead to mixed messages, potentially misleading industry and the courts about the seriousness of the risk of non-compliance.<sup>4</sup>

2. *Heavy Vehicle National Law*, section 3.

3. *Ibid.*

4. *Ibid.*, p 113.

## Reliance on individual offences to prosecute

There are limited options available under the HVNL to effectively deal with the most serious safety failures. According to road agencies, prosecutors have had to resort to charging hundreds of offences to ensure the Court has an appropriate picture of the defendant's conduct.

### Recommendation 1: there is a need to change the chain of responsibility regime

The issues with the current CoR regime are sufficiently serious to require changes to the CoR regime.

## 1.4 Options to improve chain of responsibility (per the discussion paper)

Based on the issues identified, research into legislative and regulatory best practice for achieving safety outcomes, and consultation with stakeholders, the discussion paper proposed the following four options for reform, with stakeholders asked to consider their preferred option as part of their submission. These options were neither exhaustive nor exclusive.

### Option 1: primary (general) duty of care

This option focuses on primary duties of care for parties in the chain of responsibility to ensure safety, limited to the existing regulatory framework of the HVNL and to the current chain of responsibility parties in the law. The key feature of the primary duty is its comprehensive nature, which requires all parties to consider, minimise, and eliminate, a wide range of hazards and risks, applicable to the circumstance, in order to comply.

### Option 2: chapter-based duties

This option would see the inclusion of a high level duty within the applicable chapters covering speed, fatigue and mass, dimension and loading (potentially also vehicle standards), similar to the current duty on fatigue. The duty would be broad and like the primary duty, would require parties to consider and mitigate a wide range of hazards and risks, applicable to the circumstances.

### Option 3: additional specific obligations

This option would see the current CoR regime extended in a way that closely resembles its current structure. This would include drafting additional obligations on existing chain parties to address specific risks and behaviours. This would extend the CoR regime in a targeted and precise manner.

### Option 4: no legislative change; focus on operational/policy components

This option would see no change to the HVNL. As an alternative, attention would focus on providing more guidance and education about obligations, their administration, investigation and enforcement.

### Options reviewed in the discussion paper

Based on the issues presented, option 1 best addressed these concerns, with option 2 also addressing most, but not all, issues. Option 3 arguably presents a 'more of the same' piecemeal approach to improving the regime, while option 4 presented no real improvements. However, the paper acknowledged the need for operational support and guidance is integral to the success of any reform.

### Submissions to the discussion paper

The NTC received 25 submissions to the discussion paper. The suite of submissions includes respondents from government road and transport agencies, enforcement agencies, industry representatives, private organisations and consultancies. A summary of submissions is included at chapter 4 of this paper, with submissions listed at Appendix 1.

## 2. Preferred approach to improving chain of responsibility

### Key points

The preferred approach to improving CoR is to:

- Include primary duties of care for parties in the chain of responsibility to ensure safety, limited to the existing regulatory framework of the HVNL (as outlined in s.4) and to the current chain of responsibility parties in the law.
- Include a primary duty on operators, to ensure the safety, for the purposes of the HVNL, of their road transport operations.
- Include specific duties on other parties to manage the risk associated with their role and interaction with road transport operations. These would likely include complementary detailed duties for activities considered high risk such as fatigue, speed, and mass, dimension and loading. This approach is consistent with that taken under equivalent rail and maritime laws.
- Consolidate CoR offences (including existing offences), at the head of which will sit the primary duties.

Feedback to the discussion paper indicated a preference for the inclusion of primary duties of care, with some stakeholders preferring a broad overarching approach and others considering a chapter-based approach more appropriate.

In addition, the complexity and inconsistency of the current CoR regime has been a source of ongoing commentary from stakeholders. For this reason, the review and consolidation of CoR provisions is proposed.

### 2.1 Primary duties of care

#### Addressing the Heavy Vehicle National Law's objects and safety as an integrated approach

Based on feedback from stakeholders, there are a number of issues with the current CoR regime, including that the HVNL does not take a principles-based approach to risk and safety management, which would better address the objects of the Law. A subsequent issue is that the CoR regime as it currently stands does not seek an integrated approach to safety. Instead, it is an amalgamation of the various model laws, drafted at different times and in different ways, leading to the inclusion of different duty types and structures.

The inclusion of primary duties of care best addresses these issues. Primary duties of care will make it clear that parties in the chain must take responsibility for safety, and work out for themselves how to do this.<sup>5</sup> The fundamental advantage of this approach is that duties of care are broad and outcome focused, and can be applied in a variety of circumstances.

Primary duties are comprehensive in nature, as they require all relevant parties to consider a wide range of hazards and risks, and how these might be mitigated or eliminated. It gives duty holders the ability to determine what actions are required to suit their operations. In this respect, it is flexible in application and capable of adapting to innovation.

5. NTC, *Improving the Regulatory Framework for Rail Safety in Australia: Discussion Paper*, 2004, p 39.

Under the HVNL, a primary duty would take a principles-based approach to risk identification, mitigation or elimination, for the entire regulatory framework of the HVNL. Moving away from a prescriptive regulation approach has significant benefits for industry, which will be able to tailor policies and systems to the risks specific to their operations.

### Recommendation 2: develop primary duties of care

#### **Amend the HVNL to include primary duties for parties in the chain of responsibility in place of existing CoR obligations.**

The amendments will restructure existing chain of responsibility obligations to construct a primary duty of care to ensure safety within the existing regulatory framework of the HVNL.

The primary duties will apply to current chain of responsibility parties only. This will include a primary duty on heavy vehicle operators to ensure the safety of their road transport operations for the purposes of the HVNL. It will further include tailored or specific duties on other chain of responsibility parties to manage the risks associated with their role and interaction with road transport operations.

The primary duties introduced will include vehicle safety, consistent with the outcomes of the Heavy Vehicle Roadworthiness Review.

To support the development of these amendments, the next phase of the project will be to examine the following issues:

- the application of primary duties to existing parties
- chain of responsibility obligations and parties for vehicle standards, to be aligned with the recommendations of the Heavy Vehicle Roadworthiness Review
- whether the applicable standard of care should be 'all reasonable steps' or 'reasonably practicable', and the effect of this on other HVNL provisions
- associated penalties for new duties
- the application of primary duties to executive officers and the effect on the current executive officer liability provisions.

Restructuring the existing obligations is aimed to help clarify obligations and increase consistency, whilst not increasing the existing burden on compliant parties.

## 2.2 Consolidation of the current chain of responsibility regime

The complexity and difficulty in interpretation of the current CoR regime was raised by numerous stakeholders as a key reason for reviewing and improving the regime. The complexity of the regime is brought about due to the amalgamation of the model laws into the HVNL. This has led to CoR provisions taking different constructions and requiring different performance outcomes for compliance.

Adding to this complexity, the CoR provisions are spread throughout the key risk chapters of the HVNL. This means they are siloed from each other, and do not allow for a coordinated approach to ensuring on-road safety. This does not recognise the potential interplay between risks, such as speed and fatigue, which may each contribute to the same unsafe outcome.

A standalone CoR chapter could simplify the regime and adopts a similar structure to that under the model WHS Act, where offences are listed by duty holder. This seeks to simplify and improve the accessibility of the regime. It would also allow for duplicate provisions to be consolidated, bringing together the key risk areas of the HVNL and allowing for a systematic approach to addressing these risks. This goes some distance towards improving consistency in CoR obligations.

### Recommendation 3: review the current chain of responsibility duties

The NTC will review the current structure of chain of responsibility duties in the HVNL to consolidate existing provisions, remove duplication, remove unnecessary provisions, and improve consistency of construction.

## 3. Next steps: stage 2

### Key points

As part of stage 2, the NTC will:

- Consider the application of duties to individual parties.
- Consider whether the standard of care should be 'all reasonable steps' or 'reasonably practicable', and the impacts on other HVNL provisions.
- Consider associated penalties for new duties.
- Investigate the application of primary duties to executive officers and the impacts on the current provisions.
- Review of the current CoR duties to consolidate, remove duplication, remove unnecessary provisions, and improve consistency.

Stage 2 will see further consideration given to the way any new duties might be structured, the impacts on other areas of the law, and how they might be administered, complied with and enforced. The issues to be considered, including but not limited to, those listed here, will form the basis of a second phase options paper to facilitate discussion and guide further consultation with stakeholders. As part of this process, sourcing of independent legal advice may be necessary.

Stakeholder contributions will inform the recommendations put to ministers, further refining the preferred option. The paper will contain the outcomes of stage 1 as well as information arising from stage 2 to provide ministers with full and robust recommendations about improving the CoR regime.

Stage 2 outcomes are proposed to be reported to ministers in November 2015.

### 3.1 Issues to be considered during stage 2

#### Construction of proposed duties

This includes testing of the primary duty, or duties, of care to discern the construction that best achieves the outcomes sought. This will include consideration about the placement of the duty or duties within the HVNL, and the way it impacts on other provisions within the law.

#### Parties to whom duties will extend

A primary duty would be placed on heavy vehicle operators, to ensure the safety, for the purposes of the HVNL, of their road transport operations.

In addition, tailored or specific duties would be placed on other parties in the chain to manage the risk associated with their role and interaction with road transport operations. These would likely include complementary detailed duties for activities considered high risk such as fatigue, speed, and mass, dimension and loading.

#### Standard of care

Options include a 'take all reasonable steps' defence consistent with the current drafting of the HVNL, or a standards of 'so far as reasonably practicable' as used in the model WHS Act. It is noted that the two concepts are very similar in outcome, however a number of stakeholders have argued

that 'so far as reasonably practicable' is a concept better aligned with Workplace Health and Safety law, more familiar to industry and with more case law to support interpretation.

It is noted that currently the standard of 'take all reasonable steps' applies to a wide range of provisions in the HVNL outside of the CoR regime, which will require further consideration.

### Monetary penalties

Any new offences will require monetary penalties. Consideration needs to be given to whether the current HVNL maximum penalties are appropriate to primary duties of care.

### Treatment of executive officers

Impacts on how liability might extend to executive officers will be considered, including whether the existing approach remains appropriate; whether the primary duty would cover executives; or whether executive officers should be covered by their own duty, as is the mechanism under the model WHS Act.

Currently, the extension of liability to executive officers applies to non-CoR offences as well as CoR offences, which require further consideration.

### Changes to existing duties/provisions

The current structure of HVNL CoR provisions will be reviewed to consolidate existing provisions where appropriate, remove duplication, remove unnecessary provisions, and to improve consistency in the construction of the regime.

This is intended to assist industry, regulators and enforcement agencies to better understand and administer the CoR regime.

## 3.2 Stage 2 consultation with stakeholders

The NTC will seek to consult broadly with both industry and government stakeholders in developing detailed recommendations for Stage 2.

## 4. Review of stakeholder feedback

### Key points

Twenty-five submissions were received, including from government road and transport agencies, enforcement agencies, industry peak bodies, transport companies and consultants. While there was a wide variety of views, there was broad consensus on several points, including that:

- Existing duties should be clarified, combined and consolidated
- There is a need for further guidance material.

### 4.1 Stage 1 consultation

#### Stakeholder workshop

Prior to the release of the discussion paper, the NTC held a workshop in Melbourne with select stakeholders, including representatives from government, industry and enforcement agencies. The workshop saw nominated stakeholders present the argument for each of the options for improving CoR, which was based on their contribution to taskforce discussions.

Groups made up of representatives from different agencies workshopped the options, to ensure robust discussions.

The workshop was not intended to resolve outstanding issues or result in recommendations, rather to spark discussions and allow parties to address each other's concerns. The commentary from the workshop informed the discussion paper released in November 2014.

#### Discussion paper and subsequent discussions

The discussion paper was released via the NTC's website, accompanied by media alerts and notifications via the NTC's regular newsletter. Additionally, the discussion paper was emailed directly to a broad list of stakeholders made up of known and new contacts.

Following the release of the paper and during the consultation period, the NTC actively engaged with stakeholders (via in-person meetings and teleconferences) about their impressions of the paper and broader CoR issues. These discussions and formal submissions have informed this paper's recommendations.

The NTC met with the following stakeholders:

- Transport and Main Roads (TMR), Queensland
- Roads and Maritime Services (RMS), NSW
- Transport for NSW
- Commercial Vehicle Industry Association of Queensland (CVIAQ)
- Australian Trucking Association (ATA)
- Australian Logistics Council (ALC)

- Refrigerated Warehouse and Transport Association of Australia (RWTA), including representatives from the following companies:
  - Oxford Cold Storage
  - Bega Cheese
  - Swire Cold Storage
- LATUS

## 4.2 Summary of submissions to the discussion paper

The NTC received 25 submissions from government road and transport agencies, enforcement agencies, industry peak bodies, individual companies and consultants. The list of organisations that made submissions is provided at Appendix 1.

Although diverse, stakeholder responses to the four options posed in the NTC's discussion paper also revealed consensus views on various important issues. These consensus reforms are regarded as necessary whichever option is adopted.

The most important areas of consensus include:

- duties pertaining to speed, fatigue, and mass, dimension and loading (and in the view of some stakeholders, vehicle standards) should be clarified, combined and consolidated
- clarifying CoR through improved and expanded guidance material
- reform of the enforcement regime, to simplify prosecution and create a more diverse range of enforcement strategies and penalties.

### Responses to option 1: primary (general) duty of care

Stakeholder responses to option 1 stressed the importance of combining duties pertaining to speed, fatigue and mass, dimension and loading, and vehicle standards. Currently, these duties are described in separate chapters and/or are not subject to duties in the same way.

Stakeholders emphasised that the standards to be met to bring prosecution proceedings against parties other than transport operators should be simplified and the enforcement regime for CoR should be reviewed. Toll Group suggested a national compliance and enforcement policy and strategy could be developed, and a dedicated CoR unit established in the NHVR.

The improvement of educational and guidance material for all chain parties is regarded as essential by a majority of stakeholders.

Other issues raised in relation to option 1 include:

- creation of a positive duty for executive officers
- close consultation with industry in the development of a primary duty
- limiting the primary duty to parties that are already specified in the HVNL
- addition of vehicle standards within any primary duty of care.

The submission from Transport for NSW/Roads and Maritime Services provided a detailed set of recommendations based on option 1. The Australian Trucking Association has presented a detailed submission that argues for a primary duty approach, however captured within a dedicated CoR chapter. These concepts are detailed and discussed later.

### Responses to option 2: chapter-based duties

The response of stakeholders to option 2 closely resembled those to option 1. Some stakeholders did not express a firm view about the relative merits of the first two options, regarding them as similar in effect, coverage and outcome.

### Responses to option 3: additional specific obligations

Stakeholders stressed the importance of consolidating and combining duties pertaining to speed, fatigue and mass, dimension and loading. There was little support for this option, as it is difficult to create additional specific obligations while also consolidating provisions and such an approach would not address the broader issues set out in 1.3.

### Responses to option 4: no legislative change; focus on operational/policy components

Stakeholders agree that certain elements of the existing law must be made more effective even for 'business as usual' to continue. Therefore the option to make no change was not supported, although the Australian Logistics Council (ALC) argued that there was not currently sufficient evidence for change.

Government agencies argue that the operational effectiveness of CoR is currently hampered by difficulty in capturing parties beyond the operator, particularly in a manner that courts will recognise. For industry, chain parties are not being provided with sufficient or clear information about their existing responsibilities and how to execute these. Instructional and guidance material for chain parties needs development.

### Other issues raised by stakeholders

Although potentially outside of the remit of this project, stakeholders raised a number of other issues relevant to the broader context of CoR, including:

- expanding the application of CoR to vehicles <4.5 tonnes
- reducing the number of regulatory agencies (which can each have a different focus) overseeing the same duties
- clarification and, if necessary, provision of guidance to industry bodies to ensure they are not exposed to lawsuits for providing incorrect advice
- analysis of the success of WHS investigations and prosecutions relating to primary care duties
- address specific gaps in the HVNL by giving authorised officers greater investigatory powers.

## 4.3 Stakeholder responses to key issues

The discussion paper outlined a number of issues for consideration should changes be made to the CoR regime. Stakeholders have provided considerable feedback on these issues.

### Number of primary duties

Stakeholder views on the appropriate number of duties ranged from potentially expanding the current number of duties, to retaining the current number in addition to a primary duty, or replacing current duties with a single primary duty.

Most stakeholders agreed more readily that the language used to describe or define duties should be made less ambiguous. Respondents also agreed that duties must relate to the objects of the law, especially safety.

Transport for NSW/Roads and Maritime Services (NSW) suggested that duties should be apportioned in a manner akin to under WHS, as follows:

- primary duty holder: will ensure the safety of road transport operations
- officers: will ensure compliance
- workers: will ensure their safety and the safety of others, and will comply with instructions for safety, and cooperate with the primary duty holder.

Alternatively, the Australian Trucking Association (ATA) suggested that a new primary duty based on the existing key safety areas of the HVNL (speed, fatigue, mass, dimension and loading, and vehicle standards) be introduced, subject to the creation of a dedicated CoR chapter. The new primary

duty would consolidate the duties of chain parties to ensure, so far as is reasonably practicable, that speed, fatigue and mass, dimension and loading, as well as vehicle safety and standards breaches do not occur.

The ATA also advocated the inclusion of a duty requiring chain parties to ensure that vehicles are free from defects, safe and maintained in a roadworthy condition, and extended to vehicle maintenance providers. It is noted that the Roadworthiness Review is currently considering the extension of CoR to vehicle standards.

### Appropriate standard of duty

Broadly, stakeholders agreed that the standard of duty should be consistent with other workplace safety legislation. While numerous respondents were open to or agnostic about the use of 'reasonably practicable' as opposed to the current 'all reasonable steps', the primary concern is that the highest standard is adopted in a manner consistent with that required under other work safety legislation, provided there is no legal difference between the two standards. Both the ATA and NSW strongly supported moving to a 'reasonably practicable' test.

Respondents also sought contextual information about appropriate standards for compliance, either within the HVNL itself or supplemented by the NHVR. This recognises current concerns about misunderstanding of the duty standard.

### Onus of proof for extended liability

Some stakeholders expressed support for retaining the current onus of proof for extended liability, which rests on the defence, while others preferred alignment with the model WHS Act, which includes an onus on the prosecution.

A change in the duty structure to include a primary duty and of the standard to one of reasonable practicability may better facilitate an amendment of onus to lie with the prosecution.

### Appropriateness of executive officer liability

NSW argued for the extension of liability to executives via a duty requiring due diligence. Other stakeholders argued for retaining the existing approach.

Stakeholders, including the Department of Planning, Transport and Infrastructure, South Australia (DPTI SA) recognised that CoR and executive officer liability are linked. However, the underlying offences to which executive liability applies goes beyond the CoR regime.

### Appropriateness of monetary penalties

Stakeholder views about penalties are wide ranging. Some stakeholders argued that, if a primary duty is to be included, it should be accompanied by a high penalty akin to those applicable under WHS. This position is supported by the argument that current HVNL penalties are inappropriate to the safety risk and an insufficient deterrent. This problem of insufficient deterrent is compounded, DPTI argues, by the tendency for magistrates to issue penalties at the lower end of the available scale.

NSW and LATUS Logistics Risk Specialists (LATUS) both argue that a broader range of penalties should be made available. These might include authorised officer-issued prohibition orders, adverse publicity orders, injunctions, restoration orders (recognised by courts and the NHVR), and community service orders requiring offenders to help educate and mentor others. The Department of TMR (Qld) considered that increasing penalties may deter would-be offenders, particularly large companies that can budget for small or moderate fines from time to time.

### Impact on enforcement tools

LATUS argues that enforcement officers need better tools and training to ensure that agencies maximise their enforcement effort in their limited available resources. The dissemination of better guidance and educative material may help in achieving this outcome.

NSW suggested alternative remedies, such as those that exist under WHS legislation, as methods of broadening enforcement capacity, similarly, a power to issue prohibition notices.

The NTC notes that the introduction of enforceable undertakings is also currently being considered as part of the Roadworthiness Review.

### Impact on enforcement powers

Some stakeholders argued that powers should be enlarged, while others advocated the retention of current powers. NSW and TMR Qld, which perform enforcement and investigative roles, expressed the need to access information from parties beyond the operator and materials other than those applicable to a given vehicle and its load.

NSW agreed that powers need to be flexible, as an operational necessity. Regardless of any changes to the duties structure, there is a need to periodically review enforcement powers.

The NTC notes that the specific issues presented by stakeholders on enforcement powers have also been raised through the HVNL Maintenance Group and will be reviewed as part of that process.

### Need for guidance material

Perhaps the greatest level of consensus amongst respondents related to the need for guidance materials, regardless of the stakeholder's preferred option on duties. The range of media and materials available should be broad. Information should be promptly and periodically reviewed as case law for the HVNL develops.

Gas Energy Australia (GEA) and Nacap recommend that industry codes of practice be a primary mechanism for delivering guidance. While not disagreeing, government agencies are concerned that guidance material not be interpreted by courts as prescriptive, thereby placing limitations on enforcement and prosecution, but also on innovation and initiative about approaches to safety outcomes.

The NTC notes that the development of detailed guidance materials will be undertaken by the NHVR as the lead agency, with support from the NTC.

### Impact on resources

The question of resource implications presented divergent and controversial responses. LATUS argues that some transport operators regard CoR as an additional administrative burden, rather than levelling the commercial playing field or improving business practices.

NSW suggests that the introduction of a primary duty may reduce regulatory inefficiency. A primary duty may allow for a streamlining of business practices and resources, particularly where the HVNL can be brought into line with WHS approaches to safety.

Stakeholders indicated that, depending on the chosen course of action, a streamlined duties structure may allow regulators to better allocate their resources applicable to compliance monitoring, enforcement and prosecutions.

### Potential cost implications

Only limited stakeholder feedback was received on this issue. However, the South Australian Freight Council and the ALC argued that no changes should be made to the HVNL until a full cost/benefit analysis has been completed.

## Role of industry codes of practice

While government respondents stressed that compliance with a code of practice must not be seen as compliance with the law, most stakeholders regard the role of codes to help explain obligations as very important. The need to create guidelines and processes for approved codes of practice is considered a matter of urgency by stakeholders.

Guidance about the production of codes, as GEA suggests, is also important to assure industry bodies about the potential liability of providing such advice.

The NTC notes that the development of guidelines and processes for approved codes of practice will be undertaken by the NHVR as the lead agency, with support from the NTC.

## 5. Appendix 1: Stakeholder submissions

The following stakeholders provided submissions to the discussion paper.

- ANZPAA: New South Wales Police Force
- ANZPAA: Queensland Police Services
- ANZPAA: South Australia Police
- ASIXA
- Australian Forest Contractors Association
- Australian Livestock and Rural Transporters Association
- Australian Logistics Council
- Australian Trucking Association (supported by National Road Transport Association and South Australia Road Transport Association)
- Cement Concrete & Aggregates Australia
- Commercial Vehicle Industry Association of Queensland
- Department of Planning, Transport and Infrastructure, South Australia
- Department of Transport and Main Roads, Queensland
- Department of Transport, Northern Territory
- Gas Energy Australia
- LATUS
- Motor Trade Association of South Australia
- Nacap Australia
- National Heavy Vehicle Regulator
- RD Williams
- Road Transport Lawyers
- Toll Group
- Transport for NSW/Roads & Maritime Services
- Transport Safety Victoria
- VicRoads

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