



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

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## From Your Editor-in-Chief



As the final quarter of this year gets under way, road transport operators and their customers are still scrambling to come to grips with the ever-changing COVID-19 conditions. As landside logistics continue to be impacted, finding the time and head space to focus on safety and regulatory compliance can be a challenge.

This only serves to remind us of the importance of safe business practices. Safety should not be something that 'has to be done', but rather something that inherently forms part of the way we do things. By now, safety and compliance should be ingrained in the way that road transport and logistics tasks are undertaken along the supply chain. Unfortunately, this is not always the case and we continue to see incidents and prosecutions as a result.

When focusing on concerns over COVID-19 and personal safety, we should remember that we operate in one of the most dangerous sectors on a daily basis. During and after this crisis, we should bring the same level of safety focus to our transport activities as we are all pouring into our personal safety right now.

The current circumstances provide an opportunity for the domestic logistics sector to prove its worth. We don't want to drop the ball while everyone is watching!

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

## What will the HVNL 2.0 look like?

Nathan Cecil, Partner, Holding Redlich

After months of consultation, we are all eager to see what shape the new Heavy Vehicle National Law (HVNL) will take. In the last issue, we had a cursory look at the Regulation Impact Statement (RIS) released following the review of the HVNL. The RIS contains a number of options from the outcomes and offers a glimpse into how the revised HVNL might look.

To help people work through some of those options, the National Transport Commission (NTC) has released 'HVNL 2.0 – A better law scenario' (HVNL 2.0). HVNL 2.0 is intended to be an illustration of what the revised HVNL might resemble. While it is merely an illustration and not reflective of any preferred outcome, it no doubt provides some insight into issues that the NTC considers important for the future of the HVNL. So, what do they include? It is expected that the HVNL will address the points below.

- The purpose of the HVNL is to support a safe and efficient heavy vehicle journey,

which includes a safe driver, safe and efficient vehicle and suitable route.

- The HVNL should provide for multiple levels of assurance. At a base level, everyone has to meet the law. Beyond that, some parties in the Chain may call for more solid safety measures. This is generally because it is simply their preference or their customers require them to implement 'better than base level' safety practices. These practices may include accreditation schemes, implementing a regulator-approved driving schedule or fatigue management options, implementing full-scale safety management systems, undergoing audits to establish that appropriate compliance practices are in place and so on. The revised HVNL should provide mechanisms for the full range of safety assurance practices, so that businesses can slot themselves in wherever they wish on the continuum of assurance.

➤ Continued on page 2

## Managing rollover risk for shipping containers

Meshal Althobaiti, Lawyer, Holding Redlich

Container freight has a significant role to play in global transport supply chains. However, the process of transporting containers from ship to shore has its hazards. In this article, we examine the rollover risks associated with shipping containers transported on the road and provide tips as to how to manage such risks.

Shipping containers were first introduced in 1956, aboard a refitted World War II oil tanker that carried 58 containers from New Jersey to Texas. This began a shipping revolution that transformed the commercial world and globalisation of the freight supply chain.

Here in Australia, the Victorian International Container Terminal is considered as one

of the world's most advanced container terminals and has an annual capacity of one million 20-foot equivalent containers. Evidently, containers are a key feature in the industry and they inevitably come with various safety obligations.

### SHARED RISK AND RESPONSIBILITY

Let's get back to basics. The Chain of Responsibility (CoR) requires that any goods loaded on a heavy vehicle are properly restrained. For any goods not properly restrained, any person concerned with the packing, loading, securing or carriage of the goods can expect to be held liable under the Heavy Vehicle National Law (HVNL).

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## — HELPDESK QUESTION OF THE MONTH —

### What is a 'formal warning' and why are they issued? (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)

## Victoria urged to keep supply chain businesses open

Following Melbourne's stage four lockdown, Heavy Vehicle Industry Australia (HVIA) has urged the Victorian Government not to mirror the decisions made by the New Zealand Government when it imposed its lockdown restrictions.

"We have asked the premier to exempt freight and the heavy vehicle supply chain, including, manufacturers, component suppliers and businesses involved in the design, service, repair, maintenance and engineering support for heavy vehicles," HVIA Chief Executive Todd Hacking said.

"However, the media speculation has been enough to make HVIA members nervous, particularly given how disastrous the NZ Government's decision proved to be in the first instance for the heavy vehicle industry.

"While the New Zealand Government exempted freight and heavy vehicle repair and maintenance providers, other critical parts of the supply chain were forced to close — such as manufacturers and component suppliers.

"This was initially due to the urgency of the shutdown but the NZ Government had to repeatedly make changes as the unintended consequences became apparent.

"Just about all heavy vehicle manufacturers and suppliers provide ongoing product support and technical guidance once the part or component is operational or the vehicle is on the road.

"If these businesses were shutdown, the flow on effect would quickly have significant national consequences as Victoria has the highest concentration of heavy vehicle businesses in the country.

"Without these businesses open and trading, the heavy vehicle fleet will likely be compromised and the freight supply chain across the country will suffer significant delays, which will fuel panic and anxiety within the community."

Mr Hacking noted that HVIA members had responded proactively to the COVID-19 threat, taking precautions to ensure the safety of their personnel.

"The Kenworth factory closed for four weeks whilst changes were made to the assembly line to ensure the one person per four square metres rule could be adhered to," he said.

"Other measures taken by HVIA members in Victoria include daily temperature checking, lunch-room closures, split shifts, investments in technology, increased cleaning and sanitation, working from home arrangements, and operational COVIDSafe plans to ensure staff and customers remain safe." ■

► Continued from page 1 "What will the HVNL 2.0 look like?"

- The primary duty might be extended beyond the current 'named parties' in the supply chain and apply to any person with an influence on heavy vehicle safety. It is suggested that providing this flexibility could help ensure that the law is able to accommodate emerging business models. This suggestion could be in response to the common criticism that businesses like online freight broker platforms are not named parties in the CoR. However, this is a discussion for another day. Whilst the underlying rationale for this change is reasonable, extending the primary safety duty to an unspecified class of persons who do not conduct but merely 'influence' transport activities will also likely lead to significant uncertainty – at least until the extent of this change is clarified through enforcement and prosecution action.
- Clarification that the primary safety duty extends to include ensuring driver competency and fitness for duty. Whilst the National Heavy Vehicle Regulator's view is that these matters are included in the current primary safety duty (see 'How to ensure fitness to drive' from the July issue) they aren't expressly included in the HVNL.
- The HVNL should try and address the proliferation of private audits of transport operators and others in the Chain.

The suggestion is that the HVNL could be amended to state that a party in the Chain (e.g. customer) can rely on an accredited audit of a transport provider to meet its primary duty in relation to the engagement of that transport provider, thereby removing the 'need' for the customer (and every other customer of the transport operator) to audit the transport operator to within an inch of their life. The hope is that transport operators could actually spend time delivering freight, rather than completing audit forms.

- The HVNL should recognise other robust accreditation schemes (such as TruckSafe) and provide their members with the same rights to adopt alternative regulatory compliance options e.g. more flexible fatigue management options. Further to that, for any audit mechanism under the HVNL, the law should recognise audits under those 'approved' accreditation schemes. This would help avoid the 'need' for parties in the Chain to be enrolled in multiple accreditation schemes and undergo duplicate auditing processes.

From our view, anything that can be done to level the playing field for robust accreditation schemes and remove any need for multiple duplicative audits would be highly welcomed by the sector. ■

## Increasing the uptake of heavy vehicle safety technology

Nathan Cecil, Partner, Holding Redlich

**The National Heavy Vehicle Regulator (NHVR) considers that the increased uptake of safety and environmental technology is a positive step in using innovation and technology to overcome operating conditions in Australia.**

The NHVR has just released the *Vehicle Safety and Environmental Technology Uptake Plan (Technology Uptake Plan)* to encourage industry to do so.

The Technology Uptake Plan identifies that new heavy vehicle technologies can improve safety, environmental and productivity outcomes. However, despite the availability of such technologies increasing, their adoption into the national heavy vehicle fleet remains low. The NHVR has committed to a three-pronged plan to increase the uptake of these beneficial technologies, involving removing regulatory barriers to their uptake, offering productivity incentives and providing education to operators on the benefits of such new technologies.

As part of this, the NHVR has mapped out a national work plan that involves:

- Advocating for the national harmonisation of Australian vehicle standards, in particular

mass and dimension limits, to be able to accommodate the fitting of such new technologies.

- Relaxing access and use limits for vehicles fitted with new technologies – including providing for mass concessions to accommodate the increased tare mass arising from fitting such technologies.
- Reviewing exemption notice conditions including requirements for additional safety technology as a condition of granting exemptions, to ensure overall safe outcomes are maintained.
- Empowering industry to make informed decisions on technology implementation. This includes publishing information on the operation, use and benefits of new technologies and, potentially, encouraging local and state government agencies to mandate the implementation of such technologies in their fleets and fleets used to service their infrastructure projects.

The last point is of particular interest to operators who service or wish to service the ongoing infrastructure projects that are being encouraged as a way to help the nation overcome the economic slump imposed by COVID-19. ■

# The case for technology in speed management compliance

*Nathan Cecil, Partner, Holding Redlich*

Speed management compliance is made complex by numerous factors – time constraints, weather conditions, external pressure, traffic delays. For something so easy to slip up on, speeding can have disastrous consequences. In this article, we consider the importance of working with technology to improve safety and productivity outcomes in the area of speed management compliance.

A new Heavy Vehicle National Law (HVNL) is on the horizon and in anticipation of it, we have been reflecting on the gaps in the current law. How can we better support parties in our supply chains to meet their safety obligations? Technology is an easy way to track, manage and demonstrate compliance.

Earlier in this issue, we looked at the new Vehicle Safety and Environmental Technology Uptake Plan released by the National Heavy Vehicle Regulator (NHVR). This is intended to encourage industry to implement new heavy vehicle technologies into vehicles. Evidently, we are heading in the direction of embracing greater use of data and technology.

With regards to managing speed, we have seen electronic speed management systems and speed limiters become more prevalent. It seems that the time is ripe to consider the place for technology in your business' transport activities.

## ► IMPORTANT

Digital technology provides businesses with increased visibility, greater accessibility, and a wider reach across business departments.

## SPEED COMPLIANCE BASICS

There are a number of tools available to manage and enforce heavy vehicles' speed limits, both in the HVNL and in state and territory road safety laws.

The HVNL provides that:

- heavy vehicles more than 4.5 tonnes Gross Vehicle Mass (GVM) must not travel in excess of 100 km/h;
- section 26C imposes a primary duty on each party in the CoR to ensure, so far as reasonably practicable, the safety of the party's transport activities relating to the heavy vehicle;
- section 26E prohibits a person from asking, directing or requiring (directly or indirectly) the driver of a heavy vehicle or party to the supply chain to breach their speed obligations;
- there is a requirement for certain heavy vehicles to be fitted with speed limiters; and
- various sections prohibiting speed-limiter tampering.

Pursuant to s 705 of the HVNL, the NHVR has the power to make guidelines about the preparation and content of an industry code of practice that is registered under the HVNL. The Master Code is an industry-led framework which provides a set of national standards and procedures to assist businesses in the Chain of Responsibility (CoR) to comply with their various obligations such as in regard to speed management compliance.

## ► IMPORTANT

The HVNL does not cover circumstances where a driver commits other driving contraventions that are general road-safety offences, such as using a hand-held mobile phone while driving. Where an offence like this occurs, the driver would likely face penalties under the relevant state law.

## SPEED COMPLIANCE AND TECHNOLOGY

To support compliance with these obligations, industry has turned to using speed limiters and electronic speed management. So, how has technology been used so far?

1. Speed limiters are devices that limit a heavy vehicle's maximum speed. They essentially don't allow drivers to breach speed maximum speed limits applied to their heavy vehicles. By ensuring that they are appropriately fitted to heavy vehicles, businesses can use this technology to support compliance with their primary duty.
2. Electronic speed management systems, often referred to as telematics, use satellite tracking and wireless communication technology to monitor, among other things, the speed of heavy vehicles. This technology can include GPS. To optimise the use of telematics to promote business compliance with HVNL obligations, businesses should pair capabilities that notify them of speed contraventions with escalation procedures. For example, a procedure could include a continuous notification to the driver to slow down. Alternatively, if a business is notified of persistent contraventions then there may be formal warnings or employee reviews implemented.

Any business involved in the supply chain must ensure that transport activities do not result in a speed breach or influence someone else (usually the driver) to breach their speed obligations.

## THE BENEFITS OF A DIGITAL SYSTEM

We often talk about the importance of keeping a paper trail to demonstrate compliance. Electronic CoR systems are capable of managing a range of processes without the need for paper. By adopting a 'one system' approach, you can ensure that all data is captured and stored in one place, providing your business with greater awareness. Moreover, real-time accessibility allows fleet operators to access the data through cloud-based technology and will be

able to analyse incidents with greater ease. Speed management is often tied in to other issues such as fatigue, time constraints, weather and traffic conditions. The main advantage of a digital system is that your business can have real-time access to:

- speed management;
- fatigue management;
- electronic work diaries;
- maintenance management;
- driver performance;
- mass management;
- incident reporting; and
- integrated runsheets and timesheets.

Greater access and insight to data enables more tailored approaches and outcomes for your business. You must be mindful of the unique risk factors that apply to you. For example, fleets and parties in the Chain which undertake urgent, express or overnight deliveries or move time-sensitive freight, such as perishable items, may require different compliance controls to those that are not involved in those activities.

Your business must always keep records of the steps taken by parties to comply with safety obligations under the HVNL. Although tools such as electronic speed management systems are a proactive method to ensure compliance, it is equally important that your business has appropriate procedures to ensure those systems accurately record compliance (or non-compliance) and that there are adequate reporting mechanisms.

The wide-ranging benefits of using technology are particularly evident when it comes to record keeping. The ability to centralise important information such as driver rosters and trip schedules means that different parties can access the same data in real-time. Technology can aid effective two-way consultation, cooperation and coordination. Supervising and monitoring transport activities can be done with greater ease when technology is involved which can lead to better productivity and safety outcomes.

## WHO IS WATCHING YOUR SPEED?

At the end of the day, there are multiple measures in place to monitor speeding on our roads and in heavy vehicles. However, drivers must be attentive to speed limits and their safety obligations. Although there are many parties in the supply chain, there is only the one driver seated at the wheel.

The risks associated with speeding for any road vehicle are significant. For heavy vehicles, speeding poses a significantly larger risk due to the size and mass of the vehicle and any possible loads they may be carrying. The heavier the vehicle, the longer it takes to stop, the greater the impact and potentially more severe the consequences. ■

► Continued from page 1 “Managing rollover risk for shipping containers”

Load restraint requirements do not just apply to the goods as loaded onto a heavy vehicle, they also apply to the restraint of goods within a freight container. This is usually done at the point of origin and is unable to be inspected by any party further down the chain. It is crucial that your business ensures that it is discharging its obligations in relation to the restraint of goods within a container. This becomes challenging when your business is not the one that packed the container and cannot check the load restraint within it once the doors are sealed.

CoR recognises that operators of the vehicle are not the only parties that can influence what happens on the road. Take, for example, the consequences of the risks that are associated with a Container Weight Declaration (CWD).

**► DEFINITION: CONTAINER WEIGHT DECLARATIONS**

A Container Weight Declaration is a written declaration of the weight of a container and its contents. It may be either in hard copy or electronic form, or a placard attached to the freight container. It may consist of one or more documents in different formats – for example, documents may be in the form of a sheet of paper, an email, on an electronic device but in any case, it must be able to be produced in its entirety to an authorised officer, upon request.

If the stated weight of a CWD is noted as less than it actually is, it may cause overloading which could lead the vehicle to roll over. In such circumstances, the following parties may be found liable:

- **Drivers:** by operating the vehicle while overloaded.
- **Consignors:** by not fully considering the ramifications of any additional weight being included.
- **Loaders:** by not thoroughly reviewing the CWD or checking the accuracy of any supply documentation.
- **Executives:** by not exercising due diligence and failing to identify any problems.

The above decisions, actions or omissions could have caused the driver to operate the vehicle while overloaded.

Thinking about the transport activities relating to heavy vehicles loaded with shipping containers is an effective example of how safety is the shared responsibility of each party in the supply chain.

The level and nature of a party’s responsibility for a transport activity depends on:

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

The primary duty is to ensure, so far as is reasonably practicable, the safety of the party’s transport activities relating to the vehicle thus limiting the relevant transport activities to those performed in a particular capacity by the particular party.

Businesses need to consider their role in a shared safety duty aimed at ensuring safe loads, safe drivers and safe vehicles. Likewise, supply chain executives have an independent duty to exercise due diligence to ensure that their business is doing the right thing.

**CHALLENGES**

Containerised freight poses particular challenges to CoR parties. In a domestic freight arrangement the driver and operator will have considerable influence on how the vehicle is loaded. However, there may be less control by the driver and the operator in a containerised freight situation.

In many cases, containers are loaded and packed overseas. So, packers are the party with the most influence and control over container

loading and packing. But, it is difficult to enforce these obligations when those parties are outside of Australia. This issue is made even more challenging where the safety standards in the country of origin do not match those in Australia.

Import containers must be packed and their contents secured to Australian standards (refer to *Load Restraint Guide 2018*), not the standard at the place of export. The volume and nature of container trades means it is impossible to routinely open and inspect containers when they arrive at the wharf and before they take to the roads. After loading, it is often difficult to inspect container loading and packing. Truck drivers and operators are often at the front line when dealing with the consequences of poorly packed and secured containers. Despite this, a driver’s ability to influence and control the packaging of the container is limited. The driver typically does not have the ability to physically inspect the packing and thus the ability to identify deficiencies or hazards such as inadequate load restraint.

As such, the responsibility of securing goods within a container rests with the consignor of the container – typically the importer. It is the importer’s job under the CoR to exercise their control and influence over how containers are packed, before the Australian importer organises for the container to be transported by road in Australia and to check that this instruction is being followed.

**CONSIGNOR OR CONSIGNEE**

Under the HVNL, a party is generally classified as a consignor of goods when it engages a heavy vehicle operator either through an agent or another party to transport its goods (i.e. consignment) to a consignee by road for commercial purposes.

If your business simply receives the goods at your premises, then it is likely that your business is a ‘consignee’ under the HVNL. A consignee is defined as a person who:

- has consented to being, and is, named or otherwise identified as the intended consignee of the goods in the transport documentation relating to the road transport of the goods; or
- actually receives the goods after completion of their road transport.

If the business does not have any involvement in the packing of the container and does not book the road transport upon its arrival in Australia, then its duty would be limited to a ‘watching brief’ i.e. look out for any issues with the packing or load restraint within the container and report/document any problems to your local supplier to raise those issues with the overseas supplier, then continue to monitor to make sure that the same problems do not continue to occur.

If you book the road transport to collect the container from the port, then your business is likely a ‘receiver’ and a ‘consignor’.

Under s 186, a receiver means a person who, other than the person who merely unloads the goods, (a) first receives the goods in Australia or (b) unpacks the goods after the goods are first unloaded in Australia. A receiver must ensure, so far as is reasonably practicable, the consignment documentation is not false or misleading.

**CASE STUDY**

Businesses that fail to take all reasonably practicable steps to ensure the safety of their transport activities, or place undue pressure on other parties within the supply chain that requires, results in or encourages them to breach a relevant safety standard are routinely prosecuted and fined.

Proceedings were brought against an importer, Futurewood, and its two directors, in relation to the transport of a sealed container by road from an Australian port, having arrived from China. In this case, Futurewood engaged ENG Haulage Contracting Pty Limited (ENG) to collect the container from Port Botany in NSW and transport it to Futurewood’s warehouse.

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➤ Continued from page 4

As the ENG driver was heading north on the Hume Highway at Liverpool, NSW, and turning left onto the Cumberland Highway, the combination began to lift on the left-hand side and began rolling over to the driver's side and into oncoming traffic. Two vehicles travelling in the opposite direction were struck and one of the drivers was killed on impact.

The Court held that there were several causes of the accident arising from the negligence of multiple wrongdoers (being the CoR parties) including:

- the driver was driving the freightliner at an excessive speed for the load as he navigated the corner;
- the load had been inadequately secured within the container by the foreign exporter;
- the container was overweight; and

- each CoR party failed to make reasonable enquiries that could have avoided the foreseeable risk of the rollover and the damage suffered.

In this case, the driver should have made inquiries about the weight of the container and whether the load was secured. The consigner should have made the foreign exporter aware of the load restraint requirements applying to the consigned goods or otherwise ensured that they were met. Finally, the employer should have contacted the consignor to find out how the load was restrained, where it was aware that the consigner had not properly restrained goods in the past.

As you can see, everyone has a part to play. The sheer size and weight of shipping containers pose a significant risk where load restraint is concerned. If each party in the supply chain had properly met their safety obligations it could have prevented such a tragedy from occurring. ■

## Table: How to manage rollover risk

Meshal Althobaiti, Lawyer, Holding Redlich

There is no single solution to prevent rollover accidents. However, by understanding the causes and creating a safe system that is based on load restraint, your business can help significantly reduce the likelihood of a rollover incident.

We have prepared a table to help you manage and identify risks associated with rollover of container-laden heavy vehicles. The table draws heavily on the *Load Restraint Guide 2018*, published by the National Transport Commission.

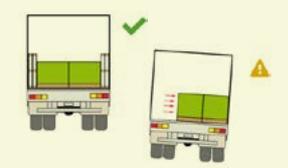
TABLE: KEY RISKS WITH CONTAINER-LADEN HEAVY VEHICLES		DOWNLOAD 
<b>Unbalanced loading</b>	A vehicle can be made unstable and increase the rollover risk if the loads are not balanced across or along the container. Load the mass centrally along and across the container when loading containers.	
<b>High centre of gravity (CoG)</b>	A vehicle can be made unstable and at risk of rollover by loads with a high CoG. As the load's mass increases the rollover risk increases. For example, light freight should be placed on top of heavy freight to lower the centre of gravity and increase vehicle stability.	
<b>Inadequate load restraint</b>	Inadequately restrained freight can move and slide when the vehicle navigates bends. A vehicle can become unstable if inadequately restrained freight moves and slides during movement. By packing out or blocking all horizontal gaps you can prevent the load from moving.	

TABLE: ROLLOVER RISK MANAGEMENT	
<b>Load planning</b>	Make sure your business has a load plan developed to explain the freight packing process including how freight should be wrapped or strapped to pallets securely; and how the load should be positioned and freight restrained within the container. Load restraint and CoR obligations should be understood by each party.
<b>Verification</b>	You should verify that the load has been loaded in compliance with your developed load plan. This process may involve a supervisor being present at the loading site in order to verify the loading of the container whilst using an inspection checklist. It may also be useful before the container is sealed to obtain photographs of the load so that they can be verified.
<b>Information</b>	Your road transport operator should be provided with complete and accurate information including Container Weight Declarations and your business' load plan. Domestic and overseas suppliers should be provided with information on Australian load restraint requirements.
<b>Communication</b>	The focus should be on safety and not product damage. So communicate and support the expectation that drivers should not depart the business' premises until safety requirements involving the load are addressed. There should be a discussion on load restraint requirements e.g. dunnage bags and such discussion needs to involve properly qualified people.
<b>Record</b>	Record any non-compliances with your business load planning procedure and any hazardous incidents to proactively follow up with the loader of the container. No supplier should be used if they cannot or will not comply.

# Proceed with caution: Responding to notices to produce

Rebecca Niumeitolu, Lawyer, Holding Redlich

Authorised officers have information-gathering powers under the Heavy Vehicle National Law (HVNL). These powers include the requirement for a responsible person for a heavy vehicle to make available, or to produce, certain business documents and information relating to heavy vehicles and responsible persons for them for inspection. This article provides tips for businesses that receive notices to produce and provide information under the HVNL.

## Tip 1: Seek legal advice

Responses to notices to produce documents and information can be used by regulators as a springboard for further enforcement actions, charges or investigations under the HVNL. Accordingly, if you receive a notice to produce, and have the resources, it can be helpful to seek legal advice.

A lawyer can guide the disclosure process and advise you on the risks associated with disclosing information to the regulator. A lawyer may also be able to assist you in planning potential defences if you are aware that a notice to produce has been issued in the context of suspected contraventions of the HVNL.

## Tip 2: Diarise the date when you are expected to provide a response to the notice

Diarise the date for compliance with the notice to avoid the risk of not meeting the deadline and exposure to pecuniary penalties.

It is an offence not to comply with notice to produce unless you have a reasonable excuse. For example, non-compliance with a notice to produce:

- under s 569(1) attracts maximum penalties of \$33,700 for companies and \$6740 for individuals;
- under s 570(1) attracts maximum penalties of \$33,700 for companies and \$6740 for individuals;
- under s 570A attracts maximum penalties of \$56,050 for a company and \$11,210 for individuals.

If the notice to produce is broad and requires significant disclosure then you may consider writing to the relevant regulator to seek an extension of time for complying with the notice. Ensure that any extension that you receive is in writing.

## Tip 3: Ensure the notice to request is consistent with the authorised officer's powers under the HVNL

Generally, where criminal proceedings could follow from a notice to produce, the aim is to provide only the documents and information that is strictly required from you and no more. You are not required to provide any documents or information requested that are not supported by a power under the HVNL.

For example, if an authorised officer included in a request to provide information pursuant to s 570 a request to attend your business premises to interview staff, you would not be obliged to provide such access to your site and employees because that request falls outside the scope of an authorised officer's power under s 570.

As another example, a request under s 570 must be made for compliance purposes. If it is not apparent that the request is being made for compliance purposes then this should be clarified prior to disclosing information to authorised officers.

## Tip 4: Ensure that you do not disclose documents that are subject to legal professional privilege

Generally, legal professional privilege covers confidential communications and documents made or prepared for the dominant purpose of a lawyer providing legal advice. For example, emails between your business representatives and lawyers in which lawyers provide advice as to the business' obligations under the HVNL, risks of liability or ways to manage a breach of the HVNL.

Section 735A of the HVNL provides that nothing in that law compels a person to give information that is the subject of legal professional privilege to another person. This means that when responding to a notice to produce, you can exclude such communications prepared for the dominant purpose of seeking/providing legal advice.

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## Responses to notices to produce can be used by regulators as a springboard for further enforcement actions, charges or investigations under the HVNL

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## Tip 5: You can't avoid disclosure on the grounds that compliance might expose you to liability

Section 587 of the HVNL provides it is not a reasonable excuse for a person not to comply with a requirement imposed by an authorised officer, such as a requirement to comply with a notice to produce, because compliance might incriminate you or make you liable to penalty.

Businesses concerned that disclosure might incriminate them might consider with their lawyers whether there are alternative protections from disclosure, such as that information is covered by legal privilege, as well as options for planning ahead in view of potential criminal proceedings.

## Tip 6: You are entitled to appear with a lawyer if called to give oral evidence

Pursuant to s 570A, an authorised officer may issue a notice where the officer reasonably believes a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of a safety duty or executive duty, or that will assist to monitor or enforce compliance of such duties. It also allows authorised officers to require persons to give oral evidence.

If required to give oral evidence, you can appear with a legal practitioner. Although it is not mandatory, having a legal practitioner can be helpful to ensure that the scope of questions asked by the regulator are in line with the terms of s 570A and can offer comfort to persons giving evidence in what can sometimes be an intimidating situation.

## Tip 7: If you give oral evidence, ask for a transcript

You can ask for a transcript of your interviews with regulators. This can be helpful for planning possible defences and appeals against appealable decisions made by regulators that concern the information you provide to them under a notice to produce. ■

**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.

## Is there a way to detect fatigue?

**Q** What is fatigue under the HVNL? How can I detect it?

**A** The HVNL provides that fatigue includes but is not limited to:

- feeling sleepy;
- feeling physically or mentally tired, weary or drowsy;
- feeling exhausted or lacking energy; or
- behaving in a way consistent with any of the above.

Signs that a driver is impaired by fatigue include, that they:

- are drowsy, nodding-off or having micro-sleeps;
- strain to open their eyes;
- are yawning;
- lack alertness;
- make more mistakes than usual;
- are unable to concentrate;
- are moody;
- are involved in near-collisions;
- have difficulty navigating and manoeuvring their vehicle efficiently; and/or
- cannot keep a consistent vehicle speed.

Ways to monitor and detect fatigue include:

- training staff, especially drivers and those working in close contact with drivers and schedulers, to identify signs of fatigue;
- ensuring staff are aware of obligations not to permit a driver to drive while fatigued;
- having policies and procedures that staff can follow where they suspect signs of fatigue, such as speaking with drivers to ask them about how they feel, completing checklists as to whether the driver is displaying signs of fatigue, and if a driver appears to be fatigued asking them to rest and notify supervisors to make new arrangements for transporting goods;
- monitoring driver work diaries to ensure they are complying with work and rest hour options; and
- if your business has the resources available to it, using GPS and alertness-monitoring technology to support fatigue management.

## Which time zone should I use?

**Q** If I drive through different time zones, which time zone should I use to calculate work and rest periods?

**A** It is important to correctly monitor and record your work and rest times to ensure compliance with work and rest hour option requirements under the HVNL. This includes ensuring that you record correct times when travelling between states and time zones.

Section 248 of the HVNL provides that when you take a journey and go to a time zone different to your base, work and rest periods must be counted by reference to your base as a driver.

For example, if your base is in Queensland and it is necessary to work out the hours of night work time while travelling to NSW, then the hours of work time are the hours between midnight and 6 am in the Queensland time zone (which may equate to 1 am to 7am in NSW time).

It is also important to calculate your work and rest time accurately. 'Work time' includes all tasks to do with the operation of your vehicle. This includes driving, loading and unloading and completing your work diary. 'Rest time' is all time that is not work time. Section 247 of the HVNL provides that your work time is always counted from the end of a rest break and work time is rounded up to the next 15-minute interval. When travelling through different time zones all periods of time must be counted in 15-minute blocks relevant to the time zone of your base.

## Why are formal warnings issued?

**Q** What is a 'formal warning' and why are they issued?

**A** A formal warning is a type of enforcement measure under the HVNL. Authorised officers can issue a formal warning to a person pursuant to s 590 of the HVNL where the officer reasonably believes a person has contravened the HVNL, the person has exercised reasonable diligence to prevent the contravention and was unaware of the contravention, and that a formal warning is an appropriate method of addressing the contravention. Formal warnings are not given for substantial or severe risk breaches of mass, dimension or loading requirements.

Authorised officers who can issue a formal warning include, but are not limited to, police officers, road safety authority officers and the NHVR.

Formal warnings can be withdrawn within 21 days after they are given, by providing notice to the person who was the subject of the warning. If a formal warning is not withdrawn, then the person who is the subject of the warning cannot be proceeded against for an offence under the HVNL.

Formal warnings are one of the ways that duties under the HVNL are enforced. They are generally issued for minor contraventions and are on the lower scale of HVNL sanctions. Other enforcement measures for HVNL contraventions include enforceable undertakings, infringement notices and court sanctions. It is at the discretion of the authorised officer and the HVNR as to what enforcement measure they will choose to impose in relation to contraventions of the HVNL. ■

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## The danger of misrepresenting health conditions

A collision on Monaro reminds us to monitor sleep-related health issues, particularly those that are ongoing or chronic, and to be aware of the disastrous consequences that can arise from carelessness around health and fatigue. In this article, we take a look at the case of *R v Livas (No 2) (2020)*, which highlights the pressures that drivers may feel to misrepresent health conditions.

The ACT Supreme Court sentenced a driver of a 7-tonne medium rigid tipper truck to an imprisonment term of 39 months with a non-parole period from 19 February 2020 to 18 May 2022 for culpable driving causing death contrary to s 29(2) of the *Crimes Act 1900* (ACT).

The offence arose when a driver for Canberra Sand and Gravel was travelling on the Monaro Highway and drove into the rear of a car ahead of him that was stationary at an intersection. The collision resulted in the death of a four-year-old passenger in the back seat.

While the case relates to a driver that was not operating under the Heavy Vehicle National Law (HVNL), it serves as a reminder of the importance of ensuring that drivers affected by possible sleep-related health issues seek treatment and are monitored on the job.

### COURT OBSERVATIONS ON THE CAUSE OF THE COLLISION

It was found that the driver had a long history of untreated sleep-related issues that contributed to the cause of the accident.

Between 2010 and 31 July 2017, there were several occasions where the driver identified to various health professionals that he had sleep-related issues. He had cases of "frequent walking at night" and drowsiness during the day. He was also referred at least twice to Canberra Sleep Clinic in relation to a possible diagnosis of sleep apnoea.

When treated at the scene by paramedics the driver told them, "I was driving my truck and at some point I blacked out". He repeated similar statements to hospital staff.

Notwithstanding concerns arising around a possible sleep disorder, the driver pursued work as a commercial driver. At a driver licence medical examination he positively asserted he had no sleep disorder. When applying to work with Canberra Sand and Gravel he identified that he was in good health and was unaware

of any injury, illness or condition that would affect the performance of his duties. Later, when applying to renew his driver's licence he identified that he was not suffering from a long-term illness, injury or condition that could affect his ability to drive.

The ACT Supreme Court observed that had the driver had his condition investigated, as a professional truck driver in his position ought reasonably to have done, he would not have been driving the truck at the time of the collision. The driver's conduct was unjustifiable.

**When treated at the scene by paramedics, the driver told them, "I was driving my truck and at some point I blacked out."**

### LESSONS FOR DRIVERS IN THE HVNL CONTEXT

It is well known that fatigue and distraction are common causes of accidents on the road.

In this case, the driver pleaded guilty to culpable driving causing death and showed insight into the impact his actions had and would continue to have on the victim's family, other road users and himself. Still, prior to the accident he went to efforts to indicate that he was able to perform his job, when in reality all the warning signs were there.

In the HVNL context, drivers should:

- Not be short-sighted when they complete forms to qualify them to drive heavy vehicles and earn employment in the transport industry. It might be self-serving in the short term, but the consequences misrepresenting illness, injuries or conditions that can impact on driver's ability to drive can have permanent and life-altering consequences.
- Not drive while impaired by fatigue.
- Seek medical care and treatment if drivers are concerned about sleep-related health issues or are aware that they may suffer from a sleep disorder.

- Notify their employer if they are impaired by fatigue or may need to seek medical care or treatment in respect of sleep-related health issues.
- Be aware that driving while fatigued may not only expose them to monetary penalties under the HVNL but also risk imprisonment under other criminal and road legislation.

### LESSONS FOR EMPLOYERS IN THE HVNL CONTEXT

1. Don't let drivers drive while impaired by fatigue.
2. If a driver or other employee reports concerns about driver fatigue, employers should take it seriously. Employers should speak to the driver about the fatigue concerns, keep an eye out for signs of fatigue and document this monitoring. If employers suspect that a driver's inattentiveness or fatigue may be affected by underlying conditions, illnesses or disorders, employers should consider asking the driver to undertake a medical examination before proceeding with their driver's duties.

In the above case, the driver actively hid his sleep-related health issues from his employer. However, had the employer been aware of the driver's untreated long-term health concerns and had the driver been driving a fatigue-regulated heavy vehicle, one might imagine that the employer too could have been pursued for possible charges for contravening its primary duty or making prohibited requests under the HVNL, or even had civil proceedings for negligence commenced against it.

### FATIGUE'S GRAVE CONSEQUENCES

Ensuring drivers are not fatigued and distracted is critical to ensuring safety on our roads. The collision in Monaro highlights the pressures that drivers may feel to misrepresent health conditions that could impair their ability to drive and adversely impact on their livelihood. However, in light of the grave consequences that driving while fatigued can have on the safety of road users and drivers, it is imperative that drivers who are affected by sleep-related health issues seek treatment and employers carefully monitor drivers who might be at risk of driving while impaired by fatigue. ■

**IN THE NEXT ISSUE**  
OUT OCTOBER 2020

- WA company prosecuted for fatigue breaches
- Facing prosecution? How to get the best result
- Defences under the HVNL