

2016 Heavy Vehicle National Law Chain of Responsibility & Executive Officer Liability Reforms Frequently Asked Questions

Last update: 8 August 2016

CHAIN OF RESPONSIBILITY

1. Why are we changing Chain of Responsibility (CoR)?

Chain of responsibility is about ensuring all parts of the supply chain are contributing to safer roads.

However, the current law can be improved. Not all parties understand how the law applies to them. The current law is complex and can be costly to comply with. Some obligations are inconsistent.

In addition, there are concerns the current law is too prescriptive and that it is not being enforced consistently. The current chains of responsibility laws do not promote a proactive and systemic approach to risk identification, assessment and management or allow regulators to proactively address risks in the industry.

2. What are the key changes?

The key change is to restructure the existing prescriptive chain of responsibility obligations as an overarching and positive primary duty of care on all chain of responsibility parties to ensure safety.

The duty is to ensure the safety of road transport operations, including the risks of speed, fatigue and mass, dimension and loading – so far as reasonably practicable.

These changes better align chain of responsibility with work health safety. They will make the law more performance-based rather than prescriptive. This should enable a more flexible, outcomes based approach to compliance and enforcement and lead to better safety outcomes.

These changes also remove the existing prescriptive obligations where these obligations are covered by the primary duty. This should reduce regulatory burden and improve consistency and clarity.

3. Are there any changes to the parties covered or the scope of obligations?

No. The primary duty will apply to all current chain of responsibility parties, as defined in the Heavy Vehicle National Law (HVNL) consistent with their role in the supply chain. There is no change to the parties covered.

This means the chain of responsibility obligations will continue to apply to operators, prime contractors and employers, schedulers, consignors, consignees, loading managers, loaders, unloaders and packers.

The changes will include obligations on relevant chain of responsibility parties in regard to vehicle standards and maintenance, but otherwise the scope of obligations remains the same.

4. What is the standard of care?

Based on stakeholder feedback, including from industry, the standard of care will change from 'all reasonable steps' to 'so far as reasonably practicable'. This is the same standard of care used under work health safety laws.

The 'so far as reasonably practicable' standard is similar in outcome to the current 'all reasonable steps' standard. But there is greater guidance material and case law to explain its application, the standard is more familiar to industry, and aligns with other national safety laws.

For ease of compliance, and enforcement, the 'so far as reasonably practicable' standard will apply across the HVNL. Many current offences will be reformulated to apply the 'so far as reasonably practicable' standard as an element of the offence – consistent with other national safety laws.

5. What is 'reasonably practicable'?

A definition of 'reasonably practicable' similar to that used in work health safety law will be included in the HVNL.

What is 'reasonably practicable' is determined by the factual circumstances and depends on:

- the likelihood of the hazard or risk
- the degree of harm that might result
- what the person knew or ought reasonably to have known about the hazard or risk, and the ways to eliminate or minimise that hazard or risk
- the availability and suitability of ways to eliminate or minimise the risk, and
- the costs associated with eliminating or minimising the risk – including whether the costs are grossly disproportionate to the risk.

Unlike the current 'all reasonable steps' standard, the 'so far as reasonable practicable' standard will be expressly defined in the law.

6. Will penalties change?

The penalties for offences under the HVNL are currently significantly less than the penalties for offences under other national safety laws.

Penalties for breach of the primary duty will:

- align more closely to the penalties under work health safety laws, with a maximum penalty for the most serious cases of \$300,000 or 5 years imprisonment, or both, for an individual; and \$3 million for a corporation
- be based on categories of risk similar to those used in work health safety laws,

The highest penalties are available only for the most serious cases – where a person without a reasonable excuse, engages in conduct that exposes an individual to the risk of death or serious injury or illness, and is reckless to that risk.

7. What other changes will there be?

#1 Changes to information gathering powers

These reforms also make changes to information gathering powers to give regulators and enforcement agencies greater ability to access documents from third parties, for the purposes of investigating breaches of the primary duty.

These powers align with work health and safety laws. Importantly there are checks and balances on the use of these powers, to ensure procedural fairness and natural justice.

#2 Changes to evidentiary status of codes of practice

The reforms include changes to clarify the evidentiary status of codes of practice, to ensure consistency with other national safety laws.

#3 Creation of a new remedy – enforceable undertakings

The CoR reforms agreed by ministers also give effect to the recommendations arising from the NTC's Roadworthiness Review, a joint program involving both the NTC and the NHVR begun in late 2013, following the Cootes heavy vehicle incident on Mona Vale Road in Sydney.

Most significant is the creation of a new remedy – enforceable undertakings - as an alternative to prosecution and available across all parts of the HVNL. Enforceable undertakings are entered into voluntarily and involve operators agreeing to take specified steps to address shortfalls in their compliance.

8. How will the primary duties be applied to executive officers

The primary duties regime will also apply to executive officers. The effect of this is that the existing 103 chain of responsibility offences for executive officers will be reformulated as a positive due diligence obligation on executive officers to ensure that their corporation complies with the primary duty.

As part of the changes, the current reverse burden of proof on executive officers will be removed. Instead, the prosecution will bear the burden of proof, with the executive officer innocent unless proven guilty.

The effect of these reforms therefore is that executive officer liability for non-chain of responsibility offences will remain as it is currently, although the reverse burden of proof will be removed.

Ministers also agreed that the extension of the executive officer due diligence obligation across the HVNL more broadly should be considered as a second phase of reform. The NTC is currently working on this second phase.

9. How will the current changes to CoR affect me (as an operator)?

For compliant operators who are already doing the right thing under the HVNL and their workplace health and safety obligations, there should not be significant changes.

The changes are focused on safety but they remove some of the existing prescriptive requirements, which will give operators more flexibility to determine how they ensure safety.

Operators can better align processes for compliance with the HVNL and workplace health and safety law, and take more of a risk management approach to safety.

10. How will the current changes to CoR affect me (as an executive officer)?

For compliant executive officers who are already doing the right thing under the HVNL and their workplace health and safety obligations, there should not be significant changes. There should not be any increase in compliance obligation.

The changes are focused on safety but they remove some of the existing prescriptive requirements, which will give executive officers more flexibility to determine how they exercise due diligence.

11. What are the next steps for CoR?

The bill with the chain of responsibility and executive officer changes was agreed by ministers earlier this year. This bill will be introduced to Queensland parliament, as the host jurisdiction for the HVNL later this year. Once passed, this bill will amend the HVNL.

We are now looking at two related reforms.

The first involves looking at the responsibilities of corporate executive officers. We are examining whether the due diligence obligation on executive officers should be extended from primary duties to the entire HVNL. We released a consultation paper on this in March 2016 and are now preparing final policy recommendations for ministers' consideration in November 2016.

The other reform looks into investigative and enforcement powers. We are asking whether the regulator and enforcement operators have the right powers to meet the objects of the law. We are planning to release a discussion paper for consultation later this year.

12. Will I have an opportunity to see the bill before it is passed?

Yes. Following usual process, we anticipate that Queensland parliament, as the host jurisdictions for the HVNL, will publish the draft bill for public consultation as part of their committee review process. Ministers have also endorsed a 12 month implementation period to allow industry time to understand and apply the changes.

13. When will the CoR changes come into effect?

Ministers have agreed a 12 month period for implementation. This means the chain of responsibility reforms are likely to come into force in early- to mid- 2018, 12 months after the amending legislation is passed by Queensland parliament.

14. When will the other related changes come into effect?

All law changes, including any changes arising from the further executive officer liability reform and the investigative and enforcement powers projects, will commence at the same time as the agreed chain of responsibility reforms.

15. How will the reforms be implemented & who will lead the implementation process

Implementation will be led by the National Heavy Vehicle Regulator (NHVR), as the administrator of the national law. The NTC have been working closely with the NHVR on this project and will continue to work closely with the national regulator to help ensure a smooth implementation process.

The NHVR is developing guidance and communication materials to inform industry about the changes.

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