



Your one-stop resource for practical  
**Chain of Responsibility** solutions

MAY 2020

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## From Your Editor-in-Chief



We are living in enduring and interesting times which can be incredibly unsettling for businesses and people.

It is often in such times that we gain an appreciation for what keeps our world turning. In this case, the critical nature of global, regional and local supply chains in keeping our businesses and lives operating has been undeniable. At almost all levels, our world truly turns on the movement of goods across our nation and the globe.

With developments moving so quickly in relation to COVID-19, often daily, we have decided not to attempt to cover this issue. Information we put together in advance is likely to be out of date by the time it is published. One thing that we can say – and that will remain true – is that the transport and logistics sector has really shown what it is made of.

And this shouldn't be squandered. Once this crisis is over, the industry should leverage this new-found recognition to drive changes for greater productivity, efficiency and fairness within the public and private sectors. We must properly acknowledge and reward the heavy vehicle industry for the essential service it provides for us all.

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

## Outcomes from the review of the HVNL

*Nathan Cecil, Partner, Holding Redlich*

**At the CoR Adviser, we have been following the National Transport Commission (NTC) as they review the Heavy National Vehicle Law (HVNL) from scratch. Now it is time to examine the outcomes of the review which will form the basis of the recommendations given to government.**

In 2019, the NTC undertook rigorous consultation to identify the main issues with the HVNL. Towards the end of last year, they begun to generate solutions. You might recall the seven issues papers that the NTC released seeking feedback on various aspects of the law.

The first issues paper, *A risk-based approach to regulating heavy vehicles*, questioned the object and scope, regulatory style, regulatory structure, and the relationship of the HVNL to other legislation. The outcomes from the

extensive consultation and feedback on this paper are outlined below.

### AIMS OF THE LAW

- There was broad agreement that the HVNL should have a clear purpose of safety, complementing more general WHS laws.
- There was broad agreement that productivity and/or efficiency should be included in the aims of the law.
- There were diverse views on how productivity and efficiency should be reflected in the aims. Some stated that safety should have priority, whereas others thought that productivity should be given equal status as an object of the law.
- Industry largely shared the view that licensing and registration should be part of the HVNL, however this view was not shared by governments.

➤ *Continued on page 2*

## Contractor compliance: Your business and managing third-party risk

*Mesha Althobaiti, Lawyer, Holding Redlich*

**Certain shortcomings of the current Heavy Vehicle National Law (HVNL) – which is now under review – have stirred debate around the primary duty. Parties in the Chain of Responsibility (CoR) might question the extent to which they are responsible for their contractors' compliance. In this article, we unpack the distinction between monitoring and managing risks in relation to third parties.**

There seems to be ongoing uncertainty over what is required under the primary safety duty in any particular circumstance. Do you have a duty to inspect and confirm the maintenance of your contractors' vehicles? Generally, those that do not own or operate vehicles are not expected to check under the bonnet or carry out dipstick tests.

However, if you should reasonably notice obvious risks associated with maintenance, or indeed any other CoR aspect, you are required to do something about it.

For example, a business operates a facility from which its goods are consigned by truck. It observes that the vehicle supplied is obviously (i.e. to a reasonable observer) unroadworthy and that the driver does not at all restrain the load before departing. It observes the same thing the next day, and the next. Is the business 'ensuring so far as reasonably practicable the safety of its transport activities' including ensuring that its conduct does not directly or indirectly encourage breaches of the HVNL? In short, no.

➤ *Continued on page 4*

## — HELPDESK QUESTION OF THE MONTH —

### How do I use concessional mass limits? (answer on page 7)

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

## Rest stops exempt from COVID-19 restrictions

Content Editor, Partner Press

Following concerns raised by heavy vehicle industry stakeholders, the Australian Health Protection Principal Committee (AHPPC) and the National Cabinet have allowed roadhouses, dedicated truck stop facilities and truck driver lounges to remain open for heavy vehicle drivers.

"Our truck drivers are transporting everything from supermarket supplies and fuel to vital medical equipment and medicine to where it is needed across Australia," Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development Michael McCormack said.

"We have heard their concerns loud and clear and this is a common-sense solution which ensures heavy vehicle drivers have access to essential amenities, can take regular breaks and eat properly whilst delivering their vital cargo.

"Roadside service stations, roadhouses and truck driver lounges provide a vital function allowing truck drivers to eat, shower, use restrooms, refuel and rest comfortably before resuming their work – which is critical for them to continue efficient and safe freight distribution across the country."

Use of these facilities will be strictly limited to heavy vehicle drivers and only where appropriate social distancing and hygiene measures can be enforced.

Assistant Minister for Road Safety and Freight Transport Scott Buchholz said the safety of truck drivers has been a key consideration in making this decision.

"I come from a freight industry background and I know first-hand how important these facilities are. I've been hearing direct from industry about the great work they are doing in this difficult time and the challenges they have been facing," he said.

"We want to make sure our truckies are safe, both in terms of fatigue management and their risk of exposure to COVID-19 and this exemption gets that balance right.

"With this exemption now in place, I do ask that facilities that can open per the social distancing and hygiene requirements of this new exemption do so.

"I want to thank the heavy vehicle sector and the peak industry bodies for working cooperatively with government and raising this from the grassroots level to the attention of the Commonwealth, the AHPPC and the National Cabinet." ■

► Continued from page 1 "Outcomes from the review of the HVNL"

### REGULATORY STYLE AND STRUCTURE

#### Regulatory style

- Most agreed that the new HVNL should contain a balance of regulatory styles that address risk. Most agreed there needs to be a tiered approach that addresses risk in relation to the diversity of the industry, including owner drivers and large multinational operators.
- Some suggested that any changes to the regulatory style should allow sufficient time for implementation.
- Respondents did not agree on the areas in the law that should adopt a prescriptive, performance-based or outcomes-focused regulatory style. This requires further analysis and discussion.

#### Regulatory structure

- Most were supportive of placing obligations as low in the hierarchy of legislative instruments as is appropriate.
- Most were supportive of moving towards a risk-based legislative structure.
- Although most were supportive of moving towards a risk-based legislative structure, they did not agree on what the legislative structure should include.

### DUTIES

There was support across government, regulators and industry for retaining the primary duty in the future HVNL. Many stakeholders acknowledged opportunities to reconsider its scope and the way it is enforced.

- A large group of peak industry bodies and operators agreed the primary duty should apply to drivers.
- There was broad support for clarifying what the primary duty requires and reducing instances of third-party customer auditing which does not help operators to improve safety practices.
- Not all agreed that third-party repairers should be included as parties in the CoR and captured by the primary duty. One industry body noted that while third-party repairers should do their job competently, they cannot force operators to undertake recommended repairs to the vehicle.
- On the issue of including drivers in the CoR, drivers highlighted that despite the primary duty, drivers still bear the brunt of enforcement as regulators may be reluctant to go up the chain.

From the above points, you get an idea of the key matters at stake.

The NTC will consider the above positions further and then set out its preferred approach in a Regulatory Impact Statement (RIS) to be issued in the first half of 2020. You will have further opportunity to comment on the RIS.

In upcoming issues of the CoR Adviser, we will look at the key matters coming out of the other issues papers circulated by the NTC as part of the HVNL review process.

**Note:** the contents of this article are based on the NTC's HVNL Review - summary of consultation outcomes. ■

## When will the NHVR prosecute?

Nathan Cecil, Partner, Holding Redlich

### One question many of us would like an answer to is when will the National Heavy Vehicle Regulator (NHVR) pull the trigger and prosecute...

The NHVR has issued a policy setting out when it and those state agencies acting as its agents will prosecute.

The starting point is that prosecution is the exception rather than the rule.

The policy states:

"The resources available for prosecution are limited and should not be wasted pursuing inappropriate cases; the converse of which is that they are employed to pursue, with vigour, those cases worthy of prosecution."

So, the NHVR makes the decision to prosecute where prosecution is likely to:

- change the behaviour of the alleged offender;
- deter future offenders; and
- punish those who commit offences.

Further, prosecution should only proceed if there is a reasonable prospect of conviction being secured and the prosecution is in the public interest (including to assist in clarifying

the law to help the community understand the various obligations and rights arising from the Heavy Vehicle National Law).

If the above thresholds are met, the NHVR may still have to decide whether to prosecute for breach of the primary safety duty (with more significant penalties) or for breach of another specific provision (with much lesser penalties). The general position is that the lesser prosecution should be commenced, unless there is, for example:

- death or injury;
- a real risk of the same, serious or systematic non-compliance;
- a failure to properly implement or monitor safety practices;
- a choice to favour commercial benefits over safety; or
- an ancillary failure of the executive to comply with the law.

The NHVR's policy on when to prosecute is just that – a policy or guidance document. If you are prosecuted and think that it is unfair, you can't rely on the policy to try and invalidate your prosecution. But, it does provide clear guidance as to who is in the cross hairs. ■

# Are your training programs ongoing and thorough?

Nathan Cecil, Partner, Holding Redlich

**Lately, we have discussed the importance of robust policies and procedures in uncertain and unstable times. Having certain frameworks in place can help your business meet its safety obligations. In this article, we examine awareness and training business practices aimed at ensuring Chain of Responsibility (CoR) compliance.**

The National Heavy Vehicle Regulator (NHVR) has deliberately moved away from a 'tick the box' approach and towards a CoR culture where parties think proactively and critically about risk management. A measure your business can take in order to ensure the safety of its transport activities, is to adhere to specific business practices that facilitate instruction, training and supervision to workers so that they can better comply with CoR laws.

## ► IMPORTANT

There is no one-size-fits-all training module. Required training will depend on the transport activities conducted by your business, how CoR compliance is managed by your business, a person's role and responsibilities, and the CoR compliance performance of businesses and individuals.

There are three main aspects to any awareness and training program:

- induction training;
- periodic refresher awareness/training; and
- special needs training.

Let's take a closer look at these three elements.

### 1. Induction training

Induction training is your first line of defence against CoR non-compliance. It should be aimed at equipping each worker with an awareness of CoR and an understanding of how compliance is managed in your business.

Induction training will need to be more involved than a simple one-page handout on CoR. In fact, training and awareness should be ongoing. They shouldn't end once a person has received their induction training. The courts have, on a number of occasions, been highly critical of businesses that rely on such superficial (and ineffective) 'training'.

Initial general awareness training can be relatively high level and uniform. Your general awareness training should cover:

- the structure of CoR laws, i.e. the underlying principle of shared responsibility;
- who is in the Chain;

- what elements are covered (e.g. mass);
- the nature of the limits for each element (e.g. vehicles have maximum axle and gross mass limits);
- executive liability;
- penalties; and
- an overview of what components are required in the business' compliance framework.

Beyond that, induction training must be specific to the roles and responsibilities of workers. Induction training must cover the individual and equip them with an understanding of how your business manages CoR compliance. They must understand things such as:

- the policies and working procedures that you have implemented;
- how you manage third-party compliance;
- how you assess compliance performance; and
- what you do in the event that you detect a CoR issue.

### 2. Periodic refresher awareness and training

Induction training needs to be periodically reinforced and supported, so that worker performance continues to be aligned with compliance policies and practices. This training and awareness can be delivered using a variety of methods, in order to enhance its effectiveness.

Common delivery methods include:

Toolbox talks – these are typically routine daily/weekly operational-level discussions among teams. They should cover general awareness, any changes in or issues complying with policies and working practices, any compliance issues/incidents that have arisen and any necessary 'fix' implemented.

CoR compliance committee reports, broadcasts or 'lessons learned' circulars – these could include general information broadcasts (e.g. a refresher broadcast on mass compliance requirements), updates from the compliance committee on new compliance initiatives, reports on identified compliance issues and how they have been addressed, or general CoR incident reports and how they have been addressed to ensure compliance in future (i.e. learning from others' mistakes).

Performance review and feedback sessions – CoR compliance performance at your business should be discussed in detail with those responsible for performing and managing CoR functions. They should focus on the cause of any issues, reminders about

compliance practices that should be in place, and discussion of any required change in working practices.

### 3. Special needs training

Finally, where you identify deficient compliance performance, or where a significant compliance issue arises, you may need special responsive training outside of the usual routine refresher training. Depending on the nature of the weakness in CoR performance, this may be a business-wide (re)training or could be individual remedial (re)training.

### SHARING RESOURCES

Given that you may be responsible for monitoring or managing the compliance of others within your supply chain (if you control or influence their conduct), it may make sense to share your training and awareness resources. This is certainly true for third parties who will be required to follow your working practices (e.g. your load restraint guide, site queuing rules or loading procedures), but it also extends to others generally.



**TIP:** You may do this if you have identified that their training and awareness program might be lacking, or if their organisation is too small to realistically have a highly developed training and awareness program.

### USE OF THIRD-PARTY TRAINING RESOURCES

You don't need to tackle training all alone. Third-party resources and expertise are a great way to inject another perspective into your awareness and training, and your overall compliance performance.



**TIP:** The NHVR has published a series of highly detailed information sheets and videos on its website. Circulating these 'straight from the horse's mouth' could form part of your general induction and routine refresher training. Inviting your supply chain partners to share the NHVR's training and awareness insights is also a great way to share knowledge, and ensure awareness and consistency of compliance practices within your supply chain.

Finally, bringing in an external compliance expert to run general or targeted training programs is a good idea, and also demonstrates that your business is seeking qualified and 'best practice' views. A well-trained, informed and engaged workforce usually results in better performance – not just on the safety front, but on the commercial front as well. ■

➤ Continued from page 1 **“Contractor compliance: Your business and managing third-party risk”**

If you observe obvious risk (or one which ought reasonably have been observed) where a simple solution (such as engaging with the transport operator) could eliminate that risk, it is considered to be ‘reasonably practicable’ action to take steps to reduce that risk.

### SHARED RESPONSIBILITY

Each party in the Chain must ensure, so far as is reasonably practicable, the safety of their transport activities.

Additionally, the safety of transport activities relating to a heavy vehicle is the shared responsibility of each party in the Chain for the vehicle.

This is a shared responsibility to ensure that business practices, requests or demands, delivery requirements, schedules, packing goods, loading or unloading practices do not directly or indirectly cause or encourage:

- the driver to contravene the HVNL and or exceed the speed limits; or
- another person (including another party in the CoR) to contravene the HVNL.

Whether a person has responsibility depends on:

- the function the person performs;
- the nature of the risk; and
- the person’s capacity to control, eliminate or minimise the risk.

### ARE YOU RESPONSIBLE FOR YOUR CONTRACTORS’ COMPLIANCE?

Transport activities often involve interactions with third parties who have a shared responsibility for the safety of all road users. A safety duty under the HVNL may not be transferred to another person, so it is essential that all parties in the Chain cooperate to control, eliminate or minimise transport risks.

#### ➤ DEFINITION: THIRD PARTY

A third party may be a business or an individual not directly employed by you that your business interacts with – and that you may or may not have an agreement with – to complete the tasks associated with your transport activities. These interactions can take place between, for example:

- customers;
- prime contractors;
- subcontractors;
- warehouses and distribution centres; and
- maintenance and equipment service providers.

The level of responsibility that each business or person has depends on their capacity to influence and control the particular activity, including decision-making relating to the activity. Capacity, in general, means the ability to have an effect on something or the behaviour of someone. Capacity in this context means the ability to control, eliminate or minimise the safety risk.



**TIP:** Parties in the Chain only have a positive duty to notify regulators of ‘notifiable incidents’ under WHS laws. However, you should consider how to ensure the safety of your transport activities and/or ensure that you do not encourage or reward others in the Chain to breach their duties. Sometimes this requires you to notify and engage with other parties (not notify the regulators) when you detect a compliance problem.

Businesses do not need to micro-manage contractors, try to run their compliance function for them and audit everything that they do. But, the HVNL will not permit you to avoid responsibility for unsafe practices merely by saying, “my contractor did that, not me”.

Especially if the problem arose as part of a process in which you were involved. If you could and should have readily identified that there was a problem, you must not turn a blind eye to it.

### MONITORING VERSUS MANAGING CONTRACTOR RISK

Monitoring or managing contractors is simply a part of identifying, analysing, evaluating and mitigating general risk.

The following advice was recently presented by the NHVR.

You will be required to monitor risks in situations when you have limited control to manage the risk. This may be because:

- the contractor has expertise that you do not have;
- the transport activity occurs outside your geographical control (such as a fatigue incident on a public road away from a base); or
- you have limited control of the transport activity (commercial goods packed by third party supplier).

You will be required to manage risks in situations when you possess the knowledge, skills and experience to manage the risk. This may include scenarios where:

- you have the expertise, even though you are contracting with another expert;
- the transport activity occurs within your geographical control, i.e. loading on site; or
- you have a high level of control of the transport activity.

### EXECUTIVE DUE DILIGENCE

Executive duties of due diligence will also extend to the appropriate monitoring or management of contractors and, in this context, requires executives to:

- gain and maintain knowledge about the safe conduct of their transport activities;
- understand the hazards and risks associated with their transport activities;
- maintain appropriate resources to implement processes to eliminate or minimise their hazards and risks;
- respond to information received about their hazards and risks in a timely manner; and
- verify that their resources and processes are provided, used and implemented.

### 5 TIPS FOR DEALING WITH THIRD PARTIES

Consider the following when dealing with third parties:

1. Exercise a degree of due diligence in engaging a contractor, e.g. obtain some assurance that they are aware of and complying with their CoR duties.
2. Include terms in your contract with them that require them to comply with the HVNL, comply with any site policies that you have and report to you if CoR incidents occur when they are engaged on your jobs. You cannot blindly assume that they will do their job. It is important to periodically check in with them or observe their actions on your site to ensure that they are actually doing what has been agreed upon.
3. Ensure that your transport providers are aware of their CoR safety obligations and have systems in place to manage those risks. Ask for some evidence of those systems, e.g. the underlying CoR compliance policy or accreditation scheme enrolment, but not every compliance record.
4. During the conduct of your transport activities, periodically observe that those systems are being used and are effective, e.g. make checks to ensure that loads are not arriving obviously poorly restrained or with evidence of load shift.
5. Keep a log book of observations that raise a red flag warning, the kind of things that cause you to say, “Whoa, that isn’t right!” even if you are not a trucking expert. ■

# Step-by-Step: How to effectively manage contractors

Meshal Althobaiti, Lawyer, Holding Redlich

To effectively meet your safety obligations, it is useful to implement systems that help ensure compliance. To manage Chain of Responsibility (CoR) risks, your business must consider the full extent of its obligations to other parties in the supply chain.

Procedures that can assist you to manage your safety responsibilities in relation to contractor management include:

- risk management;
- supervision;
- training instruction and information;

- consultation, cooperation and coordination; and
- monitoring or compliance performance review.

When managing your third-party interactions, your business should clearly be able to demonstrate that your safety systems and processes are in order so that you minimise or eliminate the possibility of breaching the Heavy Vehicle National Law (HVNL).

Here is a simple guide to dealing with contractors. This guide is based on a five-step model of the contracting process and recent contractor management presentations by the National Heavy Vehicle Regulator (NHVR). ■

| STEP-BY-STEP: HOW TO EFFECTIVELY MANAGE CONTRACTORS |  | DOWNLOAD  |
|---|--|--|
| Steps   | What does this involve?  |  |
| <b>1. Plan</b>                                      | <ul style="list-style-type: none"> <li>▪ Establish the size and nature of your transport activities.</li> <li>▪ Assign roles and responsibilities.</li> <li>▪ Ensure contractors understand your safety expectations.</li> <li>▪ Choose contractors who can meet your requirements.</li> </ul>   |  |
| <b>2. Source</b>                                    | <ul style="list-style-type: none"> <li>▪ Pre-qualify contractors based on their capability to perform the transport task.</li> <li>▪ How does the contractor manage the safety risks of their transport activities?</li> <li>▪ Consider conducting an NHVAS accreditation or reference check.</li> <li>▪ Does the contractor intend to subcontract any work to another party? If so, whom? How will their performance be assured?</li> <li>▪ Does the contractor have relevant insurances?</li> <li>▪ Has the contractor been involved in any previous safety incidents?</li> </ul>        |  |
| <b>3. Mobilise</b>                                  | <ul style="list-style-type: none"> <li>▪ Reach agreement and be clear on your responsibilities and the responsibilities of the contractor.</li> <li>▪ Document these responsibilities in a written agreement.</li> <li>▪ Include terms for how incidents will be notified.</li> <li>▪ Include trigger points for escalation and termination of the contract.</li> <li>▪ Include requirements for any training and induction by either operator and/or contractor.</li> <li>▪ Include requirements to maintain safety management systems, accreditation, certain standards, etc.</li> </ul> |  |
| <b>4. Manage</b>                                    | <ul style="list-style-type: none"> <li>▪ Monitor the performance of policies, procedures and contracts.</li> <li>▪ Conduct periodic meetings to discuss and manage issues.</li> <li>▪ Nominate a contact point in each party to discuss contractual/safety issues.</li> <li>▪ Consider audits to ensure compliance with the contract.</li> <li>▪ Outline incident notification procedures, e.g. what/how often/to whom?</li> </ul>   |  |
| <b>5. Review</b>                                    | <ul style="list-style-type: none"> <li>▪ Evaluate contractor performance to make sure the contractor is performing the transport activity according to contractual agreement.</li> <li>▪ Provide updates on safety management systems or the nature of the transport activity.</li> <li>▪ Learn from incidents and adjust practices/contracts if required.</li> <li>▪ If unsatisfactory, attempt to negotiate ways to improve their performance.</li> <li>▪ If negotiation fails, consider finding another contractor.</li> </ul>  |  |

## Supporting drivers in tough times

Rebecca Niumeitola, Lawyer, Holding Redlich

There are challenges ahead for transport businesses as they deal with increasing pressures to move essential goods across the country while disruptions caused by the COVID-19 pandemic escalate. It is critical that in times of significant stress such as these, that we lean on the safe practices around work, rest and fatigue set out in the Heavy Vehicle National Law (HVNL) to ensure that drivers' health and ability to drive safely is maintained.

Lately, drivers of heavy vehicles are likely to be feeling the immense physical and psychological demands of staying focused and attentive to road safety for long hours. This is exacerbated by possible stresses of COVID-19 exposure, being away from family, financial pressures at home and adjusting to new social arrangements.

The dangers to road safety arising due to drivers' lack of sleep, distraction and inadequate rest are well known. For every kilometre driven by an overworked driver, another road user passing by is placed at risk.

### WORK AND REST REQUIREMENTS

#### Key obligations concerning work and rest times

Drivers commit an offence if they breach work and rest requirements that apply to them. The maximum penalty for a critical breach of work and rest requirements by drivers is \$16,830.

Parties in the Chain of Responsibility (CoR), such as schedulers, managers and directors of transport businesses, are also prohibited from asking, directing or requiring drivers or other CoR parties from doing something that they know, or ought reasonably to know, would have the effect of causing drivers to breach applicable work and rest hours options. Maximum penalties for individuals giving these types of instructions is \$11,210 and for companies, \$56,050.

#### What is work and rest?

Work time means any time a driver spends undertaking the following tasks in relation to their fatigue regulated heavy vehicle:

- driving;
- instructing or supervising a person to drive;
- performing tasks relating to the use of the heavy vehicle; and
- occupying the driver's seat of a heavy vehicle while the engine is running.

Work time therefore encompasses a broad range of activities beyond driving. It includes times where drivers load or unload heavy vehicles, inspect heavy vehicles or their load, clean or refuel their heavy vehicles, perform tasks for the use of the heavy vehicle, canvass orders to transport goods, record information or documents required by the law and filling out work diaries.

Rest time means any time that the driver is not working.

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**For every kilometre driven  
by an overworked driver,  
another road user passing  
by is placed at risk**

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### WHAT WORK AND REST TIME REQUIREMENTS APPLY TO YOUR DRIVER?

Work and rest time requirements applicable to drivers will depend on the scheme they are operating under. Generally speaking, drivers will operate under Standard, Basic Fatigue Management (BFM) or Advanced Fatigue Management (AFM) work and rest arrangements.

Maximum work and minimum rest hour requirements that apply under Standard and BFM Schemes are set out in tables in Schedules 1 and 2 of the *Heavy Vehicle (Fatigue Management) National Regulation*.

Drivers operating under AFM work and rest arrangements have business-specific work and rest hour requirements.

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**The maximum penalty for  
a critical breach of work  
and rest requirements by  
drivers is \$16,830**

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### UNDERSTANDING FATIGUE

#### Key obligations concerning fatigue

Drivers have an obligation not to drive while impaired by fatigue. Failing to do so exposes them to a maximum liability of \$6,740.

CoR parties are also prohibited from asking, directing or requiring drivers or other CoR parties from doing something that they

know, or ought reasonably to know, would have the effect of causing drivers to drive while impaired by fatigue. Maximum penalties for contravening this obligation are \$11,210 for individuals and \$56,050 for companies.

#### What is fatigue?

The concept of fatigue covers more than feeling sleepy and showing signs of falling asleep, yawning, finding it difficult to keep eyes open or needing more naps than usual.

Fatigue also includes feeling physically or mentally tired, weary, drowsy, feeling exhausted, lacking energy or behaving in a way which is consistent with these feelings. Symptoms of fatigue are also wide-ranging, including drivers displaying mood changes, increased irritability, changes to mental health, fitness, exercising poor judgement, or making more mistakes than usual.

### 3 WAYS TO SUPPORT DRIVERS DURING THE COVID-19 PANDEMIC

Tips to support your and your drivers' compliance with work, rest and fatigue requirements during the COVID-19 outbreak:

1. Circulate a memo to, or in your next toolbox discuss with, drivers, schedulers and managers about work, rest and fatigue requirements. Remind them that during the COVID-19 outbreak, it is likely that additional stress may be on drivers that could result in them being more prone to fatigue and that signs of fatigue include mental exhaustion and mood changes.
2. If you are a business that has experienced increased demand and is employing new drivers, make sure that you don't take shortcuts on your CoR compliance training. Although administrative burdens are usually the lowest priority in times of crisis, ensuring that drivers know their work, rest and fatigue obligations and ensuring you have records of training will pay dividends if an on-road safety incident occurs.
3. Adjust schedules to accommodate potential delays in cross-border transportation of goods. Where drivers need to stay overnight away from home, consider providing supplementary guidance on strategies to manage COVID-19 isolation impacts to reduce stress. For example, reminding them to bring additional food supplies if they are going to remote locations where shop closures may make food supplies very limited. As another example, guidance could include references to mental health support services, such as Beyond Blue's call line 1300 22 4636. ■

## 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](mailto: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.

## Are waiting delays considered 'work' time?

**Q** Our drivers often experience long delays waiting in queues during loading. Is the time that our drivers spend queuing considered work for the purposes of time recording? Also, as an employer, are we required do anything in particular to manage our CoR obligations during this period?

**A** The HVNL requires drivers to record all time spent working and resting in participating jurisdictions.

The HVNL adopts a comprehensive definition of 'work' in s 221. According to this definition, 'work' includes, among other activities, the loading or unloading of goods onto a heavy vehicle, cleaning or refuelling a heavy vehicle and, relevantly, any time spent occupying the driver's seat of a fatigue-regulated heavy vehicle while its engine is running. This means that the time your drivers spend queuing in their respective drivers' seats with their vehicle's engines running must be counted as work time in their work diaries.

In terms of your obligations as an employer, you are required to take all reasonable steps to ensure the safety of your transport activities, which would include oversight of drivers. You are also required not to ask, direct or require your drivers to do something that you know or ought reasonably to know would cause your driver to breach work or rest hour options.

Options for employers who are concerned about drivers breaching work and rest hour options, or directly or indirectly causing drivers to breach work and rest hour options, during delays include:

- ensuring drivers are aware that time they spend waiting in queues, loading and unloading all count as work time and are recorded in work diaries;
- advising drivers to adhere strictly work and rest requirements and not to drive if that would result in them working for longer than maximum work hour limits;
- if employers anticipate delays at particular loading facilities, build in 'buffer-times' in drivers' schedules to avoid breaches of work and rest hour options; and
- employers could also consider speaking with their customer to provide more flexible delivery schedules where they have experience of persistent delays to scheduled collection times at particular loading facilities. Managing customer expectations around delivery times can help alleviate pressure on drivers to deliver goods within specific timeframes at the risk of breaching work and rest hour options.

## How do I use concessional mass limits?

**Q** As an operator, I am interested in utilising concessional mass limits (CML) for my vehicles. How can I get approval for concessional mass limits and what limits are permitted under this scheme?

**A** Applications to operate under CML can be made through the NHVR online, by email, fax or post.

To obtain approval for CML you will need to:

- become a National Heavy Vehicle Accredited Scheme member;
- meet the standards under the NHVR Mass Management Accreditation Guide, which includes policies regarding vehicle control, vehicle use, verification, internal review and training and education; and
- identify which of your vehicles you would like to operate under the CML scheme.

Heavy vehicles operating under CML must not exceed manufacturers' ratings and must comply with the *Heavy Vehicle (Mass, Dimension and Loading) National Regulation's* requirements on axle spacing applicable to the heavy vehicle.

Under CML, the Gross Vehicle Mass of nominated heavy vehicles are increased to 5% over, subject to:

- a maximum increase of 1 tonne for a vehicle or vehicle combination with an allowable gross vehicle mass not exceeding 55 tonnes (e.g. 6-axle semi-trailer);
- a maximum increase of 2 tonnes for vehicle combinations with an allowable gross vehicle mass exceeding 55 tonnes (e.g. 9-axle B-Double); and
- an upper limit on axle and axle group mass as given in the table of the CML.

In Queensland only, the mass limits that apply in the CML are extended to include:

- a maximum increase of 3 tonnes for vehicle combinations with an allowable gross mass exceeding 85 tonnes but not exceeding 120 tonnes; and
- a maximum increase of 4 tonnes for vehicle combinations with an allowable gross mass exceeding 120 tonnes. ■

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## When to challenge unlawful searches of heavy vehicles

On 18 May 2018, Senior Constable Pretts, member of the Heavy Vehicle Enforcement Section of the SA Police, received a tip-off that the owner of a prime mover should be pulled over. The anonymous caller identified the owner as a drug user and added that his heavy vehicle was capable of travelling in excess of the maximum speed limit applying to the heavy vehicle.

When Senior Constable Pretts later came across the vehicle that day, he signalled the driver to pull over. The driver was Mr Carter, who was not the owner of the prime mover but one of his 'mates'.

Senior Constable Pretts asked Mr Carter for his work diary. After inspecting it as well as information from a safety camera, Senior Constable Prett formed the reasonable belief that the driver had committed an offence or offences under the Heavy Vehicle National Law (HVNL). In particular, he determined that the driver had failed to complete his work diary properly by stating that he started work at 10am, when his truck had been recorded by the safety cameras as being on the road earlier than that.

### The defence submitted that the search of the truck was undertaken under the guise of search powers under the HVNL

Senior Constable Pretts advised the driver he was going to search the vehicle. In doing so, he saw two mobile phones and partially viewed a message that appeared to him to be "from a person trying to buy drugs or looking for favours to buy drugs". Further searches revealed plastic resealable bags containing methylamphetamine as well as scales.

In the lead up to the trial of Mr Carter, his defence team made an application to the District Court of South Australia to exclude evidence of the heavy vehicle search (*R v Carter* [2020] SADC 27). The defence

submitted that the search of the truck was undertaken under the guise of search powers under the HVNL, when really Senior Constable Pretts was intent on searching the truck for drugs based on earlier information about the truck owner.

The court dismissed defence's application on the basis that as soon as Senior Constable Prett became aware that the driver was not the heavy vehicle's owner he focused on the work diary and breaches of the HVNL and that a lawful search of the heavy vehicle was genuinely taken on grounds of reasonable suspicion of contravention of that law.

#### When can a legal search of a heavy vehicle take place?

Although Mr Carter's case arises in the context of drug trafficking law, the decision of the District Court also speaks to the grounds on which lawful searches of heavy vehicles under the HVNL can be undertaken.

Under s 521 of the HVNL, an authorised officer can only enter and search a heavy vehicle for investigation purposes if the officer reasonably believes:

- the vehicle is being, or has been, used to commit an offence against the HVNL;
- the vehicle, or a thing in the vehicle, may provide evidence of an offence against the HVNL that is being, or has been, committed; or
- the vehicle has been or may have been involved in an incident involving the death of, or injury to, a person or damage to property.

In undertaking the search the officer can only use "necessary and reasonable help and force".

A court ascertains whether a search is lawful or is otherwise unlawful (and constitutes trespass) by asking the following:

- What was the state of mind of the authorised officer when he or she enters the heavy vehicle?
- What factors allow the officer to form the reasonable belief that any of the points in (a) to (c) were present?
- Was "necessary and reasonable help and force used" to enter the and search the heavy vehicle?

As to the search of the heavy vehicle driven by Mr Carter, the court considered how Senior Constable Prett referred to the work diary and safety cameras to form a reasonable belief that offence(s) under the HVNL had taken place.

### The driver should check that officers have provided identification to demonstrate that they are authorised officers

#### What should drivers do if they are pulled over and the officer wants to undertake a search?

It is not really a driver's role to determine whether an officer is undertaking a lawful search because he or she has formed a reasonable belief that any of the factors at (a) to (c) above have arisen.

Accordingly, we recommend that a driver's role in heavy vehicle searches should be generally limited to:

- checking that officers have provided some identification to demonstrate that they are authorised officers; and
- observing the search to allow for a report or account of the search and the drivers' discussion with the authorised officer to be provided to the business once it is concluded.

#### What if the officer had no basis for undertaking the search?

A search may be unlawful if the conditions for undertaking it are not present. For example, if an officer pulled a truck over and without any information of a suspected offence commenced a search.

If in an unlawful search results in charges being made, the defendant may be able to apply for any evidence found during the unlawful search to be excluded from the trial. ■

## IN THE NEXT ISSUE

OUT JUNE 2020

- Who will the NHVR choose to prosecute?
- More key issues coming out of the HVNL review
- First enforceable undertaking under the new HVNL