

**INSTITUTIONAL SUPPORT  
TO  
THE MALAWI MINISTRY OF TRANSPORT  
ROAD TRAFFIC AND TRANSPORT  
LEGAL FRAMEWORK**

**Submitted to:**  
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### SYNOPSIS OF FINDINGS AND RECOMMENDATIONS: ROAD TRAFFIC AND TRANSPORT

*The Road Traffic Act is recently adopted legislation which facilitates a competitive commercial environment through economic deregulation of market access for both domestic and international services. Once the supporting Road Traffic regulations have been gazetted, the Act will also provide an adequate framework for promoting safe road transport. The liberal approach adopted by the Act is undermined by anti-competitive elements occurring in the Malawi Road Transporters Authority Act. In addition, the Road Traffic Act requires supplementation to address regulatory needs which arise from Malawi's international road transport relations. The Act does not yet provide legal authority for the administrative system of overloading control or for government oversight of privatized weighing stations. The above gaps can be rectified by minor amendments to sections 2, 81, 82 and 86 of the Act and the inclusion of two new parts dealing respectively with "International Road Transport" and "Vehicle Loading". The repeal of, or alternatively, minor amendments to section 2 and 8 of the Malawi Road Transporters Authority Act, are also required.*

| RECOMMENDATION  | MOTIVATION   | IMPLEMENTATION REQUIREMENTS  | PRIORITY   |
|---|--|--|--|
| 1. Repeal Malawi Road Transporters Authority Act (MRTAA), and if feasible, replace with new legislation to promote the interests of <b>all</b> road transporters on a non-discriminatory basis. | The MRTAA is discriminatory against a segment of Malawian road transporters and has potentially anti-competitive effects.  | Act repealing the MRTAA with provisions for transitional arrangements, eg transfer of assets, ongoing validity of certain acts, etc. | If the repeal of the Act is not feasible in the short to medium term, the recommendations contained in 2 and 3 below should, at a minimum, be implemented.     |
| 2. As alternative to recommendation 1: Amend definition of "approved transporter" in MRTAA.   | Current definition is potentially discriminatory. "Non-Africans" may not become members of the MRTA and membership is open only to those transporters "approved" by the authority. Opens the door to cartel forming and is probably in conflict with the Competition and Fair Trading Act. | Amendment of section 2 of the MRTAA (See par 2.4.3).   | The recommendations should be treated as a priority to counter existing or possible future anti-competitive impacts if recommendation 1 cannot be implemented. |
| 3. As alternative to recommendation 1 and supplementary to recommendation 2: Delete provisions permitting the Malawi Road Transporters Authority (MRTA) to receive public funds.                | Potential anti-competitive effects of a statutory association providing commercial services in competition with non-members using public funds.  | Delete section 8(1)(h) of the MRTAA (See par. 2.4.3).  | Comments made with regard to recommendation 2 apply.   |

| RECOMMENDATION   | MOTIVATION   | IMPLEMENTATIONS REQUIREMENTS   | PRIORITY   |
|--|--|--|--|
| <p>4. Introduce comprehensive legal framework addressing the full scope of Malawi's international road transport relations. Issues to be addressed include:</p> <ul style="list-style-type: none"> <li>* Power of Minister to conclude agreements;</li> <li>* Power to take reciprocal action against foreign carriers in cases where Malawian carriers are discriminated against;</li> <li>* Distinction between international and domestic road service permits;</li> <li>* Optional powers to permit cabotage;</li> <li>* Facilitatory functions to be performed in respect of border-posts and other matters impacting on efficient international road transport;</li> <li>* Powers to implement provisions of road transport agreements in relation to sanctioning of carriers, etc.</li> </ul> | <p>Authorities do not have sufficient powers to regulate international road transport relations. National Transport Policy has identified need to be able to take reciprocal action against foreign carriers in cases of discrimination as a priority.</p> | <p>Amend the Road Traffic Act through the inclusion of annex 1 as a new part after Part VII - Operator Fitness (see annex 1).</p>  | <p>Recommendations address both priority and non-priority issues. However, amendment should preferably be introduced as a "package" to reflect full scope of Malawi's international road transport policy.</p> |
| <p>5. Abolish restrictions on double coupling of Malawian and foreign registered vehicles for international transport.</p>   | <p>Restrictions reduce business opportunities for Malawian transporters by limiting back-haul opportunities. Malawian transporters are disadvantaged vis-a-vis foreign transporters who do not face similar restrictions.</p>                              | <p>Provisions in annex 1 dealing with international road service permits (subsection (9)) provide that a permit is only issued in respect of a mechanically-propelled vehicle (horse or rigid truck). Trailers do not require permits and may, therefore, be foreign-registered.</p> | <p>Introduce in conjunction with other RTA amendments.</p>   |
| <p>6. Establish principles to be followed by Director: Road Traffic in applying administrative sanctions against operators.</p>  | <p>Director's discretion is wide and undefined and creates potential for unequal treatment.</p>  | <p>Amend Secs 82 (1) and 86 (3) to provide for a gradual increase in the severity of administrative sanctions depending on the frequency of contraventions by an operator (See par 2.4.2).</p>   | <p>Regulatory action by the Director is not yet an issue, but may become more relevant in future. Amendment could be introduced in conjunction with other proposed amendments to RTA.</p>                      |

| RECOMMENDATION   | MOTIVATION  | IMPLEMENTATION REQUIREMENTS  | PRIORITY  |
|--|---|--|---|
| <p>7. Provide powers in the RTA to introduce system of administrative control of overloading based on payment of overloading fees.</p> | <p>Current RTA provisions do not provide sufficient legal authority for a system of administrative control. However, administrative control should be implemented as it avoids the constraints of the criminal justice system and provides for improved enforcement mechanisms. System is also in line with approach proposed by SADC.</p>                        | <p>Amend Road Traffic Act through inclusion of new part after Part IX - Rules of the Road (See annex 2).</p> | <p>The Ministry is already implementing a de facto system of administrative control. It should be regarded as a priority that this approach be placed on a firm legal footing.</p>  |
| <p>8. Enable private operation of weighing stations (including weighing using portable scales) subject to government oversight.</p>    | <p>Existing public funds are limited and government requires flexibility to introduce options to concession existing weigh-bridges or permit private operation of new ones. Concessioning can occur in terms of the Public Enterprises (Privatization) Act (PEPA), but PEPA provides no overall framework for future regulation of private weighing stations.</p> | <p>Amend Road Traffic Act through inclusion of new part after Part IX - Rules of the Road (See annex 2).</p> | <p>The Government Contracting Out Unit has already advertised for tenders to provide weighing stations. Alternatively, a transfer of some or all overloading control functions to the National Roads Authority is under consideration. Government has no powers to regulate private weighing stations and this may become a critical need in the near future.</p> |

## 1. BACKGROUND

1.1 The legal framework for the Malawi road traffic and transport sub-sector comprises:

- C the Road Traffic Act, 1997 (RTA);
- C the Road Traffic Regulations, 1997;
- C the National Roads Authority Act, 1997; and
- C the Malawi Road Transporters Authority Act, 1970.

It should be noted that the Road Traffic Regulations, 1997 have not yet been gazetted. However, the intention is that this will occur in the short term, and that the regulations will supplement the other acts as part of the legal framework applicable to this sub-sector. Accordingly, the analysis in this report focuses on these regulations, rather than on those which will be repealed once the 1997 regulations enter into force.

1.2 In addition, a number of cross-sectoral acts are relevant, namely:

- C the Public Enterprises (Privatization Act), 1996;
- C the Environmental Management Act, 1996; and
- C the Competition and Fair Trading Act, 1998.

## 1.3 ROAD TRAFFIC ACT

As the primary legislation applicable to this sub-sector, the following may be noted with regard to the RTA:

- C The RTA is primarily concerned with issues related to **road traffic management** and **traffic control** (ie traffic safety). It comprises 18 Parts dealing respectively with:

- Part I: Preliminary
- Part II: Registering Authority and Officers;
- Part III: Registration and Licencing of Motor Vehicles;
- Part IV: Registration of Manufacturers, Builders and Importers;
- Part V: Licensing of Drivers, Issuing Professional Driving Permits and Hours of Driving;
- Part VI: Fitness of Vehicles;
- Part VII: Operator Fitness;
- Part VIII: Road Traffic Signs, General Speed Limit and Parking Fees;
- Part IX: Rules of the Road;
- Part X: Accidents and Accident Reports;
- Part XI: Reckless or Negligent Driving, Inconsiderate Driving, Driving while under the influence of Intoxicating Liquor or a Drug having a Narcotic Effect and Miscellaneous Offences;
- Part XII: Presumptions and Legal Procedure;
- Part XIII: Registers and Records;
- Part XIV: Compulsory Third Party Insurance;
- Part XV: General Provisions;
- Part XVI: Traffic Court;
- Part XVII: Regulations and By-laws; and
- Part XVIII: Repeal and savings.

## 1.4 ROAD TRAFFIC REGULATIONS

### 1.4.1 Road Traffic (Operator and Road Service Permit) Regulations (ORSP)

The ORSP regulations supplement Part VII of the RTA and deal primarily with the administrative procedures regarding the application for operator registration and the issuing of road service permits. Provision is also made for the procedures applicable to the suspension of permits.

### 1.4.2 Road Traffic (Certificate of Fitness) Regulations (CoF)

The CoF regulations relate to forms and fees applicable to fitness certificates and address the appointment, classification, registration and powers of motor vehicle inspection stations. In addition to the criteria and procedures relating to the issuing of certificates of fitness under these regulations, the criteria and procedures for certification as motor vehicle inspector are set out.

### 1.4.3 Road Traffic (Public Service Vehicle Operation) Regulations (PSVO)

These regulations relate to the duties of driver and conductors on public service vehicles and the rules of conduct and safety to be observed by public service vehicle personnel as well as rules regarding the behaviour of passengers.

### 1.4.4 Road Traffic (COMESA) Road Transit Charges Regulations (RTC)

The RTC regulations were originally known as the Road Traffic (Preferential Trade Area) Road Transit Charges regulations. These regulations provide for the imposition of transit charges on vehicles engaged in international transport operations in Malawi.

### 1.4.5 Road Traffic (Appeals) Regulations (RTAP)

The RTAP regulations stipulate the designated authority and the procedures governing appeals under the RTA. Records must be compiled under the direction of the Minister, and the fees payable at the time of notice are listed.

### 1.4.6 Road Traffic (Registration and Licencing) Regulations (RL)

These regulations contain an obligation for motor vehicles to be registered by the title holder and delineate those categories of motor vehicles exempt from registration. The regulations spell out who must bring applications, whom to apply to, when to apply and in what manner to apply. In respect of licencing, the regulations oblige the owner to obtain a licence, amongst others setting out the procedure for obtaining refunds of licence fees. Other parts deal with the operation of a motor vehicle under a motor trade number, the issuing of licences in respect of motor trade numbers, temporary and special permits and the registration requirements applicable to manufacturers, builders and importers.

### 1.4.7 Road Traffic (Construction, Equipment and Use) Regulations (CEU)

The CEU regulations set out the standards governing vehicle dimensions and permissible loads. Penalties and procedures for the payment of penalties, as well as appeals by persons aggrieved at the action of an authorised officer have been addressed. Several tables spell out the requirements in respect of braking performance and specifications in relation to other equipment are addressed. Since the equipment specifications applicable to public service vehicles are of a different nature, these are contained in a separate part.

### 1.4.8 Road Traffic (Driving Licences) Regulations (DL)

These regulations deal primarily with licencing categories and procedures. Criteria and procedures applicable to professional driving permits and international driving permits are spelt out. As regards international driving permits, the regulations contain the requirements of the 1926 Convention relative to Motor Traffic and the 1949 Convention on Road Traffic.

#### 1.4.9 Road Traffic (Carriage of Hazardous Cargo) Regulations (CHC)

The CHC regulations contain safety rules and procedures that govern the conveyance of hazardous cargo in or on tankers, tank trucks and other goods vehicles. The regulations also relate to the loading and unloading of such substances.

#### 1.4.10 Road Traffic (Speed Limits) Regulations (SL)

These regulations contain general speed limits and impose an obligation to observe the speed limit as indicated by appropriate road traffic signs, and imposed on certain classes of vehicles or vehicles fitted with pneumatic tyres. Speed limits have also been set in relation to the braking capability of a vehicle.

#### 1.4.11 Road Traffic (Insurance) Regulations (INS)

These regulations supplement Part XIV of the RTA and cover the content of certificates of third party insurance and records to be kept by insurers. The regulations also address the position of foreigners (who are required to either hold a third party insurance policy valid in Malawi or to take out local insurance) and liability limits.

### 1.5 NATIONAL ROADS AUTHORITY ACT, 1997 (NRAA)

The NRAA establishes the National Roads Authority (NRA) with responsibility to:

- C raise funds for the maintenance and rehabilitation of roads;
- C advise the Minister and the Ministers of local government and of transport on:
  - S preparation and implementation of the annual national roads programme; and
  - S controlling the overloading of vehicles on public roads.

For the above purpose, the NRA also administers the Road Fund.

(The Act was initially drafted on the assumption that it would be administered by the Minister responsible for works. Currently the Act is administered by the Minister responsible for transport. This results in a contradictory reading of the Act, ie the reference to that fact that the "Minister" should advise the "Minister responsible for transport" quoted above. However, this discrepancy does not give rise to any practical difficulties, nor does it pose a problem of legal interpretation as the re-allocation of responsibility for the legislation has been done by the President in terms of his constitutional prerogative).

The Road Fund is funded from:

- C those road user charges which the Minister determines by order published in the *Gazette*, to be a source of revenue for the fund;
- C moneys appropriated by Parliament;
- C sums or assets which accrue to or vest in the fund, grants, donations by foreign governments or international agencies, sums derived from the sale of property on

behalf of the NRA; and

C penalties payable in terms of the NRAA.

The NRA is overseen by a board comprising largely private sector members representative of road users, the National Road Safety Council, the construction industry and the general public. *Ex officio* members are the Secretaries of Works and Supplies, Local Government and Transport.

The board is responsible and accountable to the Minister for ensuring efficiency, transparency and propriety in:

- C the collection and utilization of public funds;
- C the conduct of its business; and
- C the operations and activities of the Authority.

Of note is that the NRA may not disburse any funds to a contractor appointed by the NRA to perform work, prior to the Minister having certified that such work has been completed to the required standard.

The functions of the NRA are, amongst others, to:

- C decide on the allocation of funds to roads agencies;
- C advise the Minister on the maintenance, rehabilitation and development of public roads;
- C advise the Minister and the Minister of Transport of the types, sizes, and usage of vehicles on roads and the laden and axle weight of vehicles to protect roads from damage;
- C advise the Minister and the Minister of Transport on the enforcement of axle load limits;
- C make such rules as are necessary for the administration and management of the fund;
- C advise the Minister of Transport on appropriate road signs and advise road agencies on the location of road signs;
- C recommend to the Minister appropriate levels of road user charges, fines, penalties, levies or other sums collected in terms of the Act and paid to the fund;
- C recommend to the Minister responsible for energy, reviews of the fuel levy as may be necessary for the purposes of the fund; and
- C advise the Inspector-General of Police or road agencies, on methods for enforcing road traffic legislation.

## 1.6 MALAWI ROAD TRANSPORTERS AUTHORITY ACT, 1970 (MRTAA)

The Act establishes the Malawi Road Transporters Authority (MRTA) as a juristic person charged primarily with promoting the interests of the road transport industry through activities aimed at information dissemination, training, financial assistance etc. The MRTA comprises 8 members of whom 4 are ministerial appointees, 2 represent development parastatals, 1 represents the Ministry and 2 represent “approved transporters” within the road transport industry. An “approved transporter” is defined as a Malawi African road transport operator approved by the Authority for the purposes of the Act. The MRTA is funded from the assets of the Malawi African Road Transporters Association Ltd (which it replaces) and may also be funded from parliamentary appropriations (although this has not occurred in practice). The MRTA is also authorised to provide road transport services and has, as an association, done so upon occasion, eg with the transportation of drought relief.

#### 1.7 NATIONAL ROAD SAFETY COUNCIL OF MALAWI ACT, 1978 (NRSCMA)

The Act establishes the Malawi Road Safety Council as a body corporate which is charged with the responsibility of promoting road safety in Malawi. To this end, the principal functions of the Council are information dissemination and education and the funding of research on road safety issues. The Council functions separately from the Ministry of Transport and is supported by its own staff. The Minister may by order impose a levy on road users or insurers payable to the Council to discharge its functions under the Act.

#### 1.8 PUBLIC ENTERPRISES (PRIVATIZATION) ACT, 1996 (PEPA)

This Act establishes the Privatization Commission as the sole authority to implement the privatization of direct or indirect government ownership of any enterprise. The Commission reports directly to cabinet. Privatization occurs in terms of a divestiture sequence plan which identifies those enterprises with a commercial orientation which will be the subject of privatization. Enterprises not considered to have a commercial orientation will revert to the control of the appropriate ministry. As part of this process, the Act also mandates the commercialization of any government department.

#### 1.9 COMPETITION AND FAIR TRADING ACT, 1998 (CFTA)

The Act establishes the Competition and Fair Trading Commission with the broad functions of regulating, monitoring, controlling and preventing any act which adversely affects competition or fair trading. The act prohibits anti-competitive trade practices and permits the Commission to control mergers and takeovers and regulates the relationship between suppliers of goods and services and consumers. For the purpose of promoting a fair competition regime, the Commission may conduct investigations and convene hearings and generally take such action as it deems necessary to achieve the objects of the Act. The scope of the CFTA is sufficiently wide to apply to anti-competitive behaviour within the road transport sector as well as between transport modes.

#### 1.10 ENVIRONMENTAL MANAGEMENT ACT, 1996 (EMA)

This Act makes provision for the protection and management of the environment and the conservation and utilisation of natural resources. Promotion of sustainable utilisation of natural resources is one of the general guiding principles. It confers a right to a decent environment on inhabitants, setting out the criteria and procedures for complainants who wish to commence action. The Minister responsible for environmental matters acts in consultation with lead agencies to realise the objectives of the Act. Institutional provisions include the appointment of the Director of Environmental Affairs, establishment of the National Council for the Environment, and the Technical Committee on the Environment and the Act sets out the duties and responsibilities of these organs.

One of the primary responsibilities of the Minister is to draw up a National Environmental Action Plan which must be submitted to the National Assembly for approval. The Act prescribes the processes for designing environmental impact assessment reports and allocates responsibility for periodic environmental audits. Environmental management provisions are included to make it possible to establish control in respect of access to genetic resources and management of waste. Furthermore, the Act contains provisions aimed at controlling pollution and provides for the designation of environmental inspectors.

The Act sets up an Environmental Fund which is controlled by the Minister. Offences and penalties are regulated and the Act also contains a provision conferring immunity against legal proceedings on officials in respect of actions undertaken in good faith in terms of the Act.

#### 1.11 Viewed collectively, the above Acts and regulations provide the broad context for the road

traffic and transport sub-sector. The following should, nevertheless, be noted:

- C As the primary legal instrument applicable to this sub-sector, the RTA is a generic Act which applies to private and commercial vehicles, private and commercial drivers and operators of commercial vehicles. The principal thrust of the legislation is, therefore, on generic issues relating to traffic management and control which include both private and commercial traffic. With regard to commercial transport, the Act addresses this aspect only in a limited fashion, with reference to market entry requirements (which is regulated on the basis of safety considerations) and post market entry safety regulation. **The focus of this report is on the legal framework in so far as it applies to commercial freight and passenger transport.** This includes the principal regulations which apply to commercial road transport, ie the ORSP, COF, CEU, RTA and RTC regulations.
- C Thanks to their relative youth, the RTA and regulations are an example of modern road traffic legislation which responds to the rapid technological advances which characterizes this sub-sector. In this respect, the RTA does provide an adequate framework for the promotion of road traffic **safety**, which will be extended once the regulations are gazetted. The adequacy of legislation is, however, only one of the elements in a comprehensive road traffic management system. Amongst others, such a system must be bolstered by adequate law enforcement capacity, appropriate law enforcement strategies and adequate law enforcement equipment. To the degree that the road transport sector is still characterized by high accident rates and a general lack of road traffic safety, it may be concluded that the RTA, notwithstanding its adequacy, suffers from a practical lack of implementation. This is compounded by the fact that the majority of the regulations assessed have not yet been gazetted. In practice, this constrains law enforcement authorities from acting effectively to counter the extensive lack of traffic safety on Malawian roads.
- C The current structure of the RTA reflects the assumption that Malawi would largely rely on market forces as the principal mechanism to promote **competition** in the road transport sector. This can be deduced from the absence of provisions providing for the regulation of competition in this sub-sector. However, market forces alone appear to have been insufficient to ensure this objective, as there is evidence of collusive practices, eg on international routes. The adoption of the Competition and Fair Trading Act, 1998, which also applies to the road transport industry, supplements the RTA by providing a body of competition law which can be applied to the road transport sector. The Act is of recent origin and probably untested in the road transport field. The degree to which it can be effective in promoting adequate competitive environment, therefore, will only become apparent over time.

1.12 For the purposes of this report, the remaining analysis of the legal framework for the road traffic and transport sub-sector is discussed under the following headings:

- C Market liberalization; and
- C Management of vehicle loading.

## 2. MARKET LIBERALIZATION

The analysis of the state of market liberalization in this sub-sector distinguishes between **domestic** and **international** road freight and passenger transport.

### 2.1 POLICY

- (a) Domestic road freight and passenger transport

The National Transport Policy (NTP) includes the policy objective:

“to remove physical and non-physical barriers within the transport sector in order to facilitate **domestic** ...trade and travel and to ensure the provision of efficient and economic road transport services”.

This objective is expanded by the particular strategy to: “liberalise the provision of road passenger transport services and deregulate tariffs”

This objective accords with the SADC Protocol (Art 5.5) which provides that Member States shall ensure that domestic measures accord with regional policies, one of which is “to progressively introduce measures to liberalize their market access policies in respect of the cross-border carriage of goods” (Art 5.2). In the case of passenger transport, the Protocol provides in the same vein for Member States “to consider the possibilities of future liberalization of road passenger services”.

In line with its general objective of promoting the removal of barriers to facilitate domestic trade and travel, the NTP adopts the strategy to:

C “deregulate tariffs”; and

C “support the development of a sustainable Malawian trucking industry capable of handling the bulk of domestic .... traffic”.

(b) International road freight and passenger transport

The National Transport Policy (NTP) includes the policy objective:

“to remove physical and non-physical barriers within the transport sector in order to facilitate ... **cross-border** trade and travel and to ensure the provision of efficient and economic road transport services”.

In addition, the NTP has also adopted the objective to:

“Evoke the principle of reciprocity when Malawian hauliers are subjected to unfair treatment as may be the case if some neighbouring countries do not comply with harmonized road transit charges”; and

“comply with the agreed national obligations arising from bilateral, regional and international road transport .... conventions to which Malawi is party”;

and to this end to pursue strategies to:

“design and co-ordinate annual programmes aimed at implementing the relevant bilateral, regional or international agreements; and

“review the agreements to assess relevance and level or status of compliance”.

The above policy objective is in agreement with Art 5.2 of the SADC Protocol in so far as it binds Member States to “develop harmonized road transport policy providing for equal treatment, non-discrimination, reciprocity and fair competition, harmonized operating conditions...”.

## 2.2 STATUS QUO NARRATIVE

### 2.2.1 Domestic road freight and passenger transport

The provisions regulating access to the road transport market and post-entry behaviour are mainly contained in Part VII of the RTA dealing with operator fitness, ORSP regs, CoF regs and the RTAP regs.

The relevant sections of the RTA are:

- C registration of an operator (s 81)
- C issue of a road service permit (section 82);
- C display of a road service permit on a vehicle (section 83);
- C duties of an operator (section 85);
- C powers of the Director in respect of operator activities (section 86);
- C appeal to Minister (Sec 87); and
- C operator liability for an act or omission of a manager, agent or employee of an operator (Sec 88).

The relevant ORSP regs relate to:

- C classes of motor vehicle in respect of which an operator must be registered (ORSP reg. 6);
- C categories of road service permit (ORSP reg. 7);
- C procedure to apply for registration as an operator (ORSP reg. 8);
- C registration of an operator by the Director and issue of a road service permit (ORSP reg. 9);
- C period of validity of road service permits (ORSP reg. 10);
- C suspension of road service permits (ORSP reg. 11);
- C manner of application for and issue of a duplicate road service permit (ORSP reg. 12);
- C procedure to change the particulars of a registered operator (ORSP reg. 13);
- C the manner in which road service permits must be displayed on a motor vehicle (ORSP reg. 16); and
- C appeal to the Minister (ORSP reg. 17).

The relevant CoF regs relate to:

- C an obligation to obtain a certificate of fitness (CoF) in respect of motor vehicles (CoF reg. 15);
- C inspection to obtain a CoF (CoF reg. 16);
- C examination of motor vehicle (CoF reg.17);
- C issue of CoF (CoF reg. 18); and
- C period of validity of a CoF (CoF reg. 19).

The relevant provisions of the RTAP regs are:

- C commencement of the appeal (RTAP reg. 7);
- C date of the hearing (RTAP reg. 8);
- C contents of the notice of appeal (RTAP reg. 9);
- C requests for persons to attend an appeal and notice of hearing (RTAP reg. 10);
- C contents and service of notice of hearing (RTAP reg. 11);
- C failure of a person to attend a hearing after service of notice (RTAP reg. 12);
- C failure of the appellant or respondent to appear at a hearing (RTAP reg. 13);
- C record of a hearing (RTAP reg. 14);
- C adjournment of a hearing (RTAP reg. 15);
- C appeals to be called on the date of a hearing (RTAP reg. 16);
- C procedure at a hearing (RTAP reg. 17);
- C affidavits (RTAP reg. 18);
- C non-application of the rules of evidence (RTAP reg. 20);
- C decisions taken by the Minister (RTAP reg. 21); and

C fees payable (RTAP reg. 22).

In terms of the RTA, market access is obtained through the registration of a service provider as an **operator** in respect of a vehicle which is required to be **roadworthy**.

The RTA requires any person wishing to operate one of the following vehicles to apply for **operator registration**:

- C any goods vehicle to be used for hire or reward;
- C any passenger vehicle to be used for hire or reward (to be not more than 6 years old); and
- C any breakdown vehicle.

In terms of the ORSP Regs, an operator may only apply for registration in respect of a vehicle registered in Malawi.

Upon registration, an operator is issued with a **road service permit** which serves as proof of operator registration. Permits are valid for **six** months in the case of a passenger vehicle and **12** months in the case of a goods vehicle. Short term goods permits may also be issued for a period not exceeding three months and special journey passenger permits for a period not exceeding 7 days.

Permits are open-ended in the sense that they do not limit the number of journeys that may be undertaken, nor do they contain back-haul restrictions. Neither do they provide for rate conditions or route restrictions.

The process of operator registration imposes only a few formalities on the applicant who is required to:

- C present a form of identification;
- C submit the registration certificate of the vehicle; and
- C pay the prescribed fee.

An operator may only use a vehicle if it is roadworthy. The CoF Regs require specific categories of vehicles to be issued with a **certificate of fitness** (CoF):

- C a goods vehicle with a gross vehicle mass exceeding 3 500 kilograms;
- C a bus with a gross vehicle mass exceeding 3 500 kilograms or a vehicle designed for the conveyance of more than 10 persons including the driver;
- C any other motor vehicle used for the conveyance of passengers for reward; or
- C a breakdown vehicle.

A CoF is valid for 12 months in the case of a goods vehicle and 6 months in the case of a passenger vehicle. In practice, a vehicle is required to be presented for inspection upon each renewal of the CoF.

The system of operator registration is administered by the Director of Road Traffic who enjoys wide **regulatory powers** which are focussed on ensuring **safe** road transport once an operator has entered the market. In this regard, a number of instruments are at the disposal of

the Director, ie:

- C to give an operator written notice to take steps to ensure that a vehicle is roadworthy;
- C to require a written explanation from an operator regarding steps taken referred to above;
- C to direct an operator to produce a vehicle for inspection, examination or testing;
- C to issue a directive to an operator to fulfill his duties;
- C to appoint any person to investigate the activities of an operator; or
- C to direct an operator to appear before him to furnish reasons for a failure to fulfill his duties.

In this regard, it should be noted that an operator is also held liable for acts or omission of his or her employee or agent which amounts to a contravention of the Act, unless he or she proves that:

- C he or she did not connive at or permit the act or omission;
- C he or she took all reasonable steps to prevent the act or omission; and
- C that the act or omission did not fall within the scope of authority of the agent or employee.

The principal enforcement power of the Director is the authority to **suspend** a road service permit, to issue a permit under such specific **conditions** as the Director deems fit or **refuse** to issue a permit.

The above action may be taken by the Director in any case where an operator **fails to comply with any provision of the RTA**. In practice, this will amount to non-compliance with a safety or environmental rule. The RTA provides no guidance as to the manner in which the Director is to exercise this discretion.

An **appeal** lies against the decision of the Director to the Minister. The procedure for appeals is described in the RTAP Regs which set out a process in terms of which the parties present their cases at a hearing to the Minister. The regulations provide for a formal procedure whereby a notice of appeal is filed, a date for a hearing is fixed in consultation with the Minister and any person may be served with a notice of appeal to attend a hearing. The Minister determines procedures at a hearing and sworn affidavits may be submitted. However, normal rules of evidence do not apply. The Minister is required to make known a decision in writing.

The operator system is supported further by rules requiring:

- C the driver of a vehicle in respect of which an operator is registered to hold a **professional driving permit**;
- C the driver of a vehicle in respect of which an operator is required to be registered to comply with prescribed restrictions in terms of the number of **hours** which that vehicle may be driven continuously (no rules have yet been prescribed in this regard); and
- C specific rules pertaining to the carriage of **hazardous cargoes**.

Operator registration is limited to persons wishing to provide services for hire and reward, ie

own account carriers need not register as operators. However, as soon as an own account operator wishes to use such vehicle for hire and reward purposes, operator registration becomes obligatory. There is no restriction in the RTA, preventing an own account operator from switching to hire and reward operations.

The rules on operator registration apply uniformly, ie no distinctions are made between classes of drivers within specific categories, vehicles or nature of the cargoes carried. In the case of professional drivers, a professional driving permit is required in respect of any vehicle used to carry goods or convey passengers for reward. However, an exemption applies in the case of vehicles with a gross vehicle mass equal to or lower than 3,5 tonnes.

### 2.2.2 International road freight and passenger transport

The RTA and regulations contain no express reference to access to the international transport market by Malawian operators, except for the obligation to pay transit charges in terms of the scale of fees approved by the COMESA Council of Ministers. In terms of the RTC regs, these charges apply equally to both domestic and foreign operators.

The Act only addresses the position of foreign operators entering Malawi, in so far as it deals with the recognition of foreign documentation, ie:

- C circumstances in which a licence issued other than under the RTA is deemed to be a licence (RTA section 28 and ORSP regs 15);
- C recognition of professional driving permits issued in a prescribed territory (RTA section 45(2));
- C circumstances where registration of a foreign operator is required (RTA section 81(3) and (4)); and
- C issue of road service permit (sections 82(3) and (4)).

In the absence of any statutory provisions regulating international road transport, Malawi's approach to market access has been guided by:

- C her membership of the Common Market for Eastern and Southern Africa (COMESA) and the decisions adopted by COMESA relating to intra-COMESA transit of goods vehicles; and
- C the provisions of bilateral road transport agreements concluded by Malawi with other African states.

Under the COMESA arrangements relating to the licensing of COMESA carriers, Malawi recognizes a licence issued by a competent authority in another COMESA Member State, subject only to the requirement to pay transit charges. In practice, this amounts to the **deregulation** of access for foreign road transport operators from COMESA countries. The transit charges apply uniformly to both Malawian and foreign (other COMESA) operators.

Malawi has adopted a similar approach in the case of those African states who are not members of COMESA (ie South Africa and Mozambique). In the case of both latter states, bilateral agreements have been concluded which provide for a regulatory system similar to the COMESA licence (ie each state issues the equivalent of a road service permit which is recognized by the authority in the other state). Additional aspects dealt with in the agreements include:

- C consultation procedures between government authorities in issuing permits;

- C establishment of route-based consultative mechanisms between the authorities and carriers;
- C sanctions to be imposed on carriers violating provisions of the agreements or permit conditions;
- C harmonization of vehicle mass and dimension limits; and
- C mutual recognition of documentation, eg weighing certificates.

In addition to the intergovernmental agreements referred to above, it appears that Malawian carriers have also concluded **business agreements** which govern aspects of the provision of transport services on international routes. The existence of such agreements is evident from standard freight rates charged by carriers plying such routes. These agreements are apparently not officially sanctioned, but until now the Malawi authorities appear not to have taken any action in countering the anti-competitive effects of such agreements. Since the adoption of the CFTA, the legality of such practices has become increasingly doubtful. This aspect is considered further under 2.3.1 (b) below.

It should, however, be noted that the RTA contains no provisions providing for international agreements to have **legal force** in Malawi (in terms of the Malawi constitution only agreements ratified by an act of parliament have legal force (sec 211)). So far, none of the bilateral agreements concluded by Malawi, have been ratified. This includes both the agreements with Mozambique and South Africa referred to above, as well as agreements with Tanzania and Zimbabwe signed in April 1999. By implication, subsequent amendments similarly do not automatically become part of the law of Malawi. In keeping with this approach, the RTA also does not accommodate any **management** needs which may arise from the conclusion of international agreements, eg maintenance of registers of operators, administrative sanctions to be imposed in cases of non-compliance, etc.

Once a foreign operator has entered Malawi, the Director may give such operator notice that a permit is no longer recognized for the purpose of international road transportation in Malawi. The circumstances under which the Director may take such action are the same as those which apply to the suspension of a road service permit of a Malawian operator. However, unlike the position of Malawian operators, a foreign road transport operator does not enjoy the right to appeal to the Minister against the action of the Director. However, the Director's action would still be subject to review by a competent court, if an application to this effect is made by the aggrieved operator.

## 2.3 STATUS QUO ANALYSIS

### 2.3.1 Competition

#### (a) Domestic road freight and passenger transport

- C The RTA regulates **market entry** on the basis of compliance with specific **safety** requirements. No burden of proof rests on the applicant except for the requirement to submit proof of vehicle registration. In this regard, it is presumed that a **register** of operators is being kept as the primary information tool to assist the Director in executing management functions in respect of operators.
- C The RTA and applicable regulations comprehensively **deregulate** access to the domestic market and the legislation introduces no barriers to market entry based on **economic criteria**. As such, the RTA enhances the potential for competition in the market. This positive feature of the RTA is, however, countered by the restrictive provisions of the MRTAA. The anti-competitive effects of the MRTAA entail:
  - S Membership is restricted to Malawian Africans who are "approved". No criteria are laid down for approval and in practice, it appears that certain

operators could be excluded from membership either for being “non-African” or on some other arbitrary basis.

S The MRTAA authorises the authority to undertake a diversity of functions. While certain of these functions have merit, eg information dissemination and training of operators, others potentially give rise to anti-competitive practices. The most glaring example is the fact that the authority itself may provide road transport services. As has occurred in the past, the MRTA can participate in the market in competition with non-members. This situation could potentially be aggravated by the fact that the Act authorizes the MRTAA to receive funds appropriated by Parliament, which could be used in funding commercial operations undertaken by the authority (although Parliament has, to date, never voted funds for the MRTA.)

C The RTA describes a procedure for gaining market access which is based on a **single transaction** and appears relatively simple. It is, however, noteworthy that no obligation is imposed on the Director to respond to applications for registration within a specific time frame, and such a time frame may be desirable to ensure that market entry is not constrained through administrative delays.

C Once market access has been granted, the fundamental approach remains to regulate operator behaviour on the basis of compliance with **safety** rules. No provision is made for the regulation of **tariffs** or determination of **routes** to be served. In this respect the RTA already meets the objective of the NTP to deregulate tariffs. By the same token, there are no discriminatory provisions or provisions inhibiting competition in the application of the rules related to **professional driving permits, driving hours** or the carriage of **hazardous cargoes**.

C The requirement of six-monthly or annual renewal of a CoF provides an effective regulatory mechanism which is **self-executing** in the sense that the duty rests on the operator of the vehicle to renew the CoF (ie no pro-active action is required on the part of the authorities to ensure that a CoF is renewed). In the case of a **professional driving permit**, a similar result is achieved by the requirement that such permit be renewed every 2 years.

(b) International road freight and passenger transport

C In line with the approach to the domestic market, the RTA **deregulates** access to the international market for Malawian operators. In turn, existing international agreements grant similar access to Malawi for foreign operators undertaking international transport. This accords with the policy objective of the NTP “to remove physical and non-physical barriers within the transport sector in order to facilitate **cross-border** ... trade and travel and to ensure the provision of efficient and economic road transport services”.

C Although there are no statutory impediments to Malawian operators entering the international market, the absence of a **statutory authorization** may in practice be problematical in the case where Malawi issues permits or licences for international transport in terms of **intergovernmental agreements**. These agreements provide for the Malawi authorities to issue permits to its operators to undertake road transport in the territory of the other party, based on the principle of extraterritorial jurisdiction. However these permits are not authorized in the RTA (although the Director may issue a road service permit in terms of the RTA, such a permit can only be valid inside Malawi). In practice, therefore, there is no statutory basis for these permits, except in so far as the legislation of foreign countries may recognize the right of the Malawian authorities to issue such permits. The net effect is that Malawi is relying on recognition of its own permits by **foreign legislation** to ensure their validity. This points to a need

for a provision which authorizes the issuing of permits for international transport, as distinct from domestic transport, in the RTA.

- C While market access is deregulated in terms of the existing legislation, the existence of business agreements between international carriers may, in practice, have an **anti-competitive effect**. Agreements to set uniform freight rates, for example, are likely to fall within the category of trade agreements prohibited in terms of the CFTA (Sec 33), ie where rival enterprises collude “in settling uniform prices in order to eliminate competition”. Alternatively, such agreements may be prohibited as anti-competitive practices falling in the category of “trade agreements fixing prices between persons engaged in the business of selling ... services which agreements hinder or prevent the sale or supply or purchase of ... services, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services .” (Sec 32 (2)(g), CFTA).
- C The absence of a **comprehensive legal framework** providing for the management of Malawi’s international road transport relations has been partially identified in the NTP and is the motivation for the strategy to “evoke the principle of reciprocity when Malawian hauliers are subjected to unfair treatment as may be the case if some of the neighbouring countries do not comply with harmonized transit charges”. Currently, the RTA provides no basis on which the authorities can legally apply reciprocal measures. Such a framework should comply with and facilitate implementation of existing bilateral and multilateral agreements. Issues to be addressed within such a framework include:
- S the authority to negotiate and conclude international agreements;
  - S the validity and legal force of agreements;
  - S the principles governing international road transport, eg equal treatment, non-discrimination and the right to take reciprocal action;
  - S the administrative procedures applicable to international operators, e.g to apply for permits; the duties of international operators in providing services, etc;
  - S the sanctions to apply to international operators violating permit conditions or the Act;
  - S facilitatory mechanisms to promote the interests of the road transport industry, eg the establishment of route management groups, their duties and functions; and
  - S undertaking law enforcement in respect of international operators.
- C While the Malawi authorities have been implementing a policy to enforce restrictions on **dual coupling** of foreign to Malawi-registered vehicles, several factors point to such a strategy being of doubtful value and even possibly, detrimental to Malawi’s transport interests. The practical effect of the restriction would be to prevent the Malawian operator of a mechanical horse from obtaining back-haul opportunities in foreign destinations, except if cargoes are loaded on Malawian-registered trailers. If such opportunities are not available, hauliers would be obliged to either delay returns in anticipation of such opportunities or to return with no loads. No other Southern African country is currently imposing such restrictions. In practice, their operators enjoy the freedom (not enjoyed by Malawians) to undertake backhauls irrespective of the registration of trailers. It is recognized that this requirement is motivated by the intention to prevent cabotage by foreign hauliers in Malawi, ie hauliers undertaking domestic transport using foreign registered mechanical horses and locally-registered trailers. While concerns about cabotage are legitimate, a restriction on double coupling is not an appropriate strategy to counter this problem. Rather the solution lies in distinguishing between international and domestic transport by way of road service permits. This would allow the authorities to permit double coupling in the case of international transport, but to restrict it in the case of domestic transport through appropriate permit conditions.

- C The prohibition on **cabotage** is reinforced by the requirement that an operator may only be registered in respect of a vehicle registered in Malawi. This implies that non-Malawians would have to purchase and register vehicles in Malawi to be able to render services in the domestic market, in addition to complying with requirements for registration in terms of other laws, eg the Companies Act. A prohibition on cabotage is permitted in terms of Art 5.3 (8) of the SADC Protocol and accords with regional practice at this stage. However, the Malawian authorities may in future find this provision restrictive. If foreign states are willing to open their domestic markets to Malawian carriers on a reciprocal basis, the Malawian authorities will be restricted by the RTA, in providing such reciprocal access. This points to the need for the RTA to be amended to provide the authorities with sufficient flexibility to be able to respond to such developments.
- C The safety requirements imposed by Malawian law, ie, with reference to professional driving permits, driving hours and the carriage of hazardous cargoes are **non-discriminatory** in so far as the relationship between domestic and foreign operators are concerned and can therefore be described as neutral in their competitive impacts.
- C The provisions recognizing permits issued in foreign jurisdictions enable Malawi to give effect to its obligations in terms of multilateral (COMESA) and bilateral agreements to grant foreign operators **market entry** in Malawi. However, there is a potential for conflict between the RTA and the intergovernmental agreements in so far as it relates to **suspension** or **withdrawal** of permits. The RTA contains provisions permitting the withdrawal of recognition of foreign permits, but this aspect is also addressed in the intergovernmental agreements, which (eg in the case of the Malawi / South Africa agreement) generally lay down procedures to be followed in these cases. If Malawi were to follow only the provisions of the RTA (and ignore the provisions of the intergovernmental agreements), it may result in Malawi breaching its obligations in terms of international law. This points to the need for an amendment to the RTA which provides for the Director to exercise his powers only **after** procedures stipulated in agreements to which Malawi may be party, have been exhausted. This forms part of the broader requirement described above for an appropriate legal framework to be included in the RTA addressing Malawi's international road transport relations.

### 2.3.2 Safety

- C The RTA provides an adequate body of **safety rules** supported by various interactive mechanisms, ie:
- S operator registration;
  - S CoF requirements;
  - S driving licence and professional driving permit requirements;
  - S rules on driving hours; and
  - S carriage of hazardous cargoes rules.
- C The system of operator registration has as its prime objective the promotion of road traffic safety and as such its also promotes the development of a safe road transport industry which has been adopted as an objective of the NTP.
- C The degree to which the legislation has enhanced safety levels in practice remains to be assessed. The requirement that a CoF be renewed on a 6 or 12 monthly basis will play a crucial role in this regard. As stated above, the requirement of CoF renewal amounts to a self-executing regulatory mechanism and in practice, the obligation will rest on operators to ensure that vehicles are roadworthy at all times. This facilitates the enforcement role of the Director (and of on-the-road law enforcers) who need only

establish whether or not timely renewals have been undertaken. The degree to which acceptable levels of compliance are reached will, however, largely depend on the adequacy of vehicle testing and the capacity of law enforcers to police compliance through on-the-road law enforcement.

- C **The regulations made in terms of the RTA provide an adequate framework for safety regulation in terms of Malawi's existing needs.** To the extent that safety issues are addressed in regulations rather than the main act, amendments in response to technological developments can be speedily facilitated through ministerial action rather than by means of lengthy parliamentary procedures.

### 2.3.3 User

- C Although the RTA does not address the issue of **commercial protection** of road users, eg protecting consignors against collusive practices, etc, the CFTA does provide an adequate framework in terms of which such practices could also be regulated in the transport industry. However, the effectiveness of the legislation, given its relative youth, will only become apparent over time. The degree to which the Commission is able to mobilize capacity and perform satisfactorily will be crucial in rendering it an effective and credible body promoting competition in Malawi.
- C The double-coupling restriction also impacts negatively on users in that it limits business opportunities for Malawian operators and drives up transport costs. This provides further justification for a review of the current policy decision as well as the introduction of a dual system of international and domestic road service permits, so that Malawian operators may benefit from back-haul opportunities using foreign registered trailers.
- C While the absence of statutory regulation of freight **rates** and passenger **fares** is positive, the apparent existence of price-fixing arrangements in international transport also drives up prices. In this regard, the Competition and Fair Trading Commission will have an important role to play in eliminating such practices.
- C In the final instance, it should be noted that Malawi, as a land-locked state, is highly dependent on the efficient movement of freight across frontiers. Inefficiencies in this regard could have major cost impact, eg delays at borders due to cumbersome clearance procedures. It is in the interest of users that the government assume responsibility for **facilitating** transport cross-sectorally as well as inter-modally. The RTA should impose an express obligation on the transport authorities to undertake such facilitatory functions as part of the broader framework of provisions governing international relations.

### 2.3.4 Regulatory system

- C The focus of the regulatory system is on non-compliance with **safety** and to a limited extent, with environmental rules. In this regard the Director acts as **reactive regulator**, ie by reacting to incidences of non-compliance rather than on the basis of interventionist action. The RTA provides the Director with an adequate spectrum of regulatory instruments, ie:
  - S conducting investigations;
  - S issuing instructions and directives; and
  - S suspension or removal of privileges (ie a road service permit).
- C In practice, the Director enjoys a wide **discretion** in taking regulatory decisions. The

impact of these decisions may vary from mild to severe, ie ranging from a warning to the withdrawal of operator registration which would amount to enforcing market exit. However, the RTA does not lay down any guidelines to ensure that regulatory action by the Director follows a consistent sequential pattern, ie by imposing sanctions which are progressively more severe depending on the frequency of contraventions. It could, therefore, occur that one operator receives only a warning while another may be sanctioned more severely, although the nature of the “offence” is the same. While the likelihood of such discrepancies may be small, it should be borne in mind that the effectiveness of the safety regulatory system will in practice depend on the credibility of the decisions of the Director. This will require the Director to not only **use** the powers available to him, eg by excluding unsafe operators from the market, but also to use those powers **consistently**. This points to the need for appropriate guidelines to be put in place whereby consistent regulatory action by the Director can be ensured.

## 2.4 RECOMMENDATIONS

### 2.4.1 IT IS RECOMMENDED THAT:

the RTA be amended through the inclusions of a new Part entitled: “International Road Transport” containing the provisions as proposed in Annex 1.

### 2.4.2 IT IS RECOMMENDED THAT:

Sec 81 (4) of the RTA be amended as follows:

“(4) The Director, shall, if satisfied that the designated person should be registered as the operator, register such person as the operator of the motor vehicle concerned, no later than 7 days from the date of the application contemplated in subsection (1) or within such lesser period as the Minister may prescribe.”

Sec 82 (1) of the RTA be amended as follows:

“(1) The Director shall, no later than 7 days from the date on which a person has been registered as an operator in terms of section 81 (4) or within such lesser period as the Minister may prescribe, provide and issue in respect of each motor vehicle referred to in section 81 (1) a road service permit, upon payment of the prescribed fee, to the operator concerned.”

Sec 86 (3) of the RTA be amended as follows:

(3) The Director may, if the record of an operator indicates that such operator does not comply with the provisions of this Act, by written notice -

- (a) direct such operator to fulfil the duties conferred upon him under section 85 and warn him that a failure to comply with the notice may result in an investigation into his activities, a hearing and a suspension of his road service permit or permits ;
- (b) appoint a person whom he deems fit, to investigate the activities or specific activities of such operator and direct the person so appointed to make a written recommendation to him as to what measures should be taken in respect of such operator; or
- (c) direct such operator to appear before him or before any person appointed by him, in order to furnish reasons for his failure to fulfil the duties conferred on him under section 85.

(4) The Director must -

- (a) in the case of an operator who appears before him in terms of subsection (3) (c) for the first time-
  - (i) warn such operator that his road service permit or permits may be suspended in the event that he fails for a time to fulfill the duties conferred on him under section 85; or
  - (ii) suspend such permit or permits for a period not exceeding 3 months or notify him that no application to renew a permit or permits will be considered for a period not exceeding 3 months;
- (b) in the case of an operator who appears before him for a second time, suspend the road service permit or permits of such operator for a period not exceeding six months or notify him that no application to renew a permit or permits will be considered for a period not exceeding 6 months ; and
- (c) in the case of an operator who appears before him for a third or further time, suspend such permit or permits for a period not exceeding twelve months or notify him that no application to renew a permit or permits will be considered for a period not exceeding 12 months:

## Provided that -

- (aa) any decision by the Director under this paragraph shall be taken only on the basis of a recommendation by a person appointed under subsection (3)(b); and
- (bb) the Director shall within twenty-one days after the date of the notice, in writing furnish such operator with the reasons for his decision.
- (5) In exercising his powers under this Part, the Director shall act in an impartial manner and may not take an instruction from any person.
- (6) Any person who seeks to influence the Director in the exercise of his powers under this Part shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding K ...

**2.4.3 IT IS RECOMMENDED THAT:**

In the case of the MRTAA, measures be introduced to counter the potential anti-competitive effects of this Act. In this regard, various options (which are not necessarily mutually-exclusive) exist:

- C Repeal of the Act in its entirety; or
- C Limited amendment of the MRTAA to remove the most glaring anti-competitive features.

The preferred option for the short term would be to repeal the Act in its entirety. This would have the effect of levelling the playing field for all carriers, at least from a legal perspective. If this is not feasible, the draft amendments provided below should, **at a minimum** be introduced. The latter option will not, however, completely meet the ultimate objective of level playing fields, especially as carriers who were classified as approved transporters are likely to retain a

privileged position within the MRTA.

Limited amendments to the MRTAA which could be introduced in the short-term are:

Sec 2:

““approved transporter” means any person registered as an operator in terms of section 81(4) of the Road Traffic Act”.

Sec 8:

Delete subsection (1)(h).

### 3. **MANAGEMENT OF VEHICLE LOADING**

#### 3.1 **POLICY**

The NTP responds to the above issue in terms of its general objective to “ensure an acceptable standard of road traffic services” and to this end adopts the strategies:

“to vigorously enforce vehicle weight limits and vehicle dimensions....”;

“to introduce punitive fines to deter the use of overloaded vehicles on Malawi roads and ensure that excess loads are off-loaded at any check points”; and

“to harmonize the country’s ... highway axle load regulations within the region”.

The NTP goals accord with the SADC Protocol which bids Member States to:

“...implement harmonized permissible axle mass loads and gross vehicle mass limits and gross combination mass limitations... “ (Art 6.6); and

“...develop and implement harmonized standards in respect of vehicle dimensions and vehicle combinations” (Art 6.5).

The NTP further includes the strategy to:

“involve private sector participation in the monitoring and operation of weighbridge equipment”.

#### 3.2 **STATUS QUO NARRATIVE**

##### 3.2.1 **Legal framework**

The legislative provisions dealing with the control of vehicle loads and dimensions are dealt with in the RTA and the CEU regs.

The provisions in the RTA address:

- C power of a traffic officer to weigh vehicles and offload overloaded vehicles (Sec 8(1)(d));
- C duty of an operator to ensure compliance by the driver of a vehicle with the loading of vehicles (Sec 85(c)(iii));
- C prohibition against the use of a vehicle on a public road in a manner likely to cause

- damage thereto (Sec 121);
- C presumption in regard to mass ascertained by a mass-measuring device applicable in criminal proceedings (Sec 133);
- C presumption in regard to the gross vehicle mass of a vehicle in a prosecution under the Act (Sec 134);
- C proof of the vehicle mass of a motor vehicle (Sec 135);
- C vehicle and load may be exempted from the provisions of the Act (Sec 158);
- C power of an authorized officer to seize vehicle and loads suspected of being involved in the commission of an offence (Sec 166(1));
- C forfeiture of vehicle and load suspected of being involved in the commission of an offence to Government (Sec 168);
- C power of the Minister to make regulations in respect of vehicle dimensions (Sec 181(1)(c));
- C power of the Minister to make regulations in respect of maximum vehicle mass (Sec 181(1)(d));
- C power of the Minister to make regulations in respect of the use and control of any vehicle on a public road, its construction and equipment, including dimensions and mass (Sec 181(1)(l));
- C power of the Minister to make regulations in respect of the protection of any public road, the mass, tyres and load of any vehicle in relation to any specified bridge or ferry (Sec 181(1)(n)); and
- C power of the Minister to make regulations in respect of fees to be charged for any purpose under the Act including administrative fees for overload offences (Sec 181(1)(w));

The provisions in the CEU regs address:

- C rules in respect of a contravention of motor vehicle mass limits (CEU reg. 25);
- C calculation of a vehicle overload (CEU reg. 26);
- C calculation of overload penalties (CEU reg. 27);
- C imposition of penalties and procedures (CEU reg. 28);
- C weighing of vehicles (CEU reg. 29);
- C weighing procedures (CEU reg. 30);
- C authority of certain officers (CEU reg. 31); and
- C appeals to the Minister (CEU reg. 32).

The provisions in the National Roads Authority Act, 1997 relevant to overloading control have been summarized in 1.5 above.

### 3.2.2 Overloading control

Current overloading control strategy is directed towards controlling vehicles crossing Malawi's borders with neighbouring states. Weighbridges are operational at 4 border posts. Only one internal weighbridge is operated, located at Balaka. Vehicle weighing is undertaken by

weighbridge inspectors who fall within the category of “authorised officers” identified in the RTA. Permissible mass loads are specified in CEU regs. These are:

- C any wheel mass-load: 4000 kg
- C any axle fitted with 2 or 3 wheels: 8000 kg
- C any axle fitted with 4 or more wheels: 10 000 kg
- C any axle unit consisting of 2 axles with 2 wheels on each axle: 16 000 kg
- C any axle unit consisting of 2 axles with 4 wheels on each axle: 18 000 kg
- C any axle unit consisting of 3 axles with 4 wheels on each axle: 24 000 kg

The total axle mass load of a motor vehicle may not exceed 56 000 kg.

Where a vehicle is found to be overloaded, current practice is to require the payment of an overload fee before the vehicle may proceed with its journey. This is in line with the approach adopted in the CEU regs (Reg 25) that a contravention of mass limits is not a **criminal offence**. Reg 25 (3) authorises the Director to determine and impose a penalty in the form of an overloading fee. The fee is payable at the weighbridge and the excess load must be off-loaded. If a vehicle is overloaded on one axle, but not overloaded in terms of gross vehicle mass, the load must be re-adjusted to bring the vehicle within the permissible limit. An exception is made in the case of overloaded vehicles carrying indivisible loads or hazardous cargoes which are permitted to proceed without the requirement to off-load, subject to payment of 5 times the prescribed overload fees.

Despite the provisions of the CEU regs, the RTA itself does not **decriminalize** overloading, and certain provisions in the RTA create the impression that the intention still is to prosecute overloaders in the courts. Eg, the RTA still contains certain presumptions which may be used in prosecuting an offender for overloading (Secs 133 and 134). The only reference found in the RTA, is the authority vested in the Minister to make regulations regarding administrative fees for overload offences (Sec 181 (1)(x)). This aspect is considered further under 3.3.1 below.

### 3.2.3 Privatization of weighing stations

The privatization of weighing stations in Malawi is envisaged to occur through:

- C the sale or concessioning of **existing** assets; and
- C the invitation of bids for concessions to build and operate **new** weighing stations.

The Government Contracting Out Unit has recently invited tenders for the provision of weighbridge operations at specified locations. At the same time, negotiations are underway with the National Roads Agency to explore the possibility of the latter agency taking over overloading control functions from the Department of Road Traffic. In practice, it appears that a dual approach may be followed in terms of which overloading control could be undertaken by both public and private entities.

Sec 160 of the RTA permits the Minister to authorize any person, organization or authority to carry out any inspection which the Minister deems necessary to ensure compliance with the Act. Under this section, the Minister could delegate the authority to undertake vehicle weighing to the NRA. Alternatively, once bids have been invited for the private operation of weighbridges, the Minister could delegate the authority to weigh vehicles to the successful bidder.

Sec 25 of the PEPA authorizes the sale of assets of any “public enterprise”. The latter is defined, among others, as “commercial assets held or created in which the Government has a direct or indirect interest”. It appears that existing weigh-bridges could be classified as commercial assets and as such, they may be sold under PEPA, or privatized in “any other method the Commission deems appropriate”.

Although the RTA provides a basic authority for the weighing of vehicles by private persons or entities, the Act provides no framework for, amongst others:

- C inspection and accreditation of private weighing stations;
- C imposition of administrative sanctions; and
- C promotion of voluntary compliance.

Finally, it may be noted that currently, the RTA does not authorise the joint provision and operation of weighbridge facilities between Malawi and any other state. By the same token, no provision is made for the recognition of weighing certificates issued in any other state.

### 3.3 STATUS QUO ANALYSIS

#### 3.3.1 Competition

##### (a) Overloading control

- C The existing provisions apply **without discrimination** to all operators and are, therefore, not detrimental to promoting a healthy competitive environment.
- C Despite the provisions of the CEU regs, the RTA does not establish a system of administrative control of overloading. As a general principle, subsidiary legislation (CEU regs) cannot grant wider powers than is provided for in primary legislation (RTA). **A reference in regulations that overloading is not a criminal offence cannot be regarded as sufficient authority to decriminalize overloading and introduce a system of administrative penalties and is probably ultra vires.** The RTA should, therefore, be supplemented to provide for:
  - S Express decriminalization of overloading and the introduction of a system of administrative controls based on overloading fees;
  - S Supplemental administrative sanctions against habitual offenders (including the option of introducing a points demerit system);
  - S Obligatory weighing of vehicles at weighing stations *en route*; and
  - S Powers to set differentiated weight limits depending on pavement conditions or design, traffic volumes, etc;
- C The proposed approach to introduce a system of **administrative control** of overloading accords with the current approach favoured by SADC as set out in the report of the SATCC 5 Country Special Working Group on Overload Control.

##### (b) Privatization of weighing stations

- C Although the existing legal framework permits both the privatization of existing weighing stations or concessioning the provision and operation of new weighing stations by the private sector, it should be noted that provisions should be made for **general oversight** by government of weighbridge operations and ensuring that **minimum standards and practices** are adhered to by private entities. Such oversight may be undertaken by either the Department of Road Traffic or the National Road Authority or could itself be contracted out.

- C Irrespective of the preferred approach, the RTA must be supplemented to provide an adequate framework for:
- S Express authorization that any person may operate a weighing station, subject to official approvals;
  - S Accreditation of weighing stations;
  - S Annual audits and random inspections of weighing stations;
  - S Appointment of an inspectorate of weighing stations (which could also be a private entity);
  - S Appointment and powers of weighbridge inspectors.
- C The absence of any provisions authorising co-operation with neighbouring states in overloading control, may be a constraint on future efforts by Malawi to co-ordinate its enforcement activities with such states. Practice elsewhere has shown that significant benefits can be derived from joint provision and operation of weighing stations, eg at border posts or in close proximity thereto. However, this requires legislative provisions which:
- S mandate the setting up and operation of weighing stations together with other states (whether on Malawian territory or in a neighbouring state);
  - S authorize Malawian officials to perform official duties in a neighbouring state in respect of Malawian-registered vehicles, or foreign officials to perform such functions in Malawi;
  - S mandate the use of a weighing certificate issued outside Malawi for the purposes of imposing penalties, etc.

### 3.3.2 Safety

- C In so far as overloading control is, amongst others, intended to enhance traffic safety by barring unsafe vehicles from the roads, the current RTA provisions provide an adequate framework for meeting this objective.

### 3.3.3 User protection

- C The comments made under 3.3.2 also apply in this case.

### 3.3.4 Regulatory system

- C The RTA does not provide any regulatory framework within which private weighing stations can be operated. Within a privatized context, it will be necessary, as stated above, that weighing stations **be accredited** on the basis of compliance with prescribed standards and be subjected to regular audits and inspections.

## 3.4 RECOMMENDATIONS

### IT IS RECOMMENDED THAT:

The RTA be supplemented through the inclusion of a new Part containing the provisions set out Annex 2.

## ANNEX 1

### EXPLANATORY NOTES:

1. The contents of this annex contain draft provisions which provide a comprehensive framework for the management of Malawi's international road transport relations and give effect to the recommendation contained in paragraph 2.4.1 of the report.
2. The drafting approach which has been followed was to prepare provisions which can be slotted into the existing Road Traffic Act, without necessitating major amendments to existing provisions. It is proposed that this annex be included as a new Part VIII to follow immediately upon Part VII - Operator fitness.
3. In certain cases, the provisions unavoidably necessitate amendments to the main Act or regulations. Where this is required, the scope of the required amendment is indicated in a *drafting note*.

### **Authorisation to conclude road transport agreements**

*(1) The Minister may enter into an agreement with another state whereby arrangements are made with that state to control and regulate cross-border road transport between Malawi and that state based on reciprocity, similar treatment and non-discrimination and where appropriate, extraterritorial jurisdiction.*

*(2) The agreement must also provide for -*

- (a) its entry into force;*
- (b) the procedure to be followed for amendment of the agreement;*
- (c) the rights of the parties thereto in the event of substantial breach thereof;*
- (d) the suspension of the agreement or of any relevant provision thereof; and*
- (e) the procedure to be followed in the event of a dispute regarding the interpretation or application thereof.*

*(3) Where an agreement or a part thereof is required to have force of law in Malawi, the Minister must table such agreement in Parliament within 15 days of the signing thereof if Parliament is in session, or within 15 days after Parliament has reconvened, if Parliament is not in session.*

*(4) An agreement contemplated in subsection (3) may be approved by Parliament by resolution, and an agreement as approved, shall have force of law in Malawi as if it has been ratified in terms of section 211 of the Malawi Constitution.*

Drafting note: An alternative procedure has also been adopted in some Malawi legislation (ie the Forestry Act, 1996, the Fisheries and Conservation Act, 1997 and more recently in amendments to the National Parks and Wildlife Act, 1997) providing for incorporation of international agreements in domestic law. This procedure authorizes the Minister, by order published in the *Gazette*, to specify measures for the proper implementation of relevant provisions of any convention (which is defined in the Interpretation Act as any bilateral or multilateral international agreement) to which Malawi is a party (The first of such orders is currently under consideration by the Attorney-General's chambers). This approach is interpreted as complying with the provisions of Sec 211 of the Constitution in terms of which an Act of Parliament is required to ratify any convention which is intended to have domestic legal force.

*(5) The provisions of subsection (4) apply, with the necessary changes, to any amendment of an agreement, if and to the extent approved by Parliament.*

(6) Where a state with which an agreement has been entered into, breaches a provision thereof the Minister must, subject to the provisions of the agreement -

- (a) inform the other state of such breach and request it to rectify such breach within a reasonable period;
- (b) upon failure of the state to act in accordance with the request as contemplated in paragraph (a), by notice in a newspaper of general circulation, publish his or her intention to suspend the application of the agreement in part or in full; and
- (c) by notice in a newspaper of general circulation, publish the date on which the suspension of the application of the agreement in part or in full will come into force.

### **Equal treatment**

(1) The Minister may, when another state accords treatment to Malawian carriers which is less favourable than the treatment that is being accorded by Malawi to carriers from that state, by 30 days' notice in a newspaper of general circulation, despite any provision to the contrary in this or any other Act or any agreement concluded with such state, apply treatment to the carriers of that state which is equivalent to the treatment which that state accords Malawian carriers.

(2) The Minister may at any time amend or withdraw a notice referred to in subsection (1) by notice in a newspaper of general circulation.

### **Application for an international road service permit**

(1) Subject to subsection (2) and (3), no person may undertake road transport between Malawi and another state unless he or she is the holder of an international road service permit.

(2) A Malawian carrier must, where an agreement referred to in section ... (authorisation to conclude road transport agreements) exists and provides for extraterritorial jurisdiction, apply, in accordance with the provisions of the agreement and the regulations, to the Director for an international road service permit authorising road transport from the territory of Malawi into or across the territory of any state with which Malawi has concluded such an agreement and from such territory back to Malawi.

(3) A foreign carrier must, where an agreement referred to in section ... (authorisation to conclude road transport agreement) exists and provides for extraterritorial jurisdiction, apply, in accordance with the provisions of the agreement and the regulations, to his or her competent authority for an international road service permit authorising road transport from the territory of the state concerned into or across the territory of Malawi and from the territory of Malawi back to the territory of such state: Provided that the Director must, where required in terms of the provisions of such an agreement, consider the application of such foreign carriers and recommend to the competent authority whether or not to issue the carriers concerned with a international road service permit.

(4) Subject to subsection (6), a Malawian carrier and a foreign carrier must, where an agreement referred to in section ... (authorisation to conclude road transport agreements) exists but does not provide for extraterritorial jurisdiction or where the Minister has concluded an executive arrangement with a minister of another state in anticipation of concluding an agreement referred to in section ... (authorisation to conclude road transport agreements), apply, in accordance with the provisions of the agreement and the regulations or the provisions of the executive arrangement, to the Director for a international road service permit authorising the part of the road transport undertaken in the

territory of Malawi.

(5) Subject to subsection (6), a Malawian carrier and a foreign carrier must, where no agreement referred to in section ... (authorisation to conclude road transport agreements) exists, apply to the Director for a international road service permit authorising the part of the road transport undertaken in the territory of Malawi.

(6) Despite the provisions of subsections (4) and (5), any document issued by a competent authority in a prescribed state, and serving in such state a purpose similar to that of an international road service permit shall, subject to the conditions thereof, and to such conditions as may be prescribed, be deemed to be an international road service permit for the purposes of this section.

*Drafting note: The inclusion of this subsection requires the deletion of section 82(3) of the RTA.*

(7) Where no agreement referred to in section... (authorisation to conclude road transport agreements) exists, the Director may, where any circumstance arises in respect of the holder of document contemplated in subsection (6) which in his opinion would have entitled him to act under section 86, the Director may inform such person in writing that such document is no longer deemed to be an international road service permit for the purposes of this section, and from the date on which such person is so informed, such permit shall cease to be in force in Malawi.

*Drafting note: The inclusion of this subsection requires the deletion of section 82 (4) of the RTA.*

(8) Subject to subsection (9), if more than one international road service permit is issued in respect of the same vehicle, the holder of the international road service permit must be the same person.

(9) Despite the provisions of this or any other Act, no international road service permit is required in respect of any motor vehicle, other than a mechanically-propelled vehicle.

*Drafting note: These provisions abolish the restrictions on double-coupling in respect of international road transport, by requiring a permit to be issued only in respect of the mechanically-propelled vehicle (ie a mechanical horse or rigid vehicle). A trailer or semi-trailer will not require a permit and may also be foreign-registered.*

(10) Where a person, other than the holder of an existing international road service permit, applies for a international road service permit in respect of the same vehicle, the Director must -

- (a) inform the existing international road service permit-holder that an application in respect of the same vehicle has been received;
- (b) request the existing international road service permit-holder to provide reasons within 14 days as to why the existing international road service permit must not be cancelled; and
- (c) inform the existing international road service permit-holder of and request his or her attendance on the date when the application will be considered by it.

(11) If the existing international road service permit-holder fails to respond to a request as contemplated in paragraph (b) or (c), the Director may cancel the existing international road service permit.

(12) If the existing international road service permit-holder's international road service permit is cancelled in accordance with subsection (11), the said international road service permit-holder must

return the cancelled international road service permit to the Director within 21 days.

(132) The Director may grant condonation for the international road service permit-holder's failure to comply with the requests as contemplated in paragraph (b) or (c) upon good cause shown.

### **Freight and passenger transport**

The Director must take the following into consideration in making a decision in relation to any application for the granting, renewal, transfer or amendment of international road service permits for cross-border freight or passenger road transport:

- (a) whether the applicant complies with the relevant provisions of the Road Traffic Act;
- (b) whether the applicant has forwarded the prescribed consignment notes or passenger lists, as the case may be, in respect of the previous international road service permits which were held by the applicant; and
- (c) a foreign state's track record with regard to reciprocity where the applicant is from a state with which Malawi does not have an agreement providing for international road service permits with extraterritorial jurisdiction.

### **Cabotage**

The Director may not issue an international road service permit to a foreign carrier authorising cabotage, unless the state of a foreign applicant accords a Malawian carrier equal treatment in this regard.

### **Temporary replacement of vehicle**

(1) In the event of a breakdown en route, a driver must be allowed to complete the specific journey with another vehicle on the authority of the international road service permit issued to the vehicle which had broken down.

(2) The driver must within a reasonable time make a sworn declaration regarding the nature of the breakdown, and where the broken-down vehicle can be inspected: Provided that the sworn declaration must be carried on the replacement vehicle.

(3) The international road service permit-holder or the driver must allow any authorised officer to inspect the broken down vehicle at the place where the latter vehicle is.

### **Withdrawal, suspension or variation of international road service permit**

(1) The Director may, subject to the provisions of subsections (2) and (3) where an international road service permit-holder or a person in his or her employ contravenes the conditions of an international road service permit in Malawi or in a state with which an agreement as contemplated in section ... (authorisation to conclude road transport agreements), has been concluded, of his own accord or upon a request from the state with which such an agreement has been concluded, act against such permit-holder in terms of section 86 (4).

### **Road transport facilitation**

(1) The Minister must oversee the establishment and development of corridor-based and route-based co-operative and consultative relationships and structures based on co-operation between stakeholders and government, which may include adequate representation by -

- (a) *the Ministry;*
- (b) *cross-border road transport carriers;*
- (c) *customs and excise authorities;*
- (d) *freight forwarding and clearing agents;*
- (e) *financial and insurance institutions;*
- (f) *trade and industry authorities and bodies;*
- (g) *border post authorities;*
- (h) *immigration authorities;*
- (i) *tourism groups; and*
- (j) *any other designated stakeholder.*

*(2) The Minister may prescribe guidelines for the establishment of cross-border road transport corridor-based or route-based consultative mechanisms.*

*(3) The Director must, in support of his functions, develop and maintain a cross-border road transport information database containing information obtained from any appropriate source, and devise the most appropriate ways to disseminate cross-border road transport information.*

*(4) The Minister must prescribe the type of information to be included in the database, who may access such information and the procedures to access the information.*

### **Offences and penalties**

*The Minister may make regulations, in respect of any matter contemplated or required under this Part and may provide for penalties for a contravention of any regulation and also for different penalties in the case of successive or continuous contraventions.*

## ANNEX 2

### EXPLANATORY NOTES:

1. These provisions have been prepared to address the need identified in the report for comprehensive provisions dealing with overloading control, in particular with regard to the introduction of administrative penalties and the possible privatization of weighing stations. They give effect to the recommendation contain in paragraph 3.4 of the report.
2. The provisions rectify the principal deficiency in the current legal framework, namely the absence of a statutory basis in the principal legislation (RTA) setting up an administrative system for the control of overloading. Secondly, it creates a framework within which the government can retain oversight over privately-operated weighing stations through accreditation procedures and regular inspections. In practice, there may be a concern regarding the current capacity of the Department of Road Traffic to undertake such functions. This is met through provisions which provide for oversight functions to be out-sourced, eg to an inspectorate, which may be a private body.
3. These provisions have been drafted on the basis that the Director of Road Traffic is responsible for overloading control (as the RTA currently provides). The possible transfer of this responsibility to the National Roads Authority has, however, also been borne in mind and these provisions do not present an obstacle to such a transfer. The principal mechanism to facilitate such a transfer is Sec 169 of the RTA, which permits the Director to delegate any power or duty conferred on or assigned to him under the RTA to any other person. This section is wide enough to accommodate a transfer of functions to the NRA, should this become necessary. Where a specific need has existed to refer to the role of the NRA in the provisions, this has been done.
4. It will be noted that the provisions also address the carriage of abnormal and awkward loads. While this has not been identified as a priority issue in itself, the principles for controlling abnormal and awkward loads do not differ in any significant way from those pertaining to overloads. It has, therefore, been deemed useful to include such provisions here, but may be excluded if not required.
5. The remarks made above in respect of Annex 1 regarding the drafting approach and the inclusion of these provisions in the RTA, also apply here. It is proposed that this annex be included in the RTA as a new Part following on the current Part IX - Rules of the Road.

### **Definitions**

**“abnormal load”** means an indivisible load which, due to its dimensions or weight, cannot be transported on a vehicle or vehicles without exceeding the mass or dimension limits;

**“accreditation”** means certification of a weighing station by the Authority or an inspectorate as complying with the prescribed accreditation standards;

**“Authority”** means the National Roads Authority established by section 3 of the National Roads Authority Act, 1997, Act No. 13 of 1997 or its duly appointed agent;

**“awkward load”** means an indivisible load which when loaded on a vehicle exceeds the permissible dimensions of such vehicle;

**“Director”** means the Director of Road Traffic appointed under section 3 (of the Road Traffic Act, 1997);

*Drafting note: As these provisions will eventually be included in the Road Traffic Act, there will be no need to repeat the reference to the Act in the text - hence the use of the brackets above.*

**“inspectorate”** means the inspectorate appointed under section ...(inspectorate of weighing stations);

**“mass limit”** means the limits prescribed by the Minister in terms of section 181 (of the RTA) in respect of vehicle mass and permissible axle mass;

**“Minister”** means the Minister of Transport and Communications; and

**“overloading fee”** means a penalty payable by the owner or operator of a motor vehicle which exceeds a prescribed mass limit.

### **Overloading of vehicles to be dealt with under this Part**

*A contravention of a prescribed mass limit shall not constitute a criminal offence, but shall be dealt with administratively in terms of this Part.*

*Drafting note: The inclusion of this section requires the deletion of CEU reg. 28*

#### **Liability for overloading fee**

*(1) If it is established that a vehicle is carrying a load in excess of the mass limit, a person owning or operating such vehicle is liable to pay the prescribed overloading fee to the Authority, at such place as may be designated by the Authority by notice in a newspaper of general circulation.*

*Drafting note: The inclusion of this section requires the deletion of CEU reg. 28.*

*(2) A vehicle contemplated in subsection (1) may not continue on its journey unless the load can be redistributed and the vehicle is, upon being re-weighed, found to be within the mass limit, or the vehicle is off-loaded to lower its weight below the mass limit and -*

- (a) any amounts due in terms of subsection (1) have been paid;*
- (b) a guarantee has been provided to the satisfaction of the Director that such amounts will be paid within 7 days.*

*Drafting note: The inclusion of this section requires the deletion of CEU reg. 31(3).*

*(3) Any amount due in terms of this section may be enforced by way of a civil order of the High Court.*

*(4) The Director is not liable for any loss or damage suffered by a carrier as a result of a vehicle being immobilised during the period contemplated in subsection (2).*

*(5) The provisions of this section apply in addition to any measures adopted in terms of section .. (administrative sanctions).*

#### **Obligatory weighing of vehicles**

*(1) Subject to section ..., a person owning or operating a commercial vehicle must present such vehicle to be weighed at every weighing station which is situated along the route traversed by such vehicle or which is designated for this purpose by the Director by notice in a newspaper of general*

*circulation.*

*(2) If a person fails to comply with subsection (1), the Director may impose on such person any of the sanctions contemplated in section ... (administrative sanctions).*

**Exemption from obligatory weighing**

*(1) Except in the case of a person in respect of which the Director has withdrawn an exemption in terms of section ... (administrative sanctions), section ... (obligatory weighing) does not apply where*

- (a) a person owning or operating a vehicle has presented such vehicle to be weighed at an accredited weighing station prior to the commencement of the journey and such vehicle has been fully loaded; and*
- (b) a weighing station contemplated in paragraph (a) has issued a weighing certificate certifying that the weight of the vehicle does not exceed the mass limit.*

*(2) Despite subsection (1), a person owning or operating a vehicle which has undergone pre-journey weighing in terms of subsection (1), must ensure that the weighing certificate issued at the occasion of the pre-journey weighing is presented for verification at every weighing station situated along the route traversed by such vehicle or which is designated for this purpose by the Director by notice in a newspaper of general circulation.*

*(3) An authorised officer may, despite the provisions of this section, require a vehicle in respect of which a pre-journey weighing certificate has been issued, to be weighed where there are reasonable grounds for concluding that such vehicle is carrying a load which exceeds the weight indicated on such certificate.*

**Administrative sanctions**

*(1) Where any person fails to comply with section ... (liability for overloading fee) and section... (obligatory weighing), the Director may, in addition to recovering any monies due as overloading fees, impose one or more of the following sanctions against such person -*

- (a) a temporary ban on the use of a specified road or route or generally;*
- (b) the imposition of a higher scale of overloading fees in respect of any future carriage of loads in excess of the mass limit for a specified period or indeterminately;*
- (c) despite the provisions of section... (exemption from obligatory weighing), the withdrawal of an exemption from obligatory weighing notwithstanding the fact that a vehicle is weighed prior to the commencement of a journey; or*
- (d) investigate the withdrawal of the operator registration of such person in terms of section 86 (of the RTA).*

*Drafting note: The comment made above with regard to references to the RTA, also applies here.*

*(2) The imposition of the higher overloading fees may be linked to the points demerit system contemplated in section ... (points demerit system) as prescribed.*

**Differentiation in mass limits**

(1) Subject to subsection (2), the mass limits as prescribed apply in respect of all roads and routes in Malawi.

(2) The Director may, subject to subsection (3) and the approval of the Minister, by notice in a newspaper of general circulation, set different mass limits for different roads or routes, having regard to -

- (a) the condition of the pavement of the road or route under consideration;
- (b) the design standard of the road or route under consideration;
- (c) the existence of weighing stations along the road or route under consideration;
- (d) the volumes of commercial traffic using the road or route under consideration;
- (e) the relative importance of the road or route for the trade and commercial relationships of Malawi; and
- (f) any other matter which the Director deems advisable for the purpose of making a determination in terms of this section.

(3) For the purpose of subsection (2), the Director must consult with the National Roads Authority and any other road authority which has responsibility for roads in respect of which he proposes to set differentiated mass limits.

#### **Conditions for carriage of abnormal or awkward loads**

(1) No person may carry an abnormal or awkward load on a public road unless -

- (a) a prescribed pre-journey declaration has been made to the Director;
- (b) an abnormal or awkward load fee, as prescribed, has been paid;
- (c) such person has been granted an exemption, where applicable, to operate an overweight or over-dimensional vehicle on a public road in terms of section 158 (of the RTA),

and such person is not disqualified in terms of the conditions contemplated in subsection (2).

Drafting note: The comment made above with regard to references to the RTA also applies here.

(2) A person is disqualified from carrying an abnormal load if -

- (a) the carriage of the abnormal load will exceed the rated capacity of the vehicle to be used for such carriage; and
- (b) such person -
  - (i) has an outstanding debt in respect of any monies payable in terms of this Act; and
  - (ii) is disqualified from carrying abnormal loads in terms of section .. (administrative sanctions).

**Supplementary conditions to carriage of abnormal or awkward loads**

(1) *The Director may impose supplementary conditions on any person wishing to carry an abnormal or awkward load, including but not limited to -*

- (a) *the presentation of the vehicle and load to be weighed;*
- (b) *the route to be followed by the vehicle;*
- (c) *the provision of escorts;*
- (d) *the use of warning lights and devices;*
- (e) *travel times; or*
- (f) *any other matter which, in the opinion of the Director, is necessary for the safe carriage of such load and the protection of road infrastructure and the environment.*

(2) *The Minister may prescribe a fee in respect of any of the supplementary conditions imposed on the carriage of an abnormal or awkward load.*

**Transfer of overloading fees and abnormal and awkward load fees to Road Fund**

*The Director or any agent appointed in terms of section 169 (of the RTA) must, on a monthly basis or within such period as determined by the Minister by notice in a newspaper of general circulation, pay all overloading fees and abnormal and awkward load fees collected to the Road Fund established by section 18 of the National Roads Authority Act, 1997, Act No. 13 of 1997.*

**Duties of carrier**

*A carrier -*

- (a) *carries any load at the carrier's own risk and is liable for any damage, other than pavement damage, which may occur to roads, bridges and other property as a result of such carriage; and*
- (b) *may not remove any signs or structures along any road without the written permission of the person having jurisdiction over that sign or structure.*

**Points demerit system**

(1) *The Minister may prescribe, upon recommendation of the Director, a points demerit system providing for points to be recorded against a carrier in respect of any failure to comply with a provision of this Act.*

(2) *The system must provide for -*

- (a) *overloading to be categorized according to the degree of severity;*
- (b) *a threshold or thresholds of overloading which, if exceeded, results in one or more of the administrative sanctions contemplated in section ... (administrative sanctions) being imposed; and*

- (c) *a reduction of demerit points where acts of non-compliance are not recorded within specified time periods.*

*(3) The points contemplated in this section are recorded upon payment, by a carrier, of an overloading fee.*

***Appointment of weighbridge inspectors***

*(1) The Minister may, by notice in a newspaper of general circulation, vest any power accorded a traffic police officer in the Act in -*

- (a) an employee of the National Roads Authority;*
- (b) an employee of any government agency performing functions on the agency basis in terms of this Act; or*
- (c) an employee of a person operating an accredited weighing station or providing weighing services;*

*by appointing such employee as a weighbridge inspector and issuing such inspector with a prescribed certificate of appointment.*

*(2) A notice contemplated in subsection (1) must specify the period of appointment of each weighbridge inspector.*

*(3) The Director may -*

- (a) pending an investigation into allegations of a failure by a weighbridge inspector to perform his or her duties in a fit and proper manner, suspend the appointment of such officer; and*
- (b) where in a properly constituted proceeding a weighbridge inspector has been found guilty of such failure, rescind such appointment.*

*(4) A rescission contemplated in subsection (3) must be published by notice in a newspaper of general circulation.*

***Powers of weighbridge inspector***

*An weighbridge inspector may, in addition to any other power vested in him or her by the Minister -*

- (a) require the driver of a vehicle to stop the vehicle for the purposes of weighing and inspecting the vehicle;*
- (b) enter the vehicle;*
- (c) inspect -*
  - (i) any load being carried in or on the vehicle; and*
  - (ii) any record relating to any load carried in or on the vehicle;*
- (d) weigh the vehicle and any load being carried in or on the vehicle;*

- (e) weigh the amount of weight being borne by an axle or an axle group of the vehicle;
- (f) inspect any record relating to, issued or required under any transport legislation;
- (g) inspect any record, object or thing that relates to the vehicle, its operation or any load carried in or on the vehicle;
- (h) make inquiries of any person who operates the vehicle inspected under this section; and
- (i) perform or cause to be performed tests or examinations of or in respect of the vehicle or any load carried in or on the vehicle.

**Driver of vehicle to stop upon instruction of weighbridge inspector**

A driver of a vehicle must -

- (a) on being signalled or requested to do so by an weighbridge inspector with the prescribed identification markings; or
- (b) if requested to do so by an weighbridge inspector who has produced his or her certificate of appointment,

forthwith take the vehicle to a weighing station as directed by the weighbridge inspector.

**Any person may operate weighing station or provide weighing services**

(1) Subject to subsection (2), any person may -

- (a) operate a weighing station;
- (b) build and operate a weighing station; or
- (c) provide weighing services using portable equipment,

for the purpose of promoting compliance with the provisions of this Act.

(2) No act performed at any weighing station or with portable equipment is valid for the purpose of this Act, unless a weighing station operator or provider of weighing services has been accredited in terms of section ... (accreditation).

**Application for accreditation**

(1) A person -

- (a) operating a weighing station;
- (b) wishing to build and operate a weighing station; or
- (c) wishing to provide weighing services using portable equipment,

must apply, in the prescribed manner, to the Director or the inspectorate, for accreditation.

(2) An application made in terms of subsection (1) must be accompanied by -

- (a) a locality plan and drawings of the weighing station, if applicable;
- (b) a specifications certificate issued by the manufacturer of the mass measuring equipment installed at the weighing station or of the portable weighing equipment to be used;
- (c) a maintenance plan for the weighing station, if applicable, and a programme for regular calibration of equipment complying with manufacturers' requirements;
- (d) a road traffic flow plan for the weighing station prepared in the prescribed format, if applicable;
- (e) proof that the prescribed insurance cover has been obtained in respect of the weighing station, if applicable;
- (f) any other additional information or documents as may be required by the Director; and
- (g) the prescribed fee.

#### **Accreditation**

(1) Upon receipt of an application referred to in section ... (application for accreditation), the Director must -

- (a) ensure that such application is in order; and
- (b) undertake an inspection of the weighing station or of the portable weighing equipment to be used to ensure compliance with the prescribed accreditation standards.

(2) The Director may specify different standards for different weighing stations or portable weighing equipment having regard to -

- (a) the volume of traffic on the route along which a weighing station is situated or weighing using portable equipment will be undertaken;
- (b) the category or type of vehicles to be weighed;
- (c) whether the weighing station will be a common-user facility or dedicated to vehicles operated by the applicant or a specified category of carriers; or
- (d) whether the weighing station will be jointly managed in terms of a multilateral or bilateral agreement concluded with the government of another State.

(3) If the Director is satisfied that the weighing station or portable weighing equipment complies with the prescribed accreditation standards, he shall -

- (a) issue to the applicant a certificate of accreditation on the prescribed form; and
- (b) give notice of such accreditation in a newspaper of general circulation.

(4) Subject to section ... (annual audits and random inspections), a certificate of accreditation issued in terms of sub-section (3) is valid for an unlimited period and must contain the conditions subject to which such certificate was issued.

(5) The Minister may prescribe the conditions under which a certificate of accreditation may be renewed.

### **Annual audits and random inspections**

(1) An accredited operator station or provider of weighing services is subject to an annual audit by the Director to confirm that the requirements for accreditation are being met.

(2) For the purpose of subsection (1), the Director may impose an audit fee to recover the cost related to an annual audit.

(3) A weighing station operator or provider of weighing services must provide the Director with all reasonable assistance to undertake an audit, including -

- (a) any information which may be requested;
- (b) access to documentation relating to the operation of the weighing station or portable weighing equipment;
- (c) access to any part of the weighing station and its facilities or to the portable weighing equipment; and
- (d) access to any person employed with regard to the operations of the weighing station or portable weighing equipment.

(4) If the findings of an annual audit are that a weighing station operator or a provider of weighing services no longer complies with the prescribed standards, the Director may -

- (a) issue a directive in writing to the weighing station operator or provider of weighing services to ensure compliance within the period specified in the directive;
- (b) suspend the certificate of accreditation pending such compliance; or
- (c) revoke the certificate of accreditation.

(5) A certificate of accreditation may be re-issued if a weighing station operator or a provider of weighing services is found to comply with the prescribed standard after an accreditation inspection contemplated in section ... (accreditation) has been conducted.

(6) The Director may, at any time, conduct a random inspection for the purpose of verifying compliance with an applicable standard.

(7) The provisions of subsection (3) apply to any random inspection conducted in terms of subsection (6).

### **Right of appeal to Minister**

(1) Any person who is aggrieved at the refusal of the Director to accredit him or her as a weighing station operator or a provider of weighing services or at the suspension or cancellation of his or her

accreditation may, within 21 days after such refusal, suspension or cancellation, in writing appeal to the Minister against such refusal, suspension or cancellation and such appellant must at the same time serve a copy of the appeal on the Director.

(2) After receipt of the copy of the appeal referred to in subsection (1), the Director must forthwith furnish the Minister with reasons for the refusal, suspension or cancellation to which such appeal refers.

(3) After considering the appeal, the Minister may give such decision as he or she may deem fit.

### **Inspectorate**

(1) The Minister may, by notice in a newspaper of general circulation, appoint any suitably-qualified person or entity as an inspectorate of weighing stations and portable weighing equipment to perform the functions of the Director as contemplated in section ... (accreditation) and section.... (annual audits and random inspections).

(2) The Minister must publish a notice of appointment of an inspectorate in a newspaper of national circulation for public comment.

### **Mutual recognition of weighing certificates**

(1) A weighing certificate issued by an accredited weighing station operator or provider of weighing services in any other country is recognized as valid for the purpose of carriage in Malawi, but such recognition does not exempt a carrier from the obligatory weighing requirements in terms of section ... (obligatory weighing), if applicable.

(2) Nothing in this section is deemed to prohibit a weighbridge inspector from requiring a vehicle carrying a weighing certificate contemplated in subsection (1) from being weighed in terms of this Act.

### **Effectiveness of vehicle overloading control systems and law enforcement and incidence of corruption**

(1) The Director must annually prepare and submit to the Minister a report comprising clear recommendations on approaches, methods and mechanisms -

- (a) to improve effectiveness of vehicle overloading control systems;
- (b) to enhance overall vehicle overloading law enforcement; and
- (c) to eliminate corruption.

(2) The Minister must publish the report or extracts thereof in a newspaper of general circulation.

(3) Road authorities must indicate the extent to which they have complied with the recommendations referred to in subsection (1) in their annual reports.

### **Offences**

Any person who -

- (a) fails to pay any overloading fee legally imposed in terms of this Act;

- (b) *damages a road by carrying a load in respect of which a overloading fee is payable;*
- (c) *fails to present a vehicle for obligatory weighing as required in terms of section... (obligatory weighing); or*
- (d) *fails to comply with the direction or instruction of a weighbridge inspector in terms of section ... (powers of weighbridge inspectors),*

*is guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding...*

**Extra-territoriality**

*(1) Any person who is authorized to exercise his or her powers and perform his or her duties in Malawi in respect of vehicle loading -*

- (a) *may independently perform all duties and powers in another state in terms of the laws of Malawi;*
- (b) *may independently perform all duties and powers, within Malawi on behalf of another state and in terms of that state's laws; and*
- (c) *may independently perform all duties and powers, in another state on their behalf in terms of that state's laws.*

*(2) The duties and powers contemplated in subsection (1), must include the power to perform any of the functions contemplated in section ....*

*(3) Any offence in terms of the laws of Malawi committed at a shared weighing station facility located wholly in the territory of another state, is deemed to have been committed in the territory of Malawi.*

*(4) Any offence in terms of the laws of another state which is committed at a shared weighing station facility located wholly in the territory of Malawi, is deemed to have been committed in the territory of the other state.*