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JANUARY 2021

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From Your Editor-in-Chief



This month, we take a look at a development that has been a long time in the making; Electronic Work Diaries (EWDs) are finally here.

After a long gestation, two products have recently secured approval from the National Heavy Vehicle Regulator (NHVR). Although the arrival of EWDs doesn't change the underlying fatigue management obligations, EWDs do have the capacity to drastically change the day-to-day documentation and management of work and rest.

Recently, the NHVR has been reaching for enforcement tools other than penalty notices and prosecution. We take a look at two cases where the NHVR issued prohibition orders when it had immediate safety concerns. The consequences of a prohibition notice being issued can be severe, so we discuss some tips on how to avoid being issued with one.

We also revisit the concept of a Safety Management System (SMS). While it isn't mandatory to implement a full-scale SMS in order to comply with the Heavy Vehicle National Law (HVNL), there may be good reasons for doing so, particularly in businesses that already have mature safety management frameworks.

We hope you enjoy!

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

Operators hit with prohibition orders

Nathan Cecil, Partner, Holding Redlich

When a business compromises safety by failing to proactively and adequately manage risk, there are a variety of tools the NHVR can use to address the issue depending on the severity of the breach. This article looks at a recent example of how the NHVR can restrict companies to operate, direct or schedule heavy vehicles until they undertake specific corrective processes as well.

On 13 November 2020, the NHVR issued a prohibition notice to Sidhu Investments (Qld) Pty Ltd t/as Auswide Linehaul Services (Auswide Linehaul). The notice required the business to cease operating its fleet of approximately 100 heavy vehicles until it had implemented mandated fatigue management controls, fatigue management training, fitness for duty controls, systems for non-conformance management, incident management, vehicle safety and due diligence.

The prohibition notice was issued under s576A of the HVNL.

The prohibition notice was issued following inspections conducted at the business' premises in September 2020, forming part of an ongoing safety investigation conducted by the NHVR. The investigations followed a number of incidents involving the business, including a heavy vehicle roll-over and a near miss head-on collision with a heavy vehicle operated by a third party.

The NHVR can issue a prohibition notice if it reasonably believes that an activity involving a heavy vehicle is occurring or may occur that will involve an immediate or imminent serious risk to the health or safety of a person. We take a closer look at this in this issue in our article, **Prohibition notices in the spotlight** (see page 6).

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How-to: Implement a safety management system

Nathan Cecil, Partner, Holding Redlich

It may be the start of a new year but your safety obligations under the HVNL remain unchanged. Each person in the heavy vehicle supply chain has a responsibility to promote and prioritise safety. In this article, we highlight the benefits of implementing these systems and demonstrate how they can assist your business in keeping on top of its safety obligations.

Businesses must do everything reasonably practicable to prevent or minimise potential injury, danger or loss by ensuring safe transport activities. Having an SMS in place can be one of the most effective ways of meeting your safety obligations under the HVNL. Adopting and actively using an SMS has proven to help reduce safety-related incidents in other heavy transport industries, such as maritime, rail and aviation.

► DEFINITION: SAFETY MANAGEMENT SYSTEM (SMS)

An SMS is a systematic approach to managing safety (including the necessary organisational structures, accountabilities, policies and procedures) that is integrated throughout your business wherever possible.

An SMS helps your business to continuously improve the safety of your operations through the following four components:

1. Safety policy and documentation.
2. Safety risk management.
3. Safety assurance.
4. Safety promotion and training.

► Continued on page 4

— HELPDESK QUESTION OF THE MONTH —

Can I use my fatigue-regulated heavy vehicle for personal use, for example, to go to the bank? (answer on page 7)

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

Managing fatigue instead of managing the books

Nathan Cecil, Partner, Holding Redlich

It is finally time to put down the pen and paper. Although EWDs have been recognised and permitted under the HVNL for some time now, platform owners are required to obtain certification of their product before being used by transport operators. After two years of comprehensive review and consultation, heavy vehicle work diaries can now turn digital for approved providers.

An EWD is an electronic device or system approved by the NHVR, to monitor and record the work and rest times of a driver and is a voluntary alternative to the written work diary.

As of 1 December 2020, Step Global's 'Smart eDriver' and Telectrac Navman's 'Sentinel' EWDs have been approved for use in all HVNL jurisdictions.

The Minister for Infrastructure, Transport and Regional Development Michael McCormack states that he hopes the use of EWDs "...will cut this red tape enabling drivers to record their work and rest hours by simply pressing a button, rather than spending time ruling lines and counting multiple time periods on multiple pieces of paper."

NHVR Chair, Duncan Gay, put the development in even starker terms, saying:

"Right now, industry is managing 60 million pages of work diary paper per year – this equates to 14 B-Double loads of red tape."

"Today's announcement will enable companies and drivers to more effectively focus on managing their fatigue, rather than managing the book – which is an important step forward in delivering improved fatigue safety outcomes."

"As well as reducing time checking written work records on the side of the road, it also delivers huge cost and time savings for heavy vehicle businesses with many operators spending multiple days every week reconciling the written workbook with internal systems."

Australian heavy vehicle drivers will now have a choice in how they record their work and rest hours, following the approval of the first EWDs. We look forward to seeing the safety outcomes of this technology in the area of fatigue management with an improved and more accurate paper trail. ■

► Continued from page 1 **"Operators hit with prohibition orders"**

We can infer that the NHVR considered the occurrence of repeat safety incidents and, presumably, other matters identified during their inspection, to indicate that certain aspects of safety and risk management were not being proactively managed, posing a risk to health and safety.

This prohibition notice has since been lifted, with Auswide Linehaul working with the NHVR to develop and implement measures to address the NHVR's concerns including:

- engaging a third party to conduct driver training and driver skills/competency assessments;
- developing and implementing the mandated controls for fatigue management, fatigue management training, fitness for duty, non-conformance management, incident management, vehicle safety and due diligence;
- conducting defect inspections on 65 heavy vehicles;
- engaging third-party safety management consultants to assist with the development, implementation and training relating to risk management procedures; and
- continuing to install real-time fatigue measurement and monitoring systems in the business' fleet of heavy vehicles.

Separately, Auswide Linehaul conducted an audit of its policies, procedures, documents and management practices. The business also noted that it had spent over \$350,000 on the installation of fatigue management technology, electronic work diaries and GPS tracking of vehicles.

A separate business (although bearing a similar name), Punjab Roadtrains Pty Ltd

trading as Auswide Transport Solutions (**Auswide Transport**) and an associated business, Southern Cross Freight Lines Pty Ltd (**Southern Cross**), were also issued with prohibition notices three days after Auswide Linehaul. That prohibition notice similarly focused on fatigue management safety concerns held by the NHVR.

The prohibition notices against Auswide Transport and Southern Cross were lifted after the businesses entered into an undertaking to the NHVR as to the development and implementation of additional compliance practices to address the NHVR's concerns.

WHAT YOU CAN LEARN

The occurrence of a series of safety incidents and/or inspections by investigators that suggest HVNL safety is not being properly managed may lead to the NHVR issuing a prohibition notice which effectively grounds the fleet until it is complied with lifted or successfully challenged and overturned.

Either way, the immediate commercial impact to a business whose fleet is instantly grounded would be significant.

If your business is the subject of investigation, the best approach is to ask the investigators to identify any concerns they have and either satisfy those concerns by explaining how the business already addresses them or agree to implement corrective measures in conjunction with the investigators.

Doing this may allow you to avoid what could otherwise be the profound commercial and financial impacts of having your fleet immediately grounded. ■

Promoting safety with COVID-safe toolbox talk kit

The NHVR's COVID-19 toolbox talk kit is a great way for heavy vehicle industry operators to keep having important conversations about vehicle, workplace and hand hygiene, wearing a face mask and mental health.

Although we welcome the COVID-normal start to the new year, it is important to encourage ongoing conversations about safety and not become complacent with the current situation in Australia.

Added to the NHVR's existing suite of industry safety, accreditation and compliance material, the toolbox talk kit includes a series of quick guides, videos, checklists and templates that provide information on COVID-19 safety.

"Many heavy vehicle businesses are still located within or are required to operate in areas where COVID-19 cases have been reported," NHVR CEO Sal Petrocchio said.

"All transport operators should continue to have safety conversations with their staff and drivers to reduce the risk of transmission within their workplace, when handling freight

or interacting with other parties in the supply chain."

The release of the toolbox talk kit during National Safe Work Month late last year, was a great reminder for operators to continue having frequent and effective safety conversations. These kits are a simple and effective way to distribute important safety information and share responsibility for everyone's safety.

"A recent NHVR Safety Survey showed that 78 per cent of managers agree that there is an ongoing program of safety promotions and communication, while 52 per cent of drivers and 71 per cent of loaders agreed.

"The NHVR's material can be easily modified to include company information such as logos and additional topics that are specific to their business, such as how to report safety incidents and what to do if staff are sick or notice symptoms."

The videos, templates, quick guides and checklists are available on NHVR's website: www.nhvr.gov.au/sms-toolbox-covid-19. ■

Lead your business into a new year

Nathan Cecil, Partner, Holding Redlich

There is no doubt that with all the changes, disruptions and increased demand on supply chains in 2020, executives were put to the test. The pandemic revealed the extent to which our economy relies on the movement of freight across the country and parties all along the supply chain rose to the challenge. In this article, we unpack and simplify the duties and responsibilities of executives to understand how you can safely steer your business into 2021.

Now is a great time to critically reflect on your business' safety policies and practices. Ask yourself, what did you learn from last year's challenges? Are there any gaps or shortcomings that you need to address?

While the role of executives may seem straightforward, with so many moving parts in the heavy vehicle industry, it can be helpful to regularly recap each party's safety obligations in their specified roles and to each other. After all, the supply chain is interconnected and there is a shared responsibility to ensure that breaches do not occur.

WHO IS AN EXECUTIVE?

Section 26D of the HVNL defines 'executive' as an 'executive officer' of a corporation, being:

- a director;
- any person who is concerned or takes part in the management of the corporation – typically not extending to just any 'manager', but only those very senior people who can effectively set the direction of a company;
- a partner in a partnership; or
- a management member of an unincorporated body

Each month, we make reference to the executive's independent and positive duty to ensure, so far as reasonably practicable, that their business is complying with its Chain of Responsibility (**CoR**) safety duties. This is primarily achieved through implementing systems aimed at preventing breaches and eliminating or minimising risks, as well as monitoring conformance and compliance by their employed drivers.

THE ACTIVE EXECUTIVE OBLIGATION

No incident, accident or on-road offence needs to occur before an executive can be investigated and prosecuted. Executives must actively ensure that their business is identifying and managing transport activity risks. Does your business allocate sufficient resources to implement and monitor systems and processes to eliminate or minimise risks?

If executives neglect to do these things, they may be in breach of their obligations regardless of whether any on-road non-compliance has occurred.

The HVNL specifies that executives are required to:

- understand what transport activities their business undertakes;
- understand the risks and hazards arising from those activities;
- understand how to manage transport activity risks safely;
- ensure that their business has and uses appropriate resources to eliminate or minimise those risks; and
- check that those resources and processes are being used and implemented, and are effective in eliminating or minimising those risks.

> IMPORTANT

The executive obligation is not passive – it is active. It is also personal to the executive and cannot blindly be delegated. Even if the executive delegates CoR compliance to the safety team, the executive must actively check in to ensure the job is being done properly.

EXECUTIVE REPORTING

Everyone in the business has a role to play in upholding and ensuring safety.

All parties in the supply chain under the HVNL have an obligation to ensure breaches of road transport laws do not occur. While executives hold the greatest responsibility, all parties are responsible to each other. Part of this is ensuring there are open lines of communication – namely, a clear and direct way to report back on safety compliance and incidents. Executive reporting is an essential pillar of 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.

Executives must ensure that their business receives, considers and responds in a timely way to information about risks, hazards and any incidents. It is therefore essential that executives receive some form of CoR safety compliance performance reporting – in much the same way as they would already receive work health and safety reporting. Without it,

how can an executive know what has been implemented and whether it is working, in order to discharge their duty?

It is not practicable to expect executives to personally perform the compliance checks and singlehandedly obtain the necessary information to carry this out. For executives to be able to discharge their duty, they will largely rely on feedback from others within their business.

PENALTIES FOR EXECUTIVES

Evidently, CoR safety is a boardroom issue as well as an operational issue. If executives fail to discharge their duty, they can be prosecuted and fined, even without an incident occurring. The consequences of failing to proactively ensure compliance with the HVNL can be severe.

Sections 26F, G and H of the HVNL set out the maximum penalties for executives, as follows:

- category 1 offence (conduct that recklessly exposes a person to risk of injury) – a maximum of \$300,000 and/or up to 5 years in jail;
- category 2 (conduct that exposes a person to risk of injury) – a maximum of \$150,000; and
- category 3 (conduct that breaches the executive duty) – a maximum of \$50,000.

Not only can executives who fail their duty be hit with hefty fines and potential jail time, they can also be banned from being involved in the management of their business or performing certain safety-critical tasks within their business.

STEER YOUR BUSINESS THROUGH UNCERTAINTY

Last year, the way we live and work fundamentally changed. Now, the need for robust and forward-looking safety systems, policies and practices has never been more apparent.

The challenges of COVID-19 have also highlighted how business practices can be improved and what kind of leadership is required to steer a business through uncertainty.

The unprecedented pressure experienced by the heavy vehicle industry demonstrated time and time again how crucial the transport supply chain is to the proper functioning of society. This should motivate executives to promote and prioritise a proactive approach to safety in the new year. Good leadership will be reflected not just in the boardroom but down the supply chain in how each party manages their safety obligations. ■

➤ *Continued from page 1 “How-to: Implement a safety management system”*

Essentially, implementing these four components provides your business with a structured set of guidelines that detail the processes for maintaining safety in accordance with established regulations, specifications or legislation.

As with any compliance framework, the components seek to implement communication processes, risk controls and governance practices for maintaining compliance.

Let’s take a closer look at the above components and how to implement them.

SMS COMPONENTS

1. Safety policy and documentation

Your entire organisation should be committed to establishing and maintaining policies and procedures that ensure work is performed safely.

Business owners or executives have direct duties under the HVNL and are accountable for their business using safe practices throughout its commercial operations. Of course, executives can delegate tasks to implement those safe practices, but ultimately executives cannot delegate their duties under the HVNL.

As a first step for limiting liability and ensuring safety across your business’ commercial activities, you should put a documented safety policy in place that points the business in the right direction.

A safety policy should:

- acknowledge that executives and your organisation are committed to safety;
- reflect your business’ operating environment;
- outline your business’ approach to safety;
- explain how safety and risks will be managed and by who; and
- show how your business will continuously improve its safety performance.

As a second step, you should implement safety objectives. The purpose of these safety objectives is to complement the safety policy and help workers envision how safety can be achieved in practical terms.

Some examples of safety objectives include:

- conducting weekly safety meetings with employees;
- responding to all hazard reports within 24 hours;
- reviewing all risks and risk controls at least every six months; and
- promoting reporting of maintenance issues to reduce vehicle downtime.

As a third step, you should clearly establish the safety responsibilities of each employee. Responsibilities should be clearly defined, appropriately allocated to the right person in your business and there should be a direct reporting line to upper management/executives to report safety issues.

Establishing a direct reporting line is a critical part of ensuring compliance. It allows executives to demonstrate that not only are safety measures in place, but that they are taking proactive steps to ensure any safety issues during day-to-day operations of the business are appropriately reported.

Lastly, all staff members should make an effort to gain operational experience and boost their knowledge of safety in their organisation. Everyone within a business has some responsibility to ensure safety, and appropriately trained staff is a major step in the right direction.

Underpinning all of the above is the documentation of each step. It is often the most burdensome but it needs to be done. While you may be confident that your business is compliant, you need to ensure the documentation can demonstrate to someone outside the business that you are complying with your obligations. Documents may include procedures, checklists and forms that can all be used to support the steps you take to ensure safety.

2. Safety risk management

There are four subcomponents to safety risk management:

- hazard identification;
- risk assessment and mitigation/treatment;
- risk monitoring; and
- incident reporting.

Together, each subcomponent ensures there is a proactive approach to managing safety and creates a process of identifying, assessing, treating and monitoring the risks your business encounters.

Your risk management processes may improve where the entire organisation is collectively working towards the day-to-day identification and management of risk. This requires all employees of all levels to be mindful of the safety risks and identify hazards that your organisation is exposed to.

Employees engaged in the day-to-day operations of your business are best placed to identify different hazards, such as:

- physical objects that are clearly visible;
- risky behaviours; and
- non-observance of your business’ policies or procedures.

Once hazards are identified, you should undertake a risk assessment. A risk assessment is useful in identifying the consequences if a hazard materialises, the extent to which hazards may interact or compound, and the manner and timeframe in which these hazards should ideally be resolved.

Once a risk has been identified and assessed, the next step is to ensure that the risk has been addressed and mitigated. This requires implementing a control to mitigate the risk and then monitoring and reviewing how that control is addressing the risk.



WARNING: Never wait until something goes wrong to act – it’s important to be proactive and review the effectiveness of your risk controls periodically.

As part of your business’ safety risk management framework, there should also be a robust incident reporting mechanism.

Despite a business’ efforts, incidents and near misses will inevitably occur. When those incidents do occur, you must have a system in place to allow employees to report those incidents to the appropriate person, to gather that information, document it and allow the event to be investigated and analysed to improve future safety outcomes.

The incident reporting framework should specify the following:

- the types of incidents or near misses that need to be reported;
- who needs to report incidents, when and to whom;
- instructions for dealing with larger incidents, such as contacting emergency services and preserving the site of the incident; and
- attending to injuries and ensuring the safety of those involved.

➤ *Continued on page 5*

► Continued from page 4

3. Safety assurance

In addition to undertaking risk assessments, you should also prioritise safety assurance in your business.

Safety assurance is achieved by making a commitment to the following four aspects in your organisation:

- **Internal safety investigations** – This is a commitment to monitor and evaluate any incidents or near-misses that your organisation encounters. Importantly, we recommend that organisations are mindful of how processes can change and be improved as opposed to merely identifying and punishing those that are responsible.
- **Safety performance monitoring and management** – Your organisation should be mindful of how your SMS operates and any potential shortfalls it may have. You should also put mechanisms in place to allow stakeholders in your organisation to amend and improve the SMS. A significant consideration is how your SMS acknowledges and reacts to areas that are of increasing risk to your organisation.
- **Change management** – Safety risks often evolve out of an organisation’s inability to adapt to change. As a result, it is crucial that your SMS ensures the safety of your organisation by developing a structured approach to change management. This may involve increasing the participation of all employees in safety initiatives or even consistently evaluating the risk that a change may bring in an organisation.
- **Continuous improvement** – While it may be helpful to collect data on risk management and safety, it is of equal importance that you are mindful of how the data collected can shape an SMS. Accordingly, we highly recommend that your organisation periodically evaluates your SMS, and implements any recommended changes to your SMS.

4. Safety promotion and training

An effective SMS can be achieved by promoting and communicating safety at all levels of your organisation. In practical terms, this means:

- **Establishing adequate training and education programs** – Your organisation should offer safety training that provides employees with the knowledge and skills necessary to help identify, manage and resolve safety risks, as well as perform their responsibilities safely.



TIP: Provide refresher courses throughout the year to ensure that all employees are up to date.

- **Encouraging safety communication throughout your organisation** – You should encourage employees at all levels to communicate their thoughts on safety in your organisation. Conveniently, by opening up avenues for employees to express their thoughts when it comes to safety, your organisation’s SMS may improve more holistically.
- **Prioritising safe practices** – A successful SMS is one that is supported by all employees. Best practice states that senior management should set an example for safe working practices. Ideally, this means that a new employee entering your organisation should be able to recognise the entire organisation’s commitment to safety.

A robust SMS will significantly assist your business in meeting its safety responsibilities under the HVNL and along the supply chain. Your business will benefit by having a clear framework to manage risk and enhance safe practices, as well as a means to assist you in allocating resources to the most critical areas that have an impact on safety. ■

Checklist: How to implement an SMS

Nathan Cecil, Partner, Holding Redlich

Here is a short checklist to get you thinking about what is required for an effective SMS:

CHECKLIST: HOW TO IMPLEMENT AN SMS DOWNLOAD 	
Safety policy and documentation:	
✓	Is there a commitment from business owners and managers to ensure and improve the safety of the transport activities your business performs?
✓	Are roles and responsibilities related to safety clearly defined?
✓	Is there a process in place to manage safety when interacting with other parties?
✓	Are there policies and procedures in place that document how work is performed safely?
✓	Does your business have sufficient resources (financial, human, material) to support the SMS?
✓	Has your business identified and documented safety objectives that support the safety policy?
✓	Does your business have a safety manager/officer or someone appointed to implement, manage, communicate and promote the SMS?
✓	Does your business have an SMS Manual that outlines the safety requirements and direction for your business?
Safety risk management:	
✓	Does your business have a process in place to identify and record hazards?
✓	Do you have a culture encouraging hazards to be reported to senior management?
✓	Does your business have a risk register in place to assess risks created by hazards, develop and implement controls, and ensure the ongoing effectiveness of risk controls?
✓	Are controls in place to eliminate or minimise risks?
✓	Does your business have a formal process in place for reporting incidents and near misses?
Safety assurance:	
✓	Does your business have an internal safety investigation framework to deal with incidents or near misses?
✓	Are risk controls regularly reviewed to ensure that they are appropriate?
✓	Does your business conduct regular checks of work activities associated with documented procedures and processes?
✓	Does your business have a process to monitor and measure the control's effectiveness?
✓	Are improvements made to the SMS following outcomes of risk management and safety assurance activities?
Safety promotion and training:	
✓	Are your employees provided with appropriate and ongoing training?
✓	Does your business conduct ongoing safety promotion activities (e.g. regular briefings, toolbox talks, newsletters, display board)?
✓	Does management/leadership play an active role in ensuring workplace safety is a top priority?



TIP: For more information, see the Introduction to Safety Management Systems in the Heavy Vehicle Industry published by the NHVR, found here: <https://www.nhvr.gov.au/files/201805-0798-sms-introduction-to-sms-in-the-heavy-vehicle-industry.pdf>.

Prohibition notices in the spotlight

Rebecca Niumeitolu, Lawyer, Holding Redlich

Lately, the NHVR has been reaching for alternative enforcement tools under the HVNL. With potential to see more action in this space, this article provides guidance on the grounds upon which the NHVR can issue prohibition notices and options for businesses that receive a prohibition notice.

In November, off the back of investigations into fatigue management and safety practices, the NHVR issued prohibition notices to two related companies: Punjab Roadtrains Pty Ltd trading as Auswide Transport Solutions and Southern Cross Freight Lines, which were subsequently lifted. The NHVR also lifted a prohibition notice issued to Sidhu Investments (Qld) Pty Ltd trading as Auswide Linehaul Services (**Auswide Linehaul**).

> DEFINITION: PROHIBITION NOTICE

A prohibition notice is direction by an authorised officer to a person that prohibits that person from carrying on an activity or carrying on an activity in a certain way.

WHEN CAN A PROHIBITION NOTICE BE ISSUED?

A prohibition notice can only be issued if the authorised officer reasonably believes that an activity involving a heavy vehicle is occurring or may occur that will involve an immediate or imminent serious risk to health or safety of a person.

WHO CAN A PROHIBITION NOTICE BE ISSUED TO?

A prohibition notice can only be issued to a person who has control over the activity to which the prohibition notice is directed.

IN WHAT FORMAT CAN A PROHIBITION NOTICE BE ISSUED?

A direction that is pursuant to a prohibition notice can be given orally or by written notice. If given orally, the authorised officer must give notice of it in writing as soon as practicable after giving the oral direction.

Section 576B of the HVNL provides that a written prohibition notice must include:

- a statement that the authorised officer believes they have grounds to issue the notice;
- identification of the activity that the authorised officer says involves safety risks; and
- identification of the provision under the HVNL the authorised offer believes is or is likely to be contravened by the activity.

A notice can also include directions to remedy the risks that are the subject of the notice.

WHAT CAN YOU DO IF YOU ARE ISSUED WITH A PROHIBITION NOTICE?

You broadly have two options:

- you can comply with the prohibition notice and seek to rectify risks associated with your heavy vehicle activities, as identified in the notice; or
- you can contest the application of the prohibition notice by seeking internal review and, if that is not successful, an appeal.

HOW DO YOU APPEAL WITH A PROHIBITION NOTICE?

As appeals are technical, it can be helpful to obtain legal advice to guide you through this process.

Generally, there are usually two layers to the internal review/appeal process:

- **Staying the application of the prohibition notice**

'To stay' the prohibition notice means to stop its application.

It is important that you take note of when the direction under the prohibition notice applies to you. If it applies immediately, you should move swiftly to seek to stay the application of the prohibition notice. This is because it continues to apply until and unless it is stayed or overturned on internal review or appeal.

A failure to comply with a prohibition notice can result in significant penalties.

- **Seeking to overturn the prohibition notice altogether**

You only have 28 days after being notified of the prohibition notice to appeal it.

This is unless you obtain an extension of time from the NHVR or, request and receive a statement of reasons for the prohibition notice, in which case the period of appeal only starts once you are given the statement of reasons. It can be helpful to ask for a statement of reasons if you are unclear as to the basis for the prohibition notice being issued to you.

The NHVR website provides a form for lodging internal review applications. Usually it is recommended that when completing the form, you attach:

- a. the original prohibition notice issued to you;
- b. any statement of reasons provided by the authorised officer; and
- c. any further details of why you say the prohibition notice should not apply to you.

Grounds for review are varied and might include that the prohibition notice is issued to you when you have no control over the relevant activity. Alternatively, you could seek to dispute that the basis upon which the authorised officer issued the prohibition notice is affected by error, e.g. perhaps you did not have any contravention of the HVNL that lead to the notice being issued, perhaps there were no reasonable grounds for the officer to reasonably believe your activities involve an immediate or imminent serious risk to health or safety of a person.

A failure to comply with a prohibition notice can result in a penalty of \$11,390 for individuals and \$56,950 for companies.

WHAT IF YOU DON'T COMPLY WITH THE PROHIBITION NOTICE?

A failure to comply with a prohibition can result in a penalty of \$11,390 for individuals and \$56,950 for companies (as at the date of this article).

IS A PROHIBITION NOTICE THE SAME AS A PROHIBITION ORDER?

No. A prohibition notice is issued by an authorised officer, in circumstances where the person that is the subject of the notice has not been charged and convicted for contraventions under the HVNL. Whereas a prohibition order is an order issued by court after a person is convicted of offences under the HVNL.

WHAT IS THE END POINT OF A PROHIBITION NOTICE?

A prohibition notice can be lifted once the authorised officer is satisfied that the matters that give rise to risks to health or safety of your activities are remedied. In the case of Auswide Linehaul, the NHVR lifted the prohibition notice because it believed that the organisation had taken sufficient steps to rectify safety risks associated with its transport practices, which included giving training to drivers, introducing controls for fatigue management, conducting inspections on its vehicles, engaging an external safety consultant and installing real-time monitoring of driver fatigue. ■

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.

Does my business need a Registered Industry Code of Practice (RICP)?

Q What is an RICP and should my business adopt one?

A An RICP complies with the NHVR's *Guidelines for Preparing and Registering Industry Codes of Practice (Guidelines)* and can qualify for registration under the HVNL.

Anyone can adopt an RICP, however it must align with the Master Code established by the NHVR and reference it if there is any overlap. The RICP should be a point of guidance for all parties in the Chain of Responsibility on how to mitigate their respective transport risks and meet their obligations under the HVNL.

There are multiple benefits to adopting an RICP. It may be used as evidence in court proceedings as to the level of knowledge of hazards, risk assessments and risk controls in your business. It may also give you confidence that your business has adopted an industry standard code of practice which would be assessed favourably by a court. Adopting an RICP will give your business an improved reputation and ensure minimised cost and time spent rectifying issues.

Overall, better risk management is advantageous for your business.

Presently, there is one RICP, being the 'Master Code', which is intended to be of general application across all industries and transport activities.

There are six codes of practice currently under development, covering specific risk management situations in the forestry, livestock, agricultural/horticultural, waste and wine sectors.

There is also a code of practice for the crane industry that has been submitted for approval.

Modification approval

Q My heavy vehicle requires modifications, do I need to get any approvals before making these?

A Different types of modifications require different approvals, if any.

If a minor modification needs to be carried out, which would not cause the vehicle to be non-compliant with industry standards, approval is generally not required. Minor modifications include fittings or minor alterations such as installing additional lighting, air conditioning or alarm systems. However, it is best practice to consult with the NHVR if you are unsure whether your modification is 'minor'.

The NHVR has a Code of Practice for the Approval of Heavy Vehicle Modifications which contains modifications that require approval by an Approved Vehicle Examiner (AVE) prior to being carried out. These are more complex modifications that have the potential to pose a safety threat if incorrectly carried out. An AVE must issue a modification certificate and oversee the affixation of a modification plate once it approves the modification.

Any modifications not covered by the NHVR code must be approved by both the NHVR and an AVE. These are usually significant modifications which affect a vehicles design and structural integrity. A modification application must be submitted to the NHVR. Once this is approved, a Statement of Requirements for Modification Approval will be issued outlining the best course of action for the vehicle modification. An AVE will then need to inspect the modifications and issue a modification certificate and a modification plate once approved.

It is always better to err on the side of caution and confirm whether or not your modification requires approval before carrying them out.

Personal use of heavy vehicles

Q Can I use my fatigue-regulated heavy vehicle for personal use, for example, to go to the bank?

A It is not always feasible to access alternative means of transport for personal use. That is why the NHVR has provided drivers with additional work time to undertake personal activities.

The *National Heavy Vehicle Work and Rest Hours Exemption (Personal Use) Notice 2018 (No. 1)* provides one hour of additional work time to drivers under standard hours to carry out permitted personal activities using their fatigue-regulated heavy vehicle. The *National Heavy Vehicle Work and Rest Hours Exemption (Personal Use – BFM and AFM) Notice 2019 (No.1)* provides the same for drivers under AFM and BFM. This only applies during a driver's 24 continuous hours stationary rest break and at any time where the conditions of the exemption have been met.

What is a permitted personal activity? Anything done by the driver for personal purposes, including cleaning the vehicle or visiting a bank. Importantly, this flexibility is limited to non-commercial purposes to ensure drivers are not subject to longer working times. It is useful to look through the checklist created by the NHVR, The *National Heavy Vehicle Work and Rest Hours Exemption (Personal Use – BFM and AFM) Notice 2019 (No.1)*, to ensure that your activities are in fact, personal. Some factors to take into account to establish the distinction are whether or not you will be paid for the work you are proposing to do and whether you have been instructed to do the proposed work by your boss. ■

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\$5.55 million funding up for grabs

The latest round of funding by the Heavy Vehicle Safety Initiative (HVSII) is up for grabs for initiatives that will deliver tangible safety improvements for roads, road users or heavy vehicles. In this article, we take a look at the application process and what kinds of projects get funded.

The HVSII is administered by the NHVR, with the latest round of funding being Round 6. In this round, \$5.5 million is available.

The funding provided by the HVSII is awarded to projects on a basis of merit – that is, good projects may get funding to assist their development and implementation.

Certain rounds of funding have favoured submissions that address certain themes. In the current round, the themes are:

▪ Safer drivers

- Aimed at initiatives that result in safe, skilled drivers and safe and sustainable working practices surrounding drivers.
- Improvement outcomes might include driver competency and skills, reduced fatigue or driver distraction, fitness for duty and drivers being free of outside influence or pressure to perform transport activities in an unsafe manner.

▪ Safer vehicles

- Aimed at initiatives that help bring existing and emerging safety technology within reach of smaller and medium industry participants.
- Improvement outcomes might include the increased adoption of safety technology solutions, improvements in maintenance management, improvements in mass and dimension management and the safe and secure loading of goods.

▪ Safer road use

- Aimed at initiatives that provide education opportunities or resources to road users to encourage a mutual approach to road safety concerning heavy vehicles.
- Improvement outcomes might include improved loading techniques, technology used to assist route planning and heavy vehicle safety initiatives aimed at protecting vulnerable road users.

Applications should seek to address each of the following 'guiding principles' by which applications will be assessed:

- Principle 1 – Alignment with heavy vehicle safety priorities identified by the regulator and governments.

- Principle 2 – Implementable projects that are demonstrated as already having the groundwork laid.
- Principle 3 – Evidence-based projects that can satisfy the NHVR that they will have the positive safety outcomes desired. Evidence could include the success of similar projects within Australia or overseas or include the further development and extension of already successful projects.
- Principle 4 – Broad benefits, either nationally or at least across jurisdictions.
- Principle 5 – A holistic approach that provides a total industry-wide or issue-wide solution.
- Principle 6 – Value for money. Although the NHVR has cash to splash, they still want bang for their buck. Project proposers are expected to contribute financial or 'in kind' support for the project.

WHO CAN APPLY?

Anyone. Funding proposals submitted on behalf of a broad range of stakeholders will be looked upon favourably, i.e. those that address a problem industry-wide.

Applications for funding close on 12 February 2021. The submission form and guidelines are available from: <https://www.nhvr.gov.au/about-us/heavy-vehicle-safety-initiative>.

WHAT ARE THE ASSESSMENT CRITERIA?

Apart from having to address the above issues, proposals will be addressed according to the following criteria:

1. Demonstrated capacity to deliver the project.
2. Demonstrated evidence-based support for the project.
3. Scope of the project and its safety benefits.
4. Location and geographic reach of the project.
5. Project budget and milestone delivery plan.
6. Value for money and competitive assessment against other funding proposals.

WHAT KIND OF PROJECTS GET FUNDED?

To help get you thinking, below is an extract from the NHVR's website detailing five projects that obtained funding in the last round. ■

Organisation	Project name	Project description
Australian Fertiliser Services Association	CoR and SMS Training to Industry Stakeholders	Conduct CoR and SMS training to enhance stakeholder understanding and compliance under Heavy Vehicle National Law.
Australian Livestock and Rural Transporters Association	Managing Effluent in the Livestock Supply Chain – an Industry Code of Practice Awareness Campaign	Develop and deliver an awareness campaign to enable stakeholders to better understand how to manage effluent for the Livestock Supply Chain Industry Code of Practice.
Grain Trade Australia	Practical Steps to CoR Compliance for Australian Grain Industry Participants	Develop a program to educate the grain industry's small-to-medium enterprise sector about CoR obligations under Heavy Vehicle National Law.
Healthy Heads in Trucks and Sheds Foundation	Healthy Heads in Trucks and Sheds	Improve the mental health of heavy vehicle drivers, warehouse and distribution centre staff nationally.
Lindsay Australia	Work-related Musculoskeletal Disorder (MSD) Prevention Program	Develop a risk assessment and prevention toolkit to mitigate and reduce MSD injuries to heavy vehicle road transport drivers.

IN THE NEXT ISSUE
OUT FEBRUARY 2021

- 2020 case law recap
- Industry CoR compliance guides
- New cyber security requirements for the transport sector