

Chain of Responsibility Review Taskforce Report June 2014

Report prepared by: The chain of responsibility taskforce

SUMMARY

As decided in 2012 by the then Standing Council on Transport and Infrastructure, a taskforce consisting of representatives of the road transport industry, road transport regulators, the Transport Workers Union and with the participation of representatives of police forces, undertook a review of chain of responsibility (CoR) provisions under the Heavy Vehicle National Law (HVNL).

The review commenced in May 2013 and was completed in April 2014, in accordance with the time frame set by Ministers. The taskforce, supported by a secretariat of NTC officers, held six meetings, issued three papers for public consultation and arranged three workshops, two involving industry associations and one involving regulators and police. This is the second report from the taskforce to be presented to Ministers with the first being a progress report provided in November 2013.

What was examined

Recognising the overarching public interest in securing public safety and achieving the goals of the HVNL, the taskforce examined three key topics relating to the CoR provisions:

1. the duties of persons who are covered by the chain of responsibility 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 following table summarises the themes and findings resulting from the CoR review.

1. The duties of persons who are covered by the chain of responsibility provisions;
The taskforce considered whether: <ol style="list-style-type: none">(a) additional duties were required;(b) reasonable steps remained an appropriate standard for meeting the CoR duties;(c) other approaches to placing duties on executive officers were preferable.
The findings were: <ol style="list-style-type: none">(a) there would be benefit in investigating general duties further to determine whether additional duties are necessary and if so, whether they should take the form of a positive overarching duty and/or positive chapter specific duties and/or positive party specific duties;(b) support for extending the CoR regime to heavy vehicle standards and roadworthiness but further consideration is needed to settle the standards to be applied and the parties to be covered;(c) subject to State and Territory justice policies support for the development of prosecution guidelines to provide for the types of matters that should be considered before a prosecution is brought under the HVNL.
2. The persons who should be covered and the identification of their roles
The taskforce considered: <ol style="list-style-type: none">(a) whether the existing CoR provisions cover all relevant persons;(b) how duty holders under the CoR provisions could be better informed about meeting their obligations;(c) whether executive officers should be brought more directly under the CoR regime.
The findings were: <ol style="list-style-type: none">(a) there is need for improved and consolidated CoR guidance material and examples on how parties in the chain of responsibility can comply with their obligations under the HVNL;(b) support for the concept of describing a person by role and function rather than title;(c) support for the premise that a party with a material role in influencing road transport should be covered by the chain of responsibility regime

3. Strengthening compliance with and fair and effective enforcement of the provisions

The taskforce considered whether:

- (a) the powers of enforcement authorities should be changed;
- (b) national compliance and enforcement guidelines should be promulgated;
- (c) penalties should altered;
- (d) additional sentencing options should be available;
- (e) how cross-border compliance issues may be better addressed.

The findings were:

- (a) general support for a review of the powers of authorised officers to ensure clarity, fairness and effectiveness;
- (b) general support to produce enforcement guidelines for authorised officers making decisions that pertain to the national CoR regime;
- (c) support for allowing authorised officers, including police, to notify operators that driver breaches under the HVNL have occurred, subject to considerations of procedural fairness, privacy considerations and operational practicalities;
- (d) no support for making changes to the penalties for CoR offences as part of the CoR review, although changes may occur as part of the HVNL Penalties review;
- (e) although the importance of codes of practice is recognised, there is no support for making changes to their current status as a means of demonstrating that reasonable steps have been taken;
- (f) the adoption in the HVNL of court-ordered enforceable undertakings is supported ;
- (g) recognition of the merits of authorised officer issued prohibition orders subject to further examination of appropriate safeguards in relation to the circumstances for their use, time limits on their application, court review and compensation;
- (h) support for stronger guidance from the NTC and NHVR to WHS authorities to emphasise that the NTC guidelines for managing driver fatigue must be regarded as authoritative on issues regarding heavy vehicle driver fatigue;
- (i) support for reviewing the chapters of the HVNL that incorporate CoR provisions to ensure clarity and consistency.

The taskforce has made the following 13 recommendations for Ministers' consideration on these and other related matters. In some areas, the taskforce was unable to reach consensus. Where this has occurred, the report identifies options, and proposes processes for making final decisions.

Topic/ Subtopic	Recommendation	Page
Duties/General Duties	Recommendation 1: The taskforce recommends that the NTC establish a process to investigate the development of broader duties within the chain of responsibility. This should be the first step in resolving outstanding issues.	26
Duties/Specific Duties	Recommendation 2: The taskforce recommends: (a) Extending the chain of responsibility regime to heavy vehicle standards and roadworthiness; and (b) Developing a process to extend the chain of responsibility regime to heavy vehicle standards and roadworthiness. <i>Note that this recommendation complements recommendation 1.</i>	29
Duties/Onus of Proof for Extended Liability	Recommendation 3: 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>Note that this recommendation complements recommendation 1.</i>	32

Parties and roles/Understanding of Roles/Activities/ Undertakings and Responsibilities of Parties	Recommendation 4: The taskforce recommends that the NHVR, in consultation with stakeholders, develop a program and timeline for preparing and issuing chain of responsibility guidance material to assist parties to comply with their obligations.	40
Parties and roles/Parties in the Chain of Responsibility	Recommendation 5: 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 (recommendation 1).	44
Compliance & enforcement/ Enforcement Powers	Recommendation 6: 6.1 The taskforce considers it essential and recommends that 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. 6.2 The taskforce recommends allowing authorised officers, including police, to notify operators that driver breaches under the HVNL have occurred, subject to further consideration of procedural fairness, privacy considerations and operational practicalities. 6.3 The taskforce recommends revising the powers of authorised officers after the process to review the possible inclusion of additional duties (recommendation 1) is complete.	53
Compliance & enforcement/Extra-Territorial Activities	Recommendation 7: The taskforce recommends that the NHVR expedite the establishment of its chain of responsibility unit and clarify its role. The taskforce recommends that the NHVR lead national efforts to improve cross-border chain of responsibility investigations and data sharing.	55
Compliance & enforcement/Penalties for Chain of Responsibility Offences	Recommendation 8: The taskforce recommends that further consideration be given to the penalties for CoR offences after the process to review the additional duties for parties (recommendation 1) is complete.	57
Compliance & enforcement/Non-Government Accreditation Schemes and Industry Codes of Practice	Recommendation 9: 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 (recommendation 1), after which the legal status of codes should be re-examined.	60
Compliance & enforcement/Defences under the HVNL	Recommendation 10: The taskforce recommends that the NHVR develop prosecution guidelines to provide for the types of matters that should be considered before a prosecution is brought under the HVNL.	64

Compliance & enforcement/ Enforcement Measures	<p>Recommendation 11:</p> <p>11.1 The taskforce recommends the adoption of court-ordered enforceable undertakings.</p> <p>11.2 The Taskforce recommends further examination of 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.</p> <p>11.3 The taskforce recommends further examination of additional sanctions after the process to review the additional duties for parties (recommendation 1), is complete.</p>	67
Compliance & enforcement/ Overlapping Obligations	<p>Recommendation 12:</p> <p>The taskforce recommends that stronger guidance be given to WHS authorities so that it is clearer to them that the NTC guidelines must be regarded as authoritative. This might be addressed by joint advice from the NTC and NHVR to the WHS regulators.</p>	70
Miscellaneous/ Consistency in the Drafting and Construction of the Framework	<p>Recommendation 13:</p> <p>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 (recommendation 1).</p>	72

Addendum to the Taskforce Recommendations – Endorsement by the Transport and Infrastructure Council

At its meeting on 23 May 2014 the Transport and Infrastructure Council endorsed the recommendations of the CoR Taskforce Report with the following exception:

The Council

ENDORSED the recommendations of the Chain of Responsibility Review Taskforce Final Report, except for recommendation 2 of the report.

AGREED to ask the National Transport Commission to provide advice to the Council by November 2014 on:

- a) The options for extending Chain of Responsibility provisions to cover heavy vehicle maintenance standards and road worthiness; and
- b) The consistency of the executive officer liability provisions in the national law with the COAG Principles and Guidelines relating to duties of company directors.

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INTRODUCTION

1. Since 1997, heavy vehicle law has included the concept of the chain of responsibility (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.
2. The CoR concept has been carried over to the Heavy Vehicle National Law (HVNL), which is now given effect in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria.¹
3. 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 Act 2011* (WHS Act).
4. These peak bodies requested that this work be part of the Forward Work Program of the National Transport Commission (NTC) and that it be undertaken by a collaborative industry-government taskforce. The peak bodies noted that their support for HVNL Amendment Bill 2012 was predicated on the establishment of a taskforce and also nominated several industry groups for representation on it.
5. Further, as part of a Council of Australian Governments (COAG) reform relating to executive officer liability, jurisdictions have audited their legislation for consistency with the COAG Principles and Guidelines.
6. In November 2012, the then Standing Council on Transport and Infrastructure (SCOTI) agreed that a targeted review of CoR would be undertaken by an industry and government taskforce. The work of the taskforce is guided by agreed terms of reference, which are provided at Appendix A. The review was identified as a priority area by jurisdictions and industry in December 2012.

Purpose of this Paper and Outcomes

7. This paper analyses the views of key stakeholders and interested parties on the structure of the CoR framework in the HVNL obtained through the responses to the CoR Assessment of Options paper published in February 2014. It highlights consistent positions and significant divergences in stakeholder views across a range of related CoR issues. The taskforce recognises the inter-dependence of some issues and that the adoption of one option or proposal may result in the resolution of another issue, meaning changes to resolve the second issue would be unnecessary. For example, the adoption of an overarching general duty would mean the assessment of the HVNL's executive officer liability provisions against the COAG Guidelines and Principles may not be required.
8. The taskforce agrees on the value of the CoR concept and supports the continuation of CoR provisions within the HVNL. Broadly, the taskforce considers that:
 - a) The provisions should be assessed to ensure all important influencers of on-road behaviours are included in the chain.

¹ The Northern Territory will commence the new national law at a later date. Western Australia will not commence the HVNL at this time.

- b) The NTC’s analysis of the provisions relating to executive officer liability should be finalised to ensure consistency with the COAG Principles, recognising that this may not be necessary if a positive duty were to be placed on executive officers rather than the current attributed liability for breaches by corporate parties
 - c) Regulators and enforcement agencies’ should have appropriate, up-to-date powers to enforce CoR provisions.
 - d) Enforcement powers and functions should be subject to modern and transparent enforcement principles, consistent across all participating jurisdictions.
 - e) More efforts should be made in the areas of information, advice and education about CoR.
9. The taskforce has made 13 recommendations for Ministers’ consideration. In some areas, the taskforce was unable to reach consensus as important groups of stakeholders have differing positions on key issues that could not be resolved within the time frame for the review. Where this has occurred, the report identifies options and recommends processes for reaching final decisions.
10. Table 2 provides a broad indication of stakeholder positions on the key issues that have been identified through the collaborative process and represents the views of 18 stakeholders who made formal submissions. Appendices C and D provide an in-depth analysis of respondents’ feedback.

Table 2: Summary of agreement & disagreement on key issues

Issue	For	Against	No Position
Overarching general duty (1,1) ²	10	7	1
Chapter specific general duties (1,2)	8	6	4
Specific duties for mass, dimension and loading (2,1)	6	6	6
Specific duties for vehicle standards (2,2)	6	5	5
Remove reverse onus of proof for extended liability (3,1)	7	8	3
Reassess executive officer liability provisions against COAG Principles (5,1)	6	7	5
Provide greater clarity of obligations (6,1)	13	2	3
Include other entities as parties in the chain of responsibility (7,1&2&3)	11	4	3
Expand powers of authorised officers (8,1)	5	7	6
Ensure clarity of powers of authorised officers (8,2)	10	2	6
Requirement to compel persons to answer questions (8,5)	6	7	5
Requirement to notify operators of driver breaches (8,8)	13	0	5
Requirement to reseal a broken seal (8,10)	4	7	7
Codes of practice deemed as compliance (i.e. ‘safe harbour’) (11,1)	3	9	6
Power for the Regulator to approve non-governmental accreditation schemes (11,3)	5	6	7
Adoption of court accepted enforceable undertakings (13,3)	6	4	8
Define overlapping areas, obligations and responsibilities between the HVNL and WHS Act (14,1)	3	11	4

Purpose of the Chain of Responsibility Review

11. The review aims to address the continued effectiveness of the CoR regime under the HVNL, which is intended to encourage compliance and improve safety. Identified parties in the chain perform particular activities that influence road transport operations and have a direct impact on the safety

² (1,1) Refers to Issue 1, Option 1 as per the issues and proposals listed in appendix D.
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of drivers and the general public. These parties must be appropriately accountable for the influence and control they exercise, which is achieved under CoR. Broadly, the purpose of the taskforce and CoR review is:

- a) to ensure that the HVNL retains an effective CoR regime, capable of holding current identified parties, including executive officers of those parties, sufficiently and appropriately accountable for the influence and control they can exercise over the compliance and safety of transport drivers, and the safety of the general public.
- b) to examine recent CoR provisions proposed or enacted in the HVNL with a view to:
 - (i) providing broad affirmative legal obligations, such as general or specific statutory duties, upon the parties within the chain of responsibility, and including the executive officers of those parties, that are consistent with the positive duties provisions which apply under the WHS Act; and
 - (ii) maintaining consistency with COAG Principles and Guidelines and other national transport reforms relating to the imposition of criminal liabilities upon directors and other corporate officers in connection with a corporate offence.
- c) to advise whether, with respect to the HVNL, the penalty regime relating to existing chain of responsibility provisions the HVNL needs to be amended as part of any move to adopt a framework of affirmative legal obligations.
- d) to advise whether any other amendments are desirable in order to advance the effectiveness, appropriateness or fairness of the CoR regime.

12. Appendix B outlines how the taskforce has met the requirements for the scope of work as set out in the terms of reference.

Consultation Process

Public Consultation

13. The taskforce has undertaken a comprehensive assessment of the CoR regime. This has involved a number of meetings, workshops and the release of three separate papers examining sixteen regulatory issues and fifty-nine options and proposals.
14. The taskforce, with members from industry and government, has met on six occasions to identify and examine potential issues in the existing CoR regime. The Australia New Zealand Policing Advisory Agency (ANZPAA) has been represented at three of these meetings. An industry advisory group, which was established to assist the taskforce, has met twice.
15. In July 2013, the taskforce released an issues paper for comment. The paper identified issues that stakeholders raised during the HVNL development process. It sought ideas, feedback, analysis and comments on the appropriateness and effectiveness of the current CoR framework and the need for reform. The issues paper also provided stakeholders with preliminary research, methodology and assessments relating to the terms of reference for the taskforce. The taskforce posed a number of questions for government and industry relating to matters such as the appropriateness of general and specific duties, executive officer liability, parties in the CoR including their roles and activities, enforcement powers, industry codes of practice, penalties for CoR offences and defences available under the HVNL.
16. After considering responses from stakeholders, the taskforce released an Assessment of Options paper in February 2014. Its purpose was to allow interested parties to respond to the options proposed by stakeholders following the release of the earlier issues paper. The Assessment of Options paper summarised the feedback and identified pros and cons for each option. This paper and

the options and proposals provided was intended to form the basis for considering any proposed changes to the CoR framework.

17. The taskforce received a total of 18 submissions responding to the Assessment of Options paper, from:
 - National Heavy Vehicle Regulator (NHVR)
 - Australian Trucking Association (ATA)
 - Australian Logistics Council (ALC)
 - Australian Livestock and Rural Transporters Association (ALRTA)
 - New South Wales Roads & Maritime Services and Transport for New South Wales [NSW RMS/TfNSW]
 - Queensland Transport & Main Roads [QTMR]
 - South Australia Department of Planning Transport and Infrastructure [SA DPTI]
 - VicRoads
 - NSW Police Force [NSWPF]
 - South Australia Police [SAPOL]
 - Victoria Police [VICPOL]
 - Rod Hannifey
 - Bus Industry Council [BIC]
 - Caltex Australia [Caltex]
 - Gas Energy Australia [GEA]
 - National Road Transport Operators [NatRoad]
 - Bond University [BOND]
 - The Australian Chamber of Commerce and Industry [ACCI]
18. Although the TWU did not make a formal submission, it indicated support for an overarching general duty.
19. The taskforce recognises the vital contribution of all individuals and organisations involved in the consultation process for the chain of responsibility review. In particular, the taskforce acknowledges and thanks the ATA and NSW RMS/TfNSW for their roles in progressing discussions, including by the provision of data, detailed information and advice.
20. In March 2014, a workshop for regulatory agencies and police and an industry advisory group meeting were held to examine the options and proposals of the Assessment of Options paper, and to clarify any important issues. Feedback from these sessions was provided to the taskforce for consideration.
21. Some key areas of agreement and disagreement derived from the feedback to that paper are as follows:
 - a) There is a high degree of agreement amongst enforcement and transport agencies as to the inclusion of an overarching general duty in relation to CoR. It is seen as reinforcing the effectiveness of CoR responsibilities and would, in appropriate cases, simplify prosecutions. However, some industry groups are concerned that an overarching general duty could lead to duplication and confusion with the duties of care under the WHS Act and might ultimately be used by enforcement agencies to prosecute all breaches.
 - b) There is some agreement between industry and regulators as to the need to cover parties such as employees and workers who are not drivers, inventory managers, time slotters and load owners, who influence or exert influence on on-road activities and who are currently not identified as parties within the chain of responsibility framework. However, a number of police agencies and the ATA and NatRoad considered that all parties who should be covered by the CoR framework already are.

- c) There is some agreement on the need to review authorised officer powers to clarify ambiguous areas such as the distinction between exercising a power for monitoring purposes under section 495 (finding out whether this Law is being complied with), or for investigative purposes under section 497 (investigating a contravention or suspected contravention), to ensure that officers do not inadvertently misuse their powers or potentially affect the admissibility of evidence. However, a number of police agencies maintain that powers under the HVNL are appropriate and do not require amendment.
- d) There is also disagreement as to the merits of amendments in the areas of the extended liability provisions, the reverse onus of proof and the status afforded to industry codes of practice and accreditation schemes.

Regulators Survey

22. In February 2014, the taskforce conducted a survey of regulatory and enforcement agencies to obtain a greater understanding of CoR compliance and enforcement activities. The survey posed questions relating to the CoR regulatory activities performed in the period from 2009 to 2012. Responses were received from the QTMR, the SA DPTI, VicRoads, VICPOL, NSW RMS/TfNSW and the NSWPF. Responses to the survey are summarised in table 3 below.

Table 3: Summary of responses to the regulators' survey

1. Which regulatory bodies are responsible for securing compliance with the COR provisions in your jurisdiction and how many regulatory officials are engaged in doing so?	
Jurisdiction	Feedback
QTMR	1 investigations manager, 2 intelligence staff and 152 on-road officers
South Australia	<u>SAPOL</u> - A Heavy Vehicle compliance section that has 9 staff and a dedicated prosecutions <u>SA DPTI</u> - 7 investigators; 13 on road compliance officers; 10 SafeTCam staff; 6 Prosecutions staff
Victoria	<u>VICPOL</u> - 6 investigators and 16 on-road officers <u>VicRoads</u> - 3 investigators and 45 on-road officers
New South Wales	<p><u>NSWPF</u> - The NSWPF does not usually become involved in CoR investigations in most circumstances these investigations are undertaken by the Roads & Maritime Services unless it is essential that police involvement is necessary.</p> <p><u>NSWRMS</u> - Roads and Maritime Services are responsible for securing compliance with Chain of Responsibility in NSW. Within RMS, the following Branches have responsibility for the operation (in part or in full) of Chain of Responsibility:</p> <p>Compliance Operations Branch is responsible for the detection and investigation of Chain of Responsibility offences. 1 General Manager; 4 Principal Managers; 4 Enforcement Sector managers and 22 Operations Managers; 285 Enforcement Operations Officers (IVRs); 1 Manager of Investigations; 3 Senior Investigators and 10 Investigators; 20 Adjudication Officers; 4 planning and performance officers (data analysis); 5 Policy Officers; 1 Brief of Evidence Officer; 2 support officers; and, 8 Heavy Vehicle Safety Stations.</p> <p>Compliance Operations Branch also manages NSW extensive road safety camera network and it includes systems like Safe-T-Cam and Point-to-Point. Prosecutions Branch is responsible for in-court activities of prosecutions and appeals including camera detected offences (such as speeding and red light) Chain of Responsibility prosecution and other RMS detected offences. The Branch has 32 staff members, 12 of which are specialized prosecutors. Heavy Vehicle Branch has 35 staff members and also supports Chain of Responsibility by engaging with stakeholders and providing industry support services. RMS Legal Branch assists in providing legal advice and strategic support to the business in relation to legislative compliance, such as Chain of Responsibility.</p> <p>The Joint Heavy Vehicle taskforce consists of RMS and NSW Police Traffic and Highway</p>

	Patrol and was established to identify and detect heavy vehicle non-compliance throughout NSW. Since February 2012 and up to April 2014, the task force has conducted over 40 major joint operations targeting speed, speed limiter compliance, fatigue, load restraint and roadworthiness. The operations can be credited with improving the compliance, fairness and competitiveness of the road transport industry. It has also ensured those parties responsible for breaches of Chain of Responsibility laws have appropriate enforcement action taken against them.
2. Are officials who are responsible for securing compliance with the chain of responsibility given training or guidance material in relation to the relevant law and practice and, if so, what type of training or guidance material and with what frequency?	
Jurisdiction	Feedback
QTMR	Transport Inspectors are provided with coaching, mentoring, guidance and support by the Business Manager (Investigations, and are expected to hold a Cert IV or Diploma in investigations (though this is not always the case)
South Australia	Internal training is provided, usually by senior investigation staff to other compliance members. It is provided on an 'as needed' basis
Victoria	<u>VICPOL</u> – conducts the Heavy Vehicle Investigation course (1 week) for staff dedicated to CoR investigations. Victoria Police also provides general training and guidance via the Road Policing Course which all on-road traffic operatives must undertake. VICPOL's Heavy Vehicle Unit members are not tasked to CoR investigations unless they have performed a minimum of 12 months duty at the Unit. <u>VicRoads</u> - On-going training provided
New South Wales	<u>NSWPF</u> - Training and education in CoR legislation and associated provisions is provided to all police through Education Officers (EDO's) across the State. However, training and education in most circumstances is specifically for Highway Patrol police as they are directly engaged in the enforcement of heavy vehicles. This training is re-enforced through training days. Initial training of the legislation and provisions is also provided through our Highway Patrol Education Program and relates to the actual law not practices <u>NSWRMS</u> - During the period, the Minister for Roads and Ports and the Director, Safety and Compliance Division initiated a number of forums, including Speeding Leadership and Heavy Vehicle Container forums, to engage the heavy vehicle industry and to promote compliance through education. RMS has also delivered many presentations, alone and together with the Traffic and Highway Patrol Command of NSW Police, to industry to educate on compliance standards and areas that RMS will target through enforcement. Following the introduction of Chain of Responsibility laws, RMS has continued to educate the heavy vehicle industry on the requirements under law through high level forums and liaising industry associations and stakeholder groups. RMS employs two Industry Liaison Officers that are a direct point of contact for the heavy vehicle industry. The officers provide information and education to the industry and attend events like Industry Safety Days, "toolbox talks" and other industry events. The Agency also holds 'open days' through the Heavy Vehicle Checking Stations. On these days, drivers are able to seek information and advice from RMS Inspectors.
3. In the period 2009-12, what action was taken to inform or educate duty holders about their responsibilities in the chain of responsibility?	
Jurisdiction	Feedback
QTMR	The conduct of seminars, presentations to companies, industry forums and information publicly available on the website
South Australia	Information sessions and training sessions in regard to legislative updates and amendments
Victoria	<u>VICPOL</u> - Regularly provides individual information sessions to the industry, and participates in the TWU OH&S training course. In 2013, HVU presented to 18 transport companies. In 2012, HVU presented to 14 transport companies. In 2009 – 2011, HVU

	would average 10 -12 transport companies. This does not include visits to companies made under CoR investigations <u>VicRoads</u> - Training sessions in regard to legislative updates and amendments and inductions for new staff
New South Wales	<u>NSWPF</u> - The NSWPF were provided extensive lectures upon the introduction of CoR provisions by the then Traffic Services Branch and other initial training through the Highway Patrol Education program <u>NSWRMS</u> - RMS has not sought external or independent evaluation of the Chain of Responsibility laws but the Agency has noticed a marked turn in on-road compliance within the heavy vehicle industry. Compliance activities, coupled with education campaigns, have delivered improvements in speed, fatigue, mass and loading offences. RMS continues to liaise with industry stakeholders to ensure compliance with Chain of Responsibility obligations.
4. If there were any initiatives of this type, were they evaluated and what were the results?	
Jurisdiction	Feedback
QTMR	The feedback from the face-to-face seminars was positive, and assessments of published information have not been undertaken (to the responder's knowledge)
South Australia	Feedback only received of an informal nature, training was adequate for the purpose
Victoria	<u>VICPOL</u> – Heavy Vehicle Unit always receives feedback at the time. Resulting from these sessions was the Victoria Police initiative which provides daily collision data on heavy vehicles to the VTA & NHVR <u>VicRoads</u> - N/A
New South Wales	<u>NSWPF</u> - RMS provided extensive website and training forums in this area and should be responded by that agency <u>NSWRMS</u> - RMS Authorised Officers are subject to on-going training and professional development. The Compliance Operations Branch has a team dedicated to developing and delivering training to Officers across the State. Training includes inductions, changes to procedures and updates in legislation. RMS is a Registered Training Organisation aligned with Charles Stuart University to deliver compliance training. RMS Enforcement Officers are put through a rolling training programme include online training and competency based assessments. Chain of Responsibility Investigators hold Certificates and Diplomas in Government Investigations and they have specific delegated powers.
5. In the period 2009-12, has there been any review undertaken about how the chain of responsibility provisions are being complied with or enforced or both, and if so, what were the findings and subsequent action, if any?	
Jurisdiction	Feedback
QTMR	Internal review of methodologies, strategies and outcomes by the Business Manager (Investigations) with Recommendations for improved training, enhanced structure and stronger commitment. The Recommendations have not been implemented at the time of response.
South Australia	Not aware of any review.
Victoria	<u>VICPOL</u> - 2012 – 2014: VicPol company visits for CoR purposes increased by 50%. Company visits as a result of collision involvement increased 23.8%. Improvement Notice issue increased 75%. CoR investigation rate increased 31.8%. Company presentations increased 28.6%. <u>VicRoads</u> - N/A
New South Wales	<u>NSWPF</u> - No comment <u>NSWRMS</u> – RMS has conducted multiple internal reviews into the effectiveness of our education campaigns and compliance operations. As a result of one of these reviews, improvements to reporting of compliance operation data have been undertaken. Reports identify key information, such as repeat offenders and the types of non-compliance so that

	RMS can target resources to achieve better outcomes. Operational data assists in identifying risks and the information is used to mitigate potential harms. RMS has found that heavy vehicle speeding, load restraint and maintenance offences have been decreasing. It is RMS' view that the operation of Chain of Responsibility is working well and there have been improvements in the heavy vehicle industry through the work of education practice and enforcement.
6. In the period 2009-12, how many CoR offences were identified in your jurisdiction by regulatory officers?	
Jurisdiction	Feedback
QTMR	Thousands – Uncertain of precise number
South Australia	469 CoR offences investigated by the Investigation Unit
Victoria	<u>VICPOL</u> - A similar number to VicRoads (VicRoads reported in excess of 5000). <u>VicRoads</u> - In excess of 5000
New South Wales	<u>NSWPF</u> -Unknown, although from a policing perspective the provision of reasonable steps defence inhibits and precludes further investigations <u>NSWRMS</u> - Refer to Question 10.
7. In the In Were the regulatory officers (a) members of the police or (b) transport officials?	
Jurisdiction	Feedback
QTMR	Transport Inspectors
South Australia	Transport Officials – DPTI investigators
Victoria	Both Victorian Police members and VicRoads Officers
New South Wales	<u>NSWPF</u> - NSWPF do not usually investigate CoR laws this is a primary role for the RMS <u>NSWRMS</u> – RMS works with the NSW Police Force, particularly Highway Patrol, to conduct roadside compliance and enforcement activities in NSW. Depending on the issue to be targeted in operations, RMS may also work with officers from WorkSafe, the Environmental Protection Authority and NSW Fair Trading. RMS Enforcement Officers are responsible for conducting operations and enforcement activities in NSW. Chain of Responsibility investigators are responsible for conducting high-level and complex investigations of matters associated with heavy vehicles. Investigators may be supported by other Agencies, including the NSW Police, to support prosecutions against non-complying offenders. RMS and the Police work collaboratively to conduct special operations that target non-compliance of road transport laws, such as load restraint, vehicle standards, fatigue and speeding. From November 2011 to December 2013, RMS has conducted over 34 major operations targeting speed, speed limiter compliance, fatigue, load restraint and roadworthiness. RMS also conducts many other smaller operations across NSW, including in regional areas, to maintain a safe and functioning road network. The work of enforcement officers is enhanced and supported by an extensive camera network.
8. What types of offences were detected?	
Jurisdiction	Feedback
QTMR	Fatigue, mass, dimension and load restraint
South Australia	Mass, Dimension, Load Restraint and Fatigue
Victoria	<u>VICPOL</u> - Fatigue, Mass, Dimension and Load Restraint, and Speeding heavy vehicles. <u>VicRoads</u> - Fatigue, mass, dimension and load restraint
New South Wales	<u>NSWPF</u> – Unknown <u>NSWRMS</u> - RMS Enforcement Officers detect a wide range of offences, from roadworthiness, mass limits, speed and speed limiter, fatigue, work diary and working hours, load restraint, registration and driver licensing.
9. What regulatory action was taken?	

Jurisdiction	Feedback
QTMR	Prosecutions and Improvement notices. A supervisory intervention order is being sought in a prosecution currently before the court
South Australia	A range of sanctions including Improvement notices, Expiation notices and prosecution before the magistrates' court
Victoria	<u>VICPOL</u> - VicPol used the full suite of sanctions, including a Supervisory Intervention Order <u>VicRoads</u> - A range of sanctions including warnings, improvement notices, penalty notices and prosecution before the magistrates' court
New South Wales	<u>NSWPF</u> – Unknown <u>NSWRMS</u> –Under NSW road transport law, RMS has a range of enforcement tools that can be used where Chain of Responsibility offences are detected. RMS Authorised Officers have discretion to issue Penalty Notices, Defect Notices or Court Attendance Notices to all parties in the supply chain depending on the type of offence committed. Chain of Responsibility investigations are launched where serious offences have been detected and RMS may issue sanctions or lay further charges as a result of the investigation against all parties in the Chain. RMS may choose to commence proceedings in either the Local Court or Supreme Court. Generally, RMS only commences proceedings in the Supreme Court for more serious matters, for instance, where an incident has led to death, serious injury or infrastructure damage. Following commencement of the HVNL, proceedings may now only be commenced in the Local Court. As a result of compliance operations conducted at the Sydney ports precinct in 2011, RMS served improvement notices to stevedore operators in connection with loading practices to ensure road safety and asset protection in NSW. RMS advised Sydney ports stakeholders that the transport of commercial loads (such as containers) is the responsibility of all supply chain parties to ensure mass restrictions are not exceeded and their related policies and procedures in connection with their loading practices, do not contravene the law. To ensure heavy vehicle movements are effective, safe and legal, Sydney ports stakeholders have installed weigh devices. These devices provide an effective and economical tool for self-regulation to ensure heavy vehicles are weighed before leaving the port to prevent overloading. The use of weigh devices also help to create a level playing field for port precinct heavy vehicle operators by making it more difficult for those that operate outside of the law to gain a competitive advantage.
10. Where prosecutions were undertaken:	
a) how much time elapsed between:	
i. the detection of an offence and the commencement of proceedings?	
ii. the commencement of proceedings and the hearing of the proceedings?	
iii. the hearing and the judgment?	
Jurisdiction	Feedback
QTMR	i. Varying time. However under the current QTMR structure the delay is principally between submission of files to prosecution and a compliant and summons being issued by that unit ii. Depends upon the intentions of the defendant, and the court's availability – though commonly with a 3-4 months after initial appearance iii. Same day usually for summary trails
South Australia	i. Not available ii. Not available iii. Not available
Victoria	<u>VICPOL</u> i. up to 12 months, dependent upon the complexity of the investigation ii. 3 – 4 months iii. 0 – 4 months <u>VicRoads</u>

	<ul style="list-style-type: none"> i. 4 – 8 months ii. 2 months iii. 0 to 2 weeks 																																																				
New South Wales	<p><u>NSWPF</u> -</p> <ul style="list-style-type: none"> i. Unknown ii. Unknown iii. Unknown <p><u>NSWRMS</u> -</p> <ul style="list-style-type: none"> i. RMS aims to commence proceedings against parties where Chain of Responsibility offences have been detected within 1 year. This is to ensure timeliness and fairness in investigation and proceedings. Due to the complexities in investigating the level of responsibility held by off-road parties, proceedings against these parties may take a little longer. RMS has a target of completing Chain of Responsibility proceedings within 2 years of the offence being reported. These timeframes are controlled by road transport law and RMS can do little in these cases. ii. Between 1 May 2012 and 10 April 2014, there was an average of 144 days between commencements of proceedings to hearing in NSW. iii. Generally, most matters are resolved and a sentence handed down on the day of the hearing. Over the same period, there was an average of 154 days between commencement of proceedings and finalisation of the matter in NSW. 																																																				
10. Where prosecutions were undertaken:																																																					
b) Which person or persons in the relevant chain of responsibility was or were prosecuted?																																																					
Jurisdiction	Feedback																																																				
QTMR	Managers, Schedules, Loaders, Corporation (company) and directors																																																				
South Australia	Consignor, Consignor (body corporate																																																				
Victoria	<u>VICPOL</u> - Driver, Operator, Scheduler, Loader, Consignor. <u>VicRoads</u> - Driver, Operator, Loader, Consignee, Consignor																																																				
New South Wales	<u>NSWPF</u> – Unknown <u>NSWRMS</u> - All parties in the Chain of Responsibility supply chain may be prosecuted. This includes the consignor, consignee, director(s) of the company, employees, loaders, any other responsible persons, schedulers, operators and owners.																																																				
10. Where prosecutions were undertaken:																																																					
c) How many prosecutions resulted in a conviction?																																																					
Jurisdiction	Feedback																																																				
QTMR	Less than half – though that is a matter for the court (uncontrolled or determined by investigators)																																																				
South Australia	4																																																				
Victoria	<u>VICPOL</u> - 90% <u>VicRoads</u> - 95%																																																				
New South Wales	<p><u>NSWPF</u> - Unknown <u>NSWRMS</u> –</p> <table border="1"> <thead> <tr> <th colspan="13">Total number of charges laid by the RMS (March 2014): 4432</th> </tr> <tr> <th></th> <th>Consignee</th> <th>Consignor</th> <th>Director</th> <th>Employee</th> <th>Employer</th> <th>Loader</th> <th>Operator</th> <th>Owner</th> <th>Responsible person</th> <th>Scheduler</th> <th>Allocator</th> <th>Total</th> </tr> </thead> <tbody> <tr> <td>Charges Laid</td> <td>685</td> <td>514</td> <td>543</td> <td>55</td> <td>161</td> <td>10</td> <td>2271</td> <td>1</td> <td>55</td> <td>14</td> <td>123</td> <td>4432</td> </tr> <tr> <td>Individuals Charged</td> <td>9</td> <td>60</td> <td>45</td> <td>22</td> <td>4</td> <td>8</td> <td>231</td> <td>1</td> <td>25</td> <td>2</td> <td>1</td> <td>408</td> </tr> </tbody> </table>	Total number of charges laid by the RMS (March 2014): 4432														Consignee	Consignor	Director	Employee	Employer	Loader	Operator	Owner	Responsible person	Scheduler	Allocator	Total	Charges Laid	685	514	543	55	161	10	2271	1	55	14	123	4432	Individuals Charged	9	60	45	22	4	8	231	1	25	2	1	408
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d) How many prosecutions were defended?																																																					

Jurisdiction	Feedback
QTMR	Less than 5%
South Australia	Not available
Victoria	<u>VICPOL</u> - 100% legal representation. <u>VicRoads</u> - 15%
New South Wales	<u>NSWPF</u> - Unknown. <u>NSWRMS</u> - Between 1 May 2012 and 10 April 2014, 568 prosecutions were defended. A total of 2,023 prosecutions were not defended.
10. Where prosecutions were undertaken: e) What penalties were imposed or orders were made?	
Jurisdiction	Feedback
QTMR	Depends upon nature, seriousness and quantum of charges. Ranges from \$10,000 to \$500,000 – so far
South Australia	Not available
Victoria	<u>VICPOL</u> - Fines of up to \$48,000, and a Supervisory Intervention Order <u>VicRoads</u> - A range of penalties up to \$100,000
New South Wales	<u>NSWPF</u> – Unknown <u>NSWRMS</u> – The Court has discretion to impose significant fines, orders and costs against convicted offenders. Supervisory intervention orders, prohibition orders, commercial benefits penalty orders and roads compensation orders have been sought in appropriate proceedings and were granted. In one matter, the Local Court imposed the maximum penalty available within its jurisdiction, having assessed the appropriate penalty as well in excess of its jurisdictional maximum. The majority of penalties imposed are up to 20 per cent of the maximum available. Other penalties are typically imposed in the middle of the range of available penalties. While penalties have been imposed in the tens of thousands for individual offences, NSW Courts also have discretion to make an order finding a person has committed an offence but dismissing the proceedings without a conviction (an order under Section 10 of the Crimes (Sentencing Procedure) Act 1999). Between 2005 and 2014, Magistrates: (a) Dismissed 58 matters under Section 10; (b) Dismissed 112 matters with costs (average costs \$207); (c) Dismissed 192 matters without costs; (d) Dismissed 16 matters but placed 6 month good behavior bonds on the operator / driver.
10. Where prosecutions were undertaken: f) In which court or courts were the proceedings brought?	
Jurisdiction	Feedback
QTMR	Magistrates Court – transport offences are not indictable offences
South Australia	Magistrates Court
Victoria	<u>VICPOL</u> - Magistrates Court <u>VicRoads</u> - Magistrates and County and Supreme on appeal
New South Wales	<u>NSWPF</u> – Unknown <u>NSWRMS</u> - Proceedings are brought in either the Local Court or Supreme Court. As noted above, under the HVNL (NSW), proceedings may only be commenced in the Local Court.
10. Where prosecutions were undertaken: g) How many appeals were there and with what result?	
Jurisdiction	Feedback
QTMR	Nil

South Australia	Not available
Victoria	<u>VICPOL</u> - No appeals <u>VicRoads</u> - 8 appeals 2 of which were upheld
New South Wales	<u>NSWPF</u> – Unknown <u>NSWRMS</u> - Between 2005 and 2014, there have been defence appeals to the District Court and Supreme Court; RMS has also appealed to the Supreme Court on a handful of occasions.

Principles of Chain of Responsibility

23. Findings from the 1984 National Road Freight Industry Inquiry and submissions to the NTC’s 1993 Operator Performance discussion paper supported holding parties, other than drivers, accountable for breaches where those parties played a role leading to the breach.³
24. The Industry Inquiry found evidence of drivers’ deliberate non-compliance with trucking regulations but also found a “considerable amount of evidence that the truck operator, freight forwarder, agent and broker all have a significant and proximate role to play”.⁴ Many submissions to the Operator Performance discussion paper suggested parties other than drivers should be held responsible for breaches, even where their conduct does not amount to forcing or inciting the driver to break the law. Submissions identified consignors and owners of non-complying loads, operators who set unrealistic schedules and directors of companies involved in such activities as key parties of interest.⁵

Principles applying to the Chain of Responsibility Regime

25. In the 1995 Compliance and Enforcement Proposal and the draft Road Transport Reform (Compliance and Enforcement) (General) Bill the NTC proposed extending personal liability to a director, company secretary or a senior manager of a body corporate that commits a road law offence. Extending personal liability to these parties involves punishing them in the same way as an individual who has been found guilty of the offence.⁶
26. The *Road Transport Reform (Dangerous Goods) Regulations 1997* (Dangerous Goods Regulations) and the *Road Transport Reform (Driving Hours) Regulations 1998* (Driving Hours Regulations) set out CoR provisions that identified specified parties in the transport chain by title, and assigned individual responsibilities.⁷ The Dangerous Goods Regulations identified owners, consignors, packers, loaders and prime contractors. The Driving Hours Regulations identified employers, responsible employees (with roster or scheduling responsibilities) and consignors.⁸
27. The NTC’s *Compliance and Enforcement: Mass, Dimension and Load Restraint Policy* (MDL Policy) considered that due to multiple and shifting roles applicable to the various parties in the chain, provisions focusing on the essential elements or activities in the transport chain rather than titles may better cover all chain parties, i.e. consigning, loading, carrying, driving, receiving and packing.⁹
28. The MDL Policy also proposed extending personal liability to directors, company secretaries and senior managers where a body corporate commits a breach of the mass, dimension or load restraint

³ NRTC, *Compliance with the Road Transport Law – Principles, Objectives and Strategies – Discussion Paper*, 1994, p.17.

⁴ *ibid.*

⁵ *ibid.*

⁶ NRTC, *Compliance and Enforcement: Mass Dimension and Load Restraint – Approved Policy Proposal*, 2000, p.40.

⁷ *ibid.*, p.39.

⁸ *ibid.*

⁹ NRTC, *Compliance and Enforcement: Mass Dimension and Load Restraint – Approved Policy Proposal*, 2000, p.40.

requirements. In this respect it reflected the view that these parties should take responsibility for all aspects of a body corporate's activities. The MDL Policy proposed personal liability should not attach to these parties if they were not in a position to control the body corporate's conduct in relation to the offence, or if they made every reasonable effort to prevent the offence.¹⁰

29. The MDL Policy proposal retained four general principles applying to the CoR, which were part of the existing national regulations for mass, dimension and load restraint at the time:
- (a) Where more than one party is liable, proceedings may be taken (simultaneously, if desirable) against each liable party; it is not intended that there be 'shifting liability' or that there be 'point the finger' type provisions – all may be jointly and severally liable, depending on their individual involvement.
 - (b) The successful prosecution of one party in the chain should not be a precondition to the prosecution of another in the chain for the same breach incident (but may be a consideration as to which other parties are, or are not, prosecuted).
 - (c) A person may be liable for more than one offence if requirements relating to different parts of a vehicle, or different vehicles in a combination, are breached.
 - (d) However, a person who meets more than one description should only be punished once in relation to the same breach.¹¹
30. Road transport enforcement agencies were initially cautious, providing in principle support for the CoR concept but expressing concern about the increased resources that would be needed to conduct more complex investigations, to apply the more sophisticated enforcement tools and to train enforcement personnel.¹² The road transport industry made significant changes in anticipation of proposed CoR obligations. Road transport customers reviewed loading and unloading practices and, in some cases, refused to pay for freight delivered in excess of the legal payload.¹³ Customers cited concern about their potential liability under occupational health and safety duty of care provisions and proposed CoR provisions, and heightened awareness of risks to drivers, as the primary motivations for change.¹⁴
31. The Australian Transport Council approved the *Road Transport Reform (National Compliance and Enforcement) Bill* (C&E Bill) in 2003, which provided model provisions for the legislative proposals in the approved MDL Policy.¹⁵
32. The Regulatory Impact Statement (RIS) for the C&E Bill identified that existing legislation focused almost exclusively on drivers and, to a lesser extent, vehicle owners, as responsible for any breaches of the road law. This was considered to be an inadequate approach to enforcement as it failed to recognise that other parties often bear substantial responsibility for breaches. The C&E Bill dealt specifically with the duties of consignors, packers, loaders, vehicle operators and receivers as well as drivers. Directors, company secretaries and senior managers of corporations involved in the use and operation of heavy vehicles also faced liability for breaches of the road law.¹⁶
33. The RIS for the C&E Bill anticipated benefits in two main areas:
- (a) improved fairness: prosecutions would be better able to target those chiefly responsible for breaches of the road laws; and

¹⁰ *ibid*, p.45.

¹¹ *ibid*, pp.40-41.

¹² McIntyre K. & Moore B. 'National Road Transport Compliance and Enforcement Reforms: On the Road to a New National Culture of Compliance', paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference, Melbourne, 2-3 September 2002, p.7.

¹³ *ibid*.

¹⁴ *ibid*.

¹⁵ NRTC, Road Transport Reform (Compliance and Enforcement) Bill Regulatory Impact Statement, 2003, foreword.

¹⁶ NRTC, Road Transport Reform (Compliance and Enforcement) Bill Regulatory Impact Statement, 2003, p.15.

- (b) enhanced effectiveness: prosecution of all responsible parties, leading to the application of appropriate sanctions, could be expected to better deter law-breaking behaviour.¹⁷
34. Improved fairness was also expected to indirectly improve compliance, since it would lead to greater acceptance of the law and, hence, a higher level of “voluntary compliance”.¹⁸ The C&E Bill proposed absolute liability for certain offences (primarily mass, dimension and load restraint offences), along with a special statutory “reasonable steps” defence, encouraging parties in the chain to actively consider appropriate steps to prevent an on-road breach.¹⁹ General liability provisions included a “due diligence” defence for directors, partners, managers and employers.
35. The road transport industry strongly endorsed the CoR proposals in the C&E Bill, but other industry sectors expressed equally strong concerns about extending liability for road transport-related breaches to parties further along the logistics chain, such as consignors and loaders.²⁰

Principles applying to the Enforcement of Chain of Responsibility

36. Regulators and enforcement agencies increasingly accepted the CoR proposals and many regarded CoR, rather than increased enforcement powers or stronger penalties, as the most powerful element of the C&E Bill for achieving improvements in compliance.²¹ To guide CoR enforcement under the C&E Bill and related road transport law, AustRoads developed the following principles:
- (a) recognising that there is a wide ranging chain of responsible persons involved in the transport network and to make those parties aware of and accountable for their responsibilities, acts and omissions;
 - (b) achieving cooperation and uniformity in the compliance of influencing persons in the area of heavy vehicles;
 - (c) applying enforcement measures to improve road safety, protect infrastructure assets and the environment;
 - (d) effectively targeting those parties who constantly flout the law to discourage noncompliance practices that may give them a commercial advantage over those parties that work within the law and "do the right thing";
 - (e) compliance and enforcement practice will be conducted in an equitable, impartial, predictable and consistent manner;
 - (f) compliance and enforcement will be applied consistently and evenly to individuals, companies and government agencies;
 - (g) enforcement will be undertaken by authorised officers using lawful procedures
 - (h) emphasis on preventative measures through education;
 - (i) endeavour to conduct investigations along the transport chain to the point at which liability can be proven.²²
37. The C&E Bill covered parties that had not previously been subject to road transport law, or who had not recognised their obligations, so all influencing parties, especially "off road" parties, needed education on their CoR obligations and responsibilities.²³
38. In 2009 the COAG agreed to establish the NHVR and a national body of law governing the regulation of all vehicles weighing more than 4.5 tonnes.²⁴ COAG decided that the HVNL should be based on

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*, p.16.

²⁰ McIntyre K. & Moore B. ‘National Road Transport Compliance and Enforcement Reforms: On the Road to a New National Culture of Compliance’, paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference, Melbourne, 2-3 September 2002, p.7.

²¹ *ibid.*

²² Austroads, Guidelines for the Practical Application of New Chain of Responsibility Provisions, 2006, p.2.

²³ Austroads, Guidelines for the Practical Application of New Chain of Responsibility Provisions, 2006, p.3.

existing model laws, including the C&E Bill, rather than starting over.²⁵ As such, the intent was not to revisit previously agreed reforms and/or make new policy decisions.²⁶ The HVNL consolidates existing provisions from the model laws and existing state and territory laws, but it does not rationalise and reframe all provisions from first principles. During development of the HVNL industry expressed strong commitment to supporting 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 equipped with effective, fair CoR laws and resourced to directly apply these laws using its own staff. Industry believes strong CoR laws are a vital component of heavy vehicle regulation in Australia but that they must be fair and implemented effectively.

²⁴ NTC, Heavy Vehicle National Law Regulatory Impact Statement, 2011, foreword.

²⁵ *ibid*, p.1.

²⁶ *ibid*. An exception is the new decision-making framework required to support the NHVR.

OPTIONS AND PROPOSALS CONSIDERED

39. The following chapters summarise the analysis undertaken for the taskforce by the NTC, of feedback received from governments and industry through the targeted and public consultation processes. The taskforce's recommendations have taken of that feedback, whether in formal submissions or offered in consultation.

Topic 1: Duties

General Duties

Summary of Positions

Support for the concept of additional duties (either an positive overarching duty and/or positive chapter specific duties and/or positive party specific duties)	
Support	NSW RMS/TfNSW, QTMR, SA DPTI, NSWPF, SAPOL, VICPOL, Caltex, GEA, BOND, VicRoads, ALRTA, ATA, BIC, NatRoad, ACCI, NHVR
Not Supported	ALC

Current Situation

40. General duty offences establish an obligation on parties to secure or avoid certain broadly described outcomes. The HVNL contains one broad general duty (section 229 - duty of party in the chain of responsibility to prevent driver driving while fatigued) and a series of narrower specific duties in relation to particular requirements of the HVNL.
41. In the drafting of the HVNL the non-inclusion of an overarching general duty on chain parties was justified by the existence of WHS provisions, which 'bind all participants in the Australian workplace'.²⁷
42. The HVNL is not intended to replace WHS provisions, but to establish 'prescriptive requirements specific to the road transport industry'.²⁸ In this respect the HVNL underpins the general provisions prescribed by WHS legislative regime, and places the HVNL in a similar position as the more industry specific WHS regulations. It should be noted, however, that the regulators responsible for compliance with the WHS laws are separate from those responsible for heavy vehicle safety, operate under different laws and typically report to different Ministers from those to whom the WHS regulators report. Accordingly, the relevant regulators of heavy vehicle safety do not have either functions or powers in relation to securing compliance with WHS laws. In addition, the Rail Safety National Law and the *Marine Safety (Domestic Commercial Vessel) National Law Act* contain general duties along the lines of those in the WHS laws for duty holders under those laws.
43. Feedback from the July 2013 issues paper saw the proposal to include a general duty within the HVNL put forward by a number of taskforce members and stakeholders. Proponents considered that such a provision may serve as a 'catch all' to ensure relevant parties are not missed or inadvertently excluded by not being directly included in the HVNL. The provision would also cover parties within the chain who cannot easily be identified by title or performance of a specific task. This recognises the changing nature of the industry and would mean legislative change would not be required should new roles or relevant parties be incorporated into the supply chain into the future. In addition, the

²⁷ National Transport Commission. (September 2011). *Heavy Vehicle National Law Regulation Impact Statement*. p 111. <http://www.ntc.gov.au/filemedia/Reports/HVNatLawRISFINAL.pdf>.

²⁸ Ibid.

placement of a general duty (or series thereof) within the HVNL may encourage more proactive compliance, similar to the way general and specific duties are treated under the WHS regime.

Options/Proposals

44. As part of the February 2014 Assessment of Options paper, two options for the adoption of general duties were identified. Depending on the approach taken there may be a need to amend the specific duties pertaining to particular parties in the chain as currently provided for in the HVNL. The options proposed were:

Option 1: Amend the HVNL to provide an overarching, HVNL-wide general duty based upon the general duties contained within the WHS Act and RSNL. (note: this would extend beyond the matters within the taskforce’s terms of reference).

Option 1: Introduce an overarching general duty	
Support	NSW RMS/TfNSW, QTMR, SA DPTI, NSWPF, SAPOL, VICPOL, Caltex, GEA, BOND
Conditional Support	NHVR (further policy development to consider whether all parties might be general duty holders; whether the harms and circumstances to which the duty will apply; and the statutory relationship with WHS law)
Not Supported	VicRoads, ALC, ALRTA, ATA, BIC, NatRoad, ACCI

Option 2: Amend the HVNL to provide for chapter specific general duties based on section 229 ‘Duty of party in the chain of responsibility to prevent driver driving while fatigued’, within the mass, dimension and loading (MDL), speed and potentially vehicle standards chapters of the HVNL (for more information on vehicle standards and CoR see proposal 2 of Specific Duties from page 26).

Option 2: Introduce chapter specific general duties	
Support	SA DPTI, VicRoads, SAPOL, VICPOL, BIC, Caltex, ALRTA, ACCI, NHVR
Not Supported	NSW RMS/TfNSW, QTMR, NatRoad, ALC , ATA

Stakeholder Feedback

Arguments For	<p>Option 1:</p> <ul style="list-style-type: none"> • Would improve the effectiveness of CoR and provide greater clarity for responsible parties. • Would cover parties and their activities that are not, may not or cannot be anticipated. • Would focus on effective risk identification and management • Would result in uniformity with other regulator mechanisms such as the Workplace Health and Safety laws • Would assist in consistency between the HVNL and WHS Act and assist in resolving concerns about lack of clarity • From the perspective of consistency and productivity for industry, it would not be appropriate to leave enforcement of general duties, and punishment for extreme non-compliance, with individual state and territory work health and safety regulators. • Would provide the Regulator and the courts flexibility to deal with offences in a way that more appropriately reflected the seriousness of offending behaviour. <p>Option 2:</p> <ul style="list-style-type: none"> • Would provide specific detailed guidance whilst minimising volume and duplication
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	<ul style="list-style-type: none"> • The existing general duty at s229 applies equally to all parties in the chain and in all types of circumstances and is used by operators to demonstrate to other supply chain participants that they definitely have unavoidable liabilities with regard to driver fatigue. • Would allow for specification standards or "proof" elements (similar to section 229(2)) to be specifically tailored to the offences in the relevant Chapter
Arguments Against	<p>Option 1:</p> <ul style="list-style-type: none"> • Would duplicate and/or add to confusion with the detailed duties contained within the Model WHS Act • Would expose parties to a possibility of dual prosecution actions under the WH&S and HVNL. • Does not recognise the subordinate nature of the HVNL against the Model WHS Act. <p>Option 2:</p> <ul style="list-style-type: none"> • Prescriptive duties are incapable of responding promptly to change and focus on physical hazards at the expense of systemic factors, fostering a 'tick a box' approach to safety.

Option 1 and 2 – Introduce an overarching general duty and Introduce chapter specific general duties

45. NSW RMS/TfNSW, Bond University, GEA, the SA DPTI and police agencies recommended that option 1 be explored on the basis that it would cover parties and their activities who are not, may not or cannot be 'anticipated' by more prescriptive legislative requirements. This was also supported by the QTMR which considered that the inclusion of a general duty would ensure the requirements of the HVNL focus industry participants on effective risk identification and management rather than compliance with prescriptive standards.
46. The ALRTA, the ACCI and VicRoads supported option 2 and noted that any general duty contained in the HVNL must recognise the subordinate nature of the HVNL, in the context of the WHS general duty, and be limited to the chapters relating to fatigue, speed, and MDL requirements (and potentially be extended to include vehicle standards/maintenance). This would then allow for specification standards or 'proof' elements [similar to section 229(2)] to be specifically tailored to the offences in the relevant Chapters.
47. The SA DPTI, VICPOL and the NSWPF proposed investigating both options 1 and 2 in more detail. SAPOL raised concerns with overlapping provisions between the HVNL and WHS and the need to ensure that if a general duty offence is to be included that it relates to the obligations within the HVNL and remains within the HVNL sphere.
48. The NHVR supported further work by the NTC to assess whether a general duty could be feasible for inclusion in the HVNL. The NHVR noted that all major contemporary safety laws have a general duty as the keystone of their legislative design. The NHVR also supported the introduction of chapter specific general duties and maintained that chapter specific duties would align with community and industry expectations of the CoR regime.
49. The ATA and NatRoad did not support either options 1 or 2 and proposed the introduction of positive duties on chain parties that are relevant to that party's role and circumstances. The ALC disagreed with both option 1 and 2 and considered that no evidence has yet been presented by stakeholders to suggest the creation of further general duties would either encourage greater compliance or improve safety outcomes.

Findings

50. The taskforce recognises the merits of additional duties. However, there is no consensus within the taskforce as to whether additional duties are necessary and if so, whether they should take the form of a positive overarching general duty and/or positive chapter specific duties and/or positive party specific duties or whether these are necessary.
51. This issue is unlikely to be resolved within the time frame for the review. The taskforce considers there would be benefit in investigating this issue further. This should be undertaken as a first step in resolving outstanding issues. Any review would need to examine further the underlying problem to be addressed, whether changes to existing duties are required and if so whether this should take the form of a positive overarching general duty and/or positive chapter specific duties and/or positive party specific duties. The review would also need to take into consideration issues of public safety, the public interest, procedural fairness and justice.

Recommendation 1:

The taskforce recommends that the NTC establish a process to investigate the development of broader duties within the chain of responsibility. This should be the first step in resolving outstanding issues.

Specific Duties (intermediate duties, process-based requirements and specification standards)

Summary of Positions

Supportive of the concept of extending the chain of responsibility regime to heavy vehicle standards and roadworthiness	
Support	NSW RMS/TfNSW, QTMR, SA DPTI, NSWPF, SAPOL, VICPOL, Caltex, GEA, BOND, ALRTA, ATA, BIC, NatRoad, ACCI, ALC, NHVR
Not Supported	VicRoads (seeking further clarification on application prior to indicating support or not)

Current Situation

52. CoR offences under the HVNL are of four distinct types; general duties as discussed in the previous section, intermediate duties, process-based requirements and specification standards.
53. The HVNL's intermediate duty offences are based around the role and functions of the relevant parties, with the proposition that breaches of speed and fatigue pose significant safety risks.²⁹ Parties subject to an intermediate duty must actively consider whether the way in which they intend to carry out their tasks will prevent drivers from breaching the speeding and fatigue requirements.
54. A process-based requirement specifies particular processes or steps that may be followed in order to meet an obligation. Process-based requirements focus on four fundamental steps of identification, assessment, control and review.
55. Specification standards provide guidance to duty holders by including precise and detailed information on what is required to meet a duty. These duties identify the preventive measures that must be implemented by the duty holder thereby enabling authorities to readily ascertain whether the duty holder has met their duty.³⁰
56. In the feedback from the July 2013 issues paper, some stakeholders raised concern that there are inconsistencies in the way CoR is applied across the HVNL. In particular, while the specific duties exist for speed and fatigue offences, they are lacking for MDL and vehicle standards.

Options/Proposals

57. As part of the February 2014 Assessment of Options paper, two proposals to resolve inconsistency issues were put forward, namely:

Proposal 1: Redraft *Chapter 4 – Vehicle operations – mass, dimension and loading* to include specific duty provisions similar to those found at *Chapter 5 – Vehicle operations – speeding* and *Chapter 6 – Vehicle operations – driver fatigue* (i.e. specific duties relating to business practices, terms of consignment, requests and contracts).

Proposal 1: Introduce specific duties for mass, dimension and loading	
Support	SA DPTI, SAPOL, ALRTA, ATA, NatRoad
Conditional Support	NHVR (subject to a review of all existing specific duties in the HVNL for consistency and effectiveness).
Not Supported	NSW RMS/TfNSW, QTMR, VicRoads, VICPOL, NSWPOL, ALC, BOND, ACCI

²⁹ Hatcher, A, Review of Regulatory Approaches to Transport Safety Law, 2008, p.37.

³⁰ Bluff, E & Gunningham, N, Principle, Process, Performance or What? New Approaches to OHS Standards Setting, 2003, p.6

Proposal 2: Redraft *Chapter 3 – Vehicle operations –standards and safety*, to include specific duty provisions that require those parties that have influence over vehicle standards to take reasonable steps to ensure breaches do not occur.

Proposal 2: Introduce specific duties for vehicle standards	
Support	SA DPTI, SAPOL, ALRTA, ATA, NatRoad, VICPOL, ACCI
Conditional Support	NHVR (subject to a review of all existing specific duties in the HVNL for consistency and effectiveness).
Not Supported	NSW RMS/TfNSW, QTMR, VicRoads, NSWPOL, ALC, BOND

Stakeholder Feedback

Arguments For	<p>Proposal 1:</p> <ul style="list-style-type: none"> • Would improve consistency between Chapter 4 (MDLR) and Chapter 5 (Speed) and Chapter 6 (Fatigue) – including chapter specific general duties. • Would improve compliance by clarifying minimum requirements and reducing the inherent ambiguity of general duties. <p>Proposal 2:</p> <ul style="list-style-type: none"> • Recent accidents and the high profile blitzes have highlighted the risks to public safety manifested by alleged poor maintenance practices and the potential for management to overlook this important issue in the absence of any direct accountability. • There is a reasonable and growing community expectation that heavy vehicles will be kept in a safe operating condition and that those with influence in this area will be held accountable.
Arguments Against	<p>Proposal 1:</p> <ul style="list-style-type: none"> • The introduction of a broad positive duty for heavy vehicle transport operations would make the addition of a specific duty, such as this, unnecessary. • Results in rigidity and an inability for the Regulator to deal with changing issues and circumstances. <p>Proposal 2:</p> <ul style="list-style-type: none"> • The introduction of a broad positive duty for heavy vehicle transport operations would make the addition of a specific duty, such as this, unnecessary. • Results in rigidity and an inability for the Regulator to deal with changing issues and circumstances.

Proposal 1 and 2 – Introduce specific duties for mass, dimension and loading and Introduce specific duties for vehicle standards

58. The ATA and NatRoad supported both proposals 1 and 2 on the basis that CoR could be enhanced with positive duties that are relevant to a party’s role. The ATA and NatRoad proposed that CoR be extended to government agencies so issues associated with regulatory failure are covered, such as providing a positive duty for road agencies to provide adequate rest areas.
59. The ALRTA supported proposals 1 and 2 and considered that specific duties would improve consistency between Chapters 4 (MDL), 5 (Speed) and 6 (Fatigue). This would also clarify minimum

requirements and reduce the inherent ambiguity of general duties. The ALRTA supported extending specific duties into the vehicle standards chapter as there is a reasonable and growing community expectation that heavy vehicles will be kept in a safe operating condition and that those with influence in this area will be held accountable.

60. The NHVR was opposed to enacting new specific duties based on the model of those in other chapters. However, it supported both proposal 1 and 2 subject to a review of all existing specific duties under the HVNL. The NHVR also recommended that the NTC should establish, as a national legislative policy, the principle that whenever some new behaviour or hazard may be brought in to the HVNL, it may be accompanied by one or several specific duties.
61. NSW RMS/TfNSW and Bond University maintained that adopting a general duty in the HVNL would mean the proposals for the extension of specific duties into other chapters would be unnecessary. NSW RMS/TfNSW considered that specific duties are best avoided as it results in rigidity and an inability for the NHVR to deal with changing issues and circumstances. This sentiment was supported by VicRoads, VICPOL and the NSWPF, although, SAPOL and VICPOL supported the extension of the CoR regime to cover vehicle standards and maintenance. The QTMR supported the retention of the existing specific duties to support the introduction of a general duty.
62. The ALC did not support proposal 1 and 2 on the basis that stakeholders were yet to produce sufficient evidence to justify the imposition of either new duties or duty holders as part of the CoR review process. The ALC noted that if such evidence was produced, then this could be considered and developed through the HVNL management programme

Findings

63. The taskforce notes that there are inconsistencies in the way CoR is applied across the HVNL. In particular, while specific duties exist for speed and fatigue offences, they are lacking for MDL, and vehicle standards.
64. The taskforce supports extending the CoR regime to heavy vehicle standards and roadworthiness. However, further consideration is needed to settle the standards to be applied and the parties to be covered.
65. While the direction is clear, this issue could not be resolved within the time frame for the review. Further consideration could be given to this issue as part of any process to review the possible inclusion of additional duties as discussed in recommendation 1.

Recommendation 2:

The taskforce recommends:

- (a) Extending the chain of responsibility regime to heavy vehicle standards and roadworthiness; and
- (b) Developing a process to extend the chain of responsibility regime to heavy vehicle standards and roadworthiness.

Note that this recommendation complements recommendation 1.

Onus of Proof for Extended Liability

Current Situation

66. In certain circumstances where a breach of a driver's duty is identified, CoR provisions extend liability to parties other than the driver and operator of a heavy vehicle. For extended liability provisions, the onus of proof lies on the party in the chain who is required to establish that they took reasonable steps. Onus of proof refers to the legal obligation on the party who asserts a matter, to establish their case on the balance of probabilities by adducing sufficient supporting evidence to satisfy the required standard of proof. A party in the CoR who exercises a reasonable steps defence also asserts a matter to establish their case and is therefore required to produce evidence in support. Extended liability is intended to provide increased fairness by providing penalties to be imposed on all persons responsible for breaches of the relevant requirements. Further it is expected that extended liability would create greater incentives for compliance with the relevant requirements.³¹
67. Feedback to the July 2013 issues paper saw some stakeholders express concern that the use of the reasonable steps defence for extended liability may not be the most appropriate mechanism to achieve the intended outcomes of the CoR provisions. Fundamentally, this is due to the principle of the criminal law that the prosecution should bear the primary onus of proving all of the elements of an offence beyond reasonable doubt
68. It is noted that the First Report of the National Review into Model Occupational Health and Safety Laws found that if there were to be a reverse onus of proof, fairness would require some scaling back of the investigatory powers of the regulator.³² Similarly, there would be minimal justification to reverse the onus of proof where inspectors have wide investigatory powers.³³ The report recommended that the burden of proof for offences under the Model WHS Act, lie with the prosecution. In reaching this conclusion, weight was given to the recommended substantial increases in penalties and proposed strengthening and broadening of investigatory powers for officers.³⁴
69. It should be recognised that should changes to the reverse onus of proof for extended liability offences under the HVNL be approved, then this may result in the need to review the powers of monitoring and investigation provided under *Chapter 9 - Enforcement*.

Options/Proposals

70. As part of the February 2014 Assessment of Options paper, one option to resolve the above issue was put forward. This option was:

Option 1: Change the reasonable steps defence for extended liability offences so that onus of proof rests with the prosecution.

Option 1: Remove reverse onus of proof for extended liability	
Support	ALC, ALRTA, ATA, BIC, NatRoad, ACCI
Conditional Support	NSW RMS/TfNSW, QTMR (subject to a general duty approach and evidence regarding the successful investigation and prosecution of general duty offences without the reasonable steps defence and reverse onus of proof) NHVR (subject to the introduction of chapter specific and specific duties and

³¹ HVNL Explanatory Notes, 2012, p.19

³² National Review, First Report', op cit n 1, p 154.

³³ Ibid.

³⁴ Ibid, p.55.

	expansion of investigative powers)
Not Supported	SA DPTI, VicRoads, NSWPF, SAPOL, VICPOL, BOND

Stakeholder Feedback

Arguments For	<ul style="list-style-type: none"> • A reverse onus impinges on the basic legal principle of innocent until proven guilty.
Arguments Against	<ul style="list-style-type: none"> • Current investigatory powers are not sufficient for an authorised officer to gather evidence to prove an extended liability offence without reverse onus. • Information is available to the defendant and not easily to the prosecution. This change would restrict the effectiveness of the provision. • Would not achieve the desired outcomes of the CoR provisions which are to cover all parties responsible in the chain of events. • A reverse onus of proof is a variation on a theme, he who alleges must prove. a person claiming to have taken reasonable steps should be required to prove that those steps were actually taken and were reasonable in the circumstances.

Option 1 – Remove reverse onus of proof for extended liability

71. The ATA and NatRoad strongly held that the onus of proof for extended liability offences should rest with the prosecution, not the defendant, and that this would be consistent with the basic legal principle of being innocent until proven guilty. This was supported by the ACCI and the ALC who proposed reinstating the mistake of fact defence. The ALRTA, which in previous submissions has supported the limited use of deeming provisions, advised that they now support the ATA's position on option 1 and agreed that the burden of proving an offence should rest with the prosecution.
72. The NHVR supported changes to the onus of proof subject to the introduction of chapter specific and specific duties, the expansion of investigative powers such as the power to compel someone to attend an interview, the adoption of enforceable undertakings and providing for admissible authoritative guidance to be issued regarding minimum levels of good practice.
73. VICPOL and SAPOL opposed changes to the onus of proof and considered that an individual, who exercises a reasonable steps defence, asserts a matter to establish their case and therefore is required to produce evidence in support of that defence. SAPOL stated that as the first indication a prosecution unit may know of a reasonable steps defence being raised is likely to be in court, it is not possible for the prosecution to anticipate all reasonable step scenarios that may exist in order to negate them.
74. VicRoads and the SA DPTI considered that changes to the onus of proof would not achieve the desired outcomes of the CoR provisions to cover all parties responsible in the chain of events and that prosecutions would potentially be unsuccessful. VicRoads supported the arguments of VICPOL and SAPOL and pointed to section 72 of the Victorian *Criminal Procedure Act 2009* which stipulates that the evidentiary burden rests with the accused for exceptions, exemptions, provisos, excuses or qualifications.
75. The SA DPTI commented that under the HVNL there is no ability for investigators to compel persons to answer questions or to obtain documents relating to business practices for non-speed/fatigue matters, only documents relating to the vehicle or its load, or the journey. The SA DPTI argued that if the onus of proof rested with the prosecution, then there would be no way of proving any extended liability with the investigatory powers currently available. This sentiment was supported by Bond University which considered that at present it is arguable whether the investigatory regime under the HVNL would be sufficient to identify and prosecute breaches of persons identified as

having extended liability. Bond University suggested that unless the powers given to authorised officers in the HVNL are significantly extended, then the reverse onus provision as it currently stands should be maintained.

76. NSW RMS/TfNSW stated that it would support changing the onus of proof so that the onus rests with the prosecution subject to the introduction of an overarching general duty. The QTMR agreed with NSW RMS/TfNSW and would support re-assessing the reverse onus of proof subject to further supporting evidence regarding the successful investigation and prosecution of general duty offences without the reasonable steps defence and reverse onus of proof.

Findings

77. The taskforce notes that the NTC is undertaking an assessment of the consistency of the current executive officer liability offences in section 636, and the provisions in schedule 4 of the HVNL, with the COAG Principles and Guidelines. There is no consensus as to whether changes are required at this stage.³⁵
78. The taskforce recognises the inter-dependence of this issue with the outcome of any consideration of the merits of additional duties. The taskforce also recognises that changes to the reverse onus of proof for extended liability offences by the adoption of positive duties may result in the need to modify the monitoring and investigation powers for authorised officers provided under *Chapter 9 – Enforcement* of the HVNL.
79. This issue is unlikely to be resolved within the time frame for the review. The taskforce suggests there may be benefit to investigating this issue through a project separate to this process.

Recommendation 3:

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.

Note that this recommendation complements recommendation 1.

³⁵ The COAG-agreed principles for assessment of directors' liability provisions – see paragraph 91 below.
Chain of Responsibility Review: Taskforce Report June 2014

Executive Officer Liability – Reassessment of Section 636

Current Situation

80. Section 636 of the HVNL extends liability for some CoR offences to executive officers of corporations. Specifically, section 636 sets out two offences;
- a. Section 636(1) – is a form of accessorial liability. An executive officer must have actively authorised or permitted the offence.
 - b. Section 636(2)(a) and (b) – is a form of modified type 3 liability as specified in the COAG guidelines in that the defendant must prove their defence but the prosecution must first adduce evidence, and prove beyond reasonable doubt, that:
 - (i) the executive officer knew or ought reasonably to have known of the conduct constituting the offence; or
 - (ii) the executive officer knew or ought reasonably to have known that there was a substantial risk that the offence would be committed.
81. Under section 636(3) a due diligence defence is provided for an executive officer charged under section 636(2). The onus of proof is reversed onto the defendant to make out their defence. Even so, a defendant will only be required to do so if the prosecution can prove that the defendant had actual or constructive knowledge of the offending conduct or of the risk of the offending conduct.
82. In the feedback from the July 2013 issues paper, some stakeholders have expressed concerns as to whether the executive officer liability provisions sufficiently meet the requirements of the COAG Principles and Guidelines.
83. In line with the terms of reference, the NTC is undertaking an assessment to ensure the current executive officer liability offences in section 636 and the provisions in schedule 4 of the HVNL are consistent with the COAG Principles and Guidelines. This work is still in progress and will not be completed in time for the Transport and Infrastructure Council’s May 2014 meeting. The taskforce notes that, should an overarching general duty approach be adopted, then the above-mentioned assessment may not be required. Similarly, if chapter specific duties were adopted, then a different assessment containing the new provisions would be necessary.

Options/Proposals

84. As part of the February 2014 Assessment of Options paper, four options to resolve the above concerns were identified. These options were:

Option 1: Redraft section 636 to align with the WHS Act – moving to a positive duty with due diligence to be defined within the HVNL

Option 1: Redraft section 636 to align with the model WHS Act – moving to a positive duty with due diligence.	
Support	BOND, Caltex, SA DPTI, ALRTA, NSW RMS/TfNSW
Conditional Support	NHVR (subject to the introduction of chapter specific and specific duties, the expansion of investigative powers and admissible authoritative guidance)
Not Supported	ALC, QTMR, VicRoads, VICPOL, SAPOL, NSWPF

Option 2: Retain section 636 as drafted (i.e. deemed liability for executive officers) retaining reasonable diligence but defining this term similar to the definition of ‘due diligence’ provided in the WHS Act.

Option 2: Retain section 636 as drafted retaining reasonable diligence but defining this term.	
Support	ACCI, QTMR
Not Supported	ALC, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Option 3: Redraft section 636 to include prescribed and positive duties on executive officers to take reasonable steps.

Option 3: Redraft section 636 to include prescribed and positive duties on executive officers to take reasonable steps.	
Support	ATA, NatRoads, ALRTA
Conditional Support	QTMR (Subject to further supporting evidence regarding the successful investigation and prosecution of general duty offences without the reasonable steps defence and reverse onus of proof) NHVR (subject to the introduction of chapter specific and specific duties, the expansion of investigative powers and admissible authoritative guidance)
Not Supported	ALC, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF,

Option 4: Maintain the current section 636, however remove ‘knowingly authorised or permitted’ and ‘who knew or ought reasonably to have known’.

Option 4: Remove ‘knowingly authorised or permitted’ and ‘who knew or ought reasonably to have known’.	
Support	SA DPTI, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF
Conditional Support	NHVR (in the absence of any other reform)
Not Supported	ATA, NatRoad, ALC, ALRTA

Stakeholder Feedback

Option 1 – Redraft section 636 to align with the model WHS Act – moving to a positive duty with due diligence

85. NSW RMS/TfNSW and Bond University supported option 1 on the basis that the positive diligence duty sends a clear message of the importance of officers in promoting safety and makes those officers more liable for their actions. This would hold officers and senior managers accountable for managing, rather than being automatically liable for another party’s conduct. This position was supported by Caltex and the ALRTA. Caltex considered that the WHS general duty approach will give those who govern the organisation a clear incentive to be aware of the hazards and risks associated with the business and provide safe work practices, ongoing compliance and continual improvement. The SA DPTI believes that whilst it is worthwhile further investigating option 1, the existing provisions should be given the opportunity to be used. The NHVR supported option 1 subject to the introduction of chapter specific and specific duties, the expansion of investigative powers such as the power to compel someone to attend an interview, the adoption of enforceable undertakings and providing for admissible authoritative guidance to be issued regarding minimum levels of good practice.

86. VICPOL and The NSWPF argued against option 1 and considered that no supporting evidence has so far been provided to warrant any amendments and that implementing a prescriptive list of positive duties would risk setting 'parameters' around the scope of an executive officer's duties and obligations. This position was reiterated by the ALC.

Option 2 – Retain section 636 as drafted retaining reasonable diligence but defining this term

87. Most stakeholders argued against adopting a due diligence definition under options 2. The ALC stated that the due diligence provision contained in model WHS law is merely an inclusive definition that does not cover everything that could constitute due diligence and therefore does not advance the current situation. VICPOL considered that the WHS Act definition relates solely to health and safety matters and that it is inappropriate to transfer a term used in WHS legislation to define what would be considered 'reasonable diligence' in road transport law. They reasoned that transferring the WHS definition to the HVNL would simply duplicate WHS requirements under the HVNL. This was supported by the NSWPF. The ACCI and the QTMR however saw merit in aligning the definitions between the WHS Act and HVNL in order to provide consistent guidance to duty holders.

Option 3 – Redraft section 636 to include prescribed and positive duties on executive officers to take reasonable steps.

88. The ATA, NatRoad and the ALRTA strongly supported option 3 whereby the onus of proof rests with the prosecution instead of the defendant. The ALRTA and NatRoad maintained that it is paramount that CoR laws adhere to the general principle of Australian law that all persons must be presumed innocent. VICPOL and the NSWPF argued that an executive officer has deemed liability for a range of offences (listed in schedule 2 of the HVNL) and it would be impractical to provide prescribed duties on executive officers to take reasonable steps in relation to all of these. In addition, VICPOL considered that implementing a prescriptive list of duties would risk setting a 'limit' on what executive officers' must do to fulfil their responsibilities.

Option 4 – Remove 'knowingly authorised or permitted' and 'who knew or ought reasonably to have known'.

89. VICPOL and SAPOL supported option 4 and the removal of the terms 'knowingly authorised or permitted' and 'who knew or ought reasonably to have known' as the model law did not utilise this wording and as it stands it currently makes the offence unworkable. This position was supported by the QTMR, the SA DPTI and NSW RMS/TfNSW. SAPOL added that these terms have made it that much more difficult to prove the mental aspect which has provided a layer of insulation to protect the executive officers.
90. VICPOL is advocating for the remove of 'knowingly authorised or permitted' and 'who knew or ought reasonably to have known' from section 636(1) on the basis that it has been supported by the majority of respondents. However, the taskforce maintains that this removal would be premature and acknowledges that as per the CoR review terms of reference, the NTC's will be assessing the current executive officer liability offences in section 636 and the provisions in schedule 4 to ensure consistency with the COAG Principles and Guidelines. This assessment will consider the drafting of section 636(1) and (2).

Findings

91. See findings for Onus of Proof for Extended Liability on page 31.

Executive Officer Liability – Reassessment of Executive Officer Liability Offences under Schedule 4

Current Situation

92. In December 2009, COAG recommended six principles (Principles) for the Commonwealth, States and Territories to adopt when framing offences in the future that make executive officers personally liable for the criminal acts of their corporations. The Principles are also to be used for the review of current jurisdiction based executive officer liability provisions with a view to reducing the number of those provisions and achieving a consistent approach to executive officer liability across Australia. On 25 July 2012 COAG agreed to the Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles (Guidelines). The Guidelines provide interpretations of the COAG Principles and are to be used by jurisdictions when preparing legislation that contains executive officer liability provisions or when reviewing existing provisions.
93. At schedule 4, the HVNL contains two columns listing the provisions that executive officer liability is extended to. The provisions contained in column 2 are specified for the purposes of section 636(1), which places accessorial liability on executive officers. Column 3 offences attract type 3 liability, which places an evidential and legal onus on the defence (reverse onus). Some HVNL offences fall within both columns. During the development of the HVNL Amendment Bill 2012, legal advice was obtained from the Australian Government Solicitor (AGS) about the how the HVNL’s executive officer liability provisions (section 636) align with the COAG Principles and Guidelines. In August 2012, the AGS concluded that the HVNL’s executive officer liability provisions ‘generally comply’ with the COAG Principles and Guidelines.
94. Some stakeholders have raised concerns that the current drafting of the executive officer liability provisions do not meet the COAG Guidelines, in particular the allocation of offences to column 2 – accessorial liability, or column 3 – type 3 liability.
95. In line with the terms of reference, the NTC is currently undertaking an assessment to ensure the current executive officer liability offences in section 636 and the provisions in schedule 4 of the HVNL are consistent with the COAG Principles and Guidelines. This work is still in progress and will not be complete in time for the May 2014 Transport and Infrastructure Council meeting. The taskforce notes that should an overarching general duty approach be adopted, then the above-mentioned assessment may not be required. Similarly, if chapter specific duties were adopted then a different assessment containing the new provisions would be necessary.

Options/Proposals

96. As part of the February 2014 Assessment of Options paper, two options to resolve the above concerns were identified. These options were:

Option 1: Reassess the offences listed in columns 1, 2 and 3 of schedule 4 to ensure alignment with the COAG Guidelines.

Option 1: Reassess executive officer liability provisions against COAG principles	
Support	ATA, NatRoad, ALC, ALRTA, QTMR, VicRoads
Not Supported	ACCI, SA DPTI, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Option 2: Maintain the status quo which involves no change to the current drafting of the HVNL.

Stakeholder Feedback

Option 1 – Reassess executive officer liability provisions against COAG principles

97. The ATA, the ALRTA, the ALC and NatRoad supported option 1 and the reassessment of the offences in columns 1, 2 and 3 of schedule 4 to ensure alignment with the COAG Guidelines. The ATA maintained that liability should only apply where a person has influence relevant to an offence. This position was supported by NatRoads. VicRoads explained that a number of offences pertain to both the accessorial provisions in column 2 and the type 3 directors' liability provisions in column 3. Therefore both an adversarial and type 3 directors' liability provision may potentially apply to the same offence. There is some concern from Victoria's perspective as to the practical functionality of this approach and they would support a reassessment of provisions. This view was supported by the QTMR.

Option 2 – Maintain the status quo which involves no change to the current drafting of the HVNL

98. However, the ACCI, the SA DPTI, SAPOL and the NSWPF considered work had already been completed to ensure consistency with the COAG principles and that there did not appear to be supporting evidence or a strong case to reassess offences. VICPOL maintained that the HVNL executive officer liability offences clearly align with the COAG Principles and currently recognise the compelling public interest for executive officers to have liability for corporate misconduct which places public safety at risk.
99. VICPOL stated that its review of offences had shown that in each instance, non-compliance with the respective requirements has potential to cause significant harm, or to undermine systems established under the HVNL designed to regulate and ensure compliance and that this was consistent with principle 4 of the COAG principles.
100. NSW RMS/TfNSW reiterated its position that should an overarching general duty provision be adopted then section 636 would need redrafting anyway and the provisions specified in schedule 4 would no longer be required.

Findings

101. See findings for Onus of Proof for Extended Liability on page 31.

Topic 2: Parties & roles

Understanding of Roles/Activities/Undertakings and Responsibilities of Parties

Current Situation

102. Over time, various publications have been released detailing the responsibilities of particular identified parties in the chain and providing guidance on what might be considered a reasonable steps defence.
103. Stakeholders, particularly industry, have expressed the view that there should be more robust guidance available in relation to what might constitute a reasonable steps defence and how chain parties might go about acquitting their duties.
104. The intention of the reasonable steps defence is that it allows some degree of flexibility in its application, appropriate to the parties involved, the size and reach of the business, and the particular circumstances of an event or offence. Narrowing the reasonable steps that parties may take poses a number of risks, including reducing flexibility for chain parties to self-assess what steps are reasonable in their particular circumstances; the mandate of some examples over others may create unnecessary red tape for chain parties; a reduction in the motivation for chain parties to undertake proactive steps over and above those 'recommended'; reducing the future flexibility of the HVNL to adapt to a changing industry.

Options/Proposals

105. As part of the February 2014 Assessment of Options paper, three proposals to resolve the above concerns were identified. These proposals were:

Proposal 1: Need for clarity on responsibilities and how parties in the chain can comply with obligation. This can be achieved through further examples provided in the HVNL and regulations or through additional fact sheets and guidelines

Proposal 1: Clarify responsibilities and how parties in the chain can comply with obligation.	
Support	BOND, Caltex, ATA, NatRoad, ACCI, SA DPTI, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL
Conditional Support	NHVR (subject to the introduction of chapter specific and specific duties and admissible authoritative guidance)
Not Supported	ALC, NSWPF

Proposal 2: Amend the HVNL to include statutory obligations on the steps parties in the chain must take in order to comply with their obligations under the HVNL.

Proposal 2: Include statutory obligations that parties in the chain must take in order to comply with their obligations under the HVNL	
Support	ATA, NatRoad SAPOL (only to clarify)
Conditional Support	SAPOL (only in so far as it helps to define reasonable steps rather than making an abstract theme.)
Not Supported	ALC, SA DPTI, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, NSWPF, NHVR

Proposal 3: Provide within the HVNL, a requirement on an employer to notify employees of their roles, activities, undertakings and responsibilities to ensure that employees are aware of their CoR obligations.

Proposal 3: Provide a requirement on an employer to notify employees of their roles, activities, undertakings and responsibilities.	
Support	ALRTA, QTMR
Not Supported	ALC, SA DPTI, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Stakeholder Feedback

Proposals 1 and 2 – Clarify responsibilities and Include statutory obligations that parties in the chain must take in order to comply with their obligations

106. The majority of stakeholders supported proposal 1 and saw the need to provide clarity on responsibilities and how parties in the chain may comply with obligations through fact sheets and guidelines rather than further examples in the HVNL. Caltex considered that the HVNL was complex and as such it would be prudent for there to be clear guidelines in place that would assist an employer in notifying employees of their roles, activities undertakings and responsibilities under the HVNL.
107. The QTMR supported proposal 1, however it did not support proposal 2 and considered that an overly prescriptive approach to compliance such as legislative requirements could result in a ‘tick and flick’ approach that would not lead to industry developing a true safety culture. VicRoads supported the QTMR’s position on the basis that it would provide for flexibility rather than strict legislative compliance.
108. SAPOL supported proposal 1 over 2 considering that while there was a need for clarity, it must be in the law through examples rather guidelines or fact sheets. This, it argued would clarify the minimum steps that must have been taken. SAPOL asserted that the current situation means that police have to identify the steps the person should have taken and that they believe are reasonable in the circumstances. The NHVR supported proposal 1 subject to the introduction of chapter specific and specific duties and the power for admissible authoritative guidance to be issued regarding minimum levels of good practice.
109. The ALC opposed proposal 1 and 2 and considered that the information provided in the Assessment of Options paper provided plenty of guidance as to what constitutes ‘all reasonable steps’.
110. The ATA and NatRoad supported a combination of proposals 1 and 2 and suggested that CoR could be enhanced through the introduction of positive duties on chain parties that are relevant to that party’s role and circumstances. VICPOL and VicRoads did not support proposal 2 and argued that it would be impossible to cover all the ways in which a party must comply with their responsibilities and that what constitutes ‘responsibilities’ will depend on the circumstances of each individual case.

Proposal 3 –Employer to notify employees of their roles, activities, undertakings and responsibilities

111. The majority of respondents did not support the adoption of proposal 3 and the requirement on an employer to notify employees of their roles, activities, undertakings and responsibilities. The ALC stated that this would effectively replicate the WHS obligations and the SA DPTI considered that this may undermine the ability to prosecute many offences if an employer failed to notify employees. VicRoads considered that it was inappropriate to criminalise failing to notify employees of their role, activities, undertakings and responsibilities. VICPOL and the NSWPF considered that

good management would see companies using the HVNL to inform company policy and ensure employees are aware of and comply with their obligations as part of reasonable steps.

112. The ALRTA and the QTMR supported the proposal. The ALRTA considered that it was a reasonable requirement which is in both the interests of the employer and the employee. The QTMR stated that while it could be argued that this requirement is inherent within a general duty as well as the reasonable steps for the specific existing extended liability requirements, the effective induction and education of employees is considered integral to all effective safety management systems.

Findings

113. The taskforce agrees on the need for improved and consolidated guidance material and examples on how parties in the chain of responsibility can comply with their obligations under the HVNL.
114. The taskforce supports the work of the NHVR in developing and consolidating guidance material to assist parties in the chain of responsibility to comply with obligations.

Recommendation 4:

The taskforce recommends that the NHVR, in consultation with stakeholders, develop a program and timeline for preparing and issuing chain of responsibility guidance material to assist parties in the chain of responsibility to comply with their obligations.

Parties in the Chain of Responsibility

Current Situation

115. CoR aims to identify responsibilities of various parties and hold those parties legally accountable for breaching their responsibilities. Each party expressly identified is considered to play an integral part in the prevention or performance of breaches of relevant requirements.³⁶
116. Some stakeholders have raised concerns that there are currently parties who influence or exert influence on on-road activities and who are not identified as parties within the chain of responsibility.

Options/Proposals

117. As part of the February 2014 Assessment of Options paper, six proposals to resolve the above concerns were identified. These proposals were:

Proposal 1: There is a need to target all entities that exert influence over business practices to the extent that it may cause a breach of the HVNL.

Proposal 1: Target all entities that exert influence over business practices to the extent that it may cause a breach of the HVNL.	
Support	BOND, SA DPTI, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW
Conditional Support	NHVR (subject to a regulation making power and provisions clarifying that there may be more than one individual standing in a named functional) VICPOL (agrees that all parties who exert influence in the chain should be targeted however, believes all relevant parties are currently captured)
Not Supported	ALC, SAPOL, NSWPF, ATA, NatRoad

Proposal 2: There is a need to target individuals that create demand for road transport that results in breaches (i.e. inventory managers, time slotters, retail managers, load owners and freight customers).

Proposal 2: Target individuals that create demand for road transport that result in breaches.	
Support	Caltex, ATA, NatRoad, ALRTA, QTMR, VicRoads
Conditional Support	NHVR (the current law, augmented by specific duties, would resolve this issue) VICPOL (agrees that all parties who exert influence in the chain should be targeted however, believes all relevant parties are currently captured)
Not Supported	ALC, SAPOL, NSWPF

Proposal 3: There is a need to target employees and workers under the CoR provisions, such as with the model WHS Act approach.

Proposal 3: Target employees and workers under the CoR provisions, such as with the model WHS Act approach.	
Support	Caltex, ACCI, QTMR, VicRoads, NSW RMS/TfNSW
Conditional Support	SAPOL (may warrant further investigation in line with discussion about overarching general duty) NHVR (the current law, augmented by specific duties, would resolve this

³⁶ HVNL Explanatory Notes, 2012, p.19.

	issue)
Not Supported	ALC, VICPOL, NSWPF

Proposal 4: One way to manage the above three proposals is to expand the current definitions of 'parties in the chain of responsibility' (i.e. consignees, schedulers etc.) to include parties such as inventory managers, time slotters, retail managers, load owners and freight customers.

Proposal 4: Expand the current definitions of 'parties in the chain of responsibility' to include parties such as inventory managers, time slotters, retail managers, load owners and freight customers.	
Support	ACCI, ALRTA, QTMR, VicRoads, SAPOL
Conditional Support	NHVR (may not oppose adjustment if there are specific examples of problems encountered by agencies or by industry).
Not Supported	ALC, SA DPTI, VICPOL, NSWPF

Proposal 5: Another way to manage the proposals 1, 2 and 3 as discussed above, may be to amend the HVNL to relocate the definition of 'parties in the chain of responsibility' from the Act to the regulations. This would mean that the definition could be expanded and additional parties could be added as needed to without the difficulty that comes with amended an Act.

Proposal 5: Relocate the definition of 'parties in the chain of responsibility' from the Act to the regulations.	
Support	BOND, ALRTA
Not Supported	ATA, NatRoad, ALC, SA DPTI, QTMR, VicRoads, VICPOL, SAPOL, NSWPF. NHVR

Proposal 6: Redraft the definition of consignor to focus on the role of the consignor rather than the individual named on documentation.

Proposal 6: Redraft the definition of consignor to focus on the role of the consignor rather than the individual named on documentation.	
Support	BOND, SA DPTI, ALRTA, QTMR, NSW RMS/TfNSW, NHVR
Not Supported	ALC, VICROADS, VICPOL, SAPOL, NSWPF

Stakeholder Feedback

Proposals 1 and 2 – Targeting of persons who influence on road behaviour

118. Bond University supported proposals 1 and 2 and believes that as it is impossible to anticipate and therefore legislate for every party or eventuality, therefore the taskforce should adopt the approach already discussed of introducing a general duty obligation to cover parties not specifically mentioned.
119. An example of such as provision 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 in such a way as to endanger the health and safety of any person, has a duty to take reasonable steps to ensure that their acts or omissions do not so endanger the health or safety of any person'.
120. Bond University's argument was supported by the SA DPTI, QTMR and NSW RMS/TfNSW whereas VicRoads considered that the current definitions of 'parties in the chain of responsibility' or a

'relevant party' could be amended so as to indicate that the list is not exhaustive (i.e. the parties in the chain of responsibility, includes but is not limited to, the following parties). This would mean that the onus is on the investigation/prosecution to prove that a person/entity was a responsible or relevant party in the commission of an offence without having to fit the person/entity into one of the prescribed definitions. The ALRTA supported proposal 1 and proposal 2 and the inclusion of a 'catch all' mechanism such as 'any person, by whatever name called, whose role or responsibilities gives the person responsibility for a heavy vehicle'. The ATA and NatRoad opposed proposal 1 but supported proposal 2 as it provided clarity for industry. The ATA suggested that to remove all doubt as to whether parties are or are not included in the CoR, a 'catch-all' definition of "any person, by whatever name called, whose role or responsibilities give them responsibility for a heavy vehicle", could be added to relevant parts of the current speed and fatigue chapters.

121. Caltex acknowledged the concern of stakeholders that current duties in the HVNL did not cover parties that should be covered. As such Caltex supported the expansion of the duty holders to include the parties mentioned in proposal 2 which would assist in aligning the HVNL with broad principles for duty holders contained in the WHS Act.
122. The NHVR supported proposal 1 subject to the inclusion of a regulation making power to allow additional parties to be declared and of provisions clarifying that there may be more than one individual standing in a named functional role. The NHVR also opposed a general provision that covers all parties as a means of seeking to capture new functional roles within the CoR and strongly supported the retention of the current functional roles model, as it provides greater certainty in the market place.
123. VICPOL and the NSWPF considered that both proposals were unnecessary and that all parties who should be included in the CoR provisions currently are and that the functions of these additional jobs such as time slotters are covered under current definitions. The ALC did not believe that sufficient evidence had been provided to justify the identification of new duty holders, and should evidence be provided, then adding new duty holders should be tested through the HVNL Legislation Management Programme process.

Proposals 3 and 4 – Targeting employees/workers & widening of current definitions

124. Caltex indicated support for proposal 3 to include the broad definition of a 'worker' from the WHS Act in the HVNL. This was reiterated by the ACCI and NSW RMS/TfNSW as the current law has the effect of singling out drivers but not other workers. While it is reasonable that drivers have specific obligations because of their role in the logistics chain, other workers should also be held accountable for the impact their conduct may have on the safety of road transport operations. The ACCI, the QTMR, SAPOL and the ALRTA supported amending the definition of 'parties in the chain of responsibility' to include additional parties as discussed in proposal 4. SAPOL added that this issue may warrant further consideration as part of any discussion on a general duty. VICPOL and the NSWPF considered that the HVNL provisions already covered employees and workers and therefore no amendment to include additional parties was unnecessary. The NHVR considered that these issues could be managed through the introduction of specific duties on these parties.

Proposal 5 – Use of regulations to identify responsible persons in the chain of responsibility

125. Proposal 5 discussed relocating the definition of 'parties in the chain of responsibility' from the HVNL to the Regulations to allow the definition to be expanded to include additional parties. This proposal was opposed by the majority of respondents. VicRoads argued that it is not appropriate for the definition of 'parties in the chain of responsibility' to be provided in regulation as these are related to criminal offences and should be dealt with in primary legislation. This proposal was supported by the ALC who considered that regulations should not be used to expand the class of

- person who can face criminal liability established in primary legislation. The ATA and NatRoad opposed the proposal as a derogation of parliamentary responsibility. Bond University and the ALRTA supported proposal 5 on the basis that it provided flexibility in targeting supply chain parties.
126. Bond University stated that this proposal combined with the adoption of a general duty provision would be desirable for the sake of simplicity. Another approach highlighted by Bond University would be to affix a deeming clause to each relevant section of the Act allowing the definition of the type of person relevant to the requirements of that section to be expanded by the regulation. The new deeming provision at s 214(h) and at 227(j) could simply read 'and any other party deemed to be so by the regulations'. Bond considered that the insertion of such a provision would allow for a rapid amendment of the regulatory system to meet unanticipated eventualities without the need for the slower and more cumbersome amendment to the HVNL.

Proposal 6 – Redefine consignor to focus on role

127. NSW RMS/TfNSW supported proposal 6 and highlighted the current problem whereby the definition of 'consignor' states that a person is taken to be a consignor if they are so named in transport documentation. Only where no such documentation exists can their actual behaviour be considered. Proposal 6 was also supported by the SA DPTI, the QTMR and VicRoads. Bond University suggested that this could be simply amended by the addition of a subsection 2 which reads 'despite a person being named as a consignor of goods is the documentation pursuant to (l)(a) above, where there is evidence that another person has the effective responsibility for the engagement of the operator of a vehicle to transport the goods either directly or indirectly, then that other person shall be taken also to be a consignor of goods'. The NHVR agreed with NSW RMS/TfNSW and considered that the drafting of this definition was inconsistent with the definition of consignee and inconsistent with the principle that a party must not be able to contract out from their CoR duties. VICPOL and the NSWPF considered that changes based on this proposal were unnecessary and they considered that the definition was currently sufficient. The ALC did not believe that sufficient evidence had been provided to justify making changes to the definition of consignor.

Findings

128. The taskforce supports the concept of describing a person by role and function rather than title. The taskforce supports the premise that a party with a *material* role in influencing road transport should be covered by the chain of responsibility regime. However, whilst the taskforce has received some feedback that indicates a need to target additional parties who are not currently covered, this is not a universal view and some key stakeholders believe the appropriate parties are already covered.
129. The taskforce recognises that there is uncertainty amongst stakeholders as to whether all parties who should be covered actually are and that the existence of gaps should be tested. The taskforce suggests that consideration should be given to exploring the inclusion of additional parties in the context of looking at duties to determine the most appropriate way to cover these parties.
130. The taskforce notes that if recommendation 2 to extend CoR to vehicle standards and roadworthiness is accepted, an examination of whether additional parties should be covered will be necessary.

Recommendation 5:

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 (recommendation 1).

Topic 3: Compliance & Enforcement

Enforcement Powers

Current Situation

131. The decision to initiate a CoR investigation may be based on a combination of factors and triggers internal to the investigating agency inclusive of (but not limited to) resource availability, organisational capability, government priorities, changing strategic focus; and opportunity (to improve compliance; educate; to be proactive or reactive).
132. The decision may also be based on a combination of external factors and triggers such as number of offences, severity of offences, location of responsible parties, location of offences, likely existence of evidence, strength of opposing legal argument, ability to influence improved compliance behaviours as a result of the investigation, statute of limitations and risk of time overrun, evidence of systemic and habitual breaches, evidence of unfair commercial advantage as a result of breaches, road collisions resulting in damage or posing safety or infrastructure risks and evidence of unreasonable demands and pressures on parties in the supply chain to breach the laws.
133. Some stakeholders have raised concerns that certain powers afforded authorised officers under the HVNL limit their ability to obtain all necessary information to assist a CoR investigation.

Options/Proposals

134. As part of the February 2014 Assessment of Options paper, ten proposals to resolve the above concerns were identified. These proposals were:

Proposal 1: Broaden the entry powers for authorised officers.

Proposal 1: Broaden the entry powers for authorised officers.	
Support	BOND, SA DPTI, QTMR, NSW RMS/TfNSW, NHVR
Not Supported	ATA, NatRoad, ALC, ALRTA, VicRoads, VICPOL, NSWPF

Proposal 2: Redraft sections regarding the powers of inspectors. The focus of that redrafting should be the pursuit of clarity which will assist inspectors in exercising their powers within the extent allowed by law.

Proposal 2: Redraft sections regarding the powers of inspectors. The focus of that redrafting should be the pursuit of clarity which will assist inspectors in exercising their powers within the extent allowed by law.	
Support	BOND, ATA, NatRoad, SA DPTI, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, NSWPF, NHVR
Not Supported	ALC, VICPOL

Proposal 3: Amend section 569 of the HVNL to provide for the instantaneous production of transport documents at business premises not limited to written requirements and not inhibited by time (retrieval and delivery).

Proposal 3: Amend section 569 of the HVNL to provide for the instantaneous production of transport documents at business premises not limited to written requirements and not inhibited by time (retrieval and delivery).	
Support	SA DPTI, QTMR, NSW RMS/TfNSW
Not Supported	ATA, NatRoad, ALC, ALRTA, VicRoads, VICPOL, NSWPF, NHVR

Proposal 4: Broaden the parameters of the power to require production of documents under section 569 to remove the limitation of needing to be satisfied that documents are in possession or under control of person/company.

Proposal 4: Broaden the parameters of the power to require production of documents under section 569 to remove the limitation of needing to be satisfied that documents are in possession or under control of person/company.	
Support	BOND, SA DPTI, QTMR, NSW RMS/TfNSW
Not Supported	ATA, NatRoad, ALC, ALRTA, VicRoads, VICPOL, NSWPF, NHVR

Proposal 5: Amend section 570 of the HVNL to align the power to compel persons to answer questions with section 155 of the WHS Act (knowledge and documents and at a time and place etc.).

Proposal 5: Amend section 570 of the HVNL to align the power to compel persons to answer questions with that under section 155 of the WHS Act (knowledge and documents and at a time and place etc.).	
Support	BOND, SA DPTI, QTMR, NSW RMS/TfNSW, SAPOL
Conditional Support	NHVR (subject to any amendment importing the safeguards found at s155 of the WHS Act).
Not Supported	ATA, NatRoad, ALC, ALRTA, VicRoads, VICPOL, NSWPF

Proposal 6: Amend section 570 so that it extends to all people who may have information and not just a responsible person for a heavy vehicle.

Proposal 6: Amend section 570 to extend to all people who may have information and not just a responsible person for a heavy vehicle.	
Support	BOND, SA DPTI, ALRTA, QTMR, VicRoads, NHVR
Not Supported	ATA, NatRoad, ALC, VICPOL, NSWPF

Proposal 7: Amend section 570 to include additional information that may be integral to an investigation for example information relating to business practices.

Proposal 7: Amend section 570 to include additional information that may be integral to an investigation, for example, information relating to business practices.	
Support	ATA, NatRoad, SA DPTI, ALRTA, QLD, SAPOL, NHVR
Not Supported	ALC, VICROADS, VICPOL, NSWPF

Proposal 8: Amend the HVNL to provide that where a driver of a heavy vehicle is charged with a breach of the HVNL for which an operator may also be liable (via extended liability), and an officer does not take action against the operator of the heavy vehicle, that either the NHVR or the authorised officer working on behalf of the NHVR, have the discretion to notify the operator that a breach has occurred.

Proposal 8: Amend the HVNL to provide that where a driver of a heavy vehicle is charged with a breach of the HVNL for which an operator may also be liable (via extended liability), and an officer does not take action against the operator of the heavy vehicle, that either the Regulator or the authorised officer working on behalf of the Regulator, are required to notify the operator that a breach has occurred.	
Support	BOND, ATA, NatRoad, ALC, SA DPTI, ALRTA, VicRoads, VICPOL, SAPOL, BIC
Conditional Support	QTMR (further investigation of any privacy issues would be required) NHVR (subject to ensuring that the NHVR is given sufficient powers to enter into agreements, make directions or put forward Ministerial Guidelines).
Not Supported	

Proposal 9: Produce enforcement guideline to assist officers in making decisions that pertain to the CoR regime.

Proposal 9: Produce enforcement guideline to assist officers in making decisions that pertain to the CoR regime.	
Support	BOND, ATA, NatRoad, ACCI, ALC, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, NHVR
Conditional Support	VICPOL, SAPOL, NSWPF (noting that operational guidelines developed by external agencies are not binding).
Not Supported	

Proposal 10: Amend the HVNL to require authorised officers who break seals when conducting searches of heavy vehicles, to reseal the thing or if the officer does not have a seal available, to leave an auditable account of their actions.

Proposal 10: Amend the HNL to require authorised officers who break seals when conducting searches of heavy vehicles, to reseal the thing or if the officer does not have a seal available, to leave an auditable account of their actions.	
Support	ATA, NatRoad, ALC, SA DPTI, ALRTA, QTMR, NHVR
Conditional Support	NSW RMS/TfNSW, VICROADS, VICPOL, NSWPF (standard operational practice)
Not Supported	

Stakeholder Feedback

Proposal 1 – Broader entry powers

135. NSW RMS/TfNSW clarified the intent of the proposal to broaden the entry powers for authorised officers. NSW RMS/TfNSW considered that certain tools essential to an investigator's ability to carry out a thorough investigation are lacking from the HVNL, namely the ability to access all information necessary to determine where there is a risk to safety. Accessing such information necessarily includes the power of entry, the power to require information to be provided to the inspector and,

importantly, the power to compel persons to answer questions where warranted (discussed further under proposal 5).

136. Bond University agreed that from the current structure it is clear that there are significant limitations which would preclude (rather than simply hinder or make more difficult) an authorised officer's capacity to obtain sufficient information to successfully prosecute many individuals guilty of breaches of CoR duties. Bond University recommended that the HVNL be amended to give authorised officers extended powers and suggested that a section equivalent to section 117 of the WHS Act would be appropriate. Under this section an officer may enter a workplace for the purpose of inquiring into a suspected contravention if they reasonably suspect that the contravention has occurred or is occurring. This position was supported by the SA DPTI and the QTMR.
137. The NHVR supported proposal 1 due to certain practical barriers to investigations that have been identified. The NHVR acknowledged the concerns of industry regarding the disruptive and possibly intrusive nature of investigative operations and suggested that these concerns may be managed with investigative guidelines, codes of conduct, internal audit, and transparent ombudsman functions.
138. The ATA and NatRoad opposed any broadening of powers on the grounds that it would expose industry to the risk of 'fishing expeditions'. This position was supported by the ALC and the ALRTA who maintained that many drivers and operators state that the current entry and inspection powers are too broad. The ALRTA argued that it is a reasonable expectation in a free society that officers must have sufficient and justifiable cause before violating a private business premises or the cabin of a truck which can also be the private living quarters of the driver.

Proposal 2 – Redrafting of inspectors' powers

139. The majority of stakeholders supported proposal 2 to redraft the sections on the powers of inspectors to focus on clarity to assist inspectors in exercising their powers within the extent allowed by law.
140. NSW RMS/TfNSW noted that although the HVNL provides powers of entry, these powers are limited by certain conditions depending on the reason for entry (monitoring or investigative purposes) or whether the entry is to a place or a vehicle. A further area of concern raised by NSW RMS/TfNSW was the overlap and confusion in the powers ascribed to inspectors under the HVNL. By way of example, the power of an authorised officer to enter premises is subject to the occupier's consent (unless certain exceptions apply) and does not include the power to film at those premises. The power to enter and inspect heavy vehicles, on the other hand, is not reliant on consent and does include a power to film. NSW RMS/TfNSW maintained that the overlap and differences in the extent of the powers may cause inspectors to inadvertently misuse their powers and thereby lead to the inspectors acting ultra vires and their actions being challenged in court.
141. The QTMR and VicRoads agreed with NSW RMS/TfNSW that clarification of entry powers was necessary. VicRoads provided an example of a case where evidence was deemed to have been illegally and improperly obtained because officers that entered the subject premises did not have the legislative authority to enter the place in question.
142. The ALRTA agreed that powers should be clarified however an exceptionally compelling case would need to be put forward before industry would support greater entry and inspection powers. The ATA and NatRoad considered that proposal 2 may have merit as part of on-going maintenance to

the reform. VICPOL and the NSWPF maintained that powers are already quite specific and clear and amendment was not required.

Proposal 3 – Immediate production of documents

143. The majority of stakeholders opposed proposal 3 to allow for the instantaneous production of transport documentation.
144. The QTMR stated that during some investigations, consent to enter has been for the purpose of conducting an interview and this limits the ability to obtain documents or information at that time. The QTMR maintained that should an officer then attempt to gather information/evidence, the courts would likely exclude it for lacking a relationship to the original purpose of entry. It proposed an investigative power that afforded entry to premises when the business is open and allowed for the ability to make various requirements irrespective of whether or not it was stated in the purpose of the entry. This position was supported by both the SA DPTI and NSW RMS/TfNSW.
145. VicRoads considered the current drafting of the HVNL to be appropriate as it allows authorised officers to require documents to be produced for inspection at a reasonable time and place nominated by the officer. This approach gives a person sufficient time to gather the required documents. The QTMR's position is that for records required to be kept, investigators ought to be able to expect such documents be produced upon demand. The QTMR believes that there is a risk of losing such evidence once companies become aware of the approach of officers. The SA DPTI agreed that the time given in a written direction to produce documents may allow for the alteration of existing documents or the creation of new false documents.
146. The ALRTA recognised the concerns of regulators and enforcement agencies regarding the current powers to produce documents, however, maintained that proposal 3 went too far in seeking 'instantaneous' production and that section 569 already provides a power for documents to be made available at a reasonable time and place nominated by the officer. The ALRTA considered that the 'reasonable' test would have regard for the location of the document and ease of access and that even at a business premises, production of documents may be limited by time for reasons such as absence of a particular staff member or complex filing and retrieval systems.

Proposal 4 – Remove a particular qualification of the power to require production of documents

147. The majority of stakeholders opposed proposal 4 to remove the limitation of an authorised officer having to be satisfied that documents are in possession of person a person.
148. The SA DPTI argued that proving a document is under a person's control can be problematic for an authorised officer. The SA DPTI highlighted instances when a business has gone into administration (either voluntary or involuntary) and the documents in question have been in the control of the solicitor, but it is uncertain if that solicitor meets the definition of a responsible person. The SA DPTI considered that it was crucial that officers could request documents relating to business practices of all types of offences, in order to fully investigate those offences. Bond University agreed that there was no sensible or discernable reason for limiting the types of document that an authorised officer can access and that it was quite possible that other documents outside of those identified in section 569 would assist in proving a breach. Bond University argued that other documents that cannot be anticipated could assist an authorised officer in their investigation and that if a document is acquired that does not assist then no harm has been incurred. Bond University reasoned that it must be presumed that investigations will be carried out efficiently and in good faith and will not consist of mere fishing expeditions (no such evidence has been seen in relation to the broad powers available for some time under the general WHS Acts) and until such evidence is adduced, authorised officers' powers should not be unduly restricted by overly prescriptive burdens.

149. The ALRTA considered that proposal 4 has potential to push the boundary too far towards regulatory expediency at the cost of fairness and reasonableness. The ALRTA raised concern that the proposal will effectively allow officers to ‘go fishing’ for documents while simultaneously placing a significant regulatory burden on investigated parties.

Proposal 5 – Compelling answers to questions, subject to safeguards

150. Proposal 5, to provide power to compel a person to answer questions, elicited a range of responses from stakeholders. Bond University considered that the capacity to question workers and officers and other relevant persons is crucial to any investigation and it is therefore entirely appropriate that authorised officers have wider powers to obtain information from persons. Bond University also reasoned that it must be presumed that investigations will be carried out efficiently and in good faith and will not consist of mere fishing expeditions. The SA DPTI and SAPOL supported Bond University’s comments and considered that compelling responses from people under proposal 5 may serve to protect individuals and identify the real motivators behind non-compliance. NSW RMS/TfNSW maintained that without the ability to compel a person to speak to the inspector, the inspector will not be able to assess the entirety of the information, including the potential culpability of other parties in the chain aside from the more obvious ones involved in the offence (e.g. the driver or the operator). This means that authorised officers are limited in their ability to assess the actions of all parties in the chain and their potential defences which may make an inspector more reluctant to commence a prosecution.
151. The NHVR considers that a power of this kind was essential to supporting effective investigations into complex matters and matters which may involve sophisticated, skilled and/or well-resourced parties. The NHVR also supported providing appropriate protections and immunities that would preserve the rights and liberties of natural persons.
152. The ALRTA opposed proposal 5 and considered that persons under investigation should be afforded an opportunity to carefully consider any questions asked in the context of all circumstances and answer these after taking professional advice, making their own enquiries and ‘calming down’ after what can be a very stressful experience. The ATA and NatRoad also opposed the proposal on the grounds that it would expose industry to the risk of ‘fishing expeditions’. VicRoads maintained that the amendment could not compel a person to answer questions and that silence could still occur and will only constitute an offence for failure to answer questions. VICPOL agreed with VicRoads and believes that the HVNL powers are sufficient.

Proposal 6 – Wider range of persons to come within compliance powers

153. VicRoads and the QTMR supported proposal 6, to extend section 570 to all people who may have information and not just a responsible person for a heavy vehicle, on the basis that it would remove the onus on the investigator to justify who is a responsible person when gathering evidence. The QTMR also specified that this amendment is consistent with current powers under its *Transport Operations (Road Use Management) Act*. The ALRTA agreed that enforcing chain of responsibility relies heavily on officers being able to obtain relevant information, provided that the information is only sought as part of active investigations and when there is just cause for doing so.
154. The ATA and NatRoad opposed the proposal on the grounds that it would expose industry to the risk of ‘fishing expeditions’. VICPOL considered that the definition of ‘responsible person’ under the HVNL was currently sufficient to cover the appropriate parties

Proposal 7 – Wider range of information to come within compliance powers

155. The majority of respondents supported proposal 7 to include other information that may be integral to an investigation and considered that the proposal should be explored further. The SA

DPTI maintained that it was crucial that regulators can request documents relating to business practices of all types of offences, in order to fully investigate those offences. SAPOL added that it would assist to get to the root cause of on-road breaches such as contractual arrangements or standard operating procedures that may not otherwise be known of that have influenced others in committing the offence. The ALRTA agreed provided that the information is only sought as part of active investigations and when there is just cause for doing so.

156. VicRoads considered that information relating to business practices would not be used to assist an investigation but rather by a defendant to constitute the reasonable steps defence. VICPOL was uncertain how enquiries relating to business practices would be relevant to an enquiry under section 570 as it deals with obtaining information about a heavy vehicle, the start point, route and end point of its journey and its load.

Proposal 8 – Notifying an operator of a breach

157. The majority of respondents supported further consideration of proposal 8, to provide power for an authorised officer to notify the operator that a driver breach has occurred. However, most enforcement and transport agencies considered that this should be a discretionary requirement.
158. Bond University considered the proposal to be eminently sensible, given that a person in the CoR is more likely to take action to prevent breaches from happening if they are aware of them. The ALRTA strongly supported the proposal and considers that this was a peculiar oversight within CoR law and maintained that while this matter could be covered in employment contracts, this is typically not a reliable practice as employees have an understandable motivation not to report matters which may negatively affect their employment. The ALRTA agreed that while arguments have been made against disclosure 'on the basis of privacy and human rights concerns, road safety is a matter of life and death that should be the paramount concern'.
159. VICPOL supported the proposal however, maintained that if introduced, that it must contain protection for the authorised officer who releases the information, must be discretionary as to whether the notification occurs and must not create a grounds for defence based on the fact that notification could have occurred but did not. VICPOL also proposed that this requirement could also extend to offences such as drug driving to alert employers to the behaviours of employees.
160. The SA DPTI stated that currently in South Australia if the company was being investigated then the operator would be notified of the time/date and nature of the driver offence. However, in the case that an infringement notice has been issued to the driver, the operator may never know of the offence and have no opportunity to address the behaviour.
161. The NHVR supported the proposal subject to considerations of privacy issues around access to data, possible accidental release of the wrong data or to the wrong person and the treatment of any liability. The NHVR recommended that any proposal should also provide that the Regulator is given sufficient powers to enter into agreements, make directions or put forward Ministerial Guidelines in order to facilitate implementation.

Proposal 9 – National chain of responsibility enforcement guidelines

162. The majority of respondents supported further consideration of proposal 9 to produce enforcement guideline to assist officers in making decisions that pertain to the CoR regime. The ACCI supported developing a national compliance and enforcement policy that would be applied consistently across Australia. The ALC proposed that the NHVR and police forces enter into a memorandum of understanding as to when and how police will exercise enforcement functions under the HVNL. The ALC further stated that the NHVR should publish prosecution guidelines

containing matters that must be taken into account by officers when providing services for the NHVR.

163. NSW RMS/TfNSW considered that in order to achieve and maintain national consistency, the NHVR should consider issuing national enforcement guidelines to assist regulatory and law enforcement agencies to enforce the provisions of the HVNL consistently across jurisdictions. Bond University agreed to the extent that any such guidelines are not unduly prescriptive, and are consistent across jurisdictions. Bond University proposed that Authorised Officers be encouraged within the guidelines to fully investigate parties in the CoR other than drivers.
164. VICPOL reiterated that as an independent enforcement agency with a specialist CoR Unit, adherence with the law, VICPOL policies, priorities, resources and subject-matter expertise would determine CoR enforcement activities and not guidelines issued by external agencies. This position was supported by NSWPF.

Proposal 10 – Resealing containers

165. The majority of respondents supported proposal 10 to require authorised officers who break seals on containers to reseal the container. However, a number of enforcement agencies maintained that this proposal can be achieved through operational practice and did not require legislative amendment.
166. SAPOL stated that officers carry load seals and issue receipts for any load seals that have been replaced. Officers are also instructed that load seals will not be removed unless there are replacements at hand. SAPOL reminded stakeholder that as other laws also allow searching of vehicles and use of force such as the *Controlled Substances Act 1984* within South Australia, should a load seal be removed under a drug search, which is outside the HVNL's subject coverage, then the HVNL could not require the load seal to be replaced. VicRoads argued that the problem has not been encountered in Victoria and that should changes need to be made, then this can be implemented through operational policies/guidelines.
167. The NHVR supported the proposal and suggested that a performance or outcomes based regulation would be appropriate.

Findings

168. There is general support for proposal 2, to review and clarify the powers of authorised officers.
169. There is general support for proposal 9, to produce national enforcement guidelines for authorised officers making decisions that pertain to the CoR regime.
170. There is general support for proposal 10, to develop guidelines to provide for situations where an authorised officers needs to break a seal, to reseal it.
171. There is universal support for proposal 8 to provide power for an authorised officer to notify an operator that a driver breach has occurred. The taskforce recommends that data be collected from regulators and industry groups to call attention to where broader powers may be required and where powers may be unfair.

Recommendation 6:

6.1 The taskforce considers it essential and recommends that 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.

6.2 The taskforce recommends allowing authorised officers, including police, to notify operators that driver breaches under the HVNL have occurred, subject to further consideration of procedural fairness, privacy considerations and operational practicalities.

6.3 The taskforce recommends revising the powers of authorised officers after the process to review the possible inclusion of additional duties (recommendation 1) is complete.

Extra-Territorial Activities

Current Situation

172. Currently, all States and Territories are bound by legislation and system impediments that hamper investigation across state boundaries. A wide range of inter-jurisdictional information sharing protocols means that some agencies tend to investigate only vehicles registered in their jurisdiction, despite the fact that they may not be the highest risk operators and creating acknowledged equity issues.
173. Frustration about the lack of interoperability of systems is not limited to regulators and enforcement agencies. One of the concerns expressed by industry is that a vehicle can be stopped several times on an interstate route and that very few of these intercepts 'talk' to one another. Therefore, a vehicle stopped in Victoria and found to be compliant may be stopped shortly thereafter in NSW and then again in Queensland. Of course there may be good reason to target the vehicle repeatedly. However there may be other, higher risk vehicles that should be the focus of attention. In the absence of a real-time, national heavy vehicle database it is impossible to know.
174. Stakeholders have raised concerns that differences in the resourcing of CoR investigations and prosecution between States and Territories have a noticeable impact upon the fairness and effectiveness of the CoR regime.

Options/Proposals

175. As part of the February 2014 Assessment of Options paper, three proposals to resolve the above concerns were identified. These proposals were:

Proposal 1: Formalised information exchange amongst law enforcement agencies and jurisdictions

Proposal 1: Formalised information exchange amongst law enforcement agencies and jurisdictions	
Support	ALC, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, SAPOL, ATA, NatRoad, VICPOL, NSWPF
Conditional Support	NHVR (supports this proposal noting that it is an entirely operational matter which should be handled by the NHVR)
Not Supported	

Proposal 2: Enhanced coordination including the national rollout of technology between jurisdictions.

Proposal 2: Enhanced coordination including the national rollout of technology between jurisdictions.	
Support	ALC, SA DPTI, ALRTA, ATA, NatRoad, VICPOL, SAPOL, NSWPF, VicRoads
Conditional Support	NHVR (supports this proposal noting that it is an entirely operational matter which should be handled by the NHVR)
Not Supported	

Proposal 3: Ensuring regulatory agencies including the NHVR are appropriately equipped with adequate resources and technology to conduct cross-border investigations.

Proposal 3: Ensuring regulatory agencies are equipped with adequate resources and technology to conduct cross-border investigations.	
Support	ALC, SA DPTI, ALRTA, ATA, NatRoad, VICPOL, SAPOL, NSWPF, QTMR, VicRoads, NSW RMS/TfNSW
Conditional Support	NHVR (supports this proposal noting that it is an entirely operational matter which should be handled by the NHVR)
Not Supported	

Stakeholder Feedback

176. Although supported in principle, the majority of respondents highlighted the fact that all three proposals are operational issues and therefore beyond the scope of the CoR review. Whilst respondents accepted the benefits of formalised information sharing, coordination of technologies and adequate resources to enhancing the CoR regime, respondents drew attention to the NHVR and its role in ensuring its CoR team can adequately address cross-border issues.

Findings

177. The taskforce notes the current challenges of cross-border prosecutions in CoR and that the NHVR plans to establish a CoR investigations unit.

Recommendation 7:

The taskforce recommends that the NHVR expedite the establishment of its chain of responsibility unit and clarify its role.

The taskforce recommends that the NHVR lead national efforts to improve cross-border chain of responsibility investigations and data sharing.

Penalties for Chain of Responsibility Offences

Current Situation

178. In July 2013, stakeholders were asked to provide their feedback on the HVNL's CoR offences and penalties and aspects of the regime that may require amendments. Two primary issues were raised in response to penalties.

Options/Proposals

179. As part of the February 2014 Assessment of Options paper, two proposals were identified. These proposals were:

Proposal 1: Reduce penalties for extended liability offences compared to the substantive driver offences.

Proposal 1: Reduce penalties for extended liability offences compared to the substantive driver offences.	
Support	ACCI, ALRTA
Not Supported	BOND, ATA, NatRoad, ALC, SA DPTI, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Proposal 2: Increase penalties for CoR provisions to align HVNL CoR penalties with penalties under the WHS Act.

Proposal 2: Increase penalties for CoR provisions to align HVNL CoR penalties with penalties under the WHS Act.	
Support	VicRoads, NSW RMS/TfNSW
Conditional Support	NHVR (any reform package which introduces additional general and specific duties will need to involve recommendations regarding penalties).
Not Supported	BOND, Caltex, ATA, NatRoad, ACCI, ALC, ALRTA, QTMR, VICPOL, SAPOL, NSWPF

Stakeholder Feedback

Proposal 1 and 2 – Reduce penalties for extended liability offences and Increase penalties for CoR provisions

180. The majority of respondents opposed both proposals 1 and 2 and noted that the penalties in the HVNL were under review. Some respondents preferred for the penalties for CoR offences to be dealt with in the penalties review to ensure that a consistent approach was adopted across the HVNL.
181. The ALRTA supported proposal 1 on the grounds that other parties in the chain have not actually committed 'the same' offence as the driver but rather breached a duty of care to prevent the offence from occurring. VicRoads argued that the ALRTA's position goes against the CoR principle that all parties are held equally accountable for the offence. Bond University emphasised that penalties should be set as a maximum amount for both the substantive offence and the extended offence to allow the Courts to determine the appropriate penalty in each case. Caltex considered that the issue of penalties should be deferred until the legislation is embedded and there has been period to observe and better understand the overall response to the legislation and as such its effectiveness in achieving compliance and improving safety.

182. The NHVR observed that the introduction of new general and/or specific duties would require the setting of penalties.

Findings

183. While the taskforce does not propose changes to the penalties for CoR offences, it recognises that penalties may change due to recommendations flowing from the NTC's penalties review and from the outcomes of the duties review proposed under recommendation 1.

Recommendation 8:

The taskforce recommends that further consideration be given to the penalties for CoR offences after the process to review the additional duties for parties (recommendation 1) is complete.

Non-Government Accreditation Schemes and Industry Codes of Practice

Current Situation

Codes of Practice

184. One way that reasonable steps may be demonstrated as part of a defence to a prosecution is through the application of registered industry codes of practice. Under the HVNL, the NHVR may register codes of practice that satisfy a range of specific criteria. Both the development and registration of the codes are voluntary but have the advantage of providing industry with a means of demonstrating, in the event of a breach of the standards occurring, that reasonable steps have been taken.

Accreditation Schemes

185. The HVNL allows for heavy vehicle operators to apply for accreditation and receive benefits under the National Heavy Vehicle Accreditation Scheme (NHVAS) modules if they agree to abide by the NHVAS Business Rules and provide documentary and audit evidence that they comply with the relevant standards. Currently, only the accreditation schemes created by the HVNL attract regulatory benefits. The NHVR has control over the management of these schemes and is responsible for compliance and enforcement under the NVHAS. The non-government industry accreditation schemes such as TruckSafe operate outside the legislation.
186. Some stakeholders maintain that the co-regulation potential of existing codes of practice and non-government accreditation schemes have been inadequately utilised and explored. In addition, the HVNL's prescriptive approach to codes encourages a 'tick a box' approach to safety and does not promote proactive seeking of new and innovative ways to ensure safety.

Options/Proposals

187. As part of the February 2014 Assessment of Options paper, two options to resolve the above concerns were identified. These options were:

Option 1: Amend the status afforded to codes of practice under the HVNL so that compliance with a relevant code of practice is deemed to constitute compliance with the relevant duty or obligation (i.e. covers all defences, not just reasonable steps).

Option 1: Amend the HVNL so that compliance with a relevant code of practice is deemed to constitute compliance with the relevant duty or obligation.	
Support	ATA, NatRoad, ALC
Not Supported	SA DPTI, ALRTA, QLD, VICROADS, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Option 2: Amend the status afforded to codes of practice under the HVNL to align with the WHS Act (i.e. can be considered by a court in determining what is reasonably practicable in the circumstances to which the code of practice relates).

Option 2: Amend the status afforded to codes of practice under the HVNL to align with the model WHS Act.	
Support	BOND, ACCI, SA DPTI, ALRTA, QLD, VICROADS, RMS/TfNSW
Conditional Support	NHVR (appropriate reform may not require amendment to the HVNL)
Not Supported	ATA, NatRoad, ALC, VICPOL, SAPOL, NSWPF

Option 3: Amend the HVNL to provide that the Regulator can approve non-governmental accreditation schemes for the purposes of providing the same benefits as those operating under the NHVAS.

Option 3: Amend the HVNL to provide that the Regulator can approve non-governmental accreditation schemes.	
Support	ATA, NatRoad, ALRTA, VicRoads
Conditional Support	NHVR (subject to powers for the NHVR to enter into agreements, to make various enquiries and to apply various accountabilities on a scheme owner.
Not Supported	BOND, SA DPTI, QTMR, VICPOL, SAPOL, NSWPF

Stakeholder Feedback

Option 1 – Compliance with codes of practice to constitute compliance with statutory obligations

188. The ATA and NatRoad supported option 1 and considered that codes of practice, supported by appropriate due diligence, are a recognised means of encouraging and ensuring compliance. The ALC supported the ATA and NatRoad position and proposed that a person who complies with a registered industry code should be taken as having discharged the duty to take all reasonable steps to comply with the HVNL.
189. The majority of respondents however, opposed option 1 on the basis that affording codes of practice the standing of a complete defence would not deliver the best safety outcomes. NSW RMS/TfNSW highlighted the scenario whereby a duty holder with special knowledge about their business, who knew that taking additional steps beyond the requirements of the code would improve the standard of safety, would still have a defence if they failed to take these additional steps. The NHVR opposed the proposal and considered that the HVNL should not provide an absolute safe harbour defence against liability.
190. The ALRTA provided a case study scenario where an operator complains to an unloading facility that their practices are causing fatigue issues for their drivers. The facility manager informs the operator that the facility is a signatory to an industry fatigue code of practice and can demonstrate compliance with the code. As they can rely upon the code of practice as an absolute defence, no further action is taken. The ALRTA stated that although they supported the use of codes as a strong reasonable steps defence, they believe that if codes were to become an absolute defence, parties will simply meet these standards and do no more than the minimum requirements. The majority of respondents considered that the HVNL was appropriate in providing that parties can rely on a code of practice for the purposes of establishing whether a person or body has taken reasonable steps.

Option 2 – Courts to be able to take account of codes of practice in proceedings

191. Bond University supported option 2 to align the status afforded to codes of practice under the HVNL to align with the WHS Act. It further argued that this status does not jeopardise the usefulness of codes of practice in defending against a breach as a court would not reject such evidence if the standard of the non-accredited code or scheme can be shown to provide a high level of protection. NSW RMS/TfNSW also supported option 2 in that codes should provide no more than an indication of the range of matters to which the court can have regard. The NHVR supported option 2 noting the need for admissible authoritative guidance to be issued regarding minimum levels of good practice. The NHVR considered that unlike the WHS Act, nothing in the HVNL allows industry norms to be published to provide authoritative guidance on 'good practice' that must be considered, regardless of whether a person subscribes to a commercially available Code.

192. The ALC considered that option 2 did not appear to materially change the current situation of the HVNL except for the fact that the 'all steps' test is changed to a 'reasonably practicable' test to which ALC saw no reason to change. VICPOL opposed option 2 and highlighted that the WHS Act has rules governing the approval of codes of practice and only under these rules is a code of practice admissible as evidence of whether or not a duty or obligation under the HVNL was complied with. These rules are more stringent than those under the HVNL where only the Regulator's approval is required in order to register a code of practice. VICPOL considered that without the same rigor being applied to codes of practice under the HVNL, and compelling evidence being provided which demonstrates that this would have road safety benefits, that VICPOL would not support any such changes.

Option 3 – Approval of non-regulator developed accreditation schemes

193. The majority of respondents opposed option 3 and considered that this proposal was outside the scope of the CoR review. VICPOL stated that until the current accreditation scheme was reviewed, and processes put in place to ensure accredited operators are fulfilling their obligations, extending the NHVR's ability to approve non-governmental accreditation schemes would not be in the public interest of road safety. Bond University agreed and argued that the NHVR's approval of such schemes would give rise to an excessive administrative burden being imposed and may lead to an unnecessary proliferation of schemes.
194. The ALRTA, the ATA, VicRoads and NatRoad supported option 3. The ALRTA made their support conditional on non-government code demonstrating that they can achieve the same or better compliance and safety outcomes as the equivalent government scheme. Similarly VicRoads considered that if the non-governmental accreditation schemes could achieve the principles of CoR, which in turn would improve road safety, then the NHVR should be able to approve them.
195. The NHVR believes that there was no obvious policy merit in entrenching the NHVAS as a prescribed accreditation scheme and suggested that the NHVR be given a generic power to certify and authorise one or more accreditation schemes. The NHVR considered that any power to certify an accreditation scheme would need to be accompanied by a range of powers to enter into agreements, to make various enquiries and to apply various accountabilities on a scheme owner.

Findings

196. The taskforce recognises the importance of codes of practice and supports the status-quo (of providing a means of demonstrating that reasonable steps have been taken), pending final decisions on the review of duties. The issue of codes of practice may need to be revisited after the review of duties, as their role may be impacted by changes to duties.
197. The taskforce notes the importance of the proposed NHVR guidelines for the registration of codes of practice. Some taskforce members have noted the urgency in developing these guidelines given the upcoming expiry of existing codes.

Recommendation 9:

The taskforce recommends retaining the status-quo (as a means of demonstrating that reasonable steps have been taken), pending final decisions on the review of duties (recommendation 1), after which the legal status of codes should be re-examined.

Defences under the HVNL

Current Situation

198. The reasonable steps defence was part of model law and, as such, is a long standing part of heavy vehicle legislation throughout Australia. The rationale for adopting the reasonable steps defence was to allow all parties access to an appropriate defence based on due diligence in appropriate circumstances. Such a defence allows some flexibility in circumstances where a person has taken reasonable steps to achieve compliance, but where the breach has occurred due to factors beyond their knowledge and control.
199. It was considered that the honest and reasonable mistake of fact defence had the potential to expose loopholes in the case of the off-road parties who may be treated more sympathetically by the courts than the on-road parties. At the same time, the honest and reasonable mistake of fact defence could operate in a way that is too restrictive for drivers and operators. However, it was also proposed that the reasonable steps defence was likely to be more generous in scope for drivers and operators because the on-road parties are more likely to be taking steps to comply with the road transport law as part of their core business activities
200. Stakeholders expressed a wide range of views on the effectiveness, appropriateness and fairness of defences under the HVNL. Some stakeholders raised concerns regarding the challenges that investigator, prosecutors and parties in the chain face when mounting defences under the HVNL. The majority of feedback targeted the use of the reasonable steps defence.

Options/Proposals

201. As part of the February 2014 Assessment of Options paper, two options to resolve the above concerns were identified. These options were:

Proposal 1: Reassess the application of the reasonable steps defence to CoR provisions. Further information from the ATA and NSW RMS/TfNSW is required on this issue to determine the extent of this assessment.

Proposal 1: Reassess the application of the reasonable steps defence to CoR provisions.	
Support	BOND, ATA, NatRoad, VicRoads, NSW RMS/TfNSW
Conditional Support	ALRTA (More information is required about the reasons and scope of the assessment before full support can be given.) NHVR (subject to the introduction of chapter specific and specific duties, the expansion of investigative powers and admissible authoritative guidance)
Not Supported	ALC, QTMR, VICPOL, NSWPF

Proposal 2: Create a requirement for authorised offices to consider whether a reasonable steps defence might be sustained before proceeding with a prosecution. This requirement could (a) be a statutory requirement as proposed by industry, or (b) a requirement contained in guidelines which reflects current state and territory practices.

Proposal 2: Create a requirement for authorised offices to consider whether a reasonable steps defence might be sustained before proceeding with a prosecution.	
Support	ATA, NatRoad, ALC, ALRTA
Not Supported	BOND, SA DPTI, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Proposal 3: Develop operational guidelines to direct situations where infringement notice penalties can be issued in relating to the production of a weighbridge certificate.

Proposal 3: Develop operational guidelines to direct situations where infringement notice penalties can be issued in relating to the production of a weighbridge certificate.	
Support	ATA, NatRoad, ALC, ALRTA
Not Supported	SA DPTI, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Proposal 4: Redraft the CoR offences (duty and extended liability) to adopt the ‘reasonably practicable’ test from the WHS Act.

Proposal 4: Redraft the CoR offences to adopt the ‘reasonably practicable’ test from the model WHS Act.	
Support	ACCI, NSW RMS/TfNSW, NHVR
Conditional Support	BOND (it is recommended that the HVNR develop an issues paper and seek further feedback), ALRTA (supports further investigation of Proposal 4, including a scenario analysis to ascertain the impact on CoR enforceability)
Not Supported	ALC, SA DPTI, QTMR, VicRoads, VICPOL, NSWPF

Stakeholder Feedback

Proposal 1 – Reassessment of reasonable steps defence

202. The majority of respondents, while supporting proposal 1, requested additional information from the ATA and NSW RMS/TfNSW on the reasons and scope for the proposed assessment. NSW RMS/TfNSW established that the main impediment to mounting defences was the lack of clarity in the defence provisions and that convoluted drafting makes it difficult for chain parties to understand and comply with their legal obligations. NSW RMS/TfNSW also considered that the dual application of broad duties to ‘take reasonable steps’ and extended liability provisions subject to a ‘reasonable steps defence’ makes it difficult for enforcement agencies to implement coherent and effective compliance strategies and programs. NSW RMS/TfNSW did point out that there would be minimal need to retain the defences if the HVNL adopted the general duties approach which would focus on prevention, rather than liability. The ATA and NatRoad highlighted the information contained within their submission and attachments to provide direction in support of the proposal. The NHVR supported the proposal and considered that as the Model Law for CoR was delivered in three separate Bills, that coherence in drafting had not been maintained.
203. Bond University recommended reviewing the defences as a matter of urgency given the complicated approach in which the defences have been incorporated into the HVNL. VicRoads cautioned against making changes to defences without strong evidence however, proposed amending the defences to remove the reasonable steps defence for the driver and operator. VicRoads argued that the placing of the driver and operator under strict liability with no reasonable steps defence is necessary for the enforcement of the HVNL as is evident from the case *Welsh v Donnelly* [1983]. The ALC considered that the current formulation of the reasonable steps defence, (i.e. that a person should show they took all reasonable steps to avoid a contravention of the HVNL), in combination with the general duties relating to speed and fatigue contained in chapters 5 and 6, remains satisfactory and did not support changes as per proposal 1.³⁷

³⁷ NTC Note: There is only a chapter specific general duty for fatigue. This duty does not exist for CoR speeding offences.

Proposal 2 – Statutory obligation to consider whether a reasonable steps defence is available

204. The majority of respondents did not support the creation of a requirement for authorised offices to consider whether a reasonable steps defence might be sustained before proceeding with a prosecution. Bond University argued that if officers are not currently determining whether a reasonable steps defence is available before they decide to prosecute, then they are not doing their job properly and should be replaced or provided with better training. The SA DPTI stated that officers already follow this process and assess if there is a reasonable steps defence before submitting a file. VICPOL also noted that this is current operational practice and that no evidence has been provided to support such an amendment. The QTMR maintained that consideration of the existence of a reasonable steps or any other defence is already part of the prosecutorial process before a decision is made to prosecute or any time after the prosecutor is made aware of the existence of such a defence. The QTMR considered that it would be inappropriate for such duties to be statutorily imposed on prosecutors. VicRoads and NSW RMS/TfNSW supported the QTMR comments and highlighted that there are already model litigant and prosecutorial guidelines to consider facts such as defences prior to making a decision to prosecute.
205. The ALRTA supported the proposal and claimed that there is a widespread view within industry that officers do not consider whether or not a proposed reasonable steps defence would be sustained prior to proceeding to prosecution. The ALC supported placing the NHVR under a statutory duty to publish guidelines compelling those who provide services to the NHVR under service agreements (including prosecutors), to have regard to the guidelines when considering the commencement of a prosecution of an offence under the HVNL. They also supported the NHVR and police forces entering into a memorandum of understanding as to when and how police will exercise enforcement functions under the HVNL.

Proposal 3 – New guidelines relating to infringement notices relating to weighbridge certificates

206. The majority of respondents did not support the proposal to develop guidelines to direct situations where infringement notice penalties can be issued in relating to the production of an accurate weighbridge certificate. The QTMR noted that the proposal would not necessarily address the underlying issue with respect to a driver or operator's reliance on the information contained in a weighbridge certificate. VicRoads maintained that the onus is on the accused to demonstrate the reliance on a weighbridge certificate as reasonable steps and that this can be done via a request for internal review of the infringement notice or an election to appear in Court to have the matter heard and determined. NSW RMS/TfNSW considered that the HVNL already provides for reliance upon weighbridge certificates and regarding the issuing of infringements, that such certificates should have only limited presumptive value as the vehicles in combinations can be changed during a journey. VICPOL and the NSWPF reiterated that Police agencies would not be bound by operational guidelines produced by external agencies. The ALRTA, the ATA, NatRoads and the ALC supported the proposal.

Proposal 4 – Adoption of *reasonably practical* test

207. Whilst there was general opposition to the proposal, some respondents indicated that it should be given further consideration as there are merits as well as difficulties in adopting the WHS Act's 'reasonably practicable test'. The NHVR supported the proposal to work in conjunction with the NHVR's support for the implementation of chapter specific and specific duties. The NHVR noted the benefits in that the efficacy of the language used in WHS law is already established.
208. Bond University recommended that an issues paper be developed to seek further feedback prior to implementing (or not) this proposal given the significant impact it could have on CoR responsibilities. The ALRTA supported this position as the 'reasonably practicable' test can be used as an effective defence in many circumstances and importantly, allows business to continue even

when safety risks are known and addressed but cannot be fully rectified. Further to this argument, the ALRTA proposed a scenario analysis to ascertain the impact on CoR enforceability. Caltex raised concern with the current requirement for an accused to demonstrate they took “reasonable steps” and viewed the proposal as a preferred and more legislatively consistent option where the duty holder has failed to meet the standard of what is ‘reasonably practicable’ as defined in section 18 of the WHS Act.

209. VicRoads argued that the objectives of the WHS and the CoR provisions in the HVNL are not consistent and that the 'reasonably practicable' test from the WHS Act is not a legal standard that should apply to CoR offences designed to contribute to road safety. This position was supported by the SA DPTI, VICPOL and the NSWPF who added that there is no purpose or evidence that the 'reasonably practicable' test from the model WHS Act would have road safety benefits. The ALC considered that the current formulation of the reasonable steps defence, (i.e. that a person should show they took all reasonable steps to avoid a contravention of the HVNL) remained satisfactory.

Findings

210. The taskforce recognises the importance of prosecution guidelines and considers that there may be advantages to developing HVNL specific prosecution guidelines.

Recommendation 10:

The taskforce recommends that the NHVR develop prosecution guidelines to provide for the types of matters that should be considered before a prosecution is brought under the HVNL.

Enforcement Measures

Current Situation

211. Under the HVNL, courts and authorised officers have a broad range of measures available for addressing regulatory non-compliance. This recognises that different compliance and enforcement tools are needed to address differently motivated and capable regulated entities. Equally, different tools are needed depending on the degree and seriousness of the non-compliance.
212. Although a comprehensive toolkit already exists in the HVNL, such as formal warnings and improvement notices, there is evidence to suggest that these alternatives to financial penalties have not been utilised to their potential.
213. Some stakeholders have provided feedback that the HVNL may benefit from the introduction of additional enforcement measures such as those within 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.

Options/Proposals

214. As part of the February 2014 Assessment of Options paper, four proposals to resolve the above concerns were identified. These proposals were:

Proposal 1: Adopt the WHS Act enforcement measures currently unavailable under the HVNL. These are authorised officer issued prohibition orders, court ordered adverse publicity orders, injunction orders, restoration orders and enforcement undertakings accepted by both the Court and the Regulator.

Proposal 1: Adopt the model WHS Act enforcement measures currently unavailable under the HVNL.	
Support	NSW RMS/TfNSW
Conditional Support	NHVR (subject to more work on the possible framing of new interventions)
Not Supported	ATA, NatRoad, ALC, QTMR, ALRTA, VicRoads, VICPOL, NSWPF

Proposal 2: Adoption of NHVR issued prohibition notices.

Proposal 2: Adoption of Regulator issued prohibition notices.	
Support	NSW RMS/TfNSW, NHVR
Not Supported	ATA, NatRoad, ALC, QTMR, SA DPTI, ALRTA, VicRoads, VICPOL, NSWPF, SAPOL

Proposal 3: Adoption of court accepted enforceable undertakings.

Proposal 3: Adoption of court accepted enforceable undertakings.	
Support	ATA, NatRoad, QTMR, VicRoads, NSW RMS/TfNSW, ALC, ALRTA, NHVR
Not Supported	VICPOL, NSWPF

Proposal 4: Adoption of court issued adverse publicity orders.

Proposal 4: Adoption of court issued adverse publicity orders.	
Support	NSW RMS/TfNSW, VICPOL, NHVR
Not Supported	ATA, NatRoad, ALC, ALRTA, VicRoads, QTMR, NSWPF

Stakeholder Feedback

Proposal 1 – Adopt the model WHS Act enforcement measures currently unavailable under the HVNL

215. The majority of respondents considered that the existing suites of enforcement measures under the HVNL are adequate and that there was minimal evidence to suggest that further tools contained within the WHS Act would assist with the CoR regime. VicRoads noted that the penalties in the WHS Act are greater and that this may be reflective of the need for a wider suite of compliance and enforcement tools under that law. The ALC maintained that no case had been made that any new power would increase compliance and safety outcomes. The NHVR supported the future introduction of more flexible, innovative and effective compliance tools subject to more work on the framing of new sanctions. NSW RMS/TfNSW considered that alignment with WHS legislation was desirable and that the HVNL should include similar compliance and enforcement measures.

Proposal 2 – Adoption of Regulator issued prohibition notices

216. NSW RMS/TfNSW supported the power for officers to issue prohibition notices without first resorting to prosecution as an invaluable way to guide a duty holder's responsibilities in a time and cost effective manner. SAPOL agreed subject to appropriate controls around who was authorised to issue them, which would be similar to the issuing of improvement notices. The SA DPTI considered that the difference between the WHS and the HVNL circumstances make it unsuitable for officers to issue prohibition notices under the HVNL. VicRoads, VICPOL and the NSWPF maintained that the prohibition notice should be court ordered only and that compliance with a prohibition notice issued by the NHVR may cause increased regulatory burden on the operator.

Proposal 3 – Adoption of court accepted enforceable undertakings.

217. The NHVR considered there to be a need for enforceable undertakings and was aware of several key matters where the availability of undertakings would have yielded a much more cooperative, lower cost and faster result. The NHVR suggested that further work be undertaken to consider whether undertakings must be 'Court accepted' in all instances, or whether it should be open to the NHVR to accept an enforceable undertaking in its own name. They noted that the ACCC is currently equipped with such a power, which is extensively used.
218. The ATA and NatRoad supported the inclusion of court-accepted enforceable undertakings as a way to provide parties in the CoR and regulators with a proactive and agreed, way forward in difficult circumstances. This position was supported by VicRoads on the basis that they are a useful judicial tool, however they specified that regulator enforceable undertakings are opposed as the regulator would require resources, constant monitoring, and specific legal understanding as to their use and consequences. NSW RMS/TfNSW considered that enforceable undertakings provide an excellent opportunity to work with a duty holder to improve their safety systems and reduce risk in a mutually acceptable manner. VICPOL and the NSWPF opposed the adoption of all enforceable undertakings without more understanding of what they would comprise, the circumstance in which they would be relevant, and how the NHVR would enforce them.

Proposal 4 – Adoption of court issued adverse publicity orders

219. NSW RMS/TfNSW considered that court enforced sanctions should be expanded, for example, to include adverse publicity orders. The NHVR also saw considerable safety benefit from making adverse publicity orders available as there are clear indications that the market is now very alert to COR issues. VICPOL considered that adverse publicity orders would raise awareness of HVNL laws and publicise the consequences of non-compliance. VicRoads however argued that there was no evidence to suggest a link between adverse publicity and improvements in regulatory compliance. VicRoads maintained that as media attention will be given to matters of road safety, there is no need for court issued publicity orders.

Findings

220. The taskforce supports the adoption of court-ordered enforceable undertakings.
221. While the majority of respondents did not support the adoption of prohibition orders within the written submissions, the taskforce recognised the merits of authorised officer issues prohibition notices subject to the examination of appropriate safeguards (such as those provided under the WHS Act), in relation to the circumstances for use, time limits on application, court review and compensation. Some industry stakeholders have noted that appropriate caution should be exercised in the examination of this matter.
222. The taskforce notes that COAG will be discussing work health and safety at its May meeting³⁸ and that this may impact upon enforcement measures provided under the WHS Act.

Recommendation 11:

11.1 The taskforce recommends the adoption of court-ordered enforceable undertakings.

11.2 The Taskforce recommends further examination of 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.

11.3 The taskforce recommends further examination of additional sanctions after the process to review the additional duties for parties is complete.

³⁸ COAG Communique, 13 December 2013

Overlapping Obligations

Current Situation

223. The road transport industry is subject to overlapping obligations in road transport and WHS legislation, many of which are directed to the same or very similar outcomes, such as ensuring safety and removing or minimising safety risks. Section 18 of the HVNL deals with the relationship between the HVNL and primary work health and safety laws. This section provides that compliance with the HVNL is not, in itself, evidence of compliance with the primary WHS Law. This is considered reasonable given that the WHS regime contains broader general duties than the CoR provisions in the HVNL.
224. The HVNL recognises that compliance with health and safety laws is separate to compliance with CoR laws and that a party in the chain cannot avoid responsibility for breaches of the WHS Act simply because they have complied with the CoR provisions. Section 18 acknowledges obligations may co-exist under the HVNL and the primary WHS Law, but the HVNL does not provide direction on the extent to which compliance with one law may constitute compliance with the other.
225. Some stakeholders have raised concerns that overlapping legislative requirements between road transport legislation and workplace safety regimes have created challenges for heavy vehicle compliance and enforcement.

Options/Proposals

226. As part of the February 2014 Assessment of Options paper, three options to resolve the above concerns were identified. These options were:

Option 1: Define overlapping areas, obligations and responsibilities under the HVNL to avoid overlap with the WHS Act.

Option 1: Define overlapping areas, obligations and responsibilities under the HVNL to avoid overlap with the WHS Act.	
Support	ATA, NatRoad, ACCI
Not Supported	BOND, ALC, SA DPTI, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Option 2: Amend the HVNL to reflect the position that the WHS Act will take precedence over the HVNL in the event of overlapping obligations.

Option 2: Amend the HVNL to reflect the position that the model WHS Act will take precedence over the HVNL in the event of overlapping obligations.	
Support	ALRTA, ACCI
Not Supported	BOND, ALC, SA DPTI, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF, NHVR

Option 3: Recognition that compliance with duties under one regime constitutes compliance with other regimes.

Option 3: Recognition that compliance with duties under one regime constitutes compliance with other regimes.	
Support	ATA, NatRoad, ALC, ALRTA, ACCI, NHVR
Not Supported	BOND, SA DPTI, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, SAPOL, NSWPF

Stakeholder Feedback

Option 1 – Define overlapping areas, obligations and responsibilities under the HVNL to avoid overlap with the WHS Act.

227. The majority of respondents disagreed with the proposed options to manage potential challenges arising from overlapping WHS and HVNL obligations. Bond University considered that over time the relationship between the duties under the WHS Act and the duties under the HVNL would be tested by the Courts. Bond University further argued that although it is possible that there will be overlaps in the two regulatory systems that will lead to increased administrative burdens for stakeholders, it is also possible that a system of partly overlapping duties will add to clarity for stakeholders, as the courts and others attempt to clarify in detail how the industry specific duties of the HVNL differ from those found in the general WHS system.
228. The ALC noted that as there are times where WorkCover officers will choose to investigate a heavy vehicle breach, usually in cases of death and serious injury, a clear memorandum of understanding between the NHVR and SafeWork Australia should be developed to explain the functionality of the relationship between WHS authorities and the NHVR.

Option 2 – Amend the HVNL to reflect the position that the model WHS Act will take precedence over the HVNL in the event of overlapping obligations.

229. In relation to option 2, VICPOL considered that if a proceeding is commenced for an offence against the HVNL, then the HVNL obligation would naturally take precedence over any overlapping WHS Act obligation as the HVNL was developed to specifically regulate heavy vehicles. The SA DPTI stated that where there is any potential overlap that either act should be able to be used provided a person could not be charged under both acts for the same actions. The SA DPTI's position was supported by the ALRTA.

Option 3 – Recognition that compliance with duties under one regime constitutes compliance with other regimes.

230. The ATA and NatRoad supported option 3 and viewed the HVNL as a supportive law that provided detailed obligations similar to regulations under the model Work Health and Safety law. As such the ATA believes that meeting obligations under the HVNL should be seen as satisfying complementary WHS obligations. The majority of respondents however maintained that the regimes should not be considered as overlapping as they deal with specific and varying subject matters. The NSWPF considered that compliance with one law does not exonerate those who have failed to comply with other laws. This position was supported by VicRoads, VICPOL and SAPOL. The NHVR supported option 3 and noted that some sector-specific safety regimes, such as mines laws and rail safety laws, have previously contained clauses directing the Courts that they are to be 'read as if' they were a division or regulation under the predominant WHS laws.

Finding:

231. The taskforce recognises that there is some overlap between the HVNL and WHS Act however it notes that the WHS Act covers community obligations that any employer must display whilst the HVNL manages specific safety risks inherent in operating heavy vehicles.
232. The taskforce does not propose changes to section 18 of the HVNL. However, it recognises that there is concern amongst industry groups as to consistency in how jurisdictional WHS agencies enforce the WHS Act, particularly in regards to fatigue management.
233. The taskforce notes that SafeWork Australia's November 2013 publication, *Guide for Managing the Risk of Fatigue at Work*, recognises the National Transport Commission's *Guidelines for Managing*

*Heavy Vehicle Driver Fatigue.*³⁹ The Safe Work Australia publication states (p.2) that it is *not designed to provide information on managing fatigue in specific industries and does not replace requirements related to fatigue under other laws, for example, heavy vehicle driver fatigue laws ... This information is available in the National Transport Commission's Guidelines for Managing Heavy Vehicle Driver Fatigue.*

234. The taskforce considers that stronger guidance should be given to WHS authorities so that it is clearer to them that the NTC guidelines must be regarded as authoritative. This might be addressed by joint advice from the NTC and NHVR to the WHS regulators.

Recommendation 12:

The taskforce recommends that stronger guidance be given to WHS authorities so that it is clearer to them that the NTC guidelines must be regarded as authoritative. This might be addressed by joint advice from the NTC and NHVR to the WHS regulators.

³⁹ SafeWork Australia, Guide for Managing the Risk of Fatigue at Work, November 2013, <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/guide-fatigue-at-work>

Topic 4: Miscellaneous Issues

Consistency in the Drafting and Construction of the Framework

Current Situation

235. Inconsistencies in drafting of the HVNL CoR provisions may make it difficult for chain parties to understand and comply with their legal obligations. Some stakeholders have indicated that the HVNL would benefit from redrafting of CoR provisions with the focus on clarity and consistency, which would also assist authorised officers in exercising their powers.

Options/Proposals

236. As part of the February 2014 Assessment of Options paper, three proposals to resolve the above concerns were identified. These proposals were:

Proposal 1: Amend section 227 to state that the ‘exercise of any of those functions, whether exclusively or occasionally, decides whether a person falls within any of these definitions, rather than the person’s job title or contractual description’.

Proposal 1: Amend section 227 to state that the “exercise of any of those functions, whether exclusively or occasionally, decides whether a person falls within any of these definitions, rather than the person’s job title or contractual description”.	
Support	ACCI, ALC, SA DPTI, QTMR, NSW RMS/TfNSW, ALRTA, NHVR
Not Supported	ATA, NatRoad, VicRoads, VICPOL, NSWPF

Proposal 2: Redraft chapters 4 (MDL), 5 (speeding) and 6 (fatigue management) and in particular the CoR provisions in a consistent manner.

Proposal 2: Redraft the MDL, speed and fatigue chapters and in particular the CoR provisions in a consistent manner.	
Support	ACCI, SA DPTI, ALRTA, ALC, QTMR, VicRoads, NSW RMS/TfNSW, NHVR
Not Supported	ATA, NatRoad, VICPOL, NSWPF

Proposal 3: Redraft section 194 to remove the mental element of the consignee intending a result or being reckless or negligent as to the doing of the act or making of the omission that in a contravention of a mass, dimension or loading requirement.

Proposal 3: Redraft section 194 to remove the mental element of the consignee intending a result or being reckless or negligent	
Support	SA DPTI, ALRTA, QTMR, VicRoads, NSW RMS/TfNSW, VICPOL, NSWPF, NHVR
Not Supported	ATA, NatRoad, ALC

Stakeholder Feedback

Proposal 1 – Amend section 227 of the HVNL

237. The ALC, NSW RMS/TfNSW, the SA DPTI and the QTMR agreed that the definition of ‘parties in the chain of responsibility’ needs consistent application across the HVNL and supported changes to section 227 to focus on the roles of parties rather than their titles.
238. VicRoads stated that it has had no difficulty in proving the role of a party in the chain of responsibility. VICPOL considered that the definition of parties in the chain was appropriate and the proposal was unnecessary.

Proposal 2 – Redraft Chapters 4, 5 and 6 of the HVNL for greater consistency

239. The SA DPTI, VicRoads and the QTMR considered that the framework for all sections should be consistent to prevent confusion and to make the framework easier to adhere to. The QTMR added that consistency is essential as it would assist to remove any misinterpretations between similar but not identical, provisions. This position was supported by the ALRTA who considered that a large part of the estimated economic benefits come from greater consistency within the HVNL and this must remain a key objective when assessing options for improving CoR.
240. The ALC maintained that this is more likely a technical amendment that could be supported subject to the final proposal. The ATA and NatRoad opposed the proposal whilst VICPOL and the NSWPF maintained that there is no evidence that a change is warranted.

Proposal 3 – Redraft section 194 to remove mental element of offence by consignee

241. The majority of respondents supported proposal 3 on the basis that the test with regard to the mental element required is not applied to other offences or with regard to other duty holders in the chain. A number of enforcement agencies highlighted the difficulties in proving the mental element in order to prosecute the consignee. NSW RMS/TfNSW considers that the introduction of a broad positive duty for heavy vehicle transport operations would make any changes to this offence unnecessary as officers would be able to target the steps the consignee had taken to minimise a contravention of a mass, dimension or loading requirement rather than prove a mental element existed. The NHVR considered that this provision was inconsistent with the HVNL and the reforms proposed by this review. The NHVR recommended that the provision be amended or repealed, subject to the adoption of other recommendations arising from this review.
242. The ALC argued that the drafting of section 194 reflects the policy contained in the previous model and that no clear argument had been provided as to why the section should be changed.

Findings

243. The taskforce agrees that the chapters of the HVNL that incorporate CoR provisions should be reviewed to ensure clarity and consistency, but this should occur after the process to review duties is complete.

Recommendation 13:

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 (recommendation 1).

Out of Scope Issues for Further Consideration

Current Situation

244. Some issues that have been raised by taskforce members and stakeholders either fall outside of the scope of the CoR review terms of reference or are earmarked to be assessed as part of other projects such as the HVNL penalties project or upon further investigation may be resolved through other avenues.
245. Although it may not be suitable to examine these issues fully within the CoR review, some stakeholders maintain that the taskforce may still have a role in providing feedback and advice on these issues

Summary of Issues

Issue 1: Awarding costs against the prosecution where a reasonable steps defence is sustained.

Issue 2: Awarding costs against a defendant for the cost of investigations.

Issue 3: Moving court appearances to another town, city or jurisdiction.

Issue 4: Insurance cover for criminal penalties.

Issue 5: NHVR examination and review of regulatory agency issued formal warning, improvement notices and infringement notices under the HVNL.

Issue 6: Is it fair and reasonable to attach a five times corporate multiplier under the HVNL to all companies regardless of size?

Issue 7: Mandatory application of demerit points.

Issue 8: The application of demerit points to parties in the chain is misdirected and disconnected from its original purpose.

Stakeholder Feedback

246. The majority of respondents agreed that these issues are outside the scope of the CoR review and the approved terms of reference. As such, the majority of respondents considered that no further action should be taken on these issues. The ATA and NatRoad however supported further consideration of issues 1, 3, 5 and 6.

Findings:

247. The taskforce draws the above out of scope issues to the attention of Ministers
248. The taskforce recognises that Issue 5 to examine and review regulatory agency issued formal warning, improvement notices and infringement notices has been provided within findings 4 and 9 of the NTC's Heavy Vehicle Compliance Review. The taskforce notes that this issue could be managed within the development of the NHVR's enforcement guidelines (see recommendation 8).

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