Managing your own compliance can be hard. Monitoring and managing the compliance of third parties over whom you have control or influence, such as suppliers and contractors, is harder.

Monitoring and managing the compliance of third parties who are wholly overseas and not answerable to the Australian CoR regulators can be extremely difficult.

So, if you deal with those foreign third parties who refuse to address CoR, do you get a free pass? Unfortunately not. But, we have some useful tips in this edition for you...

If you get tired just thinking about it, maybe you need to manage fatigue in your workplace more flexibly. If so, check out our article on the alternatives to Standard Hours provided under the National Heavy Vehicle Accreditation Scheme.

Need something to drink? Spare a thought for the grape sector (amongst other agricultural sectors), which is increasingly finding itself under the compliance spotlight, as covered in this issue.

Finally and looking forward, load restraint within freight containers is a perennial focus of the regulators. Next month we will feature a special on this topic, so stay tuned.

Nathan Cecil, Partner, Holding Redlich

For questions regarding your current issue, or to get answers from our Helpdesk, email us at: helpdesk@coradviser.com.au Username: Transport2018 Password: dimension

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5 tips to help you comply with the new CoR laws

Nathan Cecil, Partner, Holding Redlich

The amended Chain of Responsibility (CoR) laws commenced on 1 October 2018 – but what do the changes really mean for your business?

1. You can’t ignore CoR anymore

More than ever, heavy vehicle road safety is not just the driver’s or the operator’s issue. Even if you engage and pay for someone to transport goods, this does not shift all responsibility for safe transport onto them.

The increased CoR compliance obligations elevate CoR to the same level as workplace health and safety obligations. The exact same legal test and penalties now apply under both regimes.

You can’t ignore workplace health and safety, can you? So, as of now, you can’t ignore CoR.

2. You need to be proactive, not reactive

The old test was: “Something went wrong, did you do everything reasonable to avoid ‘that thing’ going wrong?” It was reactive and only focused on the particular breach(es) in question (e.g. mass).

Ultimately, the rationale is that if heavy vehicle operators are able to take more responsibility for the safety of their drivers, there will be a safety benefit to all road users.

In this article, we discuss heavy vehicle accreditation in relation to fatigue compliance under the National Heavy Vehicle Accreditation Scheme (NHVAS).

The NHVAS alternative compliance scheme under the Heavy Vehicle National Law (HVNL) allows heavy vehicle operators to obtain accreditation under the following modules:

- Fatigue Management: Basic Fatigue Management (BFM); and
- Fatigue Management: Advanced Fatigue Management (AFM).

The new test is: “Are you doing everything reasonably practicable to prevent and avoid CoR breaches from occurring within your transport activities?” It is proactive and forward-looking, focusing on what you are doing to prevent breaches from occurring.

So, you need to shift your mindset and start proactively managing risk and preventing incidents from arising, and not merely reacting to them when they do.

3. You need to implement a CoR compliance framework

The new laws make it mandatory that you have in place CoR compliance ‘business practices’. These mandatory business practices include:

- CoR compliance policies and procedures;
- training/awareness practices;
- compliance clauses in supply chain contracts;
- compliance monitoring; and
- response/remediation and executive compliance reporting.

Not so basic: How to achieve fatigue compliance accreditation

Adam Vrahnos, Lawyer, Holding Redlich

The purpose of fatigue accreditation is to allow businesses the flexibility to implement auditable accredited schemes to manage driver fatigue, which are specific to their businesses’ commercial operations.

Ultimately, the rationale is that if heavy vehicle operators are able to take more responsibility for the safety of their drivers, there will be a safety benefit to all road users.

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- Fatigue Management: Advanced Fatigue Management (AFM).

FATIGUE MANAGEMENT: BASIC FATIGUE MANAGEMENT

A BFM fatigue management system, for an operator of a fatigue-regulated heavy vehicle, means the operator has implemented a management system for ensuring compliance with the BFM standards and business rules.

continued on page 2
Every road user has a responsibility, Director of Compliance declares

Content Editor, Portner Press

Speaking at the 2018 ALC & ATA Supply Chain Safety & Compliance Summit in September, Roger Weeks, NSW Roads & Maritime Services Director of Compliance, explained how the State’s authorities were working to increase Chain of Responsibility (CoR) compliance.

He said that the purpose of their regulatory activities was to “motivate safe and compliant road user behaviour” and that these behaviours weren’t just the responsibility of the government, road regulators, police and leading operators, but every road user.

“[E]very road user … has a personal responsibility … when using the road” he said.

Mr Weeks said that the objectives to help increase compliance were achieved by authorities through deterrents, detecting, enforcing and where appropriate, prosecuting road users. Seventy-eight percent of their investigations concluded with either no case to answer, or the road user voluntarily making improvements. An improvement notice was issued in 9% of investigations, while 13% resulted in prosecution.

“When we decide to prosecute we use the Director of Public Prosecutor guidelines with paramount consideration for public interest,” he said.

“We have over 190,000 heavy vehicles on the NSW heavy vehicle register. We know that on NSW Roads on any one day there are up to 400,000 heavy vehicle trips.

“We know that 65% of Victorian, South Australian and Queensland registered heavy vehicles traverse through New South Wales on major freight networks”.

In the 12 months up to February 2018, 41% of heavy vehicles involved in fatal crashes in NSW were registered interstate.

Twenty-two percent of all NSW road fatalities involved vehicles registered in the state. A “significant over representation” Weeks noted, as only 2.5% of the state’s registered vehicles are heavy vehicles that only cover 9% of all kilometres travelled by all the state’s registered vehicles.

Weeks said his organisation would help operators that tried to comply but didn’t always succeed, however “[t]hose that don’t want to comply we need to deter by detection and endeavour to change behaviour”.

“For the percentage that have decided not to comply we will use the full force of the law” he said.

Continued from page 1 “5 tips to help you comply with the new CoR laws”

If you don’t have these practices in place, then you are probably not “doing everything reasonably practicable to prevent and avoid CoR breaches from occurring within your transport activities”.

Many businesses will already have these required practices in place. However, they are often not properly documented or rolled out, meaning that they are often applied in an ad hoc manner or inconsistently throughout the business. Apart from undermining all of the time and effort put into them, this also introduces gaps in your safety practices, exposes people to risk, and exposes you to penalty.

You, your employees and your subcontractors need to get to grips with your CoR compliance framework.

4. You need to manage subcontractors more actively

Speaking of subcontractors, as part of the proactive management of risk, the new laws will require greater attention to be placed on subcontractors.

Subcontracting out a relevant activity does not avoid your CoR duty – the primary safety duty is non-delegable. So, if you are going to subcontract out a relevant activity, you need to ensure that the subcontractor is going to perform it properly and not expose them – and you – to the risk of penalty.

Subcontracting out a relevant activity does not avoid your CoR duty

This means that, where possible, you should screen your subcontractor’s CoR compliance prior to engaging them (see some tips in our article on managing third party compliance on page 6) to ensure that they are aware of their obligations and have in place practices to meet them.

If you aren’t satisfied, you should also consider implementing a routine and/or spot-check system to check that subcontractors are doing things in the compliant manner that they said they would.

5. You need to have a clean bill of health in order to get good business

Finally, other businesses will be less and less inclined to engage with you if you pose a compliance risk to them. You will need to be able to present a clean CoR record to customers in order to be considered for their work.

Over dimension will not be overlooked

Nathan Cecil, Partner, Holding Redlich

It is not easy to meet the criteria to be exempted from the dimension requirements under the Code of Practice for the Transport of Agricultural Vehicles as Loads (Code), but Busbridge still tried – and failed.

Busbridge was transporting an air seeder and four tyres belonging to it on a semi-trailer. The four tyres were detached from the air seeder and loaded separately onto the semi-trailer.

The load was placarded as oversize.

Police intercepted the load and found that the tyres exceeded the standard dimension requirements for a heavy vehicle with its load. Requirements state the load must not be more than 2.5m in width. The tyres measured 500mm over this limit.

Busbridge sought to rely on the dimension requirement exemptions under the Code which provided a concessional dimension limit of 4.5m for ‘agricultural vehicles’.

The definition was limited to agricultural machinery that:

- cannot be carried on any vehicle or combination of vehicles without exceeding any of the general access dimension limits for length, width and height.

The police argued that, as the tyres could be (and were) removed, they could be divided without great difficulty, expense or risk of damage and therefore did not fall within the dimension exemption available under the Code for ‘agricultural vehicles’. In support, it was noted that the air seeder was supplied without tyres, which were fitted after delivery.

Busbridge also sought to argue that the air seeder, along with its tyres, where a ‘large indivisible item’ and fell under another available allowance.

The Court agreed that the tyres could be easily removed and that they did not form part of a ‘large indivisible item’.

Busbridge was therefore found guilty of the offence and charged $1,000. Busbridge filed an appeal, which was unsuccessful.

This case highlights the importance of being across the fine print of any mass or dimension exemptions or permit terms. The exemption documents typically have a number of technical caveats, which if not met, will void the protection given by the exemption.
Understanding the steps in the CoR investigation process

Nathan Cecil, Partner, Holding Redlich

Chain of Responsibility (CoR) prosecution is not just about punishing parties for failing to comply with their Heavy Vehicle National Law (HVNL) obligations. It is also about educating parties about the right ways to manage their obligations.

This article takes a look at CoR prosecution procedure and provides some helpful tips for managing this process.

The new HVNL commenced from 1 October 2018 and has meant some significant changes. There is an increased focus on the practices and procedures of all parties in the Chain and the introduction of terms such as ‘shared responsibility’ and ‘due diligence’ for Executive. Officers means that parties must be proactive, not reactive in complying with their obligations.

The National Heavy Vehicle Regulator (NHVR) makes an example out of companies with deficient CoR policies and procedures, so it is important to understand how it conducts the investigation and prosecution process.

4 INITIAL STEPS IN THE CoR INVESTIGATION AND PROSECUTION PROCESS

If you are under investigation for a breach of the HVNL, there are certain steps that will be taken by the NHVR:

1. Notice to Produce

The NHVR usually commences an investigation process by issuing you with a Notice to Produce. The Notice to Produce will require that you produce documents to the NHVR within a specified time period. These notices are drafted in broad terms and require parties to produce copies of relevant journey and transport documentation.

Documents requested may include:
- entry and exit times of a vehicle to various sites;
- copies of all transport documentation, such as bills of lading, consignment notes, CWDs and delivery orders; and
- records of any communication with the operator of the vehicle and other parties in the Chain.

An authorised officer may issue an Improvement Notice requiring that you take action to stop the contravention from continuing or occurring again, or to remedy the matters or activities causing the contravention. Improvement Notices are considered one of the more educative and persuasive enforcement options available under the HVNL to ensure compliance with its requirements.

2. Improvement Notice

3. Court Attendance Notice

If the NHVR determines that your documents show deficient CoR procedures, proceedings for an offence under the HVNL are commenced by the issue and filing of a Court Attendance Notice. You don't want this to happen.

DEFINITION: COURT ATTENDANCE NOTICE (CAN)

A CAN is a formal notice requiring each listed defendant to attend court to answer to charges for an offence of the HVNL.

The time limit for commencing any proceedings for certain mass, dimension and load offences under the HVNL by way of a CAN is the latter of: 2 years after the commission of the offence; or 1 year after the offence comes to the complainant’s knowledge, but within 3 years after the commission of the offence.

4. Entering a Plea

Once you receive the CAN, you will have to decide whether to plead guilty or not guilty to the charge.

Many factors specific to each individual case will dictate when (or whether) it is appropriate to enter a guilty plea, and whether it is appropriate to bring evidence of contrition for the offences as charged.

Some of these factors include:
- what are the defences available to you in relation to the charges; and
- what are the potential fines and costs of defending the charges?

The costs of defending a CoR prosecution are not limited to just the legal costs (which may be significant). The costs to reputation and time are also significant (if not more important), and they can be difficult to measure.

In many cases, the concerns of the NHVR will be addressed through production of the documents listed above.

2. Improvement Notice

An Improvement Notice may be issued where there is or has been a breach of the HVNL.

New report: Vehicle collision to blame for 31% of work-related deaths

Content Editor, Partner Press

Safe Work Australia has released a report showing that the transport industry is one of the most dangerous industries for workers in Australia.

In 2017, 191 workers were killed at work in Australia.

Sixty (31%) died as a result of vehicle collision, Safe Work Australia’s Key Work Health and Safety Statistics Australia 2018 report found.

According to the report, machinery operators and drivers had the highest fatality rate, with 7.1 deaths recorded per 100,000 workers, accounting for 55 of the nation’s work-related fatalities.

Labourers had the second highest fatality rate, with 4.6 deaths per 100,000 workers, resulting in 56 work-related fatalities last year.

Agriculture, forestry and fishing remains to be the most dangerous industry for workers, with 16.5 deaths per 100,000 workers (accounting for 52 deaths in 2017), with transport, postal and warehousing being the second most dangerous; 8.6 deaths per 100,000 workers were recorded in this industry (accounting for 54 of the 2017 deaths). Safe Work Australia’s Chair, Diane Smith-Gander, urges us to look beyond the numbers.

“I would like those who read this publication to remember that every number in the publication represents a life changed forever” she said.

“While there is a 47% decrease in the national workplace fatality rate since 2007, there were still 191 workplace fatalities and every worker fatality is one too many.

“Understanding the national work-related injury, disease and fatality statistics can help reduce work-related fatalities, injury, illness and disease”, Ms Smith-Gander said.

In 2016-2017, 106,260 serious injury and disease claims – those resulting in the worker requiring one week or more off work – were made.

Forty-one percent of these were due to traumatic joint/ligament and muscle/tendon injuries, while 16% were for wounds, lacerations, amputations and internal organ damage. Musculoskeletal and connective tissue diseases made up another 16% of claims.

The agriculture, forestry and fishing industry had the highest incidence rate of serious claims at 18.7 per 1,000 employees.

Sixteen claims per 1,000 employees were made in the construction industry, 15.1 claims per 1,000 employees were made in manufacturing, and 15 claims per 1,000 employees were made in transport, postal and warehousing.

Published annually, Key Work Health and Safety Statistics sources its data from jurisdictions, the National Coronial Information Service and the media.
This includes implementing systems and processes which:

a. record the name, current driver’s licence number and contact details of each driver who is currently operating under the operator’s BFM accreditation;

b. ensure each of the drivers is in a fit state to safely perform required duties and to meet any specified medical requirements;

c. ensure each of the drivers have been inducted into the system and have been informed of the BFM hours; and

d. ensure anyone employed in the operator’s business, who has responsibilities relating to scheduling or managing the fatigue of the drivers has been inducted into the system and has been informed of the BFM hours.

Furthermore, all drivers operating under BFM accreditation must carry accreditation details. Section 468 of the HVNL states:

The driver of a heavy vehicle who is operating under a BFM accreditation or AFM accreditation must keep in the driver’s possession:

a. a copy of the accreditation certificate for the accreditation; and

b. a document, signed by the operator of the vehicle who holds the accreditation, stating that the driver:

   i. is operating under the operator’s BFM accreditation or AFM accreditation; and

   ii. has been inducted into the operator’s relevant management system; and

   iii. meets the requirements relating to drivers operating under the operator’s BFM accreditation or AFM accreditation (if any); and

c. for a driver operating under AFM accreditation, a document stating the BFM hours applying under the accreditation.

To qualify for BFM accreditation, you must be audited by an independent auditor to verify that your record-keeping and other procedures ensure you can comply with the Fatigue Management Standards. You will also be audited at specific intervals after qualifying for the accreditation so that the accreditation can be renewed after two years. An additional audit called a Trigger Compliance Audit may be required if, for instance, it seems that you are not fully meeting all of the above standards.

The auditor may find some evidence of non-compliance and recommend that you take corrective action. Provided you respond to the corrective action promptly and sufficiently, a recommendation to take corrective action should not affect its prospects of renewal.

The maximum penalty for a driver failing to carry the required documentation is $3000. If the driver commits the offence, the operator of the vehicle is also taken to have committed an offence and faces the penalties. The operator does not have the benefit of the mistake of fact defence for this offence.

The RCS then uses the score to help assess the levels of fatigue risk associated with combinations of work, rest and sleep which can be broken down into three dimensions:

1. Work-related rest breaks

   While it may seem obvious, one of the most important determinants of fatigue is ‘time on task’.

2. Recovery breaks

   When an individual starts work they need to be sufficiently rested so as to be able to sustain their work activities over the designated duration of the next shift.

   Drivers must have sufficient time between jobs to get to sleep, and should aim to reduce the likelihood of unsafe levels of fatigue by providing adequate sleep opportunities, minimising night shifts and ensuring that there are well-equipped rest areas.

3. Reset breaks

   While recovery breaks between shifts provide an opportunity to obtain sufficient sleep, in practice, fatigue increases as an accumulation across subsequent shifts and therefore fatigue-related risk increases.
Drivers must be allowed to ‘reset’ in order to avoid the build-up of unsafe levels of fatigue over multiple shifts. This can be achieved by reducing the accumulation of fatigue with reset breaks at least 30 hours and including two night periods (00:00 – 06:00) between work sequences.

ADDITIONAL AFM STANDARDS

While there are no set criteria, there are six standards that businesses must comply with for both BFM and AFM (outlined in the Table below) – and an additional four standards for AFM.

Most of the standards for BFM are equally applicable for AFM, however, there are four additional standards under AFM including:

1. Health – drivers are to participate in a health management system to identify and manage fatigue risks.
2. Workplace conditions – workplace environments and conditions must assist in the prevention of fatigue.
3. Management practices – management practices are to minimise the risks relating to driver fatigue.

4. Operating limits – operating limits will provide drivers and operators with the flexibility to effectively manage fatigue.

TIP: You do not have to complete the RCS for every schedule. Many operators have a policy in relation to their scheduling practices, and as such, they should assess the normal limits and any potential uses of the outer limits using the RCS.

AFM AUDITING

There are also various requirements for scheduled audits of the accredited fatigue management system.

The AFM participant’s systems and processes must undergo a scheduled compliance audit within the first six months of operation, and a second audit within 12 months prior to the end of the accreditation period.

Participants must provide various documents to an external audit, including (but not limited to) a list of all drivers who have been approved for use under accreditation since the previous scheduled audit, and after the first accreditation period, the system is subject to one scheduled compliance audit every accreditation period, within the last 12 months of the accreditation period. Every effort should be made to align the scheduled compliance dates for different NHVAS modules to avoid the participant having differing audit cycles.

BREACHES OF WORK AND REST UNDER THE AFM

There are a range of breaches of hours of work and rest under the conditions of the AFM approval. If the AFM conditions are breached, escalated risk contraventions may apply in circumstances where:

- AFM conditions are breached (a necessary pre-condition); and
- the escalated risk thresholds are also breached.

SUMMARY

Accreditation is an effective way to demonstrate compliance with the HVNL, and as it is a system which continually updates, it is more attuned to modern compliance practices than the compliance regime specified in the legislation.

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**TABLE: COMPLIANCE STANDARDS FOR FATIGUE MANAGEMENT ACCREDITATION**

<table>
<thead>
<tr>
<th>Standard</th>
<th>Summary</th>
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</thead>
<tbody>
<tr>
<td><strong>1. Scheduling and rostering</strong> – Scheduling of individual trips and rostering of drivers are to be in accordance with the limits prescribed in the HVNL.</td>
<td>The prescribed limits in the HVNL must be considered when scheduling individual trips and rostering drivers. The transport task and the amount of time required to complete the task safely should also be considered.</td>
</tr>
<tr>
<td><strong>2. Fitness for duty</strong> – Drivers are in a fit state to safely perform required duties and meet the specified medical requirements.</td>
<td>Drivers must be in a fit state for work in order to complete their duties safely. Drivers should undertake regular medical tests before trips to identify any risks or conditions that may compromise their ability to carry out their duties, such as sleep disorders.</td>
</tr>
<tr>
<td><strong>3. Fatigue knowledge and awareness</strong> – Everyone in the business is required to be involved in the management, operation, administration, participation and verification of the BFM processes and have competent knowledge of the fatigue management requirements within the operator’s Fatigue Management System.</td>
<td>All employees, including managers, must be equipped with the knowledge and skills required in order to identify fatigue management issues, and adopt adequate fatigue management practices.</td>
</tr>
<tr>
<td><strong>4. Responsibilities</strong> – The authorisations, responsibilities and duties of all positions involved in the management, operation, administration, participation and verification of their operations under the BFM option are current, clearly defined and documented, and carried out accordingly.</td>
<td>All relevant personnel are required to understand and implement the requirements under the BFM standards.</td>
</tr>
<tr>
<td><strong>5. Internal review</strong> – An internal review system is implemented to identify non-compliances and verify that the activities comply with the BFM standards and the operator’s Fatigue Management System.</td>
<td>Internal review processes are crucial for ensuring compliance with BFM standards. Internal management systems must be established in order to identify, report and investigate incidents of non-compliance with the BFM standards.</td>
</tr>
<tr>
<td><strong>6. Records and documentation</strong> – The operator will implement, authorise, maintain and review documented policies and procedures that ensure the management, performance and verification of the BFM option in accordance with the standards.</td>
<td>An organisation’s level of compliance with the BFM standards should be supported through the use of systems, and maintained through the use of records.</td>
</tr>
</tbody>
</table>
Changing the landscape of CoR practices in the agriculture and dairy sectors

Rebecca Niumeitolu, Lawyer, Holding Redlich

What do the grape industry, horticulture produce industry and dairy industry have in common? They are all industries that the Australian Competition and Consumer Commission (ACCC) has recently raised concern over the lack of formal contract practices and a lack of transparency...

It may well be that such practices seem unnecessary when verbal agreements are struck, when goods are packed and ready to go, or when the paperwork just seems like too much of a hassle. But from the CoR perspective, these findings by the ACCC also hint at other gaps in business practices, like the lack of documented and effective procedures for Heavy Vehicle National Law (HVNL) compliance.

This article looks at why it is integral for CoR parties, particularly in the agriculture and dairy sectors, to look at formalising their CoR compliance practices now, as well as strategies to encourage compliance of third parties.

WHY DO I NEED TO IMPLEMENT CoR PROCEDURES NOW?

1. Regulator attention and enforcement

There appears to be a concerted effort by regulators – both the National Heavy Vehicle Regulator (NHVR) and the competition regulator, the ACCC – around encouraging the agriculture and dairy industries to formalise their agreements and to ensure that business practices comply with safety requirements.

You might have noticed that the NHVR ramped up training seminars for primary producers in the lead up to the new HVNL laws taking effect in October 2018. The ACCC has also been engaging in public consultation and monitoring the implementation of industry codes around dairy, horticulture and the grape grower sectors.

The motive behind these seminars and industry engagements has been to provide guidance on how to ensure compliance with the various new legislative schemes. Parties in those sectors should be aware that the prioritisation by regulators of compliance within a particular industry tends to bring in its wake industry monitoring and enforcement measures to deter non-compliance and to impress upon the sectors the need to take their obligations seriously.

In August this year, the ACCC imposed the first fine of a fruit and vegetable wholesaler under the Horticulture Code just over a year after that Code took effect. Acknowledging that there may be a lag time before the same happens under the HVNL, it appears to be only a matter of time before the same happens under the HVNL, in particular, to the agriculture industry as a key risk area for non-compliance.

2. Higher penalties

Higher penalties under the new scheme is also a compelling reason to ensure that your CoR procedures are in order.

Maximum penalties for breaches of the new HVNL are seen in the Table below.

3. Personal liability for failing to have appropriate practices

The new amendments impose on Executives an obligation to exercise due diligence to ensure that their businesses comply with their safety duties under the HVNL. Executives are not just directors, they also include partners in partnerships and managers in unincorporated bodies.

The HVNL provides that the obligation to exercise due diligence includes, among other things, taking reasonable steps to ensure that the business has and implements processes:

- to eliminate or minimise those hazards and risks in respect of transport activities;
- for receiving, considering, and responding in a timely way to, information about those hazards and risks and any incidents; and
- for complying with the business’ primary duty under the HVNL.

Executives that do not ensure that such formal practices and procedures are documented and implemented risk personal liability under the Executive due diligence provisions.

WHAT IF SOMEONE I DEAL WITH DOES NOT WANT TO IMPLEMENT CoR PRACTICES?

This is a real concern for some CoR parties in industries that have traditionally operated using informal agreements. The risk for CoR parties that want to comply with the HVNL now, is that they may, to some extent, be held responsible for ensuring compliance of their counterparts in the Chain, insofar as they can control or influence the performance of transport activities.

So, what can these CoR parties do to encourage their counterparts to pull their weight?

1. Remind other parties that the obligations under the HVNL are non-delegable. Your compliance with the HVNL will not excuse their non-compliance. Moreover, a non-complying party takes on a lot of risk (e.g. penalties and safety risks) when they decide not to implement proper procedures to meet their obligations under the HVNL.

2. Share your CoR materials. There is no one-size fits all with CoR policies, procedures and risk assessments, but at least sharing your information with your counterparts can assist to put them on notice of their obligations and your expectations.

3. Include compliance in your contract terms and set out the repercussions of non-compliance.

If someone is unwilling to comply, then you should consider taking your business elsewhere. It may seem like a serious step to take, but a decision to deal with a repeat offender who demonstrates an unwillingness to abide by the HVNL shifts the onus on you to show whether you are properly meeting your primary duty to ensure, so far as reasonably practicable, the safety of your transport activities. The likely answer to that question will be ‘no’, such that continuing to deal with parties in breach of the HVNL will cause you to breach the HVNL whether or not a transport accident arises.

<table>
<thead>
<tr>
<th>Category</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1 offence: recklessly engaging in conduct exposing an individual to a risk of death or serious injury or illness</td>
<td>Corporation $3 million Individual $300,000 and up to 5 years imprisonment</td>
</tr>
<tr>
<td>Category 2 offence: contravention exposing an individual, or class, to a risk of death or serious injury or illness</td>
<td>Corporation $1.5 million Individual $150,000</td>
</tr>
<tr>
<td>Category 3 offence: other contravention of the duty</td>
<td>Corporation $500,000 Individual $50,000</td>
</tr>
</tbody>
</table>

Table: Maximum penalties for breaches under the new HVNL
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.

**Can drivers carry their documents in soft copy?**

**Q**  My company is moving predominately into paperless processes, how does this affect the documents my drivers are required to carry when driving a heavy vehicle?

**A**  Heavy vehicle drivers are required to carry documentation such as notices, permits, accreditation certificates or induction letters. If a heavy vehicle driver is asked by an authorised officer to produce documents, electronic versions may be acceptable.

For these electronic documents to be accepted they must be readily accessible and readable. This means that rather than just having a USB, you will need to have a visual display that the officer can use to read the relevant document.

However, the following documents must always be carried in hard copy:
- documents which have a specific requirement to be carried in hard copy, such as a condition of a notice;
- information recorded that cannot be presented electronically roadside; and
- National Heavy Vehicle Accreditation Scheme Inspection Report Books that must be presented in hard copy.

Accordingly, if you are moving to paperless, then you should ensure that your drivers are equipped with the proper devices to read electronic documents and verify that your documents are allowed to be in electronic form. Heavy vehicle drivers who are unable to produce documents when requested by an authorised officer may be subject to penalties and/or enforcement action.

**What are the legal requirements for when my solo drivers need to take rest breaks?**

**Q**  I have been trying to find the legal requirements for when my solo drivers need to take a rest break in their work schedule. Where can I find the times that they need to break? In particular, do they need to take their first 15 minute break at a particular time if they are rostered to work for 5.5 hours?

**A**  The times when solo drivers of fatigue-regulated heavy vehicles should break (that is ‘rest’) are set out in a table in Schedule 1 of the Heavy Vehicle (Fatigue Management) National Regulation (Regulations).

That table sets out the minimum rest time for drivers in any given period. For example, according to the table:

a. In any period of 5.5 hours a driver must not work for more than 5.25 hours work time and a driver must rest for at least 1.5 continuous minutes rest time.
b. In any period of 11 hours, a driver must not work for more than 10 hours work time and must rest for at least 60 minutes in blocks of at least 15 continuous minutes.

Applying scenario (a) to your question, there is no specification in the Regulations about when in the 5.5 hour period your driver needs to have their 15 continuous minutes rest. For example, a driver could take a break of 15 continuous minutes after 1.5 hours of work or after 2.5 hours of work.

A useful table setting out the work and rest hour requirements under standard hours can be found here: https://www.nhvr.gov.au/safety-accreditation-compliance/fatigue-management/work-and-rest-requirements/standard-hours.

**How do we properly restrain bales of hay?**

**Q**  I have read the National Restraint Guide 2018, but am concerned about the way I transport bales of hay. Could you please provide me with some assistance?

**A**  The National Restraint Guide 2018 establishes guidelines which help heavy vehicle drivers meet Loading Performance Standards. Subject to certain exemptions, the Loading Performance Standards state that a load on a heavy vehicle should not move in relation to a heavy vehicle when subjected to certain movements in a forward, rearward or lateral direction.

Baled loads of hay are often slippery and lack rigidity. As such, heavy vehicle drivers are encouraged to use a combination of methods in order to comply with the Loading Performance Standards. Baled loads may be restrained by using methods such as:

1. **Containment** – the containment surface, such as a curtain, must be suitably engineered to restrain bales of hay. Heavy vehicle drivers must avoid overloading the containment surface, as it will result in exceeding the maximum allowable load width or height.
2. **Blocking** – the use of suitably engineered and rated forward and rearward blocking surfaces may be implemented. Where blocking surfaces are unrated, these surfaces may be reinforced through the use of chains wrapped around the face of the blocking surface. Heavy vehicle drivers must properly apply the reinforcing chains or run the risk of compromising the effectiveness of the blocking surface.
3. **Tie-down** – tie-down lashings may be used to restrain bales of hay. While the number of lashings are dependent on the friction of the baled load, tension can be increased by inserting paper between the lashings and the bales of hay.

As the methods noted above are guidelines only, heavy vehicle drivers can use alternative methods to restrain baled loads. However, it is highly recommended that an engineer certifies these alternative methods.

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From ship-to-shore: Screening foreign suppliers to ensure compliance

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The HVNL impacts international transport supply chains that involve on-road distribution in Australia. Due to the concept of shared responsibility and the broad scope of the Chain of Responsibility (CoR), this impact begins even before cargo is unloaded from vessels and loaded onto heavy vehicles for on-road distribution; it begins when a contract is formed with a foreign supplier.

THE HVNL AND FOREIGN SUPPLIERS

Chasing foreign businesses that are involved in a breach of the HVNL can be difficult from an enforcement perspective.

Wholly foreign suppliers may consider themselves outside the purview of the HVNL, thinking, ‘Realistically, what could an Australian regulator do to make me change the way I pack and load my product? How could a foreign penalty be imposed on me if cargo was loaded incorrectly or if my transport documents contained false and misleading information?’

While direct regulatory enforcement against wholly foreign businesses for breach of the HVNL is practically impossible, there is a strong business case to rebut the perspective that foreign suppliers are beyond the reach of the HVNL.

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In terms of business longevity, domestic importers and transport service providers’ HVNL obligations do (and should) impact the way foreign suppliers do business and behave in the international transport supply chain. This is because the ripple effect of missteps early in the transport supply chain on the costs and safety of transport activities down the Chain are too significant for domestic CoR parties not to require foreign supplier compliance with the HVNL – essentially, domestic parties can expect to pay the cost for non-compliance.

For example, if a foreign supplier organised for a container to be packed for shipment without regard to the Load Restraint Guide, the load’s weight distribution and whether the load could become dislodged, that would pose a serious risk to the safety of the transport activities of parties further down the Chain. It could also amount to other CoR parties breaching load restraint requirements if they had or could have any control or influence over the way the goods were packed.

Another example would be where a foreign supplier records the incorrect mass information in their transport documents, which if relied on, would risk drivers, operators and consignees breaching mass obligations under the HVNL and pose a risk to the safety of their respective transport activities.

In each of the above examples, it makes commercial sense for domestic parties in the Chain to mitigate against the risks posed by foreign suppliers who do not comply with the HVNL by either not doing business with them or obtaining assurances from foreign suppliers about the procedures they implement to ensure compliance with the HVNL.

Thus, far from being free from HVNL obligations, foreign suppliers (whether they like it or not) are active and participating parties in the Chain and share responsibility for breaches of the HVNL by reason of the commercial risks posed by their non-compliance with the law.

HOW TO MITIGATE YOUR RISKS THROUGH PRE-ENGAGEMENT SCREENING

The level of appropriate checks to mitigate risks to your business will vary on the type of supplier you are dealing with.

Large suppliers with a strong customer base in Australia may be familiar with the HVNL requirements and may already have effective systems and policies to ensure compliance, such that pre-engagement screening and compliance checks are seamless.

Whereas smaller exporters or exporters with a limited customer base in Australia may require more ‘hand-holding’ to ensure that they are aware of the standards with which they must prepare and load their product and prepare their transport documents.

4 KEY FACTORS TO ADDRESS IN PRE-ENGAGEMENT SCREENING OF FOREIGN SUPPLIERS

Key points that domestic CoR parties should address in pre-engagement screening are as follows:

1. Advise the foreign supplier of its requirements under the HVNL, in particular of its obligations relating to mass and load requirements as well as transport documentation.

2. Provide the foreign supplier with the Load Restraint Guide, or at least extract specific requirements that are relevant to the goods which are the subject of transportation. This could include portions relating to load performance standards (that identify limits on the permissible movement of the load) and the types of restraint suitable for the products that are to be transported.

3. Don’t make compliance an option, make it an obligation. Make sure that your contract makes clear reference to the foreign supplier’s obligations to ensure compliance with the HVNL and identify what recourse you have against them if they breach such obligations. For example, non-compliance could be grounds for refusing to accept the goods (subject to your obligations to deal with the non-compliance load) or the costs of making new arrangements to transport the goods in a manner that complies with the HVNL.

4. Agree on a process for identifying and addressing risks and breaches of the HVNL.

WARNING SIGNS DURING TRANSPORTATION

Discrepancies in the mass or dimension information in transport documentation should raise alarm bells that you may need to verify these elements of the load before transport.

Signs of a shifted load or failed load restraint will mean that checks need to be conducted on the load restraints and the weight distribution of the load.

REMEMBER, THERE ARE OTHER LINKS IN THE CHAIN

Securing the compliance of foreign suppliers with load, mass and transport documentation obligations under the HVNL serves to mitigate against risks of breaching the HVNL and risks to cargo and ultimately your business, but it is important to remember that foreign suppliers are just one part of the Chain.

IN THE NEXT ISSUE

OUT DECEMBER 2018

- Special Edition: Load restraint in containers
- What does the new Load Restraint Guide say? And what you should be doing...
- The problems posed by foreign suppliers – and the solutions