



Your one-stop resource for practical
Chain of Responsibility solutions

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From Your Editor-in-Chief



When we give seminars on Chain of Responsibility (CoR) obligations we usually provide examples of what not to do. These examples are often met with, "Yeah, but people don't actually do that in real life, right?". The thinking being that the kind of conduct that the law is aimed at doesn't really occur in the real world – at least, not deliberately.

Unfortunately, such real-world examples continue to veer into our lane. In this edition, we look at a recent case study where drivers were told to 'lose' their work diaries and continue driving long distance. The direction was given even with the knowledge that it would cause the drivers to be in breach of fatigue rules.

We also have a special guest article on accreditation that offers ideas for the future of a consistent national accreditation framework. The current situation, where there are overlapping government, industry and a plethora of private schemes is unsustainable – in particular for operators who have to undergo multiple audits at their cost. The sector as a whole would benefit from a consistent framework of recognised schemes with mutual recognition to avoid duplication, so spread the word after you read the article.

Nathan Cecil
Partner, Holding Redlich
Editor-in-Chief, CoR Adviser

Getting accreditation right

Melissa Weller, ATA, Safety, Health and Wellbeing Director

As the review of the Heavy Vehicle National Law (HVNL) enters its second phase with the release of the consultation Regulatory Impact Statement (RIS), it is now more important than ever to fix truck accreditation.

New laws don't just happen overnight so it is important that we get it right. These laws will have an impact on operators and their employees for many years to come.

In a submission to the National Transport Commission's (NTC's) assurance models issues paper, the Australian Trucking Association (ATA) called for robust audit requirements, greater consistency and mutual recognition between schemes, the development of a single national accreditation framework, regulatory recognition for all recognised schemes and expanded scheme membership.

This submission included feedback from trucking operators, industry members, and

key points from the 2018 Medlock Analysis of Heavy Vehicle Accreditation Schemes in Australia, which recognised the ATA's TruckSafe accreditation scheme as a robust scheme. It called for TruckSafe accredited members to receive the same benefits as those in the National Heavy Vehicle Accreditation Scheme (NHVAS).

An initiative by industry for industry, TruckSafe is an award-winning accreditation system that has been improving the safety and professionalism of trucking operators nationwide since 1990.

For operators, accreditation shows that they are meeting their due diligence and duty of care.

For customers, TruckSafe provides confidence that operators have responsible work practices, well-maintained vehicles, healthy and well-trained drivers and management systems to meet their transport needs.

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Put yourself in the prosecutor's shoes

Meshal Althobaiti, Lawyer, Holding Redlich

Prosecution is not simply about punishing parties for failing to comply with their Heavy Vehicle National Law (HVNL) safety obligations. However, courts do make examples of those that breach their safety obligations in certain situations in order to send a message to others. In this article, we consider the perspective of the prosecutor to try to understand what may cause them to dish out more severe penalties. We also explore steps you can take to stay on top of your safety obligations.

The reality is that with the continual shaping of the HVNL and with more changes forecast, it is possible some parties will falter with their safety obligations and face prosecution.

Some businesses may even stumble more than once. The East Coast Mining Group has been convicted of three offences in a two-year timeframe. The company was recently fined \$10,000 by the Sydney Downing Centre Local Court for the offence of Not Comply Mass (Severe) as a result of a 25.1 per cent overload on Axle Group 3. It had been previously found guilty of similar severe breaches in the last two years.

Under the HVNL, a corporation is liable for five times the penalty applicable to an individual. In the case of East Coast Mining Group, this took the maximum penalty from \$14,000 for an individual to \$70,000.

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— HELPDESK QUESTION OF THE MONTH —

Can my vehicle's number plates be seized under the HVNL? If so, how can I get them back? (answer on page 7)

For questions regarding your current issue, or to get answers from our Helpdesk, email us at: helpdesk@coradviser.com.au

ATA launches 'Voice of the Driver' campaign

The Australian Trucking Association (ATA) and transport newspaper Big Rigs have launched the 'Voice of the Driver' campaign, which the organisations say will be "amplifying the voice of Australia's truck drivers".

The aim of the campaign is to obtain feedback from Australian truck drivers on the proposed fatigue laws as outlined in the Heavy Vehicle National Law (HVNL) review Regulatory Impact Statement (RIS).

"Following the success of the ATA and Big Rigs 'Have Your Say' campaign, we have teamed up again to amplify the voice of the driver as the HVNL review progresses," ATA Chief Executive Officer Ben Maguire said.

"Seeking feedback from truck drivers during the review process is absolutely crucial, as they are the ones dealing with these issues every single day.

"This campaign is about giving drivers the opportunity to share their views on the proposed fatigue laws in an easily accessible way, through our online survey and a series of social media polls."

The ATA will use the feedback gathered from the survey and the wider campaign to support its submission to the consultation RIS.

Editor of Big Rigs James Graham said he is thrilled to be resuming collaboration with the ATA in what he describes as a "critical juncture in the reshaping of the fatigue regulations in the HVNL".

"For too long drivers have felt they have been left out and that their opinions didn't matter when it came to policy matters," Mr Graham said.

"But the National Transport Commission is clearly now listening to their concerns and issues. We're already seeing the difference the Have Your Say campaign has made with the RIS, and I'm confident that the Voice of the Driver will only build on that momentum."

As a thank-you for participating in the survey, each respondent will have the opportunity to receive one of five Kenworth merchandise packs.

"We know our truck drivers are busy keeping Australia moving, however we really appreciate them taking time out of their day to share their valuable feedback," Mr Maguire said.

"Each week, our judges will select the best response to the open questions in the survey and award the driver with a Kenworth pack." ■

► Continued from page 1 "Getting accreditation right"

The newly released consultation RIS echoes the ATA's calls. It states:

"TruckSafe is a more comprehensive assurance scheme than the NHVAS. It has a much clearer focus on risk assessment and management and has been designed to align with the primary duty and CoR obligations in order to give certainty to accredited operators that they are complying with their obligations so far as is reasonably practicable."

The RIS puts forward options to revamp the NHVAS, or have multiple competing certification schemes, like TruckSafe, which supports the ATA's calls to remove duplication and unnecessary complication within the accreditation space.

This audit duplication is costly and time-consuming. The audits generally cover the same ground and are of little legal value.

In our submission to the HVNL review, the ATA proposed that customers should be able to rely on an operator's accreditation as part of establishing their own compliance with the safety duties in the HVNL. We even provided chamber-ready legislative amendments to put the proposal into effect.

I'm pleased to say that two of the options in the consultation RIS – options 7.3 and 7.4 – include this proposal.

For 28 years, TruckSafe has been a safety leader, working to continually strengthen its

standards to align with safety duties in the law and the Industry Master Code of Practice. Its rigorous independent audit system and 'one in, all in' approach is what makes TruckSafe such a strong system.

TruckSafe has been proven to be more comprehensive than the NHVAS, so it is only fair that operators who participate in the TruckSafe scheme are rewarded with business advantages.

Frustratingly, those who understand the benefits of comprehensive accreditation watch, and continue to protest, as government offers accreditation that is not as rigorous and that includes regulatory benefits for their members.

The ATA has called for accredited operators to be able to choose their preferred accreditation provider.

The role of the National Heavy Vehicle Regulator (NHVR) should be to regulate accreditation – not run a scheme themselves. This would also see all businesses certified by an approved scheme to be deemed compliant with their safety duties under the HVNL.

Now is the time to shape accreditation laws to a system that is both efficient and will deliver practical safety benefits to trucking operators.

For more information about TruckSafe or to become a member, head to www.trucksafe.com.au. ■

'Lose your work diaries and continue driving'

Nathan Cecil, Partner, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) has reported on a recent prosecution of the depot manager of a WA-based transport company.

Two drivers engaged by the company were scheduled to do a Perth-Sydney-Perth run.

On the return leg, the drivers notified the depot manager that they each needed to take their mandatory 24-hour rest break.

The depot manager responded by telling the drivers to 'lose' their work diaries and continue driving. Presumably fearing repercussions for not following the direction, the drivers continued driving.

The vehicle was intercepted by NHVR officers as part of routine inspections near Ceduna. By this time, they had been driving for eight days without the mandated 24-hour rest break.

Upon being informed by the drivers of the direction they were given to continue driving,

an investigation was launched into the conduct of the depot manager.

The depot manager was charged with one offence for each driver for 'asking, directing or requiring the driver to do something that they know would have the effect of causing the driver to drive while impaired by fatigue or drive in breach of work/rest hours'.

The maximum penalty was \$11,120. The Court imposed fines of \$4,000 per offence, reduced by 25% to \$3,000 per offence, in recognition that the depot manager entered a guilty plea early in the proceedings, thereby avoiding the time and cost of a contested charge. The depot manager had convictions recorded against them.

Ray Hassall, Executive Director Statutory Compliance of the NHVR reminded parties in the chain "If you are asked to do something you know is not safe you can make a free confidential report to the Heavy Vehicle Confidential Reporting Line on 1800 931 785". ■

Telematics, technology and the road ahead

Nathan Cecil, Partner, Holding Redlich

The role of technology and data in enabling Australia's supply chains to meet the growing freight task more safely and efficiently cannot be underestimated. This year has demonstrated the importance of a reliable transport supply chain and the place for technology in realising this. It is apparent that the intelligence provided by data systems is becoming increasingly integral to industry. In this article, we take a closer look at telematics to understand its place on the road and in the Chain of Responsibility (CoR).

Telematics technology is one of the most significant developments since the Heavy Vehicle National Law (HVNL) was first implemented. In previous editions, we have advocated for technology in promoting efficiency and achieving compliance. However, telematics can cause confusion as it is not expressly captured within the HVNL. So, let's unpack telematics to explore how technology can support contemporary business approaches to achieve regulatory, productivity and safety outcomes.

THE NATIONAL TELEMATICS FRAMEWORK

Transport Certification Australia (TCA) is the national organisation that provides assurance services relating to transport technologies and data to enable public purpose outcomes from road transport.

The TCA is responsible for the administration of the National Telematics Framework (the Framework), including its rules, specifications, agreements, digital infrastructure and other supporting services.

The Framework is a digital business platform consisting of infrastructure and rules that support an open marketplace of telematics and related intelligent technology providers.

WHAT ARE TELEMATICS?

> DEFINITION: TELEMATICS

The term 'telematics' refers to integrated systems of information, communications and sensors to exchange data and information between vehicles and other locations. Telematics is a type of technology which involves a system that captures and sends information electronically, typically with an in-vehicle device.

A telematics system is a multi-functional piece of technology that monitors information relating to a vehicle or an entire fleet. The system gathers data including vehicle location, driver behaviour, engine diagnostics and vehicle activity, and reproduces that to assist fleet operators to manage their resources. This data can assist for regulatory purposes, such as recording work and rest hours, and attributes such as speed, location and on-board mass. There are also commercial benefits for users,

as they can optimise freight operations by collecting diagnostics about harsh braking, engine performance and routing.

TELEMATICS TODAY

In fulfilling one of their functions under the HVNL, the TCA established the Framework to facilitate the creation and use of telematics within the industry.

Telematics technology is used today to assist in heavy vehicle compliance and enforcement practices.

With the proliferation of telematics software across the heavy vehicle industry, the TCA has emphasised the need to establish regulations and frameworks to ensure they are being used appropriately.

The Framework sets out the compliance structure for the use of telematics. As outlined by the TCA, the Framework supports government agencies, regulators and end-users by:

- providing a platform for the delivery of an open technology market;
- providing outcome-focused, technology neutral, disruption-resilient applications;
- addressing security and privacy concerns;
- encouraging innovation; and
- facilitating the recovery of costs from the telematics and technology sector, which offset cost burdens to government.

Currently, the use of telematics is dealt with under chapters 6 and 7 of the HVNL. Chapter 6 relates to National Heavy Vehicle Regulator (NHVR) approved electronic recording systems for work and rest times to assist in the management of driver fatigue-related obligations. Chapter 7 relates to TCA-approved intelligent transport systems. Under Chapter 6, the NHVR is authorised to approve electronic recording systems on the application of manufacturers of those systems, operators of fatigue-regulated heavy vehicles and drivers of fatigue-related heavy vehicles.

These electronic recording systems for fatigue-related compliance activities are referred to as Electronic Work Diaries (EWDs), which are an electronic recording system that can record work and rest times to assist drivers in managing their fatigue-related obligations under the HVNL.

Telematics enables the low cost sharing of data between multiple parties in a manner which benefits both private entities and the public. It relies upon the use of a platform of business rules, data standards, definitions and other 'cyber-infrastructure' that is technology neutral but encourages interoperability of systems, technology and data.

UNDERSTANDING THE FRAMEWORK

The Framework encourages efficiency and opportunities for further optimisation. It enables balanced outcomes to be achieved across the four inter-related pillars of: policy, operational, technical and commercial.

Across this, it brings providers, producers and consumers together.

Producers are the creators of Framework offerings and applications such as government bodies, regulators and the private sector. Consumers are the buyers or users of the Framework offerings and applications such as operators, drivers and end users. Providers are the interface between producers and consumers and make technology offerings and applications available to consumers.

Ultimately, the Framework facilitates the creation and use of offerings and applications by using a common infrastructure through a government endorsed digital business platform.

The TCA has developed a suite of documents within the Framework so that businesses can be provided with a level of assurance that telematics deliver the intended outcomes for compliance. These can aid understanding of how the software is to be used.

THE ROAD AHEAD

The rapid manner in which technology is being developed will continue to challenge the pace of legislative reforms. New technologies, business models and services are continually emerging. In its submission to the National Transport Commission (NTC), the TCA recommended that as far as possible legislation should be agnostic of technology. This essentially means that the HVNL should not prescribe specific technologies. Further to this, the TCA also set out in its submission that laws should instead enable technology to its fullest extent by incorporating various provisions which:

- provide opportunities for policy makers, program managers and duty holders to introduce innovative approaches to use technology and data to deliver upon the objects of the HVNL;
- offer consistency and certainty to all stakeholders in the use of technology and data in the heavy vehicle sector;
- can accommodate the disruptive influences of new technologies, market entrants and business models;
- define clear roles, responsibilities and accountabilities for technology providers in the context of the objects of the HVNL; and
- enable the use of existing technologies by transport operators for regulatory purposes where appropriate.

The TCA states that the HVNL could benefit from provisions that put positive obligations on technology providers to meet certain clear requirements to core duty holders in the CoR.

In an environment where the operation of heavy vehicles is being influenced by digital transformation, there is an opportunity to incorporate enabling provisions for technology and data into the HVNL. This can enable data to be fit for purpose for different requirements such as aiding meeting safety obligations and improving operations. ■

► Continued from page 1 **"Put yourself in the prosecutor's shoes"**

Even though the company was ultimately fined \$10,000, this was a significant increase on the previous fines of \$2,500 and \$500 - but clearly well short of the \$70,000 maximum.

A spokesperson of Transport for NSW said to the Australian Transport Network (ATN):

"Transport for NSW has welcomed the strong message recently sent by the courts that overloading heavy vehicles is unacceptable,"

"Overloading heavy vehicles can be a substantial safety risk which increases the risks of a crash and can lead to road damage."

"Both trucking companies and the driver can be held responsible for overloading offences."

TO PROSECUTE OR NOT TO PROSECUTE?

The idea of putting yourself in the shoes of an investigator or prosecutor can be a useful way to approach your safety duties.

Prosecutors are central to the public enforcement of law and we can look to how the National Heavy Vehicle Regulator (NHVR) makes decisions on offences under the HVNL to better understand the prosecution process. The most crucial step in the process is the decision of whether or not to prosecute. Offences are not automatically the subject of prosecution.

The decision to prosecute is based on a two-part test that involves determining whether there is a reasonable prospect of conviction and the prosecution is in the public interest.

When the NHVR commences a prosecution, they aim to:

- change the behaviour of the alleged offender;
- deter future offenders; and
- punish those who commit offences.

The NHVR is committed to a policy of prosecuting whenever significant breaches of the HVNL occur, which generally include cases involving fatalities and/or serious injury or where potential risks to personal/community safety are high. Organisations that are seeking to adopt and maintain a risk-based approach to meet their safety obligations should develop a compliance framework that is agile enough to respond to new and existing risks in a business' commercial activities based on safety and prevention.

PROSECUTION 'RED FLAGS'

The CoR primarily focuses on the overarching primary duty, i.e. to do what is reasonably practicable to ensure the safety of road transport operations.

The NHVR will look at the following principles when considering whether to commence a primary duties prosecution:

- Has a death or serious injury occurred or was there a real possibility that one could occur?
- Was the safety risk caused by serious or systematic non-compliance with the HVNL?
- Was the safety risk created by business practices and/or company culture?
- Is there a demonstrable preference of a commercial benefit over safety?
- What was the actual ability of any proposed defendant to influence and/or control the safety risk?
- If a defendant company, what is the potential culpability of any natural persons involved in the company?

The above principles should give your business some insight into how to develop frameworks to help safeguard your business from prosecution by addressing each of the above prosecution 'red flags'.

Each person in the CoR must, so far as is reasonably practicable in respect of their transport activities:

- a. eliminate public risks and, to the extent it is not reasonably practicable to eliminate public risks, minimise the public risks; and
- b. ensure the party's conduct does not directly or indirectly cause or encourage the driver of the heavy vehicle to contravene the law, or another person, including another party in the CoR, to contravene the law.

Such frameworks should ultimately guide parties to help them understand their compliance obligations so that they can fulfil their primary duty. This necessitates a forward-looking approach to ensure you are focusing on what you are doing to prevent breaches from occurring.

THE ROLE OF TECHNOLOGY IN COMPLIANCE

With the majority of convictions, such as in the case of East Coast Mining Group, companies fail because they neglect to prioritise safety and compliance. Prosecutors will look to various things to determine whether steps have been taken to prioritise safety and compliance.

In last month's issue, we looked at the notable role that technology can play in meeting safety objectives and demonstrating compliance.

The Glen Cameron Group advocates how adopting technology can help a business implement policies and procedures in a more thorough, efficient, accessible and beneficial way to parties in the Chain of Responsibility (CoR). This assists in developing a compliance framework that is agile.

Glen Cameron, the company's founder, stated:

"We're fortunate to have developed a talented senior management team to provide key support and considered execution of the company's strategies and plans, and we've consistently embraced the smart application of technology to deliver safety, environmental and efficiency dividends."

Large businesses, in particular, demand better technology so that managers do not lose control and increase risk of a breach. Digital technologies provide businesses with increased visibility, greater accessibility and a wider reach across business departments.

The Glen Cameron Group uses a telematics platform to disseminate its meeting notes to all its drivers in real time using a messaging system and receive and respond to any questions direct to individual drivers as the need arises. Mr Cameron's business has also had all GPS devices integrated with a hands-free phone and the ability to dial a managed list of depot and operational staff numbers.

Another facet of Mr Cameron's business is thinking about the 'long game' and as he puts it: *"Being safe at work has to be at the front of everything we do"*. As far as avoiding prosecution goes, this would be the right kind of mindset to adopt.

His business is active in the industry and contributes by having a strong record of pushing for improvements in driver support and facilities in Australia. In the event of a prosecution, it is this kind of record that prosecutors will consider and courts will take into account as a mitigating factor if you are found guilty of an offence under HVNL.

MITIGATING FACTORS

Mitigating factors are circumstances that may reduce the punishment an offender receives after being found guilty or pleading guilty to an offence. They reduce the severity of the wrongful conduct and, therefore, the necessary penalty.

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) imposes an obligation on courts to take certain factors into account when determining the appropriate sentence to hand down to a party that has committed an offence.

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If an offence occurs, you should give thought to any mitigating factors that may apply and either put measures in place to satisfy them or gather evidence to prove them. Some of the factors that may be considered by a court to reduce any sentence or fine imposed for a breach of the HVNL include:

- **Your previous criminal history:** if you have no prior convictions, you can generally expect to be treated more leniently than someone who does have prior convictions.
- **Whether you are of good character:** good character may be shown through community involvement, general compliance with the law or other obligations, or written character references from someone who knows you personally or professionally.
- **Whether you provided assistance to law enforcement authorities:** the court will look favourably on any assistance you have provided

to law enforcement authorities, e.g. if you have cooperated in any investigations into an incident and/or provided information that will help to bring other offenders to justice. You should always aim for a full and frank cooperation with the authorities.

IT IS NEVER TOO LATE TO START

Often it takes something going wrong before parties take a closer look at their systems and procedures and critically evaluate them. In the event that you find yourself facing a prosecution, it is imperative that you can show tangible ways you prioritise safety. If you have received a Court Attendance Notice requiring you to answer to charges for an offence and have pleaded guilty, do not think it is too late to adopt good practices. Think about investigating the incident yourself or through an external investigator to demonstrate that you are taking the breach seriously and attempting to remedy the situation. ■

Step-by-Step: How to conduct an investigation

Meshal Althobaiti, Lawyer, Holding Redlich

A thorough, independent investigation shows the business took an incident that occurred seriously and will put you in a better place in the event of a prosecution.

Investigations are an important step for a business to comply with its legal obligation to prevent/address safety breaches under the Heavy Vehicle National Law (HVNL).

Although not all incidents will amount to a breach of the HVNL, it is still important for businesses to actively manage any breaches to limit the risk of a substantial fine.

Conducting thorough and balanced investigations and maintaining records of the investigation process, outcomes and findings helps to ensure that your business is in a stronger position to defend potential prosecutions under the HVNL.

Prevention is the main objective of most investigations and a good investigation aims to establish what actually happened and highlight the series of events that should have taken place to identify areas that require improvement or change.

We have prepared a table to help you understand and implement an investigation process that suits your organisation. ■

STEP-BY-STEP: HOW TO CONDUCT AN INVESTIGATION		DOWNLOAD 	
Step 1: Preparation and information gathering	<ul style="list-style-type: none"> ▪ Visit the scene as soon as possible after the incident and before physical evidence is disturbed. Ensure that you take photographs or sketches. ▪ Identify and categorise the nature of the incident (e.g. fatigue management, mass, dimension and loading and speed compliance offences). ▪ Identify the parties to the incident and their location and availability (e.g. witnesses, driver, contractor, scheduler, loading manager, loader, consignor or consignee). ▪ Obtain any relevant background information available (e.g. compliance documents, CCTV footage, equipment manuals, previous reports, design specifications and operating logs). 		
Step 2: Interviewing the relevant parties	<ul style="list-style-type: none"> ▪ Interview witnesses separately – note down all sources of information and keep records to show that the investigation was conducted in a fair and impartial manner. ▪ Ensure that you look for causes and do not attribute blame. Systems fail for many reasons and the people involved are not necessarily the cause of the incident in question. ▪ Build a chain of events to identify all the causes. For the investigation to be successful it is necessary to establish the following information: <ul style="list-style-type: none"> a. events leading up to the incident; b. facts of the incident itself; c. facts regarding what occurred immediately after the incident; and d. essential factors and causes. ▪ Develop questions that will help you to establish the facts. Remember to take care in obtaining answers to some of these questions as the investigator could be accused of apportioning blame. 		
Step 3: Determining recommendations and conclusions	<p>What systems failed?</p> <ul style="list-style-type: none"> ▪ How can you prevent failure or make it less likely? ▪ How can you detect risks that could lead to a possible failure? ▪ How can you control failure and minimise the consequences? ▪ Why was the system in place? ▪ What could have been done instead? 	<p>Which parties failed?</p> <ul style="list-style-type: none"> ▪ Why did the party fail? ▪ Did an action or lack of action lead to the failure? ▪ How can you ensure failure is less likely? <p>What could be done instead?</p> <ul style="list-style-type: none"> ▪ Who else could do it or how else could it be done? 	<p>What specific items in the system triggered the incident?</p> <ul style="list-style-type: none"> ▪ What is the purpose of this item? ▪ Is there something else that could have been done instead?

Relying on mistake of fact to defend charges

Rebecca Niumeitolu, Lawyer, Holding Redlich

Ignorance never equates to bliss where your safety obligations are concerned. However, it can be argued that relying on genuine mistake of fact to defend charges under the Heavy Vehicle National Law (HVNL) is not entirely out of the question following changes made to the law at the end of 2018. In this article, we look at what the mistake of defence is and how it might arise in different alleged offence settings under the HVNL.

Prior to the 2018 overhaul of the HVNL, various offence provisions expressly excluded persons charged with relevant offences from relying on the 'mistake of fact' defence. For example, in June 2017, s 96 prohibited a person from driving a heavy vehicle that did not comply with mass requirements and stated that a person charged with an offence under this section did not have the benefit of the mistake of fact for the offence. Similar exclusions of the mistake of fact defence were also set out for breaching dimension and loading requirements, tampering with emission control systems to heavy vehicles, and, among others, extended liability provisions.

As of October 2018, provisions excluding the mistake of fact defence were removed. Although the HVNL as we now know it does not specifically state that parties in the Chain of Responsibility (CoR) can rely on that defence, it can be persuasively argued this position is supported by the explanatory memorandum that accompanied the 2018 changes which stated that "the mistake of fact defence will apply to all offences" (Explanatory Memorandum to the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (Qld)). So, does the removing of exclusions of the mistake of fact defence have the effect of allowing defendants charged under the HVNL to rely on that defence?

WHAT IS THE MISTAKE OF FACT DEFENCE?

The mistake of fact defence arises where at the time of an alleged offence the accused had a reasonable belief regarding the existence of particular facts that were incorrect. Had the facts been true, the acts by the accused would have been innocent.

Typically the defence would be relied on where an accused wants to say that they did not know of the relevant state of facts that make up the ingredients of an offence.

CAN A COMPANY ALSO RAISE A MISTAKE OF FACT DEFENCE?

Yes, a company can raise a mistake of fact defence. If a business wanted to raise this defence, the Court would look at the beliefs and understandings of persons who are the 'directing mind of a company' to decide whether a mistake of fact defence arises (*Timms v Darling Downs Co-Operative Bacon Association Ltd* (1988) 38 A Crim R 430 at 441). For example, the belief of executives, directors and managers.

Examples in the HVNL context can be seen in the table below.

WHERE MIGHT IT BE MORE DIFFICULT TO RAISE A MISTAKE OF FACT DEFENCE?

The HVNL does not exclude the mistake of fact defence from breaches of the primary duty. That said, it can be much more difficult to establish a mistake of fact defence to a charge of contravening the primary duty, where charges are commonly laid in circumstances of repeated or systemic failings by a CoR party to ensure so far as reasonably practicable the safety of their transport activities.

For example, where a charge for breaching the primary duty is based on facts that also give rise to multiple breaches of loading requirements, the accused might need to show that they had a reasonably mistaken belief as to each instance of alleged wrongdoing. A mistake of fact defence on those facts might seem disingenuous, or in turn point to other failings in the accused's CoR reporting and monitoring systems, or might even show a lack of due diligence by the executive.

A GREY AREA

The terms of the HVNL do not highlight availability of the mistake of fact defence for CoR parties that are charged, but they equally do not exclude that defence. For 'A+' CoR parties that are caught by surprise by charges for contravening HVNL requirement, this defence might be worth advancing to fend off charges. ■

TABLE 1: EXAMPLES IN THE HVNL CONTEXT

Alleged contravention	Example of how a mistake of fact defence could arise
Operator charged with permitting a heavy vehicle to be used on the road that is unsafe due to mechanical defects	If the heavy vehicle had recently been serviced, signed-off for use and the mechanical defect was latent, then an operator could seek to rely on a mistake of fact defence to say that it reasonably believed that the heavy vehicle was safe. To persuade the court the mistake was reasonably held by the operator as the accused, it would likely need to produce records of inspections of the heavy vehicle including the most recent one identifying that the vehicle was safe for use.
Operator charged with permitting a person to drive a heavy vehicle in contravention of loading requirements	An operator might use the mistake of fact defence if they considered that the load was compliant at the time it departed its site and that it might have shifted just before departing its premises or during the journey was no fault of its own. To advance the mistake of fact defence in that scenario the operator could point to evidence showing that: <ul style="list-style-type: none"> its supervisor oversaw packing and could attest to the goods being loaded and secured in accordance with relevant <i>Load Restraint Guidelines</i>; its supervisor completed a checklist confirming that goods were loaded and secured complying with HVNL requirements; and it trained the driver in load restraint requirements, and required the driver to check the load intermittently during the journey.

HELPDESK

Each month we publish some of our top questions from the *CoR Adviser Helpdesk*.

To ask your question today, email: helpdesk@coradviser.com.au.

Please note: All identifying details are removed for reasons of confidentiality.

Whether your concerns are about recent legislative changes, difficulty ensuring compliance of others in the supply chain, or the steps you need to take to protect yourself, our team of lawyers is ready to answer your questions.

Can directors be banned?

Q Can directors be banned for a Chain of Responsibility (CoR) breach?

A Not only can executives who fail their duty be hit with hefty fines and potential jail time, they can also be banned from being involved in the management of their business or performing certain safety-critical tasks within their business.

In the case of *R v Metropolitan Demolitions and Recycling Limited (2017)* the Roads and Maritime Services conducted an investigation into Metropolitan Demolitions and found 138 mass offences, three instances of knowingly providing false information and 14 executive officer offences. Upon sentencing, the court used its extended penalty powers to fine Metropolitan Demolitions \$1.5 million. Plus, the company and its director were ordered to pay \$50,000 in prosecution costs. In addition to this, the director was issued with the following prohibition order.

The court ordered that for a period of 12 months, the director was prohibited from:

- being a director, executive officer or manager of a company engaged in the operation and use of heavy vehicles;
- managing the loading and consignment of loads on heavy vehicles; and
- managing the receipt of loads from heavy vehicles.

The above case shows what a director can face if they knowingly neglect their due diligence. Due diligence means that for any business entity subject to any CoR safety duty, the executive for that business entity must ensure that the business is doing the right thing.

Sections 26F, G and H of the Heavy Vehicle National Law (HVNL) set out the maximum penalties for executives, as follows:

- Category one offence (conduct that recklessly exposes a person to risk of injury) – a maximum of \$300,000 and/or up to five years in jail.
- Category two (conduct that exposes a person to risk of injury) – a maximum of \$150,000.
- Category three (conduct that breaches the executive duty) – a maximum of \$50,000.

The executive liability provisions of the HVNL make it clear that CoR safety is a boardroom and senior-management issue as well as an operational issue. If executives don't discharge their duty, they can be prosecuted and fined, even if no incident or accident has occurred. Executives must proactively ensure that their business is complying with the HVNL – the consequences of failing to do so could be severe.

Why should I have Registered Industry Codes of Practice?

Q Am I required to have a Registered Industry Code of Practice? What benefits does it offer?

A You are not required to have Registered Industry Codes of Practice.

Registered Industry Codes of Practice are codes developed by any party that is registered by the National Heavy Vehicle Regulator (NHVR). They set out detailed, practical standards and procedures to achieve compliance with the HVNL.

Registered Codes are an excellent and very valuable tool to help you comply with the HVNL and defend any investigation or prosecution.

Section 632A of the HVNL provides that where someone is charged with an offence they will be able to rely on a Registered Code to prove "what is known about a hazard or risk, risk assessment, or risk control, to which the code relates" and "what is reasonably practicable in the circumstances to which the code relates".

Registered Code sets out the current state of industry knowledge of compliance hazards and risks and best practice for how to respond to them. If you can demonstrate that you have followed a Registered Code it will be easier for you to defend a prosecution as you will be able to show that you have applied current industry best-practice risk assessment and response measures. However, a Registered Code is not a get out of jail free card.

How do I retrieve seized number plates?

Q Can my vehicle's number plates be seized under the HVNL? If so, how can I get them back?

A Section 551 of the HVNL empowers an authorised officer to seize a number plate (whether or not it is displayed on your vehicle) if the officer reasonably believes:

- that the number plate is being used other than in accordance with an Australian road law; or
- that the number plate was not issued in accordance with an Australian road law.

In circumstances where a number plate is displayed on a heavy vehicle, the officer may seize the number plate if the officer reasonably believes:

- that the number plate does not bear the registration number last assigned to the vehicle; or
- that the vehicle is not registered or exempt from registration and the period during which the registration of the vehicle may be renewed has expired.

To retrieve the seized number plate, the driver must satisfy to the officer that the number plate was issued and is being used in accordance with the road laws or that circumstances exist that allow it to be used while not registered.

The above highlights why it is important for drivers to abide by road laws and maintain their vehicle registration. Drivers who have had their number plates seized or have their plates stolen or damaged will need to contact the transport authority in their state. The process for obtaining replacement plates varies from state to state. ■

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Hotline brings primary duty prosecution

On 25 August 2020, the National Heavy Vehicle Regulator (NHVR) published a media release identifying a Queensland trucking company was charged and pleaded guilty to two charges of contravening its primary duty.

The charges against the company arose following tips on the NHVR's Confidential Reporting Line. Subsequent investigations showed that drivers of the company were involved in various breaches of fatigue hours. The NHVR's Executive Director of Statutory Compliance, Mr Ray Hassall, stated "*Steps [the company] failed to take included not scheduling journeys to ensure that they could comply with the fatigue regulations of the Heavy Vehicle National Law (HVNL), and not monitoring the GPS data from the trucks to ensure the drivers were complying with their fatigue requirements.*"

The company was fined \$60,000 in respect of its breaches.

The case is the first prosecution in Queensland under the post-October 2018 HVNL laws and the primary duty. At the same time, the company's inadequate fatigue practices are not the first of their kind, and serve as an ongoing reminder of how gaps in fatigue compliance systems are a magnet for enforcement action.

LESSONS TO LEARN AGAIN AND AGAIN

- **Rookie mistake – if you have GPS then you might as well use it**

Time and time again we see operators undone by their failure to use systems that they already have in place to monitor compliance with work and rest hour options.

For example, published examples of court outcomes on the NHVR's website show that on 14 November 2018 a trucking company in Adelaide was fined \$21,600 for failing to prevent a driver driving while fatigued. The charges arose in circumstances where the company's trucks were fitted with GPS and GPS data could have been easily accessed to cross-check the driver's compliance with work and rest options in his work diary.

History tells us that if you have a fatigue system you should use it, particularly if you suspect a driver is driving while fatigued or not complying with work and rest options.

If you don't use it, you can bet that any prudent regulator investigating non-compliance with fatigue requirements will. That appears to be how in April 2020, a Queensland driver ended up with a \$12,000 fine plus orders to pay the prosecutor's costs after the regulator investigated GPS data and ANPR data to find that he had falsified his work diary.

- **Gaps in fatigue compliance = exposure to investigation and enforcement action**

If risks to road safety are not enough to get you over the line to comply with fatigue compliance, a higher susceptibility to prosecution and steep pecuniary penalties might.

Fatigue is heavily regulated under the HVNL and compliance with such requirements produces a significant paper trail. This is arguably why we see so many prosecutions under the HVNL focusing on breaches of work diary requirements and work and rest hour options. In effect, fatigue practices are highly documented and can be easily cross-checked.

In the circumstances, it is best to get compliance right off the bat because it is an area in which weaknesses in CoR compliance systems and breaches of HVNL fatigue requirements are easily exposed.

- **Where there is one there are usually more**

The fact that the Queensland company was charged with a primary duty offence suggests that its failings in respect of fatigue compliance were repeated and/or systemic. Case law also shows us that fatigue breaches often come in groups.

The lesson for CoR parties is to be proactive about rectifying possible breaches of fatigue requirements; whether it means providing drivers and schedulers with a toolbox talk focusing on fatigue, reviewing driver work diaries if there is an incident of non-compliance with work hour

options, or giving a driver a warning if he or she does not comply with instructions concerning fatigue compliance.

Taking a proactive approach to fatigue compliance can avoid risks of breaches, charges and fines mounting. As can be seen by the \$60,000 and \$21,000 fines respectively imposed on the Queensland and Adelaide trucking companies identified above, non-compliance is not cheap.

- **Provide a space for employees to express concerns to you**

Creating a culture of compliance, where employees feel empowered to report suspected or actual breaches of the HVNL, is critical to ongoing compliance with the HVNL and avoiding enforcement action.

Section 699 of the HVNL provides that an employer must not dismiss or otherwise prejudice employee if he or she makes a complaint about contraventions or alleged contraventions to past or present employers, colleagues, unions, public authorities or law enforcement agencies. The same applies if an employee helps or gives information to a public authority or enforcement agency for actual or suspected breaches of the HVNL.

Practically speaking, if your business does not provide an open space for employees to discuss and report HVNL compliance issues, then you risk that employee leaving or making a report to the HVNL on its hotline. Arguably the consequences of an employer going elsewhere are more serious for your business, as the Queensland trucking company case shows us. Reporting on the hotline may result in investigation and enforcement action before giving your company the chance to redress possible non-compliances with HVNL requirements and collating information in support of its case.

Accordingly, it appears both from a compliance and strategic perspective that you should encourage reporting within your business rather than driving employers to air their grievances elsewhere. ■

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OUT NOVEMBER 2020

- **\$80,000 for fatigue breaches**
- **Over size and over mass**
- **How to make sure your trucks are safe**