



Your one-stop resource for practical
Chain of Responsibility solutions

MARCH 2020

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From Your Editor-in-Chief



What is to be done with the Heavy Vehicle National Law (HVNL)?

In this issue, we take a closer look at the current review of the HVNL. We consider some options being put forward for its development, primarily those aimed at ensuring that the HVNL achieves its safety objectives.

There is also a spotlight on the issue of whether ineffectual safety requirements are stifling productivity and creating a 'lose/lose' situation. This is good news for industry, as it is fairly well accepted now that the HVNL hasn't fully delivered on its productivity promises, but instead has created various prescriptive compliance requirements that have a questionable connection to real safety outcomes.

Vehicle standards, roadworthiness, and maintenance are some of the newest kids on the HVNL block. However, they have caused a lot of grief. Would unsuspecting consignees be expected to conduct pit inspections of vehicles delivering their goods? Would office clerks have to dirty their fingers checking oil levels? Thankfully not. Our recap clarifies who is expected to carry out what tasks.

Finally, do you have a Chain of Responsibility question or problem that is keeping you up at night? If so, get in touch with our Helpdesk. We love hearing from you.

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

Big ticket issues for the HVNL review

Nathan Cecil, Partner, Holding Redlich

What are the 'big ticket' issues or the prospective 'shopping list' for the National Transport Commission (NTC) as part of the current review of the Heavy Vehicle National Law (HVNL)?

The NTC has issued a number of 'suggested policy option' papers which offers some insight into areas for the potential development of the HVNL. In this article, we take a closer look at these suggested papers.

The NTC's policy papers are intended to be used for discussion, to determine the recommendations that will ultimately be put to relevant ministers for the development of the HVNL.

The suggested changes are as follows:

- **Elevate safety to be the primary objective of the HVNL**

The HVNL presently states that its objectives include the promotion of both safety and productivity. There is some concern that people might interpret this to mean that safety concerns can be set aside

or considered secondary in the pursuit of productivity.

The recommendation is therefore to make it explicit that safety is the primary concern and productivity and any other objective is secondary.

An issue with this approach is that it might mean that the regulators focus only on safety, or on safety to the exclusion of other considerations – where productivity gains were one of the big unfulfilled promises of the HVNL.

We think that the desired outcome could be achieved without downgrading productivity concerns, by providing that productivity cannot come at the expense of safety.

- **Introduce a remote zone**

Australia is geographically expansive and the operation and safety concerns arising out of remote or long-distance driving are quite different to those of driving in more developed areas. A common criticism of the HVNL is that it adopts a 'one-size-fits-all approach'.

➤ *Continued on page 2*

Vehicle maintenance: Who is actually responsible?

Meshal Althobaiti, Lawyer, Holding Redlich

Do you know what your vehicle maintenance obligations actually are? The complex laws governing the heavy vehicle transport industry can make it confusing. In this article, we provide a refresher for parties in the Chain of Responsibility (CoR) on their responsibilities as well as strategies for compliance. We also explore how your business can meet its safety obligations through adhering to Maintenance Management Standards.

Vehicle standards were put in place following numerous serious heavy vehicle incidents, some of which resulted in fatalities. However, although these vehicle standards exist to ensure the safety of road users, the

introduction of vehicle maintenance into the Heavy Vehicle National Law (HVNL) has stirred some controversy. While proper maintenance by vehicle owners is critical to heavy vehicle safety, potentially extending responsibility to other parties through the primary duty has not been easy.

WHAT ARE VEHICLE STANDARDS?

Vehicle standards effectively relate to design, construction and roadworthiness standards. Much of the commentary refers to this as 'maintenance', as a proactive preventative maintenance and inspection program is generally considered the best way to monitor vehicle standards and roadworthiness.

➤ *Continued on page 4*

— HELPDESK QUESTION OF THE MONTH —

How important is CoR compliance reporting? (answer on page 7)

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

Reforming the HVNL: Review workshops

Nathan Cecil, Partner, Holding Redlich

As part of the ongoing review project of the Heavy Vehicle National Law (HVNL), the National Heavy Vehicle Regulator (NHVR) has facilitated a number of national workshops aimed at exploring options for reform that might be included in the Regulation Impact Statement that is being prepared for submission to national transport ministers.

FATIGUE MANAGEMENT OPTIONS

The first workshop looked at how best to manage and police fatigue. Specifically, participants discussed:

- whether fatigue should be managed under general Work Health & Safety (WHS) law or the HVNL;
- how to manage direct risk factors, such as lifestyle, fitness for duty, night or long-distance driving;
- how to manage underlying risk factors, such as medical fitness issues;
- whether prescriptive fixed work/rest hours rules were the best way to manage fatigue; and
- what record-keeping requirement should be imposed.

GETTING THE FUNDAMENTALS RIGHT

The second workshop looked at the fundamentals, including:

- what safety duties should apply and who should hold them;
- whether the adoption of formal Safety Management Systems should be required;
- how accreditation will fit into the new laws, for example, will any third-party accreditation schemes be recognised under the HVNL and will accreditation provide evidence or proof of compliance with safety duties; and
- whether some degree of operator enrolment or 'permissioning' (read: operator licencing) might be included under the new laws, as a condition of operating a transport business and what the eligibility criteria might include.

Two more workshops have been held and will be discussed in our next edition.

The future program is:

- Early 2020 – Preparation of Regulation Impact Statement
- Mid-2020 – Consultation on Regulation Impact Statement
- November 2020 – Recommendations to Ministers.

The topics chosen for the workshop indicate what issues the regulator is considering for inclusion under any revised HVNL. So forward-looking businesses will want to keep a close eye on these developments. ■

► Continued from page 1 "Big ticket issues for the HVNL review"

The materially different fatigue considerations that arise from remote or long-distance driving are one of the major reasons why WA didn't sign up to the HVNL and are perhaps part of the reason that the NT hasn't done so either.

The suggestion here is that specific, and likely more flexible, fatigue management options should be opened up for remote driving operations. This might be offset by additional requirements such as roadworthiness, fitness for duty requirements and/or driver training and competency, to balance the risk associated with more flexible fatigue regimes.

■ Apply key parts of the WA fatigue management approach

Adopt something from the West? That's right!

Fatigue management under the HVNL is inflexible, highly prescriptive in terms of work/rest hours and administratively burdensome in terms of the requirement to complete mandatory work diaries etc. Further, it is slowly being recognised that issuing infringements for people who fail to complete their registration number in their work diary (or other similar administrative matters that are technically breaches of the law) is probably not producing amazing safety outcomes.

The suggestion is for more flexibility in the management of fatigue, including the ability to slightly exceed prescribed hours due to unforeseen circumstances, such as completely unpredicted delays. Any variation would only be allowed to be

minor and reasonable and the variation mechanism would not be permitted to be abused and used as a routine occurrence. It is also suggested that the fixed form of the mandatory work diary is scrapped and replaced with a general requirement to keep driving records in whatever form works for you.

The trade-off might be additional requirements for fatigue management plans, fitness to drive assessments and fatigue management training.

■ Duty to ensure driver competency

Drivers aren't just monkeys put in front of a steering wheel. The safe conduct of transport activities requires more knowledge, experience and skill than is injected through standard heavy vehicle licencing procedures.

The suggestion is to establish a duty on employers, prime contractors and operators to ensure that drivers are not just licensed, but competent to perform the services required. This would include having proper knowledge of the vehicle, its operation and likely driving conditions; the skills to do each component task of loading, operating and unloading the vehicle safely and the experience to conduct those activities in the full range of road operating and environmental conditions likely to be encountered.

The development of these papers and consultation with government and industry will continue until May 2020, followed by the presentation of these recommendations to ministers towards the end of this year. ■

TWU in 'fight against incompetence' of council and contractor

The issue of a \$344 infringement notice to a truck driver who was pouring concrete has raised the ire of the Transport Workers' Union (TWU). It has now demanded answers from the council and concrete contractor.

"Our member, an Owner-Driver has been driving a concrete agitator as a contractor for Holcim for 32 years with a clean driving record. He attended a worksite operated by Fairfield City Council to deliver four cubic metres of liquid concrete for kerb and guttering works," TWU NSW State Secretary Richard Olsen said in a media release.

"Whilst parked up, with the concrete pouring, a Fairfield City Council Ranger took a photo of the truck and sent our member a traffic infringement notice with a fine. That is unnecessary behaviour on part of the Council."

With the intervention of the TWU, the conviction was quashed through a court order known as 'section 10'.

"I cannot think of a more appropriate situation than this matter where s.10 (3)

would be invoked in relation to the trivial nature of an offence," NSW Magistrate Theo Tsavdaridis said.

But this incident has led to questions about safety.

"Our member is asking why the Fairfield City Council did not put traffic management in place, and where were the permits that Holcim should have arranged with the council?," Mr Olsen said.

"Our member should have been able to turn up to the site and know that he and his truck would be safe as well as members of the public. Fairfield City Council should have ensured that traffic management was in place, based on the needs of a heavy vehicle and a concrete pour.

"Safety in the transport industry is a shared responsibility. Clients like Fairfield City Council and contracting companies like Holcim Australia's Readymix must explain to our members why they are not properly ensuring a safe, managed drop off zone for deliveries." ■

Do you know your cargo?

Nathan Cecil, Partner, Holding Redlich

Time and time again we hear about the importance of proper load restraint in the heavy vehicle industry. Although there are expected changes to the Heavy Vehicle National Law (HVNL) ahead, one thing that will remain consistent is the need to properly restrain loads on heavy vehicles. In this article, we take a look at the current law and how to discharge your obligations.

Poorly restrained loads on heavy vehicles have been identified as a cause of numerous safety incidents and casualties, as well as legal cases against drivers and transport companies. A failure to properly restrain your load means that any person concerned with the packing, loading, securing or carriage of the goods can be held liable under the HVNL.

It is imperative that your business has adequate safety measures in place and that all parties are aware of their safety obligations in order to minimise the possibility of harm to other road users.

All parties have a duty to manage loading with which they are involved, under the primary safety duty.

THE LAW

Part 4.4 of the Heavy Vehicle National Law sets out the loading requirements imposed on parties to the CoR. Under the HVNL, a person who drives or permits another person to drive, a heavy vehicle on a road must ensure the vehicle and the vehicle's components and load comply with the loading requirements applicable to the vehicle, unless the person has a reasonable excuse. In addition, all parties have a duty to manage loading with which they are involved, under the primary safety duty.

Further, the HVNL provides for national regulations to be implemented which prescribe requirements about securing a load on a heavy vehicle or a component of a heavy vehicle. Those regulations are contained in the Heavy Vehicle (Mass, Dimension and Loading) National Regulations (**the Regulations**) which were also amended on 1 October 2018 to incorporate, among other things, the load restraint performance standards (**Performance Standards**).

In short, the Performance Standards under the HVNL require that a load on a heavy vehicle must:

- not be placed in a way that makes the vehicle unstable or unsafe;
- be secured so it's unlikely to fall or be dislodged from the vehicle; and
- be restrained using an appropriate method of restraint, or in a way that meets the loading Performance Standards contained in the Regulations. The Performance Standards are contained in the Load Restraint Guide.

DISCHARGING YOUR OBLIGATIONS

Your obligations with respect to loading requirements and loading performance standards are stipulated in Schedule 7 of the Heavy Vehicle (Mass, Dimension and Loading) National Regulation (**MDL Regulations**).

Under the MDL Regulations, a load on a heavy vehicle must not be placed in a way that makes the vehicle unstable or unsafe and must be secured so it is unlikely to fall or be dislodged. It is a requirement that 'an appropriate' method is used to restrain the load. A specific restraint method for certain loads is not required. However, you must ensure that whatever restraint method you use, is capable of meeting the loading performance standards required under the MDL Regulations.

These requirements also apply to the restraint of goods within a freight container. This is usually done at the point of origin so is not visible or able to be inspected by parties further down the chain. So, how do you ensure that you are discharging your obligations in relation to the restraint of goods within a container when you didn't pack the load and you are unable to check the load restraint within it once the doors are sealed? Like many problems, you need to attack it at the source.

Recent court decisions have identified the following practical measures as potentially being required by importers, those concerned with the loading of goods into containers and consignors of containerised goods:

- notify manufacturers and suppliers (including overseas) of the load restraint requirements and performance measures applicable in Australia
- stow containers to minimise any space between the goods and container walls – less than 200mm of gaps cumulatively in any direction (side/side, fore/aft)

- if in doubt as to the sufficiency of any load restraint system, engage qualified load restraint engineers to design and/or approve any load restraint system in accordance with the performance measures in the Load Restraint Guide.

The common objection – "my customer/supplier isn't interested in the load restraint requirements and there's nothing that I can do to change this" – often arises. The truth of the matter is that it is usually just a matter of making the request, exerting the right level of pressure, and/or addressing who will pay any associated costs.

For any customers who have multiple incidents of load shift, refuse to carry their goods.

5 PRACTICAL TIPS TO ENSURE LOAD RESTRAINT COMPLIANCE FOR TRANSPORT OPERATORS

For those further down the chain, such as drivers, who have nothing to do with the loading of the goods, the courts have suggested the following practical measures to take:

1. Require customers to warrant that goods have been loaded and restrained in accordance with the Load Restraint Guide.
2. Ensure that you obtain particulars of the goods, their weight and the centre of gravity of the container, so that you can determine the appropriate truck for the task, e.g. side loader vs flat tray.
3. Inspect containers before driving to check for signs of load shift, e.g. bulging container walls and damage from container impact.
4. Where any load shift is identified or later reported, require the customer to satisfy you that they have reviewed their load restraint practices to prevent any further incident of load shift occurring.
5. For any customers who have multiple incidents of load shift, refuse to carry their goods. Just like in romantic movies, it's what's on the inside that counts. The CoR laws require you to look beyond the exterior and find out whether your cargo is good or bad underneath. ■

► Continued from page 1 **“Vehicle maintenance: Who is actually responsible?”**

This means that parties in the Chain with control or influence over vehicle standards will have responsibility in relation to the roadworthiness of vehicles used in their supply chain.

Vehicle maintenance has been introduced into the central concept of ‘transport activities’ around which many of the most recent CoR obligations and duties hinge.

► DEFINITION: TRANSPORT ACTIVITIES

In s 5 of the HVNL, ‘transport activities’ refer to any activities, including business practices and making decisions, associated with the use of a heavy vehicle on the road. This includes, for example, contracting, directing or employing a person to drive the vehicle or to carry out another activity associated with the use of the vehicle such as maintenance or repairs.

Businesses that do not take all reasonably practicable steps to ensure the safety of their transport activities, or who put undue pressure on other parties within the supply chain that requires, results in or encourages them to breach a relevant safety standard are routinely prosecuted and fined.

⚡ CAUTION: Maximum penalties are \$3 million for corporations and \$300,000 and up to five years in jail for executives.

YOUR MAINTENANCE OBLIGATIONS

You must ensure that all vehicles being used in the operation of the business meet the minimum requirements for design and safety.

The primary duty for CoR parties – that is, to ensure so far as reasonably practicable the safety of their transport activities – intersects with the following principal obligations:

- CoR parties must not use, or permit another person to use, a heavy vehicle on the road that is unsafe. A vehicle is unsafe where its condition or the condition of its components or equipment is such that using the vehicle would be unsafe or would endanger public safety; and
- CoR parties must not use, or permit another person to use, a heavy vehicle that contravenes an applicable heavy vehicle standard. Heavy vehicle standards arise under the Australian Design Rules and the Heavy Vehicle (Vehicle Standards) National Regulation, which set out various vehicle standards, including general safety requirements such as those relating to steering, tyres and vehicle configuration.

ASSIGNING RESPONSIBILITIES

Section 26A clarifies that safety of transport activities relating to a heavy vehicle is the ‘shared responsibility’ of each party in the CoR. The level and nature of a party’s responsibility for a transport activity depends on:

- the nature of the public risk created by the carrying out of the transport activity; and
- the party’s capacity to control, eliminate or minimise the risk.

Section 26C provides that the primary duty under CoR is to ensure, so far as is reasonably practicable, the safety of the party’s transport activities relating to the vehicle. This limits the relevant transport activities to those performed in a particular capacity by the particular party.

Generally, operators (and their executive) and drivers are the parties who are considered to hold the most responsibility regarding vehicle standards.

Operators

Operators of heavy vehicles are primarily responsible for maintaining and inspecting their heavy vehicles, as they have the greatest capacity to control, eliminate and minimise risks associated with the vehicle. Such responsibilities may include:

- ensuring that its business has effective Maintenance Management Systems; and
- ensuring heavy vehicles are regularly maintained and inspected according to the applicable heavy vehicle standards. If a defect is detected, they must not allow the defective vehicle to be used until the issue can be rectified and the vehicle is safe and compliant with applicable standards.

Drivers

Drivers also have duties in relation to heavy vehicle maintenance, although usually their obligations will not be as onerous as those of an operator. Drivers should conduct pre-trip checks. If a driver observes a defect in a heavy vehicle such as an oil leak, a broken seatbelt, a broken mirror or flat tyre, then the driver’s maintenance responsibilities are likely to be triggered such that they should:

- not drive the heavy vehicle, as it may be unsafe and non-compliant with heavy vehicle standards; and
- notify the operator of the nature of the heavy vehicle defect.

Executives

Executives must exercise due diligence to ensure that their business complies with safety duties, including the duty not to permit a vehicle to be used if it is unsafe. It is important for an executive of a business who owns and operates heavy vehicles to ensure that the business has, among other things:

- effective and sufficiently resourced Maintenance Management Systems;
- systems for their management team, drivers and inspectors to report any suspected or actual heavy vehicle defects and record steps taken to rectify faults; and
- training for management, drivers and inspectors to ensure that they can identify heavy vehicle faults according to their respective roles and expertise.

Businesses should keep in mind that under s 26B(1) of the HVNL, a person may have more than one duty because of the functions the person performs or is required to perform. For example, in the case of consignors and consignees, a person might be an operator and a consignee or consignor at the same time.

A consignor is the person or organisation (usually the seller) who delivers a consignment to a carrier to transport to a consignee (usually the buyer). The consignee is the entity financially responsible (the buyer) for the receipt of a shipment, also known as the receiver.

MAINTENANCE MANAGEMENT SYSTEMS

CoR parties who are responsible for or who can influence vehicle standards should proactively and regularly check vehicles and their trailers or shipments to ensure that they are fit for their intended use and for driving on the roads.

Sometimes the type of vehicle, trailer, and the amount of usage will determine the type of maintenance and its schedule. In order to satisfy the minimum requirements, a good start would be to follow the manufacturer’s maintenance instructions. However, if possible, it is always better to exceed them.

► Continued on page 5

➤ Continued from page 4

Manufacturer’s requirements are typically less than the Heavy Vehicle Standards (for roadworthiness) under the HVNL. More frequent inspection (e.g. daily pre-start checks) are required in order to endure compliance with the more extensive Heavy Vehicle Standards (for roadworthiness). If such pre-start checks are not already implemented, they should be.

In addition, your business should continue to ensure that any planned maintenance is carried out in accordance with manufacturer’s requirements. You should keep a log of all scheduled, completed and incomplete maintenance work, along with records signed by the authorised mechanic or other person who conducts any maintenance or repairs.

To achieve better compliance parties must ensure that:

- vehicles are well-maintained and roadworthy;
- vehicles are fitted with safety equipment;
- unsafe vehicles are removed from services or repaired; and
- problems with vehicles are reported to the owner.

 **CAUTION:** Drivers should NEVER drive an unsafe vehicle or tamper with safety equipment.

MAINTENANCE MANAGEMENT ACCREDITATION

Heavy vehicle operators can also apply for accreditation under the National Heavy Vehicle Accreditation Scheme modules. For example, Maintenance Management Accreditation encourages heavy vehicle operators to take more responsibility for maintaining their vehicles correctly and ensuring that they are always in good mechanical condition.

The Maintenance Management Standards set maintenance management requirements for operators of heavy vehicles to ensure that vehicles are kept in a safe and roadworthy condition.

The benefits to operators who obtain a Maintenance Management Accreditation can include:

- productivity and efficiency improvements;
- correct maintenance of vehicles at all times resulting in savings;
- better vehicle life;
- reduced rejection of vehicles by customers for perceived poor maintenance;
- increased driver confidence;
- reduced impact of enforcement; and
- improved relationships with enforcement agencies. ■

Maintenance Management Systems and Standards under the NHVR

Meshal Althobaiti, Lawyer, Holding Redlich

A maintenance management system is the best way to ensure that your business complies with its vehicle maintenance obligations.

Implementing a maintenance management system takes time to develop and communicate, but the benefit to your business is undeniable. Your maintenance management system must comply with the National Heavy Vehicle Regulator’s (NHVR) Maintenance Management Standards. There are eight Maintenance Management Standards and one optional standard (Standard 9) with which your business needs to comply.

A copy of National Heavy Vehicle Accreditation Scheme: Standards and Business Rules - Maintenance Management standards can be found here: <https://www.nhvr.gov.au/files/201403-0023-nhvas-maintenance-management-standards.pdf>.

We have summarised the Maintenance Management Standards below to help you understand your obligations and how you can meet them. ■

TEMPLATE: MAINTENANCE MANAGEMENT SYSTEMS AND STANDARDS UNDER THE NHVR	
DOWNLOAD 	
Maintenance Management Standards	Description
Daily check	Review procedures/policy and evidence of completion, including documented fault reporting. Operators should document instructions detailing when the daily heavy vehicle check is to be carried out and who will do it and how it is to be recorded.
Fault recording and reporting	Review procedures/policy, evidence of completion for both trailing and hauling equipment, and reporting mechanism. Drivers should be able to record and report any recognisable fault occurring during the course of a journey so that it may be assessed and rectified.
Fault repair	Review procedures/policy, evidence of assessment and prioritising, identification of responsible person, evidence of repairs conducted and maintenance of records.
Maintenance schedules and methods	Review procedures/policy, evidence of roadworthiness certification, when applicable, maintenance schedules, tables of tolerance, identification of responsible person, evidence that maintenance is conducted with scheduled timeframe.
Records and documentation	Review availability of the documented maintenance system, and ensure the following is maintained: <ul style="list-style-type: none"> <li style="width: 50%;">▪ Fleet register <li style="width: 50%;">▪ Scheduled maintenance <li style="width: 50%;">▪ Daily checks <li style="width: 50%;">▪ Authorities and responsibilities <li style="width: 50%;">▪ Fault recording and reporting <li style="width: 50%;">▪ Internal review <li style="width: 50%;">▪ Fault repairs
Responsibilities	Review responsibilities for the maintenance management system, including defined responsibilities for the above dot points, and identification of external service providers.
Internal review	Regularly look at the system against the standards to see that it complies. An effective review will pick up problem areas in the basic requirements, show failures to comply with procedures, and identify non-compliances that should be fixed as soon as possible.
Training and education	Review procedures/policy, appropriateness of training, evidence of training records and identification of responsible person. Ensure all employees, including managers, understand the maintenance management system and have the appropriate knowledge and skills to carry out the tasks given to them.
Fuel quality (fuel tax credit only)	Review fuel storage arrangements and that supply is from a reputable supplier.

Which standard will help you perform your primary duty?

Rebecca Niumeitolu, Lawyer, Holding Redlich

If there were ever an expression that had the sheen of a lawyer’s editorial touch, it’s the phrase ‘so far as reasonably practicable’. So far as reasonably practicable, parties in the Chain of Responsibility (CoR) must ensure the safety of their transport activities. In this article, we break down the legal jargon to show you how this phrase shapes your primary duty.

Simplistically, the inclusion of ‘so far as reasonably practical’ in the primary duty signals to CoR parties that their obligation to ensure the safety of their transport activities is something less than absolute. The obligation takes account of that CoR party’s circumstances.

REASONABLY PRACTICABLE DEFINED

Section 5 of the Heavy Vehicle National Law (HVNL) defines ‘reasonably practicable’ as that which is, or was at a particular time, reasonably able to be done in relation to a duty, weighing up all relevant matters. Relevant matters include:

- the likelihood of a safety risk, or damage or road infrastructure happening;
- the harm that could result from the risk or damage;
- what you know, or ought reasonably to know, about the risk or damage;
- what you know, or ought reasonably to know, about the ways of removing or minimising the risk, or preventing or minimising the damage and the availability and suitability of those ways; and
- the cost associated with the available ways, including whether the cost is grossly disproportionate to the likelihood of the risk or damage.

HOW DOES THE STANDARD OF WHAT IS REASONABLY PRACTICABLE DETERMINE WHAT YOU NEED TO DO TO PERFORM YOUR PRIMARY DUTY?

1. Your standard for compliance considers what a person standing in your shoes would know and do.

The standard of what is reasonably practicable requires that you respond to risks by reference to what you know and would do and by what you ought reasonably to know. The practical implication of this is that you can’t use ignorance as an excuse for failing to identify a safety risk or to remove, minimise or prevent it.

A way to break this down further is to take a pause when considering a particular safety risk, damage or resulting harm, and think, “if that risk, damage or harm were to arise would I tell a person in my position ‘you should have known better’?”

If the answer is “Yes” then you should reconsider how you can adjust your safety systems or conduct to get to a place where you can comfortably say, “No, I couldn’t have known better” or, “Yes, I have done what anyone in my shoes would or could have done in relation to that risk”.

You can’t use ignorance as an excuse for failing to identify a safety risk or to remove, minimise or prevent it.

2. Your standard for compliance takes account of the viability and efficacy of steps to alleviate risk.

The definition of reasonably practicable takes account of the availability, suitability and (to a lesser extent) cost of such steps to remove, minimise or prevent risks or damage.

In practice, this suggests that when devising responses to risks, you need not financially cripple your business with costly compliance measures. Instead, you should favour efficacy over expense and attend to safety risks according to their likelihood and seriousness.

Your primary duty is routed in your business activities and your business’s ability to respond to safety risks

For example, take a small to mid-size operator with robust fatigue policies and procedures, fatigue training for drivers, schedulers and managers, and diligent work diary practices and monitoring. That business could argue that measures to implement driver distraction/fatigue monitoring cameras and corresponding

administrative systems are not necessary in light of the appropriate and effective roll-out of the measures just described.

You don’t necessarily have to roll out the most technologically advanced or most expensive fix, if there is something else that you can do which is appropriate and effective. However, you generally can’t use cost/inconvenience as an excuse not to do anything, or not to do something which is appropriate and effective. Cost only comes into it if the cost of the only available means to respond to a risk is grossly disproportionate to the risk or harm is likely to result.

3. Your primary duty is routed in your business activities and your business’s ability to respond to safety risks.

Pegging the standard of your primary duty on what you can do so far as reasonably practicable informs you about the scope of your obligations in relation to other CoR parties. It coheres with the notion that a person’s responsibility is limited by their capacity to influence and control the matter (e.g. a safety risk or transport activity) under s 26B of the HVNL.

Take, for example, a consignor that has a comprehensive CoR compliance system. It enters into a contract with an operator and does a general scan of its CoR compliance policies and procedures. Everything looks good on paper. Soon after entering the contract, the consignor receives feedback from its several buyers (consignees) over time that their goods are severely damaged and appear to have shifted in transit under the operator’s care. After issuing several warnings to the operator around load restraint requirements, the consignor is aware of persistent breaches and is concerned about its own risk exposure for the operator’s non-compliance with the HVNL.

What does the standard of doing so far as reasonably practicable require the consignor to do in this situation? The standard for compliance does not require the consignor to run the operator’s safety compliance system for it. Arguably that is not something that the consignor would be reasonably able to do. However, a step that would be available and suitable for the consignor in the circumstances would be to consider, and perhaps take, escalation or termination procedures under its contract with the operator. ■

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.

Do I need to comply with SMSs?

Q What is a Safety Management System, how does it work and is it mandatory?

A It is easy to get lost navigating the long and numerous provisions of the HVNL and its regulations. Furthermore, it can be difficult to settle on a landing place for how your business can implement safety compliance. To help you grapple with this issue, the industry turns to Safety Management Systems (SMSs)

An SMS is a practical framework to give businesses the chance to step back, assess their HVNL obligations and implement systems to manage the safety of their transport activities.

An SMS seeks to provide an integrated approach to safety management across a business's transport activities and across its organisational levels (from operational staff, to management to executive officers). As opposed to a policy document, SMSs are a broader business framework, a 'live' tool for businesses to strive for HVNL compliance, working best when they are in play, allowing all levels of the business to give feedback on what works and what does not work to ensure the safety of its particular transport activities.

SMSs are not mandatory, but they can help you meet your obligations under the HVNL.

How important is CoR compliance reporting?

Q As an executive (director), how important is CoR compliance reporting and what are the most important things to report?

A Under the HVNL, executives have a proactive and positive duty to exercise due diligence to ensure their business complies with all its CoR obligations.

Your business must continue to establish, implement and document business practices to ensure CoR compliance. Once your business has designed and implemented its CoR compliance management framework, you must measure and monitor compliance to ensure that the systems implemented are successfully ensuring safety. In order for executives to discharge their duty at this point, they need to receive compliance performance reporting.

For each CoR compliance component, the most meaningful report is the number and severity of breaches that have occurred. Breaches slipping through the cracks are the things that most need to be addressed. These incidents suggest defective compliance management, training or implementation.

After that, it is also important to know the number of incidents that are still arising but are, thankfully, being picked up before a truck hits the road - that is, the number of CoR near-misses. These incidents suggest either that system and process design is not eliminating incidents at the source, or that training on how to conduct processes is not effective, but that at least final checks and balances are detecting and remedying problems.

Finally, some general CoR compliance system 'health check' information is useful. For example, confirming that all supply chain contracts have mandatory CoR compliance clauses included and that all CoR-facing employees and contractors have been properly inducted and have received any scheduled refresher training.

However, reporting those figures in a vacuum is of little benefit. The executive needs context. For example, how do the compliance reporting figures this period compare with those of the last period and/or the 12-month average?

Can I appeal PBS application decisions?

Q I received a notice from the regulator advising that it refused my application for a Performance-Based Standard (PBS) design approval, what are my options to appeal the decision?

A The PBS Scheme enables PBS-approved vehicles that meet particular performance levels to operate on roads that are authorised for use by PBS vehicles that meet or exceed that performance level.

The regulator's decision to refuse to grant PBS design approval is a reviewable decision. This is unless the basis for the refusal is that under s 21 of the HVNL the responsible minister in your jurisdiction has prohibited a vehicle built to the design in your application from operating in the relevant jurisdiction, or your application proposes for a vehicle to be used in a way contrary to conditions imposed by the responsible minister in respect of that vehicle design.

Your first option to appeal the regulator's decision is to apply for internal review of the regulator's refusal. This must be done within 28 days of you receiving the regulator's notice refusing your application.

Your application must be in writing and specify grounds for review. Grounds for review could include, among other things, that:

- the regulator did not give a copy of your application to the PBS Review Panel before refusing your application; or
- the regulator applied the incorrect guidelines or standards and vehicle assessment rules to your application.

The outcome of an internal review process is that the reviewer could confirm the regulator's original refusal of your PBS design application, amend it or substitute it with another decision (such as an approval).

If that fails, then you have the option of escalating your matter to the relevant appeal body in your jurisdiction. This must be done within 28 days of receiving the review notice.

An alternative option for you could be to reconsider your design and work with a PBS assessor to resubmit an alternative design. Of course the practicality of this option will depend on your circumstances. ■

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Dangerous goods in the transport supply chain

The transport of dangerous goods is regulated by a scheme that aligns with the safety concerns of the HVNL. At a national level, the standards applying to the safe transport of dangerous goods are set out in Australian Code for the Transport of Dangerous Goods by Road and Rail (**ADG Code**). The National Transport Commission has subsequently developed model legislation for state and territory level adoption of the code.

WHAT ARE DANGEROUS GOODS?

There is no fixed definition of dangerous goods, instead they are goods or substances declared or identified as such for the purposes of the applicable dangerous legislation. Dangerous goods are subsequently categorised under the ADG Code by reference to the hazard or most predominant hazard they present and their substance, which includes:

- Class 1 - Explosives
- Class 2 - Gasses
- Class 3 - Flammable liquids
- Class 4 - Flammable solids, substances liable to spontaneous combustion, substances which, on contact with water, emit flammable gases
- Class 5 - Oxidising substances and organic peroxides
- Class 6 - Toxic and infectious substances
- Class 7 - Radioactive material
- Class 8 - Corrosive substances
- Class 9 - Miscellaneous dangerous substances and articles, including environmentally hazardous substances

IS THE TRANSPORT OF DANGEROUS GOODS A COR ISSUE?

The HVNL sets out principles of shared responsibility along the supply chain expressly and clearly. State legislation concerning the transport of dangerous goods is relatively less sophisticated, but it still hits the mark for singling out parties along the transport supply chain and giving each general and specific duties concerning the safe transportation of dangerous goods.

For example, in NSW, s 9(1) *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) makes it an offence for a person involved in the transport of dangerous goods by road or rail to fail to ensure that they are transported in a safe manner. This is unless the accused can show that it was not reasonably practicable for the person to transport the goods in a safe manner, or if the offence occurred due to causes outside the accused's control and it was impracticable for the accused to make a provision against the offence occurring. A person involved in the transport of dangerous goods could include various parties in the supply chain including the driver, operator, freight forwarder, packer, loader, or consignor.

Part 3 of the *Dangerous Goods (Road and Rail Transport) Regulation 2014* imposes specific obligations on consignors, packers, loaders, prime contractors and drivers in relation to dangerous goods or substances of commercial importance. Provisions of part 3 respectively require these parties not to engage in transporting, driving, packing or loading dangerous goods (as they apply) if the relevant party knows or ought reasonably to know that the transport of the goods would not comply with the applicable special provision of the ADG Code.

The way these obligations on parties along the transport supply chain often play out in enforcement actions is by way of 'bulk' charges against numerous defendants for the same or similar offence arising from the same safety incident. For example:

- In *Environment Protection Authority v Hill: Environment Protection Authority v Stockwell International Pty Ltd* (2017) both the driver and a customs brokerage and freight forwarding company were charged and pleaded guilty to offences of failing to ensure that expandable polymeric beads which had flammable substances (dangerous goods) that were transported by road were transported in a safe manner. Toll Global Forwarding Pty Ltd, which had arranged for the transport of the dangerous goods by road, was also charged with a similar offence.

- In *Environment Protection Authority v Moama Refinery Pty Ltd* (2002) and *Environment Protection Authority v Embridge Crest Pty Ltd* (2002) both the owner and consignor of a highly flammable and dangerous liquid, as well the operator of a transport business engaged to transport the liquid, were charged and pleaded guilty (separately) to offences of failing to ensure so far as was practicable that the goods were transported in a safe manner.

HOW DOES DANGEROUS GOODS LEGISLATION SIT WITH THE HVNL?

The HVNL deals with the general and the dangerous goods legislation deals with the particular. Generally, the HVNL is concerned with transport activities involving heavy vehicles. It has a broader regulatory focus, targeting mass, dimension, load restraint, speed, fatigue and road worthiness aspects of safety.

The dangerous goods legislation is limited to specialised transport requirements for dangerous goods. It targets, among other things, the classification, packing and performance testing, segregation and storage and transfer of dangerous goods. It also deals with the carriage of dangerous goods (such as bulk containers), vehicle requirements, special markings and placarding, documentation, safety equipment and emergency equipment for the transport of dangerous goods.

CoR parties transporting dangerous goods using heavy vehicles must comply with the HVNL as well as applicable dangerous goods legislation. For example, a CoR party would need to comply with the HVNL, *Dangerous Goods (Road and Rail Transport) Act* and Part 6.1 of the *Road Transport Act 2013* (NSW).

To the extent that there may be subject matter overlap relating to restraining dangerous goods, the Load Restraint Guide harmonises CoR party obligations by referring them to restraint requirements under the ADG Code. ■

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OUT APRIL 2020

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- **More HVNL review ideas**
- **How to avoid convictions being recorded against your name**