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# NEWS

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## Duty of Care and Road Transport Reform

Many areas of the law now anchor individual accountability in a statutory 'Duty of Care' and recognise 'Chains of Responsibility' along which individuals can be held liable for compliance breaches.

In addition to their use in transport law, these notions are also well established in occupational health and safety law, environmental law, and other areas including the companies and securities law.

But, due largely to work by the National Transport Commission (NTC) in the 13 years since its foundation in 1991, the use of these principles is nowhere more advanced than in the area of road transport reform.

And in confirmation of the NTC's achievements in road transport reform, Australia's Transport Ministers have agreed to introduce legislation (which came into effect in January 2004) which will add rail and intermodal regulatory reform to its existing responsibilities.

The Occupational Health and Safety Act 1985 broke new ground by imposing upon employers a 'General Duty of Care' to provide and maintain a working environment that is safe and without risk to human health.

The NTC's Heavy Vehicle Driver Fatigue: Draft Fatigue Code of Practice, released for comment in July 2003 and scheduled for consideration by Transport Ministers later this year, proposes the imposition of a 'general duty to manage fatigue in order to minimise road safety risk'.

This 'general duty' will operate in the same way as the 'general duty of care' provisions of the Occupational Health and Safety Act 1985 and will apply to all parties in the logistics chain.

While the current road transport regulations do not create a specific requirement to manage fatigue, operators are required to provide safe workplaces under OH&S legislation.

If adopted, this Code of Practice will assist transport operators to schedule their operations in ways that minimise the risk of fatigue.

This Draft Fatigue Code of Practice is one of several outcomes to flow from an NTC review of the regulatory regime governing hours of work and rest for drivers of heavy vehicles (vehicles with GVM of 12 tonnes and over and busses with 12 or more seats).

'Duty of Care' is handled in a different way in Dangerous Goods law.

In defining the responsibilities of parties in the dangerous goods transport chain, the Road Transport Reform (Dangerous Goods) Act 1995 and the Road Transport Reform (Dangerous Goods) Regulations 1997 draw a distinction between the primary liability of a person who was responsible to ensure that a particular requirement was met and the secondary liability of a person who was responsible only to the extent that he or she knew, or reasonably should have known, that a particular obligation was not fulfilled.

This imposes defined legislative and regulatory responsibilities on packers, loaders, manufacturers, consignors, prime contractors and drivers that correspond to their respective duties in the loading and transport of dangerous goods.

The extent of their liability in any specific breach of the law is limited by the extent of their control over the duties that establish that breach.

The Road Transport Reform (Driving Hours) Regulations 1999 applies the 'Duty of Care' and 'Chain of Responsibility' principles in yet another way, imposing a general duty of care on all parties, but more fully specifying duties for consignors, employers and drivers.

In seeking to hold individuals accountable for failures to properly discharge the activities for which they are responsible, the NTC, in its Compliance and Enforcement: Mass, Dimension and Load Restraint Policy, uses activities rather than job titles or role descriptions to define the 'Chain of Responsibility' as it relates to the road transport mass, loading and restraint laws.

This approach has the distinct advantage that it assigns responsibility for complying with mass, dimension and load restraint requirements to any person involved in consigning, packing, loading, carrying, driving or receiving goods, irrespective of their title or their role in the transport chain.

The model legislation which gives expression to that policy, the Road Transport Reform (Compliance and Enforcement) Bill, was approved by Australia's Transport Ministers in November 2003.

Under the Intergovernmental Agreement that drives the national road transport reform process, each State and Territory government is expected to implement the reforms embodied in this bill, unless Ministers agree that the legislation does not apply in a particular jurisdiction or jurisdictions. The 'Chain of Responsibility' provisions of this model bill have no precedent, either in Australia or

overseas, and will enable each party in the logistics chain to be held legally accountable for on-road compliance with the road transport mass and loading laws.

The NTC claims that this will reduce pressures currently placed on on-road parties and, ultimately, will lead to improved compliance and safer roads. Under current State and Territory laws, only the driver and vehicle owner are liable for breaches of road transport mass limits.

'Chain of Responsibility' proceedings have been brought against off-road parties in some jurisdictions, but they have been hampered by the lack of extended liability provisions.

This model bill overcomes that limitation through the inclusion of provisions that allow the consignor, packer, loader and receiver to be held legally liable for breaches of heavy vehicle mass, dimension or load restraint requirements, standing them in the same shoes as their on-road counterparts.

The model bill lets stand current State and Territory laws which apply 'absolute liability' or, in at least one case, 'strict liability', to the driver or the vehicle owner in all breaches of mass or loading laws, irrespective of whether the driver or the owner knew, or did not know, that the vehicle was overloaded or intended to overload it.

But it ensures fairness in instances where the driver or owner did not 'knowingly or recklessly' induce or encourage a mass, dimensional or load restraint breach by providing on-road parties with access to special defences.

In the defence of minor breaches, when an unforeseeable breach occurs, drivers and operators can access what is termed a 'reasonable steps defence'.

This defence is intended for use in instances where fairness warrants latitude, and will not be available to give those taking 'short-cuts' an unfair advantage over those seen to be 'doing the right thing'.

A more extensive special defence is available to drivers and operators who

have placed reasonable reliance on an understated weight declaration. And in these circumstances, the defence will apply irrespective of the degree of overloading.

Additional defences are available to drivers and operators where a vehicle has been used without permission, is used by an employee acting outside his (or her) terms of employment, or where a vehicle or its equipment is maintained by another party.

Fairness for off-road parties is provided by access to a 'reasonable steps defence' for consignors, loaders and packers for breaches of the heavy vehicle mass and loading laws. And this defence is not limited to minor risk breaches.

The provision of access to a broader 'reasonable steps defence' for off-road parties performing these functions recognises that they will not always exercise operational control over the entire load carried, or have full control of other on-road decisions such as the choice of vehicle or the adequacy of load restraint.

'Chain of Responsibility' investigations are made possible in this model bill by the introduction of the notion of a 'reasonable person' with specific duties that ensure that the driver and operator are not misled by false information about a consignment.

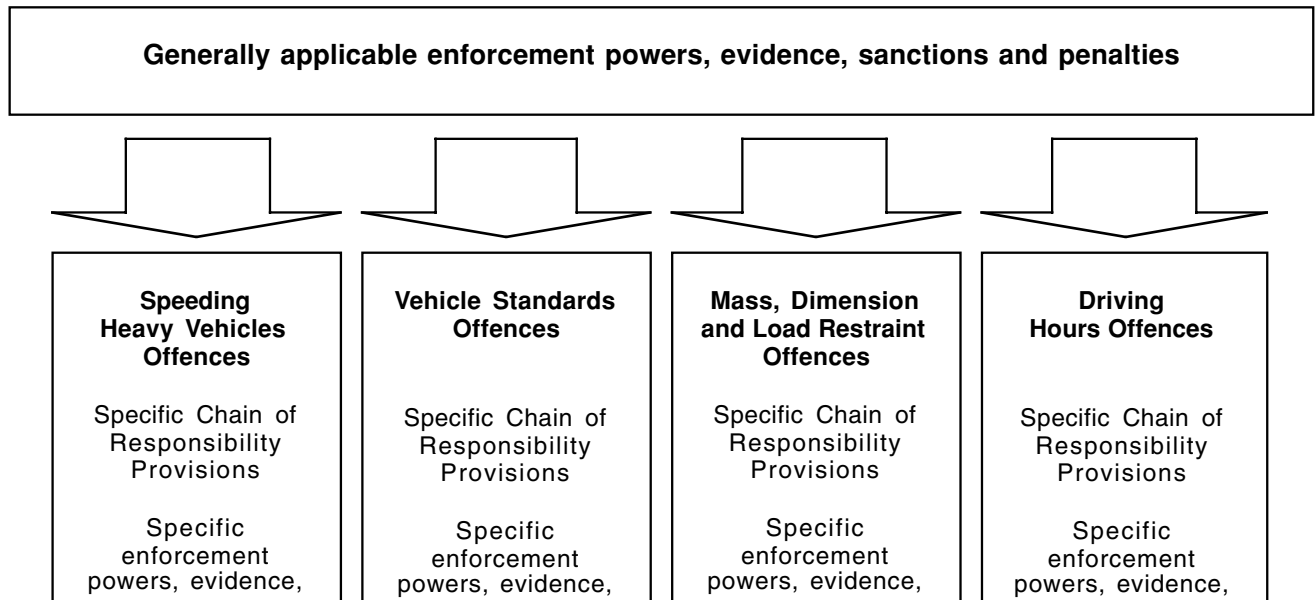
When requested to do so by authorities, this person is also required to provide information about the load and about the identity of other parties in the chain.

So much for 'Duty of Care', 'Chain of Responsibility' legislation and the more predictable face of road transport reform. But there is much more to the NTC's reform agenda (and to its success) than this.

To fully benefit the nation, industry reform must not only deliver the right policy outcomes, it must also deliver those outcomes within timeframes that accommodate market expectations, industry needs and the dictates of international events.

**Fig 1**

**The Road Transport Reform (Compliance and Enforcement) Bill**



New draft national laws to improve compliance with heavy vehicle standards and operating requirements and to support national chain of responsibility initiatives are contained in the model *Road Transport Reform (Compliance and Enforcement) Bill*.

The Bill has been developed by the National Road Transport Commission (NTC) in consultation with representatives from the Commonwealth, State and Territory road transport agencies, police, the road transport industry, the Transport Workers Union, occupational health and safety organisations and road user organisations.

It makes available nationally consistent provisions, including stronger powers for enforcement officers, evidence to enable investigations and prosecutions, general offences and defences, and a range of innovative sanctions and penalties.

Historically, the passing of new Acts of parliament has been the driving force of industrial and social reform in Western democracies, with regulations and codes of practice giving expression to them – but emanating from them and coming after them.

But this sequencing often frustrates the rapid delivery of policy outcomes.

Timeliness is best served by regulations which are outcomes-driven and performance-based. That is, regulations which selectively target high priority outcomes and tilt the playing field to advantage individuals and groups who move early and successfully to meet those performance targets.

Acts of parliament and their enabling

regulations are not outcomes-driven (nor should they be).

New legislation redefines rights, responsibilities, duties and relationships between parties, producing structural change which reshapes market- industry- and social behaviour.

Consequently, legislation often produces economic and social reform slowly and somewhat indirectly.

This thinking is reflected in the NTC’s unique road transport reform program, in which its voluntary, outcomes-driven Performance-Based Standards (PBS) system and an advanced e-enabled transport information system (Intelligent Access Project) are being developed in parallel with model

legislation (the Model Road Transport Reform (Compliance and Enforcement) Bill).

The NTC and Austroads (the association of Australia’s and New Zealand’s road and traffic authorities) are using Performance-Based Standards to develop an alternative system for regulating heavy vehicles.

This system will be optional and available to all those responsible for the design, manufacture, operation and use of heavy vehicles.

What matters under the PBS system is on-road performance (how heavy vehicles turn, hold the road, keep within lanes; how they are operated; and how much road wear they cause) not their appearance.

What vehicles can do will determine whether they are approved, and the roads on which they are allowed to operate.

And under PBS, vehicles with a demonstrable ability to perform to predetermined performance standards will be registrable even though they may not comply with conventional mass and dimension limits.

And with a 2002 report showing that the bulk of the nation's existing heavy vehicles meet, or exceed, the 15 proposed performance standards now being considered, Performance-Based Standards is well positioned to help fast track road transport reform.

The more straightforward PBS applications will require plating and labelling, and NHVAS membership. But to facilitate compliance monitoring and ensure that 'Chain of Responsibility' obligations are being met, GPS tracking (and possibly on-board weighing systems) will be required for more complex applications.

The NTC hopes to have a national model ready for implementation in 2005.

The significance of the PBS system's outcomes-driven capabilities is accentuated by: Bureau of Transport Economics forecasts of a doubling of the national freight task by 2020; a greater than 100% increase in rural areas and in interstate road freight; the need to substantially reduce heavy vehicle accidents; and the need to better protect our roads and bridges.

Beyond this, PBS gains added importance as a consequence of the fact that it is not possible, through the draft bill, to propose a uniform approach to some matters (including proposals relating to 'absolute liability' and the 'reasonable steps defence') because jurisdictions are bound to conform to broader criminal justice policies and procedures which are already in place.

While telematic systems, like that under development by the NTC and Austroads in their Intelligent Access Project, are needed to monitor compliance by vehicles operating under PBS approval, e-enabled intelligent transport systems will generate important new efficiency streams not only in infrastructure management (reduced road and bridge damage) and in OH&S areas, but also in improved service delivery, greater responsiveness, and reductions in operational costs.

Many transport operators are already looking at telematics systems to help manage their vehicles and with road freight usage growing twice as fast here than in Europe or the USA we can confidently expect that Australia will be to the fore in utilising these new technologies.

For more information on the NTC's Road Transport Reforms visit [www.ntc.gov.au](http://www.ntc.gov.au) .

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