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**THE NATIONAL ROAD TRANSPORT
COMMISSION: AN EXPERIMENT IN
COOPERATIVE FEDERALISM**

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Introduction

National Co-ordination of Road Transport Regulation Prior to 1991

As powers over road transport are not specified in the Commonwealth of Australia Constitution Act, they lie, for the most part, with the States and Territories. The Commonwealth has made limited use of section 92 powers to establish a partial regulatory scheme for vehicles engaged in interstate trade (the Federal Interstate Regulation Scheme), but has not yet attempted to use more recently established powers (eg, corporations powers) in applications relating to road transport operations. However, the Commonwealth has also made use of corporations and foreign trade powers to regulate new motor vehicle safety and environment standards through the *Motor Vehicle Standards Act 1989*. These standards are known as the Australian Design Rules. Road transport regulation includes measures covering the registration, operation and charging of vehicles, the licensing of drivers, and measures to ensure compliance with the regulations. Generally, this regulation has been the responsibility of the States and Territories in the Australian federal system.

Prior to the establishment of the National Road Transport Commission (NRTC) in 1991, national co-ordination of road transport regulation was undertaken through the Australian Transport Advisory Council, comprising Commonwealth, State and Territory Ministers for Transport. The process was advisory and relied on implementation by jurisdictions following consensus decisions at ATAC.

Problems in the regulation of the road transport industry had been considered by the Inter-State Commission, which was re-established in 1984 and was merged into the Industry Commission in 1990.¹ During its second existence, the Inter-State Commission had documented variations between jurisdictions in the regulation of road transport and had made recommendations to the Commonwealth Minister to consider, in conjunction with his colleagues in the Australian Transport Advisory Council.² The final report of the Inter-State Commission³ recommended the establishment of a National Commission to co-ordinate the regulation of road transport.

The Special Premiers' Conferences

By the early 1990s, there was a widespread perception that the division of powers under Australia's federal system was acting as an impediment to economic efficiency and that this impediment had to be addressed to enable Australia to maintain a competitive position in an increasingly difficult world economic environment. At this time, there was a perception in the road transport industry and amongst transport policy-makers that the efficiency of road transport was impeded as it was a national industry suffering from differential regulatory treatment by States and Territories. Differences between jurisdictions at that time included: standards for heavy vehicles and their weights and dimensions, permitted hours of driving, work and vehicle charges. The establishment of the NRTC through the Special Premiers' Conference process is discussed in Moore and Starrs:

Three Special Premiers' Conferences were held over a period of just over a year. The first conference was held in Brisbane in October 1990. It was at this conference that the Overarching Group on Land Transport (OAG) was established. At the second SPC held in Sydney in July 1991, the Heavy Vehicles Agreement was signed and provision made for the establishment of the National Road Transport Commission on an interim basis. The Light Vehicles Agreement was agreed to at the Premiers and Chief Ministers Meeting held in Adelaide in November 1991. This "SPC" was notable for the absence of the Commonwealth. The Light Vehicles Agreement was signed by all jurisdictions by the middle of 1992.⁴

¹ The Industry Commission later became the Productivity Commission.

² Inter-State Commission, *Harmonisation of Road Vehicle Regulation in Australia* 2 vols (1988).

³ Inter-State Commission, *Road Use Charges and Vehicle Registration: A National Scheme* 2 vols (1990).

⁴ B Moore and M Starrs, 'Road Transport Reform in a Federal System'. Paper presented to the 18th Australasian Transport Research Forum, 1993.

NRTC legislation

The NRTC was established on an interim basis in October 1991 and formally in January 1992. The Commission operates under a Commonwealth Act, to which the Heavy Vehicles Agreement and the Light Vehicles Agreement are attached as Schedules. The initial legislation included a sunset clause after six years, but with a requirement for a review prior to that date. The NRTC was reviewed in 1996. In the initial absence of unanimous agreement on the amended Heavy Vehicles Agreement and Light Vehicles Agreement by Heads of Government, the Commonwealth unilaterally extended the life of the Commission by one year. Subsequently the amended Agreements were signed and an amended Act was passed in the Commonwealth Parliament, providing for a second six-year term for the Commission (including the interim extension). Under the amended legislation, the Commission's second six-year term will expire in January 2004. A second review of the Commission will be undertaken in 2001/2002 under the auspices of the Standing Committee on Transport (CEOs of transport agencies) and recommendations will be made to Australian Transport Council with a subsequent recommendation to the Council of Australian Governments.

The NRTC comprises a Commission of five part-time members, plus the Chief Executive Officer and a staff of around 23. The Commission's annual budget (\$m3.54 since 1993) must be approved by the Australian Transport Council. The Commonwealth is responsible for 35 per cent of the budget and the remainder is split between jurisdictions on the basis of vehicle numbers.

In considering recommendations of the Commission, the Australian Transport Council is bound by formal voting procedures. For most matters, if a legislative proposal is 'not disapproved' by a majority of ministers, the Commonwealth is required to use best efforts to take the legislation through Parliament for application in the Australian Capital Territory. Under the initial Act, other jurisdictions were expected to implement by legislative reference to the Australian Capital Territory provisions ('template' legislation). The amended Act provides for means of implementation other than 'template' legislation (see discussion below). The 'non disapproval' voting process is of significance, as it forces Ministers to make decisions on items forwarded by the Commission.

It is important to note that for most of its business, the Australian Transport Council functions on the basis of consensus, with an agenda provided by the Standing Committee on Transport. However, for Commission items, the agenda and papers are provided by the Commission and a formal voting process is required. The Commission can make recommendations for decision either in-session or out-of-session. For most matters, a two-month voting period is required.

Heavy Vehicles Agreement

The Heavy Vehicles Agreement is attached as Schedule 1 to the *National Road Transport Commission Act 1991* (NRTC Act). The Heavy Vehicles Agreement sets out the role and functions of the Commission with respect to heavy vehicles (greater than 4.5 tonnes gross mass). Under the Heavy Vehicles Agreement, the functions of the Commission are quite broad (subclause 20(1)):

the functions of the National Commission shall be to have and to exercise responsibility both for the policy development in relation to Road Transport and for overseeing the administration by Participating Parties and the Australian Capital Territory of Road Transport Legislation ...

In contrast, the functions of the Commission with respect to heavy vehicle charges — a significant political issue at the time the legislation was framed — are set out in some detail. The Heavy Vehicles Agreement provides that funding shares must be agreed unanimously by Ministers, while the budget level is subject to majority approval.

Light Vehicles Agreement

The Light Vehicles Agreement is attached as Schedule 2 to the *National Road Transport Act 1991*. The Light Vehicles Agreement repeats many provisions of the Heavy Vehicles Agreement and sets out the functions of the Commission with respect to light vehicles (4.5 tonnes gross mass or less), in addition to including specific functions relating to heavy vehicles. The Light Vehicles Agreement sets out three categories of Commission functions:

- priority items, including new vehicle standards, in-service vehicle standards, a traffic code and transport of dangerous goods;
- additional items, including assembly and publication of information on road funding, taxation and charges and assisting in the development of performance indicators for the performance of the road system and road authorities; and
- items for which the implementation of national approaches requires a demonstration of 'significant net benefits', including standards for modification of light vehicles, coordination of national road safety research.

Operation of the NRTC

Method of Operation

In order to achieve its tasks, the Commission must work with a wide range of participants. In matters relating most closely to road transport, stakeholders include road authorities, road transport enforcement agencies (police and transport inspectorates) and the road transport industry. In an industry that is diverse and dominated by small operators, even this is a significant exercise. Other aspects of the Commission's role require liaison with: dangerous goods authorities; environmental agencies; occupational health and safety authorities; shippers and stevedores; and primary producers.

Nearly all of the work of the Commission requires extensive consultation with outside agencies and industry representatives. In most cases, some form of joint policy development is undertaken. This could range from intensive focus groups to joint policy development (typically the case with environmental matters) or use of road authorities as 'lead agencies' in the national process.

The Commission has obtained supplementary funding from other agencies (Austroads⁵ for the projects on performance-based standards container mass, and the Commonwealth Department of Transport and Regional Services for the development of policies on fatigue and compliance and enforcement) and is active in suggesting research topics to be funded by others (most commonly Austroads and the Australian Transport Safety Bureau). Management of these projects usually falls to the Commission.

A good example of co-operative policy-making was the process followed in the development of the Australian Road Rules. Over a period of five years, meetings were held of up to 30 representatives (mostly of road authorities and police) chaired by the Commission and with analytical work undertaken by all participants. Public consultations were a feature of the policy development, both nationally and within jurisdictions. The result was a product with shared ownership that was successfully implemented (in most elements) in all jurisdictions. This success in reaching a (largely) common set of road rules throughout Australia followed attempts that started in 1948. The Commission has a range of formal advisory groups including Transport Agency Chief Executives, the Industry Advisory Group, the Bus Industry Advisory Group and (jointly with the National Environment Protection Council) the Motor Vehicle Environment Committee.

The annual Work Program and the three-year Strategic Plan (updated annually as required in the *National Road Transport Commission Act 1991*) are also developed with extensive external input. The Work Program is presented annually to Ministers as part of the budget request and the Strategic Plan must also be approved annually by Ministers.

Work Program

The initial Commission's work program was dominated by issues related directly to vehicles and road use and represented major repairs to a regulatory system which was differentiated between

⁵ Austroads is the collegiate body of road authorities of Australia and New Zealand.

jurisdictions. These issues related to vehicle standards, charges for road use and the direct regulation of road use. The major non-vehicle issue on the initial agenda was heavy vehicle driving hours, again with a focus on removing disparities in existing legislation. Even the successful introduction of the Australian Road Rules can be seen as largely a repair to regulations that differed between jurisdictions.

With the progressive completion of the initial work program, the focus of the Commission has shifted to a more fundamental review of the method of regulation of road transport in Australia. Four examples of this shift in emphasis are discussed below.

Compliance and enforcement

The first example of this shift in emphasis was the compliance and enforcement provisions.⁶ These provisions were initially seen as little more than an effort to achieve consistent (and higher) penalties for breaches of vehicle standards or road use requirements. As the work developed, however, it quickly became a comprehensive review of approaches to compliance with road transport law (see discussion below).

When implemented, the Commission's compliance and enforcement measures will introduce a comprehensive and nationally consistent compliance program comprising 'conventional' (or sanctions-based) legislation complemented by a range of other strategies, including:

- consistent, effective and well-targeted enforcement;
- privileges and incentives-based strategies, which encourage industry to take responsibility for its own performance (including accreditation-based compliance);
- education and training of enforcement officers and industry; and
- effective communication between enforcement officers, regulatory authorities and industry.

Compliance and enforcement policies have drawn on 'best practice' approaches in other regulatory areas, including companies law, occupational health and safety and environmental regulation. In a sector where approaches had changed little for decades, implementation of these approaches should have a significant impact.

Performance-based standards

Throughout the world, the primary approach to the regulation of vehicle characteristics and use is prescriptive regulation. Whilst this approach generally provides certainty to the regulated industry, it comes at the cost of arbitrariness (at least at the margin), stifling of innovation and encouragement of pressures for 'bracket creep'. In other areas of regulation, approaches have been adopted which are more closely related to performance. The NRTC, in conjunction with Austroads, has initiated a project to establish a set of performance-based standards, to apply as an optional alternative to prescriptive standards.

Alignment of road transport and occupational health and safety regulation

A recent NRTC initiative has been the development of an approach to the alignment of road transport and occupational health and safety regulation, as far as it affects road transport operations.

After many years of taking little interest in road transport operations, occupational health and safety (OH&S) agencies are increasingly regarding road transport operations, including vehicles, as workplaces where relevant duty-of-care requirements should be enforced. At the same time, road transport regulators are recognising that road safety outcomes are heavily dependent on workplace issues.

⁶ K McIntyre, 'National Compliance Approaches' in *Smart Compliance for the New Millennium*, Conference Papers, National Road Transport Commission (2000).

Transport Agency Chief Executives have endorsed the approach proposed by the NRTC to the identification of issues of unique interest to road agencies, issues of unique interest to OH&S agencies and issues that are relevant to both sets of agencies. The NRTC is now proposing to OH&S agencies the alignment of policy development and enforcement in areas of overlap.⁷

The national consultative processes for road transport regulation have proved an effective mechanism for the development of a common position, which has provided a basis for productive discussions (to date) with OH&S agencies.

Environment

The development of road transport environment policy presents an interesting case study in the interaction of two inter-governmental agencies. One of the principles of the Heavy Vehicles Agreement is: 'minimisation of the adverse environmental impacts of road transport'. To this end, the Heavy Vehicles Agreement specifies that (20B): 'The Commission, in conjunction with the National Environment Protection Council, to develop for Vehicles national motor vehicle emission and noise standards'.

The National Environment Protection Council (NEPC) is a Council of Environment Ministers established by equivalent Acts in all jurisdictions. It too, is a product of the co-operative federalism of the early 1990s and provides another model for national reform that will not be discussed here. The Acts give the Council the ability to develop and make National Environment Protection Measures (NEPMs). However, the NEPC's role in vehicle emissions policy mirrors the NRTC role. Subsection 14(2) of the *National Environment Protection Council Act 1994* requires that, in the making of NEPMs: 'noise and emission standards relating to the design, construction and technical characteristics of new and in-service motor vehicles may only be developed and agreed in conjunction with the NRTC'.

Despite the potential problems resulting from these overlapping roles, there has been a high level of co-operation between the NRTC, the NEPC (via the NEPC Service Corporation) and the transport and environment agencies at Commonwealth and State levels. The national road transport environment program is managed by the Motor Vehicle Environment Committee (MVEC), which is established by an agreement between the Chair of the NEPC and the Chairman of NRTC. MVEC comprises senior executives of the NEPC, the NRTC, and some State and Commonwealth transport and environment protection agencies. Each MVEC strategic plan and joint work program has been endorsed by both Transport and Environment Ministers with input from a stakeholder group that is also established by the MVEC agreement.

The track record of MVEC speaks for itself. In the few years it has been operating it has gained approval from Transport and Environment Ministers on a legislative package that sets a suite of new vehicle emission standards equivalent to world's best practice, new diesel and petrol fuel standards, in-service diesel emission standards and a range of other instruments that will result in a significant improvement in urban air quality. As in the case of overlap between road transport and OH&S regulation, an attribute of the NRTC had been the ability to deliver a largely common road transport view to the regulatory development process.

Legislative and Policy Processes

Template Laws

The original national reform model laid down by the Heavy and Light Vehicles Agreements was one of legislation being developed by the Commission, enacted by the Commonwealth on behalf of the Australian Capital Territory (known as the 'host jurisdiction'), then used in all other jurisdictions as a

⁷ B Moore, 'Relationship between Road Transport and Occupational Health and Safety Regulation', paper presented to *Safety In Action* conference, Melbourne, May, 2001.

template for their own laws. This approach was, in theory at least, a sensible and straightforward means to acquire uniform road transport legislation throughout Australia. Aside from the technical ease by which the principal template laws could be adopted by each of the jurisdictions, amendments to these laws could also be accommodated just as effortlessly. Simply, once jurisdictions have adopted the template law as their own, their laws would change automatically with changes to the template.

Operating initially on the assumption that just one template legislative instrument would be needed to incorporate all areas of the national road transport law the Commission was established for a limited life span of only six years. However, it was only a short time into its first six years that the Commission began to experience significant difficulties with developing laws using the template model.

Some of these problems were technical and practical. The national road transport law covers a diverse and complex range of technical and legal subject matter and the task of manipulating this subject matter within a single legislative instrument was by no means a straightforward one. The template model can only operate effectively when the template laws are introduced in *all* jurisdictions without local amendments or delays; however, each of the jurisdictions is subject to its own legislative and parliamentary timetables. As well, jurisdiction-specific modifications to the template might be necessary to overcome local obstacles to its implementation. Working with nine different jurisdictions entailed nine different introduction times for each template law, as well as up to nine different sets of local amendments.

These technical and practical problems were inconvenient, but not insurmountable. Of much more significance, however, were the difficulties with the template model that the Commission encountered in attempting to resolve the very real and extremely complex regional, operational, institutional and legal differences of the States and Territories in their approach to road transport regulation. Also coupled with increasing problems for the Australian Capital Territory as the host jurisdiction to the national road transport template law.

To reduce the time taken and difficulty experienced by the Commission in attempting to resolve those differences, one of the Commission's first strategies was to seek Ministerial approval to abandon the pursuit of the whole national road transport law within a single legislative instrument. Instead, to use the modular approach, effectively carving the road transport law up into six stand alone, 'bite-sized' regulatory chunks. Ministers endorsed this approach, on the basis that the template laws produced in all six modules would ultimately be integrated.

The modular approach to the development of the national road transport law did result in the successful production of a number of template legislative instruments: most notably, in the areas of heavy vehicle charges and the transport of dangerous goods. These are outlined below.

Examples of Template Laws

Heavy Vehicle Charges

During the Special Premiers' Conference process, national uniformity in road use charges for heavy vehicle charges was seen as an important goal for the Commission. Substantial proportions of the *National Road Transport Commission Act 1991* and the Heavy Vehicles Agreement are devoted to specific decision-making processes for charges and methodologies to be followed in determining these charges.

The *Road Transport Charges (Australian Capital Territory) Act 1993* was the first road transport reform module and it was advanced to quickly 'lock in' charges within a rapidly changing political environment.

Heavy vehicle charges are currently made up of two components: road use charge, which is a part of the diesel excise collected by the Commonwealth (under a rebate arrangement, for larger heavy vehicles and those which operate outside urban areas, the net excise is currently equal to the road use charge) and a fixed annual (registration) charge.

Although the heavy vehicle registration charges were passed in May 1993, the legislation was not implemented nationally until July 1997. The charges have been implemented through the template mechanism in Victoria, South Australia and the Northern Territory, as well as the Australian Capital Territory.

Dangerous Goods Transport Reforms

In the dangerous goods module, five major legislative instruments were produced in template form: the *Road Transport Reform (Dangerous Goods) Act 1995*, followed by the *Road Transport Reform (Dangerous Goods) Amendment Act 1997*, the Road Transport Reform (Dangerous Goods) Regulations 1997, a set of complementing Rail Rules and the 6th Edition of the Australian Code for the Transport of Dangerous Goods by Road. This regulatory package has nearly been implemented in its entirety in template form in all jurisdictions (although one jurisdiction is still to fully implement the Act and Regulations).

The scheme harmonises the Australian requirements for the transport of dangerous goods with those of the United Nations, introduces common operating requirements throughout Australia for the safe transport of dangerous goods, a national licensing scheme for drivers and vehicles carrying dangerous goods in bulk, a general duty to use only trained people to undertake tasks involving dangerous goods, and a nationally coordinated administrative system for exemptions, approvals and other decisions.

It should be emphasised that an important factor in the development of the dangerous goods template laws was the pre-existence of the 5th edition of the Australian Code for the Transport of Dangerous Goods, which had been written and agreed upon by officers from agencies involved in the regulation of dangerous goods and by representatives of key industries involved in the transport of dangerous goods. Hence, the Commission's task in this area of the road transport law was facilitated considerably by the strong level of pre-existing 'ownership' of the reform.

At the same time, the pursuit of template law was seen to be a slow, cumbersome and costly process that was frustrating the early achievement of real, 'on the ground' safety, productivity and efficiency reforms and that was leading to widespread disaffection with the goal of national conformity. (Interestingly, and somewhat ironically though, the template Charges and Dangerous Goods laws are also widely regarded as two of the more successful of the Commission's legislative outputs.)

By late 1996, the level of general dissatisfaction with template law was such that the Independent Committee, set up under the *National Road Transport Act 1991* to review the Commission and to make recommendations regarding the Commission's second term (if any), concluded that the legislative focus of the Commission's charter was not always advancing the timely delivery of 'on the ground' and outcomes-focused reforms.⁸

In recommending that the Commission's life be extended for another six-year term, the Review Committee also recommended that the Commission's charter be broadened to enable delivery of reforms through non-legislative means (such as through national policies and practices). As well, the Committee recommended that where legislation is to be developed, template law should be the long-term goal; but the delivery of reforms should not be seriously delayed or made too expensive by the pursuit of a template program.

From these recommendations, the *National Road Transport Commission Act 1991*, including the Heavy Vehicles Agreement and the Light Vehicles Agreement, was amended in 1998⁹ to enable jurisdictions to apply the national road transport law either by template or by implementing the 'substance' of that

⁸ The Independent Committee to Review National Road Transport Law, *Reform and Australian Road Transport: A Review of Process, Progress and Impacts of the National Road Transport Commission, and Recommendations for Its Future* (1996) unpublished.

⁹ *National Road Transport Commission (Amendment) Act 1998*.

law.¹⁰ Although not precluding template delivery, the inclusion of the option of implementing only the 'substance' of the national laws formally signalled the end of template as the preferred method of delivering national road transport laws: at least in the immediate to short term, and except for reforms that have already been delivered in that style (heavy vehicle charges and dangerous goods).

Alternative Approaches

By the time the Commission's charter was amended to give effect to the recommendations from the 1996 Review, the Commission had begun experimenting with delivering reforms by different methods, such as model legislation and policy principles. Some examples are outlined below:

Examples of Model Laws

Driver Licensing

The development of national policy on driver licensing was the first explicit departure from template legislation.

A policy document was prepared in close consultation with Australia's driver licensing authorities as the basis for the reform of State and Territory driver licensing laws. The policy proposal comprised two parts: Primary Principles and Supporting Principles. The policy mirrored that of the draft *Road Transport Reform (Driver Licensing) Bill* and Regulations initially developed by the Commission. These provisions were re-drafted into Primary and Supporting Principles, when officer-level agreement could not be obtained for the draft provisions.

The Primary Principles established a framework for a national driver-licensing scheme providing for uniform arrangements for the post-novice licensing of drivers of motor vehicles, the renewal of licences, and licence suspension and cancellation.

The Supporting Principles dealt with the procedures for issuing and varying driver licences, the obligations of licence holders, suspension, cancellation and termination of driver licences and administration of the driver-licensing system.

The agreed policy did not necessarily preclude a State or Territory from dealing with some issues administratively rather than by legislation. However, it was intended that the NRTC would, in conjunction with the driver-licensing authorities, monitor the adoption by the jurisdictions of the policy to ensure that key features were included.

Driving Hours

The Road Transport Reform (Driving Hours) Regulations were drafted by the Commonwealth and were passed through Commonwealth Parliament, but were never made.

The Driving Hours Regulations have been treated as model legislation by Queensland, New South Wales, Victoria, South Australia and Tasmania and have been drafted into provisions in those jurisdictions. In each case, there has been some deviation from the national provisions but (with the exception of Tasmania where a driver logbook is not required) these deviations appear to have been minor and have not raised industry concerns.

Driving hours provisions were not intended for application in Western Australia or Northern Territory, which base their fatigue regulation on codes given status under occupational health and safety legislation. The provisions have not been applied in the Australian Capital Territory.

¹⁰ Note that the Australian Capital Territory refused to sign onto these new arrangements until its ability to legislate in non-template circumstances was made beyond doubt, and, where template was to be used, that the legislation was functional to the Australian Capital Territory.

Australian Road Rules

Some jurisdictions adopted the Australian Road Rules in template fashion, as published by the Commission, and others used a 'mirror' approach: New South Wales and the Australian Capital Territory references the Australian Road Rules published by the Commission, while South Australia, Tasmania, Northern Territory, Western Australia and Queensland have rewritten the Rules in their respective local laws. Victoria published the Rules in its Government Gazette and incorporate it by reference in regulations.

As the Australian Road Rules were being finalised, States and Territories indicated that a process was necessary to ensure the Rules were kept current and relevant, or the value of national Road Rules would dissipate quite quickly given the dynamic nature of the general traffic law. Ministers were asked to approve the establishment of a maintenance process for the Rules when they approved the Rules. The process has been put into practice since the Rules were approved in January 1999, with two amendment packages being approved prior to national implementation, and another currently being developed.

An Example of the Policy Only Reform Model

Speeding Heavy Vehicles

Management of Speeding Heavy Vehicles is an example of a reform that was developed by the Commission and approved by Ministers as policy only. In the policy proposal, approved by Ministers in November 1997, it was noted that some issues would have to be clarified during implementation.

The policy arose from concerns expressed by industry organisations over lack of effective enforcement of open-road speed restrictions. Industry calls for immediate 'grounding' of offending vehicles were rejected by road authorities and the Commission was called upon to develop an appropriate policy. The policy proposed, and endorsed by Ministers, was based on the reasoning that if a vehicle were travelling at a sufficiently high speed to indicate that the speed limiter was not functioning effectively, then the registered operator was failing in his/her duty to maintain the vehicle in proper condition. This provided a rationale for sanctions against the operator for repeated offences ('three strikes') in addition to existing penalties faced by the driver.

The lack of clarity in the approved policy has not been resolved during implementation. In addition, there have been unanticipated implementation issues, mostly arising from difficulties in capturing and transferring relevant data, both within and between jurisdictions. The result has been significant differences between jurisdictions in the way the provisions operate. One jurisdiction has implemented through administrative means, one through a mixture of administrative and legislative instruments and one through legislation, while the remainder of the jurisdictions have not implemented to date.

The lesson from this example is that, irrespective of views on the desirability of template legislation, policy certainty is required if uniform outcomes are to be achieved. Many of those involved consider that policy certainty can only be achieved if agreed policy is expressed in legislative form.

The Commission has always been involved in the development of administrative guidelines. More recently, the Commission has expanded its delivery mechanisms to include guidelines, codes of practice, enforcement guidelines, and, in the area of training of enforcement officers, to national sets of training competencies and training support materials.

Review of Methods of Delivery

With foresight as to the likelihood of future adverse consequences of a non-template approach to national consistency, another amendment to the Heavy Vehicles Agreement made provision for future reconsideration of the means by which the national road transport law should be applied in order to achieve a national uniformity or, at least, consistent integration of that law.

The amended Heavy Vehicles Agreement includes the clause:

No later than three years after the execution of the First Heavy Vehicles Amending Agreement or such later time as agreed by the Australian Transport Council, the Australian Transport Council will consider and recommend to Heads of Government the preferred means of achieving a nationally uniform or consistent integrated road transport law and Heads of Government shall make their decisions by unanimous vote, on the recommendation and any consequential amendments to this Agreement.¹¹

As the first step towards meeting this requirement, a working group was formed to develop terms of reference for a review of the appropriate method of delivering road transport law. The working group is chaired by the Commonwealth and includes representatives from all jurisdictions. From the discussions of this group, and input from the Commission, the conclusions reached at this time favour future road transport legislative reforms being produced by model law, which jurisdictions would be able to reference or substantively implement. Under that approach, a new Act would need to be established by the Commonwealth to host the model legislation. The new Act would work in conjunction with the *National Road Transport Commission Act 1991* and the model laws would be stored in schedules to that Act, but would not be enacted in themselves. These conclusions have not yet been agreed upon by transport agencies, let alone Ministers; however, they represent the Review group's and the Commission's preferred way forward at this point of time. Reasons for these conclusions include:

- the template approach has had only limited success;
- the model laws approach will not close off other delivery options, such as policy and including template, that might be used by the Commission in the right circumstances;
- instead of compelling jurisdictions to adopt every word of a legislative document, which is the hallmark of a template system, jurisdictions are encouraged to contribute to the development, approval and implementation of a legislative document which is developed as a model to guide them in implementing agreed national policy locally;
- access to the model legislation will be improved by providing a distinct home in a separate Commonwealth Act;
- policy changes over time can simply be reflected in amendments to the model laws — there is not the additional practical difficulty associated with developing, and obtaining agreement on, amendments (and consequential amendments) to 'real' legislation to give effect to those policy changes;
- the Australian Capital Territory is put on exactly the same footing and status as the states and the Northern Territory;
- the Commission will retain access to Commonwealth legislative drafting; and
- this model still affords scope down the track to integrate much of the model law and to tackle a number of the internal inconsistencies across products already delivered.

However, the question must still be asked: can model laws ever be as effective as template laws? At a theoretical level, the answer is no, but at a practical level, the answer may be yes, as the examples given in the discussion below suggest.

¹¹ Clause 8B.

Compliance and Enforcement Provisions

The Commission has, with time and experience, progressively refined its model laws, searching continuously for creative solutions to the problems to uniformity that model laws pose. In its current work on national model compliance and enforcement provisions in respect of the heavy vehicle laws the Commission is attempting to reach agreement on those aspects of the regulatory scheme that are essential to nationally consistent outcomes whilst providing for non-uniform application of other aspects that are considered to be merely desirable for nationally consistent outcomes. This approach is detailed below.

Identifying 'Essential' and 'Desirable Only' Provisions

Compliance and Enforcement: Mass, Dimension and Load Restraint

This work addresses deficiencies in the compliance provisions of the national heavy vehicle loading standards and lays down what are intended to be 'best practice' policies as the basis of future model legislative provisions and administrative guidelines that will provide nationally consistent tools to secure compliance with the standards.

In recognition of the need for the policies to be consistent not only with a national heavy vehicle compliance and enforcement framework, but also with the wider legal compliance and enforcement framework of every Australian jurisdiction, the policies have not been tailored for future template legislation. Rather they have been classified as either essential to or desirable for nationally consistent outcomes. Those classified essential are considered necessary in all jurisdictions to ensure nationally consistent compliance and enforcement outcomes. Those classified desirable are not considered necessary in all jurisdictions for nationally consistent outcomes, but this does not diminish their value as necessary components of the overall best practice regime put forward. This classification is an important development of the application of national compliance and enforcement measures. It ensures the integrity of jurisdictional criminal justice approaches whilst securing a firm basis for the achievement of nationally consistent on the ground outcomes.

The approach recognises expressly that it is more important for industry to know the requirement to be complied with nationally to avoid any breaches and to provide a consistent national framework for dealing with those in breach, than to insist on strict uniformity in the precise detail of how offenders are then treated.

For example, the proposal identifies absolute liability, coupled with a special statutory defence, as the appropriate (or 'best practice') standard for most of the offences put forward. However, the NRTC recognises that for some jurisdictions absolute liability cannot be implemented because it conflicts with their broader criminal and legal policy frameworks. A more acceptable alternative to the jurisdictions that cannot implement absolute liability, is strict liability. This approach is considered a sufficient alternative to the preferred approach for the reason that strict liability with its attendant honest and reasonable mistake defence will produce, in practical terms, outcomes very consistent with those produced by the application of absolute liability with the proposed reasonable steps defence. Hence, absolute liability is considered desirable (not essential) for nationally consistent outcomes.

This approach assisted the Commission in overcoming many of the objections that otherwise would have placed insurmountable barriers to obtaining national ministerial agreement on this policy.

The next challenge will be to represent this model effectively in a model legislative instrument. The New South Wales Parliamentary Counsel is undertaking this task.

Notwithstanding the above approach, interstate application and enforceability of the national laws in the (common) contexts of interstate freight movements and logistics chains that involve parties from two or more different jurisdictions, continue to present very real practical and legal problems for enforcement agencies and for industry. The laws not being template compound these problems.

To address these problems, we need to confront such questions as:

- what mechanisms will enable administrative action to be taken in one jurisdiction to support administrative action taken or court orders made in another jurisdiction, under laws that are consistent with, but not necessarily identical to, the laws in the second jurisdiction?
- how can the model laws enable the extraterritorial operation of the road laws of one jurisdiction in respect of a consignor, packer, loader, operator, driver, receiver etc, who is a resident of another jurisdiction or who operates from another jurisdiction, or a vehicle that is registered in another jurisdiction?
- what are the most effective means to enable the investigation powers in relation to a possible contravention of the road laws in one jurisdiction to have operation in another jurisdiction, when the relevant powers and offence provisions in the two jurisdictions are not identical?

The solutions to these questions may be found in a variety of approaches, both legislative and non-legislative.

Alex Albert of Counsel was briefed by the Commission to consider legislative and practical changes to address the problems of interstate enforceability and operability of the national laws. In his Memorandum of Advice,¹² Alex Albert identified a number of options for legislative reform, including:

- enacting legislation in each jurisdiction that as far as practicable recognises and requires the recognition and implementation of administrative decisions and court orders made in each other jurisdiction (in other words, mutual recognition legislation);
- evidentiary provisions to enable administrative decisions in other jurisdictions to be simply proven if necessary;¹³
- provisions that enable the sharing of information between the relevant authorities in each jurisdiction;
- as investigative powers are usually made dependent on suspicion of a potential contravention of legislation, it would facilitate co-operative investigation if the potential contravention included road laws of *any* jurisdiction;
- provisions to enable the mutual recognition of certificates and documentary evidence validly obtained and executed by other jurisdictions;
- registration of court orders made in another jurisdiction under road transport law on the basis of certified court extracts or records that are lodged by fax or by electronic mail;¹⁴ and

In his Memorandum of Advice, Alex Albert also provided practical suggestions in relation to 'co-operative enforcement' arrangements between the jurisdictions:

¹² A Albert, *Road Transport Law: Interstate Operation and Recognition*, Memorandum of Advice for the National Road Transport Commission, Melbourne (2001) unpublished.

¹³ For instance, by providing that a document which purports to be a copy of a record of such a decision is admissible in evidence,

¹⁴ This would provide a simpler system of registering than that of the *Service and Execution of Process Act 1992 (Comm)*.

Ideally in a co-operative national scheme, many potential cross State investigative difficulties could be overcome by co-operation between corresponding authorities. For example:

- (a) an authority in one State might request an authority in another State to assist it in its investigation.
- (b) each State authorizing officers from corresponding authorities with investigative powers so that those officers can conduct investigations across States.¹⁵

Further:

In a national scheme in which there is consistent road laws and cooperation between corresponding authorities, presumably:

- (1) an authority in one State would inform an authority in another State if its investigations indicated that an offence had been committed in that other State;
- (2) evidence that is gathered by an authority in one State of an offence that may have been committed in another State would generally be made available to an authority in the other State;
- (3) authorities in different States after sharing the evidence that they gathered would determine co-operatively which was the most appropriate jurisdiction to institute a prosecution. For example, if a truck that is overloaded in S.A. travels to Vic. and is detected as being overloaded in Vic., then the Vic. authority might pass on the evidence it gathered to the S.A. authority. A co-operative decision could then be made between the authorities whether the driver is prosecuted:
 - (a) in S.A. together with the loader for contravening S.A. law; or
 - (b) in Vic. for contravening Vic. law. It might not be possible to prosecute the loader for contravening Vic. laws. The loader may instead be prosecuted by the S.A. authority in S.A. for contravening S.A. law.¹⁶

In considering this advice at two recent meetings, the Commission's stakeholder reference groups for the compliance and enforcement reforms¹⁷ requested the Commission to take steps to prepare legislative provisions to give effect to the advice. The groups also noted that cross-border enforcement raises issues such as the relative quality of evidence, competence of officers and resources for enforcement effort. Not just mutual recognition provisions are required, but a mutual understanding is needed between the jurisdictions to set out the principles and procedures of the working relationship of jurisdictions in respect of cross-border enforcement and to enable effective co-operative enforcement. The question of what might be the most appropriate body or group of bodies to develop this guideline/protocol is the subject of further discussion between the Commission and its stakeholders.

Track record

In quantitative terms at least, the Commission has had a high success rate, which perhaps should be expected given that it has now had nine years to complete the tasks initially expected of it. Of the six initial modules, only compliance and enforcement is incomplete, and it is expected that the legislative provisions for compliance and enforcement will be forwarded to Ministers early in 2002.

The list of material produced by the Commission is long. It includes 'inputs' such as reports and discussion papers and 'outputs' such as policy, guidance material and legislation. NRTC projects have been packaged as a series of three Heavy Vehicle Reform Packages. Progress on the development of

¹⁵ At p 32.

¹⁶ At pp 30, 31.

¹⁷ The Legislation Advisory Panel (comprising officers from transport and police agencies and industry representatives) at its meeting on 11 July 2001; and the Compliance Reference Group (a broader-based and higher level advisory group) at its meeting on 12 July 2001.

these projects by the Commission and their implementation by jurisdictions is reported regularly to the Australian Transport Council in the form of an Implementation Status Report.

A Verdict: Is the experiment a success?

At the very least, the history of the NRTC is an interesting experiment in co-operative federalism. In an institutional context of State/Territory responsibility for the regulation of the road transport industry, and a reluctance to refer powers to the Commonwealth, the Commission has had reasonable success in developing and maintaining national uniformity or consistency in vehicle standards and conditions governing vehicle operation.

The strident industry complaints over differential regulation that were common in the late 1980s and early 1990s have rarely been heard. The road transport industry, through its representative forums, has become a strong supporter of the continuing existence of the NRTC or a like body.

The NRTC has proved an effective mechanism for joint development, with environmental regulators, of vehicle noise and emission standards. It has provided a forum for more effective exchange of ideas and information between road authorities, and between road authorities and agencies with related responsibilities. The Commission has completed much of its initial agenda and has begun to develop more innovative approaches to the regulation of road transport. It has proved an effective mechanism for aligning the regulatory approaches of different agencies impacting on road transport.

The tendency of the Commission to introduce innovative approaches to road transport regulation by drawing on developments in other regulatory spheres (for example, performance-based standards, compliance and enforcement, alignment of road transport and occupational health and safety) suggests a useful role for an agency freed from line responsibilities and able to concentrate on broader policy issues.

The early debates on the need for a strong method of delivery through template legislation versus concern for loss of State/Territory sovereignty inherent in that process are no longer heard. A strong consensus has developed in favour of joint policy development with outputs generally expressed in the form of model legislation. Retention of the formal voting process has assisted in the achievement, to date, of reasonable success in national implementation of proposals developed under NRTC processes.

The Commission's second sunset takes effect in January 2004. A review of the NRTC will occur in 2002. This will result in a proposal to Australian Transport Council and a subsequent recommendation to each head of government that:

- the *National Road Transport Commission Act 1991* should cease to be in force; or
- that the Act should continue, subject to any proposed modifications.