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From Your Editor-in-Chief

This month, we continue to look at the review of the Heavy Vehicle National Law (**HVNL**). This issue focuses on the outcomes concerning 'safe people and practices' – a central area to the safety of heavy vehicle transport activities. This notion of safe people and practices is at the heart of the HVNL. Without it, safe vehicles, streamlined heavy vehicle access, thorough enforcement and accreditation models mean very little.

This part of the review looked at how best to ensure safe and healthy drivers. An important element of this is urging those who employ, engage or influence drivers in any way to fully appreciate the impact they have on the safety of driving practices.

The new financial year is a good opportunity to revisit your contracts and terms and conditions. Are you properly addressing HVNL compliance in your contracts and using them as a compliance assurance tool, or missing the opportunity entirely?

Finally, as we were settling this edition, the Regulation Impact Statement (**RIS**) for the HVNL was released. We've had just enough time to summarise some of the big-ticket items coming out of it and will take a closer look in the next issue.

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

Part 4: Outcomes from the HVNL review

Nathan Cecil, Partner, Holding Redlich

At first glance, the area of 'safe people and practices' seems like common sense. However, the importance of safe driving practices demands a considered and thorough approach. In this article, we continue to look at the outcomes from the seven issues papers released by the National Transport Commission (NTC) as part of its extensive review into the Heavy Vehicle National Law (HVNL).

The NTC's fifth issues paper focused on drivers, specifically, safe operating practices performed by drivers. It also looked at the impact of practices and requirements of other parties in the supply chain on driving practices and general road safety. The outcomes from the substantial consultation and feedback on this issues paper are set out below.

MANAGING SAFE PEOPLE AND PRACTICES

- There was general agreement that the HVNL should be better aligned with the model Work Health and Safety (**WHS**) laws, so that people and businesses aren't forced to adopt two different sets of safety policies and practices to meet the requirements of each.
- Many parties thought that the HVNL should impose a primary safety duty and, below this, the regulators should have the power to issue mandatory safety standards or codes of practice in relation to specific safety risks.
- There was widespread agreement that driver fitness and competency are at the heart of safe people and practices and need to be better managed under the HVNL. However, there was no consensus on how best to manage driver fitness and competency.

PRIMARY SAFETY DUTY

- Most agreed that the establishment of the primary safety duty represented an advancement in terms of how safety is addressed in the sector.
- There was a large push for the reach of the primary duty to be expanded beyond those persons that are currently parties in the Chain of Responsibility (**CoR**) under the HVNL, including drivers, providers of online freight platforms or anyone else who exercises control or influence over transport activities.

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Known and unknown risks in contractual obligations

Meshal Althobaiti, Lawyer, Holding Redlich

In every contract concerning heavy vehicles there are known areas of risk. There are also the inevitable unknowns which arise unexpectedly. In this article, we consider these knowns and unknowns in the context of the current COVID-19 crisis. We also review compliance in the supply chain to work out how to best position ourselves for a risk-averse start to the new financial year.

Former US Secretary of Defence Donald Rumsfeld's analogy of 'known unknowns' and 'unknown unknowns' recognises the different types of risk and can easily be applied to contracts in the supply chain:

> *"Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things that we know that we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know."*
>
> Former US Secretary of Defence Donald Rumsfeld – 12 February 2002

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— HELPDESK QUESTION OF THE MONTH —

Can my transport business use indemnities to cover civil liabilities and damages? (answer on page 7)

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

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NHVR unveils new plan for heavy vehicle technology

The National Heavy Vehicle Regulator (NHVR) has launched the Vehicle Safety and Environmental Technology Update Plan (SETUP), a program designed to help manufacturers and operators incorporate the latest safety technology into new and existing heavy vehicles.

The NHVR developed SETUP following a survey of manufacturers in 2018. It is designed to meet the targets set out in the federal government's National Road Safety Action Plan 2018-2020, the regulator states.

NHVR CEO Sal Petroccitto said the plan, which will be delivered over five work packages, includes better harmonisation of Australian vehicle standards, better access to the latest vehicle technologies, ensuring appropriate in-service requirements, and industry education about new and emerging technology.

"When we surveyed manufacturers, we saw that there was very little consistency when it comes to installing newer types of safety technology," Mr Petroccitto said.

"For example, stability control was included on 78 per cent of new vehicles, but fatigue monitoring systems were used on less than one in five, while lane keep assist featured on one in four new vehicles."

Assistant Minister for Road Safety and Freight Transport Scott Buchholz said SETUP will give Australia's heavy vehicle industry certainty when installing new safety technology.

"Heavy vehicle manufacturers are designing technology, both here locally and overseas, to improve safety and get drivers home safely," Mr Buchholz said.

"This technology is available and I want to clear the way to encourage the use of that technology and make sure there are no regulatory barriers when it comes to manufacturers identifying and installing new systems.

"For example, lane departure warning, autonomous emergency braking systems and pedestrian and cyclist detection systems are all available, so let's see them on more new vehicles."

Truck Industry Council CEO Tony McMullan welcomes the plan.

"By removing barriers and aligning standards such as width and mass, manufacturers will have access to more trucks, meaning more options and lower costs for operators," Mr McMullan said. ■

Continued from page 1 ***"Part 4: Outcomes from the HVNL review"***

- However, some participants cautioned that expanding the list of parties in the CoR too far could result in persons or businesses with little to no connection to on-road safety being included, which may not result in any real change to on-road safety.
- Further, many drivers likely feel that they do not need to be included as a party in the CoR, given that they are already liable for any on-road infringements under ordinary road rules.

DRIVER SKILLS

- Many participants, including the National Heavy Vehicle Regulator (**NHVR**), were in favour of implementing a nationally consistent competency-based heavy vehicle licensing system.
- However, some participants, including certain government bodies, did not agree that mandatory 'safety skills'-type training as part of heavy vehicle licensing was required and that competency training requirements could be imposed as part of the responsibilities on transport operators etc.
- Many participants felt that all drivers should be required to undergo mandatory fatigue-management training.

HEALTH AND FITNESS

- The NHVR noted that, unlike WHS, where there is a shared safety duty between employers and employees, under the HVNL, there is no shared duty on drivers (who are not a party to the CoR under the HVNL) to share health and fitness information with their employers.
- There was broad agreement that current 'fit to drive' guidance was subject to many deficiencies and could benefit by incorporating more recent driver health data in order to be more effective in helping assessment of driver fitness to drive.
- There was no agreement on whether existing health and fitness to drive controls were sufficient.
- Likewise, there was no agreement on whether drivers should be required to undergo regular medical fitness to drive tests.

DRIVER LICENSING

- The NHVR and many industry participants were in favour of implementing a nationally consistent heavy vehicle driver licensing system, with an increased focus on driver competency, including non-driving skills, such as fatigue management.
- However, many government stakeholders did not agree and considered that heavy vehicle licensing was fit for purpose.

DRUGS AND ALCOHOL

- Both industry and government stakeholders were united in agreeing that there should be a zero-tolerance approach to alcohol and drugs in the heavy vehicle sector.
- But, there was a divergence of opinions on whether explicit requirements for drug and alcohol testing and offences under the HVNL needed to be added, or whether existing laws were sufficient.

SAFE ON-ROAD PRACTICES

- Stakeholders were broadly united in identifying heavy vehicle driver distraction as an emerging safety risk. Stakeholders considered that this issue should be investigated further to identify and provide guidance on specific practices that adversely impact on driver distraction.
- Most stakeholders agreed that driver speeding was sufficiently managed by local law enforcement.
- There was broad agreement that the primary safety duty was effective to capture obligations on CoR parties to manage speed and driver distraction, but that better enforcement in relation to these two areas was required.

SAFETY MANAGEMENT SYSTEMS

- There was general agreement that the HVNL should be modified to permit the Regulator to issue industry codes of practice, similar to under the model WHS laws.
- Stakeholders were torn as to whether formal safety management systems were more effective than existing risk-management practices and should be recognised under the HVNL.

SAFETY CULTURE

- There was general agreement that the complexity and focus of the HVNL on administrative offences (e.g. record-keeping) and the imposition of sometimes significant penalties for conduct that is not shown to have a serious impact on safety results in a culture focused on avoiding penalties, rather than on improving safety.
- There was discussion that 'culture' is probably something that is impossible to legislate.
- The NHVR suggested that culture outcomes could however be affected by the structure of the HVNL. For example, if the safety standards were clear and there were rewards for safe behaviour and risks for unsafe behaviour, this would provide a clear risk/reward structure that might encourage more parties in the CoR to adopt a safety culture with respect to their transport activities.

The above points demonstrate the key issues at stake with regards to safe people and practices. The NTC has now considered the above positions further and set out its preferred approach in the Regulatory Impact Statement (**RIS**) discussed in this issue. You will have a further opportunity to comment on the RIS. 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.

The importance of identifying and reporting breaches

Nathan Cecil, Partner, Holding Redlich

There is no doubt that this is a time of significant change – both globally and locally in our workplaces and communities. In the road transport industry, the Heavy Vehicle National Law (HVNL) has been reviewed so that it can evolve to better serve parties in the supply chain. Amidst this change and uncertainty, the likelihood of HVNL breaches remains ever-present. In this article, we look at the significance of identifying and reporting breaches and the role this plays in executive due diligence.

Under the HVNL, an integral business practice is the executive's positive and proactive duty to ensure their business complies with its Chain of Responsibility (**CoR**) obligations. Executive due diligence arises under s 26D of the HVNL. An important way that other parties can assist with this is through thorough and timely reporting of any breaches that have occurred or are likely to occur. Everyone has a part to play in compliance with safety obligations.

A CLOSER LOOK: EXECUTIVE DUE DILIGENCE

There are specific requirements that need to be met in order for executives to meet their positive and proactive duty. This involves taking reasonable steps to:

- obtain and keep up-to-date knowledge about how the business is ensuring its transport activities are safe;
- understand how and in what capacities the business engages in transport activities;
- understand the hazards and risks, including risks to the public associated with the business's engagement in transport activities;
- ensure the business has and uses appropriate resources to:
  - eliminate or minimise those hazards and risks;
  - receive and consider information about risk;
  - respond to information about those hazards and risks;
  - comply with the business's duty to ensure so far as is reasonably practicable, the safety of its transport activities and ensure it does not cause or encourage contravention of the HVNL; and
- check that the resources and processes referred to above are in fact being provided, effectively used and implemented by the business, its management and staff.

> IMPORTANT

For executives to be able to discharge their duty, they will largely depend on receiving information from others within the business.

BREACHES AND NEAR-MISSES

For each CoR compliance component, the most meaningful report is the number and severity of breaches that have occurred. Breaches slipping through the cracks are the things that most need to be addressed.

CAUTION: A common thread in CoR prosecutions is that either there were no systems or checks in place, or that information was being collected, but not properly analysed and acted upon.

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

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

REPORTING THE 'RIGHT' INFORMATION

Executives need the right information and only the right information. This is where other parties in the Chain have an important role to play. However, anecdotal evidence suggests that where there is any doubt about relevance, information is included and submitted to the executive. Although being thorough is important, you must also be discerning. If you gather and submit pages and pages of figures and tables, executives typically cannot properly assess all of it in context in a reasonable time frame.

> IMPORTANT

Avoid information overloading where possible. It is just as bad to receive no information as it is to receive information that you cannot understand or act on.

CoR is directed at safety, not business performance, and CoR compliance reporting must reflect this.

The majority of executive reporting tends to comprise of financial reporting measures. These are unlikely to give any insight into CoR compliance and performance on a day-to-day basis. At best, financial information might reveal the totality of fines or penalties imposed after the event. CoR compliance reporting should primarily be directed to occurrences and incidents, not dollars. CoR compliance reporting limited to information on breaches and remedial action only goes halfway to discharging this duty. Ideally, CoR compliance reporting should also be used to forecast non-compliance trends, so that compliance measures or further information, supervision and training can be put in place to prevent future breaches.

CoR is directed at safety, not business performance, and CoR compliance reporting must reflect this

COMMON MISTAKES

Executive reporting statistics are not merely points of interest but are for assessment and action. Depending on what the figures demonstrate, the executive will be called on to do something or ensure something is done to address the figures. A common mistake is treating compliance performance figures as 'for noting' rather than for analysis and action.

Where the performance figures indicate a problem, executives must either develop and implement a response plan, or ensure that their compliance team is doing so.

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

While the onus is on executives to supervise and implement systems to support their business's transport activities, all parties have a role to play in recognising and reporting breaches so that the positive and proactive duty is ultimately met. ■

➤ *Continued from page 1* ***"Known and unknown risks in contractual obligations"***

CONTRACTUAL AGREEMENTS AND COVID-19

Your business deals with unknown facts and circumstances in contracts regularly. These are the 'known unknowns' – the known areas of risk where the precise nature of the risk is unknown but the possibility has been addressed by implementing a contractual process for managing the response and allocating the risk to a party. However, the 'unknown unknowns' may not be part of the response in your contracts. Nonetheless, they are increasingly becoming part of the new business environment as organisations continue to cope with the unprecedented changes brought on by the COVID-19 crisis.

Businesses around the world are dealing with closures of borders, workers in quarantine and many sites face a real risk of lockdown. Concerns over Victoria's COVID-19 spike has prompted the state government to reintroduce Stage 3 restrictions as lockdown conditions are implemented for a second time. This new economic environment is reshaping the supply chain landscape and may cause a contractual shift in obligations for consumers and suppliers.

REVIEWING COMPLIANCE

Nevertheless, as we enter the new financial year, the business community is looking forward to returning to business. It is a good time for us to take stock of where we stand with compliance and make sure we position ourselves for a risk-averse start to this new financial year. It is common to relax compliance structures over time, as familiarity sets in or, in the case of the global pandemic, as our focus shifts from lockdown to recovery. In order to address this, we encourage conducting a quick health check of Chain of Responsibility (**CoR**) compliance to make sure that you are on track despite the obstacles or unknowns in this new financial year.

Reviewing contracts is a good place to start. It is common for businesses to forget about their written agreements with other organisations and not review them until there is a dispute. With any luck your business will never have to commence legal action based on your contracts. However, recently we have seen a rise in contractual claims and notifications for COVID-19 related events under contracts around Australia. These claims have namely been for notifications of events such as force majeure or change in law.

TIP: A force majeure clause allows a party to a contract to either suspend or cease contractual performance following the occurrence of a predefined event

It is important to put a monitoring plan in place that ensures that your business meets its obligations. For example, the Victorian Government introduced laws including penalties for failure to provide an owner driver with the *Victorian Owner Drivers' Information Booklet*. This intends to help owner drivers to understand their cost structures and contracts before they agree to provide their service. Remember, your business needs to understand any potential obligations that could arise when dealing with business in other jurisdictions.

Under the Heavy Vehicle National Law (**HVNL**), executives have a proactive and positive duty to exercise due diligence to ensure their business complies with all its CoR obligations. One important aspect of CoR compliance is the processes in place for contract management with e.g. your suppliers, contractors and customers. Essentially, you are required to ensure that your arrangements with those parties include appropriate clauses requiring and ensuring CoR compliance by those parties.

DON'T GET CAUGHT OUT BY TRANSPORT ACTIVITIES

CoR compliance is an essential corporate governance and risk item. Every business in which supply chains play a major part should ensure that it is up to speed. CoR underpins the HVNL because it assigns legal obligations to any person who is involved in the Chain. The 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.

Transport activities include business practices or decisions that are made in relation to the use of a heavy vehicle on the road. Therefore if a company hires or uses a heavy vehicle or engages a logistics provider that uses a heavy vehicle to deliver goods or supplies, that provider will have a duty to ensure that those activities are carried out safely.

This obligation will equally apply to a project owner supplying the principal materials under a contract. Sometimes the extent of the required service is unknown at the time of the formation of the contract with a contractor. Therefore, it is important to exercise a degree of due diligence when engaging a contractor. For example, you should obtain some assurance that they are aware of and complying with their CoR duties.

UNFAIR CONTRACT TERMS

Additionally, it is vital for transport operators to consider any potential implications under insurance and consumer law matters. For instance, businesses should determine whether their terms may fall foul of the unfair contract provisions of the Australian Consumer Law (**ACL**). Under the ACL, terms found to be unfair by a court will void a contract.

The Australian Small Business and Family Enterprise Ombudsman has described an unfair term in standard form contracts as:

> *"... one that has been prepared by one party and where the other party has little or no opportunity to negotiate the terms. An unfair term is one that causes a significant imbalance in the parties' rights and obligations and causes detriment to a small business if it were applied or relied upon."*

The unfair contract provisions apply to some 'business to business' contracts where at least one of the parties is a small business (20 or fewer employees), and where the upfront contract value is less than $300,000, or less than $1 million for contracts greater than 12 months.

In 2016, the Australian Trucking Association reported that almost 98 per cent of trucking businesses have fewer than 20 employees. Thus, these protections for small businesses have the potential to be extremely important for the trucking and transport industry.

Transport operators who rely on standard form contracts should review their customer database to ascertain the extent to which their services are provided to small businesses and consider whether their insurance arrangements are adequate.

You should also analyse any terms and conditions of carriage to identify whether any clauses may be considered unfair and whether they may be expressed in clear and unambiguous language. Businesses will need to see if their clauses exclude or limit liability for claims associated with loss of or damage to goods. For example, limitation on liability clauses may contravene the small business unfair contract terms and such clauses can in fact be viewed as exclusion clauses that have the potential to cause a significant imbalance in the parties' rights and obligations under the contract.

➤ *Continued on page 5*

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Things to remember when drafting contracts

1. You should include appropriate CoR compliance clauses in all heavy vehicle supply chain contracts, e.g. with your suppliers, subcontractors and customers. A failure to do so is often heavily criticised by investigating regulators and courts.
2. You cannot rely on indemnity clauses that purport to require one party to indemnify the other if the other is found to be in breach of CoR obligations.
3. Onerously one-sided contracts, which purport to place all CoR obligations on one party without recognising that both parties have obligations, and expressly allocating those obligations, could however be an issue and may also raise issues under the provisions for unfair contract terms.

MANAGING RISK

As noted in previous issues, the lesson here is not about the invisible breaches and whether your business has to address everything to respond to the changes that have resulted from, for example, the COVID-19 pandemic. It is about the importance of implementing measures that allow you to look for the 'known unknowns' and also the 'unknown unknowns'.

Therefore, it is apt to appreciate that the principles that apply to the interpretation of commercial contracts are very relevant to contracts in the transport industry. It is worthwhile for contracting parties to adopt a disciplined approach and not overlook the importance of other implications from insurance and consumer law obligations when preparing commercial contracts for the provision of road transport services.

Transport contracts are all about defining the parties' obligations and liabilities and making clear who does what and who is liable for what. Once your contract makes that clear the parties can then manage the relationship appropriately and make the 'known unknowns' more visible and the 'unknown unknowns' easier to detect or anticipate.

Step-by-Step: How to recognise unfair contract terms

Meshal Althobaiti, Lawyer, Holding Redlich

A business must take measures to ensure that it remains compliant with its contractual obligations and responsibilities. One way to stay on top of this is to consider the warning signs of when a contract term may fall foul of the unfair contract provisions of the Australian Consumer Law.

This is demonstrated by the Federal Court decision in proceedings brought by the Australian Competition and Consumer Commission against waste management service provider, JJ Richards & Sons Pty Ltd (JJ Richards) for declaratory and injunctive relief on the basis that 26,000 of its contracts with small businesses had unfair terms. The Federal Court declared, by consent, that eight terms in the standard form contract used by JJ Richards & Sons Pty Ltd (JJ Richards) to engage small businesses were unfair, and therefore void, following ACCC action.

The broad effect of proceedings, aside from significant obligations imposed on JJ Richards to 'make right' its 'wrongs', was to send a strong message to those involved in the waste management and transport sector to be wary about the fairness of their contract terms with small businesses. The Court's approach to determine whether the eight terms of a standard form contract were unfair provides a useful example of how terms can be analysed.

STEP-BY-STEP: HOW TO RECOGNISE UNFAIR CONTRACT TERMS — DOWNLOAD

The table below summarises the Federal Court's approach in the JJ Richards decision and can be used when reviewing your business's standard form contracts to make sure they do not include any unfair terms:

Automatic renewal of the contract	▪ It bound customers to subsequent contracts, unless the supplier cancelled the contract within 30 days before the end of the contract term. ▪ It created a situation where small businesses could inadvertently miss the window for termination or, if the supplier terminated, they had little opportunity to find an alternative waste services supplier.
Price variation	▪ It permitted the supplier to unilaterally increase prices for any reason and without the consent of the customer or a corresponding right for the customer to terminate.
Agreed times	▪ It removed the supplier's liability where performance was prevented or hindered in any way even where the customer was not responsible and the supplier was better placed to manage or mitigate the risk.
No credit without notification	▪ It allowed the supplier to charge for services it had not provided and for reasons that were beyond the customer's control.
Exclusivity	▪ It restricted customers from contracting with other parties for additional waste management services.
Credit terms	▪ It allowed for the suspension of services, but also continued to charge customers if payment was not made after 7 days.
Indemnity	▪ It created an unlimited indemnity in the supplier's favour and even where the loss was not the customer's fault or could have been avoided or mitigated by the supplier. ▪ The customer was not given a corresponding right.
Termination	▪ It prevented customers from terminating their contracts if they had payments outstanding. ▪ It entitled the supplier to continue charging customers after the termination of the contract despite no services being provided.

A guide to internal reviews of HVNL decisions

Rebecca Niumeitolu, Lawyer, Holding Redlich

If you are unhappy with certain decisions under the Heavy Vehicle National Law (HVNL) there is a scheme by which you can seek to have the decision set aside or substituted under Part 11.2 and 11.3 of the HVNL. This article provides a general guide for the internal reviews process.

1. Is a decision that has been imposed on me one that can be internally reviewed?

Not all decisions under the HVNL are 'reviewable decisions' that you can ask the National Heavy Vehicle Regulator (**NHVR**) to review.

To find out if the decision before you is one that can be internally reviewed, you can look at Schedule 3 of the HVNL. It lists all the decisions for which you can seek internal review. For example, Table 1 (below) includes the following 'reviewable decisions'.

TABLE 1: REVIEWABLE DECISIONS	
Decision by the NHVR	
Section 22	Decision not to grant a PBS design approval
Section 273	Decision not to grant a work and rest hours exemption (permit)
Section 473	Decision to amend, suspend or cancel a heavy vehicle accreditation
Decisions of authorised officers who are not police officers	
Section 572	Decision to give a person an improvement notice
Section 576A	Decision to give a person a prohibition notice
Decisions of relevant road managers for a mass or dimension authority that is a public authority	
Section 160	Decision to consent to the grant of the authority subject to a condition that a road condition be imposed on the authority

2. Are you someone that can apply for internal review?

To apply for internal review you must be a 'dissatisfied person'.

A dissatisfied person is:

- the person that applies for an exemption, authorisation, approval or heavy vehicle accreditation or an amendment of one to the Regulator and is subject to the NHVR's decision in relation to that application;
- the person that has an exemption, authorisation, approval or heavy vehicle accreditation that is amended, cancelled or suspended by the NHVR;
- person that has an exemption, authorisation, approval or heavy vehicle accreditation that the Regulator determines not to give a replacement permit for;
- the owner of a thing or sample that the NHVR imposes a forfeiture decision on;
- the person subject to an improvement notice or prohibition notice by an authorised officer;
- a person adversely affected by a decision of a relevant road manager for a mass or dimension authority;
- a person who is otherwise a dissatisfied person within the national regulations that is subject to a reviewable decision.

3. Are you within time to apply for a review of the reviewable decision?

The general rule is that you must apply for internal review within 28 days after:

- you have been notified of the original decision; or
- the day you receive the statement of reasons to the extent that the original decision was required to have them.

If the 28-day period has expired then you can apply to the NHVR for an extension of time. You can include in your extension of time application reasons for your delay. For example, if the delay was a result of factors beyond your control then that would weigh in favour of an extension of time.

4. Check that you have a statement of reasons

Some reviewable decisions require the decision maker to provide reasons for the original decision.

Requesting and obtaining a statement of reasons can be helpful to prepare the grounds for your internal review application, as it offers insight into factors and materials the decision maker considered when making the original decision.

5. Preparing your application to the Regulator

A review application must be:

- **In writing and set out the grounds for the review**

  The NHVR's website has forms that you can complete for your review application. If you want to attach supporting documents you can attach them to these forms.

  When setting out grounds for the review it can be helpful to:

  a. Identify what your ideal result would be. The reviewer has the power to confirm, amend or substitute the original decision. Set out what you want the outcome of the review process to be and proceed with setting out reasons why the reviewer should make a decision in your favour. It can also be persuasive to include any documents that support your position, including documents that you are aware were before the original decision maker.

  b. Attach the original decision for which you are seeking internal review.

- **Accompanied by the prescribed fee for an internal review application**

You can call the NHVR to clarify what fees apply to the internal review application.

6. Lodging the application

The NHVR website and forms identify options for lodgement of an internal review application. Often original decisions will include details of where to lodge internal review applications. For example it may include details of local regulators which have delegated power to conduct internal reviews, such as Transport for NSW or Queensland Department of Transport and Main Roads.

7. The review decision

The reviewer must give you notice of the review decision within the period prescribed by the NHVR (usually 28 days from the date of your application). If the reviewer does not give its decision within that period, the original decision is taken to be confirmed. The review decision must include reasons for the decision and details for appeal. ■

Regulation Impact Statement: The wait is over

Nathan Cecil, Partner, Holding Redlich

The consultation Regulation Impact Statement (RIS) has finally been issued following the review of the Heavy Vehicle National Law (HVNL). It sets out the views of the National Transport Commission (NTC) following extensive consultation as to what shape the revised HVNL should take.

The main areas for improvement are as follows:

1. Improving vehicle access

Negotiating access along a full route can be a nightmare. The RIS proposes that access is eased by increasing the general mass and dimension limits for 'as-of-right' access.

2. A more efficient PBS scheme

A more efficient, streamlined Performance-Based Standards (PBS) scheme. Getting a vehicle approved under the PBS scheme is expensive, time-consuming and uncertain.

The RIS proposes to give the NHVR authority to approve any application; linking PBS approval with access, so both can be processed together; allowing manufacturers to self-certify compliance with existing PBS-approved designs, all to streamline the process.

3. Using technology to aid compliance

There is no framework for certifying or approving specific technology solutions for compliance purposes. The RIS proposes establishing a compliance technology certifier to approve technology which meets acceptable standards, so you know that what you are using will be accepted.

4. Improving the regulation of fatigue

Managing work/rest hours is complex. The RIS proposes simplifying the calculation of work/rest hours and related record-keeping requirements. In addition, the RIS proposes additional ways to manage fatigue, such as driver health and fitness assessments.

5. Creating a more effective assurance regime

The HVNL does not formally recognise industry-run accreditation schemes, despite recognising that the recognised schemes don't have the same broad scope and compliance focus of schemes like TruckSafe. The RIS proposes a framework to recognise and reward members of reliable accreditation schemes.

You can have your say on the matters put forward in the RIS, before the proposed new laws are drafted up and sent to ministers for approval.

See https://www.ntc.gov.au/sites/default/files/assets/files/HVNLR-consultation-RIS.pdf for further information. ■

HELPDESK

Each month we publish some of our top questions from the *CoR Adviser Helpdesk*. To ask your question today, email: helpdesk@coradviser.com.au.

Please note: All identifying details are removed for reasons of confidentiality.

Whether your concerns are about recent legislative changes, difficulty ensuring compliance of others in the supply chain, or the steps you need to take to protect yourself, our team of lawyers is ready to answer your questions.

Relationships with consignors and consignees

Q **Do you have any guidance for how small/medium-sized consignors and consignees can best approach their Chain of Responsibility (CoR) interactions with large transport companies?**

A If the consignor's/consignee's relationship is with the customer/supplier who engages transport, then CoR compliance needs to be addressed contractually at this point, e.g. within the sale/supply agreement. The consignor/consignee then needs to implement a system of checks and balances on CoR compliance of the drivers, vehicles and loads and address any issues of non-compliance with the customer/supplier.

The consignor/consignee may have little direct control or influence over the transport operator. For example, apart from refusing to load/unload if the situation is deemed to be unsafe, the route of recourse will be with the customer/supplier. Likewise, it is the customer/supplier who should be required to report any instances of non-conformance in transport.

Do I follow WHS or HVNL?

Q **I am in the transport and trucking industry and have duties under Work Health and Safety (WHS) laws and the Heavy Vehicle National Law (HVNL). Which do I follow?**

A As a general rule, if a provision of the HVNL and a provision of WHS Law deals with the same subject matter and it is possible to follow both, you should comply with both sets of laws.

It is all about safety and the HVNL recognises its relationship with the WHS laws. In fact, your HVNL obligations are closely aligned with the obligations defined by the primary WHS law.

However, where there is an inconsistency and it is not possible to comply with both sets of law, the HVNL provides (s 18) that the individual is to comply with the provision of the primary WHS law.

We recommend that you consider how your organisation can develop and implement a single safety management system that will allow you to meet your obligations under both the WHS law and the HVNL.

Insurance and indemnities

Q **Can my transport business use indemnities to cover civil liabilities and damages?**

A A business can use indemnities to cover civil liabilities and damages, but indemnities are unlikely to cover compensation for penalties under the HVNL. Businesses can use indemnity clauses to avoid the risk of third-party liability in respect of transport activities, including conduct that overlaps with complying with HVNL duties. However, indemnity clauses cannot replace a business's compliance with HVNL obligations. That is, an indemnity clause won't save a business or its Executives from a sentence of imprisonment, nor will it cure the woes of paying out penalties under the HVNL. Understanding this limitation of indemnity clauses should inform your CoR compliance practices.

For parties facing claims relying on indemnity clauses to pay out HVNL penalties, consider your option to avoid payment by relying on s 742 of the HVNL. ■

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LEGAL UPDATE: REBECCA NIUMEITOLU LAWYER, HOLDING REDLICH

The scales of justice at play

From the outside we might only see fines, demerit points, compensation orders or time served. A closer look at a court's exercise of the sentencing discretion for contraventions of the Heavy Vehicle National Law (HVNL) reveals a complex interplay of social and institutional objectives that are weighed in the balance when sentencing an offender. In this article, we take a look at the case study of Shane Mounce's conviction.

This aforementioned balance of factors involved in sentencing includes:

- principles that we as community strive to achieve through the sentencing process;
- the objective seriousness of offending behaviour; and
- the subjective circumstances of the offender.

Shane Mounce's sentencing and the recent appeal by the National Heavy Vehicle Regulator (**NHVR**) bares out these considerations.

SHANE'S CONVICTION FOR OFFENCES UNDER THE HVNL

Shane was a driver for an Adelaide-based trucking company. On 19 March 2017, he was involved in a collision with another vehicle on the Augusta Highway. The occupants of the other vehicle were two elderly passengers who suffered injuries and were airlifted to hospital. When Shane was speaking to police at the scene, he indicated that *"all he wanted to do was lie down and go to sleep"* (*NHVR v Mounce* [2020] SASC 91 at [6]).

Following the collision, the police investigated Shane and his employer. Those investigations eventually resulted in Shane being charged with fatigue-related offences under the HVNL between 1 February 2017 and 19 March 2017, to which he pleaded guilty. These offences were:

- three counts of recording false or misleading entries in his work record contrary to s 325 of the HVNL, to which a maximum penalty for one count was a fine of $11,120;
- six counts of contravening Basic Fatigue Management (**BFM**) work and rest hour requirements under s 254(1) of the HVNL, which contraventions were categorised as critical risk breaches with maximum penalties of $16,830 per count;
- one count of driving a fatigue-regulated heavy vehicle while impaired by fatigue contrary to s 228(1) of the HVNL, to which a maximum penalty of $6,740 applied.

For his contraventions, the local court made the following orders:

- Shane was fined $1,050 (which was a fine reduced from $1,500 that would have otherwise been imposed on him but for his guilty plea);
- Shane was ordered to pay prosecutions costs at $150;
- Shane was also ordered to pay a Victims of Crime Levy in the sum of $1,600.

Shane also lost 24 demerit points which meant he lost his driver's licence for 5 months.

Although Shane's conduct marked a serious departure from his obligations, the local court found his offending conduct appeared to have been the result of a combination of *"ignorance, carelessness, confusion, inadequate supervision, literacy difficulties and not addressing his obligations as a truck driver."* Moreover, Shane's employer was *"inappropriately and illegally lax"* with respect to its obligations and failure to supervise Shane or give him adequate information or training about log books where he struggled with literacy and comprehension (*NHVR v Mounce* at [21] and [22]).

NHVR'S APPEAL

The NHVR appealed against Shane's sentence on the basis that it was manifestly inadequate. The focus of the NHVR's appeal was primarily on the objective seriousness of Shane's offending and how it was not reflected in his fines.

Its submissions included that:

- There are significant maximum penalties available for the fatigue-related offences committed by Shane which indicate that such offending should be taken seriously and reflected in a higher sentence.
- Shane's offending included critical breaches of his BFM work and rest hours option, which was also not reflected by his sentence. For example, at the time of the collision on the Augusta Highway, Shane had been driving for at least 17 hours in the previous 24 hours. On another occasion he had been driving for 20 hours in a 24-hour period. By reference to other cases where drivers have been charged for similar offending, the proper starting point for assessing the appropriate sentence should have been about 20 to 25 per cent of the applicable maximum fine, being $28,216 to $35,270 of a total maximum fine of $141,080.

WHAT WEIGHED IN THE BALANCE

On 27 May 2020, the Supreme Court determined the NHVR's appeal. It found that while the sentence was manifestly inadequate, it would not intervene to increase the sentence.

Section 120 of the *Sentencing Act 2017* (SA) relevantly provides that a court must not make an order requiring a defendant to pay a pecuniary sum (such as a fine) if it is satisfied that the defendant would be unable to comply with the order, or if compliance with the order would unduly prejudice the welfare of the defendant's dependants.

Shane had compelling personal or subjective circumstances in this case that met criteria under s 120 that justified the Supreme Court's decision not to increase the sentence. Shane's personal circumstances included that he had six dependent children, he was unemployed and relied on Centrelink benefits, he lost his licence and so was unable to earn income as a driver or to travel to other forms of employment, he had severe stenosis and had upcoming surgery for it, and Shane was already unable to pay the original penalty and had attempted to arrange for payments of the fine by way of instalments.

AN EXCEPTIONAL CASE

The findings by the Supreme Court and its emphasis on Shane's subjective circumstances, notwithstanding findings that the sentence was too little, brings to light the multifaceted social considerations which arise when courts impose sentences for contraventions under the HVNL.

However, this case might produce mixed feelings for the industry. On the one hand, the case suggests that if you are convicted of an offence under the HVNL you can work to materially decrease your possible sentence if you have favourable personal circumstances that may suggest a lower sentence is warranted than the 'typical' sentence that would be given for similar offences.

On the other hand, the Supreme Court found Shane's sentence was manifestly inadequate. Accordingly, it's unlikely that persons charged with fatigue-related contraventions of the HVNL are likely to see sentences as low as Shane's fines if they are convicted. His case appears to be exceptional. ■

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- **A proposal for HVNL 2.0**
- **Heavy vehicle technology uptake plan**