



HVNL REVIEW CONSULTATION RIS
CHAPTER 4: PRIMARY DUTIES AND RESPONSIBILITY
AUSTRALIAN TRUCKING ASSOCIATION SUBMISSION
14 OCTOBER 2020

1. About the Australian Trucking Association

The Australian Trucking Association and its member associations collectively represent 50,000 businesses and 200,000 people in the Australian trucking industry. Together we are committed to safety, professionalism and viability.

2. Introduction and summary

In June 2020, the National Transport Commission released the Heavy Vehicle National Law consultation regulation impact statement,¹ as well as a scenario setting out what the new law could look like.²

This submission responds to chapter 4 of the consultation RIS, which deals with the scope of the primary safety duty in chapter 1A of the HVNL, as well as the duties of drivers.

In the ATA's view—

- Governments should adopt a **hybrid of options 4.1 and 4.1b** and define the chain of responsibility to include any party with influence over heavy vehicle road transport activities. The current list of chain of responsibility parties should become non-exhaustive, with the following parties added for clarity:
 - Agents and intermediaries between consignors and operators
 - Facility owners and operators
 - Persons preparing livestock for transit
 - Heavy vehicle repairers.
- The new HVNL should include a **new duty for drivers in Chapter 1A, accompanied by a dramatic reduction in penalties for minor breaches (option 4.2b)**. The new duty should incorporate existing section 228; the maximum penalty should be set to the same level, \$6,000.
- **Option 4.4 should not be considered further**. This option proposes an unnecessary clarification of the requirements relating to driver competency and fitness for work.

¹ NTC, [HVNL review consultation regulation impact statement](#). Report prepared by frontier economics. June 2020a.

² NTC, [HVNL 2.0: a better law scenario](#). June 2020b.

3. Analysis of option 4.1: expand application of the primary duty to parties who influence the safety of transport activities for primary duties and responsibility

In 2014, the NTC pointed out that a fundamental problem with the prescriptive approach to CoR was that if a party or a party's responsibility could not be identified or exactly described, the law would not recognise them in the chain.³

Option 4.1 would seek to address this problem by amending the HVNL to expand the application of the primary duty to parties who have an influence on the safety of heavy vehicle transport. The current list of CoR parties, as defined in the HVNL,⁴ would remain to ensure that these parties are caught by the primary duty.⁵

As possible sub-options, the RIS looks at adding more parties to the current list (option 4.1b) or a hybrid of option 4.1 and 4.1b, which would specify some additional parties and add a category for other parties that influence heavy vehicle transport activities.⁶

Row 1 of table 2 (page 7) summarises the assessment of the option in the RIS.⁷

ATA assessment of option 4.1

Row 2 of the table sets out the ATA's assessment of option 4.1. Most notably—

Safety impact of the option

According to the RIS, it is uncertain that additional chain parties would change their behaviour due to the option.⁸

The ATA strongly disagrees with this finding, including the claim that mechanisms exist to enable parties in the CoR to shift responsibility to parties outside the chain such as through their contractual arrangements. Sections 26C(3)(b) and 26E of the HVNL specifically ban these mechanisms.

More broadly, the NTC and the broader safety community hold evidence that **chain of responsibility has worked to improve the safety of off-road chain parties.**

In a peer-reviewed conference paper, Jones (2015) concluded there was credible evidence that the regulatory framework was positively impacting road safety.⁹

And the NTC published AMR research in 2012 showing the change in perception of who was responsible for load restraint, mass compliance and vehicle defects due to the early implementation of the chain of responsibility concept.¹⁰

³ NTC, [Chain of responsibility: duties review discussion paper](#). November 2014. 15

⁴ s 5, (definition of 'party in the chain of responsibility')

⁵ NTC, June 2020a. 35.

⁶ NTC, June 2020a. 36.

⁷ Sourced from NTC, June 2020a, 47.

⁸ NTC, June 2020a, 43.

⁹ Jones, S. [Chain of responsibility and the heavy vehicle freight industry: benefits, challenges and opportunities](#). Paper presented to the 2015 Australasian Road Safety Conference, 14-16 October, Gold Coast, Australia.

¹⁰ NTC, *Reform evaluation in the road transport industry, 2012: survey on compliance and enforcement, and speed*. 2012. Prepared by AMR. 37.

Table 1 summarises the research findings, which show a distinct change in companies' understanding of their safety obligations during the period.

Table 1: Attribution of responsibility for tasks by companies, 2006 and 2012

Party responsible	2006 (per cent)	2012 (per cent)
The driver of the truck	80	77
The company that operates the truck	58	62
The company that employs the driver	20	42
The company organising the freight to be delivered	15	35
The consignor of the freight being carried	23	27
The receiver of the freight being carried	7	12

Source: NTC, 2012, 37.

The option need not increase enforcement costs...

The ATA does not agree that option 4.1 would increase the NHVR's enforcement costs.

The option could and should result in a reallocation of enforcement spending, but the NHVR's overall budget, including for enforcement, is set by ministers.

...but would increase compliance costs for newly regulated parties.

Option 4.1 would inevitably increase compliance costs for businesses falling within the expanded chain of responsibility. They would need to review their safety processes and potentially add new ones – but the gain to safety would make these extra costs worthwhile.

The option would create unnecessary uncertainty

As written, option 4.1 would create unnecessary regulatory uncertainty: it would extend the chain of responsibility without providing legislative guidance on the chain parties included in the extension.

Preferred option

The ATA's preferred option is a hybrid of option 4.1 and 4.1b. It would have material advantages over option 4.1 as written, because it would—

- deliver increased flexibility by extending the application of the primary duty to any party with an influence on the safety of heavy vehicle transport but also
- address the current omissions in the chain and deliver certainty that key chain parties are covered by extending the list of parties on a non-exhaustive basis.

In the ATA's view, there is good evidence that the following additional parties should be called out in the definition of parties in the chain of responsibility—

Agents and intermediaries between consignors and operators

Consignors are part of the chain of responsibility, even if they engage an operator indirectly through an agent or other intermediary.¹¹ Agents and intermediaries who act on behalf of consignors are not in the prescriptive list of parties.

Australia's 1,100 **freight forwarders** are an example. Freight forwarders have been successfully prosecuted for chain of responsibility breaches under the HVNL¹² and adjacent laws,¹³ but only when they acted on their own behalf and not merely as agents.

The ATA has previously argued that **online freight matching platforms** are not adequately covered by the prescriptive list of parties.

In its submission to the Victorian on-demand workforce inquiry, ATA member NatRoad argued that online freight platforms should be covered by the HVNL to the extent they have influence or control over the freight task. This would distinguish a platform that is a marketing service from one that participates in transport transactions.¹⁴

Facility owners and operators

The operators of facilities such as ports and saleyards are not in the prescriptive list of chain parties but have a significant influence on transport safety.

Overloading, load restraint and weight distribution within containers are significant safety issues at Australia's container ports.

Stevedores are already recognised as parties in the chain of responsibility. As a result of extending the application of the law, **port owners and operators** would fall within the chain and should be specified in the non-exhaustive list of parties to avoid doubt.

Separately, ATA member ALRTA has argued that **saleyard owners** should also be included in the list of chain parties, because the design, positioning, quality and availability of livestock handling infrastructure at saleyards has a significant influence on the safety of loading and unloading and on-road operations.

Excluding saleyard owners from the list would invite entities to argue that owning a facility is somehow different from the business of operating a facility.¹⁵

Persons preparing livestock for transit

In its submission to the NTC on effluent and load restraint, ALRTA noted that government policy makers could not agree on whether **persons preparing livestock for transit** were

¹¹ s 5, (definition of 'consignor')

¹² RMS v Generation Worldwide Logistics Pty Ltd (unreported, Local Court of NSW, 2017).

¹³ NSW EPA v Stockwell International Pty Ltd [2017] NSWLEC 72 (22 June 2017).

¹⁴ NatRoad, [Submission to the inquiry into the Victorian on-demand workforce](#). February 2019. [15]-[17].

¹⁵ ALRTA, *Submission to NHVR issues paper on improving awareness and practices in the livestock supply chain*. 4 June 2020. 7.

covered by the list of chain of responsibility parties, even though all jurisdictions agreed in principle that the matter should be covered by the HVNL.¹⁶

They clearly need to be included in the list of chain parties, if only to resolve this inter-jurisdictional dispute.

Heavy vehicle repairers

In 2014, the ATA conducted a survey on trucking business maintenance practices as part of its response to the NTC's phase 2 roadworthiness review.

The submission recommended that providers of fully outsourced maintenance services be brought within the scope of the law,¹⁷ but fell short of recommending that all heavy vehicle repairers should be included in the chain.

The years since 2014 have seen a growing number of repair organisations offer service packages, where the repairer takes on more responsibility for the management of a vehicle's maintenance as well as carrying out specific maintenance tasks.

Given this change in practice, the ATA considers that **heavy vehicle repairers** would be covered by the hybrid option and should be identified as a chain party to remove any doubt.

The safety obligations of a heavy vehicle repairer would be limited by their capacity for influence and control.¹⁸ A repairer engaged to undertake a specific task – for example, brake repairs – might well have an obligation to report unrelated safety issues they noted during the repair, but would not have an obligation to fix them.

But heavy vehicle and component manufacturers should not be covered

The ATA does not believe that heavy vehicle/heavy vehicle component manufacturers should be covered by the HVNL, as suggested in the RIS.¹⁹

Heavy vehicle and heavy vehicle component manufacturing is already regulated under the *Road Vehicle Standards Act 2018* (Cth) and sections 22-25 of the model *Work Health and Safety Act 2011*.

The ATA does not dispute the NHVR's view that there are issues with the Australian Design Rules.²⁰ The solution is to fix the ADRs, not to add another regulatory regime.

Impact assessment of the ATA's preferred option

Row 3 of table 2 assesses the impacts of the ATA's preferred option.

Compared to the current HVNL, the option would cover more parties with an influence on safety and provide flexibility as the logistics sector changes.

¹⁶ ALRTA, *Submission in response to NTC discussion paper: effluent and load restraint*. July 2018, 10.

¹⁷ ATA, [Heavy vehicle roadworthiness review – phase 2 integrity review](#). Submission to the NTC/NHVR. September 2014.

¹⁸ HVNL, s 26B(3)(b)(i)

¹⁹ *Contra* NTC, 2020a. 36.

²⁰ NHVR, [Submission to the Safe People and Practices issues paper](#). 6 September 2019. 7.

Compared to option 4.1 as presented in the RIS, however, the ATA option would deliver more certainty for businesses and less scope for arguments about whether key parties are included in the chain.

Table 2: Qualitative analysis of option 4.1 alternatives

Industry		Government and community		Other	
Compliance costs	Improvements in operational efficiency	Admin, enforcement and compliance costs	Avoided road infrastructure damage	Avoided costs associated with reduced crashes	
1. Consultation RIS assessment of option 4.1					
May increase third party audits of unaccredited parties within the CoR.	What about possible reduced compliance costs for some COR parties who no longer have to share as much of the burden?	Unclear. May increase enforcement costs if it results in more investigations and prosecutions.		Unclear. Could reduce crashes if additional parties to the CoR respond to primary duty by increasing their safety management.	Flexibility to change over time as parties with influence change offers an advantage over the base case.
2. ATA assessment of option 4.1					
Would increase compliance costs and regulatory uncertainty for businesses now included in the chain.	No changes to operational efficiency expected.	NHVR enforcement costs need not change. They are set through a separate process.		Reduction in crashes as additional parties in the chain improve their safety management.	Flexibility to change over time as parties with influence change offers an advantage over the base case.
3. Preferred option: a hybrid of options 4.1 and 4.1b					
Would increase compliance costs for businesses now included in the chain, but there would be greater certainty about the application of the law than in option 4.1.				Reduction in crashes as additional parties in the chain improve their safety management.	Flexibility to change over time as parties with influence change offers an advantage over the base case.

4. Analysis of options 4.2 and 4.3: Establish a separate driver duty (replicates worker duty under WHS laws) or apply the primary duty (s 26C) to drivers

Because of its history as a set of model laws, the HVNL does not define the duties of drivers clearly. Drivers are not subject to the primary safety duty in Chapter 1A, although they are subject to onerous prescriptive requirements and a duty to avoid driving while fatigued.²¹

In contrast, s 28 of the model *Work Health and Safety Act* imposes the following duty on workers—

28 Duties of workers

While at work, a worker must--

- (a) take reasonable care for his or her own health and safety, and
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act, and
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

Option 4.2 in the RIS would establish a driver duty in Chapter 1A based on s 28 of the model WHS Act. Existing prescriptive offences, such as the mass and dimension offences in s 96 and 102, would be retained.²²

Option 4.3 would go further and extend the primary safety duty to drivers.

ATA assessment of options 4.2 and 4.3

The impact assessment of option 4.2 in the RIS is summarised in row 1 of table 3 (page 10).

The option would add an additional offence to the law without delivering any advantages. It would not even simplify the law by consolidating offences, because the existing mass, dimension and load restraint offences would remain.

The RIS assessment of option 4.3 is summarised in row 2. The assessment is already negative. The ATA's view is in row 3. We consider that the **RIS assessment of option 4.3 is not negative enough.**

Truck drivers already consider that penalties under the HVNL are unfair, especially for minor paperwork offences. Adding an extra driver duty with a maximum penalty of \$300,000 or five years' imprisonment or both to the law would make it even more unfair.

Option 4.3 should not be considered further.

²¹ HVNL, s 228.

²² NTC, June 2020a, 38.

Preferred option: option 4.2b

There is a case for including a new duty on drivers in the HVNL, but it is not the case presented in the RIS.

The ATA considers that Chapter 1A should include a driver duty based on s 28 of the model WHS Act. The duty should incorporate a requirement not to drive while fatigued, with the result that s 228 could be repealed. The maximum penalty for breaching the new duty should be set at the same level as a breach of s 228, \$6,000.

In the ATA's view, including a general driver duty in the law would help reinforce that drivers are expected to work safely.²³

In addition, **including a general driver duty in the law would open the way for a dramatic reduction in the very high maximum penalties for minor offences**, including record-keeping offences of no safety significance.

These penalties do not make the roads safer. They act, instead, as a frustrating maze of random hazards for drivers.

Under this option, systematic breaches of the law could be prosecuted under the general driver duty, instead of the law imposing unfair penalties on drivers who make minor mistakes.

Impact assessment of proposed option 4.2b

Row 4 of table 3 (page 10) summarises the impact of the ATA's preferred option. In our view, there is good evidence to consider that this approach would—

- support reduced compliance costs for drivers and the threat of unexpected and seemingly unavoidable breaches, because penalties for one-off offences could be reduced
- reinforce that drivers are expected to work safely, and improve safety compliance by improving the fairness and credibility of the law.

²³ See Toll Group, [Safe people and practices](#). NTC submission, August 2019. 7.

Table 3: Qualitative analysis of options 4.2, 4.3 and 4.2b

Industry		Government and community		Other
Compliance costs	Improvements in operational efficiency	Admin, enforcement and compliance costs	Avoided road infrastructure damage	Avoided costs associated with reduced crashes
1. Consultation RIS assessment of option 4.2 (establish a separate driver duty)				
Note that burden is less onerous on drivers than option 4.3.		Unclear. May increase costs if it results in more investigations. These costs might be offset by the warning notice system which should stimulate behavioural change before full prosecution needs to happen.	Unclear but unlikely. Could reduce road infrastructure damage if drivers respond to primary duty although unclear if this would occur in practice given existing incentives.	
2. Consultation RIS assessment of option 4.3 (apply the primary safety duty to drivers)				
May increase paperwork for drivers and so drive additional administrative costs.		Unclear but unlikely to increase costs. May increase enforcement costs if it results in more investigations.	Unclear but unlikely. Could reduce road infrastructure damage if drivers respond to primary duty although unclear if this would occur in practice given existing incentives.	Unclear but unlikely. Could reduce crashes if drivers respond to primary duty by increasing their safety management (e.g. safer loading during journeys) though unclear if this would occur in practice given existing incentives.
3. ATA assessment of option 4.3 (apply the primary safety duty to drivers)				
May increase paperwork for drivers and so drive additional administrative costs.				Massively unfair.
4. Preferred ATA option: option 4.2b				
Reduced compliance costs for drivers, with lower penalties possible for one-off offences.			Reinforce safety expectations; increased fairness and credibility.	

5. Analysis of option 4.4. Amend primary duty to clarify requirements relating to driver competency and driver fitness for work

The ATA has long argued that the current truck driver medical standards in *Assessing Fitness to Drive* are not stringent enough.²⁴ The ATA has also argued that the truck driver licensing system is inadequate.²⁵

Option 8.6 in the RIS proposes a new national health assessment standard; Austroads is reviewing the national heavy vehicle driver competency framework.²⁶

Option 4.4 would add to these approaches by amending the HVNL to clarify that CoR parties must—

- ensure, so far as is reasonably practicable, that drivers are competent to do the heavy vehicle journey they are tasked with
- ensure, so far as is reasonably practicable, that drivers are fit to work.

The RIS notes that a variation on this option could be to develop codes of practice that clarify the content of the primary duty without the need to modify the HVNL. The RIS states, incorrectly, that this could only be achieved with reforms to the tools the regulator can use.²⁷

ATA assessment of option 4.4

Option 4.4 has already been implemented.

The HVNL already includes a mechanism for developing codes of practice to clarify the primary safety duty. Section 706 of the law empowers the regulator to register industry codes of practice. Under s 632A, a court may—

- have regard to a code as evidence of what is known about a hazard or risk, risk assessment, or risk control, to which the code relates
- rely on a code in determining what is reasonably practicable in the circumstances to which the code relates.

The ATA and the Australian Logistics Council developed a master registered industry code of practice, which the NHVR registered in September 2018.

The master code makes it clear that—

- chain parties must make sure that driver fitness for duty is considered²⁸
- chain parties should implement a training management system that identifies training needs and reviews the effectiveness of training, for example through competency assessments.²⁹

As a result, **option 4.4 does not need to be considered any further.**

²⁴ ATA, [Effective fatigue management: HVNL review issues paper 2](#). August 2019. 4-6.

²⁵ [Evidence](#) to the Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, Canberra, 8 August 2017. (Bill McKinley, Chief of Staff)

²⁶ Austroads, [Review of the national heavy vehicle driver competency framework](#). 4 May 2018.

²⁷ NTC, June 2020a, 41.

²⁸ ATA and ALC, [Master code: a registered industry code of practice under section 706 of the Heavy Vehicle National Law](#). September 2018. 48, 49, 50, 51, 56, 88.

²⁹ ATA and ALC, September 2018. 14.

The ATA will address the need for upgraded medical standards in its submission to the NTC on chapter 8 of the RIS.

In our submission on chapter 6, we will address the need for employers and prime contractors to have better information about their drivers' demerit point or licence disqualification offences. This issue was also raised by NatRoad in its submission on the safe people and practices issues paper last year.³⁰

³⁰ NatRoad, [Safe people and practices](#). NTC submission, 30 August 2019. [54]-[59]