RELATIONSHIP BETWEEN ROAD TRANSPORT AND OCCUPATIONAL HEALTH AND SAFETY REGULATION

Barry Moore
Director – Strategy
National Road Transport Commission
mooreb@nrtc.gov.au

1 PURPOSE

Road transport operators are subject to various forms of regulation and of enforcement of regulatory requirements. The dominant form of regulation impacting on road transport is, not surprisingly, road transport regulation: developed by road agencies and enforced by road transport inspectors and police. Road transport operators, as with all workplaces, are also subject to occupational health and safety (OH&S) requirements: developed and enforced by OH&S agencies.

The purpose of this paper is to argue that there is potentially overlapping coverage of road transport and OH&S regulation and enforcement and that it is therefore incumbent on policymakers to define areas of joint interest and to ensure that regulatory requirements in these areas are consistent and complementary.

2 BASIS

2.1 NRTC Principles

The issues raised in this paper will be considered from the perspective of the National Road Transport Commission (NRTC). It is arguable that the propositions presented would apply to all road transport regulatory agencies, however it is convenient to approach them from an NRTC perspective as the NRTC has an explicit role and set of objectives.

The primary role of the NRTC is to make recommendations to the Australian Transport Council (comprising Commonwealth, State and Territory transport ministers) on policy affecting road transport. The Commission focuses on the regulation of heavy vehicles (greater than 4.5 tonnes gross mass). If Ministers approve the recommendations of the NRTC, all jurisdictions are expected to implement the agreed policies (usually expressed in the form of model legislation).

The principles governing the operation of the NRTC can be summarized as safety improvements, productivity improvements and improved environmental outcomes. The safety principle reads simply:

- improvements in road safety

Other principles which may be relevant to the relationship between road transport and OH&S regulation are:

- improvements in road transport efficiency and productivity
• encouragement and facilitation of innovation in the industry and its regulation

• improvements in regulatory efficiency and reductions in administrative costs

• improvements in effectiveness and efficiency of compliance arrangements

• encouragement and facilitation of continuous improvement in the road transport regulatory environment (by, for example, monitoring and updating regulation as necessary).

2.2 OH&S Approach

The function of OH&S regulation is the protection of health and safety in the workplace. For this purpose, the regulation is independent of the form of the workplace relationship (employee, contractor or sub-contractor) and also applies to customers in that workplace. The workplace may include a vehicle, irrespective of its location. An extreme view would apply responsibilities under OH&S legislation to other road users. This view is not common and has not been substantiated in case law.

The OH&S responsibility for worker health means that those agencies are interested in a range of matters not considered relevant by road authorities. Health is defined broadly under OH&S and can include comfort and amenity.

3 MODUS OPERANDI

3.1 Road Transport Regulation

Road transport regulation has traditionally worked through “black letter” law (ie, Acts and Regulations passed through parliament and subject to parliamentary scrutiny and regulatory review), supported by administrative guidelines to interpret the legislative standards and provide guidance to both transport operators and enforcement agencies. Administrative guidelines usually have no legislative status.

Road transport regulation is enforced by road agencies (road transport inspectors) and police. Generally transport inspectors enforce requirements for mass, dimension and load restraint and police for speed and other on-road behaviour. Either agency may enforce driving hours requirements. Most enforcement is on-road, with limited powers to gather off-road evidence (eg, operator records). In severe cases, broader powers apply (eg, coronal inquiry in the event of a fatality). Dangerous goods and environmental agencies also have some road transport enforcement functions.

Road transport regulation generally defines specific responsibilities and offences for breaches of these responsibilities. Road transport regulation is usually based on prescriptive requirements governing vehicles and road use (eg, vehicle dimensions, speed limits), although some vehicle requirements are more performance based (eg, stopping distance) and the NRTC is currently leading a national investigation of the application of performance-based standards for road transport regulation.

Under national “chain of responsibility” provisions, it is intended to extend responsibility to all parties who exercise control over road transport activities and to provide enforcement officers with powers to obtain evidence relevant to these parties. Compliance and enforcement provisions under development by the NRTC also include sanctions for “persistent or systematic” offences. Under draft compliance and enforcement provisions...
for mass, dimension and load restraint, an onus is placed on off-road parties (eg, consignors) to demonstrate that they had systems in place to achieve loads which comply with requirements (eg, for mass).

The policy basis for the draft “General” provisions (including powers of officers) and compliance and enforcement provisions for mass, dimension and load restraint have received strong support from the road transport industry, regulatory authorities and enforcement agencies. It is intended that Ministers will consider model legislative provisions in late 2001.

In most jurisdictions, road transport regulation is subject to regulatory review processes which require the demonstration of net benefit to society from any proposed regulatory change. This requires explicit consideration of any trade-offs between safety gains and productivity costs. Recommendations from the NRTC must be accompanied by formal Regulatory Impact Statements, which are scrutinised by the Commonwealth Office of Regulation Review under requirements of the Council of Australian Governments.

3.2 OH&S Regulation

Australian OH&S regulation applies a principle-based approach and comprises “umbrella” legislation setting out general duties (duty of care) and means of demonstrating that these duties have been met (management processes), supported by codes of varying forms. Codes may or may not have legislative support or endorsement of relevant authorities. In most cases, they would be taken into account by a court in determining whether OH&S responsibilities had been met. Under OH&S legislation, a business may be required to demonstrate that it has in place a safe system of work.

OH&S regulation is enforced by OH&S inspectors, who have extensive powers of entry into workplaces and wide powers to inspect and remove of records. An OH&S offence will be against a general duty of care, with non-compliance with the relevant code taken as evidence of the offence.

OH&S regulation takes into account productivity impacts through some form of consideration of practicability. OH&S legislation (Acts and Regulations) is subject to the usual parliamentary and/or Office of Regulation Review/Reform scrutiny, but codes are seen as interpretation of these standards and may not be subject to review in all jurisdictions.

The role of OH&S legislation is well established and is widely accepted in the Australian community. The approach has been subject to various reviews, in States/Territories and nationally and has been revised and refined over time. The current Australian approach of generalized duty of care supported by codes is based on the findings of the Robens inquiry (UK, 1970-72) and is regarded as international best-practice.

OH&S regulation applies the duty of care approach to all areas of economic activity. The degree of consistency of application of the approach is arguable and probably depends on the nature of the industry (fragmentation, union strength, degree of risk, etc) and the level of enforcement.

4 NRTC INVOLVEMENT IN OFF-ROAD ISSUES

It is proposed that the involvement of the NRTC in workplace issues should be restricted to matters closely related to the road safety objective, tempered by productivity.
considerations. Under this proposition, the NRTC would be involved on OH&S issues only to the extent that they impact on road safety.

At the same time, it must be recognised that the road safety objectives cannot be achieved by the restriction of regulation to on-road behaviour. Many on-road outcomes are the result of systematic off-road behaviours of drivers, operators and others in the transport chain. It is also argued that these “safety precursors” are not currently effectively controlled by other regulatory agencies (including OH&S).

Under this proposition, unless road safety implications could be demonstrated, the NRTC would have no direct interest in:

- warehouse practices (an example of a road safety link would be drivers queuing for long periods, resulting in driver fatigue)
- safe loading of freight (an example of a road safety link would be an unsafe loading practice which led to inadequate load restraint)
- vehicle ergonomics (an example of a road safety link would be poor positioning of controls)
- driver health and welfare (an example of a safety link would be a health problem which could result in loss of vehicle control).

5 AREAS OF INTEREST

The NRTC is interested in road safety outcomes, both for the driver of the heavy vehicle and for other road users. These safety outcomes can only be achieved if the activities of the driver outside the vehicle cabin are subject to regulation (this includes loading, unloading and other work activities). OH&S authorities are concerned with workplace health and safety, including the health and safety of those who drive vehicles in the course of business.

The areas of singular or joint coverage by road transport and OH&S regulation can be divided into three: areas of sole interest to road agencies, areas of sole interest of OH&S agencies, and areas of joint interest.

5.1 Road transport

Many areas of road transport regulation have little or no impact on the health or safety of commercial drivers. These are regulated to achieve asset protection or a “level playing field” among operators. Examples include minor overloads, payment of statutory charges and compliance with permit requirements (in some cases). It is argued that compliance with these regulatory requirements are of interest only to road authorities as they have no impact on the health or safety of commercial drivers.

5.2 Occupational health and safety

Many practices of road transport operators which are of interest to OH&S agencies have no impact on road safety outcomes. These include driver health and safety issues which are not of sufficient severity to affect road safety outcomes. Examples include loading practices (unless they affect on-road load security), noise and vibration.
5.3 Joint interest

There are also areas which have a direct impact on driver health and safety and a potential indirect impact on road safety outcomes, both for drivers and for other road users. These are areas of joint interest for road and OH&S agencies and are generally practices which take place off-road but which have implications for on-road outcomes. Possible examples include fatigue management, speed management, and use of drugs and alcohol.

In addition, the development of chain of responsibility provisions for road transport is imposing requirements on the off-road links in the transport chain. It is increasingly recognised by road transport regulators that imposing restrictions on on-road behaviour will not, by itself, fully achieve road safety objectives. Many on-road outcomes can most effectively be improved by influencing factors which apply prior to the driver and vehicle entering the road system. It is to influence these “safety precursors” that responsibilities are being placed on players in the road transport chain to take a systematic approach to factors which influence on-road compliance.

Where there are areas of joint interest to road and OH&S agencies, it is important that consistent approaches be developed. The need for consistency will range from policy development to enforcement.

In areas of joint interest to road and OH&S agencies, there may be mutual benefit from co-ordination of enforcement effort. In order to enable enforcement of chain of responsibility provisions, transport inspectors will require training in investigative techniques currently more commonly used by OH&S inspectors. Options for enforcement co-operation could include:

- joint operations
- sharing of information
- cross-vesting of powers between road transport and OH&S inspectorates
- formation of single inspectorates to undertake road transport and OH&S enforcement.

6 OVERLAP BETWEEN ROAD AGENCY AND OH&S ROLES

Where there is overlap between road agency and OH&S roles (primarily driver safety), the two approaches can be met simultaneously if the road transport regulation is based on accepted safety principles and is assessed through a conventional benefit-cost methodology. If this is the case, meeting the road transport requirement would be judged as achieving safety at reasonable cost.

An exception could occur if an overall improvement in road safety outcomes were achieved at the expense of the safety of commercial vehicle drivers.

The OH&S role in health means that it is interested in different factors than the NRTC and acts on different trigger points. For example, vehicle and cabin design and ergonomic factors are of interest to OH&S authorities when they reach a level causing discomfort or potential long term health problems. The NRTC would only consider regulatory action if the problem reached a level where it had safety implications for the driver or other road users. For example, a low level of cabin vibration may contribute to driver stress and be of concern for OH&S, whereas a higher level of vibration would be required to threaten
relationship between road transport and OH&S regulation

vehicle control to the extent of having safety implications. The issue would be clouded if it were considered that low levels of cabin vibration were a contributor to driver fatigue.

7 EXAMPLES

7.1 Driver health and safety code

One element of the Third Heavy Vehicle Reform Package, approved in May 2000 by Australian Transport Council for development by the NRTC, is a Driver Health and Safety Code. Development of a code was proposed by the Australian Trucking Association and the Transport Workers Union as a means of improving driver health and safety by addressing off-road factors. The NRTC commissioned a project scoping exercise, facilitated by an OH&S professional (Bryan Bottomley) to work with transport operators, drivers, road agencies, road enforcement agencies and OH&S agencies to consider the possible form and content of a code.

The tentative position reached in this process is that a code could cover off-road factors which lead most directly to unsafe on-road outcomes. The indicative list of factors for inclusion in a code was:
- medical standards
- driver licensing
- load limits
- load security
- speed limits
- rest facilities
- vibration/noise
- drugs
- alcohol
- vehicle maintenance
- driving hours and fatigue management
- speed and system of work
- monitoring of driver health

7.2 Driver fatigue

Driver fatigue is an example of an overlap issue between the responsibilities of the NRTC and OH&S authorities. It is unlikely that significant reductions in fatigue related crashes will be achieved by relying solely on the regulation of on-road behaviour (driving hours) using existing enforcement practices. It is widely argued that management of driver fatigue requires control of a range of off-road factors.

On the east coast of Australia (New South Wales, Victoria, Queensland, South Australia and Tasmania), heavy vehicle driver fatigue is currently regulated prescriptively, through quantitative restrictions on hours of driving and work. Enforcement is undertaken through driver logbooks (except in Tasmania) and management records.

In Western Australia and Northern Territory the prescriptive approach has never been applied. In recent years, fatigue codes have been developed in both jurisdictions by road agencies, in consultation with the road transport industry, and given status under OH&S provisions. Enforcement is also undertaken by OH&S inspectors.
The “national” driving hours currently impose prescriptive requirements on maximum hours of driving and related work, without consideration of time of day at which the work occurs. It is at least arguable that compliance with the prescriptive requirements could lead to outcomes which are unsafe and do not meet the OH&S duty of care (for example, by driving for 14 hours per night for 10 nights in succession, as currently permitted under the Transitional Fatigue Management Scheme). If this is the case, there is a possible inconsistency between road transport and OH&S regulation on the east coast, and a possible inconsistency between the road transport requirements of the east coast and the OH&S requirements of the west and north.

One of the aims of the current fatigue review (Heavy Vehicle Driver Fatigue: Review of Regulatory Approach) is to provide consistency in fatigue regulation, both between jurisdictions and between OH&S and road transport requirements. It is proposed to achieve this by maintaining road transport regulation (in a more flexible form) in areas currently subject to this form of regulation, and supporting this by a fatigue code which could be endorsed by both road transport and OH&S agencies and which could be applied consistently in all jurisdictions, irrespective of whether their primary approach is through road transport or OH&S regulation.

The outcomes of the fatigue review will be based on safety research, so that compliance with road transport regulation will also achieve compliance with OH&S requirements. To this end, the NRTC, in conjunction with the Australian Transport Safety Bureau and New Zealand’s Land Transport Safety Authority commissioned a report from a group of fatigue experts: Fatigue Expert Group: Options for Regulatory Approach to Fatigue in Drivers of Heavy Vehicles in Australia and New Zealand

8 CONCLUSIONS

The propositions of this paper are that:

(i) there is overlap in the areas of coverage of road transport regulation and OH&S regulation

(ii) where there is overlap, consistency between the two approaches ought be achieved

(iii) this consistency should span the range between policy development and workplace enforcement

(iv) in order to achieve consistency, co-operative arrangements between road transport and OH&S agencies must be developed, both in policy development and in enforcement.