



Chain of Responsibility: Duties Review
Discussion Paper
November 2014



National Transport Commission

National Transport Commission
Chain of Responsibility: Duties Review Discussion Paper

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Report outline

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| Title: | Chain of Responsibility: Duties Review |
| Type of report: | Discussion paper |
| Purpose: | For public consultation |
| Abstract: | <p>This paper outlines the current HVNL regime, issues with that approach, and the appropriateness of various duty types that may improve CoR.</p> <p>Stakeholders are presented with four options to consider. A combination of these options may also be considered. This paper and stakeholder feedback will inform a policy paper to be considered by ministers in May 2015.</p> |
| Submission details: | <p>Submissions will be accepted until 30 January 2015 online at www.ntc.gov.au or by mail to:</p> <p>Att: Chain of Responsibility: Duties Review National Transport Commission L15/628 Bourke Street Melbourne VIC 3000</p> |
| Key milestones: | Discussion paper, policy paper |
| Key words: | Chain of responsibility, CoR, Heavy Vehicle National Law, HVNL |
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How to make a submission to the NTC

Who can make a submission?

Any individual or organisation can make a submission to the NTC.

How to submit

To make an online submission please visit the NTC homepage (www.ntc.gov.au) and select 'Submissions' from top navigational menu.

Alternatively, you can mail your comments to: Att: Chain of Responsibility: Duties Review, National Transport Commission, Level 15/628 Bourke Street, Melbourne VIC 3000.

Where possible, you should provide evidence, such as data and documentation, to support your views.

Publication of submissions

Unless submissions clearly request otherwise, all submissions will be published online. Submissions that contain defamatory or offensive content will not be published. The *Freedom of Information Act 1982 (Cwlth)* applies to the NTC.

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1. Executive summary

In 2012 a taskforce was established by the Standing Council on Transport and Infrastructure to review the Heavy Vehicle National Law (HVNL) chain of responsibility (CoR) provisions. While the taskforce acknowledged the need for a continued CoR regime, it recognised the need for improvement. To this end, the taskforce recommended:

The NTC establish a process to investigate the development of broader duties within the CoR.¹

This recommendation was endorsed the Transport and Infrastructure Council in May 2014. This project progresses this recommendation.

Through past processes, stakeholders have identified a number of potential problems with the treatment and operation of CoR under the HVNL. Regulators have expressed difficulty reaching all responsible parties for a breach and addressing all behaviours that may increase road safety and other risks. Industry has stated concerns about the clarity of the law and the ability of parties to understand and comply with obligations in an integrated way.

This discussion paper sets out the current structure of CoR duties in the HVNL. It considers these duties in light of comparable duties created in work, health and safety (WHS) legislation. Potential problems with the duties regime are outlined and four options for improving the regime detailed. A range of consequential matters are also raised, that must be considered for any major reform of the HVNL.

The options presented in this paper are:

- Option 1: Primary (general) duty of care – an overarching duty applicable across the HVNL and to all parties in the chain
- Option 2: Chapter-based duties – the placement of an overarching duty applicable to all chain parties within the relevant chapters
- Option 3: Additional specific obligations – duties applicable to identified and defined chain parties (similar to what currently exists within the HVNL)
- Option 4: No legislative change; focus on operational/policy components

These options are neither exhaustive nor are they exclusive of each other. A combination of options may be the most appropriate way forward.

Stakeholders are asked to consider the information and options in this paper and provide feedback on the merits of the options. The following questions are intended to assist stakeholders in their assessment of the options.

Feedback is due by 30 January 2015. During the consultation period the NTC will work with stakeholders to discuss the options in greater detail and to address any outstanding concerns.

1.1 Questions for stakeholders

1. How effective do you think the current approach to CoR is?
2. What impacts (positive and/or negative) have the CoR duties and obligations had on:
 - a) your organisation?
 - b) the road transport industry?
 - c) compliance and enforcement activities?
3. How effective do you think the current approach to CoR is in achieving the objects of the HVNL?

¹ Chain of Responsibility Review: Taskforce Report, July 2014, page 3.
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4. Do you agree with the problems outlined in chapter 5? Are there other issues with the current CoR regime that should be considered, from the following perspectives (as applicable to you):
 - a) legislatively?
 - b) operationally?
 - c) for compliance?
 - d) for enforcement?
5. Do you feel significant reform of the CoR provisions in the HVNL is warranted? Alternatively, could the existing approach be made more effective by minor or modest changes?
6. Which option do you think most appropriately achieves the objects of the HVNL and satisfies the issues outlined in the problem statement? How does this option address these objects and issues? The options are:
 - a) Option 1: Primary (general) duty of care
 - b) Option 2: Chapter-based duties
 - c) Option 3: Additional specific obligations
 - d) Option 4: No legislative change; focus on operational/policy components
7. Using your preferred option for context, what are your views on the following issues:
 - a) number of primary duties?
 - b) appropriate standard of duty?
 - c) identification of parties in the chain?
 - d) onus of proof for extended liability?
 - e) appropriateness of executive officer liability?
 - f) appropriateness of monetary penalties?
 - g) impact on enforcement tools?
 - h) impact on enforcement powers?
 - i) the need for guidance material?
 - j) impact on resources?
 - k) potential cost implications?
 - l) the role of industry codes of practice?
8. Do you consider that chain parties understand their responsibilities under CoR? If no, what should be done to improve this understanding?
9. Do you consider that current guidance materials have helped parties to understand and meet their CoR obligations and duties? If not, what should be done to improve this?
 - a) What are the key areas that require further guidance?
 - b) What form do you feel guidance material should take?

2. Project objective

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

This discussion paper sets out potential issues with the current CoR regime, four options for addressing these issues and compares CoR to similar regimes. The options constitute three options for changing the HVNL and one to maintain the status quo. These options are derived from discussions held during the CoR taskforce process. Although articulated as four options it may be the case that a combination approach best satisfies the HVNL's objects and resolves potential issues.

Stakeholders are asked to address a number of targeted questions in light of the information in this paper. Feedback should, wherever possible, include evidence and examples. With the release of this paper, the NTC will commence targeted consultation with a broad range of stakeholders, seeking input into the most appropriate way forward for CoR.

A preferred approach will be reported to ministers in May 2015. Based on ministerial endorsement of the recommended approach, the NTC will further investigate the detail and potential legislative and operational consequences.

The ultimate objective of CoR is to institute a regime that, in line with the objects of the law:

- promotes public safety
- manages the impact of heavy vehicles on the environment, road infrastructure and public amenity
- promotes industry productivity and efficiency
- encourages and promotes productive, efficient, innovative and safe business practices.

2.1 Next steps

Stakeholder feedback will be considered and a report on a preferred approach will be presented to ministers at the Transport and Infrastructure Council meeting in May 2015.

Following ministerial endorsement of the preferred option, the NTC will further research the detail and any implications it may have on the HVNL and regulatory regime. This will include further consultation on a targeted basis to resolve outstanding issues.

3. Project background

3.1 CoR taskforce recommendation that CoR be further reviewed

Since 1997, heavy vehicle law has included the concept of CoR. CoR provisions are designed to ensure that any party in a position to *control, influence* or *encourage* particular on-road behaviour is identified and held appropriately 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 for their accountability.

The CoR concept has been carried over to the HVNL, which is now given effect in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria.²

On 14 September 2012, the Australian Trucking Association (ATA), the Australian Logistics Council (ALC) and the Australian Livestock and Rural Transporters Association (ALRTA) jointly wrote to Commonwealth and State ministers, requesting that CoR and executive officer liability provisions in the HVNL be re-drafted based on affirmative duties, consistent with the Work Health and Safety approach.

The then Standing Council on Transport and Infrastructure established a taskforce to review the HVNL CoR provisions. The taskforce, comprising representatives from industry, regulators, the Transport Workers Union and Safe Work Australia began this review in May 2013.

The taskforce reviewed the following key topics relating to CoR:

1. The duties of persons who are covered by the CoR provisions
2. The persons who should be covered and the identification of their roles
3. Strengthening compliance with, and fair and effective enforcement of, the provisions.

The taskforce reported to ministers in May 2014 and the *CoR Review: Taskforce Report* was released in June 2014. The taskforce's key finding was that further investigation of the HVNL's duties regime was warranted. To this end, the taskforce recommended that:

*The NTC establish a process to investigate the development of broader duties within the CoR.*³

The taskforce further noted that:

*This should be the first step in resolving outstanding issues.*⁴

The outstanding issues relate to divergent views about how the HVNL CoR duties should be treated and improved. The options for consideration are outlined in this paper.

Extending from the above finding and related to the investigation of broader duties, the taskforce also made the following recommendations:

| Subject Matter | Recommendation |
|-------------------------------|---|
| Extended liability offences | <i>The taskforce recommends that further consideration be given to the onus of proof for extended liability offences as part of any process to review the possible inclusion of additional duties.</i> |
| Additional parties in the CoR | <i>The taskforce recommends that the inclusion of additional duty holders in the chain of responsibility be examined as part of a process to consider additional duties for parties in the chain of responsibility.</i> |
| Penalties | <i>The taskforce recommends that further consideration be given to the penalties for CoR offences after the process to review the additional</i> |

² The Northern Territory will commence the national law at a later date. Western Australia will not commence the HVNL at this time.

³ Chain of Responsibility Review: Taskforce Report, June 2014, page 3.

⁴ Ibid.

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| | <i>duties for parties is complete.</i> |
| Industry codes of practice | <i>The taskforce recommends retaining the status-quo (a means of demonstrating that reasonable steps have been taken), pending final decisions on the review of duties after which the legal status of codes should be re-examined.</i> |
| Enforcement sanctions | <i>The taskforce recommends further examination of additional sanctions after the process to review the additional duties for parties is complete.</i> |
| Drafting consistency | <i>The taskforce recommends that consistency in the drafting of CoR provisions be revisited after the process to review the possible inclusion of additional duties is complete</i> |

4. Current approach to CoR

4.1 Broad and diverse road transport industry requires CoR

The road transport industry is large and diverse. Its biggest players are among Australia's largest companies, yet most activity is carried out by small enterprises or one person operations, accounting for approximately 60 per cent of the industry.⁵ Despite significant improvements in road safety since the 1960s, the transport industry remains hazardous.⁶ The diversity of the industry, the range of activities undertaken by parties, the lines of accountability and authority, and the variety of contractual arrangements all pose significant challenges to the development of effective compliance and enforcement systems.⁷

4.2 What is CoR?

The application of CoR to heavy vehicles has been in discussion since the early 1990s and has been included in the model laws since 1997.

Key to CoR is the idea that off-road parties have the ability to influence on-road activities, which can potentially result in risks to safety. CoR seeks to identify those parties that may control, influence or encourage on-road behaviour by making them legally accountable for their actions.

The HVNL does this by incorporating CoR provisions into the following chapters:

- Chapter 3 Vehicle operations – standards and safety⁸
- Chapter 4 Vehicle operations – mass, dimension and loading
- Chapter 5 Vehicle operations – speeding
- Chapter 6 Vehicle operations – driver fatigue
- Chapter 8 Accreditation

To achieve this, the CoR regime applies legal standards under which four obligation mechanisms are provided. These are:

- Primary (general) duty
- Intermediate duties
- Process-based requirements
- Specification standards

Currently, the HVNL applies CoR to the following parties:

- Employer
- Prime contractor
- Operator
- Scheduler
- Loading manager
- Consignor
- Consignee
- Packer
- Loader
- Unloader

These obligations play a critical role in the regulatory system. Yet they are rarely outlined in the HVNL in their optimal or consistent manner, with offences prescribed by the national law often

⁵ NTC with the Hon. Lance Wright QC and Professor Michael Quinlan, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, October 2008, p. 11.

⁶ NRTC, *Compliance with the Road Transport Law – Principles, Objectives and Strategies – Discussion Paper*, 1994, p.3.

⁷ *Ibid.*

⁸ The CoR provisions in Chapter 3 are limited to deemed liability provisions. The extension of CoR within the vehicle standards chapter is currently being considered by the NTC.

combining categories of responsibility to suit different contexts or sectors, and to meet different regulatory objectives.⁹

Ensuring that the HVNL prescribes an appropriate mix and type of obligations is crucial to developing effective and efficient road transport policy. The evolving nature of the heavy vehicle industry requires regulators to consider whether different obligations to those currently prescribed in the law will or can better accommodate the diverse range of stakeholders and tasks in the road transport industry, and achieve better regulatory outcomes.¹⁰

4.3 Primary (general) duty

Primary (general) duty offences establish an obligation on parties to secure or avoid broadly described outcomes. This approach is necessary to avoid a 'checkbox' mentality, which allows an organisation or person to take the view that as long as they are complying with any specific requirements laid down in law, they have discharged their obligations. It makes it clear that parties must take responsibility for safety and work out for themselves how to do this.¹¹

Unlike the model Work, Health and Safety Act (model WHS Act), the HVNL contains only one primary duty (section 229 – duty of party in the CoR to prevent driver driving while fatigued) and a series of narrower specific duty offences in relation to other requirements within the HVNL.

Section 229 provides the following obligation on chain parties:

229 Duty of party in the chain of responsibility to prevent driver driving while fatigued

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

While the section 229 provision is broader than others in the HVNL, it does not cover all of the provisions of Chapter 6, which also contains provisions relating to work and rest hours and the keeping by drivers of work diaries. It is also narrower than the general duties provisions of the model WHS Act and the Rail Safety National Law (RSNL),¹² which apply primary duties of care to broadly defined parties.

4.4 Intermediate duties

Intermediate duty offences are based around the role and functions of the relevant parties and the proposition that breaches of certain areas of law (such as speed and fatigue under the HVNL) pose significant safety risks.¹³

To counter these risks, parties subject to an intermediate duty must actively consider whether the way they intend to carry out their tasks will cause the driver to breach the speeding and fatigue requirements. In addition, they must ensure that they are in a position to prove they took necessary precautions, should they be called upon to do so at some later date.¹⁴ Examples of intermediate duties found under the HVNL are:

205 Duty of employer not to cause driver to drive if particular requirements not complied with

(1) An employer of an employed driver of a heavy vehicle must not cause the driver to drive the heavy vehicle unless—
(a) the employer has complied with section 204 (ensuring business practices will not cause a driver to exceed the speed limit); and
(b) the employer is reasonably satisfied each scheduler for the vehicle has complied with

⁹ Bluff, E & Gunningham, N, *Principle, Process, Performance or What? New Approaches to OHS Standards Setting*, 2003, p.2.

¹⁰ *ibid*, p.6.

¹¹ NTC, *Improving the Regulatory Framework for Rail Safety in Australia: Discussion Paper*, 2004, p.39.

¹² See Appendix 1 for further information about the RSNL approach.

¹³ Hatcher, A, *Review of Regulatory Approaches to Transport Safety Law*, 2008, p.37.

¹⁴ NTC, *Heavy Vehicle Driver Fatigue: Policy Proposal*, 2004, p.ii.

sections 207 and 208 (ensuring a drivers schedule will not cause them to exceed the speed limit).

212 Duty to ensure terms of consignment will not cause driver to exceed speed limit

(2) A commercial consignor or a consignee of goods must take all reasonable steps to ensure the terms of consignment will not cause a relevant party for the relevant driver to cause the driver to exceed a speed limit applying to the driver.

4.5 Process-based requirements

A process-based requirement specifies particular processes or steps that may be followed in order to meet an obligation. An important characteristic of a process-based requirement is the focus on four fundamental steps of:

1. identification
2. assessment
3. control
4. review

Thus, duty holders are obliged to assess risks and to regularly evaluate and improve control measures.¹⁵

In the HVNL, process-based requirements are used:

- a) as a potential basis for establishing a defence¹⁶ (i.e., the ‘reasonable steps defence’) for certain MDL offences, or
- b) to help determine whether an offence has been committed (i.e., whether all reasonable steps have been taken) in a number of speed and fatigue related intermediate duty offences.

An example of an intermediate duty offence containing a process-based requirement is provided below.

204 Duty of employer, prime contractor or operator to ensure business practices will not cause driver to exceed speed limit

A relevant party for the driver of a heavy vehicle must take all reasonable steps to ensure the relevant party’s business practices will not cause the driver to exceed a speed limit applying to the driver.

Examples of reasonable steps—

- regular consultation with other parties in the chain of responsibility, unions and industry associations to address compliance issues
- reviewing driving, work and trip records
- a program to report and monitor (for example, by GPS tracking) incidents of speeding and related risks and hazards
- training and information about speeding for drivers of heavy vehicles, staff and parties in the chain of responsibility for heavy vehicles (within the meaning given by section 214)
- regular maintenance of vehicle components that relate to complying with speed limits (for example, speedometer, engine management system and speed limiters).

¹⁵ Bluff, E & Gunningham, N, *Principle, Process, Performance or What? New Approaches to OHS Standards Setting*, 2003, p.13.

¹⁶ See, for example, paragraphs 620(1)(b) and (c).

4.6 Specification standards

Specification standards advise duty holders how to meet a duty by providing precise and detailed information. These duties identify what preventive measures must be implemented by the duty holder and thus enable authorities to ascertain whether the duty holder has met their duty.¹⁷

The CoR specification standards are used in the mass, dimension and loading; speeding and fatigue management chapters of the HVNL and examples are provided below.

190 Duty of responsible entity

(1) The responsible entity for the freight container must not permit an operator or driver of a heavy vehicle to transport the freight container by road using the vehicle unless the operator or driver has been provided with a complying container weight declaration for the freight container.

215 Particular requests etc. prohibited

A person must not ask, direct or require, directly or indirectly, the driver of a heavy vehicle, or a party in the chain of responsibility for a heavy vehicle, to do something the person knows, or ought reasonably to know, would have the effect of causing the driver to exceed a speed limit applying to the driver.

4.7 Deemed liability provisions

In certain circumstances where a breach of a driver's specification standard relating to keeping documents, or to a mass, dimension and loading; speed or fatigue requirement is identified, CoR provisions in the HVNL automatically extend liability to persons other than the driver and operator of a heavy vehicle.

These 'deemed liability' provisions operate as exceptions to the duties and standards described above. An example of a deemed liability offence is:

183 Liability of employer etc. for contravention of mass, dimension or loading requirement

- (1) This section applies to an offence against section 96, 102 or 111 (a relevant offence).
- (2) If a relevant offence is committed in relation to a heavy vehicle, each of the following persons is taken to have committed an offence against this subsection—
 - (a) an employer of the driver of the vehicle if the driver is an employed driver;
 - (b) a prime contractor of the driver of the vehicle if the driver is a self-employed driver;
 - (c) an operator of the vehicle or, if it is a combination, an operator of a vehicle in the combination;
 - (d) a consignor of any goods for road transport using the vehicle that are in the vehicle;
 - (e) a packer of any goods in the vehicle;
 - (f) a loading manager for any goods in the vehicle;
 - (g) a loader of any goods in the vehicle.

4.8 Duty holders and applicable HVNL chapters

The table below shows which parties, as defined in the HVNL, have obligations under which chapters of the law.

¹⁷ Bluff, E & Gunningham, N, Principle, *Process, Performance or What? New Approaches to OHS Standards Setting*, 2003, p.6
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| CoR Party | Chapter 4: mass, dimension and loading | Chapter 5: speeding | Chapter 6: fatigue | Chapter 3: standards and safety | Chapter 8: accreditation |
|------------------|--|---------------------|--------------------|---------------------------------|--------------------------|
| Operator | ✓ | ✓ | ✓ | ✓ | ✓ |
| Employer | ✓ | ✓ | ✓ | ✓ | |
| Prime Contractor | ✓ | ✓ | ✓ | ✓ | |
| Consignor | ✓ | ✓ | ✓ | | |
| Consignee | ✓ | ✓ | ✓ | | |
| Loading Manager | ✓ | ✓ | ✓ | | |
| Loader | ✓ | | ✓ | | |
| Packer | ✓ | | | | |
| Scheduler | | ✓ | ✓ | | |
| Unloader | | | ✓ | | |

4.9 Relationship between the HVNL and model WHS Act

Section 18 of the HVNL provides for the HVNL's relationship with primary WHS laws and states that:

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| <p>18 Relationship with primary work health and safety laws</p> <p>(1) This Law does not limit the application of the primary WHS Law or any regulations made under that Law.</p> <p>(2) Evidence of a relevant contravention of this Law is admissible in any proceeding for an offence against the primary WHS Law.</p> <p>(3) Compliance with this Law, or with any requirement imposed under this Law, is not, in itself, evidence that a person has complied with the primary WHS Law or any regulations made under that Law or with a common law duty of care.</p> <p>(4) In this section—primary WHS Law, for a participating jurisdiction, means the law that is declared by a law of that jurisdiction to be the primary WHS Law for the purposes of this Law.</p> |
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Section 18 provides that compliance with the HVNL is not, in itself, evidence of compliance with WHS law, which is reasonable given that the WHS law contains broader general duties than the HVNL's CoR provisions. Section 18 also acknowledges that obligations may co-exist under both acts and makes evidence relating to a contravention of the HVNL admissible in proceedings under the Model WHS Act.

Thus the HVNL is designed to operate alongside the model WHS Act.¹⁸ However, as the CoR provisions emerged primarily in the context of occupational health and safety laws and environmental regulation, the road transport industry is now subject to some overlapping obligations directed to the same or very similar outcomes, such as ensuring safety and removing or minimising safety risks associated with driver fatigue.¹⁹ Arguably, the primary duties of care contained in the model WHS Act cover similar ground to the HVNL's CoR offences in that they both seek to address high risk conduct by imposing obligations on parties to ensure the safety of the public and the driver of the vehicle (the worker).

Framers of the HVNL envisaged that over time, as successful and unsuccessful enforcement activities emerge, the scope and boundaries of the WHS and HVNL obligations will become more clearly defined, in turn providing greater guidance for chain parties on the extent of their duties.²⁰

¹⁸ Hatcher, A, *Review of Regulatory Approaches to Transport Safety Law*, 2008, p.35 & 57.

¹⁹ Hatcher, A, *Review of Regulatory Approaches to Transport Safety Law*, 2008, p.76.

²⁰ Bond University submission to the Chain of Responsibility Taskforce. April 2014, p.12.

4.10 Work, Health and Safety approach to defining duties

Australia's approach to Work, Health and Safety (WHS) is based on the recommendations of Lord Robens committee, which in 1970 led an inquiry into safety and health at work for the UK government.

The committee found that the fundamental defect with UK work, health and safety law was its rigidity, taking the form of excessively detailed prescriptions for dealing with every identifiable health or safety contingency. These specifications quickly became obsolete and impeded innovation.²¹

The recommendations of the Robens committee resulted in widespread legislative reform across the UK and Australia. Work health and safety laws became more self-regulatory and performance-based.²²

The fundamental advantage of this approach is that duties of care are broad and outcome focused. This means that they can be applied in a variety of circumstances. To this end, the Robens model includes two principal elements:

- a single umbrella statute containing broad generalist duties based on the common law duty of care
- self-regulation by duty holders, who consult with employees to determine how they will comply with the primary duty.²³

In practice, prescriptive requirements were replaced with a three-tiered approach involving regulations and industry practice codes designed to support general duties in the primary act.

4.10.1 Primary duties of care

The model WHS Act is organised around primary duties of care intended to cover a range of persons, including persons conducting a business or undertaking (PCBU), officers, workers and other persons who are at a workplace.²⁴ The WHS Act prescribes only the higher duties of these persons. All detailed provisions and specific obligations applicable to particular parties or in certain circumstances are contained in the Act's regulations.²⁵

Like the duties and obligations imposed by the HVNL, each primary duty in the WHS Act is qualified. In the case of the WHS Act, the primary duty of care of a PCBU is to ensure, so far as is reasonably practicable, the:

- provision and maintenance of a working environment that is safe and without risks to health, including safe access to and exit from the workplace
- provision and maintenance of plant, structure and systems of work that are safe and do not pose health risks (for example providing effective guards on machines and regulating the pace and frequency of work)
- safe use, handling, storage and transport of plant, structure and substances (for example toxic chemicals, dusts and fibres)
- provision of adequate facilities for the welfare of workers at work (for example access to washrooms, lockers and dining areas)
- provision of information, instruction, training or supervision to workers needed for them to work without risks to their health and safety and that of others around them
- health of workers and the conditions of the workplace are monitored to prevent injury or illness arising out of the conduct of the business or undertaking, and
- maintenance of any accommodation owned or under their management and control to ensure the health and safety of workers occupying the premises.

²¹ Office of the Australian Safety and Compensation Council – Workplace Relations Ministers' Council, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, 5th Edition, 2008, p.VII.

²² Maxwell, C, *Occupational Health and Safety Act Review*, March 2004, p 77.

²³ Office of the Australian Safety and Compensation Council – Workplace Relations Ministers' Council, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, 5th Edition, 2008, p.VII.

²⁴ Safe Work Australia, *Guide to the Model Work Health and Safety Act*, 2012, p.7.

²⁵ Ibid.

There are also specific duties of care for various identified types of PCBUs (including designers, manufacturers, suppliers, importers of plant, substances or structures), which require ensuring the health and safety of specified persons *as far as reasonably practicable* who may be affected by the business or undertaking of that type of duty holder.²⁶

Workers on the other hand must, while at work, take reasonable care for their own health and safety and take reasonable care so that their acts or omissions do not harm the health and safety of other people. A similar duty is placed on other persons at a workplace.²⁷

Officers (i.e. directors and executive officers) also have a positive duty to exercise due diligence and ensure compliance with obligations created by the Act. A non-exhaustive list of actions necessary for due diligence is set out in the act and includes taking reasonable steps to:

- acquire and keep up-to-date knowledge of WHS matters
- gain an understanding for the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
- ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking (this includes verifying the provision and use of resources and processes)
- ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information
- ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under the WHS Act (this includes verifying the provision and use of resources and processes).²⁸

The model WHS Act makes a failure to discharge the duties of care, in and of itself, an offence and this is not dependent upon some harm or injury to a person or an incident having occurred. In this respect, the model WHS Act is more system-oriented (performance-based) and less prescriptive than the HVNL. Appendix A summarises the approach to duties taken under the Rail Safety National Law, which is more akin to the WHS approach.

4.10.2 Improving the model WHS laws

On 30 June 2014, ministers responsible for work health and safety from all Australian governments agreed to release an issues paper and regulation impact statement examining improvements to the model WHS laws. The review investigated ways in which the model WHS Act could be improved to reduce red tape and make it easier for businesses and workers to comply with their work health and safety responsibilities.

Safe Work Australia (SWA) has received positive feedback from stakeholders on the current duties of care, especially in relation to the use of the officer duty of care in increasing industry awareness of its responsibilities.

SWA has indicated that it will not be recommending any changes to the Act's duties of care. However, it does consider that further guidance material on the due diligence defence should be developed.²⁹

The findings of the review were presented to ministers in late October 2014. However, they were not released publically at the time. The CoR duties review will consider any finding from the WHS review that may affect the structure of duties.

The NTC notes that separate reviews have also been undertaken in Queensland, South Australia and Northern Territory, with changes to record keeping requirements being enacted in Queensland. Victoria has also undertaken a review of its Occupational Health and Safety regulations.

²⁶ Ibid.

²⁷ Safe Work Australia, *Guide to the Model Work Health and Safety Act*, 2012, p.9.

²⁸ Office of the Australian Safety and Compensation Council – Workplace Relations Ministers' Council, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, 5th Edition, 2008, p.9.

²⁹ Based on discussions between the NTC and SWA in October 2014.

4.11 Questions for stakeholders

1. How effective do you think the current approach to CoR is?
2. What impacts (positive and/or negative) have the CoR duties and obligations had on:
 - a) your organisation?
 - b) the road transport industry?
 - c) compliance and enforcement activities?

5. Are there problems with the current CoR regime?

Stakeholders and the NTC have identified a number of potential problems with the current HVNL CoR provisions. These are outlined below.

5.1 The provisions of the HVNL need to meet the objectives of the law

The HVNL's CoR provisions must meet the objects of the law. Section 3 of the HVNL outlines these objects:

3 Object of Law

The object of the Law is to establish a national scheme for facilitating and regulating the use of heavy vehicles on roads 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.

The methods that the HVNL prescribes to achieve CoR objectives sometimes conflict or operate at cross purposes. Because the HVNL does not apply a principles-based approach to risk management, instead opting for prescriptive requirements, it does not create a holistic and unified approach to achieving safety outcomes. The absence of such an approach also creates difficulties for regulators who must balance the various and, at times conflicting, objects of the law.

A principles-based approach focuses on the ultimate outcome to be achieved – such as the Objects of the HVNL. Rather than focusing on defining processes and discrete undertakings, this approach provides for regulated parties to determine how they go about achieving these outcomes as best suits their business or available resources.³⁰

5.2 Safety as an integrated approach

The HVNL is an attempt at national standardisation founded upon existing models of regulation (the model laws). As a result of the amalgamation of the model laws, which were drafted at different times and in different ways, the chapters of the HVNL dealing with fatigue, speed, mass, dimension and loading, and vehicle standards contain various duty types and constructions. These generally relate to specific identified risks contained within each area. As a result, safety is not dealt with in an integrated way that accounts for all the risks that may endanger safety in the industry.³¹

Difficulties may arise from the fact that industry parties must attempt to comply with multiple duties concerning separate subject matters (i.e. speed, fatigue etc.) found within different chapters rather than focusing at a higher level on the minimisation of safety risks. This may also lead to confusion and misunderstanding about which parties are responsible for particular obligations, how different obligations are related, and how these obligations need to be met.³²

5.3 Identification of parties in the chain

The HVNL contains a number of different duty constructions, applying to different parties and with differing requirements. It is reasonable that the law creates obligations that may differ to meet certain outcomes. However, the different duty constructions across the speed, fatigue and mass,

³⁰ Ibid.

³¹ Hatcher, A, *Review of Regulatory Approaches to Transport Safety Law*, 2008, p.111.

³² Ibid, p.113.

dimension and loading chapters means that a coordinated approach to compliance is difficult for parties with obligations in two or all of these areas to achieve.

Ambiguous provisions may make it difficult for chain parties to understand and comply with their legal obligations. Some stakeholders have indicated that the CoR provisions of the HVNL would benefit from redrafting, with the focus on clarity and consistency, which will also help authorised officers to properly exercise their powers. The taskforce indicated that this should occur after the duties review is complete. According to relevant stakeholders, this has also frustrated the effective investigation and enforcement of non-compliance.

Further, some stakeholders maintain that the definitions of parties in the HVNL may not be directly translatable to operational circumstances. This may prevent parties from correctly identifying some or all of their obligations. It may also create difficulties for authorised officers in identifying the relevant party for a breach. If parties have difficulty in understanding their obligations and/or officers have difficulty in identifying parties, then CoR may not be achieving the compliance outcomes that regulators intended.

5.4 Covering all off-road and third parties who influence on-road activities

One of the primary objectives of the CoR concept is to broaden enforcement away from drivers and operators to off-road parties that influence on-road outcomes.³³ Arguably, a fundamental problem in maintaining a prescriptive approach to defining CoR is that if a party or a party's responsibility cannot be identified or exactly described then the law will not recognise them in the chain.

This creates a situation where the party most responsible for a breach may not be able to be targeted. This frustrates the ability of enforcement agencies and other chain parties to extend liability up the chain. This is evident in the targeting of parties where the supply chain is complex or where there is insufficient documentation to clarify the roles of parties.

5.5 Promoting proactive compliance

While it may be the intention of CoR to promote a proactive approach to compliance, the manner in which the regime is constructed may not achieve this. The HVNL, in some respects, perpetuates a command and control approach to compliance and enforcement. While flexibility may exist in the 'all reasonable steps' defence, parties are restricted to addressing each obligation applicable to them on a provision by provision and chapter by chapter basis.

As the CoR provisions are siloed by category (speed, fatigue, and mass, dimension and loading) the HVNL neither applies nor encourages a systemically consistent approach to risk identification, assessment and management.

5.6 Quantum of maximum penalties

The maximum penalties prescribed by the HVNL are considerably smaller than the maximum penalties prescribed by the model WHS Act for breaches of safety duties involving equivalent degrees of risk (such as fatigue breaches). This inconsistency may result in a legislative 'mixed message' which could mislead industry parties and courts about the risks associated with non-compliance.³⁴

5.7 Conclusion that CoR should be reviewed

The issues described above are arguably serious enough to suggest that the CoR regime may need to be changed. The following section discusses options that may assist in addressing these issues.

³³ National Transport Commission. (September 2011). *Heavy Vehicle National Law Regulation Impact Statement*. p 118.

³⁴ *Ibid*, p.113.

5.8 Questions for stakeholders

3. How effective do you think the current approach to CoR is in achieving the objects of the HVNL?
4. Do you agree with the problems outlined in this chapter? Are there other issues with the current CoR regime that should be considered, from the following perspectives (as applicable to you):
 - a) legislatively?
 - b) operationally?
 - c) for compliance?
 - d) for enforcement?
5. Do you feel significant reform of the CoR provisions in the HVNL is warranted? Alternatively, could the existing approach be made more effective by minor or modest changes?

6. Options for reform

This chapter outlines four options for reforming the HVNL's approach to CoR and assesses their advantages and disadvantages.

A number of stakeholders suggested to the CoR taskforce that a primary duty (referred to as a 'general duty' at the time) be incorporated into the HVNL.³⁵ Two options were proposed first, a whole of HVNL duty in keeping with the WHS Act approach. Second, chapter-based duties similar to that found at section 229 of the HVNL, applying to driver fatigue.

An alternative approach is to include further specific duties in the HVNL. As previously noted, the current approach to CoR is largely achieved through a variety of specific duty constructions placed within the various HVNL chapters, which separately deal with a particular safety risk (speed, fatigue, mass, dimension and loading).

A final option is not to make any legislative change, but support CoR with more guidance and education about the obligations of parties, and more investigation of CoR breaches.

The options are neither exhaustive nor are they exclusive of each other. A combination of various options may be the most appropriate way forward. The NTC believes that additional guidance and education to help parties to comply with their obligations should be provided regardless of which reform option is adopted.

For ease of comprehension, the characteristics, advantages and disadvantages of each option will be described sequentially. These descriptions have been further informed by a workshop held on 15 October 2014, with participants from industry, regulators and police agencies.

6.1 Option 1: Primary (general) duty of care

This option involves including an overarching primary duty of care (covering the entire HVNL) applying broadly across parties and focusing on safety outcomes.

The key feature of a primary duty is its comprehensive nature. It requires all parties to consider a wide range of hazards and risks. The broad scope of the duty structure also means that it will not be made obsolete by changes in terminology, technology and practice. Similarly, it provides considerable flexibility for duty holders to determine what actions are required to suit their operations and enables duty holders to devise innovative compliance practices.³⁶ Indeed, this was the primary rationale behind the use of primary duties as the fundamental basis for Occupational, Health and Safety (now WHS) legislation.³⁷

It may be appropriate to have several duties drafted in the HVNL similar to the model WHS approach depending on a number of factors, including the definition of parties to which the duty applies

By way of a broad example, a primary duty may be drafted in this way:

Example

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

A definition of 'a person conducting a transport undertaking' could be '*any person whose acts or omissions, affect, or exert influence on, on-road activities, or do affect or which are likely to affect the way on-road services are delivered*'.

³⁵ *Chain of Responsibility Review: Taskforce Report* April 2014, p 22.

³⁶ Bluff, E & Gunningham, N, *Principle, Process, Performance or What? New Approaches to OHS Standards Setting*, 2003, p.9.

³⁷ *Ibid.*

This is provided as an example for discussion. Any reform would need to carefully consider the wording of such a duty.

Alternatively, using current HVNL terminology and the example provision found at section 229, a duty may be framed as:

Example

A party in the chain of responsibility must take all reasonable steps to ensure that a breach of this law does not occur.

It should be noted that this second example does not focus on safety. Rather, it focuses on ensuring compliance with the existing prescriptive requirements of the HVNL. In addition, the current definition of a 'party in the CoR' in the HVNL is restricted to the particular definition supplied in each separate chapter of the law. So, these definitions are different for mass, dimension and loading, speed, and fatigue. Further, this example maintains the reasonable steps test already established under the HVNL.

Specific to this option, consideration will need to be given to the location of such a duty in the HVNL and the extent of its application. CoR currently applies to the fatigue, speed and mass, dimension and loading chapters, and to some extent – vehicle standards. However, the HVNL also contains chapters about the Intelligent Access Program, accreditation and registration (amongst others), which may or may not be captured by a primary duty provision.

A number of key issues will need consideration in further developing this option, including but not limited to (see chapter 7 of this paper for further detail about these issues):

- The number of primary duties – whether one overarching duty would be included in the HVNL, or several applicable to different groups of parties (similar to the WHS approach).
- Appropriate standard of duty – whether 'so far as reasonably practicable' or 'take all reasonable steps' is the most appropriate test.
- Identification of chain parties – whether the primary duty should apply to all chain parties in an undefined, grouped or defined manner. Currently 'party in the chain of responsibility' is a defined term within several chapters of the HVNL, which may not be appropriate to a primary duty.
- Appropriateness of monetary penalties – currently the HVNL's highest penalty is \$20,000, while the highest penalty for a CoR offence is \$10,000. By contrast, the WHS approach in NSW, for example, has penalties in the hundreds of thousands, and millions for corporate offences.³⁸

6.1.1 Advantages

The flexibility of this type of duty allows for innovation and adaptation in risk management, which can be tailored to the circumstances of the party to whom the duty applies, their role within the chain, the nature of the risk, and the reasonableness of the party's use of resources to meet the risk.

The breadth of the duty could encompass all relevant parties, current and emerging hazards, and changes in operations. Further, the breadth of the primary duty would allow each of the HVNL's objects to be regulated in one common way.

The use of a primary duty does not single out one chain party as having a higher duty than another. However, it recognises that the steps they can and should reasonably take to execute their duty may differ. It may also ensure that relevant parties are not missed or inadvertently excluded by not being directly referenced. And it should capture parties who cannot easily be identified by title or their performance of a specific task.

From a compliance perspective, the overarching primary duty could mean parties can effectively address different obligations pertaining to mass, dimension and loading; speed and fatigue through

³⁸ Section 31 Reckless conduct – Category 1, *Work Health and Safety Act 2011 (NSW)*

the one broad approach to risk identification, assessment and management. Similarly, for enforcement and prosecution purposes, offences committed across multiple safety areas (mass, dimension and loading, fatigue, speed and vehicle standards) may be investigated and, where necessary, prosecuted as failure to observe one overarching duty.

An overarching primary duty could be included in the HVNL, without the loss of more prescriptive requirements for instances where more prescriptive obligations and instruction may be necessary, but would provide opportunities to streamline requirements.

To work effectively, this approach requires extensive supporting material, including guidelines, to help:

- industry to understand their obligations and how to meet them
- regulators ensure the duty is appropriately administered
- enforcement agencies to ensure consistent enforcement across jurisdictions.

6.1.2 Disadvantages

The breadth and flexibility of primary duties create significant ambiguity and uncertainty for duty holders and enforcement officers. A primary duty does not articulate a desired goal to be achieved (that is, the performance outcome), nor is it possible often to determine clearly whether compliance has been achieved unless the matter is tested in court.

An overarching primary duty may not be relevant to all parts of the HVNL. If the duty is to have broad application across the HVNL chapters, the drafting of the provision would need to be framed in such a way as to not place undue obligations on parties where they may not be appropriate.

While an overarching primary duty may be the most logical and potentially the most effective way to promote safety in the heavy vehicle industry, this approach would most likely be ineffective if chain parties do not understand their responsibilities. To ensure this does not occur, the development of guidance material similar to that provided by Safe Work Australia would be essential.

There are also industry perceptions that a primary duty may be impose more onerous duties than those that are currently used, and that they may be enforced more rigorously.

6.2 Option 2: Chapter-based duties

Option 2 proposes the inclusion of high level duties within the applicable chapters covering speed, fatigue and mass, dimension and loading. A chapter-based duty could also be included in the vehicle standards chapter.

As previously stated, the closest provision to this option in the HVNL in section 229 is:

229 Duty of party in the chain of responsibility to prevent driver driving while fatigued
(1) A party in the chain of responsibility (a party) for a fatigue-regulated heavy vehicle must take all reasonable steps to ensure a person (the other person) does not drive the vehicle on a road while the other person is impaired by fatigue.

The breadth of the provision is contained in its application to 'a party in the chain of responsibility' and the requirement that 'all reasonable steps' be taken to execute the obligation.

However, there are a number of limitations on the breadth of the provision, as the:

- application is limited to fatigue-related heavy vehicles, which is not all heavy vehicles
- term 'party in the chain of responsibility' is restricted by the definition of discrete parties at section 227
- reasonable steps that may be taken are effectively outlined in section 623.

As examples, chapter-based duties could be framed as:

Example – Chapter 4: Vehicle operations—mass, dimension and loading

A person conducting a transport undertaking must so far as reasonably practicable ensure that a mass, dimension and loading breach does not occur.

Example – Chapter 5: Vehicle operations—speeding

A person conducting a transport undertaking must so far as reasonably practicable ensure that a speeding breach does not occur.

Alternatively, using the current terminology in the HVNL of ‘party in the CoR’ and ‘all reasonable steps’, chapter based duties could be framed as:

Example – Chapter 4: Vehicle operations—mass, dimension and loading

A party in the chain of responsibility must take all reasonable steps to ensure that a mass, dimension and loading breach does not occur.

Example – Chapter 5: Vehicle operations—speeding

A party in the chain of responsibility must take all reasonable steps to ensure that a speeding breach does not occur.

A number of issues will need further consideration to develop this option should it be preferred. Relevant issues are detailed at chapter 7 of this paper, and include, but are not limited to:

- Appropriate standard of duty – whether ‘so far as reasonably practicable’ or ‘take all reasonable steps’ is the most appropriate test.
- Identification of chain parties – whether the duty should apply to all chain parties in an undefined, grouped or defined manner. Currently ‘party in the chain of responsibility’ is a term defined differently in the speed and fatigue chapters of the HVNL.

6.2.1 Advantages

This approach captures much of the advantage of the primary duty of care, being the breadth of both duty holders and actions that are covered, while restricting the focus of that duty to the particular subject matter covered by the chapter in question (for example, speed).

The overarching primary duty discussed at Option 1 may be too broad in its application, not relevant in the context of some of the HVNL’s provisions (as they relate to the creation and administration of the law and its regulations and not operational matters) and potentially a duplication of the WHS obligation. For this reason, the placement of a similarly constructed obligation within the chapters addressing particular risks may present an alternative.

Chapter based duties may focus the attention of industry on those activities, as well as the provisions that apply to their operations, while also providing regulators and enforcement agencies with broad enough scope to target the root cause of non-compliance.

6.2.2 Disadvantages

While chapter-based primary duties establish responsibilities that may be more readily understood than a primary duty of care, there are a number of disadvantages with this option.

Heavy vehicle operations do not always distinguish the boundaries between responsibility for, say, speed and fatigue as it is in black letter law. Thus chain parties may not be certain about where their responsibilities begin and end, especially where they are demarcated by relatively arbitrary chapter-based distinctions.

For example, a focus on preventing speeding breaches may mean that some parties in the chain do not focus on other responsibilities, such as fatigue or mass, dimension and loading over which they may have some influence. At the same time, enforcement agencies may experience difficulty investigating and preparing for prosecution cases that hold parties responsible for breaching various itemised duties rather than for failing to uphold an overarching primary duty, which would encompass all relevant responsibilities.

In addition, while chapter-based duties can be more specific, numerous such duties can result in repetitive, lengthy legislation that necessitates the creation of complex guidelines. As with an overarching primary duty, the need for adequate and succinct information resources for industry and regulators becomes essential. The inherent risk of a chapter-based approach is that by duplicating processes throughout different chapters the creation of clear, generic guidelines becomes progressively more challenging. Further, duplicated provisions increase compliance costs.

6.3 Option 3: Additional specific obligations

Option 3 would see the HVNL include additional obligations to address specific risks and behaviours. This approach uses the current specific duty constructions in the law to extend CoR in a targeted and precise manner.

Even though this option replicates the current approach to CoR in the HVNL, there are a number of issues that will require consideration should this be the preferred option, some of which are outlined at chapter 7 of this paper. These include, but are not limited to:

- Identification of parties in the chain – a number of parties already hold CoR obligations under the HVNL. Consideration needs to be given to whether these parties should have additional obligations applied to them, or whether there are additional parties who should be captured under the HVNL.
- Identification of behaviours and/or outcomes to be captured – the specific mischief and outcome that is to be addressed by the duty will need to be identified.

6.3.1 Advantages

Rather than imposing a broader duty of care, identified gaps may be managed by introducing further intermediate duties, process-based requirements and specification standards that outline the behaviour to be targeted and the steps to be taken to meet the duty.

This is in line with the role of the HVNL in dealing with specific transport related matters such as vehicle standards and mass, dimension and loading requirements.

6.3.2 Disadvantages

While specific duties are intended to provide clear guidance about processes that must be followed to ensure compliance, enshrining fixed duties and compliance procedures in law tends to preclude parties from being able to determine alternative and perhaps more appropriate and advanced procedures.

Addressing issues in an ad hoc fashion has already made the CoR regime more complex and difficult to understand than it needs to be. Responding to singular issues as they arise is less likely to remedy current inconsistencies or deficiencies in the law.

The prescriptive nature of specific duties does not promote innovation and adaptation in the development of risk management approaches and do not allow parties to tailor measures to suit their particular operations, role/s in the chain, the nature of the risk/s they must mitigate, and the resources they should reasonably use to comply.

In addition, specific duties can only work by clearly identifying specific parties in the chain. But in doing so they focus on job titles and a restricted range of roles that various parties perform. This approach cannot capture the diverse range of roles that parties in the chain may actually perform or the evolution of roles in a constantly changing operational environment.

The specific duties approach is resource intensive and inefficient from both administrative and enforcement perspectives. It compels authorities to compile exhaustive breach lists and mount prosecutions on numerous infractions rather than a single higher level offence, such as a failure to meet a primary or principles-based duty.

Finally, a specific duties approach can encourage a bureaucratic approach to compliance and enforcement, and potentially increases the red tape burden.

6.4 Option 4: No legislative change; focus on operational/policy components

Option 4 would see no change to the current duties regime. Instead, regulatory attention would focus on providing more guidance and education on the obligations of parties and conducting more investigations of CoR breaches.

The provision of additional guidance to parties to help them comply with their obligations should be developed regardless of which option is adopted.

6.4.1 Advantages

This option preferences greater effort on making the existing CoR regime work better, rather than investing resources in the development of more regulatory burden where it may not be necessary.

Arguably, the parties capable of influencing or controlling HVNL compliance outcomes are already sufficiently covered by the current CoR regime. In addition, parties may also be covered by alternative legislation such as the model WHS Act, Corporations Act, and accessorial liability (aiding, abetting, counselling and procuring) through jurisdictional common and codified criminal law.

Efforts should be directed into the development of more and improved support materials to underpin the current legislative approach. Better resourcing of CoR investigations and prosecutions and the creation of the National Heavy Vehicle Regulator's (NHVR) CoR unit would be key priorities of this option.

6.4.2 Disadvantages

There are arguably obvious gaps in the current law, particularly in relation to vehicle maintenance and extending liability to undefined off-road parties, and an approach that works purely within the current framework is unlikely to fill these regulatory gaps.

6.5 Review of options

The following table compares each option discussed above against the objects of the HVNL and the issues identified under chapter 4 of this paper.

| | Options for Reform | | | |
|--|-----------------------------------|-------------------------|--------------------|--------------|
| | 1: Primary (general) duty of care | 2: Chapter-based duties | 3: Specific duties | 4: No change |
| Objects of the HVNL³⁹ | | | | |
| (a) promotes public safety | ✓ | ✓ | ✓ | ✓ |
| (b) manages impacts | ✓ | ✓ | ✓ | ✓ |
| (c) promotes industry productivity and efficiency | ✓ | ✓ | ✓ | ✓ |
| (d) encourages productive, efficient, innovative and safe business practices. | ✓ | ✓ | ✓ | ✓ |
| Key issues for consideration⁴⁰ | | | | |
| Safety as an integrated approach | ✓ | X | X | X |
| Provides parties with clarity about their duties | ✓ | ✓ | X | X |
| Covering all off-road parties and third parties who influence on-road activities | ✓ | X | X | X |
| Promotes proactive compliance | ✓ | ✓ | X | X |

³⁹ Although each of the options addresses the HVNL Objects, the degree to which they do so differs. CoR taskforce members agreed that the current CoR regime is functional, therefore even option 4 must meet the high level objectives of the Law. However, no change to the CoR regime would not address those 'identified issues', which are integral to the manner in which those outcomes are achieved.

⁴⁰ See chapter 5 of this document for discussion of these issues.

The information provided in this chapter is based on research and discussions with stakeholders to date. On this basis, option 1 of a primary (general) duty of care appears to best meet the HVNL's objects and the key issues that have been raised for consideration. Option 2, which proposes chapter-based duties, also addresses many of the assessment issues, while options 3 and 4 do not address the assessment issues beyond the objects.

Although the table indicates that each option addresses the objects of the HVNL, they do so to different degrees and in different ways. For example, it would be remiss to suggest that the current HVNL CoR provisions do not meet the law's objects. However, a primary duty may allow parties to take a more integrated approach to safety risk minimisation, while the current specific duties approach might be dealt with on an offence by offence basis.

As this chapter outlines, there are advantages and disadvantages to each options. To this end, it may be the case that a combination approach is the most appropriate for improving the HVNL's CoR regime.

The preferred option(s) will need further analysis to understand legislative and operational impacts. Dependent on the preferred option, the volume of reform to the law required for its development may differ. A primary duty approach per option 1, for example, is new to the HVNL and as such its interaction with the current provisions may require more research and testing. This will occur during the next phase of the project, and issues that will be considered include (as further outlined in chapter 7 of this paper):

- number of primary duties
- appropriate standard of duty
- identification of chain parties
- onus of proof for extended liability
- appropriateness of executive officer liability
- appropriateness of monetary penalties
- impact on enforcement tools
- impact on enforcement powers
- the need for guidance material
- impact on resources
- the role of industry codes of practice

Additionally, before the preferred approach is introduced to the HVNL, guidance material about the changes will need to be made available to ensure provisions are understood and implemented appropriately.

6.6 Questions for stakeholders

6. Which option do you think most appropriately achieves the objects of the HVNL and satisfies the issues outlined in the problem statement? How does this option address these objects and issues? The options are:
- a) Option 1: Primary (general) duty of care
 - b) Option 2: Chapter-based duties
 - c) Option 3: Additional specific obligations
 - d) Option 4: No legislative change; focus on operational/policy components

7. Subsequent issues for consideration

This chapter outlines a number of issues that will require consideration subsequent to a decision about changes to the HVNL's CoR regime. Other issues may arise throughout the development of this project.

The treatment of CoR in the HVNL is best described as an amalgamation of heterogeneous concepts and approaches. The HVNL uses what is conceptually similar to a primary duty in relation to just one area of responsibility: fatigue management. Other responsibilities are managed with various approaches resembling the PCBU orientation of the model WHS Act and the operations-focussed model of the RSNL.

Adopting any sort of uniform approach to defining duties thus represents a substantial change in the operating rationale of CoR in the HVNL.

Conceptually, a primary duty is the most radical move. In practical terms, there are situations where it will not involve much if any change in compliance for industry because the duties placed on chain parties in relation to fatigue, for example, are quite 'general'; i.e. principles-based rather than highly prescriptive, but still imposing substantial, broad responsibilities.

A chapter-based primary duty approach may be less radical a change conceptually, but would nonetheless involve bringing a level of consistency of rationale and approach to different areas of the HVNL that currently do not exist.

The least significant change, conceptually, would be the introduction of additional specific duties. However, this would still involve considerable practical change, as numerous areas of the HVNL do not prescribe duties and procedures in significant detail.

Whichever approach/es are contemplated, it is important that stakeholders recognise, at the outset, that the adoption of any uniform approach to managing CoR duties in the HVNL represents significant reform. A piecemeal approach will be inadequate and a coherent statement of final objectives must precede policy research and certainly implementation.

Some of the potential consequences or areas for further consideration are provided below. These are:

- number of primary duties
- appropriate standard of duty
- identification of parties in the chain
- onus of proof for extended liability
- appropriateness of executive officer liability
- appropriateness of monetary penalties
- impact on enforcement tools
- impact on enforcement powers
- the need for guidance material
- impact on resources
- the role of industry codes of practice

7.1 Number of primary duties

Should option 1 be adopted, law makers would need to consider whether a single primary duty that covers all parties is adopted or whether there would be one primary duty and other duties for parties not covered by the primary duty. The latter approach is used in the model WHS Act, whereby the primary duty on PCBUs is complemented by other duties on workers and officers.

Implementation of this option would oblige law makers to consider a number of issues, including determining the parties to whom the duty or duties would apply and the impact such a system would have on the executive officer liability regime.

7.2 Appropriate standard of duty

To satisfy the requirements of a duty parties are expected to meet (and be able to prove that they have met), an appropriate standard.

The model WHS Act maintains the standard of 'so far as reasonably practicable'. Extensive guidance material is provided by SWA and the various state agencies to help parties to meet this standard. Enforcement activity and associated judgements under the model WHS Act have also provided clarity about the scope and boundaries of these duties.

The HVNL currently uses the 'take all reasonable steps' defence for CoR offences and provides guidance in sections 619-625 to help parties to comply and courts to decide whether all reasonable steps have been taken.

A primary duty or chapter-based duties could be subject to either the standard of 'take all reasonable steps' or 'so far as reasonably practicable'. According to the Hatcher Report, these standards are, in all probability, no different from each other.⁴¹ Both require a duty holder to meet the standard which is, or was at a particular time, reasonably performable to ensure compliance, taking into account relevant matters such as:

- role and capacity of the duty holder
- likelihood of the contravention, hazard or the risk occurring
- degree of harm that might result from the hazard or the risk
- what the person concerned knew, or ought reasonably to know, about the hazard, risk or contravention, and ways of eliminating or minimising its occurrence
- availability and suitability of ways to eliminate or minimise the risk and ensure compliance.⁴²

The use of 'take all reasonable steps' in a primary duty or chapter-based duties may be problematic, as section 623 provides matters that will be regarded as reasonable steps for the purposes of requirements under the speeding and fatigue chapters.

Although the matters to be addressed are sufficiently broad, it effectively allows parties to meet their obligations by ticking off specified tasks, rather than acting in a pro-active manner appropriate to the specifics of their circumstances. This therefore limits the approach towards risk identification, assessment and management sought by primary or chapter-based duties of care.

7.3 Identification of parties in the chain

The parties to whom CoR duties should apply needs careful consideration. A range of approaches could see duties given to:

- every party in the transport industry and chain (in an undefined scheme)
- designated 'parties in the chain' (as currently occurs)
- persons in the chain conducting a business or undertaking (as per the WHS Act approach, and *de facto* in some sections of the HVNL)
- persons involved in designated operations or actions (as in the RSNL, and *de facto* in some sections of the HVNL).

Broadly speaking, reform options can be classified as general or specified duties, determined by the nature of the activity or the role of the party in the chain.

It needs to be considered whether stakeholders intend to extend the scope of duties, both in terms of the range of parties that are covered and the range of duties that parties will have to perform.

Consideration will also need to be given to whether additional obligations will be confined to parties already regulated in the HVNL or if the range of parties or duties are to be expanded whether these will take the form of universal or party/action-based obligations.

⁴¹ Hatcher, A, *Review of Regulatory Approaches to Transport Safety Law*, 2008, p.40.

⁴² Safe Work Australia, *Interpretive Guideline—Model Work Health and Safety Act – The Meaning of 'Reasonably Practicable'*, p.1.

7.4 Onus of proof for extended liability

In some circumstances, where a breach of a driver's duty has occurred, liability is extended to parties other than the driver and operator of a heavy vehicle. The onus of proof lies with the chain party, who is required to establish that they took reasonable steps.

Previous feedback indicated that the use of extended liability may not be the most appropriate or fair mechanism for achieving compliance with the HVNL. This is due to the common law principle that the prosecution should bear the primary onus of proving all the elements of an offence beyond a reasonable doubt.

If a primary (general) duty is the preferred approach, consideration would need to be given to whether extended liability provisions remain relevant. This is because the primary duty would now apply to those parties currently subject to extended liability provisions.

7.5 Appropriateness of executive officer liability

Where it is proposed to introduce new offences or amend existing provisions, consideration about the application of executive officer liability will be necessary. Amendment to the HVNL's executive officer liability provision at section 636 or to Schedule 4, which contains the underlying offences to which executive officer liability applies, may require amendment.

New provisions will need to be assessed against the *COAG Principles and Guidelines – Personal liability for corporate fault*, as to whether they are appropriate for the extension of liability to executive officers.

7.6 Appropriateness of monetary penalties

If it is decided that a WHS-style (PCBU) approach should be more widely (or universally) used in the HVNL through a primary duty of care may mean reviewing the appropriateness of monetary penalties to ensure deterrence.

The monetary penalties prescribed for breaches in the model WHS Act are larger than those currently set in the HVNL, which imposes a maximum penalty of \$10,000 in most cases. By contrast, under the NSW WHS legislation a reckless conduct breach incurs a maximum penalty of:

- \$300,000 and/or five years imprisonment if committed by an individual
- \$600,000 and/or five years imprisonment if committed by an individual as a PCBU or officer of a PCBU
- \$3,000,000 if committed by a body corporate⁴³

For this reason, the taskforce recommended that a review of penalties for CoR offences should follow any review of duties.

7.7 Impact on enforcement tools

The HVNL ascribes to courts and authorised officers a broad range of measures for addressing regulatory non-compliance. The law 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

Although good enforcement measures have been established by the HVNL, some stakeholders argue that the HVNL would benefit from the introduction of additional enforcement measures, such as those in the model WHS Act. Many stakeholders believe that additional measures may provide a degree of flexibility and assist in situations where a monetary penalty might be considered inappropriate to induce compliance.

Considering these views, the taskforce recommended further examination of:

⁴³ Section 31 Reckless conduct – Category 1, *Work Health and Safety Act 2011 (NSW)*

- a) the possible merit of authorised officer issued prohibition orders subject to the inclusion of appropriate safeguards, such as circumstances for use, time limits on application, court review and compensation; and
- b) additional sanctions after the review of additional duties for parties is complete.

7.8 Impact on enforcement powers

Some stakeholders have raised concerns that certain powers given to authorised officers by the HVNL limit their ability to obtain all necessary information to assist a CoR investigation. On this subject, the taskforce review into CoR found that there is:

- divided opinion on the need for/wisdom of expanding powers
- strong support for clarifying powers of enforcement officers (including distinguishing monitoring as opposed to investigatory powers)
- divided opinion on the need for/wisdom of powers to compel persons to answer questions
- strong support for compulsory notification to operators of driver breaches.

The taskforce recommended:

revising the powers of authorised officers after the process to review the possible inclusion of additional duties is complete.

There is little formal acknowledgement in the HVNL, and there has been little subsequent discussion among regulators of the relationship between enforcement powers and the legal processes that are used to investigate offences. These powers need to inform the development of and be tailored to the CoR regime.

Conceptually, the reform of powers must inform discussion about what sort of CoR regime jurisdictions want to operate. But detailed research and subsequent consultation on/implementation of these powers must only follow rather than precede or be run in conjunction with definitive policy decisions. This is in line with the taskforce's recommendation that the powers of authorised officers be revised after the review of duties is complete.

7.9 The need for guidance material

Over time, various publications have been released to assist officers in enforcing road transport law and provide guidance to industry on what might be considered a "reasonable steps" defence.

Some stakeholders have expressed the view that:

- enforcement guidelines should be developed to help officers to interpret and enforce the CoR regime, including when to pursue charges along the chain
- there should be more robust guidance available to help parties to comply with their duties prescribed by the HVNL.

The taskforce review into CoR recommended that:

- a) the NHVR, in consultation with stakeholders, develop a program and timeline for preparing and issuing CoR guidance material to assist parties to comply with their obligations; and
- b) priority be given to the development of NHVR enforcement guidelines for authorised officers, making decisions that pertain to the CoR regime. These guidelines should extend to situations where authorised officers break seals. Where possible the guidelines should be developed in consultation with police.

Any significant reform to CoR in the HVNL will need to be preceded, or at the very least accompanied by the dissemination of guidance material to relevant parties. While such guidance could be based on existing material relating to the HVNL and other regimes, this material should be compiled in a central location, such as with the NHVR, and managed on a nationally consistent basis.

7.10 Impact on resources

During the taskforce review industry strongly supported the establishment of a highly effective, cost efficient, well-resourced regulator, with expert and experienced staff, supported by robust laws.

Industry stressed that the NHVR should be appropriately equipped to ensure its CoR team can adequately address cross-border issues.

Addressing the above, the taskforce recommended that the NHVR:

- a) expedite the establishment of its CoR unit and clarify its role
- b) lead national efforts to improve cross-border CoR investigations and data sharing.

7.11 Potential cost implications

Including new obligations within the HVNL may have administrative and compliance costs for various parties involved, including obligation holders and enforcement agencies. While the focus on risk reduction and safety outcomes is a premium concern, the way these outcomes are achieved needs to be weighed against the cost burden of changes to the law.

The intention of any changes to the CoR regime is to improve administration and compliance for industry, regulators and enforcement agencies. To this end, it is not anticipated that the associated costs will be significant, particularly where compliance is already being achieved. However, costs should be considered in the context of:

- Notification – reporting
- Education – keeping up to date
- Purchasing – of products or services to assist in compliance
- Record keeping – maintaining documents
- Enforcement – costs of audits, inspections or other compliance processes
- Publication and documentation
- Procedural – non-administrative costs

7.12 The role of industry codes of practice

One way that reasonable steps may be demonstrated is through the application of registered industry codes of practice. Industries that have common transport activities such as livestock movement, logging and bulk liquid products may develop codes of practice that provide practical compliance guidance to parties involved in the road transport industry. For example, the ALC publishes several practice codes, while the ATA frequently refers its members to TruckSafe. Some large logistics operators, such as Toll Group, also publish significant compliance material.

Some stakeholders maintain that the status afforded industry codes of practice (i.e. as a means of demonstrating that reasonable steps have been taken), should be changed so that compliance with a relevant code of practice is deemed to constitute compliance with the relevant duty or obligation spelled out in the HVNL. It should be noted however, that the taskforce reported little support for this proposal.

7.13 Questions for stakeholders

7. Using your preferred option for context, what are your views on the following issues:

- a) number of primary duties?
 - b) appropriate standard of duty?
 - c) identification of parties in the chain?
 - d) onus of proof for extended liability?
 - e) appropriateness of executive officer liability?
 - f) appropriateness of monetary penalties?
 - g) impact on enforcement tools?
 - h) impact on enforcement powers?
 - i) the need for guidance material?
 - j) impact on resources?
 - k) potential cost implications?
 - l) the role of industry codes of practice?

8. Do you consider that chain parties understand their responsibilities under CoR? If no,

what should be done to improve this understanding?

9. Do you consider that current guidance materials have helped parties to understand and meet their CoR obligations and duties? If not, what should be done to improve this?
 - a) What are the key areas that require further guidance?
 - b) What form do you feel guidance material should take?

Appendix 1: Comparative approach: Rail Safety National Law

The Rail Safety National Law (RSNL) adopts a co-regulatory approach to safety regulation. While governments establish baseline requirements and specific obligations, industry is permitted to devise its own methods for meeting these requirements/obligations. Rail industry associations generally provide guidance to member organisations in practice codes and standards.

Interaction with WHS

The RSNL works in tandem with, but is subordinate to, WHS legislation at both the Commonwealth and state level. WHS legislation overrides any provisions of the RSNL that are inconsistent with it. In addition, compliance with the RSNL is no defence against offences in WHS law but contravention of the RSNL can be used as evidence of breaches of WHS legislation.

Conceptual approach to safety

The RSNL is designed to capture various broad groups in its ambit and to ensure that they comply with a general concept of 'safety' within a limited sphere of operations. Hence the concept of safety is defined broadly but also restricted to a defined sphere of 'railway operations'.

The broad groups whose safety must be protected comprise rail workers, passengers, other users of railways and the general public. The concept of safety covered in the law covers both workplaces and the activity of the general public. The narrower concept of railway operations means that the law applies only to 'rail transport operator(s)' who perform specified functions. This means that the range of persons and functions in the rail transport industry that are captured by the law is narrower than those to whom the HVNL applies.

Overarching primary duty of care

The keystone of the RSNL is the provision that rail transport operators have an affirmative and overarching duty to *ensure, as far as is reasonably practicable, the safety of the operator's railway operations*. This duty is applied when or where:

- the defendant was a rail transport operator at the relevant time
- there was a risk to the safety of the operator's railway operations
- there is a causal relationship between an identified failure by the operator and a safety risk.

The duty applies to those who design, commission, manufacture, supply, install or erect anything that is known or ought reasonably to be known will be used as or in connection with rail infrastructure and rolling stock (and those who decommission any rail infrastructure or rolling stock).

The duty of taking reasonably practicable action applies to any party who is found to have been in a position to exercise or should have exercised some degree of control over the operations in question.

General and specific duties defined by the law and relevant operation

The RSNL requires parties to observe general and specific duties. While these specific duties are described in significant detail, their observance cannot strictly be described as a prescribed duty because operators are permitted to determine for themselves how they should best minimise and eliminate risk.

The rationale for levying both general and specific duties (i.e. those described in some detail) in broad terms is that any weaknesses in either approach can be compensated for by the strengths of the other method. For example, the breadth of the primary duty means that it applies to work methods/arrangements that could not have been known or anticipated when the law was made. On the other hand, the disadvantage of a primary duty is that it is difficult for duty holders who are not

well-resourced to properly comprehend (and act on) their duties and they therefore require significant guidance to develop appropriate measures to manage their responsibilities.