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**Chain of Responsibility** solutions

JUNE 2020

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## From Your Editor-in-Chief



This month we celebrate a Heavy Vehicle National Law (HVNL) first and it's a big one. We take a look at the groundbreaking enforceable undertaking put forward by Laing O'Rourke Australia Construction Pty Ltd in response to allegations that it committed two severe risk mass breaches. The company has committed to implementing remedial measures worth \$249,500. This is the first enforceable undertaking that has been accepted under the HVNL. It serves as a good reminder that proposing an enforceable undertaking is not a 'cheap' way to avoid prosecution.

We also have the next set of outcomes from the extensive industry consultation on the HVNL. We gaze into the crystal ball at what the future of fatigue management may look like. The structure of fatigue management under the HVNL, in particular its inflexibility, is often criticised. So, will the future be any more flexible?

Finally, we continue to examine the various notices that you can be presented with under the HVNL. We look at the dos and don'ts of improvement notices. These are often the last warning before prosecution is pursued, so it is important to handle them carefully.

We hope that you enjoy.

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

## Part 2: Outcomes from the HVNL review

*Nathan Cecil, Partner, Holding Redlich*

**At CoR Adviser, we have been keenly following each step of the National Transport Commission's (NTC's) undertaking to review the Heavy Vehicle National Law (HVNL) from scratch. In this article, we look at the outcomes concerned with the topic of effective fatigue management.**

In 2019, the NTC released seven issues papers seeking feedback on the HVNL. The outcomes of these papers will form the basis of recommendations to government as to what changes should be made to the HVNL. The second issues paper, *Effective Fatigue Management*, outlined a number of problems with fatigue management under the HVNL and invited submissions on how the future

HVNL can deliver safer outcomes and better manage fatigue. We unpack the findings from the extensive consultation and feedback on this issues paper below.

### What compliance options would be most effective in managing fatigue?

- Most were supportive of a two-tiered approach. A 'top tier' performance-based approach that permits operators to manage their fatigue risks, rather than simply count hours, and which is enforced through reporting and auditing and a 'base tier', where operators comply with prescriptive work/rest hours rules and which is enforced through roadside check and business investigations.

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## The ins and outs of improvement notices

*Meshal Althobaiti, Lawyer, Holding Redlich*

**Improvement notices are often issued as a 'last chance' before prosecution is pursued under the Heavy Vehicle National Law (HVNL). These notices provide businesses with the opportunity to improve safety and educate parties about managing their safety obligations. In this article, we take a look at the dos and don'ts of improvement notices.**

The National Heavy Vehicle Regulator (NHVR) makes an example out of companies with deficient CoR policies, procedures and working practices. The HVNL gives regulators such as the NHVR a mixed bag of enforcement tricks. Some, such as infringement notices and court prosecution, are punitive. Others are intended to be remedial. An improvement notice is an example of a remedial enforcement tool and requires you to take a specified action

to improve safety. Failure to comply with a notice is an offence.

### WHAT IS AN IMPROVEMENT NOTICE?

An improvement notice is a formal notice issued under s 572 of the HVNL and may be issued where a breach has occurred. The notice also identifies risk areas in your business operations, and requires you to take steps to address the issue. Improvement notices are considered to be one of the more educative and persuasive enforcement options available under the HVNL in order to ensure compliance with its requirements.

An improvement notice ordinarily follows a notice to produce or direction to produce information or documents. However, in serious transport incidents an improvement notice may be issued at the same time as these other notices (for example, if there has been an accident involving a fatality).

➤ *Continued on page 4*

## — HELPDESK QUESTION OF THE MONTH —

### How do I assess a heavy vehicle driver's fitness to drive? (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)

## Employer fined \$140K over truck driver's death

Content Editor, Partner Press

A Northern Territory fuel company has been convicted and fined \$140,000 for failing to provide adequate training, instruction and supervision to one of its drivers, which led to his death.

In the July 2017 incident, the 51-year-old truck driver was in his fourth week of employment with Indervon Pty Ltd when he was delivering fuel unsupervised along the Maryvale Road.

The driver failed to negotiate a curve on an unsealed portion of the road approximately 74km south of Alice Springs.

## Employers need to go beyond checking the worker holds the correct licence to operate the work vehicle

Indervon Pty Ltd pleaded guilty to one breach of Section 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* and was convicted and fined \$140,000. The company was also required to pay a victims levy of \$1,000.

NT WorkSafe Acting Executive Director Melissa Garde has stressed the importance of employers providing appropriate training, instruction and supervision to workers to ensure they are working safely.

"NT WorkSafe's investigation raised questions around the worker's ability to safely operate the fuel truck," Ms Garde said.

"The unsealed outback roads in Central Australia present a range of hazards to drivers who are unfamiliar with the conditions.

"A large proportion of worker fatalities in the Northern Territory involve a vehicle collision, with a majority of those crashes occurring outside of urban areas.

"Employers need to go beyond checking the worker holds the correct licence to operate the work vehicle.

"Employers also need to make sure they provide the worker with appropriate training and instruction to safely operate the vehicle in the conditions they may encounter." ■

► Continued from page 1 "Part 2: Outcomes from the HVNL review"

- There was some disagreement as to how conservative the 'base tier' work/rest hours should be and whether 'top tier' operators should be required to implement a fully developed safety management system in order to qualify.

### Are prescriptive rules still desirable? How can fatigue rules be simplified to make them easier to understand and comply with?

- Most agreed that the current prescriptive rules needed to be simplified (and we agree, my eyes certainly glaze over as soon as I see the work/rest schedules).
- Most agreed that drivers need more flexibility in how they manage breaks.
- There was some disagreement as to how much flexibility could be introduced without compromising safety and the adequacy of the current work/rest hours limits.

### Are record-keeping requirements and penalties the best way to ensure compliance?

- Most agreed that current record-keeping requirements were too prescriptive and complex and simply exposed people to penalty for administrative errors. However, most agreed that some form of record-keeping was reasonable to assist compliance checks.
- Most agreed that record-keeping offences that were not directly connected to fatigue risk should be removed, as they were petty penalties unconnected to safety outcomes.
- There was disagreement as to the level of detail and prescription related to record-keeping that should be included in the HVNL.

### Should fatigue management obligations apply equally to all heavy vehicle use, including 'local work'?

- Most agreed that fatigue management requirements should apply to all heavy vehicle drivers, including those performing 'local work' (e.g. within 100km of their base).
- Most supported the requirement for all drivers to undergo mandatory fatigue management training.
- Most also supported the novel issue of making drivers and operators jointly responsible for driver health and wellbeing, including the HVNL specifying what constitutes fitness for duty and requiring drivers to undergo regular health assessments. However, there was disagreement whether this issue should be left to WHS laws.

### Where should enforcement action focus?

- Most supported the notion that operators with auditable risk management systems (e.g. industry or accredited safety systems) should be subject to less on-road enforcement.
- Most supported the idea of enforcement officers focussing on education, rather than fines.

- Most also again stressed that more enforcement attention needs to be focussed up and down the chain, on off-road parties.
- Most also reiterated that consistency amongst enforcement focus and outcomes needs to be enhanced between jurisdictions.

### Fatigue management harmonisation

- Most agreed that operators who cross borders should not have to comply with multiple fatigue regimes and that the structure of the WA fatigue management regime was far simpler and more flexible than under the HVNL.
- Most agreed that codes of practice and guidelines should feature more under the HVNL.
- There was disagreement as to the suggestion that all operators should have to implement a safety management system in relation to fatigue management.

### Should new technology solutions be recognised under the HVNL?

- Most supported the idea that the HVNL should be 'technology neutral' and allow parties to meet the law by implementing any suitable technology solutions. Technology moves faster than the law, so limiting the permissible technologies that can be used will only serve to dampen innovation.
- Most also expressed concern about how data would be used by enforcement agencies and agreed that a clear framework on who can access it and what purposes it may be used for must be included in the law.
- There was disagreement on whether active fatigue monitoring technology (e.g. technology that monitors, predicts and prevents fatigued driving) could replace work and rest requirements.

From the points explored above, you can get a taste of the key issues at stake surrounding fatigue management. The NTC will consider the outcomes further and then set out its preferred approach in a Regulatory Impact Statement (**RIS**), to be issued later in 2020. You will have a further opportunity to comment on the RIS. The NTC will then make recommendations to ministers on the shape and content of the new HVNL laws, before they are drafted and come into force.

In future issues, we will look at the key concerns 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 *National Transport Commission, HVNL Review: Summary of consultation outcomes, Consultation report, NTC, Melbourne.* ■

# A risk-based approach to mass, dimension and loading

*Nathan Cecil, Partner, Holding Redlich*

**Load restraint issues will always be in the spotlight due to the real risk of fatalities when loads aren't properly secured on heavy vehicles. In addition to this, it is a stated goal of the Heavy Vehicle National Law (HVNL) to curtail any adverse impact of heavy vehicles on road infrastructure and/or public amenity. In order to manage this and meet safety obligations, the need for a proactive approach by parties to address risk is paramount.**

## THE STARTING POINT

In order to comply with the primary duty, Chain of Responsibility (CoR) parties must address the mass, dimension and loading requirements under Chapter 4 of the HVNL.

The HVNL attempts to achieve this purpose by:

- imposing mass, dimension and loading requirements for heavy vehicles;
- restricting access to certain roads by some heavy vehicles; and
- allowing regulatory schemes to apply more flexible mass limits.

Another tool provided by the National Heavy Vehicle Regulator (NHVR) to help identify and manage risks is the Master Industry Code of Practice (Master Code). This is an industry-led risk-based safety and compliance framework which sets the benchmark for businesses to identify common CoR risks. Your business can utilise the Master Code to guide you on how to identify these potential risks, and assess which of the available methods, systems or tools to use. The Master Code can assist you in better understanding your mass, dimension and loading obligations to ensure the systems you have in place are thorough and safe.

### ► IMPORTANT

The Master Code also has legal standing. Section 632A of the HVNL applies in a proceeding for an offence under the HVNL; it allows a registered industry code of practice to be admissible as evidence of whether or not you complied with a duty or obligation under the HVNL.

The Master Code isn't simply a set of suggestions to help you with your safety and compliance under the HVNL. The Master Code can and will be used against CoR parties if it can be shown that they have completely failed to identify and address the common risks that it identifies.

## A RISK-BASED APPROACH

We regularly emphasise the importance of adopting and maintaining risk-based approaches so that you can be well-positioned

to meet your safety obligations. The Master Code recommends that parties implement risk-based measures to manage safety and ensure compliance with the HVNL provisions relating to mass, dimension and loading.

There are many ways that this can be achieved, and there isn't one control that can be implemented to address every risk. Each compliance framework must be agile enough to respond to new and existing risks in a business' commercial activities.

## RISKS OF NON-COMPLIANCE

Mass breaches are often the target of prosecution because:

- they can be easy to detect in roadside inspections;
- over-mass heavy vehicles have a disproportionate impact on public infrastructures; and
- the poor performance of an over-mass heavy vehicle often leads to crashes with disastrous consequences.

The Master Code identifies a range of risks associated with noncompliant mass, dimension and load restraint, primarily where:

- off-road parties such as consignors, schedulers or loaders are not doing enough to ensure mass compliance, for example by failing to be aware of the mass of the load that they are providing, by failing to provide accurate information and instructions to the driver/transport operator in relation to the load mass, or by not being aware of the mass limits applying to a heavy vehicle and its intended route;
- unsatisfactory load restraint practices affect the stability of a heavy vehicle and its on-road performance, leading to the driver losing control, increased risk of the heavy vehicle rolling over when there are unevenly distributed loads or loads with a high centre of gravity, and risk of significant damage to the vehicle and everything in its vicinity; and
- heavy vehicles in breach of the mass, dimension and load restraint requirements cause significant damage to road infrastructure and result in serious incidents and traffic congestion.

## CAUSES OF MASS, DIMENSION AND LOAD BREACHES

The below list sets out a number of contributing factors, extracted from the Master Code, that may cause safety risks or encourage breaches of heavy vehicle mass, dimension and loading requirements.

- A lack of policy and procedures, or systems to report non-compliance.
- Ineffective two-way consultation, cooperation and coordination of all parties along the supply chain.

- Inadequate information, training, instruction and/or supervision of mass, dimension and loading requirements and associated procedures.
- Conflicting commercial arrangements between parties.
- Poorly planned or prepared loads and/or inadequate oversight to verify suitability.
- Incorrect placement and positioning of loads.
- A lack of weighing or measuring equipment or method.
- Inflexible loading and unloading practices, including inability to re-adjust loads.
- Improperly restrained loads and/or inadequate expertise to verify suitability of load restraint systems.
- Non-compliance with vehicle and equipment operating requirements.
- Inadequate maintenance of equipment.
- Deliberate actions of drivers or other CoR parties.
- Inadequate monitoring and/or due diligence by all CoR parties to ensure safety and compliance of transport activities.

You must ensure that your business has measures in place to identify and manage these risks.

## APPROACHING CONTROLS AND COMPLIANCE

The risks and controls utilised to mitigate these risks will vary between CoR parties. For example, most of you will have a control for the implementation of a business-wide policy not to enter a contract that risks causing a driver or operator to breach mass, dimension and loading requirements. However, other controls will be unique to the specific nature of business and a party's position in the CoR.

For example, a scheduler will need to have a control in place to ensure route plans take into consideration mass and dimension requirements, to ensure the route/ infrastructure is suitable for the load and complies with any route permits or conditions as applicable. On the other hand, employers and prime contractors will have to make sure there is a review process to check that a driver or subcontractor is performing the activity in accordance with their employment or contractual arrangements. These arrangements must be effective in managing mass, dimension and loading risks.

Ultimately, the Master Code is a tool that parties can utilise to assist with their HVNL compliance. In order to prevent breaches of heavy vehicle mass, dimension and loading requirements, a rigorous and flexible framework is needed. The Master Code can help establish such a framework thereby equipping your business to respond to any existing or new risks that may arise. ■

➤ Continued from page 1 “The ins and outs of improvement notices”

## WHO CAN ISSUE IMPROVEMENT NOTICES?

An authorised officer may issue an improvement notice requiring that you take action to stop the contravention from continuing or occurring again, or to remedy the matters or activities causing the contravention.

### ➤ DEFINITION: AUTHORISED OFFICER

Authorised officers are those who are formally appointed by the NHVR, typically from the ranks of:

- the NHVR;
- state or territory police officers; or
- state or territory road safety authority officers, e.g. RMS, VicRoads, Main Roads.

Not all authorised officers are empowered to issue improvement notices. Only those officers who are formally authorised under their terms of appointment can issue an improvement notice.

## WHAT CONSTITUTES A VALID IMPROVEMENT NOTICE?

An improvement notice can only be issued where an authorised officer:

- reasonably believes that you/your business has contravened or are contravening a provision of the HVNL; and
- in the circumstances, it is likely that the contravention will continue or be repeated.

An improvement notice must be issued in the approved form and must set out:

- that the authorised officer reasonably believes that a contravention has occurred or is occurring;
- that the authorised officer reasonably believes that the contravention is likely to continue or be repeated and the reasons why;
- that you/your business are required to take steps to stop the contravention from continuing or occurring again, or address the matters giving rise to the contravention;
- the time within which you/your business must take the above steps;
- how you/your business is to report to the authorised officer to satisfy them the above steps have been taken; and
- your rights to a review of the decision to issue you/your business with the improvement notice.

An improvement notice is not required to set out the steps that you/your business is required to take to address the contravention. However, an improvement notice may set out steps suggested by the authorised officer.

## WHAT ARE YOUR OPTIONS IF YOU RECEIVE AN IMPROVEMENT NOTICE?

In the event that you receive an improvement notice, there are three options available to you. They are set out below.

### 1. Comply

You can comply with the terms and conditions of the improvement notice with a view to being issued a clearance certificate.

- a. The time frame to comply with the improvement notice is a minimum of 7 days, unless the authorised officer is satisfied the person can comply earlier.

- b. If an improvement notice has been complied with, an approved authorised officer may issue a clearance certificate. Once a clearance certificate has been issued, each requirement of the improvement notice as stated within the certificate stops being operative.

### 2. Seek an internal review

- a. You may apply for review of the improvement notice through the relevant officer who issued the notice to you. Your application must be in writing, and explain the reasons for requesting the review and include any supporting evidence.
- b. If your application is successful, the improvement notice may be amended or revoked by the relevant officer. If the notice is revoked by the relevant officer, you will be issued with a clearance certificate and the notice issued to you stops being operative.

### 3. Challenge the notice

You may seek to bring the improvement notice before the court for review in circumstances where the terms and conditions are onerous and incapable of being performed satisfactorily or are unnecessary in order to achieve the stated objective or outcome of the notice.

If you receive an improvement notice, you must follow the steps set out in the notice and/or take other measures to address the contravention to stop it from occurring or reoccurring. This must be done within the stipulated time frame.

While the improvement notice may set out a recommended course of action, you are not bound by this. You can take other steps that have the same remedial outcome. However, you may have to justify how these steps are equivalent to the recommendations to satisfy the requirements and obtain a clearance certificate. As such, if you can follow any recommended steps it is usually helpful to do so.

Steps could include changing your business practices or transport documentation and contracts, or providing additional information, instruction, training and supervision to staff. The improvement notice must allow you at least 7 days to take those steps and respond to the authorised officer. However, that period can be shortened if it is reasonably practicable for you to take those steps sooner, and doing so would not result in greater cost or interruption to your business. So, it is very important that you consider and respond to an improvement notice as soon as possible.

The notice will advise how you are to report back to the authorised officer, usually through a dedicated email address.

## REQUESTS FOR EXTENSIONS

As indicated above, the time mandated for compliance with an improvement notice can be very short, typically 7 days. Where the compliance period is too short to develop and implement a sufficient response, you may be able to seek an extension of time for compliance with the improvement notice.

An extension is not likely to be granted if there is a real and continuing risk of breaches occurring during the extension period. You may have to assure the authorised officer that no breaches are likely to occur during the extension period or implement a temporary stop-gap solution.



**CAUTION:** A person must comply with the Improvement Notice unless there is a reasonable excuse not to do so (or the notice has been revoked under s 575 of the HVNL). The failure to comply with an improvement notice is an offence under the HVNL and may result in a penalty of up to \$11,210.

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## A PROACTIVE APPROACH

Often it takes something going wrong before parties take a closer look at their systems and procedures and critically evaluate them. In the event that you find yourself facing a potential CoR investigation, it is imperative that you identify how to prevent future incidents from occurring. It is crucial that parties ensure they are proactive in managing their safety obligations.

The parties in your chain must adopt the attitude of preventing any future breaches, which also includes rectifying any past breaches.

Although failure to comply with HVNL obligations can often lead to punishment, it is important to remember that it is also about educating parties on the right ways to manage their safety obligations. Ultimately, we all have the common objective of ensuring the safety of all road users. ■

## Step-by-Step: How to respond to an improvement notice

*Meshal Althobaiti, Lawyer, Holding Redlich*

In the event that you are issued with an improvement notice by an authorised officer, use the following 10-step guide to assist you with your response. The table below sets out your options for how to proceed. ■

<b>STEP-BY-STEP: HOW TO RESPOND TO AN IMPROVEMENT NOTICE</b>		<b>DOWNLOAD</b> 
<b>Steps</b>	<b>Description</b>	
<b>1. Report the notice</b>	Report the notice internally to your compliance officer, manager or director – such notices give rise to potential legal liability and should be escalated appropriately internally.	
<b>2. Seek legal advice</b>	Non-compliance with improvement notices may result in prosecution therefore it is important to seek legal help. By doing so you can ensure you receive appropriate advice regarding compliance. This will also reduce the likelihood of further conduct which may additionally prejudice any explanation or defence you have in relation to the initial incident.	
<b>3. Note compliance time</b>	This is typically a short period (7 days). If timely compliance is a concern, write and request a short extension of time, setting out the reasons why the extra time is reasonably required.	
<b>4. Consider revocation</b>	Consider whether there is any technical basis to apply for the revocation of the notice – that is, does the notice contain the information mandated under the HVNL and discussed in our above article.	
<b>5. Consider complying</b>	Review the notice and consider if you can comply with what is requested. You should ensure that the conduct complained of and steps required are within your ability, power and/or control to effect.  This may include or require you to issue directives to your agents. If it is not within your power to take some or all of the steps set out in the notice, you will need to ask for the notice to be amended or wholly/partially revoked. If you don't do this and then do not comply, you may be subject to an undeserved and avoidable penalty for non-compliance with the terms of the notice.	
<b>6. A reasonable excuse</b>	Consider whether you have a reasonable excuse not to comply. As a general guide, reasonable excuses in the context of regulatory enforcement may include that the notice is not valid or doesn't meet the requirements of the HVNL, or you have reasonably requested legal advice on your obligations before responding.	
<b>7. Assess systems for compliance</b>	Assess what actions, systems and/or procedures you have in place to comply with the notice. It is helpful to identify each individual step required under the notice and ensure that responsibility is allocated to an individual to ensure that the step is taken. Partial compliance won't be sufficient, so make sure nothing falls through the cracks. It may help to set out each individual action required and the steps taken to implement it in your response, in order to make sure nothing is overlooked	
<b>8. Reflect and look ahead</b>	Take a moment to reflect and look forward. The notice has been issued due to some past or ongoing breach of the HVNL. Whilst this breach or breaches have been identified, are there any similar areas of operation in which your business is committing other similar breaches? If so, you should take the opportunity to address them now, rather than waiting for a further notice in the future.	
<b>9. Supply information</b>	Supply the information set out in the notice by the due date and in the manner directed in the notice – typically by postal address or email.	
<b>10. Seek confirmation</b>	Seek written confirmation of receipt of your response.	

# Steel yourself for steel restraint

Rebecca Niumeitolu, Lawyer, Holding Redlich

Steel products are well known for being **shifty**. That is, they have low friction and are prone to move about trailers even in spite of loaders' best efforts to keep them under control. In fact, often parties in the Chain of Responsibility (CoR) involved in transporting steel products will need to rely on an intimate knowledge of the product and tricks of the trade to ensure that their vehicles transporting steel products comply with load restraint and dimension requirements under the Heavy Vehicle National Law (HVNL).

What are the tricks we can learn from the trade to brace ourselves for transporting steel products in a way that complies with your HVNL obligations?

## 1. Know your product

Operators transporting steel products will often rely on manufacturers to provide guidance or assistance as to how best to secure products to ensure they do not shift during transport. This is appropriate where manufacturers have special expertise in the product and where operators, drivers and loaders need to tailor general restraint techniques in the *Load Restraint Guide* to the peculiarities of the product they are moving.

**Loading low friction products onto other low friction surfaces causes them to slip and slide**

This is why, for example, we see manufacturers such as BlueScope releasing load restraint guides which don't take a one-size-fits-all approach to restraining steel. These instead provide various methods for steel restraint depending on the nature of the product. For consignors, sharing such expertise can act as both a sword for demonstrating compliance with load restraint and dimension requirements as well as a shield if an incident were to occur relating to breaches of these requirements where restraint guides have not been complied with but provided to parties down the CoR.

## 2. Low on low is a no go

Loading low friction products onto other low friction surfaces causes them to slip and slide. For this reason the *Load Restraint Guide* identifies that where there is more friction, more weight can be restrained by each tie-down lashing. It's also why steel is usually stacked on timber or rubber load mats and uses timber dunnage to increase friction to ensure loads don't shift.

**Extra precautions are required when loading irregular-shaped steel. The loading process with such products is not formulaic**

*Kemp v Doble; Kemp v Doble Express Transport Pty Ltd (2014) 67 MVR 167* demonstrates the devastating impacts that can arise where parties fail to account for low friction of steel and metal in the loading process. In that case, five bulk industrial gas cylinder packs were dislodged from a trailer, causing a road collision as well as the death of a road user.

A key factor that contributed to inadequate load restraint was that "metal pallets of gas cylinders were placed directly onto the steel deck of the trailer, resulting in low friction". Expert evidence was adduced indicating that placing metal on metal was poor load restraint practice. Better alternatives would have been to place an anti-slip rubber matt, timber sheeting or timber dunnage between the metal pallet and the steel deck of the trailer.

## 3. Beware of things that go bump

Scrap steel goes bump. Odd-shaped steel goes bump.

Extra precautions are required when loading irregular-shaped steel. The loading process with such products is not formulaic. You might need extra lashings or dunnage. If you can't cover the load you may need to take visual inspections of the load along its perimeter and height level to ensure there aren't protrusions at the time you leave a collection site and along the journey.

A failure to do so may risk lashings becoming loose or the load protruding.

This was a lesson hard learned for Sims Group Australia Holdings (**Sims**) and Delta Pty Limited (**Delta**) which were respectively ordered to pay \$55,494.85 and \$66,593.83 in tunnel repairs alone, when over-dimension scrap metal that Delta was transporting for Sims struck the roof in the Sydney M5 tunnel, and caused the vehicle to become stuck.

The dimension breach in that case arose as a result out of a series of failings by the companies, including a failure by Sims to give appropriate instructions to Delta and the seller of the scrap steel about compacting and restraining the load, as well as a failure to measure the height of the load at the departing premises where the load was not properly secured or covered.

## 4. Train and train again

A central tool for businesses to guard against breaches of restraint and dimension requirements is to train staff involved in loading and transporting steel products and to keep records of staff training.

**Sims and Delta were respectively ordered to pay \$55,494.85 and \$66,593.83 in tunnel repairs alone**

In *Kemp v KGB Protective Coating Pty Ltd (KGB) (2014) NSWSC 586*, KGB was the company in charge of loading goods for transport, but had not trained staff in load restraint and did not measure the dimensions of the load. KGB's failure to comply with load restraint requirements resulted in five prefabricated steel beams falling from a heavy vehicle, colliding with six motor vehicles and causing the death of another road user.

So the message is, if you are loading, restraining or transporting goods with peculiar properties or inherent safety risks, you need to make sure that you are aware of and put into place practices specifically tailored to deal with those risks. The higher the risk, the tighter and more tailored your practices need to be. ■

**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.

## How do I assess a heavy vehicle driver's fitness to drive?

**Q** I am involved in the heavy vehicle industry and was wondering if I have an obligation to monitor my drivers' fitness when on the road?

**A** An element of fatigue compliance under the Heavy Vehicle National Law (HVNL) is making sure that drivers are fit to drive in the sense that they are not adversely affected by fatigue.

It is not always easy to test drivers for fatigue because driver fatigue and fitness can manifest differently in different people. Generally, an assessment of fatigue fitness could involve evaluating some or all of the following:

- the driver's ability to control the motor vehicle;
- the driver's functional status including cognitive function, physical strength and skills, reaction time, insight level and ability to self-monitor their driving;
- the driver's lifestyle and the nature, frequency and requirement for driving;
- the driver's understanding and application of road laws; and
- whether the driver needs specialised equipment or vehicle modifications to facilitate their work.

One way to evaluate the above is to have your driver fill out a self-assessment form such as a driver health questionnaire as a starting point for assessing your driver's fitness to drive a commercial vehicle until a full clinical examination can be performed.

Some simple questions that you can ask your driver before undertaking any work-related tasks include:

- How are you feeling?
- Did you have sufficient sleep?
- When was your last working shift?
- When is your next working shift?
- Have you consumed any alcohol or drugs in the past 24 hours?

These questions appear obvious, but they are often overlooked and can prevent unnecessary accidents/incidents from occurring.

If you have an unfit driver who is involved in an accident, the implications for the driver and the company can be significant. For example, you could face not only civil, but also criminal liability. Therefore it is essential that companies have adequate systems and procedures in place to monitor, detect and test a driver's fitness to drive.

## Obligations of transport customers

**Q** How do I ensure that I am doing the right thing as a transport customer?

**A** As a customer of transport services, you are a part of the Chain of Responsibility (CoR) and therefore have an obligation to ensure so far as reasonably practicable the safety of your transport activities, even if practically you have limited involvement in the provision of transport services themselves.

Key ways to ensure that you are ensuring the safety of your transport activities and not potentially exacerbating non-compliance down the supply chain are as follows:

Firstly, avoid prohibited requests that ask, direct or require drivers or other parties in the CoR to cause a driver to exceed speed limits, drive while impaired by fatigue, drive in breach of work or rest hours options or drive in breach of other laws.

Secondly, avoid prohibited contracts which would have the same consequences.

Thirdly, undertake detailed pre-engagement operational due diligence. This can be achieved by checking that your transport providers are aware of their CoR safety obligations and have systems in place to manage risks. You should also keep an eye out for red flags of non-compliance and periodically observe service providers' systems to ensure they are effective.

## How important is it to document CoR compliance?

**Q** Do I need to document any of my CoR compliance practices?

**A** In short, yes. In the realm of regulatory compliance, being seen to be doing something or being able to demonstrate that you have done something is sometimes equally as important as 'doing' it in the first place.

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.

Further to this, consider these additional reasons to ensure you document CoR compliance:

1. It assists in training and awareness. Documenting your compliance policies and procedures assists in communicating them within your business and to relevant parties throughout your supply chain.
2. It is a mandatory component of pitching for tenders. Compliance must be demonstrated or proved to secure work or respond to allegations of default.
3. Your compliance procedures may be tested in court. If your operations are investigated or you are prosecuted in court, you will have to demonstrate to the regulators/court that you have complied with your obligations.
4. You are legally obliged to maintain and keep records. Certain provisions of the HVNL require you to retain records for a mandatory period of at least three years. ■

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## Spotlight on enforceable undertakings

On 25 March 2020, the National Heavy Vehicle Regulator (NHVR) accepted an enforceable undertaking (EU) offered by engineering and construction company, Laing O'Rourke Australia Construction Pty Ltd (LORAC). The offer by LORAC was made in circumstances where Transport for New South Wales charged it with two severe risk breaches under s 96(1)(c) of the Heavy Vehicle National Law (HVNL). The estimated value of the steps proposed by LORAC to ensure compliance with its mass HVNL obligations is about \$249,500, so not a cheap exercise.

In this article we revisit requirements for EUs and reasons why a party in the Chain of Responsibility (CoR) may wish to propose one to the NHVR.

### WHAT IS THE INCENTIVE IN OFFERING AN EU?

A CoR party may consider offering an EU as an alternative to being charged with contravening the HVNL. It is available in relation to all offences except for serious category 1 offences of breaching a primary duty.

The incentive for offering an EU to a regulator is essentially to stop it from advancing a prosecution against a CoR party.

Practically speaking, a CoR party that is contemplating offering an EU would also need to be willing to put significant resources behind its future compliance with HVNL requirements. This is because usually the NHVR will only accept an EU if the CoR party can demonstrate an ability "to effect profound reform of their activities to improve safety and to benefit the community in ways not able to be achieved by other sanctions" (NHVR's *Enforceable Undertaking Policy*).

As can be seen in LORAC's case, EUs can be costly depending on the nature of your business and causes of your breaches. LORAC's EU included a commitment to implement the following HVNL compliance strategies:

- Training for LORAC employees that targeted improved awareness of CoR requirements which LORAC estimated required a minimum commitment by it of \$134,500.

- CoR training for supply chain partners in NSW, Victoria and South Australia with an estimated minimum commitment of \$80,000.
- A third-party transport safety management system audit estimated to cost LORAC \$35,000.

### DOES OFFERING AN EU MEAN THAT THE COR PARTY HAS A CONVICTION PUBLICLY RECORDED AGAINST IT?

No. Section 508B(4) of the HVNL provides that if a CoR party offers to make, or makes, an EU, it is not admitting guilt.

However, making an EU can have reputational implications that may influence a CoR party's decision to offer one.

Section 590A(9) requires the NHVR to publish on its website its decision to accept an EU and its reasons for the decision, as it did in the case of LORAC's EU. This publication will include a statement by the party offering the EU that it regrets the incident occurred. While this is not the same as the CoR party admitting guilt of committing an HVNL offence, it is arguably an acknowledgment that it has some HVNL compliance concern(s).

## The incentive for offering an EU to a regulator is essentially to stop it from advancing a prosecution

Possible reputational risks associated with having EUs published may need to be weighed against other reputational risks where no EU is offered, such as risks of having a criminal conviction against a CoR party, or that criminal proceedings for charges under the HVNL are held in an open court. One advantage of an EU is that, if it is feasible for a CoR party to propose one, then it can also reassert its commitment to safety across the CoR and community.

### WHAT FORM SHOULD AN OFFER FOR AN EU TAKE?

The NHVR has published a guideline on proposing EUs on its website. It provides that proposals for EUs must include, among other things:

- details of the CoR party offering the EU and its current HVNL compliance systems;
- details of the alleged contravention, its consequences, possible consultation taken within the company concerning the EU offer, and any rectification steps taken by the company as a result of the alleged contravention;
- a statement of regret that the incident occurred, assurance around future compliance and an ability to comply with the EU;
- an acknowledgment that the EU will be published and may be publicised; and
- strategies that the CoR party will deliver to benefit drivers and CoR parties, industry and the community.

They must not include:

- outright denials of liability;
- terms which give CoR parties an 'out' (i.e. set up defences) for non-compliance with the EU or future breaches of the HVNL or Work Health and Safety laws; and
- terms that impose obligations on other parties, such as parties down the supply chain, without their consent.

### WHAT IF A COR PARTY BREACHES CONDITIONS OF ITS EU?

Failure to comply with an undertaking exposes a CoR party to three key outcomes:

- the NHVR could apply to a tribunal or court for orders that the CoR party pay a penalty for its non-compliance. The maximum penalty for a breach of an EU is \$50,060 (up to July 2020) for a company or \$11,210 (up to July 2020) for an individual;
- in addition to seeking orders for a penalty, the NHVR could seek orders for the CoR party to comply with the EU or to otherwise discharge the EU; and
- proceedings relating to the original charges may be re-enlivened.

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- Exceptions to mass limits
- Safety duties and responsibilities under the HVNL