

IMPROVING SAFETY AND COMPLIANCE, AND SIMPLIFYING ENFORCEMENT – RECENT REFORMS TO AUSTRALIA’S HEAVY VEHICLE CHAIN OF RESPONSIBILITY LAWS*

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Abstract

In November 2015 Australia’s federal, state and territory transport ministers agreed a significant package of reforms to the chain of responsibility obligations of the Heavy Vehicle National Law. These reforms substantially improve the law for both industry and regulators by reducing complexity, improving consistency and clarifying obligations. These reforms also better align the law with Australia’s other national safety laws. The aim of these reforms is to create a proactive culture of heavy vehicle road safety and enforcement, improving safety for the whole community. This paper examines Australia’s unique approach to heavy vehicle road safety through chain of responsibility, and the need for law reform, before then detailing the reforms to be implemented and the anticipated outcomes of these reforms.

Keywords: Chain of Responsibility, CoR, Heavy Vehicle National Law, HVNL, primary duties, executive officers, heavy vehicle, road safety, compliance, enforcement, Australia, Heavy Vehicles, Freight Transport, Symposium

* Another paper on this topic was presented at the proceedings of the 2016 Australasian Road Safety Conference on 6-8 September 2016, Canberra, Australia.

1. Context - Australia's heavy vehicle sector & the growing freight task

In Australia, a heavy vehicle is defined as a vehicle with a gross vehicle mass of more than 4.5 tonnes. This includes rigid trucks, articulated trucks, non-freight carrying trucks, buses and heavy trailers. In 2014, there were 329,464 heavy rigid trucks, 93,853 articulated trucks, 23,144 non-freight carrying trucks and 94,131 buses registered in Australia (ABS 2014).

For the last 40 years Australia's road freight task has been growing by a little over 5 per cent per annum. This rate is expected to double between 2006 and 2020, and triple by 2050 (BITRE 2014, IPA 2009).

In addition, heavy vehicles are also being used more intensively. The total annual distance travelled by heavy vehicles in Australia more than doubled between 1976 and 2012, from 8,457 to 19,398 million kilometres (BITRE 2013).

This growth and increased intensity of heavy vehicle use are stretching regulatory resources, presenting a challenge for heavy vehicle regulation and enforcement.

2. Heavy vehicle crashes in Australia – some statistics

Over the last decade, total annual deaths from crashes involving heavy vehicles reduced an average of 3.2 per cent per year, from 276 in 2005 to 220 in 2014 (BITRE 2015). Taking into account the increase over this period in heavy vehicle numbers, the rate of fatal crashes has dropped even more significantly, by an average of 6.8 per cent per year for articulated trucks, 4.1 per cent per year for heavy rigid trucks, and 9.9 per cent per year for buses. Three-quarters of the fatalities from these crashes are either drivers or passengers, with the majority of these being either the driver or passenger of a light vehicle (BITRE 2015).

However, there has been no comparable decline in the incidence of serious injuries (BITRE 2015). Each year, approximately 1,500 people are hospitalised from crashes involving heavy vehicles, with fewer than half being heavy vehicle occupants (BITRE 2015).

Heavy vehicle crashes impose significant costs on society through death, injuries resulting in pain and suffering, medical treatment and lost productivity through loss of working hours. In addition heavy vehicle crashes and breakdowns result in road asset damage and traffic congestion.

3. Chain of responsibility (CoR) – a uniquely Australian approach to heavy vehicle road safety

Unlike many other parts of the world, Australia does not use operator licencing to regulate its heavy vehicle sector. Instead, and for almost 20 years, Australia's heavy vehicle laws have relied on the concept of chain of responsibility (CoR), first as part of state and territory laws, then in model national laws, and now in the Heavy Vehicle National Law (HVNL).

The HVNL is Australia's key legislation regulating heavy vehicles with a gross vehicle mass of more than 4.5 tonnes and is the cornerstone of the Council of Australian Governments national heavy vehicle reform agenda. The HVNL is intended as a single national law to regulate the use of heavy vehicles in Australia. All Australian states and territories, except Western Australia and the Northern Territory, are participating in the HVNL at this time.

CoR is a key pillar of the HVNL and is therefore a critical area in Australian road safety.

CoR is designed to ensure that any key off-road party in a position to control and influence heavy vehicle on-road behaviour is identified and held accountable. In simple terms, CoR is about recognising the on-road effects of the actions, inactions and demands of key off-road parties in the transport and logistics supply chain, and provides a mechanism for holding these off-road parties accountable. CoR means that the operator of a trucking business is legally responsible for their truck crashed at the side of the road and that a loading manager at a distribution centre can be held responsible for a truck if it loses its load due to inadequate or unsafe loading practices.

The HVNL CoR provisions apply to operators, prime contractors, employers, schedulers, consignors and consignees, loading managers, loaders, packers and unpackers and cover all areas of the HVNL, including speed, fatigue and mass dimension and loading (MDL). For example the HVNL includes specific CoR obligations on employers, prime contractors and operators to ensure their business practices will not cause a driver to exceed applicable speed limits or for a driver to drive whilst fatigued, for example through setting unrealistic schedules or not allowing time for rest breaks. CoR also includes obligations on schedulers to ensure that the driver's schedule will not cause a driver to exceed the applicable speed limit. In certain circumstances, the HVNL extends liability to identified CoR parties where a driver commits an offence, for example where a driver commits a speeding offence or contravenes maximum work requirements or minimum rest requirements. Similar extended liability provisions also apply to executive officers where their corporation commits a CoR offence.

Australia's CoR laws, in particular the introduction of the CoR fatigue laws in 2008, has had a significant impact on management and driver behavior, with statistics showing the number of fatigue incidents halving in 2009 (NTI 2013). Similarly, statistics indicate that for the period 2004-2013, the period covering the national heavy vehicle model laws, fatal crashes involving articulated trucks dropped by 36.2 percent and rigid fatal truck crashes also reduced by 26.1 percent (NTI 2013).

Fatal crashes involving heavy vehicles, Australia — moving annual total

(Each point shows the number of fatal crashes during the preceding 12 months)

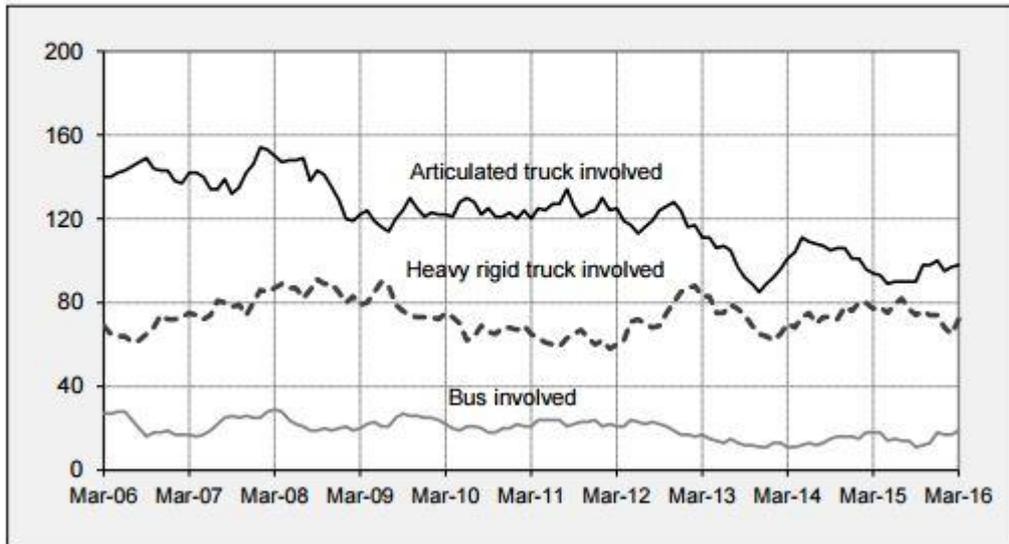


Figure 1 (BITRE 2016).

More recently, and as Figure 1 shows, during the 12 months to the end of March 2016, 204 people still died from 186 crashes involving heavy trucks or buses (BITRE 2016). Accordingly these fatality rates are still too high.

4. The need for reform of Australia's heavy vehicle CoR laws

If CoR laws are so important and safety improvements are being made, why are the laws changing?

Despite ongoing reductions in the number of heavy vehicles involved in road crash fatalities, heavy vehicles still accounted for almost 20 percent of all Australian road deaths in 2012, with this figure largely unchanged in 2014, the year the HVNL commenced operation (BITRE 2015). In addition, although road freight transport workers account for only a quarter of all transport, postal and warehousing workers in Australia, in 2012 road freight workers accounted for 71 percent of all work-related deaths (Safe Work Australia 2013). This number is 15 times the national all-industries fatality rate and is two and a half times the fatality rate for the transport, postal and warehousing industry as a whole (Safe Work Australia 2013).

Accordingly, Australia's freight industry is still one of the most dangerous industries in which to work.

Although the numbers of heavy vehicle crashes are reducing, it is not happening as quickly as authorities would like. In this context the National Transport Commission (NTC) has been advised that while CoR laws are seen as an important part of ensuring safety, they are not being fully utilized. Not all of those to whom CoR applies understand it. Driver surveys by the NTC indicate increasing awareness of CoR but still some skepticism about its effectiveness.

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As noted in the 2015 NTC *Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Policy Paper*, and as recognised by industry and regulators, there are significant limitations with Australia's current national heavy vehicle CoR laws. These limitations include:

- overly prescriptive obligations;
- differing constructions of obligations;
- a reactive approach to compliance and enforcement;
- the need to prosecute multiple offences;
- insufficient penalties; and
- inconsistency with national safety laws.

These issues are discussed below.

4.1 Overly prescriptive obligations

The HVNL prescribes detailed and specific requirements on CoR parties based on the type of risk as identified in each chapter of the law concerning vehicle standards, mass dimension and loading (MDL), speed and fatigue. Under the HVNL, each chain party must address each applicable obligation on a provision-by-provision, chapter-by-chapter basis. Industry has criticized this approach and the provisions as 'overly prescriptive'. The provisions 'do not take into account the wide diversity of business circumstances in the industry and prevent chain parties from developing measures that suit their own risk profile' (ATA 2015). The consequence of this approach is that it 'necessarily focuses the attention of parties in the chain on complying with the detailed requirements of the law rather than on their more general obligations to ensure that heavy vehicles operate in a safe manner' (TfNSW 2015).

From an enforcement perspective, the specific and prescriptive structure is also criticised as impeding the identification and investigation of all chain parties who have a role in ensuring road safety, with the consequence that 'drivers and operators are still overly represented' in prosecutions (TfNSW 2015).

4.2 Differing construction of obligations

Under the HVNL the obligations of CoR parties are constructed in different ways relevant to different chain parties and different risks. This construction is criticized by the national regulator as resulting in 'excessive fragmentation' and a 'proliferation of bespoke safety related legal obligations' (NHVR 2015). For industry, the consequence of this approach is that it is 'unnecessarily difficult for businesses, managers and employees to understand and comply with their legal obligations' (ATA 2015). These differences in construction make it difficult for CoR parties to adopt a coordinated and systems approach to compliance, particularly where obligations cross risk areas. This increases compliance costs.

4.3 Reactive approach to compliance and enforcement

There are 186 CoR offences in the HVNL's vehicle standards, MDL, and speed and fatigue chapters, with 95 of these offences dependent on some harm, incident or injury first occurring before enforcement activities can be undertaken.

This reactive approach to many CoR offences does not promote a proactive and systematic approach to risk identification, assessment and management. For these offences, a proactive approach to enforcement is also not possible. Instead, regulators and enforcement agencies must wait until after the often-catastrophic event, such as a fatality, has first occurred.

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

4.4 Need to prosecute multiple offences

Due to the prescriptive requirements of the HVNL, the regulator and enforcement agencies are often unable to address serious systemic safety risks, except by prosecuting multiple minor offences. The 2014 prosecution of Scott's Transport by NSW Roads and Maritime Services exemplifies this issue. In the Scott's Transport case, charges in relation to 165 separate speeding offences were issued. In the first instance, this resulted in significant fines being imposed against the company, director and general manager, in the sum of \$1.25 million. However, on appeal these fines were reduced to a total of \$85,000.

As the Scott's case illustrates, the current HVNL CoR provisions have the effect of imposing an unreasonable burden on the regulator and enforcement agencies to prepare cases, courts to hear them and transport companies to defend them.

4.5 Insufficient penalties

The maximum court imposable penalty under the HVNL is \$20,000 for an individual, and \$100,000 for corporations. This is significantly lower than the maximum penalties that can be imposed for breach of the primary duty under other national safety legislation, such as the Model Work Health and Safety Act, which imposes a maximum penalty for an individual of \$600,000 and/or 5 years imprisonment, and \$3 million for a body corporate. This inconsistency in penalty quantum between the Model Work Health Safety Act and the HVNL results in mixed messages about importance of safety in the heavy vehicle sector, potentially misleading industry and the courts about the seriousness of the risk of non-compliance with the HVNL.

4.6 Inconsistency with national safety laws

The intent of the CoR provisions of the HVNL is to promote a proactive approach to compliance. However, the current provisions are not conducive to this. As already noted, CoR parties must address each applicable obligation individually.

In addition, the HVNL does not adopt an outcomes based or performance based approach to the obligations of CoR parties. Instead the HVNL adopts a prescriptive approach. This is inconsistent with the best practice approach of other national safety laws, such as the Model Work Health Safety Act, or the Rail Safety National Law, which impose a positive general obligation on duty holders to ensure safety.

Critically, the HVNL does not include any general or overarching positive safety duty for CoR parties. This means that rather than managing risks and safety in an integrated and proactive way, CoR parties must focus on complying with their specific prescribed obligations. As the national regulator notes, this approach prevents industry from leveraging off safety systems that already exist to meet work health and safety obligations (NHVR 2015). For industry, given that the '[t]rucking industry personnel who deal with CoR compliance are almost always responsible for work health and safety as well. Aligning the structure of the two laws would make the HVNL more straightforward for them to use' (ATA 2015).

5. Reforms to Australia's heavy vehicle CoR laws

There is broad support from industry, the national regulator and enforcement agencies for changes to the HVNL CoR laws. Accordingly, in November 2015 Australia's federal, state and territory transport ministers agreed to reform the CoR obligations in the HVNL so that each chain party has a primary duty of care to ensure the safety of their road transport operations.

These reforms are intended to:

- clarify and simplify existing CoR obligations;
- minimise complexity and difficulty in the interpretation of CoR obligations;
- assist both industry and regulators better understand and apply the existing CoR regime; and
- not impose a greater burden on either CoR parties or regulators.

The details of these reforms are set out in the 2015 NTC Primary Duties for Chain of Responsibility Parties and Executive Officer Liability Policy Paper.

Key features of these reforms include:

- reformulating the existing prescriptive HVNL CoR obligations on current CoR parties as a primary duty of care for all CoR parties to ensure the safety of road transport operations, as relevant to the role of each chain party, and as limited to the existing regulatory framework of the HVNL;
- moving to a standard of care of 'so far as reasonably practicable' for all primary duties to align with the standard of care applied in other national safety laws. The practical consequence is that to ensure consistency, that many other offences in the HVNL will also be reformulated to apply the 'so far as reasonably practicable' standard of care as an element of the offence, rather than as an element of the defence to these offences;
- expressly defining the standard of care in the law. Similarly to the definition included in the Model Work Health Safety Act, what is 'reasonably practicable' in the circumstances is dependent on:
 - a) the likelihood of the hazard or risk,

- b) the degree of harm that might result,
 - c) the duty holder's knowledge of the hazard or risk, and the ways to eliminate or minimize the hazard or risk,
 - d) the availability and suitability of ways to eliminate or minimise the hazard or risk, and
 - e) the costs involved in eliminating or minimising the hazard or risk;
- better aligning the penalties for breach of the primary duties with the penalties for breach of the primary duty of care as set out in other national safety laws. This includes adopting a hierarchy of penalties based on risk categorization. This ensures that the highest penalties, including imprisonment, are only available for the most serious breaches involving conduct that exposes an individual to a risk of death or serious injury or illness, and where the duty holder is reckless as to these risks;
 - adopting a set of principles to guide duty holders, regulators and the courts on the application and interpretation of these duties. This includes principles of shared responsibility and accountability;
 - removing the existing prescriptive obligations on current CoR parties where these obligations are covered by the primary duty, reducing the regulatory burden;
 - applying the primary duties to executive officers by reformulating the existing 103 executive officer liability CoR offences as a single positive due diligence obligation. This obligation requires executive officers to ensure CoR parties comply with their primary duty;
 - strengthening investigation powers. Enforcement officers will be able to gather information from third parties for use when investigating potential breaches of the primary duty; and
 - expanding the remedies to include voluntary enforceable undertakings. These are a practical and workable alternative to prosecution available for use across the HVNL, reducing the impacts on the courts and improving regulatory compliance.

In June 2016 the amending legislation detailing these reforms was agreed by Australia's federal, state and territory transport ministers. This legislation is expected to be tabled in Queensland parliament, as the host jurisdiction for the HVNL, later this year.

6. Impact of the reforms

The reform of Australia's heavy vehicle CoR laws:

- clarify and simplify existing obligations;
- assist CoR parties, the national regulator and enforcement agencies better understand and apply the law;
- simplify enforcement;
- better align with Australia's national safety laws and
- reduce red tape and compliance costs.

CoR parties will be able to better align systems and processes for the HVNL with the processes already in place for meeting workplace health and safety obligations. CoR parties can also move from a compliance focus to a risk management focus, enabling greater flexibility in how they and their companies meet their overall safety outcomes.

For enforcement agencies, these reforms will enable better targeted enforcement focused on underlying and systemic safety risks. Enforcement agencies will no longer need to wait for the crash to first occur before taking action.

Overall, these reforms are intended to help reduce the number of heavy vehicle crashes on our roads, reducing deaths and serious injuries.

Time will tell the extent to which the policy objectives of these reforms will be achieved. However, these changes align with very successful reforms in workplace health and safety.

These reforms are a major achievement and represent the outcome of close collaboration between the National Transport Commission, government and industry.

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