



Your one-stop resource for practical
Chain of Responsibility solutions

FEBRUARY 2020

3 | 5 non-negotiables for the new year

6 | What makes the National Heavy Vehicle Regulator tick?

8 | Using technology to manage HVNL compliance

From Your Editor-in-Chief



In this issue, we look at the availability and enforceability of insurance for penalties under the Heavy Vehicle National Law (HVNL). We also consider what the insurance landscape may look like following the outcome of the current review of the law. In a strange twist, we also study a case that ended up costing a business *more* because it had insurance!

We revisit the issue of fatigue, as we know that fatigue management is one of the major focal points for the current review of the law. Fatigue is one of the hardest Chain of Responsibility (CoR) safety issues to manage due to the fact that it covers both 'hard' parameters (e.g. working hours) and 'soft' parameters (e.g. not being adversely affected by fatigue, which is not capable of a simple and determinative measurement). We take the time to recap the HVNL's current position on fatigue management ahead of likely changes.

Finally, another major focus under the review of the HVNL is the use of technology to ensure safety and compliance. We examine the main areas where technology can assist your business to ensure that its workers are safe and you are doing the right thing by the law.

Happy reading.

Nathan Cecil
Partner, Holding Redlich
Editor-in-Chief, CoR Adviser

Can you insure CoR risk?

Nathan Cecil, Partner, Holding Redlich

For many businesses, risk is addressed in two ways. First, reducing the likelihood or seriousness of the consequences of a risk occurring as extensively as possible e.g. through changing the way that a business performs risky activities. Second, businesses take out insurance either to cover the entire consequences of such risk or the residual risk that they cannot avoid by adopting the approaches just mentioned.

The same is often true for legal or compliance risk. Where a business is exposed to a risk of liability or penalty arising from regulation, many businesses look to adopt their practices or take out insurance as a means of controlling or underwriting this risk.

WHAT RISKS ARE WE TALKING ABOUT?

In the context of Heavy Vehicle National Law (HVNL) compliance, we are talking about the following risks:

- court penalties – for both the business and/or executive;
- payment of the prosecution's legal costs – ordinarily ordered against someone charged with an HVNL offence whether they win, lose or draw in court;
- payment of the business' own legal cost of investigation/defence; and
- compensation orders – e.g. being ordered to repair or replace road infrastructure damaged as a result of a breach of the HVNL.

➤ Continued on page 2

Back to basics: Fatigue compliance

Meshal Althobaiti, Lawyer, Holding Redlich

Driver fatigue and drowsy driving is a major safety hazard on our roads and is a leading factor in heavy vehicle crashes. In fact, studies show that fatigue is involved in one eighth of Australian heavy vehicle crashes. In this article, we take a look at how the Heavy Vehicle National Law (HVNL) addresses this hazard.

More people in NSW died in fatigue-related crashes than drink-driving crashes in the last five years. This is not surprising when you take into account that being awake for about 17 hours has a similar effect on performance as a blood alcohol content of 0.05. The HVNL attempts to address this safety hazard by imposing various obligations including counting time and record keeping requirements.

FATIGUE-REGULATED HEAVY VEHICLES

National heavy vehicle driver fatigue laws apply to fatigue-regulated heavy vehicles, which are:

- a vehicle with a Gross Vehicle Mass (GVM) of more than 12t;
- a combination when the total of the GVM is more than 12t;
- buses with a GVM over 4.5t fitted to carry more than 12 adults (including the driver); and
- a truck, or a combination including a truck, with a GVM of more than 12t with a machine or implement attached.

➤ IMPORTANT



A primary duty exists at the heart of the laws for fatigue management: a driver must not drive a fatigue-regulated heavy vehicle on a road while impaired by fatigue.

➤ Continued on page 4

— HELPDESK QUESTION OF THE MONTH —

When must a solo driver operating under standard hours take their rest breaks? (answer on page 7)

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

NHVR consulting with industry to develop productivity plan

The National Heavy Vehicle Regulator (NHVR) is seeking feedback on its *Draft Heavy Vehicle Productivity Plan 2020-2025 (HVPP)*, before it develops an Action Plan which will be released mid-2020.

The regulator said it is calling for a coordinated approach to addressing Australia's growing road freight task, which is the fifth largest globally and is growing almost twice as fast as the Australian population.

The plan has three objectives:

- provide access certainty and consistency;
- partner with local government to build capability; and
- promote safer and more productive vehicles that are better for the environment and communities.

"This is a draft blueprint for the NHVR, government and industry to work together to improve access and productivity for Australia's heavy vehicle fleet," NHVR Executive Director Freight and Supply Chain Productivity, Peter Caprioli said.

"The HVPP has at its heart an objective of delivering safe, productive and efficient heavy vehicle movements for an industry that has an impact on all Australians.

"In preparing the HVPP we consulted with more than 50 groups across government and industry who collectively want to promote the growth of safer and more productive vehicles that are better for the economy, environment and communities.

"Many in industry are calling for greater access and certainty, governments want improved consistency and data, and road managers want support for access and road infrastructure decisions.

"The HVPP offers a pathway forward to meet the ambitions of government and the heavy vehicle industry and will be further informed through this next phase of consultation."

The NHVR is currently seeking feedback on the draft HVPP which can be found at: www.nhvr.gov.au/hvpp.

Submissions can be emailed to info@nhvr.gov.au. ■

► Continued from page 1 "Can you insure CoR risk?"

There are other 'general' business losses that might also arise as a result of a breach of the HVNL (such as liability for damage to third-party property, personal injury, business continuity losses etc.), but as these aren't HVNL-specific, we won't discuss them here.

The HVNL-mandated approach to such risks is to ensure that your business has systems and practices in place so that you don't breach the HVNL. This is at the heart of the 'primary duty' under the HVNL.

Nonetheless, you won't always be able to implement systems or practices that absolutely eliminate the risk of breach. And, in any event, you might still want to take out protective insurance to cover those instances of system or human error, where breaches occur despite your best intentions.

CAN YOU INSURE AGAINST SUCH RISKS?

If celebrities can insure their vocal cords and legs, you can insure against HVNL breach risks. In short, you can insure any risk that an insurer is prepared to provide cover for.

The real question is, is there anything prohibiting you from insuring against HVNL breach risks? Unfortunately, the answer is 'maybe'.

First, s 742(1)(c) of the HVNL says that a contract is void to the extent that it purports to require a person to pay a penalty that another person has been ordered to pay

under the HVNL. Whilst this is intended to prevent parties in the chain from shifting the risk and liability burden onto another party in the chain, this provision could arguably also be applied to render any insurance contract void. So far, this interpretation is untested.

Second, there is a general rule of law that a court won't enforce contracts which are against public policy, including any contractual arrangements which cover criminal conduct. So, if your insurer declined cover (e.g. under the common exclusion for criminal or intentional conduct), a court might not assist you and may refuse to enforce the insurance contract against the insurer.

Third, there is also the prospect that a court might impose a higher penalty if you are insured, to increase the pain – see our case discussion on page 2 for an example.

There is no absolute prohibition on taking out insurance for an HVNL breach. But, the limits of the enforceability of such policies are untested.

Finally, to conclude the position in relation to insurance under Work Health & Safety (WHS) laws in NSW, there is a proposal to introduce provisions which would make it illegal to take out insurance covering any WHS penalties! Insurance cover for defence costs would still be permitted, but the amendments aim at ensuring that the person penalised actually bears the cost. ■

Does having insurance cost you more?

Nathan Cecil, Partner, Holding Redlich

In the Work Health & Safety (WHS) case of *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* (2013), the judge actually imposed a higher penalty once it became known that the defendant had insurance. Let's take a closer look at the facts of the case.

A rigger employed by Ferro Con, a specialist steel erection business, was killed by a falling beam after a fabric sling supporting the beam snapped while he was attempting to lower the beam into position. Ferro Con was charged with a breach of s 19(1) of the Occupational Health, Safety and Welfare Act 1986 (**the Act**), having failed to ensure so far as was reasonably practicable that the rigger was safe while at work. Ferro Con's director and responsible officer were charged with a breach of s 61 of the Act, for having failed to take reasonable steps to ensure Ferro Con's compliance with its statutory safety obligations.

In sentencing, the magistrate was scathing of the responsible officer's decision to call on a general insurance policy that Ferro Con had in place, which included indemnification of its director for fines imposed for criminal conduct.

He found that the policy:

- undermined the court's sentencing powers by negating the principles of both specific and general deterrence;
- sent a message to employers and officers that with insurance cover for criminal penalties for WHS offences there is little need to fear the consequences of offending; and
- was so contrary to a genuine acceptance of the legal consequences of criminal offending that it dramatically outweighed the benefits to the justice system of an early guilty plea or statement of remorse.

As a result, the court declined to give any discount on the penalty which would ordinarily apply for entering an early plea of guilty. It noted it could not increase the penalty because under the current safety laws there is no prohibition on obtaining insurance.

In the wake of this decision, legislators in NSW are considering new provisions which would make it illegal for a person to take out insurance cover for any statutory penalty for breach of the WHS laws. ■

5 non-negotiables for the new year

As we settle into 2020, it is a good time to reassess the extent to which the parties in your supply chain understand their safety obligations. The Heavy Vehicle National Law (HVNL) can be complex and long, so in this article we do a simple refresher on some of the most important elements your business must be on top of before any further changes get underway.

The National Transport Commission (NTC) has suggested that the current law is outdated, inaccessible, long, and prescriptive. As previously discussed, the NTC is in the process of developing and collating policy options for the road transport industry. It is imperative that your business has an understanding of the current law before further changes are implemented that may build on this knowledge. Now is the time to fill in any cracks in your understanding to ensure your business has strong foundations in safety compliance.

1. You cannot ignore the primary duty any more

The notion of the primary duty has been at the heart of the HVNL since the new laws came into effect over a year ago. Everyone in your business must understand that 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 primary duty represents an obligation to eliminate or minimise potential harm or loss (risk) by doing all that is reasonably practicable to ensure safety.

2. You must be proactive, not reactive

Over the past year we've talked about the shift from reactive to proactive behaviour. You must ask yourself whether your business is doing everything reasonably practicable to prevent and avoid Chain of Responsibility (CoR)

breaches from occurring. Your mindset should be proactive and forward-looking. Focus on what you are doing to prevent breaches from occurring. Make sure that parties in your supply chain are proactively managing risk and preventing incidents from arising, not merely reacting to them when they do.

Your mindset should be proactive and forward-looking. Focus on what you are doing to prevent breaches from occurring.

3. You must implement CoR compliance frameworks

The current 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.

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.

Compliance frameworks 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 risk management, the law requires you to manage subcontractors in a specific way. 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

Where possible, you should screen your subcontractor's CoR compliance prior to engaging them 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.

If you have a solid grounding in these five areas and parties in your supply chain have a thorough understanding of their responsibilities, then it will be easier to adapt to any new changes to come. ■

Careless smokers face tough penalties under new laws

Drivers in NSW caught throwing lit cigarettes from their vehicles during a total fire ban can now face fines of \$11,000 and a loss of 10 demerit points, while passengers found committing the same offence can be fined \$1,320.

If a fire ban isn't in place, drivers can be fined \$660 and lose five demerit points for discarding lit cigarettes, while passengers can also be fined \$660 for the same offence.

NSW Minister for Police and Emergency Services David Elliott said it's the first time a demerit point penalty has been imposed for such an offence.

"We had an early start to the fire season this year, and just 19 days into summer, we've seen almost three million hectares burnt, more than 700 homes destroyed, and, tragically, six lives lost," Mr Elliott said.

"Firefighters have been on the frontline fighting the blazes day and night and this kind of criminal foolishness will not be tolerated."

NSW Rural Fire Service Association President Brian McDonough has welcomed the state government's crackdown.

"This reckless behaviour puts the safety of firefighting volunteers at risk and I hope this move makes people think very carefully about the consequences of their actions next time they go to discard a lit cigarette," Mr McDonough said.

The new penalties, which came into effect on 17 January this year will be enforced by NSW Police and local authorities.

Anyone who sees a lit cigarette being improperly discarded from a vehicle is asked to contact the NSW Rural Fire Service hotline on 1800 679 737, or online at <https://www.rfs.nsw.gov.au/fire-information/cigarette-form>.

➤ Continued from page 1 "Back to basics: Fatigue compliance"

WHAT ARE THE HVNL FATIGUE REQUIREMENTS?

The legislative regime is covered under part 6.2 of the HVNL.

Section 26C is the primary duty in the HVNL. Each party in the Chain of Responsibility (**CoR**) for a heavy vehicle must ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicles.

Section 26E of the HVNL requires that a person must not ask, direct or require (directly or indirectly) the driver of a heavy vehicle or a party in the CoR to do or not do something the person knows, or ought reasonably to know, would have the effect of causing the driver:

- to drive a fatigue-regulated heavy vehicle while impaired by fatigue; or
- to drive a fatigue-regulated heavy vehicle while in breach of the driver's work and rest hours option; or
- to drive a fatigue-regulated heavy vehicle in breach of another law in order to avoid driving while impaired by fatigue or while in breach of the driver's work and rest hours option.

HOW DO YOU RECOGNISE FATIGUE?

The main purpose of fatigue management under the HVNL is to prevent drivers from being impaired by fatigue when operating a vehicle and to ensure that those in the supply chain aren't influencing (or in some cases demanding) those drivers to drive while fatigued.

To determine whether you are in breach of your obligations in relation to fatigue, a court will look for any cause or signs of fatigue arising in the circumstances of the relevant transport activities. This specifically refers to, "any factor that could cause or contribute to a person being fatigued while driving a fatigue-regulated heavy vehicle on a road (whether or not the cause arises while the person is at work)".

Examples of signs of fatigue, as defined in s 221 of the HVNL, include:

- lack of alertness;
- inability to concentrate;
- reduced ability to recognise or respond to external stimuli;
- poor judgment or memory, making more mistakes than usual;
- drowsiness, or falling asleep, at work (including microsleeps);
- finding it difficult to keep eyes open;
- needing more frequent naps than usual;
- not feeling refreshed after sleep;
- excessive head-nodding or yawning;
- blurred vision;
- mood changes, increased irritability or other changes to the person's mental health; and
- changes to the person's health or fitness.

COUNTING TIME

Legislation stipulates that time and rest time be counted in a certain way. Understanding the rules for counting time helps drivers manage their work and rest times and assists other responsible parties in the CoR with complying with their duties to prevent driver fatigue.

Part 6.3 of the HVNL identifies the work and rest time requirements. Sections 250 and 251 specifies that drivers (solo and two-up) must avoid:

- working more than the maximum work time stated in the standard hours for the period; and
- resting less than the minimum rest time stated in the standard hours for the period.

The standard work and rest hours for a given period are set out in tables in Schedule 1 of the *Heavy Vehicle (Fatigue Management) National Regulation (Regulation)*. For example, it provides the following for a solo driver of a fatigue-regulated heavy vehicle:

Total period	Maximum work time	Minimum rest time
<i>In any period of</i>	<i>A driver must not work for more than</i>	<i>A driver must not rest for less than</i>
5.5 hours	5.25 hours' work time	15 continuous minutes' rest time
8 hours	7.5 hours' work time	30 minutes' rest time, in blocks of at least 15 continuous minutes
11 hours	10 hours' work time	60 minutes' rest time, in blocks of at least 15 continuous minutes
24 hours	12 hours' work time	7 continuous hours' stationary rest time (this is a 'major rest time')

WORK DIARY

Drivers of a fatigue-regulated vehicle undertaking or planning to undertake a journey of 100+km in a day must complete their work diary (including all work and rest) for that day.

WHAT WORK AND REST OPTIONS ARE AVAILABLE?

The HVNL prescribes three work and rest hour options for drivers of fatigue-regulated heavy vehicles. These are as follows:

- Standard hours
- Basic Fatigue Management (**BFM**)
- Advanced Fatigue Management (**AFM**)

Standard hours in the HVNL applies to drivers operating without BFM or AFM accreditation. The standard hours option specifies the maximum amount of work and minimum periods of rest allowable under the HVNL without requiring heavy vehicle drivers and operators to adopt additional safety measures or obtain further accreditation.

BFM and AFM provide increased levels of flexibility by managing fatigue risks through the National Heavy Vehicle Accreditation Scheme (**NHVAS**). Heavy vehicle drivers can only work under these hours if they have been inducted into an accredited operators system.

RECORD KEEPING REQUIREMENTS FOR FATIGUE COMPLIANCE

Under the HVNL, you are required to take all reasonably practicable steps to ensure that your employees are suitably trained in CoR compliance. It is extremely important to document all your policies and procedures. This is not only to ensure that those policies and procedures are clear, easily disseminated and consistent, but also to assist your business in showing that all reasonably practicable steps have been taken should you be investigated or prosecuted.

➤ IMPORTANT

It is a breach of the HVNL and punishable by penalty and prosecution if you fail to keep relevant records to demonstrate fatigue compliance. This includes keeping a record of specific information for drivers of fatigue-regulated heavy vehicles.

For each driver the record keeper must keep:

- the driver's name, licence number and contact details;
- the dates fatigue-regulated heavy vehicles were driven;
- the registration number of the vehicle(s) driven;
- the total of each driver's work and rest times for each day and each week;
- copies of duplicate work diary daily sheets (if applicable);
- driver's rosters and trip schedules (including changeovers);

➤ Continued on page 5

➤ Continued from page 4

- driver timesheets and pay records; and
- any other information as required as a condition of an accreditation or exemption (such as driver training and health assessments).

In particular circumstances, some businesses may be exempt from certain record-keeping obligations. Especially where it may be extremely difficult to comply or if it can result in multiple recordkeeping systems being kept for different legislative obligations. In these cases, operators can apply for a fatigue record-keeping exemption (permit) from the National Heavy Vehicle Regulator (NHVR).

RISK MANAGEMENT SYSTEMS

Documenting policies and procedures is extremely important to ensure that those policies and procedures are clear, easily disseminated and consistent. Adequate documentation can also assist businesses in showing that all reasonably practicable steps have been taken should you be investigated or prosecuted.

Risk management systems can allow your organisation to:

- review driving or work schedules and work records of relevant drivers;
- regularly assess fitness for duty of relevant drivers;

- review contractual arrangements and documentation relating to the consignment and delivery of goods;
- review loading and unloading times and delays at loading and unloading places;
- develop and adhere to trip plans;
- implement formalised processes to engage and consult with other parties in the chain;
- keep up to date with the safe conduct of transport activities in the business;
- fully understand the hazards and risks associated with relevant drivers' transport activities and how these are being managed; and
- provide appropriate resources—including people, systems and equipment—to manage relevant drivers' safety hazards and risks effectively.

Your business should consider implementing a risk management system to address the risks associated with fatigue. Such a system will assist in meeting your safety obligations and satisfying the requirements of the HVNL. ■

Fatigue management policy guide

Meshal Althobaiti, Lawyer, Holding Redlich

Businesses need to proactively take measures to ensure heavy vehicle safety by addressing the risks associated with fatigue. Having relevant and adequate policies in place can go a long way.

WHY DO YOU NEED A FATIGUE MANAGEMENT POLICY IN PLACE?

Fatigue is a major safety factor affecting the heavy vehicle transport industry. Your business must be committed to ensuring that all drivers are well rested and given adequate rest breaks as prescribed in the Heavy Vehicle National Law (HVNL).

The aim of this policy is to ensure that the business, its employees, contractors and sub-contractors abide by and operate within the Chain of Responsibility (CoR) regime for the safe operation of heavy vehicles in relation to fatigue.

WHAT IS THE SCOPE OF THE POLICY?

This policy applies to all employees, contractors and subcontractors – every driver, every vehicle, every load, and every journey.

Any evidence of fatigue compliance breaches may result in disciplinary action and, depending on the safety, regulatory impact, and severity, may result in immediate dismissal of the offending person. ■

TEMPLATE: FATIGUE MANAGEMENT GUIDE		DOWNLOAD 
2020 CoR COMPLIANCE PLAN		
Role	Fatigue management	
	In order to manage fatigue, parties in your supply chain should:	
Management	<ul style="list-style-type: none"> ▪ conduct regular assessments and respond to fatigue risks which arise during commercial activities; ▪ comply with all operating time limits and maintain an accurate record of driver work/rest times through the planning and scheduling processes; ▪ manage disruptions to commercial activities which effect driver operating hours; ▪ ensure that all workers are fit to operate heavy vehicles and have received appropriate information, training and supervision in relation to fatigue management under the HVNL; and ▪ implement processes which ensure that the business maintains accurate records for management of fatigue. 	
Drivers	<ul style="list-style-type: none"> ▪ comply with trip plans, schedules and inform relevant managers if they have been delayed or are behind schedule; ▪ maintain correct trip records and take regular breaks as prescribed under the HVNL; and ▪ stop work if they have reasonable cause to believe that to continue could cause harm to themselves or others. 	
Schedulers	<ul style="list-style-type: none"> ▪ ensure drivers' schedules are designed to account for drivers' prescribed rest breaks; ▪ respond to any delays which may amend a driver's schedule and make appropriate arrangements to ensure that mandated work and rest hours are not exceeded; and ▪ ensure drivers' schedules are not exerting any unintended pressure on drivers to breach work/rest requirements under the HVNL. 	
Loading managers	<ul style="list-style-type: none"> ▪ ensure that loading/unloading of vehicles is not delayed so to infringe on drivers' allocated rest breaks; and ▪ ensure that if there are any delays, they are communicated to the drivers and schedulers to ensure appropriate arrangements are made so drivers are not influenced to speed. 	

What makes the National Heavy Vehicle Regulator tick?

Rebecca Niumeitolu, Lawyer, Holding Redlich

The increasing purview of the National Heavy Vehicle Regulator (NHVR) in enforcement of the Heavy Vehicle National Law (HVNL) across the states and territories has us asking, what makes it tick? In this article, we look at the grounds on which the NHVR decides to pursue charges against a party in the Chain of Responsibility (CoR).

NHVR'S PROSECUTORIAL FUNCTIONS

Section 659 of the HVNL sets out the NHVR's functions. This includes bringing and conducting proceedings in relation to contraventions and offences against the HVNL and conducting or defending appeals and defending appeals from decisions on review arising therefrom.

WHEN TO PROSECUTE?

Factors that the NHVR takes into account when deciding whether to prosecute are set out in the NHVR's *Prosecution Policy and the Prosecution Policy of the Commonwealth*.

If you have ever wondered why some people get caught up in charges while others don't for conduct that's ostensibly the same, it's because more goes in to the NHVR's decision to prosecute than the mere existence of facts that a contravention or suspected contravention of the HVNL has occurred. As a public agency, its decision to commence proceedings is geared towards public utility.

Factors that it takes into account include, but are not limited to:

- resources available for worthy prosecutions;
- the impact that the prosecution will have in changing the accused's conduct, penalising offenders and deterring future offenders;
- whether there are reasonable prospects of conviction based on an assessment of admissible, substantial and reliable evidence that the accused committed the offence;
- whether there is a public interest in prosecution;
- the seriousness of the offending behaviour with priority to cases involving fatalities, serious injury or high safety risks. This is why many reported cases commenced by enforcement agencies under the HVNL involve more than one-off breaches and tend to show systemic failing of a business or CoR parties to comply with HVNL obligations; and

- whether the offending behaviour is serious enough to elevate it to a Chapter 1A offence if prospective charges concern an alleged breach of the primary duty. Conduct said to contravene the primary duty should be more serious where maximum penalties for non-compliance are significantly higher than other penalties under the HVNL, going up to \$3,364,540 for companies and 5 years' imprisonment for individuals.

The NHVR gives priority to prosecute cases that undermine enforcement mechanisms under the HVNL

Aside from the seriousness of the offending behaviour, the NHVR gives priority to prosecute cases that undermine enforcement mechanisms under the HVNL. For example it prioritises the prosecution of cases involving the impersonation of authorised officers, the obstruction of authorised officers' exercise of their powers, failures to comply with enforceable undertakings or notices issued pursuant to the HVNL and offences where employers discriminate or victimise employees (e.g. where employees report HVNL breaches).

The NHVR is not likely to pursue charges if there are insufficient prospects or public interest in prosecution

WHO DOES THE NHVR TARGET?

The NHVR's policy provides that it targets persons who are primarily responsible for the alleged contravention in its prosecutions.

WHEN DOES THE NHVR BACK DOWN OR ALTER ITS APPROACH?

The NHVR is not likely to pursue charges if there are insufficient prospects or public interest in prosecution or where it could undermine confidence of the community in the criminal justice system.

The NHVR may also change its tack during charge negotiation. An accused and the NHVR have the opportunity to negotiate the charges that the NHVR will proceed on, if any. Consequences of charge negotiation could be that:

- the accused pleads guilty in exchange for lesser charges;
- charges laid against the accused may be reduced, dropped altogether or modified (e.g. from a severe risk breach to a substantial risk breach); and
- the accused could approach the NHVR and offer to make a voluntary promise to undertake organisational reform and to implement effective safety measures for transport activities. The HVNR's policies around agreeing to such promises, otherwise known as enforceable undertakings, are set out in its Enforceable Undertaking Policy. Importantly, the NHVR does not solicit enforceable undertakings and it is for the accused to offer them. In considering whether to drop charges in favour of an enforceable undertaking, the NHVR may have regard to whether the *'alleged offender demonstrates an ability to effect profound reform of their activities to improve safety and to benefit the community in ways not able to be achieved by other sanctions'*. Advantages of making an offer such as this are that an accused will not have a conviction recorded against it and that reforms are likely to prevent long-term HVNL breaches. However, any enforceable undertakings will be published on the NHVR's website.

AN INCREASING PRESENCE

The NHVR currently employs safety and compliance officers to enforce compliance in South Australia, Tasmania, the ACT and Victoria. Its presence on our roads, which is anticipated to grow in other HVNL-participating states, is bound to put the NHVR's prosecution policy into play on a more regular basis. CoR parties should be aware of its policy not only from a basic enforcement standpoint but also in the event that they fall subject to it and need to negotiate their liability exposure. ■

HELPDESK

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.

Reporting to the NHVR

Q I work at a transport company and I have serious concerns about its compliance with HVNL obligations. I'm afraid to talk to my boss because last time a colleague did he had to move jobs. What should I do?

A Typically, persons facing suspected or actual HVNL non-compliances in their businesses should be able to go to management to flag concerns with the expectation that a review of such incidents or steps to rectify them will be undertaken. After all, all CoR parties have a primary duty to ensure so far as reasonably practicable the safety of their transport activities. Moreover, executives have a personal obligation to exercise due diligence to ensure businesses comply with their safety duties and it's an offence under the HVNL to discriminate or victimise an employee for complaining about these types of incidents to their employer.

Your case, however, is different.

First, if you have concerns that your work practices pose an immediate risk to an individual's safety such as a vehicle collision, you should consider contacting the police. The NHVR also provides a list of other agencies responsible for issues related to the HVNL but not falling directly under its purview (e.g. contact the police for road rule violations).

If your concerns relate directly to business practices relating to HVNL compliance and don't pose an immediate risk to individual safety, then your alternative is to contact the Heavy Vehicle Confidential Reporting Line (HVCRL) on 1800 931 785.

Primary matters that it deals with include:

- incidents affecting heavy vehicle safety or operation (e.g. vehicle defects);
- business practices that endanger the safety of drivers, road users and the community (speeding, inadequate restraint of goods, failure to manage driver fatigue and work times); and
- business practices that facilitate breaches of the HVNL (making unrealistic work schedules).

Duty to provide driver with sufficient information

Q Do employers have a duty to provide drivers with sufficient information about what speed to travel, the load restraints used for the products to carry, or any other special instructions specific to my load?

A All businesses in the supply chain can be held liable for on-road breaches of mass, dimension, load restraint, speed, fatigue and vehicle roadworthiness, to the extent that they perform any task or part of a task relating to those matters – regardless of whether they own or operate a heavy vehicle. In addition, businesses can be in breach of the laws simply for failing to have in place business practices aimed at addressing CoR risks as part of their transport activities – without any need for an on-road incident to have occurred.

Each party in the chain of responsibility for a heavy vehicle must ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicle. This will apply to a driver's employer and will include a duty to provide the driver with proper instructions about what speed to travel, the load restraints used for the products and any additional instructions, such as taking special care with the payload.

The HVNL prohibits drivers, and persons permitting drivers to drive, from driving heavy vehicles that, together with their loads do not, or whose components do not, comply with mass requirements. These mass requirements extend to other CoR parties who also have the capacity to control, eliminate or minimise such mass breaches and associated safety risks by reason of the principle of shared responsibility and the primary duty.

Work and rest time

Q What does rest and work mean under the Heavy Vehicle National Law?

A Under the HVNL, work is driving, instructing or supervising another person driving, sitting in the driver's seat while the engine is running and any task related to the use of a fatigue-regulated heavy vehicles. This includes, but is not limited to tasks such as:

- loading/unloading the vehicle;
- inspecting the vehicle;
- attending to the load;
- cleaning and refuelling the vehicle; and
- performing marketing tasks for the use of the vehicle.

Rest is any activity that is not work.

Q Do I have to complete a work diary?

A Under the HVNL, a driver of a fatigue-regulated heavy vehicle is exempt from having to complete a National Driver Work Diary if they are working within a 100km radius of their base.

Q As an employer, am I responsible for monitoring contract drivers' rest?

A Contract drivers are responsible for monitoring their own work and rest and if there is any reasonable step you can take to assist them in doing so, you must take such steps.

Q What requirements are there to have rest in between working in a farm and driving the truck?

A There are no specific legal requirements to rest in between working in the farm and driving a fatigue-regulated heavy vehicle. However, there is a duty to not drive a fatigue-regulated heavy vehicle whilst impaired by fatigue. A driver should rest at any time they feel tired, fatigued or drowsy. ■

© 2020 Portner Press Pty Ltd All rights reserved. No part of this publication may be reproduced or transmitted in any form by means electronic or mechanical, including recording, photocopying, or via a computerised or electronic storage or retrieval system, without permission granted in writing from the publisher. The information in this publication is of a general nature and does not constitute legal advice. It is not intended to address the circumstances of any particular individual or entity. No action or inaction should be taken based solely on the contents of this publication; if you require specific legal advice on any matter relating to employment law and industrial relations, please contact the Editor-in-Chief of this publication or your own legal advisers. The information and opinions provided are believed to be accurate and sound, based on the best judgements available to the authors at the time the publication went to print. We do not guarantee that the information is accurate at the date it is received or that it will continue to be accurate in the future. The publisher is not responsible for any errors or omissions.

If you have any subscription queries, please contact Customer Services on 1300 782 911. We may monitor and record calls to maintain and improve our service. For editorial queries please email us at: cs@portnerpress.com.au. Publisher: Pippa McKee. Waterman Business Centre, Level 2, UL40/1341 Dandenong Road, Chadstone, VIC 3148. ACN 134 714 140.



Using technology to manage HVNL compliance

Technology – global navigation or positioning systems (GPS), alertness-monitoring technology, electronic work diaries (EWDs), telematics, speed limiters, electronic mass measurement technology. Most of us have heard of them, some of us use them, but how can we use them to facilitate Chain of Responsibility (CoR) compliance?

WHERE DOES TECHNOLOGY FIT IN?

Using technology in your business practices won't abrogate your obligations under the Heavy Vehicle National Law (HVNL) but it can certainly be used to track, manage and evidence compliance with them.

The CoR has witnessed the proliferation of technology to manage compliance in the following key areas of the HVNL:

1. Fatigue management and work/rest hour options

Fatigue management is a cornerstone of ensuring the safety of transport activities using heavy vehicles in the industry. A fatigued driver is one who poses a safety risk to themselves, other road users, infrastructure and the goods loaded to the heavy vehicle.

The HVNL tackles fatigue through specific obligations such as prohibitions on drivers driving while impaired by fatigue and requiring them to comply with work and rest options. It also tackles fatigue through general obligations, such as the prohibition on CoR parties making requests or contracts that would cause a driver to drive fatigued or in breach of work/rest hour options.

Industry has picked up EWDs, alertness-monitoring technology and GPS to support fatigue management:

- EWDs are an alternative to written work diaries. They are devices or systems that monitor drivers' work and rest. They are designed to improve the accuracy of time recording by drivers and to reduce administrative burdens around record keeping for operators under the HVNL.
- Alertness-monitoring technology is designed to monitor and recognise symptoms of driver fatigue, sleep and distraction. Often systems notify drivers, operators and employers if drivers show signs of fatigue.

- GPS monitors the location of heavy vehicles and records their journeys.

To maximise the use of the above technology (collectively or independently) to achieve HVNL compliance, businesses should pair their capabilities of capturing data in real-time with their safety escalation procedures. For example, if notified by the EWD program of a driver's breach of work/rest hour options or by the alertness monitoring technology that a driver is exhibiting signs of fatigue, there could a procedure for the driver to pull-over and to contact their operator/employer to identify their next steps, whether it be to cease the work hour breach or to further assess driver fatigue.

GPS systems can also be used to cross-check the accuracy of written work diaries and EWDs. For example, in the conviction of an Adelaide based trucking company the Magistrate's Court held that the company should have used its GPS data to cross-check work diaries that were affected by extreme breaches of fatigue regulations. Its failure to do so constituted a contravention of its obligation to take all reasonable steps to ensure its drivers did not drive impaired by fatigue (which could arguably be tried under the primary duty now). The company was fined \$21,600 plus costs.

In this way, these technologies work not only to support specific obligations around work/rest options and fatigue but also general obligations of operators, including their primary duty to ensure so far as reasonably practicable the safety of their transport activities.

2. Speed management

The HVNL provides that:

- Heavy vehicles more than 4.5 tonnes Gross Vehicle Mass (GVM) must not travel in excess of 100 km/h;
- CoR parties have a primary duty to ensure so far as reasonably practicable, the safety of their transport activities, including not directly or indirectly causing or encouraging a driver to speed;
- CoR parties are further prohibited from requesting or contracting with another party if the person knows or ought reasonably to know that the contract or request would have the effect of causing the driver to speed.

To support compliance with these obligations, industry has turned to using speed limiters and electronic speed management.

Speed limiters are devices that limit a heavy vehicle's maximum speed. They essentially don't allow drivers to breach speed maximum limits applied to their heavy vehicles. By ensuring that they are appropriately fitted to heavy vehicles, businesses can use this technology to support compliance with their primary duty.

Electronic speed management systems, often referred to as telematics, use satellite tracking and wireless communication technology to monitor, among other things, the speed of heavy vehicles. This technology can include GPS.

To optimise the use of telematics to promote business compliance with HVNL obligations, businesses should pair capabilities that notify them of speed contraventions with escalation procedures. For example, a procedure could include a continuous notification to the driver to slow down. Alternatively, if a business is notified of persistent contraventions of a driver of speed limits then there may be formal warnings or employee reviews implemented.

3. Mass management

Drivers and persons permitting drivers to drive must ensure vehicles comply with mass requirements. Compliance with this obligation at an operational level may include operators giving directions to drivers to use weighbridges and collect mass data at those sites when loaded.

Alternatively, some businesses have picked up electronic mass measurement technology to demonstrate and evidence compliance with HVNL obligations. Such technology has the advantage of providing immediate, reliable and recorded mass data for gross and axle weights.

To maximise the use of this technology for HVNL compliance (as with any technology) it is important that drivers are trained to interpret data and to also provide escalation procedures. For example, use of mass measurement technology should be paired with procedures informing drivers of what to do if they are overloaded. ■

IN THE NEXT ISSUE

OUT MARCH 2020

- HVNL review – what's on the horizon?
- Transporting dangerous goods
- What is reasonably practicable for primary duty compliance?