

# Beyond the Driver - Chain of Responsibility

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## Biography

Senior Constable Peter Thompson has been a member of the South Australian Police Department for 18 years. He is currently attached to the Traffic Operations Unit based in Adelaide. His prime responsibility is as an investigator investigating road traffic and heavy vehicle industry offences on a Statewide basis. He has performed duties in rural and remote areas of South Australia for most of his career and now assists in the training of police officers and prosecutors investigating the heavy vehicle industry.

## Abstract

Heavy vehicle drivers are required to adhere to prescribed regulatory driving and rest hours within SA. Drivers have been the traditional recipients of enforcement attention where fatigue, speeding or other road safety concerns are apparent. 'Chain of Responsibility' legislation reforms are pending to better hold accountable others within the transport chain who are in positions where they can directly and negatively influence the on road driving task. SA Police have experienced practical difficulties in subjecting others within the transport chain in prosecutions relating to the recurrent incidence of driving hour breaches and inappropriate scheduling within the confines of existing legislation. This paper will provide an insight into the complexity that such investigations incur. The practical difficulties encountered by investigators and prosecutors will be discussed, and an indication of the necessary elements at law which are essential for enforcement efforts to be appropriately directed towards others beyond the driver.

## 1. INTRODUCTION

*"In comparison to the USA, the UK and Finland, available evidence indicates that Australians are almost two times more likely to die in a crash involving a heavy vehicle"*

**Professor Michael Quinlan (2001)**

This statement was one of a number of findings by Professor Michael Quinlan in his report of inquiry into Safety in the Long Haul Trucking Industry in 2001.

We know that these crashes occur as a result of driver fatigue through rostering and scheduling practices, speeding, drug taking by drivers and insecure loads but what, as enforcement officers, are we doing about reducing them? Is the employed long haul truck driver merely driving around the Country in a two or three hundred thousand dollar vehicle deciding himself, through his own intuition, what he's going to do on a day to day basis or is he doing as he is told to do? Is the driver setting his own roster and schedules as he travels or is the roster and schedule being set for him? What responsibility at law does the employer/company/consignor have to their drivers?

The purpose of this paper is to discuss the consequences of the 'Chain of Responsibility' legislation in respect to the heavy vehicle industry. This paper relates to the management of hours of driving which involves driver fatigue, rostering and scheduling and speeding. I will go into a brief history of the driving hours legislation as it applied to South Australia. I will outline two instances that highlight the need for effective 'Chain of Responsibility' provisions and make some recommendations in respect to the direction I believe we need to head to counteract the

problems that we, as investigators, have been experiencing in the field as observed in South Australia.

## **2. WHAT IS 'CHAIN OF RESPONSIBILITY'**

The National Road Transport Commission (NRTC) has defined 'Chain of Responsibility' as a term used to describe the set of complementary duties imposed upon the various parties involved in a particular transport task. It includes the consignor, the loading and driving of a heavy vehicle, the receiving of a load and the management of those tasks at an employer level. All people involved in the transport industry have a responsibility within the chain.

## **3. HISTORY**

Prior to November, 1999, the management of driving hours within the heavy vehicle industry in South Australia was regulated by the then Commercial Motor Vehicles (Hours of Driving) Act. This act was an attempt to manage the hours a driver drove a heavy truck or bus and the hours that they rested. The Act did not include work hours and had no 'chain of responsibility' provisions to the employer/consignor. Employees were required to submit driving hour records to employers but there was no control or audit process for enforcement personnel.

This lack of 'chain of responsibility' provisions was found to be very evident when there was a fatal truck crash in the Riverland of South Australia on the 3<sup>rd</sup> of August, 1996. On this occasion six people travelling in two cars were killed when a truck travelling on the wrong side of the road ran over the vehicles killing all but one person instantly. The subsequent investigation in respect to this crash attempted to target the company due to the unsafe work practices being conducted and detected at the time. The driver, Snewin, was arrested as a result of the crash and in January, 1997, was convicted for causing the death of the 6 people. He subsequently served a term of imprisonment. Despite a protracted investigation in respect to the company involved the company was not able to be prosecuted as to their responsibility to that driver and the duties he was undertaking due to the lack of 'Chain of Responsibility' provisions. A Coroners inquiry was subsequently held.

On the 17<sup>th</sup> of March, 1999 the South Australian Coroner, Mr Wayne Chivell, handed down his findings in relation to this crash. Chivell had found a number of facts about the company which employed the driver involved. These facts included:

1. A director of the company had supplied the driver with the drug ephedrine;
2. Senior managers had supplied other drivers of the company with stimulant drugs who wished to avail themselves of the opportunity to continue driving beyond proper limits as part of the same work practice;
3. The managers at the company engendered a culture among its drivers which embraced driving for unsafe periods and drug taking;
4. The driving of heavy commercial motor vehicles for long periods, far longer than was safe, was part of a regular work practice at the company at the time.

It was quite clear as a result of the findings of Chivell that had the Commercial Motor Vehicle (Hours of Driving) Act contained provisions relating to "Chain of Responsibility" that the driver, Snewin, may not have been the only person to stand trial in respect to the crash.

Chivell made a number of recommendations as a result of this crash. Some of those recommendations related directly as to what Police should be able to do in such matters, and included that those charged with the responsibility of monitoring and considering refinements and improvements to the legislation should consider the following topics:

1. Ways in which modern expert knowledge about fatigue management, and in particular the cyclic effects of fatigue, can be further incorporated in a legislative framework regulating driving hours.
2. The granting to the Police the power to enter and search commercial motor vehicles or relevant defined premises, and to seize secondary evidence (such as trip sheets, manifests, pay records, fuel dockets, cargo manifests and the like) which will either verify or contradict entries in log books. These powers are particularly necessary if the sanctions against employers are to prove effective.
3. The level of penalties, including the level of fines, and the imposition of demerit points, for hours of driving breaches, and whether the present low penalties provide disincentive to the police to adequately investigate offences

The recommendation I will be concentrating on will be the second recommendation.

#### **4. CURRENT PROVISIONS**

November, 1999, some eight months after the coroners findings, saw the introduction of the Road Traffic (Driving Hours) Regulations into South Australia. This was major reform for South Australia into driving hours and was part of national reform initiated by the NRTC.

The major advantage of the legislation as seen by enforcement officers was the introduction of the 'chain of responsibility' provisions and the power to enter premises and inspect records.

'Chain of Responsibility' provisions made it an offence for an employer, a person within the chain or a consignor to allow/ask/direct/require a person either directly or indirectly to drive a heavy vehicle or bus if they knew or reasonably ought to have known that the driver was likely to commit:-

- (a) core driving hours offence<sup>1</sup>
- (b) a driving record offence
- (c) a speeding offence

(The provisions also included the rostering and scheduling of drivers for the same reasons.)

Enforcement officers agreed that it was going to take up to 12 months for the legislation to begin to take its full effect. Employees were required to give duplicate pages of their log books to employers within 21 to 28 days of their activity dependent upon which scheme they were operating under. Employers were required to keep those records for a given day for 12 months.

From the year 2000, investigators began to exercise their power to inspect records and look at the 'chain of responsibility' provisions. It was soon to become apparent to investigators that the legislation was not making the process easy. It was found that people were generally not keeping records or were maintaining records in a non-readable state. One company required employees to submit their duplicate log sheets into a 44 gallon drum which filled with water when it rained.

Despite the requirement at law to submit records and the requirement to keep records, the legislation did not require the records to be kept to any standard. The company or employer is not required to ask for the records from the driver. How do you keep something that has not been given to you?

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<sup>1</sup> A core driving hours offence is an offence where a driver exceeds his work time, exceeds his drive time or does not take sufficient rest.

Investigators trying to investigate 'chain of responsibility' provisions also found it an impedance that upon entering a premises that they could only inspect duplicate driving hours records. Other evidence in the investigation of 'chain of responsibility' provisions to assist investigators in proving 'knowledge' or 'reasonably ought to have known' provisions was not available to investigators unless a 'serious offence'<sup>2</sup> had been committed. Only then were investigators able to call on the provisions of a general search warrant. This other evidence was referred to as the secondary evidence by the State Coroner, Chivell, in the Snewin inquiry and included trip sheets, rosters, schedules and pay slips amongst others.

Due to the problems being experienced by investigators legal opinion was sought in respect to the ability of employers to seek records from their drivers. The legal opinion given by the South Australian Police legal branch advised investigators of a 'vicarious liability' of the employer in an employer/employee relationship.

The opinion stated:

*"the employer can not claim a defence by claiming that the employee did not provide the records as required. The employer is responsible for ensuring those records are provided in accordance with the legislative requirements. Indeed, if they are not, the employer may be liable to be charged with the offence of 'aid, abet, counsel or procure' the offence committed by the employee driver. In this instance, the legal principle is doubly clear as the employer has also under regulation 61, an obligation to deal with the records provided in accordance with the legislative requirements."*

**Mc Avaney(May, 2002)**

This legal opinion was later determined to be wrong.

The opinion given appeared to make the investigation of 'chain of responsibility' provisions easier. In addition to this opinion, Case law was also sought courtesy of VICPOL to assist SAPOL in the investigation of these matters.

At the end of 2001 intelligence indicated a South Australian based company was committing serious breaches of the Road Traffic (Driving Hours) Regulations regarding 'Chain of Responsibility' offences. Drivers of this company were committing speeding offences, log book offences, driving hours offences and generally vehicles being driven were found to be defective and unsafe in nature.

Police took action against the drivers of this company but it was generally felt that there was a major 'chain of responsibility' issue. This concern was particularly heightened when a driver of the company was detected with 56 offences relating to log book and driving hours offences during a 3 week period of driving. This was the same three week period that the driver had been employed by the company.

The company was spoken to on two occasions in respect to the fact that it was being targeted for it's work practices and that the intention of the Police was to prevent road crashes as a result of fatigue. Three weeks later one of the companies vehicles was involved in a serious crash on the Barrier Highway within SA injuring the driver.

In June, 2002, Police audited the company concerned. During the audit only driving hour records were able to be sought during the inspection as that is all the regulations allowed. It was found despite Police telling the employer of the driver activities, the requirement to keep log books and the believed 'vicarious liability' between employer and employee, the company had kept no records. This company was interviewed in respect to all the evidence that Police had obtained

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<sup>2</sup> Driving hours offences in South Australia are summary offences. General search warrant can only be used for indictable offences.

and eventually a report was submitted for 216 offences against the Road Traffic Driving Hours Regulations 'chain of responsibility' provisions. Despite investigators believing that knowledge was known by the company owner (they had been told by Police on two occasions) the matter never made it to Court.

Despite many months investigating companies in respect to the 'chain of responsibility' provisions only one prosecution eventuated and on that occasion the employer received a bond without a conviction being recorded.

So what are the problems that we as investigators encounter which seem to be preventing successful prosecutions? The following is a list of complexities and difficulties currently being experienced:-

1. The 'chain of responsibility' provisions do not create a vicarious liability between the employer and employee;
2. Employers are not required to ask for driving hours records and therefore have no requirement to keep them;
3. Proof that records being given to an employer, proof of a direction to an employee and proof of knowledge of the employer knowing what an employee is doing must all be proved beyond a reasonable doubt;
4. Drivers refusing to talk to enforcement officers formally to make a complaint for fear of retribution or losing their jobs;
5. The inability of investigators to inspect records other than driving records unless a serious offence has been committed;
6. There is a risk involved in charging an offence against an employer which relies solely on the evidence of an employee driver for proof;
7. Poor record keeping by employers and companies of required records;
8. Falsification of log book records by drivers;
9. Legislation not truly National.

## **5. RECOMMENDATIONS**

So what do we need for a successful prosecution in South Australia. There is currently a draft Bill set to go before the South Australian Parliament during its first sitting of 2004. This bill is the Road Transport Reform (Compliance and Enforcement) Bill and has provisions which, if enacted, will cover some of the points I am about to address.

Points that currently need to be considered to seek a successful prosecution include:

1. Vicarious Liability Provisions;
2. The ability to seek further evidence by way of secondary evidence (pay sheets, trip sheets, rosters, schedules etc);
3. The requirement of employers to keep records to a prerequisite standard;
4. Inclusion of WA and NT into a scheme to make across border investigations far easier to investigate. These States are currently not even considered, as investigators only utilise hours driven from the last 6 hour rest break from those states into South Australia and beyond;
5. Better communication between enforcement agencies across Australia.

## **Liabilities**

The compliance and enforcement draft contains 'general liability' provisions on persons within the 'chain of responsibility'. It appears that people responsible within the 'chain', can no longer avoid taking responsibility for the actions of their employees if they do not have a defence as they can at the moment. The defence for avoiding liability will be that:

- (a) the accused had no knowledge of the actual offence; and
- (b) the defendant took reasonable precautions and exercised due diligence to prevent the commission of the actual offence.

The proposed legislation also has offences for people who aid, abet, counsel and procure as well as a 'vicarious responsibility' for bodies corporate. The liability provisions should help overcome the 'vicarious liability' issue we currently have in the existing legislation. It is interesting to note that the liability provisions cover very much the opinion of McAvaney which was deemed incorrect under current legislation.

## **Power of Inspection and Search**

The compliance and enforcement draft has also increased the powers of inspection and search for enforcement officers. Officers will now have the ability to enter and search a vehicle if they believe on reasonable grounds that the vehicle has been used, is being used or is likely to be used, in the commission of an Australian road law offence. It will also give enforcement officers the ability to enter premises to search for evidence of an Australian road law offence but they must believe on reasonable grounds that such evidence may exist. Enforcement officers will now be able to obtain any record that they believe on reasonable grounds substantiates the offence, not just driving hours records. These powers may help address the needs I discussed as item 2 of the recommendations but obviously the legislation has to be proclaimed.

## **Records**

The keeping of records needs to be improved so that records that are required to be kept under an Australian road law are kept in a proper way. That is that they are readable when required to be inspected. The keeping of records is not covered by the proposed compliance and enforcement legislation but I believe the keeping of records in a proper fashion can be brought about as an amendment to existing legislation. The proposed 'liability' provisions in the Compliance and Enforcement draft should assist by a 'code of practice' in the obtaining and keeping of required records.

## **National Legislation**

Although current and future legislation proposals are deemed part of National Road Transport Reform, until all States and Territories participate there will always be issues for enforcement personnel. This is more prevalent for South Australia as it borders Western Australia and the Northern Territory, a State and Territory that are not currently participating with the reforms. Because we can only deal with driving hours from the last 6 hour rest break of drivers prior to crossing the State border from those areas, a scheme where all States and Territories participate needs to be considered. The ability to hold an employer or company responsible for offences that occur in South Australia that operates from these States and Territories without the provisions would be very difficult to achieve.

## **Information and Data Sharing**

Finally, to make the system truly national we need the ability to share data and information between States. This issue is currently a proposal being circulated by the NRTC for discussion. Having the ability to communicate offences by company vehicles and drivers from one State to the other would enhance the enforcement officers ability to successfully prosecute employers

and companies no matter where they were in Australia. Current provisions of existing driving hours legislation allow enforcement officers to hold such people accountable for offences committed within the regulated zone but there is currently no ability to data share. The ability to share data and information would complete the picture for enforcement purposes.

## **6. CONCLUSION**

The investigation of 'chain of responsibility' provisions is a long and complex task. It is important that enforcement officers have all the necessary aids at law to adequately complete the task. Remember, criminal liability requires proof beyond reasonable doubt.

Quinlan (2001) stated:

*"....If 'proper' enforcement means enforcement activities that effectively deter dangerous practices, then it must be judged that without suggesting current practices have no effect and recognizing some positive recent initiatives, there are serious deficiencies in current enforcement regime. ....there is a need for more vigorous enforcement activities that target the parties and practices (in relation to scheduling, remuneration and the like) that are the root cause of dangerous practices like speeding, excessive hours at the wheel and drug use."*

Rigorous enforcement is not possible without the necessary elements at law. The current Compliance and Enforcement Bill and the future proposals for fatigue management and data and information sharing should greatly assist enforcement personnel in their future endeavours to bring rogue operators within the 'chain' to justice.

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## **South Australian Legislation**

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Road Transport Reform (Compliance and Enforcement) Bill (March, 2003) *Model Provisions*

## **Keywords**

'Chain of Responsibility', 'Heavy Vehicle', 'Enforcement and Compliance', 'Enforcement' & 'Driving Hours'