



ATA views on fair workable chain of responsibility with appropriate deterrent value

The ATA & NatRoad have both taken legal advice on COR, directors' liability, and the model Compliance and Enforcement (C&E) Bill which is intended as the foundation of the National Heavy Vehicle Laws (HVNL). The policy intended in the original C&E model was to go beyond the drivers and apply appropriate accountability on other parties whose acts or omissions have an impact on whether on-road incidents and offences are likely to occur.. Charges did not have to be laid on lower chain parties in order to address higher chain parties. The offences were specific to a role and influence, and liability was proportionate to party's closeness to the actual offence.

The ATA wants a COR that is fair, reasonable, and places real accountability upon off-road parties and entities who do or should exercise influence over on-road incidents and behaviours. COR law should fully enable investigations and enforcement, where appropriate, to be targeted directly upon the entity of influence. Drivers and operators should not need to be charged (and found guilty) for others to be charged.

This requires the Model Provisions to be updated in line with the principles agreed by Council of Australian Governments regarding personal criminal liability of corporate fault and the clarification of the positive duty to take reasonable steps. Further, the reality is transport law and work health and safety laws apply concurrently and coexistence requires consistency. By ensuring that this update reduces current inconsistencies, the HVNL could deliver further efficiency gains for industry, by reducing regulatory overlap.

Specifically, on Directors' Liability COAG has agreed the following principles:

- where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself
- personal criminal liability of a corporate officer for the misconduct of the corporation should generally be limited to situations where the officer encourages or assists the commission of the offence (accessorial liability)
- in exceptional circumstances, where there is a public policy need to go beyond the ordinary principles of accessorial liability, a form of deemed liability could be imposed on a corporate officer only using a 'designated officer' approach (for minor offences) or a 'modified accessorial' approach (for more serious offences)

It is commonly understood that the model C&E provisions required parties to take reasonable steps. In fact, the references to "reasonable steps" is about the ability of relevant party to establish a defence in some circumstances. ATA legal advice from Tony Hulett states:

One identified anomaly in the *C&E Bill* was that it provided no positive duty upon any party in the chain of responsibility to comply with *mdlr* requirements by taking reasonable steps or otherwise. Despite this it was often incorrectly stated that parties in the chain had to take reasonable steps to comply with the requirement. The *HVNL* still does not impose a positive duty upon chain parties to comply with *mdlr* requirements. In the event of any *mdlr* offence, nominated parties in the chain of responsibility are automatically guilty of the offence.

The public draft of the HVNL did not reflect the model C&E provisions or the COAG directives. In fact, it provided that chain parties were automatically guilty of the same offence as the driver. This was unacceptable. Simplification in the HVNL draft has not worked. Explanation by the Project Office of subsequently revised provisions present in SCOTI



version or intended through amendment by Bill 2 also fails to meet our expectations. For example, the Project Office explanation includes that it is pre-condition that the driver is convicted of an offence before chain parties are pursued. This is unacceptable.

The law needs to have range of offences that relate to the incident, for the driver/operator and the parties of influence, and have these linked to the role. The Australian practice of innocent until proven guilty must be appropriately applied. It is one thing to measure a speed and apply a penalty to the driver based upon measured speed, and apply a liability where on immediate evidence the driver is guilty. It is another to suggest the same direct liability should apply to a more remote party. What we want is prescribed positive duties to take reasonable steps for each remote party and for incidents to be investigated to establish whether the party has failed to take the reasonable steps.

Similarly, the person who issues a weigh bridge docket should be directly accountable for its accuracy (within reason); a driver acting reasonably and in good faith should be able to rely upon this docket, meaning an enforcement officer should not automatically issue an infringement at the road side if a mass offence exists. If the driver has the weigh bridge docket that indicates compliance, further investigation is required to prove otherwise.

Further, a receiver of goods who timeslots operators should have duties to schedule these in accordance with reasonable and legal travel time for the freight task in hand and this duty should be able to be investigated in its own right without any action against a driver or carrier. If non-compliance is proven, the party should be infringed. In the case of a corporation, offences should be linked to the corporation in the first instance, unless inappropriate influence by a director can be proven.

Companies should a positive duty to take reasonable steps but the burden of proving an offence relates to the actions of an individual director, executive and/or manager should have should rest with the prosecution.

Corporate officers under this model would still be liable for prosecution, but the model would: provide the level of fairness expected in Australian law

This requires the C&E provisions to be reviewed in conjunction with industry and the regulators and appropriate penalties constructed. We do not believe this approach requires a regulatory impact statement as it simply implements what the model laws intended and accounts for the broad whole of Government policies applied since that time.

This is about changing the culture of clients to include a compliance factor so that negative safety influences on drivers and operators are mitigated before they exist. An extended COR concept poorly implemented has made a positive safety difference. COR implemented as intended will be significantly more effective.

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