

18 March 2014

Mr David Coonan
National Manager -Policy
Australian Trucking Association
25 National Circuit
FORREST ACT 2603

Our ref: 14576

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By Email

Dear Mr Coonan,

Chain of Responsibility Taskforce Review

As requested we have considered the application of section 623 of the *Heavy Vehicle National Law (HVNL)*.

The section only applies to speeding or fatigue management offence. There is no equivalent provision for mass, dimension or load restraint offences.

Although section 623(1) sets out what a chain party must do to be regarded as having taken all reasonable steps, it is not exhaustive. Section 623(2) provides that the section does not limit the circumstances in which things done or omitted to be done constitute reasonable steps.

The section does not provide the only basis upon which a reasonable steps defence might be established. It does not prevent the mounting of a reasonable steps defence on other grounds or on some but not all .

The section is the only one in the *HVNL* which provides certainty in effectively saying that if you take all these 5 steps than you have taken all reasonable steps.

Regulations 26 and 27 of the *Heavy Vehicle (Fatigue Management) National Regulation* provide examples of reasonable steps that may be taken under section 623(1) to-

- identify and assess aspects of activities that may lead to contraventions
- eliminate or minimize risks of contraventions

in order to comply with section 623(1)

In our view Regulations 26 and 27, irrespective of their relationship with section 623(1), provide a useful template for a reasonable steps compliance program in the fatigue and speeding areas.

Section 623 (2) would be clearer if it were amended to read

This section does not define or limit the circumstances in which things done or omitted to be done by a person charged with a speeding offence or fatigue management offence constitute reasonable steps.

From a drafting point of view it might be preferable if section 623(2) were to become section 623(1) and section 623(1) were to become 623(2).

Section 623(1) sets a very high evidentiary standard with which to mount a reasonable steps defence and for that reason we think it unlikely that it would be relied upon except in rare cases. The 5 steps are onerous and most likely capable of being taken only by well-resourced and sophisticated chain parties and perhaps not by them. Whether it ought to be necessary to do all of the 5 to be regarded as having taken reasonable steps is an issue.

The section could be amended to read:

.. the party did such of the following as may be reasonable in the circumstances to prevent...

If that amendment were made the certainty of the section would be removed and it would become equivalent to other *HVNL* provisions which provide examples of reasonable steps.

If the section is seen as too onerous and of no practical operation, it could be repealed and reliance placed on an amended section 624 so that the regulations provide examples of reasonable steps. Regulations 26 and 27 are already in place.

If, as we have recommended, sections 620 and 622 are amended so that the court must have regard to the matters listed and the *HVNL* is amended so that the burden of proof rests upon the prosecution for those offences where the reverse burden presently applies, the difficulties with the practical operation of section 623(1) might largely be overcome. The section might even become unnecessary.

We would be pleased to discuss with you.

Yours faithfully,

Tony Hallett

Lord Commercial Lawyers

