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Chain of Responsibility solutions

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From Your Editor-in-Chief



Are the chain of responsibility (CoR) laws an 'us' versus 'them' proposition? We take the view that many of the objectives of the regulators in fact align with what should be some of the goals of all supply chain businesses – namely, a fair and safe playing field for all that results in productive logistics chains. In this issue of the *CoR Adviser*, we profile the National Heavy Vehicle Regulator (NHVR) Prosecutions Unit and find out that while it is not necessarily 'us', we may have more in common than you think.

We also take a deep dive into heavy vehicle maintenance obligations, which primarily fall on operators and owner drivers. Importantly, we dispel the myth that consignors and consignees are equally responsible for maintenance and must conduct heavy vehicle condition inspections to meet their safety duties.

Have you ever wondered how courts arrive at the financial penalties that they impose for breach of the CoR laws? You can find out in our article on page 8. If you happen to find yourself on the wrong side of the law, this will provide you with guidance on the evidence that you would need to convince a judge that they do not need to impose the heaviest possible penalty on you.

Happy reading.

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

Getting to know the Big Bad Wolf

Nathan Cecil, Partner, Holding Redlich

In many industries, the regulator is considered the 'Big Bad Wolf', imagined as the monster waiting to get you if you step out of line. Rather than sowing fear of the Big Bad Wolf, we take the approach that it is better to understand the regulators, their priorities, and how they make decisions concerning who to target and what enforcement action to take.

For this reason, we have explored the approach of the National Heavy Vehicle Regulator (NHVR) to enforcement in past issues of the *CoR Adviser*. In this issue, we examine the NHVR Prosecutions Unit, which makes prosecution decisions.

WHAT IS THE NHVR PROSECUTIONS UNIT?

The Prosecutions Unit is a team of lawyers employed by the NHVR. Within the NHVR, the Prosecutions Unit acts independently

in deciding whether to prosecute or not, in accordance with the NHVR Prosecution Policy.

So, it is part of the NHVR, but independently authorised to make the final decision whether to prosecute.

WHAT IS ITS JOB?

The main job of the Prosecutions Unit is to make decisions on what matters to prosecute.

As part of this, the Prosecutions Unit provides advice to enforcement teams within the NHVR and other roadside enforcement agencies on alternative enforcement actions available. This could include, for example, improvement notices and enforceable undertakings. The reason for doing this is to seek to ensure that the right enforcement tool is used for each matter.

Once a decision to prosecute is made, the Prosecutions Unit is responsible for bringing those proceedings.

➤ *Continued on page 2*

Putting yourself in the prosecutor's shoes

Nathan Cecil, Partner, Holding Redlich

Facing a criminal charge is an extremely stressful experience and it can turn your business world upside down. It is true that chain of responsibility (CoR) prosecutions are not just about punishing parties for failing to comply with their Heavy Vehicle National Law (HVNL) obligations. It is also true that prosecutors will welcome strong messages from courts that breaches of the HVNL are unacceptable.

The reality is that with the continual reshaping of the HVNL, and with the laws (again) under wholesale review, it is possible that some of you will face a prosecution if you slip up when seeking to meet your safety obligations. Some businesses may even fall more than once.

For example, a fleet operator, East Coast Mining Group, has been convicted of three similar offences within a 2-year period. The latest resulted in a fine of \$10,000 for the HVNL offence of 'Not Comply Mass (Severe)' as a result of a 25.1% overload on Axle Group 3. Unsurprisingly, Transport for NSW condemned this sequence of offences.

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. Even though the company was ultimately fined \$10,000, this was a significant increase on the previous fines of \$2,500 and \$500.

➤ *Continued on page 4*

— HELPDESK QUESTION OF THE MONTH —

What happens if I receive a defect notice? (answer on page 7)

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

Sole trader farmer enters into enforceable undertaking after breaching mass requirements

Jessica Oldfield, Editor, Portner Press

The National Heavy Vehicle Regulator's long streak of accepting enforceable undertakings continues – this time with a first for a Victorian sole trader and farmer who failed to ensure his vehicle complied with mass requirements when transporting potatoes.

The National Heavy Vehicle Regulator (NHVR) commenced a prosecution against the farmer after an investigation determined that in July 2020, he failed to comply with the mass limits under the Heavy Vehicle National Law (HVNL). The steer axle of the heavy vehicle owned by the farmer weighed 8,850kg, which is 147% of the permitted mass of 6,000kg.

The NHVR ultimately accepted an enforceable undertaking from the farmer. NHVR Director of Prosecutions Belinda Hughes said this case demonstrates how enforceable undertakings as an alternative avenue to prosecution can be effective for small operators.

"Enforceable undertakings enable the NHVR to encourage and monitor safer behaviours, to improve safety for all road users," Ms Hughes said.

"An enforceable undertaking is designed so that instead of paying money in fines, it's instead spent on improving safety ... it's available to individual farmers, all the way to multimillion-dollar companies.

"In this case, we determined that more safety benefits would be achieved from an enforceable undertaking, for both [the farmer] and the wider farming industry."

Under the enforceable undertaking, the farmer must:

- complete a personalised course by Mass Management to bring greater awareness and specific knowledge of all issues surrounding mass management and heavy vehicles; and
- upon the completion of the course, distribute information gathered from the NHVR website and the Mass Management course to the community to bring greater awareness and specific knowledge to the users of heavy vehicles and the wider community of issues surrounding the safe loading of heavy vehicles.

The initiatives, which are to be completed within 12 months, will carry an estimated cost of \$2,000. ■

► Continued from page 1 "Getting to know the Big Bad Wolf"

HOW DOES IT MAKE DECISIONS?

The Prosecutions Unit is provided with a brief of evidence from the investigator. It reviews the brief to determine whether there is enough evidence to support a charge. If there is, the Prosecutions Unit considers whether:

- bringing proceedings falls within the guidelines of the Prosecution Policy; or
- some other enforcement action would be more appropriate.

If prosecution is appropriate, the Prosecutions Unit drafts the charges and brings the prosecution. It then arranges for the charges to be served on the defendant and conducts the prosecution in court.

WHAT ARE ITS ULTIMATE GOALS?

Some readers might be surprised to hear that the Prosecutions Unit's goal is not 'to acquire a big war chest of penalties'; rather, the primary goal of the Prosecutions Unit is 'to achieve court outcomes that drive safer outcomes'.

This reflects my own observations of the NHVR's increasing focus on providing supply chain businesses with greater awareness and guidance (e.g. see our January 2022 issue) and accepting enforceable undertakings that result in observable safety improvements

(e.g. see our March 2022 issue), as opposed to just fining businesses to score some runs on the board.

The Prosecutions Unit seeks to achieve this outcome by:

- applying for more Supervisory Intervention Orders that aim to re-educate offenders and prevent future breaches;
- focusing enforcement action for mass, dimension and loading offences on operators, which have the greatest degree of responsibility, control and influence over the conduct of such transport activities;
- applying 'commercial benefits orders' (repayment of any increased revenue of costs saved because of offending conduct) to ensure a fair and level playing field that doesn't permit businesses to obtain an unfair commercial advantage over their law-abiding competitors; and
- focusing on prosecuting the cases that produce the worst safety outcomes, such as those that result in the greatest risk of harm or arise from systemic failure of a business to address chain of responsibility risks.

Rather than being the Big Bad Wolf, the Prosecutions Unit's goal to ensure a fair and safe playing field that promotes productivity may in fact align more closely with your goals than you thought. ■

Regulator accepts enforceable undertakings from former directors of mining company

Joshua Clarke, Lawyer, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) has accepted enforceable undertakings from former directors of a mining company, providing a timely reminder of the importance of executive due diligence under the Heavy Vehicle National Law (HVNL).

Following the death of a company contractor, two former directors of Goondicum Resources Pty Ltd were charged with HVNL offences. The independent haulage contractor, while engaged by the company, was fatally injured when the heavy vehicle he was driving apparently stopped on an inclined section of public road, before rolling backwards over an adjacent drop-off.

The company's former directors were subsequently alleged to have failed to exercise due diligence to ensure the company's compliance with the primary safety duty under section 26C of the HVNL.

The regulator, as an alternative to prosecution, accepted an enforceable undertaking.

The two former mining company directors are required under the enforceable undertaking to:

- develop a detailed HVNL due diligence manual for executives and managers to better understand their chain of responsibility (CoR) obligations under the HVNL (which will be available to the NHVR to distribute to the industry), and to develop their own personalised due diligence systems;
- produce a video aimed at directors and executives of smaller scale transport operators, which will include:
 - a personal account from the directors of the incident;
 - a general summary of CoR;
 - appropriate due diligence steps; and
 - the tools and resources available from the NHVR; and
- prepare and present a paper to the Australian Institute of Directors and/or similar bodies summarising the events and lessons from the charges.

The total cost of the enforceable undertaking is valued at approximately \$72,000. ■

National Women in Transport initiative

Jessica Oldfield, Editor, Portner Press

Coinciding with International Women's Day last month, the National Transport Commission (NTC) launched the National Women in Transport initiative.

The initiative:

- showcases women in transport;
- tackles some of the negative perceptions of a career in the industry; and
- aims to improve female participation within the transport sector.

The NTC coordinates the National Women in Transport initiative on behalf of the Australian Government.

SHOWCASING WOMEN IN TRANSPORT

The National Women in Transport website profiles women leaders in the sector in its speaker bureau. The profiles of senior women transport leaders showcase the work of women in transport in both the public and private sectors.

The leaders include:

- Carolyn Walsh, NTC Chair;
- Dr Gillian Miles, NTC CEO and Commissioner;
- Romilly Madew AO, Infrastructure Australia CEO;
- Diane Brown, Department of Infrastructure, Transport, Regional Development and Communications Deputy Secretary, Transport Group; and
- Sue McCarrey, Office of the National Rail Safety Regulator Chief Executive and National Rail Safety Regulator.

“The initiative is important because it supports and connects our women.”

Carolyn Walsh says, “Creating a modern, diverse and inclusive transport industry will demand leadership of senior people in transport, both men and women.

“The National Women in Transport initiative is important because it supports and connects our women. We need to break down stereotypical perceptions of what a person in transport looks like. We need to profile role models [who] weren't around when I entered the industry.”

Sue McCarrey says, “It is the responsibility of our senior leaders in transport to bring young people on and with that making sure they are bringing more women along as part of that journey.”

You can book a leader to speak at an event and read their profiles at www.womenintransport.gov.au/speaker-bureau.

TACKLING NEGATIVE PERCEPTIONS

A key negative perception about the transport sector is that, as it is a traditionally male-dominated industry, women won't be welcome.

Dr Gillian Miles says, “Women want to work in transport. But they need to be welcomed and developed.”

Showcasing women leaders in the industry demonstrates the industry's willingness to engage women.

According to Dr Miles, “COVID accelerated the conversation around cultural change that was already happening in transport.

“The past 2 years have demonstrated how you can do a lot of work differently. It's my great hope that people will embrace and retain the new ways of working rather than try [to] go back to 'normal'.”

Sue McCarrey says it's important for leaders to show that the transport sector is “a good industry to work as opposed to what they probably see as a pretty blokey environment”.

Romilly Madew AO was initially wary when first moving into the sector from a background in another industry, but she says she “was welcomed in infrastructure and transport with open arms. People were so willing to share their experience and celebrated the new ideas I was bringing coming in from outside the industry. What I continue to find really exciting and love is the constant engagement across the industry.”

The key aim of the initiative is to attract more women to the sector.

INCREASING FEMALE PARTICIPATION

The key aim of the National Women in Transport initiative is to attract more women to the sector by creating a more inclusive modern transport industry.

“Increased participation by women in the transport sector will have flow-on benefits for business, industry and the whole economy,” Diane Brown says.

“The National Women in Transport initiative is designed to drive productivity and profitability benefits that will come with increased gender balance within the transport sector.”

According to Australian Bureau of Statistics data, while women make up approximately 50% of the labour pool, they currently make up only 27.4% of workers in the transport, postal and warehousing sector. That figure is reduced to around 20% for land transport alone.

More women are urgently needed to work in the sector across a broad range of skills and in leadership roles.

“Australia is experiencing an infrastructure and transport investment boom, and needs people with the skills to deliver it,” says Dr Gillian Miles.

“If we're not ensuring women are part of the transport industry, and comfortable in it, we have an economic problem as well as a social one.”

Romilly Madew AO says, “By taking deliberate and meaningful steps to address the working needs of women and other underrepresented groups in the transport sector, we can unlock additional capacity to deliver the record infrastructure pipeline and support Australia's long-term prosperity.”

You can find out more about the work of the initiative at www.womenintransport.gov.au. ■

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

A spokesperson of Transport for NSW speaking with *Australian Transport Network (ATN)* said at the time, "Transport for NSW 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 is a useful way to approach your safety duties.

Prosecutors are central to the public enforcement of law, and we should look at how the National Heavy Vehicle Regulator (NHVR) makes decisions regarding the prosecution process for offences under the HVNL. The most crucial step in the prosecution process is deciding whether to prosecute.

Offences are not automatically the subject of prosecution. The decision to prosecute is based on a two-part test:

1. where there is a reasonable prospect of conviction; and
2. the prosecution is in the public interest.

By commencing a prosecution, the NHVR aims 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 seeking to adopt and maintain a risk-based approach to meet their safety obligations should develop a compliance framework, based on safety and prevention, which is agile enough to respond to new and existing risks in a business' commercial activities.

The NHVR is committed to prosecuting whenever significant breaches of the HVNL occur.

COMMENCING A BREACH OF PRIMARY DUTIES PROSECUTION

The main focus of the HVNL is the overarching primary duty, i.e. to do what is reasonably practicable to ensure the safety of road transport activities.

The primary duty requires parties in the CoR, so far as is reasonably practicable, to:

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

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

- whether a death or serious injury occurred, or there was a real possibility that one could occur;
- whether the safety risk was caused by serious or systematic non-compliance with the HVNL;

- whether the safety risk was created by business practices and/or company culture;
- whether there is a demonstrable preference of a commercial benefit over safety;
- the actual ability of any proposed defendant to influence and/or control the safety risk; and
- if a defendant company, the potential culpability of any natural persons involved in the company.

These principles should give your business some insight into how to develop frameworks to help safeguard your business from prosecution.

If an offence occurs, you should give thought to any mitigating factors that may apply.

Such frameworks should ultimately guide parties to help them understand their compliance obligations so 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.

MITIGATING FACTORS

► DEFINITION: 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 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.

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.

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; and
- **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.

Other mitigating factors may be your reputation in the industry and the safety measures you have adopted in your business.

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"Putting yourself in the prosecutor's shoes"

EXAMPLE:

In cases such as East Coast Mining Group and in most other convictions, businesses fail because they fall into the error of not putting safety and compliance first. Unlike for example, Glen Cameron Group, which has been cited as "one of classic determination and business nous" by the ATN. The company's founder, Glen Cameron, was quoted as saying, "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."

The Glen Cameron Group implemented a telematics platform to disseminate its meeting notes to all its drivers in real time using a messaging system. The system also allows the business to 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 that can dial a managed list of depot and operational staff numbers.

Another facet of Mr Cameron's business is thinking about the 'long game'. As he put it: "Being safe at work has to be at the front of everything we do". 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 the HVNL.

It is imperative to show how your organisation puts safety first

IT IS NEVER TOO LATE

Often it takes something going wrong before parties take a closer look at their systems and procedures, and critically evaluate them. If you find yourself facing a prosecution, it is imperative that you show how your organisation puts safety first. But if you have received a Court Attendance Notice requiring you to attend court 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 that may be the subject of the prosecution yourself, or through an external investigator, to demonstrate how serious you are in seeing the breach in the eyes of a prosecutor and how you are taking steps to remedy the situation. ■

Step-by-Step: How to conduct an investigation

Nathan Cecil, Partner, Holding Redlich

Showing you have conducted a thorough, independent investigation demonstrates that the business took an incident seriously, which will put you in a better place in the event of a prosecution.

Investigations are an important step to comply with your legal obligation to prevent and address safety breaches under the Heavy Vehicle National Law (HVNL).

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 and limit the risk of a substantial fine.

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

Take the following steps in your investigation:

Step 1: Prepare and gather information

- Visit the scene as soon as possible after the incident and before physical evidence is disturbed. Ensure 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: Interview the relevant parties

- 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 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.
- Develop questions that will help you to establish the facts. Take care in obtaining answers to some of these questions, as the investigator could be accused of apportioning blame.
- Using the information obtained from interviews, you can build a chain of events to identify all the causes. For the investigation to be successful, it is necessary to establish the following information:
 - events leading up to the incident;
 - facts of the incident itself;
 - what occurred immediately after the incident; and
 - essential factors and causes.

Step 3: Determine recommendations and conclusions

- Answer the following questions to get to the root of the causes of the incident and recommendations for prevention:

What systems failed?

- How can you prevent failure or make it less likely?
- How can you detect approaching failure and when it occurs?
- How can you control failure and minimise the consequences?
- Why was the system in place?
- What could have been done instead?

Which parties failed?

- What did they fail to do?
- How can failure be made less likely?
- Why did they do this?

What could you do instead?

- How else could you do it?
- Who else could do it?

What specific items in the system triggered the incident?

- What does it do?
- Why do we do this?
- What could we do instead? ■

Understanding your heavy vehicle maintenance obligations

Melanie Long, Associate, Holding Redlich

Making sense of your heavy vehicle maintenance obligations under the Heavy Vehicle National Law (HVNL) can understandably feel like a confusing and overwhelming task. This is because there isn't one specific section or provision in the HVNL that deals with them. Instead, the maintenance obligations of parties in the chain of responsibility (CoR) arise out of other broader obligations with which they must comply under the HVNL.

This article provides you with a starting point from which you can begin to understand your key vehicle maintenance obligations and some of the ways to meet them.

WHAT ARE THE KEY MAINTENANCE OBLIGATIONS?

The primary obligations for heavy vehicle maintenance are:

- CoR parties must not use, or permit another person to use, a heavy vehicle on the road that is unsafe. A vehicle is unsafe where its condition, or the condition of its components or equipment, is such that using the vehicle would be unsafe or endanger public safety (section 89); and
- CoR parties must not use, or permit another person to use, a heavy vehicle that contravenes an applicable heavy vehicle standard (section 60). Heavy vehicle standards arise under the Australian Design Rules and the *Heavy Vehicle (Vehicle Standards) National Regulation*, which set out various vehicle standards, including general safety requirements, such as steering, tyre and vehicle configuration requirements.

These duties intersect with the primary duty for CoR parties in that an operator that does not inspect a heavy vehicle regularly, and allows for it to be used on the road while affected by a defect, is likely to be liable under section 89 and also in breach of its primary duty to ensure safety.

WHO IS RESPONSIBLE FOR WHAT?

Operators

Responsibilities for maintaining and inspecting heavy vehicles largely reside with the operator of the heavy vehicle, as it is the CoR party with the greatest level of capacity to control, eliminate and minimise risks associated with it.

An operator's responsibilities include ensuring that:

- its business has effective maintenance management systems. According to the National Heavy Vehicle Regulator (NHVR) *Daily Safety Check List*, daily checks should, at a minimum, cover:
 - brakes;
 - couplings;
 - wheels, tyres and hubs;
 - structure and body condition;
 - lights and reflectors;
 - mirrors;
 - windcreens and windows; and
 - engine, driveline and exhaust;
- heavy vehicles are regularly maintained and inspected according to the applicable heavy vehicle standards. The *National Heavy Vehicle Inspection Manual* provides a standardised manual to inspect heavy vehicles; and
- a defective vehicle is not used until it is rectified and restored to safe and HVNL-compliant level.



TIP: Visit www.nhvr.gov.au/files/201611-0434-creating-heavy-vehicle-daily-checks.pdf to view the *Daily Safety Check List* and www.nhvr.gov.au/safety-accreditation-compliance/vehicle-standards-and-modifications/national-heavy-vehicle-inspection-manual to view the *National Heavy Vehicle Inspection Manual*.



CAUTION: A failure to comply with maintenance obligations could result in a heavy vehicle inspector issuing a defect notice, which would generally be in place until the defect is rectified in the manner outlined in the notice. Alternatively, non-compliance may lead to the prosecution by the NHVR of the offending party. The maximum penalty for a business that permits a person to use a heavy vehicle that does not comply with its applicable heavy vehicle standards is \$15,000 (and \$30,000 if the defect is in relation to a speed limiter). The maximum penalty for a business that allows an unsafe heavy vehicle to be used is \$30,000.

Drivers

A driver will also have duties in relation to heavy vehicle maintenance, although usually such obligations will not be as onerous as those of an operator (except in the case of owner drivers).

For example, if a driver detects a defect in a heavy vehicle such as an oil leak, a broken seatbelt, a broken mirror or flat tyre, the driver should:

- not drive the heavy vehicle, as it may be unsafe and non-compliant with heavy vehicle standards; and
- notify the operator of the nature of the heavy vehicle defect.

Executives

Executives must exercise due diligence to ensure their business complies with safety duties, including the duty not to permit a vehicle to be used when it is unsafe. It is important for an executive of a business that owns and operates heavy vehicles to ensure that the business has, among other things:

- effective and sufficiently resourced maintenance management systems;
- systems for their management team, drivers and others to report any suspected or actual heavy vehicle defects and record steps taken to rectify faults; and
- training for management, drivers and others to ensure they can identify heavy vehicle faults according to their respective roles and expertise.

Other CoR parties

Other CoR parties' maintenance responsibilities are only likely to be triggered where they observe a vehicle defect. For CoR parties that don't own or operate vehicles, this is likely to be limited to the types of obvious observable defects that would be apparent to a reasonable, non-expert observer. If such defects are observed, their responsibilities are likely to involve not permitting the use of the unsafe or defective heavy vehicle, and notifying the driver and operator of the suspected or actual vehicle non-compliance.

CONCLUSION

Although the costs of maintenance can be high, the consequences of driving an unsafe heavy vehicle can be deadly. Therefore, it is important that all CoR parties – including operators, drivers and executives – understand their obligations and take the necessary steps to ensure compliance. ■

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.

Defect notices

Q What are the types of defect notices? What happens if I receive a defect notice?

A Defect notices may be issued for a defective vehicle. A defective vehicle is one that contravenes an applicable heavy vehicle standard, has a part that does not perform its intended function or has deteriorated to such an extent that it cannot be reasonably relied on to perform its intended function.

Defect notices will vary according to the type of defect affecting the vehicle and safety risks associated with that defect:

- A major defect notice will be issued if there is a safety risk posed by the defect and the risk presented by the vehicle is imminent and serious. If you receive a major defect notice, you must not use the heavy vehicle on a road other than to move it to one or more specified locations as required by the notice. In extreme cases, the vehicle will be immediately grounded, and must be fixed on site or towed to a repair point. Inspection and clearance are required by the regulator before you can use the heavy vehicle.
- A minor defect notice will be issued if there is a safety risk posed by the defect, but that risk is not considered imminent and serious. If you receive this notice, you cannot operate the heavy vehicle on road unless specific action is taken to rectify the defect. Inspection and clearance are required by the regulator before you can use the heavy vehicle.
- A self-clearing defect notice will be issued if there is no safety risk posed by the defect. A vehicle subject to a self-clearing defect notice can be operated, but the defect must be rectified as soon as practicable and within 28 days of receiving the notice.

If you receive a defect notice, you must comply with it. A person who drives or permits a person to drive a defective heavy vehicle may be liable for maximum penalties of \$34,550 for a company or \$6,910 for an individual.

Executive reporting

Q As an executive (director), how important is chain of responsibility (CoR) compliance reporting and what are the most important things to report?

A Under the Heavy Vehicle National Law (HVNL), executives (directors and any person concerned in the management of a corporation, partners in a partnership and managers of an unincorporated association) have a proactive and positive duty to exercise due diligence to ensure their business complies with all its CoR obligations.

Your business must continue to establish, implement and document business practices to ensure CoR compliance. Once your business has designed and implemented its CoR compliance management framework, you must measure and monitor compliance to ensure the systems implemented are successfully ensuring safety. For executives to discharge their duty at this point, they need to receive compliance performance reporting.

For each CoR compliance component, the most meaningful report is the number and severity of breaches that have occurred. Breaches slipping through the cracks are the things that most need to be addressed. These incidents suggest defective compliance management, training or implementation.

After that, it is also important to know the number of incidents that are still arising but are, thankfully, being picked up before a truck hits the road, i.e. near-misses. These incidents suggest either that system and process design is not eliminating incidents at the source, or that training on how to conduct processes is not effective, but that at least final checks and balances are detecting and remedying problems.

Finally, some general CoR compliance system 'health check' information is useful. For example, confirming that all supply chain contracts have mandatory CoR compliance clauses included, and that all CoR-facing employees and contractors have been properly inducted and received any scheduled refresher training.

However, reporting those figures in a vacuum is of little benefit. The executive needs context. For example, how do the compliance reporting figures this period compare with those of the last period and/or the 12-month average?

The bottom line for transport operator executives is the need for proactivity; an executive who hasn't met their due diligence duty when an incident occurs risks ending up in hot water personally. ■

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Tasmanian case confirms relevant factors for sentencing under the HVNL

The courts take many factors into account when determining an appropriate sentence for a contravention of the Heavy Vehicle National Law (HVNL). However, with so many cases going unreported, there are very few precedents for courts to look to for assistance in coming to these sentencing decisions.

In the Tasmanian case of *Kramer v Veolia Environmental Services (2020)* (**Kramer**), the guiding principles set out in the Tasmanian Supreme Court case of *Roberts v Redpath Haulage Pty Ltd (2018)* (**Roberts**) were used in coming to the sentencing decision in that case, thus cementing them as relevant factors for sentencing under the HVNL.

This article looks at the facts of the seminal case of Roberts, and summarises the factors the court in this case took into account when determining the sentence to impose, which will be applicable to all jurisdictions in which the law operates.

AT FIRST INSTANCE

Roberts was concerned with an appeal regarding the inadequacy of the sentence imposed by the lower Court, being a fine of \$850 for a severe risk breach of a mass requirement provision of the HVNL by a trucking company.

In coming to this decision, the lower Court had considered:

- evidence that showed it was a difficult matter for the company to ensure compliance, and the company was entirely reliant upon the person loading the vehicle and the driver;
- the appreciable risk of harm to others and the environment, including the risk of roll over;
- the chances of the offence occurring again, which the Court considered were low as the sole director of the company had recently retired;
- the sole director's personal financial position; and
- the company's early guilty plea.

ON APPEAL

On appeal, the Supreme Court dismissed many of the above as being appropriate limiting factors on sentencing.

In coming to the decision that the amount of the fine imposed by the lower Court was 'unreasonable or plainly unjust', the Tasmanian Supreme Court considered:

- the legislative purpose of the HVNL, which at the time of this case had recently come into force and:
 - introduced higher penalties across all offences;
 - removed certain defences for several offences;
 - imposed an obligation on all parties in the chain of responsibility to take all reasonable steps to ensure compliance; and
 - introduced a multiplier for body corporates where the maximum penalty was five times that for individuals; and
- the mandated considerations for serious breach contraventions in section 594(2) of the HVNL, including the risk of accelerated road tear, damage to road infrastructure, increased traffic congestion, diminished public amenity and an unfair commercial advantage.

It also noted the errors made by the lower Court, including that it ignored:

- that the company had no system in place to ensure compliance and only considered the fact that the company was reliant upon the person loading the vehicle. In this regard, the Supreme Court reinforced the premise that a business cannot delegate its legal responsibility, and the difficulty encountered by reason of its failure in that respect is not material to sentencing;
- that the company had significant time between the date of the offence and the date of court to implement a system for the management of the risk of overloading, but had not done so;
- that the company had three relevant prior matters involving similar circumstances that it deemed showed a cavalier attitude to compliance, noting that deterrence is an important factor in sentencing;
- the legislative purpose of the HVNL, which they stated was an important sentencing consideration with public safety at its core. In this case, the quantum of the fine imposed by the lower court was less than 2% of the maximum penalty for the offence in circumstances where the mass of the heavy vehicle significantly exceeded the allowable by 25.3%; and
- the financial circumstances of the company. Instead, the lower Court chose to focus on the financial position of the director, which is not a relevant consideration even if it may be indicative of the company's financial situation.

As a result, the Supreme Court of Tasmania ruled that the above resulted in a failure to have regard to the relevant matters in sentencing, and that the fine imposed was unreasonable or plainly unjust. As a result, the Court ordered that the company instead pay a fine of \$3,600, which was reduced by 20% in recognition of the fact that the company had entered an early guilty plea.

GUIDING PRINCIPLES OF SENTENCING UNDER THE HVNL

This case lays out some of the factors that the courts should take into account when sentencing under the HVNL, which are as follows:

- the object and legislative purpose of the HVNL, with public safety at its core;
- the need for general deterrence;
- the seriousness of the offence, including any statutory considerations attached to it;
- the penalty maximum relative to the seriousness of the offence committed;
- any prior offences, particularly if they are of a similar nature;
- in the case of a company, whether it has put systems in place to reduce the risk of non-compliance;
- whether any steps have been taken since the incident to reduce the risk of non-compliance or to in any way rectify the consequences of the offence in question; and
- any entering of an early guilty plea. ■