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**Chain of Responsibility** solutions

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## From Your Editor-in-Chief



In recent months, many industries have had to modify how they conduct business due to the global pandemic. We take a moment to consider the changes in the transport and logistics industry as restrictions ease across Australia. You may be tired of hearing about COVID-19 but the enclosed checklists for risk management in roadside service centres are mandatory reading.

We continue to unpack the findings from the review into the Heavy Vehicle National Law (HVNL). This month we look at the feedback on vehicle standards and roadworthiness as well as accreditation schemes.

At first glance, mass seems like one of the most straightforward areas under the HVNL. Mass is fixed, finite and can be measured. However, there is more to mass than meets the eye. We take a look at the various mass options available, to help simplify the matter.

Determining a driver's fitness to drive should be common sense. But, is it also an HVNL issue? Certainly under the 'old' HVNL, the answer was 'no'. But the current HVNL expands safety duties which includes fitness to drive – so we have a refresher on this important issue.

Finally, if you have any CoR questions, we love hearing from you. So send them to the helpdesk at [helpdesk@coradviser.com.au](mailto:helpdesk@coradviser.com.au).

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

## Part 3: Outcomes from the HVNL review

*Nathan Cecil, Partner, Holding Redlich*

This month, we continue to look at the findings from the issues papers released by the National Transport Commission (NTC) as part of its extensive review into the Heavy Vehicle National Law (HVNL). This article examines the outcomes from issues papers concerning vehicle standards and safety as well as assurance models. This information will contribute to the recommendations put to government as to how to improve the HVNL. Let's take a closer look at the findings.

### VEHICLE STANDARDS AND SAFETY

The NTC's fourth issues paper focused on the matter of how to ensure compliance with heavy vehicle standards and streamline the Performance-Based Standards (PBS) scheme for vehicles. The outcomes from the substantial consultation and feedback on this paper are set out below.

### Complying with heavy vehicle standards

- There was broad agreement that the scope of the law concerning vehicle standards and safety was adequate in that the requirements for safe vehicles are set at the right level.
- There was widespread dissatisfaction at inconsistent application of vehicle defect notices between different jurisdictions.
- There was general acceptance that defect notices were directly linked to safety and were therefore an important and appropriate safety tool.
- There was a general consensus that including the National Heavy Vehicle Inspection Manual within the HVNL would increase consistency in vehicle inspection and the issuing of defect notices. Reference to a set list of 'safety requirements' and methods to inspect and assess compliance was considered likely to be a major positive development.

➤ *Continued on page 2*

## How to manage risk in the new COVID-19 world

*Meshal Althobaiti, Lawyer, Holding Redlich*

The disruption caused by the ongoing global pandemic to the transport and logistics industry is unlike anything we have seen before. In the last six months, there has been an unparalleled strain on most supply chains. In this article, we explore additional measures that you should implement to promote a healthy and safe work environment for heavy vehicle use in these times.

As movement picks up around the country and some semblance of normal life resumes, it is crucial to continue to ensure hygiene measures and physical distancing practices are upheld in workplaces. It is also important to remember that despite this focus on promoting a safe and healthy work

environment, businesses are still susceptible to breaches of the Heavy Vehicle National Law (HVNL) during the ongoing COVID-19 crisis.

### ➤ IMPORTANT



A safe work environment is paramount. You must ensure that your transport activities remain safe for staff, contractors, customers and drivers as restrictions ease and movement resumes.

The imbalance of supply and demand for transport businesses and customers has altered the heavy vehicle transport landscape and increased pressure throughout the industry.

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## — HELPDESK QUESTION OF THE MONTH —

### What are the recent temporary changes to the NHVAS? (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)

## Half-billion dollar funding boost for local roads

The Australian Local Government Association (ALGA) has welcomed the announcement of the Federal Government's \$500 million Local Road and Community Infrastructure (LRCI) Program, one of two components of a \$1.8 billion local government stimulus package.

The second component is \$1.3 billion of the 2020-21 Financial Assistance Grant (FAG) payment, which the Federal Government has brought forward.

"The pre-payment of \$1.3 billion is equivalent to two quarters (50 per cent) of the 2020-21 FAG payments," ALGA president David O'Loughlin said.

"The \$500 million LRCI Program represents the largest single injection of Covid-19 assistance for councils thus far – not to overlook the various stimulus measures and jobs support programs announced by state governments over the past month.

"Ready-to-go projects will be the focus of the new LRCI Program, which will be administered along the lines of the successful Roads to Recovery program."

From 1 July 2020, NSW will receive \$139.3 million, Victoria \$101.7 million, Qld \$101.7 million, WA \$73.1 million, SA \$44.9 million, Tasmania \$16.3 million, ACT \$8 million and the NT \$14.5 million.

The funding from the LRCI Program can go towards local road projects such as the construction and improvement of bridges, street lighting, and heavy vehicle facilities such as rest areas.

"Funding can be provided quickly, and councils have the flexibility to deliver local priorities, maximising local job creation opportunities," Mr O'Loughlin said

"Eligible projects will be expanded to also include community infrastructure projects.

"Painting grandstands and refurbishing community facilities will stand alongside road safety improvements and stormwater upgrades as worthy projects – all able to employ different cohorts of locals thrust out of work during the Covid-19 restrictions.

"We are confident the new LRCI program will be welcomed by local councils, as will confirmation of the continuation of the 'pull-forward' of \$1.3 billion of Financial Assistance Grants.

"This combination of opportunity and funding certainty is exactly what councils need for their budget deliberations, underway right now, during these uncertain times." ■

Continued from page 1 "Part 3: Outcomes from the HVNL review"

### Promoting safer vehicles

- There was general agreement that Australian Design Rules needed to maintain pace with international safety standards, although this didn't need to be addressed under the HVNL.

### Safety duties, third-party repairs and replacement parts

- The majority of stakeholders thought that heavy vehicle repairers should be included as a party in the Chain of Responsibility (CoR) and subject to the primary safety duty. This would mark an interesting development in the law, given that third-party repairers currently can only do what they are instructed to do.
- However, it was noted that including repairers in the CoR could shift the focus away from operators, which could have unintended consequences in shifting safety and compliance behaviour away from them.

### Regulator powers

- There was broad agreement that regulators should adopt a risk-based approach to clearing vehicle defects and that this should be reflected under the HVNL.
- There was disagreement as to whether heavy vehicle registration should be taken over by the NHVR or remain with the states/territories.

### Performance-Based Standards Scheme

- There was general agreement that the PBS scheme delivers productivity and safety benefits to registered operators.
- However, the consensus is that administrative hurdles and burdens hold the scheme back and discourage many operators from taking the benefit of it.
- There was disagreement as to whether the NHVR should take over the role of the PBS Review Panel. Some thought that if the NHVR processed routine risk cases, this could streamline the process. Others thought that the panel should remain independent.

The above points demonstrate the key issues at stake with regards to heavy vehicle standards and the PBS scheme. Looking ahead, the NTC will consider the above positions further and then set out its preferred approach in a Regulatory Impact Statement (RIS).

### ASSURANCE MODELS

Another issue the NTC examined as part of its review of the HVNL was assurance models – that is, accreditation schemes, what they cover, how they are assessed and what you get if you are a member.

### DEFINITION: ASSURANCE

Assurance is the process by which parties in the CoR can demonstrate their capacity to comply with the law. The regulator typically sets some ground rules as to what safety outcomes are required to be achieved and CoR parties are given the flexibility to design the details themselves. As long as the measures implemented can be demonstrated to meet the safety outcomes, then the CoR party is accredited under the assurance scheme.

### Current issues with assurance under the HVNL

The current assurance framework is not comprehensive, as some assurance schemes cover certain things but not others. It is not cohesive as the assurance schemes don't dovetail with each other and might not be designed to directly match up with the HVNL. Additionally, the productivity benefits dished out to those accredited under the various schemes are not consistent.

### The future of assurance

- Most respondents agreed that there is a proliferation of individual customer-imposed requirements across the sector that are duplicated and overly complex and place a massive burden on operators.
- Most agreed that anything that could discourage this from continuing would be a massive benefit.
- Most also agreed that accreditation under an assurance scheme should count as 'deemed compliance' with the HVNL – meaning that all someone has to do is show their accreditation in order to get a 'green light', pass go and collect \$200 (a Monopoly reference, for those that remember board games).
- However, respondents could not agree on who should set the standards and how and to whom any productivity benefits (awarded as a prize for obtaining accreditation) should be granted.

In future issues, we will continue to look at the key findings of further issues papers circulated by the NTC as part of the HVNL review process. As with the others, you will have the opportunity to have your say and comment on the RIS, to be issued later in 2020. The NTC will then make recommendation to ministers on the shape and content of the new HVNL laws, before they are drafted and come into force.

Note: the contents of this article are based on the *National Transport Commission, HVNL Review - summary of consultation outcomes, Consultation report, NTC, Melbourne.* ■

# Are your supply chain contracts legally enforceable?

The need for comprehensive and flexible business practices and policies has never been more apparent. One of the measures that can help your business manage risk in this uncertain time are compliance assurance conditions. In this article, we break down the who, what, where and how of supply chain contract terms.

As the country begins to open up again, it is a great time to review what practices and procedures are in place to help you meet your Heavy Vehicle National Law (HVNL) safety obligations. Does your workplace have adequate frameworks to respond to health and safety risks? The current global pandemic has emphasised the importance of proactive and thorough measures.

The HVNL and courts recognise that one of the best proactive and positive steps a business can take to ensure safety and compliance within their supply chain is to include legally enforceable terms between parties that:

- require performance; and
- discourage or do not reward non-compliance.

Ultimately, the legally enforceable nature of the contract means that it can be upheld in a court of law. An enforceable contract is an agreement carried out by the assenting parties – in this case, the parties in the Chain of Responsibility (CoR). They are legally obligated to execute the conditions of the contract.

## Compliance assurance conditions must have teeth in order to help you effectively meet your safety obligations

Compliance policies and procedures form part of the broader business practices that should govern your workplace. The compliance assurance conditions should clearly articulate the expectations of the business in relation to its own, its employees' and its business partners' conduct, and provide specific instruction.

### > DEFINITION: COMPLIANCE ASSURANCE CONDITIONS

Compliance assurance conditions are terms that are included in a contract or arrangement between two or more parties in the Chain that require compliance with the relevant CoR obligations that apply to the transport activities being conducted under that contract or arrangement.

### WHAT SHOULD THE TERMS SET OUT?

The contract or engagement terms between parties in the Chain primarily govern the relationship between them. Those terms should set out:

- the role and responsibilities of each party;
- the standard of performance required;
- how that performance will be measured; and
- what will happen if that standard is not met.

### > IMPORTANT

The courts have indicated that meaningful compliance assurance conditions are necessary in all supply chain arrangements between parties in the CoR. So, don't exclusively focus on including them in transport or logistics contracts. You must consider all parties and relationships in your supply chain.

### WHERE SHOULD YOU INCLUDE COMPLIANCE ASSURANCE CONDITIONS?

Compliance assurance conditions should be included in:

- supply or procurement contracts for goods or materials required to be transported by road;
- contracts for the purchase or sale of goods required to be transported by road;
- warehousing, storage and handling contracts;
- transport, logistics and distribution contracts; and
- employment arrangements for workers involved in each of the above, e.g. within employment contracts or included in mandatory applicable company policies and procedures.

### HOW TO ENSURE YOUR ASSURANCE CONDITIONS ARE ENFORCEABLE

Compliance assurance conditions must have teeth in order to help you effectively meet your safety obligations. This means that it is important to set out clear consequences if

other parties operating under the supply chain contract do not meet the standards required, such as:

- a right to issue a 'show cause' notice that requires an explanation of steps implemented to avoid non-compliance occurring again;
- suspension of performance of the contract until assurances of ongoing compliance are provided;
- rights to withhold or deduct payment or withdraw performance bonus payments;
- a right to report breaches to the relevant authorities; and
- termination of the contract or arrangement.



**TIP:** Support the above compliance assurance condition consequences with some clear CoR key performance indicators (KPIs) that are included in the contract or arrangement.

### LESSONS FOR YOUR SUPPLY CHAIN

Remember, wishful thinking or expecting other parties in the Chain to do the right thing is not enough to discharge your CoR duties. These approaches are passive, not proactive and positive. The legally enforceable terms that you set out and subscribe to must require performance and discourage non-compliance.

## The terms you set out and subscribe to must require performance and discourage non-compliance

Compliance assurance conditions must be included in every supply chain contract so that your business is well positioned to promote and ensure safety and compliance in the work environment. A proactive approach is paramount during this global health crisis.

When writing these clauses, simply requiring compliance with all obligations is not sufficient. It is highly recommended that you include CoR KPIs, as mentioned above, and consequences for non-compliance to encourage satisfactory performance from all parties and ensure these obligations are effective. ■

➤ Continued from page 1 *“How to manage risk in the new COVID-19 world”*

As we enter the second half of the year and restrictions ease in all states and territories, we consider the rigorous cleaning and safety measures needed to reduce the risk of transmission in the workplace and in heavy vehicles. These safety obligations are discussed below.

**➤ DEFINITION: TRANSPORT ACTIVITIES**

Transport activities include conduct such as consigning, packing, loading and receiving goods and expressly includes a party's 'business practices'. The safety of transport activities relating to a heavy vehicle is the shared responsibility of each party in the Chain of Responsibility (CoR).

In the current climate, it is imperative to understand your transport activities to encompass the whole range of activities your business engages with. Remember this might also involve activities associated with the use of a heavy vehicle on the road, what happens in the boardroom, how decisions are made, formal and informal systems, practices and procedures. Given the ongoing health crisis, there isn't much room for error. Businesses must be diligent in implementing and maintaining health and safety practices and procedures.

**TIP:** The easing of restrictions is a timely reminder for your organisation to ensure that your transport activities are safe and not in breach of the HVNL.

After the HVNL was amended, the National Heavy Vehicle Regulator (NHVR) began undertaking investigations of serious offences nationally under the HVNL.

The investigations of the NHVR included the following allegations:

- directions to disregard work/rest requirements;
- the absence of a system for managing risks;
- ineffective driver monitoring systems; and
- poor load restraint practices.

The common theme in the above allegations is the breach of safety. Section 26C (1) of the HVNL imposes a positive duty on parties to ensure so far as reasonably practicable the safety of their transport activities. The CoR parties must do this in at least two ways by:

- eliminating or minimising public risks; and
- ensuring their conduct does not cause or encourage a driver or another person, directly or indirectly, to breach the HVNL.

**THE CHANGING LANDSCAPE**

It is not business as usual for most organisations. Many different industries are facing new issues as they navigate this unfamiliar territory of the global pandemic. The rapid rate of infection and contagious nature of COVID-19 has resulted in governments enacting new and evolving laws to try to manage the outbreak. This in turn has seen various restrictions on businesses and flexibility as they are forced to remodel how they function and adopt new and more thorough practices to minimise risk.

In Australia, transport, logistics and supply chain operators have continued to function and provide essential services throughout the disruptions. This included roadhouse and rest stops that provide meal and hygiene facilities for the trucking industry, which were exempt from the restrictions and permitted to continue their service to heavy vehicle drivers.

The challenges included and were not limited to:

- pressures placed on operators to navigate the fast-changing demands of consumers who faced new regulatory restraints and continue to supply goods;
- the closure of borders which has reduced access to international air and shipping freight, thus delaying the delivery of goods throughout Australia; and
- implementing rigorous safe business hygiene measures and social distancing practices.

**SAFETY RESPONSES**

Operators in the heavy vehicle industry need to implement reasonably practicable control measures to manage the risks associated with providing uninterrupted service to customers.

Your safety management systems should focus on your own operations and consequent risks, instead of focusing on examining what others are doing to manage their risks. This way of thinking involves a more pragmatic approach towards risk management and can be achieved by looking at how your activities might contribute to or create a risk in the operation of that vehicle. You must then consider ways to eliminate or reduce those risks.

As an example, Iveco Australia shared how it is navigating this challenging period whilst protecting the health and safety of its employees and ensuring business continuity. It has continually monitored both global inventory and supply chain from its vendors and emphasised the need to keep customers and suppliers informed with developments.

Communicating any likely changes and developments about the status of supply and production can go a long way in helping those involved assess their operational and safety needs accordingly.

Another example of how management may respond to the demands caused by COVID-19 could involve having a system in place to help identify and source critical personal protective equipment. This can be achieved by ensuring that management has an efficient inventory management system record to determine the level of stock of any of the following:

- antiviral hand sanitisers;
- disinfectants and sprays for vehicles and work areas;
- thermometers;
- gloves; and
- face masks.

The provision of facilities for heavy vehicle drivers that allow them to take a break and do things such as rest, eat and shower are key in helping drivers manage their fatigue. If your business operates a truck driver lounge, truck driver room or similar facilities at a roadside service centre, you should consider how to provide appropriate social distancing and hygiene arrangements in those facilities.

**MANAGING RISK**

How an organisation manages the risks of a possible COVID-19 transmission, and whether or not it is an acceptable risk is a matter for the operator and drivers to determine.

To ensure safety compliance, self-isolation for heavy vehicle drivers during fatigue rest breaks, for example, should be practiced.

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➤ Continued from page 4

Businesses should assess their capabilities on an ongoing basis and consider how to deliver services while supporting a safe heavy vehicle business conducting operations through a period of uncertainty. It is important to strike the right balance. For instance, where it is practical and safe to do so, you should:

- review tasks and processes that usually require close interactions of people;
- identify ways to modify and increase physical distancing;
- implement rigorous cleaning measures; and
- educate employees on these safety procedures.

**THE SAFETY LESSON**

As COVID-19 restrictions are gradually being relaxed in Australia, CoR parties and heavy vehicle operators must ensure they are ready to promote social distancing and good hygiene measures.

The take home message here is that your business requires a uniquely focused approach to health and safety in the work environment. To mitigate potential risks and ensure safety in your workplace, your business must engage in consultation with others in the CoR to assess operations, identify, understand and quantify risks. This will help to implement and review control measures to address these new and ongoing risks. ■

## Checklist: COVID-19 safety measures for roadside service centres

Meshal Althobaiti, Lawyer, Holding Redlich

The following guidelines stipulated by the Australian Government should be implemented to ensure truck driver lounges, truck driver rooms or similar facilities at a roadside service centre or service stations are able to continue to provide services to heavy vehicle drivers throughout the COVID-19 health crisis. As these facilities are considered an essential service, they have been functioning throughout. In order to stay open, it is important that the protocol below is implemented to ensure appropriate social distancing and hygiene arrangements. Follow the enclosed checklists to make sure you are meeting your safety obligations.

The information in the checklist is based on the Department of Infrastructure, Transport, Regional Development and Communication’s Requirements for Exemption: specific for heavy vehicle drivers which can be located here: [https://www.infrastructure.gov.au/vehicles/vehicle\\_regulation/files/non-essential-services-exemption-rest-stop-facilities.pdf](https://www.infrastructure.gov.au/vehicles/vehicle_regulation/files/non-essential-services-exemption-rest-stop-facilities.pdf). ■

CHECKLIST: COVID-19 SAFETY MEASURES FOR ROADSIDE SERVICE CENTRES		DOWNLOAD 
<b>Drivers</b>	If you are a driver, ask yourself the following: <ul style="list-style-type: none"> <li><input type="checkbox"/> Have I washed or sanitised my hands at all appropriate times, but especially before sitting and prior to leaving?</li> <li><input type="checkbox"/> Am I maintaining appropriate social distancing while in the truck driver lounge?</li> <li><input type="checkbox"/> How long am I planning to use the facilities? Truck drivers must not remain in the lounge for more than one hour. This includes using the showers and toilet facilities.</li> <li><input type="checkbox"/> If using the shower facilities, have I notified a truck driver lounge employee after showering to allow time for cleaning?</li> <li><input type="checkbox"/> Am I aware of and following all COVID-19 related instructions from employees in the truck driver lounge?</li> <li><input type="checkbox"/> Have I ensured that I am not displaying symptoms of illness (fever, cough, sore throat) before entering the truck driver lounge? If feeling unwell, do not enter and instead seek medical assistance.</li> </ul>	
<b>Businesses</b>	If you are a business, have you ensured the following: <ul style="list-style-type: none"> <li><input type="checkbox"/> Is there appropriate signage that clearly states the truck driver lounge is only open to truck drivers and that social distancing and appropriate hygiene requirements must be followed?</li> <li><input type="checkbox"/> Have all employees working in the truck driver lounge been provided with guidance based on the Department of Health website?</li> <li><input type="checkbox"/> Is there ongoing cleaning and sanitising of all surfaces, doors and high traffic areas in accordance with advice provided on the Department of Health website?</li> <li><input type="checkbox"/> Is soap or handwash readily available in the toilet and shower facilities?</li> <li><input type="checkbox"/> After each use of a shower facility, is there thorough cleaning and sanitising occurring? Ensure showers that have been cleaned are marked as ready to be used.</li> <li><input type="checkbox"/> Have you provided additional hand sanitising stations for both employees and heavy vehicle drivers to encourage use?</li> <li><input type="checkbox"/> Do you have in place procedures to closely monitor the health of all employees, with at least daily reporting or check-ins by supervisors?</li> <li><input type="checkbox"/> Are the tables, seating and truck driver numbers managed to comply with social distancing requirements?</li> <li><input type="checkbox"/> Are employees being reminded to minimise their interactions with truck drivers in the lounge area to those that are essential to provide them with the services?</li> <li><input type="checkbox"/> Have all self-serve options (unless pre-packaged) been removed?</li> <li><input type="checkbox"/> Have you ensured other work, health and safety and other regulatory requirements are being met?</li> </ul>	

# How to ensure fitness to drive

*Rebecca Niumeitolu, Lawyer, Holding Redlich*

Typically, when we think about the primary duty under the Heavy Vehicle National Law (HVNL) we consider it in the context of consigning goods, scheduling transport, packing, loading or unloading goods, and receiving goods. However, the terms of the HVNL cast a much wider net. In this article, we take a closer look at the shared responsibility of the fitness to drive.

The primary duty under the HVNL requires parties in the Chain of Responsibility (CoR) to ensure, so far as reasonably practicable, the safety of their transport activities relating to the heavy vehicle.

The term 'transport activities' under the HVNL covers not only conventional transport supply chain activities, but also business practices and decisions associated with heavy vehicles, as well as contracting, directing and employing people to drive heavy vehicles.

Applying the primary duty to this broader range of transport activities could mean for operators and schedulers that they have a duty to ensure, so far as reasonably practicable, that the people they contract, direct and employ to drive heavy vehicles are able to do so safely.

## HOW CAN OPERATORS AND SCHEDULERS ENSURE THEIR DRIVERS CAN DRIVE SAFELY?

Operators and schedulers can ensure drivers are able to drive safely in a combination of ways. Complying with express duties relating to driver fatigue and work and rest hours options is one way to help drivers to drive safely and to achieve compliance with the overarching primary duty.

Another way to ensure drivers are able to drive safely is by making sure they are fit to drive.

## WHAT IS BEING FIT TO DRIVE?

Being fit to drive is another umbrella term. It includes having the sensory, cognitive and motor functions required to perform the complex task of driving.

It also includes not being affected by certain conditions that could impede the driving task. Examples of this are being fatigued, affected by drugs or alcohol, or having certain medical conditions which may impair sensory, cognitive or motor functions (such as being

prone to blackouts or having vision problems) that are not treated or managed under appropriate medical advice.

## HOW CAN YOU ENSURE DRIVERS ARE FIT TO DRIVE?

### 1. Work with what you've got

Check your policy pantry because it's likely there will be some ingredients to help you on your way to building policies and practices around ensuring your drivers are fit to drive.

A great place to start might be to look at how you can build on existing practices concerning driver fatigue which will overlap to some extent with your obligation to ensure drivers are fit to drive.

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## Self-reporting works on a trust system and requires workplaces and management to take the first step to encourage honest responses.

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If you are operating under TruckSafe, Basic Fatigue Management or Advanced Fatigue Management, you are also likely to have already done the hard yards. This is because you can use your practices around requiring certification demonstrating fitness to drive by a medical practitioner, as well as your procedures for drivers' fitness for duty under those schemes to demonstrate compliance with this aspect of the primary duty.

Once you are aware of what policies and practices you have in place, you can then consider how to plug any policy of practice gaps. This could be by:

- having toolboxes with management, schedulers and drivers to ensure they are aware of the obligation to ensure driver fitness and how that interacts with their existing knowledge, practices and procedures around driver fatigue; and
- implementing further practices in policies, such as zero drug and alcohol policies.

### 2. Zero drug and alcohol policies

Drink or drug driving is a cardinal sin in the transport industry. You would be hard-pressed

to find someone who didn't consider it a no-go but, as case law shows us, it still happens.

To support compliance with obligations around ensuring drivers are fit to drive, CoR parties can look at preparing and distributing zero drug and alcohol policies and practices.

This could be in the form of:

- a policy (such as a document, pamphlet or poster) made available to employees identifying the business' position on drugs and alcohol, identifying how it can impair drivers' ability to drive and the consequences of using illicit substances on the job. It may also be helpful in these documents to identify reporting avenues for persons suspecting others of using illicit substances on the job, so that any issues can be managed appropriately, as well as identifying helplines for persons who may want assistance managing addiction and avoiding illicit substances; and
- ensuring at employee and contractor inductions that incomers are aware of your business' policies.

### 3. Fitness for work clearance

Businesses may have different approaches to clearing drivers for fitness to work. One option is to require drivers to be assessed by a qualified health care provider and to provide certification of fitness on a yearly basis, or if a driver has some major health or fitness event, after that event on the resumption of work.

Another option is for drivers to self-report on their own fitness to drive. This may involve drivers completing fitness to drive checklists on a half-yearly or yearly basis and then being able to come forward and notify employers if they feel they are unfit on a given day for any reason (such as, feeling dizzy or nauseous). Self-reporting works on a trust system and requires workplaces and management to take the first step to encourage honest responses.

One way to encourage such behaviour is for workplaces to avoid penalising instances of unfitness where they arise in circumstances beyond drivers' control. Evidently, accurate self-assessment and good communication between drivers, schedulers and management are both important factors in determining fitness to drive. ■

## 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.

## What are the recent temporary changes to the NHVAS?

**Q** What are the recent temporary changes to the National Heavy Vehicle Accreditation Scheme and how do they function in the time of COVID-19?

**A** On 25 March 2020, the NHVR announced temporary changes to the National Heavy Vehicle Accreditation Scheme (NHVAS) in response to the COVID-19 pandemic, which are to remain in place for six months.

The changes take the form of minor amendments to s 654 and 655A of the HVNL, as well as minor amendments to NHVAS rules 13 and 4.4.

The amendments acknowledge that the current COVID-19 pandemic greatly restricts the ability of individuals and companies to maintain their obligations under the HVNL and as such allows for:

1. Heavy vehicle drivers operating under Advanced Fatigue Management (AFM) or Basic Fatigue Management (BFM) accreditations to continue to drive with an expired certification. This minor amendment impacts the criteria for the 'fitness for duty' standard of the BFM module and 'readiness for duty' standard of the AFM module. To satisfy these standards, a driver under either an AFM or BFM module would have to complete a mandatory medical examination to renew their certification. The amendment has temporarily waived the requirement for the mandatory medical examination to renew their certification, provided that their current certification expired on or after 1 January 2020 and that under the expired certification, the driver was certified as fit to drive. Further, they are encouraged to obtain a current medical as soon as practicable.
2. NHVAS Business Rules and Standards auditors to conduct their audits remotely if the auditor considers that it is not reasonably practicable to carry out an audit in person. This includes companies having documents made available electronically for the auditor, as well as conducting any interviews or enquiries by telephone or other means. The amendment states that the audit summary report must record how the audit was conducted, a description of how records were made available for analysis and the reason for conducting the audit remotely.

The above minor amendments are to remain in place until 30 September 2020, after which they will both lapse. However, with the ever-changing response to the current pandemic, watch this space for potentially further review and amendment.

## What are the different categories of offences?

**Q** What does 'risk-based categorisation' of offences under the Heavy Vehicle National Law (HVNL) refer to?

**A** Risk-based categorisation of offences refers to certain offences under the HVNL, where charges and corresponding penalties are graded according to the risk (or potential damage) they present.

Not every offence under the HVNL has a risk-based categorisation. Offences which are categorised based on risk are offences relating to the primary duty, fatigue management, mass, dimension and loading.

Contraventions of the primary duty are categorised as Category 1, 2 or 3 offences.

The other risk-based categorisation offences named above are categorised:

### 1. Minor breaches

The National Heavy Vehicle Regulator (NHVR) categorised 'minor breaches' to cover circumstances where a person gains minor unfair commercial advantage over those who operate legally, but there is minimal risk to safety.

For example, a minor breach of a restraint requirement might occur where a load shifts but still does not pose an appreciable safety risk or a risk to road infrastructure.

### 2. Substantial breaches

A substantial breach typically involves a risk of damage to infrastructure, causing an adverse effect on public amenity. The risk is not classed as an appreciable risk.

The HVNL often identifies what is the upper and lower limit or the threshold for a party to commit a substantial breach of an obligation. Broadly, a substantial breach is anything more than a minimal risk to safety but under the threshold of an appreciable risk to safety.

### 3. Severe breaches

A severe breach arises where an offence involves an appreciable or substantial risk to road infrastructure, safety and public amenity.

### 4. Critical breaches (for fatigue offences only)

The HVNL defines a 'critical risk breach' by reference to the Fatigue Management National Regulations and the maximum work and minimum rest requirements outlined by these regulations. For example, in a 24-hour period the maximum work time is 12 hours and a critical risk breach is classed as working more than 13.5 hours in a 24-hour period. ■

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## Mass matters

General mass limits, exception mass limits, higher mass limits, concessional mass limits, permitted mass limits, mass notices, mass permits, combination mass limits, tare mass limits, mass on tyres, mass on axles, mass on axle groups. Mass matters under the Heavy Vehicle National Law (HVNL) might mystify us, but let's not be mistaken, mass matters count.

Let's start with the basics. Why do mass matters count?

Mass matters count because overloading impacts on the safety of heavy vehicles, the HVNL imposes obligations to avoid overloading and persons can face significant penalties for overloading.

The primary mass obligation is under s 96 of the HVNL. It requires that drivers of, and persons permitting drivers to drive, a heavy vehicle on road ensure the vehicle, its components and load, comply with mass requirements applying to the vehicle, unless that person has a reasonable excuse.

A failure to comply with mass requirements may result in a maximum penalty (indexed for 19/20FY) for severe breaches as follows (see Table 1).

### WHAT TYPES OF MASS REQUIREMENTS CAN APPLY TO A HEAVY VEHICLE?

Generally speaking there are three categories of mass requirements that can apply to heavy vehicles.

#### 1. General mass limits (GML)

GML apply to all heavy vehicles unless some exception or exemption applies. The GML is the maximum allowable mass limit that can apply to a heavy vehicle, including mass limits on axles and axle groups. GML are set out in Schedule 1 of the *Heavy Vehicle (Mass, Dimension and Loading) National Regulation (Regulation)*.

If GML apply to your heavy vehicle and Schedule 1 has two or more mass limits that could apply to it, the proper approach is to apply the lower mass limit to your heavy vehicle and to disregard other mass limits.

#### 2. Exception mass limits

Exception mass limits are as follows (see Table 2).

Critically, if a person overloads a heavy vehicle above exception limits, then the nature of the mass requirement contravention will be judged against the GML that would otherwise apply to the heavy vehicle, not against the exception mass limit.

#### 3. Exemption mass limits

Mass exemptions can arise in two ways (see Table 3).

Once CoR parties understand the types of mass limits that apply to vehicles in their supply chain and their obligations under the HVNL, they can look at how to manage compliance with mass requirements to the extent that they apply to them. ■

	Maximum penalty	Amount penalty may be increased for every additional 1% over 120% overload	Cap
Individual	\$11,210	\$560	\$22,430
Corporation	\$56,050	\$2,800	\$112,150

<b>Concessional mass limits (CML)</b>	CML allow heavy vehicles to load to a maximum of 5% over GML, subject to certain conditions. CML are set out in Schedule 2 of the Regulation.  To operate under CML, an operator needs to be a National Heavy Vehicle Accreditation Scheme (NHVAS) member, meet compliance standards under the NHVR Mass Management Accreditation Guide and identify vehicles operating under CML.
<b>Higher mass limits (HML)</b>	To be eligible for an HML permit a vehicle must have road friendly suspension systems. This is to minimise the impact of laden axles on roads and road infrastructure.  HML permits allow heavy vehicles to load to higher mass limits for certain areas or routes to which the permit applies. Routes that HML vehicles can access are available on the NHVR's website.  HML permits may be subject to conditions stated in the permit. A driver may be liable to a maximum penalty of \$3,360 if the driver contravenes a condition of a permit. An operator may be liable to a maximum penalty of \$16,800 for the same contravention.
<b>Quad axle group mass exception limits (QAML)</b>	QAML essentially allow a vehicle to load up to 27 tonnes on a quad axle group.  QAML apply if all axles in the quad axle group are fitted with dual tyres, the vehicle has PBS vehicle approval allowing mass up to 27 tonnes on the quad axle group, and the vehicle complies with PBS and its conditions of vehicle approval.
<b>One-tonne tri-axle mass transfer allowance (TA)</b>	The TA allows heavy vehicles to load up to 1 tonne over GML on a tri-axle group.  Reliance on the TA exception is subject to certain conditions, including that: <ul style="list-style-type: none"> <li>the 'overloaded' tri-axle group would otherwise be eligible under the GML to be loaded up to but not above 20 tonnes; and</li> <li>compliance with GML for all other axles (adjusted to accommodate the heavier load on the tri-axle).</li> </ul>

<b>Mass exemption notices</b>	A mass exemption notice can be granted by the Regulator if: <ul style="list-style-type: none"> <li>it is satisfied that the use of the heavy vehicle under the exemption will not pose a risk to public safety;</li> <li>the relevant road manager where the exemption would apply, consents to the exemption; and</li> <li>it is satisfied that all other consents legally required for exemption have been obtained or given.</li> </ul> National and state mass exemption notices are published on the NHVR's website.
<b>Mass exemption permits</b>	Mass exemption permits will provide similar details as a mass exemption notice but relate to a specific heavy vehicle. For example, it will provide details including the mass requirements for the heavy vehicle, areas or routes the vehicle can use under the permit and other conditions which apply to the permit.  Contravention of conditions under a mass exemption permit may result in a maximum penalty of \$6,740 for an individual and \$33,700 for a corporation.

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- Lessons on fatigue management