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Chain of Responsibility solutions

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From Your Editor-in-Chief



We all know that experience counts, but is it enough?

Experienced workers who have performed an area of work for years learn the 'ins and outs' in a way that cannot be taught through study or induction. There is no doubt that practice on the job is invaluable. However, many businesses blindly rely on the experience of their workers as a guarantee that work is being conducted safely. In this issue, we look at two such cases where businesses relied on the experience of their workers only to be found short on the safety front. The lesson being – you can't simply fall back on 'experience' to remedy a failure to assess risks and safety objectively and implement proven safe practices.

We also take a high level look at safety, as a reminder that Chain of Responsibility (CoR) safety sits within an overall concern for safety in all aspects of the supply chain.

Finally, this month we practice our counting. Work and rest hours continues to be an overly complex area and one that is in much need of simplification. Hopefully this will be part of the ongoing review of the Heavy Vehicle National Law (HVNL). Until then, let's make sure we know what to do with the numbers.

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

Experience counts, but only so far

Nathan Cecil, Partner, Holding Redlich

The case of *National Heavy Vehicle Regulator v Bitumax Pty Ltd (2019)* demonstrates how businesses that blindly rely on the experience of workers as a guarantee that work is being conducted safely can get caught out. It emphasises the need for rigorous chains of reporting, documentation and reliable systems that support experienced workers in meeting their safety obligations.

Bitumax Pty Ltd was transporting loads of gravel for use in roadworks. A casual employee of Bitumax used a motorised loader to tip buckets of gravel into the truck, which was driven by another casual employee of Bitumax.

Neither the loader or truck were fitted with scales.

The system for loading was that the driver informed the person operating the loader how many buckets to tip into the truck, with the aim of being within the manufacturer's load limits.

The truck was intercepted and weighed en route and was found to be loaded to 120% of the statutory limit. This constituted a 'severe risk breach' of the mass requirements, for which the maximum penalty at the time for a corporation was \$55,000.

Bitumax was clearly relying on the experience of its driver and loader (albeit employed on a casual basis) to ensure that the truck was loaded within its limits.

However:

- Bitumax was aiming at the wrong target – its barrister argued that Bitumax was relying on the manufacturer's load limit for the vehicle. However, the Magistrates Court of South Australia (**the Court**) noted that the manufacturer's load limits are irrelevant, as it is the load limits under the Heavy Vehicle National Law (HVNL) that apply.

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How to make the journey from A to Z safe for everyone

Meshal Althobaiti, Lawyer, Holding Redlich

There are many hazards involved in truck driving and heavy vehicle accidents impact the community at large. The causes of these incidents are often complex and the fault can lie with multiple parties. In this article, we discuss the importance of making sure your transport activities prioritise and promote safety for everyone.

At its core, safety in the Heavy Vehicle National Law (HVNL) is about people. This includes not only truck drivers, but other workers and all road users. Too many workers do not understand the dangers involved when performing their tasks with a heavy vehicle. There needs to be a concerted effort to inform parties in the Chain of Responsibility (CoR) how to

approach their activities in relation to heavy vehicles in a safe manner. The high number of fatalities and injuries associated with the transport industry has not only drawn the attention of police and road transport authorities, but also health and safety authorities. The case that SafeWork NSW brought against Banana's Truck & Tipper Hire (**Banana's Truck**) demonstrates liability in action.

CASE STUDY: BANANA'S TRUCK & TIPPER HIRE

Recently, SafeWork NSW brought a case against Banana's Truck and its director after a worker became a paraplegic as a result of falling from a truck.

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— HELPDESK QUESTION OF THE MONTH —

What criteria do authorised officers use to conduct vehicle inspections? (answer on page 7)

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

Government to spend \$7.5 billion on transport infrastructure

Content Editor, Portner Press

As part of its COVID-19 economic recovery plan, the federal government is investing a further \$7.5 billion in national transport infrastructure to improve road safety and create thousands of jobs. This builds on its previous infrastructure funding which is said to now total more than \$11.3 billion since the COVID-19 pandemic.

Prime Minister Scott Morrison said this extra spending supports its JobMaker plan and helps the nation recover from COVID-19.

"We have been working closely with state and territory governments to invest in the infrastructure that is ready to go and can help rebuild our economy and create more jobs," the Prime Minister said.

"These projects will keep commuters safe on the road, get people home to their loved ones sooner and provide better transport links for urban and regional communities.

"As part of the COVID-19 economic recovery plan we have invested an additional \$11.3 billion focused on shovel-ready projects across the country.

"This investment through Tuesday's Budget will boost the national economy and is part of our plan to support an estimated 30,000 direct and indirect jobs across the nation."

Treasurer Josh Frydenberg said that the federal government is focused on creating jobs and rebuilding the economy.

"Infrastructure helps to create jobs and to get people where they want to go sooner and safer," he said.

"These commitments will help to get the economy moving."

Minister for Population, Cities and Urban Infrastructure Alan Tudge said the delivery of these major infrastructure projects will help drive the economy and map the economic road back from the pandemic, building the economy and providing certainty for business over the long term.

"These new investments lock in billions across our infrastructure pipeline over 10 years," he said.

"We will continue to invest in the key priority projects which help drive the economy and create jobs across our states and territories." ■

► Continued from page 1 **"Experience counts, but only so far"**

- As to the absence of load scales on either the truck or loader, operators of the loader had on three prior occasions submitted requests for the loader to be fitted with scales to assist in the loading process, but those requests had never been actioned.
- There was no evidence as to how Bitumax or its drivers arrived at the number of bins that could safely be loaded into the trucks – the position appears to be that Bitumax relied on the experience of its drivers to know this or be able to work it out on the job.

As a result, the Court made the following observations:

"The loading and transport of the materials involved pure guess work and speculation."

"This was a case of complete indifference by the company and its operators as to their legal obligations."

"...the lack of any weighing system in place is surprising, improper and serious enough in itself."

"It is an extraordinary case and what is extraordinary is the complete lack of any structure by a corporate body to ensure that a chain of reporting exists to ensure compliance with the legal and safety obligations cast upon it."

The Court did accept that, subsequent to the incident, Bitumax had gone to great expense to undertake a review of its procedures, provided further training to employees and implement a system of cross-checks to ensure compliance, as well as ensuring that scales are fitted on all loaders and trucks used by it.

The Court considered that this case amounted to 30% of the worst offending (equivalent to a penalty of \$16,500), but further reduced the penalty by 40% in light of the significant mitigating factors and diminished prospects of reoffending. As a result, a fine of \$9,900 was imposed.

The Court's extreme criticism over the company's operations shows that whilst you can rely on the experience of your workers, you cannot rely on their experience to independently assess risk and design safe work practices ad hoc in the field. The primary responsibility for assessing risk, implementing safe practices and ensuring safety and compliance rests with the business. The value of having experienced workers is supplemental to this, but cannot take its place. ■

When training and experience isn't enough

Nathan Cecil, Partner, Holding Redlich

Another recent incident which demonstrates the importance of implementing and utilising sound processes and systems to meet safety obligations is Kramer v Veolia Environmental Services (2020). A closer look at the facts of this case reinforces the need for documented safety procedures instead of simply relying on expertise and experience alone.

Veolia was fined \$9,000 for a 2018 over-dimension incident on the Tasman Bridge in Hobart. Veolia was engaged to transport empty jet fuel drums in a 'C-Type', 'non-standard' container with a higher than normal height of 9'6".

Nothing in Veolia's processes flagged the extra height. A typical tilt-tray heavy rigid vehicle was assigned.

The driver conducted a visual inspection of the load, but failed to notice visible 'caution' signs indicating the over-height of the container and did not take steps to ensure that the loaded truck was within the overall height limit.

The loaded truck did not comply with the applicable dimension requirements and was 180mm higher than the signposted 4.3m maximum height on the route.

The top of the container hit the bottom edge of an overpass on the Tasman Bridge, causing damage to the bridge and colliding with a following light vehicle when the container was dislodged from the truck.

The Court accepted that the driver had relevant training and experience, but further observed:

"The defendant's internal procedures ought to have been engaged, to ensure that somewhere between the point in the system or operation where the job request was received and the point at which the container was loaded on the truck, there was a proper response to the unusual height of the container so that when it was being transported, the load height did not exceed 4.3m."; and

"It appears that the defendant instead relied too heavily on the experience and training of its employed driver; and the driver had, in breach of his responsibility, relied on those loading the container onto the truck."

This case highlights that people often mistakenly rely on experience in lieu of having in place written, tested safety procedures. ■

How robust are your risk management systems?

Nathan Cecil, Partner, Holding Redlich

There is no doubt that this year has brought conversations about risk management to the forefront. Safety systems and risk management procedures are all around us. They become increasingly important in high-risk settings such as the heavy vehicle industry. In this article, we look at what you can learn from 'near misses' and how to bolster your risk management systems.

Parties in the Chain of Responsibility (CoR) must build a culture of reporting near misses. This includes having robust incident reporting systems and procedures in place to ensure compliance with the Heavy Vehicle National Law (HVNL). When did you last assess your risk management systems? Are you aware of how to report incidents when they arise?

> IMPORTANT

Under the HVNL, a near miss is not an incident avoided but an incident in and of itself.

There is no doubt that near misses are a part of every road user's reality. Add heavy vehicles carrying loads into the mix and the risk increases. Anyone who has driven a vehicle has either experienced or witnessed a near miss at some point. However, despite how common they are, there can be a general lack of understanding regarding how to manage these incidents in the CoR.

> DEFINITION: NEAR MISS

A near miss is an unplanned event that did not result in injury, illness, damage or regulatory breach but had the potential to do so. Only a fortunate break in the chain of events has prevented the injury, fatality, damage or regulatory breach from occurring.

WHAT IS INCIDENT REPORTING?

Incident reporting systems enable businesses to identify trends for action (i.e. when certain types of incidents keep occurring or similar causes of incidents continue to arise) and allow them to respond more effectively.

Incident reporting is the process of documenting details about a safety incident or near miss and notifying the appropriate person in the business (e.g. a manager or safety officer). The primary duty requires

businesses to be proactive; an incident reporting framework allows businesses to understand risk factors which may result in non-compliance with the HVNL so they can be addressed before they happen.

A faulty process or gap in a compliance management system is invariably the root cause of the increased risk that leads to the near miss, and should be the focus of improvement in order to continue complying with the primary duty under the HVNL.

Although a job may ultimately be executed safely, if a procedure wasn't followed or something went wrong and then was remedied at the last minute – this means the risk of an incident is present and high.

WHAT IS THE POINT OF A RISK MANAGEMENT SYSTEM?

If these incidents are identified and reported by the relevant employees, parties are able to develop a risk management system that:

- identifies hazards to ensure they are prevented in the future;
- assesses risks to whether the task should be completed;
- controls risks to ensure the safety of all relevant parties; and
- reviews control measures to identify areas of improvement.

WHY SHOULD YOU REPORT NEAR MISSES?

The purpose of the HVNL and CoR is to facilitate and regulate the use of heavy vehicles on roads in a way which promotes public safety and encourages productive, efficient, innovative and safe business practices.

It is not enough to simply avoid breaches of the HVNL; businesses must actively promote safe practices. Recognising the importance of near misses in the overall compliance picture is a key to achieving this goal. Furthermore, near misses need to be included in an incident reporting system because the circumstances of an incident, crash or near miss may form part of the matters a prosecutor and ultimately a court will look at in deciding whether a breach of the HVNL has occurred.

A court may consider a business's response to prior CoR 'incidents' (including near misses) when considering whether a business has ensured, so far as is reasonably practicable,

the safety of a party's transport activities. Therefore, it's crucial that CoR parties are incentivised to report any near misses to the relevant people within their business, in order to comply with their legislative obligations and fulfil their CoR obligations.

Identifying and reporting near misses will go a long way towards showing the regulator that:

- CoR is managed under the appropriate risk management framework;
- policies, procedures, systems and processes are in place under the appropriate risk management framework; and
- compliance is monitored with policy, procedures, task descriptions and corrective action plans.

ARE THERE GAPS IN YOUR RISK MANAGEMENT SYSTEMS?

Ultimately, a near miss is an example of something slipping through the cracks. It can be considered an incident even in cases where the near miss is picked up on and an incident is averted at the last minute. Such instances can be evidence of ineffective risk management processes, a lack of training, a lack of supervision and so on. These factors all need to be addressed as part of complying with the primary CoR safety duty.

CoR parties should have an incident investigation process within their business to establish how and why an incident occurred, so that businesses can identify areas where compliance can be improved. More importantly, an incident investigation allows businesses to put steps in place to prevent a similar incident from occurring and also enables them to demonstrate that appropriate action has been taken to improve safety following an incident

PROACTIVELY PROMOTING SAFETY

Ultimately, safety is the responsibility of each party in the supply chain and everyone has a role to play in risk minimisation. The primary duty under the HVNL requires businesses to take steps to manage risks by eliminating CoR safety risks or mitigating the effects of any risk that cannot be eliminated. Executives should implement and maintain relevant systems to promote a culture that reports near misses and prioritises safety. Each party should know how to recognise and report risks to ensure we are doing more than simply exclaiming, "That was close!" then moving on when a near miss occurs. ■

► Continued from page 1 *“How to make the journey from A to Z safe for everyone”*

The NSW District Court (**the Court**) convicted the company and the director and imposed a fine of more than \$270,000 for failing to comply with their safety duties.

Banana’s Truck owned a dual-cab truck with loader crane and bin. During a tree removal operation, the worker fell from a height of approximately three metres while climbing out of the bin onto the road. Unfortunately, the worker landed on the back of his head causing him to suffer a skull fracture and other serious injuries, including a spinal cord damage resulting in permanent paraplegia from the waist down.

The worker landed on the back of his head causing him to suffer a skull fracture and other serious injuries, including spinal cord damage

The Court found that Banana’s Truck did not develop, implement and enforce a safe method of work for loading the truck. The Court also found that Banana’s Truck had created a generic Safe Work Methods Statement document in 2013, but that it was left in the truck without being reviewed before each job. Banana’s Truck did not go through the document with the worker before the incident.

NO HVNL WITHOUT SAFETY

Safety is vitally important and is at the heart of the HVNL. This year, the Federal Government committed \$10 billion in new road and rail projects, road safety and community infrastructure and \$2 billion for road safety works. This includes \$5.5 million for the establishment of a National Road Safety Data Hub. According to the Federal Transport Minister, Michael McCormack, *“Road safety is everyone’s responsibility and the government is playing our part by investing in road safety projects to get people where they need to be sooner and safer”*.

The objectives of the HVNL include the promotion of both safety and productivity – although it is a given that your business will want to conduct its transport activities efficiently, you must also be committed to upholding safety and putting the necessary systems in place to support this.

Businesses that do not take all reasonably practicable steps to ensure the safety of its transport activities, or who require or put 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.

Any business which conducts any regulated ‘transport activity’ (such as packing, consigning, loading, unloading or receiving goods or operating premises at which heavy vehicles are regularly loaded/unloaded) is part of the CoR, regardless of whether or not the business owns or operates any heavy vehicles. Under the HVNL, executive officers of a corporation (such as directors and those

concerned with the management of a corporation) can be personally charged, prosecuted and fined if a corporation commits a breach of the HVNL. Maximum penalties are \$3 million for corporations and \$300,000 and up to five years in jail for executives.

RISK MINIMISATION

Many businesses will already have a CoR compliance framework in place, including CoR compliance policies and procedures, training/awareness practices, compliance clauses in supply chain contracts, compliance monitoring and response/remediation and executive compliance reporting. However, they are often not properly documented or rolled out, meaning that they are often applied ad hoc or inconsistently throughout the business. Apart from undermining the time and effort put into them, this also introduces gaps in your safety practices, exposes people to risk and your business to penalty.

When devising responses to risks, you need not financially cripple your business with costly compliance measures. Instead, you should favour efficacy over expense and attend to safety risks according to their likelihood and seriousness.

Risks to health and safety must be managed by eliminating or minimising them so far as is reasonably practicable. The standard for compliance considers what a person standing in your shoes would know and do. For example, in the case of Banana’s Truck, the worker had not been provided with specific training on loading the truck in accordance with the Safe Work Method Statement for High Risk Construction Work (**SWMS**) and had received only minimal training on truck loading. An SWMS is required for high-risk construction work activities defined in the WHS Regulations. The Court heard that the director was remorseful and had taken steps to improve company safety, but it is clear that you cannot use ignorance as an excuse for failing to identify a safety risk or to remove, minimise or prevent it.

The NSW District Court convicted the company and the director and imposed a fine of more than \$270,000 for failing to comply with their safety duties

YOUR TRANSPORT JOURNEY

It is not enough to just make sure your truck is well-maintained. To achieve sustainable improvement and attain safety goals, you should think about the business’s attitude towards CoR. Compliance with CoR safety obligations requires accepting not just that the law requires compliance, but that safe operations require common sense. It requires participants in the Chain to think outside of their own circumstances and to understand that just because everything on their immediate patch looks to be okay, that does not simply mean their actions will not have a ripple effect down the supply chain.

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It is important to understand what the CoR risks inside the business may be and to endorse policies and procedures designed to address those risks. In order to avoid the type of harm suffered by the worker in the case of Banana's Truck, make sure the message gets down to the shop floor to ensure that the entire organisation is meeting its safety obligations.

For example, formal training in the operation of special tasks on trucks must be provided to drivers and workers who are performing activities in connection with the heavy vehicle. Ensure that you don't pressure workers into performing tasks that involve unsafe vehicles.

For drivers, they should be formally trained and qualified in all aspects of CoR safety. Programs such as TruckSafe provide an excellent example of the sort of thinking that is required. Given that you may be responsible for monitoring or managing the compliance of others within your supply chain (if you control or influence their conduct), it may make sense to share your training and awareness resources. This is certainly true for third parties who will be required to follow your working practices (e.g. your load restraint guide, site queuing rules or loading procedures), but it also extends to others generally.

 **TIP:** Utilise technologies to detect fatigue. It has been reported that fatigue and driver distraction are two of the most common contributors to road accidents. This should encourage you to the use of road safety and fatigue management technologies such as driver fatigue monitoring systems.

A CULTURE OF SAFETY

Keeping your drivers and workers safe is essential for not only their sake but for the safety of all road users. Other businesses and potential workers will be less inclined to engage with you if you pose a compliance risk to them or compromise their safety. You will need to promote a culture of safety in your business and be able to present a clean CoR bill of health to customers and workers in order to prosper. Think about how to enforce safety as a concept and in practical terms before the road journey begins. Remember, efficiency and productivity mean very little without safe business practices. ■

Table: How to ensure truck driver safety and minimise risk

Meshal Althobaiti, Lawyer, Holding Redlich

In order to effectively meet your safety obligations, it is useful to implement systems that will help ensure compliance. To manage Chain of Responsibility (CoR) risks, your business must consider the full extent of its obligations to drivers and non-drivers who perform activities in relation to heavy vehicles.

Consider implementing a process for identifying hazards that will develop effective controls to eliminate or minimise the risks arising from such hazards.

A risk management process that is based on the promotion of health and safety is a good start. Below is simple guide that will help bring about a compliance attitude. ■

| TABLE: HOW TO ENSURE TRUCK DRIVER SAFETY AND MINIMISE RISK DOWNLOAD  | |
|--|---|
| Issue | Risk management strategy questions |
| Audit, documentation and risk assessment | Has there been a Work Health and Safety (WHS) audit undertaken in the last year? Have the results of the WHS audit been provided to all company officers? Have the issues identified in the WHS audit been appropriately recorded and resolved? Is there a current WHS strategic plan? Are procedures, reports and recent workplace WHS issues regularly reviewed at management meetings? Are these reports responded to in a timely fashion? |
| Induction and training | Have all employees and drivers completed a WHS induction on or before the commencement of their employment or driving journey? Are proper induction and training records maintained in respect of employees and company officers (and contractors where relevant)? If so, have those records been checked in the past three months? Is a regular/refresher training plan in place to provide all company officers with ongoing instruction on how to perform work safely? |
| Safe systems of work | Have safe systems of work been developed and satisfactorily documented for all work tasks, including specifically those associated with plant, and the operations connected to the heavy vehicle and working at heights? Are the safe systems of work regularly reviewed at management meetings? If hazardous substances/dangerous goods are being used on the heavy vehicle, is there comprehensive and readily accessible health and safety information on each substance/good? Is an accurate record being kept for all plant and other equipment being used in the workplace, including details of inspections, maintenance, repair and alteration of the plant or equipment? Is that record readily accessible to employees and company management? |
| Emergency systems | Have appropriate emergency procedures been set in place? Is a process in place which provides for the review of those emergency procedures? |
| Committees | Is there a WHS committee that complies with all statutory requirements? |
| Consultation | Is there proper consultation with employees and drivers over WHS issues? Does consultation extend to contractors and any other workers who come onto the company sites as a matter of course? |

Back to basics: Counting work and rest time

Rebecca Niumeitola, Lawyer, Holding Redlich

Fatigue management is critical to ensuring safety for the driver of the heavy vehicle and all other road users. One way that the Heavy Vehicle National Law (HVNL) seeks to ensure that drivers are not driving while impaired by fatigue and are not susceptible to distraction is by implementing work and rest hour options. In this article, we look at the basics of how drivers operating under standard work and rest options can achieve compliance with their work and rest requirements.

STANDARD WORK AND REST REQUIREMENTS

Division 2 of Part 6.3 of the HVNL sets out the primary work and rest obligations for drivers. It provides that solo and two-up drivers commit an offence, if in any period stated in the standard hours of the driver, the driver:

- works for more than the maximum work time stated in the standard hours for the period; and
- rests for less than the minimum rest time stated in the standard hours for the period.

Schedule 1 of the *Heavy Vehicle (Fatigue Management) National Regulation (Regulation)* sets out tables which identify maximum work and minimum rest times for drivers operating under standard work and rest arrangements (see Table 1).

| TABLE 1: STANDARD WORK AND REST ARRANGEMENTS | | |
|--|----------------------|---|
| Relevant period/ period stated | Maximum work time | Minimum work time |
| 5.5 hours | 5.25 hours | 15 minutes rest time |
| 8 hours | 7.5 hours | 30 minutes rest time, in blocks of at least 15 continuous minutes |
| 11 hours | 10 hours work time | 60 minutes rest time, in blocks of at least 15 continuous minutes |
| 24 hours | 12 hours | 7 hours continuous stationary rest time |
| 7 days | 72 hours work time | 24 continuous hours stationary rest time |

COUNTING TIME UNDER STANDARD WORK AND REST ARRANGEMENTS

Counting and recording time under the HVNL is tricky. In 2019, Justice Peek of the Supreme Court of South Australia acknowledged such difficulties when he expressed sympathy for driver Mr Ballantyne who was convicted for breaching work and rest hour options. In *Ballantyne v National Heavy Vehicle Regulator* (2019), Justice Peek stated, "I should add that the appellant submits that the Act itself is very long, complex and hard for ordinary people to read or understand; and also that the examples given in the logbooks issued to truck drivers are not as clear as they might be. I must say that he does have something of a point here ...". He added that logbooks issued to drivers could be more user-friendly.

Although complex, the task of counting time is not insurmountable. Key tips to counting time in line with the HVNL are as follows:

1. When you count time you count either 'work time' or 'rest time'.

'Work time' is time spent driving or otherwise working, which includes tasks such as driving, loading your heavy vehicle, inspecting it, cleaning it.

'Rest time' is any time that is not 'work time'.

Be careful not to fall into the trap that Mr Barnes fell into when he breached his work and rest hour options in *Police v Barnes* (2017), by thinking that there was a third category of time which could also be accounted for under the HVNL, such as when taking breaks, driving between jobs, having personal time or time off. The Court in that case said that concepts of work and rest time under the HVNL are intended to be exhaustive of a drivers' time, there is no third category.

2. Work time must be counted forward from the end of a major rest break (being a rest time of at least 5 continuous hours) if there is a major rest break in a relevant period, or in any other case, the end of a relevant rest time.
3. Work time must not be counted from within a rest time.
4. Work and rest times set out in Schedule 1 of the Regulations can overlap.

As stated by the Supreme Court of South Australia in *Police v Barnes*, work time for a relevant period is not intended to stop with a new relevant period recommencing every time a driver has a major rest break. Relevant periods for work and rest time are "intended to operate by reference to a series of rolling, and potentially overlapping, periods of time".

For example, take the table above which identifies work and rest times all the way up to a period of 24 hours. Within the 24-hour period, this means that not only must a driver not work for more than 12 hours, they must also comply with each rest hour requirement which applies to shorter relevant periods. That is, the driver:

- i. after doing 5.25 hours of work, must have 15 continuous minutes of rest time;
- ii. before 8 hours is up, have had a further 15 continuous minutes of rest time;
- iii. before 11 hours is up, have had two more 15 continuous minutes of rest time;
- iv. before 24 hours is up, have had at least 7 hours of continuous stationary rest.

These applicable work and rest requirements in Schedule 1 would also apply within the 7-day relevant period, where, for example, a driver would need to comply with work and rest options for each 24-hour period, just as much as the driver would need to comply with the maximum work and rest limits for the 7-day period (72 hours of work, 24 continuous hours of stationary rest).

Managing work and rest times are critical to achieving compliance with fatigue management obligations under the HVNL, both for drivers and their counterparts. The National Heavy Vehicle Regulator has daily work and rest hour plans for download on its website, otherwise you can seek legal advice to clarify your work and rest obligations under the HVNL. ■

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.

Mass measurement adjustments

Q I've been looking at some papers provided by the National Heavy Vehicle Regulator (NHVR) identifying that I have breached mass requirements which apply a mass measurement adjustment (MMA). What is an MMA?

A An MMA is a type of measurement adjustment that is applied when a vehicle is being weighed for enforcement purposes. It appears to account for possible discrepancies which may arise using different weighing equipment, measuring methods and weighing facility features when measuring the mass of heavy vehicles.

The NHVR's *Heavy Vehicle Mass Assessment: Compliance and Enforcement Bulletin 2 (Bulletin)*, states that the MMA takes account of:

- measured mass (**MM**) – being the data that officers read on the weighing equipment when weighing a heavy vehicle;
- assessed mass – which is the MM minus the applicable MMA which applies to the heavy vehicle. It appears that the regulator/officers will determine whether there is a breach of mass requirements against the assessed mass of the heavy vehicle.

MMA's which apply to different heavy vehicle axle grounds are set out in the Bulletin.

Employer backlash

Q How can I protect myself against backlash from my employer if I report a business offence under the Heavy Vehicle National Law (HVNL)?

A This can be a difficult area to navigate. Under the HVNL, your employer is not allowed to dismiss you, or otherwise prejudice you in your employment because you helped give information to a law enforcement agency in relation to an offence against the HVNL, or if you make a complaint about an offence against the HVNL to your employer.

If an employer does discriminate you or victimise you for doing so, then they may face a penalty of up to \$56,050. You may also have direct recourse against your employer if you have experienced a backlash for reporting unlawful conduct under the HVNL. For example, a claim of unfair dismissal if you were fired.

Despite the clear position of the law, we appreciate that social realities around reporting offending conduct might not be so clear-cut and can often result in you as the reporter being under a lot of stress.

One way to protect against backlash might be to consider reporting offending conduct through the NHVR's Heavy Vehicle Confidential Reporting Line (1800 931 785). Calls to the line are confidential and there is incentive in the NHVR maintaining such confidentiality to encourage reporting to it in the long term.

If you anticipate that your report may result in significant backlash with your employer, you may also consider seeking legal employment advice prior to making your report to the regulator to ensure that you are best placed to weather the storm ahead, whatever it may be.

It is important to note that taking steps to ensure, so far as reasonably practicable, the safety of your transport activities is an obligation incumbent on all CoR parties. If you have made repeated attempts to push for organisational change around compliance with HVNL requirements to no avail and are concerned about your own and/or public safety, stepping away from your role or making a report to the regulator (although very difficult) might be one of the limited options which are available to you to mitigate against greater risks (including criminal charges, or personal harm or injury) which are associated with non-compliance with obligations under the HVNL.

Vehicle inspection criteria

Q What criteria do authorised officers use to conduct vehicle inspections?

A Authorised officers follow the NHVR's National Heavy Vehicle Inspection Manual (**Manual**) when conducting inspections on heavy vehicles. This Manual sets out a uniform way for officers to inspect and assess whether vehicles comply with requirements for maintenance, design and construction based on criteria set out in the *Heavy Vehicle (Vehicle Standards) National Regulation* and are applicable under Australian Design Rules.

There are additional criteria that inspectors in Queensland, South Australia and Tasmania also look out for in respect of vehicles fitted with vehicle-mounted lifting systems, buses and motorhomes, caravans and campervans.

Generally, vehicle inspections check for compliance with vehicle identification requirements (e.g. registration, make/model), break requirements, couplings, steering and suspension, wheels, tyres and hubs, structure and body condition, seats and seatbelts, lights and reflectors, mirrors, windscreens, engines, driveline and exhaust. ■

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When the charges don't align with the case

A dismissal of charges by the District Court raises important considerations for parties charged under the Heavy Vehicle National Law (HVNL) concerning the way that cases and hearings are managed by prosecutors. What is the entitlement of accused persons to the details of the charges that are laid against them? In this article, we take a closer look at this judgment on an overturned loading conviction.

THE LONG ROAD OF APPEAL

In September 2020, the District Court dismissed charges against driver Kevin Jesse who had been driving a tipper truck with a trailer that did not comply with loading requirements. Jesse's efforts to overturn his conviction were no small feat.

After driving his tipper truck with a trailer up the Hume Highway in August 2017, Jesse was issued a penalty notice for \$540 for a substantial breach of loading requirements contrary to s111(1)(b) of the HVNL.

Jesse contested the penalty notice and appeared at the Local Court without a lawyer in February 2018. The Local Court convicted Jesse of the offence and fined him \$2,500 plus \$1,000 in costs.

Jesse then appealed his conviction and the severity of the fine to the District Court. The District Court left his conviction in place but allowed the severity appeal, which resulted in Jesse's fine being \$1,000 instead of \$2,500.

Apparently dissatisfied with the result, Jesse requested the District Court state his case to the Supreme Court's Court of Criminal Appeal (CCA). Relevantly, the CCA found that the District Court had misdirected itself as to the proper meaning of "contained" in the *Load Restraint Guide 2004* (NSW) (LRG), in circumstances where the judge had not been directed that the term "contained" as it is defined in the LRG. Accordingly, the matter was sent back to the District Court.

It was in the District Court where Jesse's conviction was overturned, as the prosecution did not prove beyond reasonable doubt the loads in his heavy vehicle were not contained or restrained.

HOW WAS THE CONVICTION SET ASIDE?

A person who is charged for committing an offence is entitled to the 'particulars' that lay the foundation of that charge. 'Particulars' are the acts, matters or things that the prosecution says amounted to the accused breaking the law. For example, where the alleged offence took place, who was involved in it, and what the details are of the alleged offence.

The critical factor that led to Jesse's conviction being dismissed was that the particulars of the charge of contravening loading requirements set out by the prosecution did not align with the case that the prosecution ultimately advanced against him at trial:

Prior to the trial, the prosecution said the particulars of the charge were that there were a number of excavator buckets and an excavator that comprised part of the vehicle's load, which were not appropriately secured pursuant to the LRG.

However, at the trial, the prosecution added further factors that it said constituted the offence. The prosecutor said that not only were the excavator buckets and excavator improperly secured, but there was also a small jerry can, a pair of loading ramps and some conduit which were also capable of being dislodged from Jesse's vehicle.

The District Court said that adding these new components to the particulars of the charge "was a dramatic shift in the prosecution case that occasioned a significant unfairness" to Jesse. Jesse had come to court to address a charge relating to an excavator and excavator buckets and now the case had changed. This unfairness was arguably heightened by the fact that Jesse was not legally represented at trial and so was not appraised of his entitlement to object to what the prosecutor was doing.

In the circumstances, the District Court did not allow the prosecutor to rely on the additional elements of the case it advanced against Jesse at trial. The prosecutor could only rely on details of the charge which alleged that the excavator buckets and

excavator were not properly secured. On this limited case, which Jesse had come prepared to defend, the prosecutor was unable to prove beyond reasonable doubt that the loads contravened loading requirements. Thus, the conviction was set aside.

LESSONS FOR CoR PARTIES

- **Ensure you are aware of the particulars of charges against you.**

If you receive a Court Attendance Notice identifying a charge against you, be careful to look at the details of the charge. If the prosecutor has not provided you with sufficient details of the facts, matters or things to allow you to prepare your defence, you can ask for them. Usually this would be by way of a brief of evidence being provided to you.

- **If a prosecutor starts raising new details that it says makes up the charge against you at trial, which you were not informed of, you can raise this with the court.**

This is generally something that defence lawyers would be alert to and object to. However, if you do not have the opportunity to be legally represented then, rather than forcing yourself to meet a case that you weren't informed of, or needing to produce evidence 'on the fly', you can raise this matter with the court.

- **Seek legal representation if charged under the HVNL.**

In Jesse's case, we might envisage that if he had the opportunity for legal representation at the first trial, then charges might have been dismissed then or the appeal process could have been avoided. We also might envisage that the prosecutor would not have had the chance (even if inadvertent) to run a case which was substantially different to that particularised.

While some CoR parties simply won't have the resources to have legal representation at trial, taking that step where practicable can avoid a lot of stress and time spent defending charges. ■

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