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Chain of Responsibility solutions

DECEMBER 2020

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From Your Editor-in-Chief



A topic we keep coming back to is that of technology and how it can help manage Chain of Responsibility (CoR) safety issues.

The increased pressure on supply chains this year has demonstrated the place for technology in regulating risk, enabling real-time communication, thorough documentation and increased efficiency. There is no need to fear the robot uprising. Instead, we must acknowledge how technology can aid us to implement and monitor safe practices.

As the year wraps up, it might be a good idea to consider how technology solutions could be used to achieve these ends in your business. We provide an easy guide to help you on your way.

The holiday season is fast-approaching which means busier roads and schedules. Fatigue continues to be a major issue on our roads. For many in the industry, fatigue management is about filling out mountains of paperwork. In truth, it is about saving lives. When buried under the paperwork, we sometimes forget this. This month's article reminds us why this issue is so critical.

Speaking of paperwork, you can use your contracts as another compliance tool to help manage CoR safety and in this issue we will show you how.

Enjoy.

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

Winning CoR: A compliance success story

Nathan Cecil, Partner, Holding Redlich

If Chain of Responsibility (CoR) laws were a board game, a client of ours in the construction sector just won. Let's take a look at the facts of this case to understand how a proactive approach to your safety obligations can protect you from prosecution.

The business in question operates heavy vehicles and employed the loader and driver of a truck that it owned. They were loading construction fill materials. Neither the truck nor loading equipment had scales.

The truck was overloaded at 121%.

Needless to say, the business was prosecuted for the overload, with a maximum potential penalty of about \$59,000. Noting the absence of scales and the significance of the overload, the prosecutor pressed for a mid-level penalty.

Considering *only* the above, the prosecutor was probably on the money. But, the background facts changed the story considerably.

The business had identified that it had obligations under the Heavy Vehicle National Law (HVNL) and had designed and implemented compliance policies and practices to meet those obligations.

The business had previously calculated load mass/density profiles for the bulk goods that it typically carried e.g. where a specified volume of each product is check-weighed once loaded to ensure that loading that volume of product doesn't exceed mass limits. Unfortunately, this product was contaminated with foreign material that was heavier than the load mass/density profile.

➤ *Continued on page 2*

What can new technologies do for your business?

Meshal Althobaiti, Lawyer, Holding Redlich

Many transport and logistics businesses actively use technology to drive business management and efficiency. In fact, innovative technologies are transforming how we can assess risk and ensure compliance in the industry. There is growing recognition that technology can be used to monitor, manage and demonstrate compliance with the Heavy Vehicle National Law (HVNL). In this article, we examine how technology fits within the compliance framework to help businesses meet their safety obligations.

Under the HVNL, businesses in the Chain of Responsibility (CoR) must take all reasonably practicable steps to ensure the safety of their transport activities. Although the use of compliance technology or any particular product, system or platform is not mandatory,

it is becoming increasingly apparent that technology promotes safer and more efficient outcomes for your business.

MONITOR, MANAGE AND DEMONSTRATE COMPLIANCE

Technology can help to monitor, manage and demonstrate compliance with the HVNL. Take the National Heavy Vehicle Regulator (NHVR), for example. The NHVR uses technology to keep track of the safety and compliance record of road transport supply chain businesses. Businesses which are tracking above the industry average can be identified for targeted investigation and enforcement action. In this way, the NHVR can focus its attention where it is needed and is more likely to make an immediate improvement to on-road safety. Your business can also use technology to monitor your CoR safety performance and identify areas that need greater attention.

➤ *Continued on page 4*

— HELPDESK QUESTION OF THE MONTH —

What type of mistakes bring about prosecution under the HVNL? (answer on page 7)

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

NHVR and SAPOL unite in 'crossroads' operation

The National Heavy Vehicle Regulator (NHVR) and South Australia Police (SAPOL) have joined forces in Operation Crossroads 2020, a major heavy vehicle safety blitz NHVR Director Southern Region Paul Simionato described as focusing on the "crossroads" of Australia.

"The four-day joint operation ran between 9 October and 12 October, with a primary focus of monitoring the safety and compliance of heavy vehicles travelling on the Augusta Highway," Mr Simionato said.

"NHVR and SAPOL officers from metropolitan and country areas participated in the Operation which concentrated on driver fatigue and roadworthiness. These are both very significant safety risks for everyone using our roads.

"I want to acknowledge the good spirit and cooperation from drivers on the road, most were happy to chat to us and were just as focused as we are on safety.

"We always try to take an education-first approach to try and fix up minor issues so drivers can continue on their way safely."

The NHVR reports that the operation resulted in:

- 228 defects issued;
- 295 expiations issued;
- 5 cease work notices;
- 2 arrests; and
- 15 court reports.

In regard to the results, Officer in Charge of SAPOL's Heavy Vehicle Enforcement Section Inspector Joanne Howard said there was room for improvement.

"There were a significant number of defect and expiation notices issued during this operation," she said.

"The results reveal some companies have more work to do to ensure they maintain a roadworthy fleet. Equally, drivers are also responsible for ensuring they take breaks and maintain work diaries.

"Road safety is everyone's responsibility and police will continue to work with the NHVR and other key partners to keep South Australian's safe on our roads."

Mr Simionato highlighted the importance for operators and drivers alike to prioritise safety.

"It's a timely reminder to take simple steps to make sure you and everyone else on the road can get home safely," he said.

"That means always checking your vehicle for issues before you head off and making sure you're taking your breaks and filling in your work diary." ■

► Continued from page 1 "Winning CoR: A compliance success story"

The business was an accredited TruckSafe operator and had gone through the rigorous compliance and safety induction audit to obtain accreditation.

As part of a general review and reassessment, the business engaged us as independent experts in the area to conduct a boardroom briefing for the executive on the business' and executive's duties – so the executive was actively engaged in ensuring that the business was seeking to meet its HVNL obligations. After that, the business engaged us to conduct a HVNL compliance review and gap analysis. We provided our report and conducted a boardroom debrief of the major findings. The business prepared an action plan with 58 items for development. The business was part-way through ticking off and implementing those items when the above incident occurred. As part of that action plan, but after the incident, the business installed truck scales and rolled out refresher training on loading procedures and checks.

At the hearing, we took the judge through all of these matters in detail, to demonstrate the full extent of the business' proactive, genuinely substantive and multilayered approach to HVNL compliance.

The judge commented that although the nature of the offence gave rise to serious

safety risks, no actual harm arose. Further, having regard to the considerable focus and attention that the business has brought to bear on these areas, at significant cost and commitment, both before and at the time of the incident and the measures implemented by the business as a result, he was satisfied that the risk of such an offence occurring in future was low. In those circumstances, where the business was and continued to do the right thing, it would not be appropriate to impose a penalty or record a conviction against the company.

Did the business get off scot-free? Absolutely not! The business invested significant commitment, time and money in HVNL safety – and it paid off.

We usually focus on cases where businesses fail to do the right thing and are punished. It is a great pleasure to report on a case that illustrates how to 'do' HVNL compliance properly.

In the past, we have worked with a large number of businesses to help them implement HVNL compliance frameworks similar to the above. Until this case, our approach hadn't been tested in court – so it is fantastic to see that it receives the court's tick of approval. ■

Leaving compliance to chance

Nathan Cecil, Partner, Holding Redlich

Now let's change gear and look at a case with similar facts but a very different outcome. In *NHVR v Bitumax Pty Ltd (2019)*, the absence of necessary care and structure to ensure compliance led to a successful prosecution for an overloading incident. So, how did Bitumax manage to drop the ball?

In this case, Bitumax Pty Ltd, a business in the construction sector, employed the loader and driver of a truck. Neither the loader nor truck was fitted with scales. The driver instructed the loader how many buckets to load. The truck was overloaded at 120%. The business was prosecuted and fined \$9,900.

Evidently, the facts above are similar to the earlier case. So, why was there such a different outcome?

In this case, based on the information available from the judgment, the business had not implemented a Heavy Vehicle National Law (HVNL) compliance framework addressing this risk. Each driver was assumed to manage mass independently and inform the loader how much to load, based on that driver's experience. There was no policy or procedure in place formalising these assumptions. There was no objective load density/mass profiles or check-weighs

being conducted to verify that the driver were correctly instructing the loaders. There was no evidence of any monitoring by the business to ensure that drivers and loaders were in fact operating as the business assumed.

While reviewing the facts of the case, the Magistrates Court of South Australia (**the Court**) stated there was "complete indifference" by the company, a "complete lack of any structure...to ensure compliance" and the "company knew of its obligations but did nothing to ensure compliance".

This is another example in a long list of cases where the business assumes that workers or other parties in the Chain are acting in a certain way – but without the business giving any direction, setting expectations or checking on such matters.

You cannot leave this to chance or base safety on assumptions. You must implement a HVNL compliance framework comprised of business practices aimed at addressing HVNL risks.

So, comparing the compliance frameworks of the businesses in this case and the earlier example, how does your approach to safety measure up? ■

Are you carrying the correct documentation?

There is no doubt that documentation is a central part of the Heavy Vehicle National Law (HVNL). All road users have a responsibility to ensure they have the relevant paperwork for their vehicle and that it is readily available in the event they are required to produce it. In this article, we walk you through how to respond to an authorised officer's request for information and take a closer look at what they might ask of you.

The HVNL requires heavy vehicle drivers to keep in their possession certain documentation whilst operating a heavy vehicle. This may include notices, permits, accreditation certificates or induction letters.

Under the HVNL, some authorities are given a multitude of compliance and enforcement powers which include the ability to require production of documents and the provision of information.

Driver responsibilities

- If the operation of a heavy vehicle requires certain documentation to be carried, drivers must ensure that they have a hard or electronic copy of the documentation in their possession before starting (and during) the journey.
- Drivers must ensure that the documentation:
 - is valid and current;
 - is accessible and readily available to be read and understood by an authorised officer; and
 - contains vehicle identification or configuration details, if the documentation is vehicle-specific.
- Drivers must also ensure the heavy vehicle is operated in accordance with any conditions or requirements of the documentation; for example, mass or dimensions, warning devices, routes or restricted hours of operation.

Operator responsibilities

Vehicle operators should ensure that:

- drivers are provided with valid and appropriate documents required to operate the heavy vehicle in compliance with the national law, any accreditation or other legal instrument (for example, a notice or permit);
- drivers understand their responsibilities regarding the operation of the vehicle in accordance with the documentation and other relevant requirements; and
- drivers are provided with an appropriate electronic device (if required) that will allow an authorised officer to read and understand all elements of any document presented without the authorised officer having to enter the vehicle.

Drivers and operators are reminded that if drivers cannot present documents that must be carried whilst operating a heavy vehicle, enforcement action may result and the vehicle may not be allowed to continue the journey.

WHAT CAN AUTHORITIES REQUEST FROM YOU?

Under the HVNL, authorised officers have the power to compel certain information and documentation from a driver of a heavy vehicle or a person responsible for a heavy vehicle.

➤ DEFINITION: AUTHORISED OFFICER

An authorised officer under the HVNL is essentially any person who is declared by the law of a participating jurisdiction to be an authorised officer for the purposes of the HVNL. Authorised persons include members of the police, the Roads and Maritime Service and the Heavy Vehicle National Regulator.

Authorised officers might request any of the following from you:

- any document, device or anything else that the HVNL requires a driver to keep in their possession;
- any document issued under the HVNL;
- heavy vehicle accreditations; and
- transport or journey documentation.

What is the difference between transport and journey documentation?

If a document has some connection to the road transport of goods or passengers by a heavy vehicle, then it likely falls under the definition of transport documentation. Transport documents are contractual documents that can include bills of lading, consignment notes, container weight declarations, contracts of carriage, delivery orders and load manifests. Journey documentation is anything (other than transport documentation) directly or indirectly associated with a transaction for the actual or proposed road transport of goods or passengers using a heavy vehicle by any transport method, or that relates to a particular journey or to journeys generally. For example, journey documentation can include tollway receipts, fuel docketts, work diary entries or repair records.

➤ REMEMBER

An authorised officer may take a copy, printout, extract or download of the information or documentation and may seize the original document if they reasonably believe that it is evidence of an offence under the HVNL. If a copy is taken, an authorised officer may require the person providing it to certify the copy. A failure to do so is punishable by a penalty of up to \$3,000.

WHAT NOT TO DO

Often the documents that are requested are the type that the business is legally required to keep. If you do not have these documents you should speak to a lawyer to assist you in preparing a response.

You must never create fake or false documents to make it seem that you have complied with the directions of an authorised officer. Producing falsified documents or information is a serious offence and will be held against you when the court determines the penalty for the original offence being investigated.

A GUIDE TO RESPONDING TO AN AUTHORISED OFFICER'S REQUEST

If an authorised officer requests information from you, follow the steps listed below.

1. Report the request internally to your compliance officer, manager or director.
2. How long have you been given to comply with the notice to produce? If it is a short period and you are concerned that you will not be able to fully comply in that timeframe, request a short extension. Make sure to do this well before the time for compliance expires.
3. Get legal advice. Requests for information give rise to potential legal liability and penalties for non-compliance or partial compliance and should be escalated appropriately. Your lawyer can help you to understand the full scope of documents that may need to be produced and will also consider whether the request falls within the scope of powers given to the authorities under the relevant legislation.
4. Conduct thorough searches of all your records. The legislation requires that you provide information in your possession or control. If documents are in the possession of a third party or are archived, but you have the ability to obtain the document, it is likely within your control and ought to be produced.
5. Consider whether you have a reasonable excuse not to comply with the directions. If, for example, the request is oppressive and requires you to produce a substantial amount of documentation, you may be able to negotiate a sample size to be produced.
6. Collate all the relevant documents/information and provide them to the authorised officer and keep a copy of the documents you have produced. Think carefully about providing additional information beyond what is requested. ■



CAUTION: If you receive a request from an authorised officer, you must provide the requested information within the stipulated timeframe unless you have a reasonable excuse not to do so. Failure to provide any documentation or information lawfully requested may result in a penalty of up to \$6000 per offence.

➤ Continued from page 1 "What can new technologies do for your business?"

WHICH ELEMENTS OF CoR ARE SUITED TO COMPLIANCE TECHNOLOGY?

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

▶ IMPORTANT

Using technology in your business practices will not itself absolve you of responsibility for CoR compliance.

Technology solutions can be used to track, manage and evidence compliance. Technology solutions are particularly well-suited to CoR elements that are fixed or measurable and result in a 'yes/no' or 'green light/warning light' type of compliance assessment. These include:

- **Mass management:** Where electronic mass measurement has the benefit of providing immediate, accurate, reliable and reproducible mass data for both gross and axle load weight compliance.
- **Speed management:** Electronic real-time speed management technology is perhaps the most sure-fire method to manage speed compliance. Real-time driver warnings as well as head office incident reporting provide an immediate way to identify breaches and manage compliance. In addition, advanced systems can be linked to job and journey booking systems, so that depot or journey delays can be immediately integrated into journey planning, avoiding the encouragement of speeding to 'make up' any delays.
- **Fatigue management:** Where fatigue management and work/rest time calculation seems to be one of the areas subject to the greatest uncertainty as to how to calculate compliance. It can also be prone to abuse and incorrect reporting to mask non-compliance. Electronic work diaries and automatic calculation of work hours and rest requirements largely solve both of these problems.
- **Contractor/subcontractor management:** In circumstances where you may be responsible for managing or monitoring the CoR performance of other parties in the Chain, the use of technology can help to reduce the huge compliance burden faced by businesses with a large number of subcontractors and/or supply chain participants. For example, subcontractor pre-qualification screening can be completed and recorded electronically. Further, electronic management can assist subcontractor performance, incident notification and response/resolution close out for multiple subcontractors.

Technology solutions are particularly well-suited to CoR elements that are fixed or measurable and result in a 'yes/no' or 'green light/warning light' type of compliance assessment

INFORMATION, INSTRUCTION AND TRAINING

In September 2020, the National Transport Commission (NTC) presented a monthly NatRoad webinar. Warren Clark, the CEO of NatRoad, emphasised that the future HVNL would be more reliant on technology and vehicle-generated data.

In an opinion piece for Australasian Transport News, Mr Clark also stated:

"It was clear from the presentation that the days of drivers carrying a sheaf of paper permits or authorisations will soon be something of the past.

NatRoad supports the use of technology, particularly to enhance road safety. Newer, safer technologies, moving ultimately to autonomous vehicles, will have a revolutionary effect on the transport task."

Technology is particularly useful in situations where employees and other supply chain participants need to be provided with information, instruction and training. Recently, the federal government and South Australian Government joined with the South Australian Road Transport Association to buy the HVSIm and software package. This includes a training simulator designed to improve road safety in South Australia by helping learner heavy vehicle drivers navigate difficult and dangerous routes, such as the South Eastern Freeway descent, with an aim on improving safety behind the wheel. Federal Transport Minister Michael McCormack believes this kind of technology can help prevent further loss of lives on our roads.

The future of the transport sector is likely to look a little more technological

TECHNOLOGY IN ENGINEERING TO ENHANCE SAFETY AND PRODUCTIVITY

A focus on engineering can help minimise risk on the road for your business. Consider innovation advances in vehicle technology, design and equipment in recent years. Recently, a Queensland business called Arrows re-engineered a vehicle to automatically collect traffic cones off the road. The primary goal being to remove the risk to road workers from passing traffic.

This company specialises in road safety solutions and calls its Isuzu-based rigid vehicle the Automated Cone Truck (ACT). With a single operator, the ACT automatically deploys and retrieves cones from work sites, removing the need for two people to be exposed to the risks of live traffic and potentially saving lives. Arrows states, *"The ACT not only improves safety, but also improves productivity."* Engineering and vehicle design solutions can also be used to manage CoR safety issues, such as the use of on-board mass management or in-cab fatigue monitoring technologies.

A SAFE AND INNOVATIVE FUTURE

Technological developments can allow business to work efficiently and in a safer manner, including in traditionally dangerous workplaces or sectors. Innovation can make work safer and reduce the risks arising from transport activities. The future of the transport sector is likely to look a little more technological. Some will lament the loss of the old habits and others will see it for what it is – better business. ■

Table: How technology supports CoR compliance

Meshal Althobaiti, Lawyer, Holding Redlich

The table below outlines matters that your business will need to check to ensure it has taken 'all reasonably practicable steps' to prevent breaches of the Heavy Vehicle National Law (HVNL). In particular, this table sets out the place for technology in helping your business understand and demonstrate compliance. ■

TABLE: HOW TECHNOLOGY SUPPORTS CoR COMPLIANCE 	
Matters to consider	How compliance technology systems can assist
Have you accurately and safely weighed the heavy vehicle and its load?	Electronic mass measurement provides for greater certainty and substantially reduces the risk of mass breach.
Have you provided and obtained sufficient and reliable evidence to calculate the weight/measurement of the heavy vehicle or its load?	Electronic compliance systems may permit and record job/journey booking or logging and cargo mass details to assist with mass compliance. Care should be taken to ensure all available mass data is uploaded and any conflicting entries (e.g. different mass shown in job booking and consignment note) are resolved prior to driving.
Have you managed, reduced or eliminated a potential contravention arising from the location of: <ul style="list-style-type: none"> ■ the heavy vehicle; ■ the load in the heavy vehicle; or ■ goods in the load? 	This compliance measure is essentially aimed at axle weight limits, which can be accurately calculated in real time using electronic compliance systems.
Have you exercised supervision or control over others involved in activities leading to the contravention?	Managing the input and performance of multiple third-party contractors, subcontractors and supply chain participants is one of the more complex aspects of Chain of Responsibility (CoR) compliance. Contractor/participant management platforms are able to provide line-by-line reporting on third-party compliance so that ongoing education and compliance activity can focus on the weak links, thereby improving overall compliance performance along your supply chain. Remember that parties in the Chain only have a positive duty to notify regulators of 'notifiable incidents' under WHS laws. However, you should consider how to ensure the safety of your transport activities and/or ensure that you do not encourage or reward others in the Chain to breach their duties. Sometimes this requires you to notify and engage with other parties (not notify the regulators) when you detect a compliance problem.
Have you maintained equipment and work systems to enable compliance with the HVNL?	An electronic compliance management system is just that, a structured, live and responsive work system that facilitates your compliance, and the compliance of others. The benefit of an integrated technology compliance system is that the system will integrate compliance issues and work practices from across areas or participants, avoiding the need for your business to otherwise try to link reporting and compliance in one area with that of another, which increases the chances of a compliance issue falling through the cracks of an ad hoc or paper-based compliance system.
Have you addressed and remedied similar compliance problems that may have happened in the past?	One of the most critical CoR compliance responsibilities is to respond to and remedy the situation when something goes wrong. Electronic non-conformance notification and recording of remedial steps and close-out actions – particularly where this involves input from multiple parties along the chain – helps to provide transparency and accountability for compliance, as well as incident response and rectification.

How to use transport contracts as a tool for compliance

Rebecca Niumeitola, Lawyer, Holding Redlich

Your obligation to ensure so far as reasonably practicable the safety of your transport activities typically extends to ensuring that your transport contracts include terms requiring mutual compliance with Heavy Vehicle National Law (HVNL) and escalation procedures to address contraventions of such obligations. In this article, we look at terms which you can include in transport contracts to support your and others' compliance with the HVNL.

CONTRACT STAPLES

There are certain staples of transport contracts today which are used to support the respective compliance with the HVNL of the parties to such contracts. They include:

- broad statements that both parties will comply with HVNL obligations;
- warranties that each party will not ask or require the other party to do anything that would cause the other party or its employees to breach the HVNL; and
- escalation procedures.

So, what exactly are escalation procedures? Escalation procedures are an essential part of contracts in circumstances where HVNL obligations are ongoing and where instances of one party breaching HVNL requirements can potentially expose another party to prosecution.

Moreover, lessons from sentencing under the HVNL tell us that penalties tend to be higher if you do nothing when you are on notice that your business partner (e.g. another party in the Chain with whom you jointly conduct transport activities) frequently breaches the HVNL when providing services to you. Including escalation procedures in contracts are a way to respond to such risks.

Terms providing escalation procedures include:

- a. obligations for a party to notify the other if it suspects a contravention or actually contravenes the HVNL during the course of performing the contract and any remedial steps that the party takes;
- b. entitlements for a party to refuse to provide transport services if performance would result in it breaching the HVNL; and
- c. entitlements for a party to terminate a contract for convenience if there is a breach of the HVNL during the course of the parties' dealings with each other or if there is an HVNL prosecution commenced against another party.

Whether a party exercises this option is discretionary. For example, a party may see commercial value in continuing contractual arrangements with another party which notifies it of a minor breach of the HVNL which has been promptly rectified.

CONTRACT ADD-ONS

Contract basics will often be backed-up by optional terms which include:

- **Obligations for a party to comply with another party's HVNL compliance policies and procedures**

Requiring compliance with Chain of Responsibility (CoR) policies and procedures can be a useful tool to ensure uniform approaches to satisfying HVNL requirements (in particular where transport activities may be jointly conducted or the transport activities of one party interlock with those of another party) and to share compliance resources where you are dealing with parties that don't typically have sophisticated HVNL compliance resources at their disposal.

For example, a transport services provider who deals with small business consignors or consignees might want to include a term for their customers to comply with its HVNL policies and procedures to 'plug' a potential HVNL knowledge gap in that supply chain – and prevent those consignors from consigning non-compliant loads for transport. By sharing procedures detailing matters such as packing, restraint or weight requirements for packages, the transport services provider can ensure that goods which it collects are prepared for transport in a manner that means that the transport services provider is not likely to breach its own obligations when providing transport services for those goods.

- **Terms setting out specific procedures to achieve compliance with the HVNL as they relate to the services supplied or acquired by the parties**

CoR parties cannot contract out of their HVNL obligations. However, they may want to include terms clearly setting out how they want to address compliance with HVNL obligations as they arise in the parties' dealings with each other.

For example, a transport provider who regularly collects goods from a customer may want to include terms in its contract:

- a. requiring the customer to weigh the goods and provide a docket detailing the weight of the goods prior to collection so that the transport provider can in turn seek to comply with its own mass obligations under the HVNL;
- b. requiring the customer to pack goods in a certain manner to support the transport provider's subsequent compliance with its own restraint obligations; and
- c. entitling the transport provider to refuse to collect goods if the customer does not provide the weight of the goods or pack them in the appropriate manner.

WHY INCLUDE HVNL OBLIGATIONS IN CONTRACT TERMS?

You don't need your contracts to include HVNL obligations for such obligations to apply to both parties. However, including HVNL obligations in contracts does the following:

- Signals to your business partners (other parties in the Chain) and the regulator that you require compliance with the HVNL in your business practices.
- Gives you contractual recourse against business partners (other parties in the Chain) where they fall short of their HVNL obligations and would otherwise potentially expose you to the risk of penalty or prosecution.

Your contract terms may not save you from a prosecution under the HVNL if your conduct ultimately contravenes the HVNL. However, contract terms do provide scope for:

- a. added opportunity to discuss with your business partners contraventions of the HVNL and to give them warnings about their conduct;
- b. terminating a transport contract if appropriate; or
- c. seeking compensation where another party breaches HVNL-related obligations to you causing you loss or damage. For example, if a transport provider relied on misinformation in a weight docket provided by a consignor that resulted in a truck rollover then that might give the transport provider scope for action against the consignor. ■

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.

Common mistakes

Q What type of mistakes bring about prosecutions under the Heavy Vehicle National Law (HVNL)?

A Businesses that do not take all reasonably practicable steps to ensure the safety of their transport activities, or that 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.

Your business can be prosecuted if it fails to have in place business practices aimed at managing Chain of Responsibility (CoR) risks relating to transport activities it performs (either solely or in conjunction with another supply chain party). Your business can also be investigated and prosecuted for failing to develop and implement business practices aimed at ensuring CoR compliance, without any need for an on-road incident to first occur as a catalyst. Prosecutions and investigations have been brought in, among others, the construction, primary production, consumer products, landscaping, retail, waste and local government sectors.

In addition, courts can disqualify individuals from running a transport business or being in charge of any relevant 'transport activity' and make orders for businesses to be subject to a program of performance management and oversight by the regulators, called a 'supervisory intervention order'.

CoR obligations can be breached in many ways and the most common mistakes that can create breaches of CoR compliance stem from:

- **Not knowing where your business or role fits in CoR:** There are many businesses that don't know their place in the CoR framework. Knowing your role in the CoR can impact on the type of responsibilities you are expected to perform. You need to know where you fit in the chain so the right process can be implemented to meet your requirements under the HVNL.
- **Not having the right CoR system management processes in place:** When implementing your compliance processes you should consider the broader risk. This means thinking about how CoR compliance positions itself within existing risk management systems.
- **Not monitoring CoR compliance:** Once your business has designed and implemented its CoR compliance management framework, you must measure and monitor compliance to ensure that the systems implemented are successfully ensuring safety. In order for executives to discharge their duty at this point, they need to receive compliance performance reporting.

Tunnel collision

Q One of my trucks collided with the top of a tunnel. Would I be required to make compensation under the HVNL?

A Under s 611 of the HVNL a court may make a compensation order requiring a person convicted of a CoR breach to compensate the road manager for damage caused to road infrastructure as a result of the offence. In making such an order, the court must conclude that, on the balance of probabilities, the damage was caused or partly caused by the commission of the offence. However compensation under s 611 can only be ordered when a CoR conviction has been recorded.

Chapter 4 of the HVNL relates to Vehicle Operations – Mass, Dimension and Loading.

According to s 94, the purposes of Chapter 4 are to improve public safety and damage to road infrastructure by "imposing restrictions about...the projections of loads on heavy vehicles."

The dimension requirements reference national regulations that may deal with the dimensions of the load on a heavy vehicle. It is an offence to drive a vehicle that does not comply with the "dimension requirements applying to the vehicle."

Subcontractor non-compliance

Q I own a transport business and wanted to know if I am responsible for non-compliance by subcontractors?

A The primary duty under the HVNL is a shared one. Each person in the CoR has a non-delegable safety duty. Those duties are concurrent, meaning that they are overlaid and run together and one person is not absolved of responsibility just because someone else shares responsibility.

There is a current line of thought circulating that if you engage a third party subcontractor to perform a task, you are automatically absolved of or meet your safety duty under the HVNL. Unfortunately, it is not this simple.

The HVNL says that you cannot contract out of a duty that you owe under it. So even if you engage a subcontractor to perform your transport activities or part of them, you may remain responsible for their performance. Your responsibility will increase the more control or influence you have over how the subcontracted transport activity is conducted. But this does not mean that you are always responsible for the conduct of others. A series of Work Health and Safety cases provides the following circumstances where you will not be held responsible – but you have to meet all of them in order for this to apply:

- You must not, and it must not be reasonable to expect you to have the skills or expertise to carry out the relevant task.
- You must not play a role in carrying out the relevant task.
- You exercise due diligence in selecting any independent contractor to do the work or to ensure that the person on the other side who is performing the task is reasonably skilled and capable of doing so safely.
- You stipulate whatever conditions are required in order to avoid the risk of the work not being performed safely (e.g. you include in your terms of engagement that the person must perform the work safely).
- You check, so far as it is reasonable to expect you to do so, that the other person is performing or has performed the work safely. ■

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Fatal collision for fatigued driver

The upcoming holiday period can be a busy time for parties in the supply chain and each road user has a responsibility to stay alert to the warning signs of fatigue. As restrictions on movement between states are eased and more people get back onto the roads, this article is a timely reminder to check whether you are familiar with the signs of fatigue. We look at the facts of a fatal collision to highlight the severity of this issue.

On 16 January 2018, a driver headed south on the Newell Highway in his truck carrying prefabricated concrete panels. Eyes heavy, he fell in and out of sleep while his truck wove in its lane and passed the bright yellow, red and flashing signs that cautioned 'roadwork ahead', 'reduce speed' and 'prepare to stop'.

Within moments, there was an impact that included:

- a crash that killed two, grievously injured three and harmed seven;
- a moment the Chief Judge of the District Court of New South Wales (**the Court**) said "irrevocably changed the lives of many people and the lives of many people in the communities in which the victims, their families and friends live";
- a collision that led to the driver being convicted of two counts of dangerous driving occasioning death, three counts of dangerous driving occasioning grievous bodily harm, seven counts of causing bodily harm by misconduct by wanton driving, and related charges that included contravening rest hours under the Heavy Vehicle National Law (**HVNL**); and
- an aggregate sentence of imprisonment for the driver of 9 years and 6 months with a 5 year and 4 month non-parole period.

DRIVER FATIGUE

The Court held that the collision was caused by driver fatigue, which brought about micro-sleeps and inattention. Two nights before the collision the driver had 4 hours and 45 minutes rest and on the night before he had 5 hours and 45 minutes sleep. The driver was so affected by fatigue that when he passed warning signs and approached the queue of cars, he did not break, swerve, decelerate or take any evasive action.

DO YOU KNOW THE WARNING SIGNS?

The HVNL takes an explicit stance on driver fatigue. Section 228 prohibits a driver from driving while impaired by fatigue. Section 26E prohibits other CoR parties from asking, directing or requiring or entering contracts that would cause drivers to drive while fatigued.

For the driver, the Court found that he knew about his state of fatigue prior to the collision, but chose to ignore it.

> IMPORTANT

If you spot the signs of fatigue, don't ignore them, don't drive or let your driver get behind the wheel.

Signs of fatigue include:

- micro-sleeps;
- heavy eyes;
- excessive yawning;
- blurred vision;
- lack of alertness or concentration, such as missing road signs;
- mood changes; and
- difficulties manoeuvring the heavy vehicle, for example veering out of the single lane, near accidents, inability to maintain a constant speed.

If you spot signs of fatigue:

- If you are the driver, let your supervisor know and seek to make alternative arrangements so that you are not driving while impaired.
- If you are another party in the CoR, make enquiries with the driver about how tired they feel and whether they have had sufficient rest. If you are unsatisfied that they aren't fatigued, seek to make alternative arrangements to avoid them driving while fatigued.
- Record actions you take to manage work arrangements for drivers who you suspect or know are impaired by fatigue.

UNDERLYING HEALTH CONDITIONS

Sleep apnoea and sleep-related issues appear to be a common factor in heavy vehicle collisions.

In this case, the driver's undiagnosed sleep apnoea appears to have contributed to his fatigue on the day of the fatal collision.

He had even complained about it to a number of persons in the days preceding the accident.

We recently saw in *R v Livas (No 2)* how a truck driver's long history of untreated sleep-related issues was a critical factor that led to an collision at an intersection on the Monaro Highway that resulted in the death of a four-year-old passenger in another car. In that case, the driver had referrals to a sleep clinic which he did not follow up on. Despite being aware of his possible sleep disorders, he pursued work as a commercial driver, inaccurately asserting he had no such health issues in medical exams and his application to renew his licence.

It is critical that everyone is proactive and attentive when it comes to health. If you become aware of any health conditions that may impact on drivers' ability to drive then it is important that you take action. If you are:

- a driver, seek medical care and treatment and let your employer know the steps you are taking; or
- an employer and you notice ongoing signs of fatigue in a particular driver or receive reports of it, consult the driver and, where appropriate, consider options to ask the driver to take a medical exam before continuing to drive.

It may be difficult to raise health concerns where the consequence could impact on a driver's livelihood. However, as the above cases demonstrate, taking proactive steps to address and treat drivers' health concerns can save lives.

FATIGUE'S TRUE TOLL

The trial of the driver in the first case discussed above was emotional. After over 20 years as a professional truck driver, the driver continued to suffer post-traumatic stress disorder as a result of the collision and vowed to never drive a heavy vehicle again. The Court observed he wept stating, "I am devastated by what happened. I find it difficult to cope with the grief that the families of the victims have had to endure as a result of what happened."

Looking at the lengthy terms of the HVNL and the mounting paperwork required to administer it in your business, it can be difficult to see what the point of it all is. This case is an acute reminder that sometimes the underlying point is to protect two lives, ten bodies and a community from ongoing grief. ■

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OUT JANUARY 2021

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- What if you don't agree with an improvement notice?
- Another lesson from the courts