

national research centre for

OHS regulation



Working Paper 1

The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement

March 2002

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Introduction

This paper describes, analyses and compares two regulatory regimes which cover the road transport industry – occupational health and safety (OHS) legislation, and the National Road Transport Commission’s (NRTC) proposed model road transport legislation. The central questions examined in the paper are

- (i) what obligations do these laws impose, and upon whom (that is, what has to be complied with, and by whom); and
- (ii) what enforcement tools or mechanisms are provided to enforce the provisions.

I begin briefly by describing what I will call the “traditional” approaches taken by Australian governments to OHS and road transport regulation, and then explain and compare current OHS legislation and enforcement tools with existing Dangerous Goods and Driving Hours regulations, and the proposed NRTC model road transport legislation, which includes enforcement mechanisms.

The Traditional Regulatory Paradigms

Historically the law’s attempts to regulate working conditions have been based on a number of assumptions about how and where workers work. Labour law in general has assumed:

- permanent, full-time employment;
- that labour law as the regulator of employment relationships, with the contract of employment as the pivot;
- a single entity employer, with considerable freedom to determine the limits of its boundaries, and responsible only under the principles of agency and vicarious liability.

These assumptions were reflected in the traditional approach to OHS regulation, which developed in nineteenth century Britain, and was adopted by Australian jurisdictions from the 1880s (see Gunningham, 1984: chapter 4 and Johnstone, 1997: chapter 2). This approach developed around the factory system, focused on machinery and other physical artefacts, relied on detailed technical specification standards which told employers exactly what safeguards to adopt, and, at least in its twentieth century manifestations here in Australia, covered the employer and the factory occupier’s duties to employees. These provisions were enforced by OHS inspectorates which relied principally on informal methods such as advice and persuasion, and only resorted to prosecution as a last resort. The maximum available fines were very small. This model of OHS regulation was the norm in all of the Australian States until the British Robens Report of 1972 (see Johnstone, 1997: chapter 2).

Historically road transport has been regulated by road traffic legislation, which generally set down prescriptive requirements governing vehicles and road use (for example, vehicle dimensions and speed limits), and made it an offence to fail to comply with these requirements (Moore, 2001). Road transport inspectors enforced requirements for mass, dimension and load restraint, while the police monitored speed and other forms of on-road behaviour (Argent, 2000, and McKenzie, 2000). Both agencies enforce driving hours requirements (Moore, 2001). Traditionally the focus of regulation was on truck drivers, and in some cases owners or operators (McIntyre, 2000). Other parties could be held responsible

through road transport law provisions which cast liability upon persons who “cause or permit” or “aid and abet” contraventions of road traffic laws (NRTC, 2001a). Most enforcement was on-road, with occasional resort to powers to gather off road evidence (for example operator records) (Moore, 2001). Parties other than drivers were rarely prosecuted.

The major weaknesses of traditional OHS regulation were that it frequently resulted in a mass of detailed and technical rules, often difficult to understand, and difficult to keep up to date. Standards were developed *ad hoc* to resolve problems as they arose, and, as they concentrated mainly on factory-based physical hazards, resulted in uneven coverage across workplaces. As they did not apply to non-employment working relationships, they had no application to areas such as road transport. Specification standards did not encourage or even enable employers to be innovative and to look for cheaper or more cost-efficient solutions. They also ignored the now well accepted view that many hazards do not arise from the static features of the workplace, but from the way work is organised (Johnstone, 1999). The road freight industry does not fit easily within the traditional OHS regulatory paradigm. The relevant workplaces include trucks on the road, a high percentage of drivers are owner-operators and contractors (rather than employees), and a key relationship is between the truck driver and the consignor or client.

Road transport law was criticised for ignoring the contribution of parties other than drivers to unsafe road transport conditions. In particular parties such as consignors, manufacturers and loaders were ignored, even though these parties could contribute to conditions which could have a major effect on drivers’ fatigue, speeding, overloading and load restraint behaviour (NRTC, 2001a). Further, penalties (usually fines) have been inadequate and provided little general or specific deterrence.

In short, the traditional models of OHS and road transport regulation were inadequate to deal with the range of safety issues in the road transport industry.

From the 1980s, however, the scope and style of Australian OHS legislation changed significantly, and in the late 1990s road transport regulation began to move in similar directions. Both areas of regulation now overlap in notable areas, although, as I will show, there are important differences.

The application of Australian occupational health and safety legislation to road transport

From the mid-1970s to the mid-1990s each of the Australian OHS statutes was reformed. One of the most notable differences between modern OHS regulation and the traditional approach is that today’s statutes are built around “general duty” requirements. General duties are imposed upon:

- employers (in relation to both employees and persons other than employees);
- self-employed persons;
- persons in control of premises (called occupiers in some OHS statutes);
- manufacturers, suppliers and importers of plant and substances; designers, erectors and installers of plant; and
- employees.

There is considerable overlap between the general duties owed by the various parties. It is well accepted that in any one work system, more than one general duty can be owed simultaneously, by one or more parties. For example, a person may owe a duty as an employer to employees, and to non-employees, and may also owe a duty as a controller of workplace, and/or as a designer of plant used in the workplace. At the same time, a contractor engaged by the employer may owe a duty to its own employees, the employer’s employees,

and other contractors and their employees. The fact that one person has breached a general duty does not provide a defence for a second person charged with a contravention of another general duty based on the same facts.

In short, as I will show in this paper, the OHS statutes provide for a “chain of responsibility” very similar to the provisions to be found under the road transport regulations in most jurisdictions – that is, it imposes duties on a range of parties involved in the road trucking contractual chain. I will also show that because of the “generality” of the general duties, the OHS statutes have a broader reach than the road traffic regulations, and the maximum fines for contraventions are considerably greater than those found in road traffic legislation and the NRTC proposals.

These general duties are supplemented by regulations and codes of practice, which adopt a combination of performance, process and specification standards. “Performance standards” define the duty holder’s duty in terms of goals they must achieve, or problems they must solve, and leaves it to the initiative of the duty holder to work out the best and most efficient method for achieving the specified standard. “Process requirements” prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS generally. A typical example of a process requirement is the hazard identification and risk assessment process incorporated into many OHS regulations and codes of practice. I note in passing that process standards have been introduced in all Australian jurisdictions to regulate manual handling (very important in the road transport industry), hazardous substances, plant, noise and asbestos. These regulations not only introduced process requirements, but they also impose duties on a wide range of parties – designers, suppliers, manufacturers, employers, employees and so on. In other words, they too, adopt a “chain of responsibility” framework. Process-based standards have spawned greater reliance on “documentation requirements”. Increasingly OHS statutes are requiring duty holders to document measures they have taken to comply with process-based standards, performance standards and principle-based standards.

Let me illustrate how the general duties operate by describing the employer’s duty to employees. An example is section 21(1) of the Victorian *Occupational Health and Safety Act 1985* (OHSA (Vic)) which provides that “an employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.” It is well established that this an absolute duty, qualified by “practicability”, (“reasonable practicability” in some jurisdictions). A measure is not (reasonably) practicable if a reasonable duty holder, weighing the risk of an accident against the measures (including the technological feasibility and cost of those measures) necessary to eliminate the risk, considers that the risk of injury or disease is insignificantly relevant to the burden of taking the requisite measures. In other words, the duty is breached “if there were practical steps available to [the employer] which, although not taken, would have reduced the risk of foreseeable accident if they had been taken.” (*Holmes v Spence* (1993) 5 VIR 119). Whether something is “reasonably practicable” is determined by an objective test - that is, what a reasonable employer would have done in the circumstances, based on all available knowledge in the industry, and in regulations, codes of practice, Australian Standards, other standards and articles in trade journals (*R v Australian Char Pty Ltd* (1996) 64 IR 387).

In all Australian jurisdictions except New South Wales and Queensland, the prosecutor has the onus of proving the practicability of measures. In New South Wales the employer must show that there were no reasonably practicable measures. In Queensland the employer must show that s/he followed the relevant regulation or advisory standard, or, where there is no regulation or advisory standard about exposure to a risk, that s/he chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.

The duty is breached if the employer fails to take reasonably practicable measures to reduce a risk of illness or injury, regardless of whether illness or injury actually results from the breach. In implementing its statutory general duty, the employer must anticipate that workers might be careless or inadvertent, and must take steps to prevent an employee from suffering injury as a result of the employee's own negligence or inadvertence (*Holmes v Spence; R v Australian Char*).

In short, where road transport companies carry out their operations using their own employee truck drivers, then the employer's general duty requires the company to ensure that the conditions under which their employee drivers work are, as far as is reasonably practicable, safe and without risks to their health. Technically, an owner operator who incorporates his or her business, so that she or he is one of the controlling shareholders and directors of the company which runs his or her business, can be employed by the company so that the company, as employer, owes a duty to the owner operator as an employee.

Before I move on to the important duty owed by employers and self-employed persons to "others", let me touch briefly on three other duties: (i) the duties imposed on persons in control of workplaces (in some statutes called occupiers); (ii) manufacturers, designers etc; and (iii) employees. All three might be relevant in the freight industry, or in relation to workers who are not "employees".

The duty imposed upon occupiers generally requires the occupier, a person "who has the management or control of the workplace", to ensure that the workplace, and the means of access to and egress from the workplace, are safe and without risks to health so far as is practicable. Clearly this section would, for example, apply to a consignor of goods in relation to the working conditions of truck drivers and persons loading/unloading the truck on the consignor's premises.

The OHS statutes also place a general duty upon the designers of plant, and the manufacturers, importers and suppliers of plant and substances for use at the workplace to ensure that, so far as is practicable, plant and substances are safe and without risks to health "when properly used"; that they are adequately tested; and accompanied by adequate information to ensure that they can be used safely and without risks to health.

The statutes also impose a duty on an employee to take reasonable care for her or his own health and safety, and the health and safety of other persons who may be affected by the employee's acts or omissions at the workplace. This duty would be applicable, for example, to truck drivers and persons unloading trucks.

In relation to the road transport industry, the most important general duty is that owed by employers and self-employed persons to persons other than employees. For example, section 22 of the OHSA(Vic) provides that "every employer and self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed persons) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person." Similar provisions are to be found in Queensland, New South Wales and the ACT, although sections 8(2) and 9 of the New South Wales *Occupational Health and Safety Act 2000* (OHSA(NSW)) specify that the duty only applies to non-employees "while they are at" the employer or self-employed person's place of work.

Like the employer's duty to employees, the duties to non-employees are absolute duties, qualified by the concept of (reasonable) practicability. Rather than being restricted to the employment relationship, the duties to non-employees in Victoria, NSW, Queensland, and the ACT are qualified by a nexus with the "conduct of the undertaking".

Rather than building the duty to others around the concept of “the conduct of the undertaking”, section 22 of the *Occupational Health, Safety and Welfare Act 1984* (SA) (OHSWA(SA)) and section 21 of the *Occupational Safety and Health Act 1986* (WA) ((OSHA(WA)) couch the duty in terms of “reasonable care”, to “avoid adversely affecting” the health and safety of others “by an act or omission at work” (OHSWA (SA)) and to “ensure that the health and safety” of another person is “not adversely affected wholly or in part as a result of work in which [the employer] or any of his employees is engaged” (OSHA (WA)). Section 9(3) of the *Workplace Health and Safety Act 1995* (Tas) (WHSA (Tas)) provides that an employer “must ensure so far as is reasonably practicable that the health and safety of any person, other than an employee of the employer or a contractor or any person employed or engaged by a contractor, is not adversely affected as a result of the work carried on at a workplace.”

It is important to note that the duties to non-employees do not make any distinctions as to how persons come to be involved in the undertaking or come to be at or near the workplace. The category “persons other than employees” can include a wide range of persons and business organisations, including customers in retail outlets, students in educational institutions, salespeople, contractors and other workers, government inspectors visiting business establishments and neighbouring members of the public. In the road transport industry it also includes truck drivers carrying loads for consignors, and owner-drivers engaged by a trucking company to do work for a consignor.

It is quite clear that the courts have interpreted these general duties to others very broadly. For example, in interpreting the expression “exposed to risks” found in the OHSWA(Vic), the English Court of Appeal in *R v Board of Trustees of the Science Museum* [1993] ICR 876 said that the ordinary meaning of the word “risks” conveys the idea of a possibility of danger, ... The word ‘exposed’ simply makes it clear that the section is concerned with persons potentially affected by the risks.” In other words, for a contravention to occur the person owed the duty does not have to suffer actual injury or ill-health, but rather need only be exposed to a significant risk of injury or ill-health. In the *Science Museum* case, for example, the prosecutor was not required to show that members of the public within 450 metres of the museum actually inhaled the bacteria, or that there were bacteria there to be inhaled. It was sufficient that there was a risk of the bacteria being in that 450 metre range. *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268, confirmed the scope of the duty to non-employees in section 22 of the OHSWA(Vic). Hansen J said that the section “applies to potential risks to health or safety that arise from the conduct of an undertaking even if those risks may be present or operate outside the place at which the undertaking is conducted.” This is not the case in New South Wales, because of the geographical restriction in sections 8(2) and 9 of the OHSWA(NSW) discussed above. The OHSWA(ACT) contains similar geographical restrictions.

Most interesting is the application of these provisions to contractors. In *R v Associated Octel Co Ltd* [1996] 4 All ER 846 the English House of Lords held that if work conducted by a contractor falls within the conduct of an employer or self-employed person’s undertaking (see below), the employer or self-employed person is under a duty to exercise control over the activity, and to ensure that it is done without exposing non-employees to risk. Lord Hoffman (at 850-851) held that the provision imposes:

“a duty upon the employer [or self-employed person] himself. That duty is defined by reference to a certain kind of activity, namely, the conduct by the employer [or self-employed person] of his undertaking. It is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it. ... [A] person conducting his own undertaking is free to decide how he will do so. Section 3 [of the British Act] requires the employer [or self-employed person] to [conduct his undertaking] in a way which, subject to all reasonable practicability, does not create risks to people’s health and safety. If, therefore, the employer engages an independent contractor to do work which forms part of the employer’s undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. ... The employer must take reasonably practical steps to avoid risks to the contractor’s servants which arise, not merely from

the physical state of the premises ... but also from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work.”

The conduct of the employer’s or self-employed person’s undertaking is not limited to the operation of industrial processes, and includes ancillary matters, such as cleaning, repairing and maintaining the plant, obtaining supplies and making deliveries (*Associated Octel* at 851-852; *R v Mara* [1987] 1 WLR 87) as well as trading, and supplying and selling to customers (*Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25). The courts (see *Associated Octel*) have rejected the argument that an activity carried out by an independent contractor is not part of the conduct of the undertaking if the employer or self-employed person engaging the contractor does not have control over the activity. Hansen J in *Delmina* said that the expression “conduct of the undertaking”:

is broad in its meaning. In my view, such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states. It may have been thought that the word “workplace” had a narrower meaning. ... The word [“undertaking”] must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer ... and the word “conduct” refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise ... may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances may be as infinite as they may be variable. Although such a place may be, and often will be, a workplace as defined [by section 4 of the OHS(Vic)] it seems to me that the legislature has chosen not to use that word and, rather, to use an expression of breadth and possibly of wider application. I am of the view that this was deliberate and that the word “undertaking” should not be read as synonymous with “workplace”. It is neither helpful nor necessary to do so.

The courts have also taken a tough approach to the implementation of the general duties. They have held that the employer’s duty is non-delegable, and the employer is personally, not vicariously, liable under its duty to employees and non-employees: *R v British Steel plc* [1995] IRLR 310; *R v Associated Octel*; and *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78. The employer cannot simply establish “a formal or idealised system, sometimes known as a ‘paper system’”. The system at issue is the actual system of work”: *Inspector Schultz v The Council of the City of Tamworth trading as Tamworth City Abattoir* (1994-5) 58 IR 221 at 226-227. The employer must ensure that its OHS policies and procedures are fully implemented. “Paper systems are not enough”: *Sydney City Council v Coulson* (1987) 21 IR 477, following *Barcock v Brighton Corporation* [1949] 1 KB 339 at 343 per Hilbery J. The English courts have, however, left open the possibility that an employer which has otherwise exercised all proper precautions might not be liable for casual negligence on the part of low level employees or of contractors, where the company had adequately supervised the employees or contractors. This is not a new principle, but an application of the practicability qualification: see *R v Nelson Group Services Ltd (Maintenance)* [1998] 4 All ER 331 (CA).

An important point to re-emphasise, however, is that the provisions outlining the employer’s duty to others vary in content from jurisdiction to jurisdiction. In Victoria and Queensland there seems little doubt that all trucking activities (including consignment and transport arrangements affecting driver behaviour) would form part of the “conduct of the undertaking” of a consignor or client of a trucking company or an owner driver. In other words, the transportation of the client or consignor’s goods from its premises to other premises would easily come within the meaning of “conduct of the undertaking”. Thus, where it can be shown that there is a causal nexus between activities involved in the **conduct of the consignor’s undertaking** (scheduling loading of trucks, not taking loading, unloading or local delivery times into account when drawing up schedules, requiring journeys to be done in too short a period of time, requiring drivers to wait for long periods before being loaded with goods, low levels of remuneration, requiring drivers to drive too fast or for long periods without rest etc) and **risks** to the health and safety of drivers (from fatigue, drug use, speeding etc), then prima facie there has been a contravention of the duty. The same argument would not apply in New

South Wales where, as noted above, the duty is only owed to persons while they are *at* the employer's place of work. Section 22 of the OHSWA(SA) arguably would apply to consignment and transport arrangements affecting driving behaviour because they take place because of the employer consignor's "act or omission" at work. Likewise section 21 of the OSHA(WA) will probably apply to consignors because it covers conditions imposed upon drivers who are "affected wholly or in part as a result of work in which [the employer or self-employed person] or any of his employees is engaged."

The duty to others in all jurisdictions would apply to owner-drivers themselves, and would require them to take care for the safety of others (other road users, pedestrians and members of the public) while they are driving their trucks.

Finally it should be noted that the general duties of employers to employees and to persons other than employees are very broad, and require a systematic approach to OHS management. For example, Hill J in the New South Wales Industrial Relations Commission, in *WorkCover Authority of New South Wales v Atco Controls Pty Ltd* (1998) IR 80 at 85 noted that the general duty required "employers to exercise abundant caution, maintain constant vigilance and take all practicable precautions to ensure safety..." Further,

"It is essential that the approach be a proactive and not a reactive one; employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace."

New Road Traffic proposals – chain of responsibility

As I showed in the previous section, the extension of the coverage of OHS legislation to road transport has been significant. Recent reforms to national road transport laws proposed by the NRTC have a similar reach, and aim to "ensure that all who exercise control over conduct which affects compliance, have responsibility, and should be made accountable for failure to discharge that responsibility. This includes primary producers, miners, manufacturers, retailers, importers, exporters, ... and other parties involved in road freight" (NRTC, 2001a: 2). The principle behind the NRTC's chain of responsibility is that "any party who has control in a transport operation can be held responsible and may be made legally liable" (NRTC, 2001a: 2). For the first time, Australian road traffic regulation is imposing specific responsibilities on "off road" parties.

This proposed "chain of responsibility" legislation will clearly identify the responsibilities of the various parties, make it clear from the outset what these duties are, and hold them legally accountable for breach of these responsibilities (McIntyre, 2000: 32). The approach applies to all road transport offences in Dangerous Goods and Driving Hours Regulations, and in provisions being proposed for mass, dimension and load restraint requirements.

For example, under the *Road Transport Reform (Dangerous Goods) Act 1995* and *Regulations 1997* *consignors* have a duty not to consign dangerous goods for transport by road if the consignor knows or reasonably ought to know that any of the requirements relating to packaging, tank or container, equipment, stowage or segregation of goods, information, documentation or licensing is not complied with.

Various duties in relation to safe packaging and appropriate marking of goods for transport by road are imposed upon *packers*; and on *loaders* in relation to the safe loading of dangerous goods in approved tanks or containers and in packages that can safely be transported by road.

Drivers have a duty not to drive a vehicle transporting dangerous goods if the driver knows or ought reasonably to know that any of the requirements relating to packaging, tank or container, equipment, stowage or segregation of goods, information, documentation or licensing have not been complied with.

Various duties are imposed upon *owners* of a vehicle not to use a tank, vehicle or equipment to transport dangerous goods unless the tank is approved, the vehicle and equipment comply with requirements, and the vehicle is insured.

A *prime contractor* owes duties not to transport goods by road if the contractor knows or reasonably ought to know that any of the requirements relating to packaging, tank or container, equipment, stowage or segregation of goods, information, documentation or licensing are not complied with. The contractor also has a duty to comply with vehicle, insurance and route requirements.

A *manufacturer* of tanks or containers for the transport of dangerous goods has a duty not to manufacture a tank or container other than in accordance with approved design, and must attach a compliance plate to the tank in accordance with requirements.

An *occupier* of premises from which dangerous goods are transported must ensure that the transfer of dangerous goods is in accordance with requirements, and must maintain and inspect hose assemblies and keep specified records.

A similar approach is taken in the *Road Transport Reform (Driving Hours) Regulations 1999*. The regulations provide for *driver* offences where drivers' total driving times over a relevant period exceed maximum driving times (12 hours driving per 24 hours, and 72 hours driving a week); total work times over a relevant period exceed specified maximum work times (14 hours in 24 hours); and where drivers fail to take required minimum rest times.

These provisions do not apply to heavy truck drivers who are registered as driver participants, or are employed by employers registered as an employer participant, in a Transitional Fatigue Management Scheme (TFMS). *Drivers* registered in a TFMS commit an offence if they exceed the maximum driving and work times; or fail to take the minimum rest times. *Self-employed drivers* are required to manage their driving, and keep proper records. The regulations also provide for medical examinations. Obligations are also imposed upon *employers* who are registered as an employer participant in TFMS (including a "general obligation" to manage heavy truck drivers so that they can comply with their obligations).

Drivers are required to keep driving records (eg logbooks) for non-local work (ie work outside a 100km radius from the driver's base), and *employers* or *drivers* or *self-employed drivers* must keep driving records for local work. There is also provision for inspections of driving records; for employed drivers to provide their employers with copies of records of non-local driving work; for the keeping of driving records; and for offences pertaining to driving records.

The regulations set out a series of extended offences upon:

- (i) "*persons*" who request, require or direct, directly or indirectly, a driver to do something if the person knows or reasonably ought to know that by complying the driver would be likely to commit a "core driving offence" (an expression which includes offences relating to maximum driving and work times, and minimum rest times), a driving record offence or a speeding offence;
- (ii) *consignors* (defined to be a person who engages another directly or through an agent to transport goods or persons by road, and who has possession of the goods before they are transported and is not the employer of the truck driver), not to engage someone to transport goods etc if the consignor knows or ought reasonably to know that by complying with an express or implied condition of the engagement the driver would be likely to commit a core driving offence, a driving record offence or a speeding offence;

- (iii) a special obligation on *employers* not to allow a driver to drive a truck if the employer knows or ought reasonably to know that by driving the vehicle the driver would be likely to commit a core driving offence;
- (iv) more specific obligations on *employers* and *responsible employees* of employers not to roster, schedule etc driving, rest or work time of an employed driver if the employer etc knows or ought reasonably to know that in complying with the roster etc the driver would be likely to commit a core driving offence.

These provisions which, I understand, apply in Queensland, New South Wales, Tasmania, Victoria and South Australia, are not drafted in the same style as the modern Australian OHS statutes, which, as noted above, combine general duty provisions with performance (specified goals to be achieved) and process-based (usually hazard identification and risk assessment and control) regulations. The provisions are narrower in scope, more akin to the old-style prescriptive OHS obligations which preceded the modern, Robens-style enactments. It seems to me, in fact, that compliance with these prescriptive requirements would not necessarily mean that a driver, consignor or transport company is complying with the general duties of care under the OHS statutes (see Moore, 2001).

It should be noted, however, that there has been discussion of introducing a Fatigue Management Program approach, which would free companies from compliance with prescriptive driving, work and rest limits, and would instead require operators to demonstrate that they had implemented systems properly to manage driver fatigue.

However, at present none of the driving hours provisions outlined approximate the general duty provisions in the OHS legislation, although the consignor duty comes closest, and in New South Wales is more extensive in the driver fatigue regulations than is section 8(2) of the OHS Act (NSW) because it is not, unlike section 8(2) confined to the consignor's workplace (see above). The consignor duty, though, is limited to the express or implied conditions of the engagement which induce the driver to commit certain road transport offences, and does not impose a general duty of care upon the consignor to ensure the safety of truck drivers engaged. In addition, as noted above, the extended offences require evidence of subjective or constructive knowledge, which has proved to be an impediment to their enforcement. The OHS Act (NSW) general duties, on the other hand, are absolute liability offences, subject only to reasonable practicability.

I believe that the Driving Hours Regulations are being reviewed to provide stronger chain of responsibility provisions.

The proposed *Management of Speeding Heavy Vehicles Policy* provides that carriers and operators (persons who control the use of a vehicle for transport of the load) must manage vehicles and drivers to ensure that vehicles are not driven 15km/h or more above the speed limit.

The proposed National laws for heavy vehicle mass, dimension and load restraint impose duties upon *consignors, loaders, drivers, carriers* and *operators* to take reasonable steps to prevent a contravention of the heavy vehicle mass, dimension and load restraint requirements. *Consignors* have a further duty not to contravene the safe working limits of freight containers. These parties and *packers* have a duty to take reasonable steps not to provide any false or misleading transport documentation or false or misleading information about the goods, container etc. *Receivers* (persons paying for the goods and taking possession of the load) have a duty to not knowingly or recklessly engage in any conduct inducing or rewarding a breach of the heavy vehicle mass, dimension and load restraint requirements.

Other provisions, based on the chain of responsibility model, will be developed for vehicle standards and condition, and vehicle speed.

As the OHS statutes have already demonstrated, the “chain of responsibility” approach is clearly an appropriate way of regulating health and safety issues where activities are influenced by a series of parties in a contractual chain. The provisions in the OHS statutes appear to me to be more far reaching than the road traffic chain of responsibility provisions. Their generality is an advantage, in that they will apply to new work methods, and work arrangements, even those not anticipated by the regulator at the time of the enactment of the legislation. As the case law makes clear, they also institutionalise a systematic risk management approach to the management of OHS. The disadvantage of the OHS general duties is that their generality makes them difficult to understand and implement by duty holders who are not well-enough resourced to seek detailed advice.

Sanctions

All of the modern Australian OHS statutes provide OHS inspectors with the power to enter a workplace (usually defined in the OHS statutes as a place where employees or self-employed persons work) for the purposes of the OHS Act. Inspectors are given very broad inspection powers, including the power to inspect the workplace and interview any person, to require the production of, and to inspect, any document, to carry out tests, and take samples, measurements, photographs etc. Inspectors can seek the assistance of any other person. Employers, employees and others at the workplace are usually obliged to co-operate with and assist the inspector, and all of the OHS statutes make it an offence for a person to obstruct or interfere with an inspector’s exercise of his or her powers. See generally Johnstone, 1997: chapter 8.

All of the reformed OHS statutes now give inspectors broader enforcement powers than was the case under the traditional OHS statutes. An *improvement notice* may be issued where the inspector is of the opinion that any person is contravening any provision of the Act or regulations, or has contravened such a provision and the contravention is likely to be repeated. The notice should specify the contravened provision, and a date by which there should be compliance with the notice. A *prohibition notice* may be issued where the inspector is of the opinion that there is an immediate risk to the health and safety of any person. The person to whom the prohibition notice is issued is then prohibited from carrying out the activity until the matter has been remedied. A failure to comply with the terms of the improvement or prohibition notice is an offence. In most jurisdictions the person issued with the notice can appeal to an industrial tribunal to have the notice reviewed. In the remaining jurisdictions, the review process is conducted internally within the inspectorate.

In New South Wales, an inspector may also issue an “investigation notice” to an occupier of a premises to stop the use or movement of, or interference with, any plant, substance or thing that is specified in the notice; and to take measures to prevent the disturbance of any plant, substance or thing. In other jurisdictions inspectors are given similar powers, but in a less formal manner (see Johnstone, 1997: 347-54). In New South Wales, Queensland, the Northern Territory and Tasmania inspectors may also issue *infringement notices* or, in New South Wales, *penalty notices* (on-the-spot-fines). In the Northern Territory infringement notices may be issued for any offence under the Act. In New South Wales *penalty notices* can only be issued in relation to a limited range of offences, including a breach of the employee’s duty of care, a breach of the employer’s duty to consult with employees about OHS, failure to report a reportable injury to the inspectorate, failure to comply with improvement and investigation notices, failure to provide adequate first aid facilities and others. The maximum penalties are \$550-\$600 for employers and \$1100-\$1500 for non-compliance with an improvement notice. Penalty notices for contraventions of the new risk management provisions in regulations are \$1000. In Queensland *infringement notices* can be issued for

non-compliance with an improvement notice, and for a range of offences against the documentation standards in the regulations, including a failure to have prepared a work plan prior to the commencement of construction work. The maximum fine in Queensland is \$375 for a corporation and \$225 for an individual.

Each of the OHS statutes empowers the OHS inspectorate to initiate prosecutions for contraventions of the OHS statutes. In each state and in the Northern Territory, provision is made for the prosecution of responsible corporate officers, as well as the duty holder corporation. For example, 26 of the OHSA(NSW) provides that when a corporation contravenes any provision in the Act, including a general duty, each manager and director of the company is taken to have contravened the same provision unless that person satisfies the court that s/he was not in a position to influence the conduct of the corporation in relation to the contravention, or, being in such a position, used all due diligence to prevent the contravention by the corporation. Similar provisions are found in Queensland. The model adopted in Victoria, Western Australia and the Northern Territory is slightly different, and requires proof of the consent, connivance or wilful neglect of the corporate officer. South Australia and Tasmania adopt yet another model, requiring a corporation to appoint officers responsible for OHS.

Most prosecutions are conducted before Magistrates Courts, but there is provision in states like New South Wales and Victoria for offences to be prosecuted before higher level courts (for example the Industrial Relations Commission of New South Wales, the Victorian County Court, and even the Supreme Court of Victoria, as the *ESSO* case illustrated). The maximum fines available to the courts have increased significantly over the past ten years. In New South Wales, for example, contraventions of the general duties in sections 8 to 11 of the OHSA(NSW) (the employer's, self-employed persons and designer's, manufacturer's etc duties) are \$550,000 for a corporation (\$825,000 for a further offence) and \$55,000 for an individual (\$82,500 for a further offence). From 1998 the maxima for contraventions of the OHSA(Vic) in Victoria have been \$250,000 for corporations in the County Court (\$100,000 in the Magistrates Court) and \$50,000 for individuals. The court has discretion to increase the penalty by up to \$250,000 for a repeat offence. The maximum fine for a summary offence (contraventions of regulations) is \$40,000 for corporations, and \$10,000 for individuals. Legislation before the Victorian Parliament is proposing dramatic increases to penalties. In Queensland the maximum penalties (where a breach causes death or grievous bodily harm) are \$60,000 or 2 years imprisonment for an individual and \$300,000 for a corporation.

Further, the OHSA(NSW) also provides for other important sanctions, in the form of court orders that the offender take steps necessary to remedy any matter caused by the commission of the offence (section 113), orders that the offender publicise the offence, penalty and related matters (section 115) and orders that offenders undertake OHS projects (section 116). The Act also makes provision for guideline sentences to be made by the Full Bench of the New South Wales Industrial Relations Commission in Court Session.

There are also proposals before the Victorian Parliament to introduce a new crime of industrial manslaughter.

You should also note that the OHS statutes make provision for health and safety representatives and committees to represent worker interests in the workplace. The provisions vary from jurisdiction to jurisdiction (see Johnstone, 1997: chapter 9), and it is beyond the scope of this paper to explore these provisions. I should note, however, that in Victoria, South Australia and the ACT and Commonwealth jurisdictions, health and safety representatives have the power to order provisional improvement notices, and make directions that work cease if the work constitutes an immediate threat to the health and safety of any person. Most jurisdictions have enacted provisions in their OHS statutes to protect employees from discrimination if they raise OHS issues, or participate in OHS activities.

The NRTC’s Model “General” Compliance and Enforcement Laws

The NRTC (2001b) has proposed model laws “to secure compliance with heavy vehicle regulations and to support the new national ‘chain of responsibility’ requirements.” It is proposed that these model laws apply to all the heavy vehicle regulations – that is, speeding heavy vehicle offences, vehicle standards offences, mass dimensions and load restraint offences and driving hours offences. They will complement specific provisions that apply to each activity. The new provisions cover a range of enforcement issues.

Appointment and identification of enforcement officers

Enforcement functions will be performed by police officers and by authorised officers who will be appointed by the road transport authorities. These authorised officers may be drawn from road authorities, OHS inspectorates, environment protection authorities, local government, other government agencies or the private sector.

Powers of enforcement officers and requirements for co-operation

The powers to be vested in enforcement officers will apparently be broader than powers currently vested in authorised officers from road agencies, and are based on powers exercised in other areas of regulation, such as OHS and environment protection. The powers are designed to enable officers to pursue all relevant parties in the chain of responsibility. The provisions will provide enforcement officers with the power to:

- stop, direct, move and inspect heavy vehicles;
- enter and inspect premises to monitor for compliance;
- enter and inspect premises when an offence is suspected on reasonable grounds;
- enter and search heavy vehicles when an offence is suspected on reasonable grounds;
- require the production of information, documents, records and devices;
- require certain parties to provide their name and address and the identity of other parties in the chain of responsibility; and
- require reasonable assistance.

Consistent with the OHS statutory provisions described above, the new provisions will create a number of new general offences that will apply to any person obstructing, hindering or impersonating enforcement officers, making or providing false or misleading statements or documents to the officers, and failing to provide reasonable assistance to an officer.

Liability of corporate officers, general offences and defences

When one of the parties in the chain of responsibility is a corporation, and the party contravenes its obligations, a director, company secretary or senior manager may be held personally liable for the breach committed by the body corporate unless they were not in a position to influence or control the body corporate in relation to that contravention, or else have taken reasonable steps and exercised due diligence to prevent the contravention. This proposal is very similar to the current provisions in the OHSA(NSW) for the liability of corporate officers. It will enable enforcement action to be taken against directors who set general policies, and high level managers responsible for rosters and schedules.

This paper has already outlined the specific duties owed by various parties under the chain of responsibility provisions. The proposed general compliance and enforcement provisions provide a number of general offences that apply to any person in the chain. Any person who aids, abets, counsels or procures the commission of an offence by another person will be taken to have committed the offence, even if the principal offender is not prosecuted. Any

person who causes or permits the commission of an offence or coerces, induces or offers an incentive to another person to commit an offence, will also be guilty of an offence. Further, and consistent with the OHS statutes, it will be an offence to discriminate against any person who has reported or raised concerns about road law contraventions.

Further, it is proposed to create a number of legal presumptions and other evidentiary provisions to assist in the investigation of road transport offences and to expedite prosecutions. Essentially this means that official records will be taken to be true and correct, and the defendant challenging the official record will have to lead evidence to prove that the record is incorrect.

General defences will be available to parties. These will include conduct performed under duress, conduct in response to a sudden and extraordinary emergency, and conduct performed in compliance with a direction by an enforcement officer.

Responsive Sanctions and Penalties

As noted above, traditionally the penalty for road transport offences was a court imposed fine. The level of penalty available and imposed was very low, and the focus was principally on drivers and operators. These two factors reduced the potential deterrent effect of prosecution.

The NRTC's new sanctions and penalties aim to provide greater and more effective deterrence. They distinguish between first-time offenders, and "systematic or persistent" offenders (NRTC, 2000b: 5), and can be tailored to the individual offender, the circumstances of the offence, and the consequences of the offence (risk to safety or increased profits). They can be seen as organised within a hierarchy, and can be used separately or in combination

In ascending order of seriousness, the sanctions that will be available are:

- *improvement notices*, which will give the person issued with the notice at least seven days to remedy the alleged contravention. The notice will be subject to an internal appeal process, and, if necessary, a court appeal process.
- *Formal warnings*, which will be issued if the contravention is minor and the officer believes that the person had taken all reasonable steps to prevent the breach and was unaware of the breach. Formal warnings can be withdrawn and more serious measures taken if further evidence reveals that the offender's record, or the nature of the offence, was more serious than initially believed;
- *Infringement notices*, which may be issued as an alternative to a court prosecution for less serious offences. These penalties will be approximately 20 per cent of the maximum fine available for the offence, and will be the same for individuals and corporations. The maximum penalty for an infringement notice appears to be \$600. The issue of a notice will preclude the possibility of a prosecution for the contravention, and will not constitute conviction. The record of the notice will, however, be used to aid a court in determining in later proceedings whether the persons was a systematic and persistent offender (see below);
- *Fines*, which will be available for any offence. The maximum fine for a corporation will be five times the maximum for an individual. The level of fines ranges between \$500 and \$5000 for individuals (\$2500 and \$25,000 for corporations). There is, however, also a maximum fine of \$10,000 (\$50,000 for a corporation) for a receiver knowingly or recklessly inducing or rewarding a contravention of the heavy vehicle mass, dimension and load restraint requirements, plus up to \$200 for every one per cent over 120 per cent overloading. Further, maximum fines double for second and subsequent contraventions of the heavy vehicle mass, dimension and load restraint requirements;
- *Commercial benefits penalties*, which will be up to three times the amount calculated to be the commercial benefit that would have been derived from the offence.

- *Restitutionary orders*, which may be made on the application of a road authority for loss or damage to infrastructure caused by an offender.
- *Supervisory intervention orders*, which may be made against a person found by the court to be a systematic and persistent offender, if the court is satisfied that the making of such an order will improve the ability or willingness of the person to comply with road transport laws. Such an order may direct the offender (i) to undertake acts to improve compliance (for example retraining staff, appointing a compliance auditor, obtaining expert advice, implementing operational changes and publishing compliance reports); (ii) report or disclose information on compliance enforcement; and (iii) conduct specific operations subject to the directions of the authority. The order cannot be made for greater than one year, and may be imposed with another order.
- *Orders affecting driver licence or vehicle registration*, where, for more serious offences, the court can modify, suspend or cancel the registration of the vehicle for which the offender is the registered operator, or the licence of a driver. The Speeding Heavy Vehicles Policy operates on a “three strikes and you are out policy”. Operators of heavy vehicles detected speeding in excess of 15 km/h above the open road speed limit will first be warned, then will have a speed limiter fitted, and will have their registration suspended for 28 days or three months for a third offence.
- *Prohibition orders*, which will be available against systematic and persistent offenders for whom no other penalty is adequate. The court may prohibit any involvement in the road transport industry (for example operating a particular type of vehicle, or being a corporate officer of a corporation operating a heavy vehicle) for a particular period of time.

These enforcement provisions are very progressive, and well thought out. The observer familiar with the OHS sanctions debate is immediately struck by the range of flexible sanctions available to road transport authorities. OHS regulators would do well to adopt some of these measures (see Gunningham and Johnstone, 1999: chapter 7). A lot will depend, however, on how responsively road transport regulators use these sanctions. Regulatory theory makes it clear that the benefits of flexible sanctions depend on the ability of the regulator to tailor its sanctioning responses to the behaviour and characteristics of the duty holder, and to play “tit for tat” with duty holders. Regulators should assume that duty holders will comply voluntarily, but should be prepared to escalate their enforcement responses if this assumption is ill-founded. If duty holders respond to escalation, the regulator can relax its enforcement response (see Ayres and Braithwaite, 1992: chapter 2). But this strategy requires smart and well-resourced regulators.

It also requires “big sticks” or a “benign big gun” at the top of the enforcement pyramid (see Ayres and Braithwaite, 1992: chapter 2; Gunningham and Johnstone, 1999). In this context the prohibition and suspension sanctions are important. The OHS observer, however, notes that the proposed fines for road transport breaches still lag a long way behind those currently in force, and being debated, in OHS regulation.

Conclusion

This paper has shown that there have been important and exciting developments in road transport and OHS regulation in the past 20 years. Both have heeded some of the important lessons of regulatory theory, and regulation in both areas is clearly smarter and likely to be more effective than the traditional regimes. But this paper also highlights the desperate need for co-ordination between OHS and road transport regulators.

It is important that the OHS and road transport provisions outlined in the first part of this paper operate easily together in regulating OHS in road transport. Clearly enforcement of these provisions needs to be streamlined and co-ordinated between the road transport agencies and the OHS regulatory authorities. Better alignment of the legal duties and obligations might

be achieved by considering whether there might be explicit recognition in the OHS statutes that compliance with chain of responsibility provisions in the road transport provisions will be accepted by OHS authorities as compliance with general duty requirements. Any process of streamlining the operation of the OHS statutes with the road transport chain of responsibility provisions would require a close review of the chain of the road transport chain of responsibility requirements to ensure that they are consistent with the principles and requirements of the OHS statutes. To be avoided is the situation where compliance with the road transport chain of responsibility provisions will be accepted as compliance with the relevant OHS general duty, when in fact the standard of care required by the chain of responsibility provision is weaker than that required by the OHS general duty.

Other areas of OHS regulation are grappling with similar issues. For example, the New South Wales Government recently released proposals for the regulation of coal mining in New South Wales (New South Wales, 2002). Coal mining is already covered by the *Occupational Health and Safety Act 2000* (NSW), and employers in the industry would be subject to the employer's general duties in sections 8 and 9 of the Act. They would also be covered by the proposed *Coal Mining Health and Safety Act*, which would impose more detailed duties upon prospecting holders, colliery holders, mine operators and contractors. A person might conceivably contravene the employer's duty in *Occupational Health and Safety Act* as well as the operator's duty in the *Coal Mining Health and Safety Act*. The proposals indicate that a person could be prosecuted under the *Occupational Health and Safety Act 2000* for a contravention of that Act, and under the *Coal Mining Health and Safety Act* for a contravention of that Act, but that a person cannot be punished twice for something that is an offence under both Acts. The *Occupational Health and Safety Act 2000* (NSW) provides that if a particular provision in associated OHS legislation (which includes the *Coal Mining Health and Safety Act*) is inconsistent with the *Occupational Health and Safety Act 2000*, then a person must comply with the OHS Act. The New South Wales coal mining proposals are that a person in the coal mining industry prosecuted under the *Occupational Health and Safety Act 2000* would need to prove that they had done everything that was reasonably practicable to comply with their general duty under the OHS Act. The proposals make it clear that compliance with a detailed provision under the *Coal Mining Health and Safety Act* may not be sufficient to demonstrate this level of care. However failure to comply with the *Coal Mining Health and Safety Act* or its regulations will be used as evidence that a person has also failed to comply with their general duties under the OHS Act.

Likewise, careful co-ordination is required to ensure that road transport authorities, the police, OHS, environmental and industrial relations enforcement agencies co-operate to ensure a co-ordinated approach to the enforcement of these provisions.

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