

Article Information

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Transport Update - Guidance on the Heavy Vehicle Law Reasonable Steps Defence

The decision in *Western Freight Management Pty Ltd v Roads and Maritime Services, New South Wales [2014] NSWCA 132* was handed down earlier this year and provides guidance on the difficulty of relying on the “reasonable steps defence” under the Heavy Vehicle National Law.

The case was heard in the NSW Court of Appeal following an initial hearing in the Magistrate’s Court and a subsequent appeal in the NSW Supreme Court. Both earlier decisions found that Western Freight Management Pty Limited was guilty of a contravention of a mass requirement.

The Facts

Western Freight Management Pty Limited (the Operator) arranged for goods to be picked up from Minova Pty Ltd, pursuant to a transport contract the Operator had with Newcrest Mining Limited. The Operator’s driver had twenty-five years’ experience.

The driver gave evidence of the process involved in loading the truck by forklift operated by an employee of Minova at the site of Minova in Blacktown. The driver instructed the forklift operator to distribute the load in a certain configuration which was given to him by the Operator.

However, the configuration of the load was not carried out according to the instructions. The driver was in the driver safety zone, which is about thirty metres from where the loading took place as this was a requirement of Minova.

The driver admitted that he did not watch the forklift operator to confirm he was carrying out his instructions because he assumed the forklift operator “was doing his job properly”. He also did not check that the pallets had been placed in the right positions after the loading had been completed.

Due to the operation of the legislation, the Operator was charged with the offence of overloading a tri-axle of a prime mover tabletop and trailer by 2.68 which constituted a substantial risk breach of the mass requirement.

The Legislation

At the time the offence occurred, the *Road Transport (General) Act 2005* (NSW) the (RTG Act) was in force. This Act has since been repealed and replaced with the *Heavy Vehicle National Law* (HVNL) which commenced on 10 February 2014 and contains a similar “reasonable steps” defence.

Under the RTG Act and the HVNL, it is a defence of certain offences if the defendant establishes that they:

- Did not know, and could not reasonably be expected to have known, of the contravention
- Had taken all reasonable steps to prevent the contravention.

Further, under the RTG Act, the court is not entitled to be satisfied that the defendant took all reasonable steps to prevent the contravention unless the defendant took all reasonable steps to cause the mass of the load carried on the vehicle to be ascertained at the start of the journey.

The Decision

At first instance, Magistrate Ryan held that the Operator had not established that all reasonable steps had been taken to prevent the contravention because the driver of the vehicle had not checked the truck once it was loaded to ensure the load had been correctly distributed in the manner in which the loader had been instructed.

The driver acknowledged he had the power to request that a truck be reloaded if he saw that it was being loaded incorrectly but chose not to do primarily to the fact that Minova were rushing trucks through as they were double parked outside.

Her Honour stated "The fact that the driver did not adequately check the load prior to driving out of Minova is, in my view, extremely poor practice. The final responsibility of compliance rests with the driver. How can compliance be met if the driver does not check visually the load? "

Her Honour also commented that "If he had made certain observations on the day and made a complaint then there is no doubt that this would have been considered as taking a reasonable step, but he did not even make the observation."

On Appeal

The applicant argued on appeal that the Magistrate should have held that the prosecutor had an obligation to identify the steps which were reasonable for the Operator to take to avoid the offence.

This argument was rejected on the basis that the relevant offence concerned the overloading, in this case of the tri-axle, not any matter which went to requiring the Operator to take reasonable steps.

The onus of proving that all reasonable steps had been taken was instead on the Operator when raising the reasonable steps defence.

Discussion

The key take away points from this decision for Operators are:

- *Company Policies*

In attempting to maintain the reasonable steps defence, the Operator in this decision sought to rely on evidence concerning the system they had in place to ensure that no overloading occurred, namely, providing the driver with loading instructions and ensuring that if the vehicle was not loaded correctly that it would be reloaded.

Despite, this system in place, the offence arose in this instance as the driver failed to inspect the load to ensure that it was distributed correctly and accordingly did not require those loading it to correct their error.

This serves as a timely reminder for operators to not only have procedures in place which prevent breaches of their obligations under the HVNL (which can serve as evidence of reasonable steps taken) but also to ensure that employees are well trained in these policies and they are always followed.

- *Reasonable Steps*

As this decision demonstrates, the reasonable steps defence in the HVNL will be difficult to prove and as a minimum, operators must ensure that their drivers are taking reasonable steps to satisfy themselves that they are HVNL compliant, for example by visual inspection of their loads. If the driver then knows or suspects that their load is not compliant, the driver must ensure that this is rectified before the start of their journey. Anything short of this standard may prevent the reasonable steps defence being available in the event of a breach of a mass requirement.

- *Onus and Standard of Proof*

It is clear from this decision that an operator may be found guilty of an overloading offence without any need for the prosecution to outline what reasonable steps an operator should have taken in order to avoid the offence. The onus of proving the reasonable steps is instead on an operator to raise as a defence if it so chooses.

This decision also shows how difficult it can be to successfully rely on the reasonable steps defence. It is clear that operators should take care to prevent breaches of the legislation at first instance as this will likely reduce compliance costs in the long term.

If you have any questions about this decision or wish to know how the HVNL could affect your business, please contact a member of our [Transport team](#).