



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

APRIL 2021

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## From Your Editor-in-Chief



It's a new month and there's a new prosecution for an alleged breach of the primary safety duty. This particular case has a twist because it doesn't involve an alleged breach of any mass, dimension, loading, speed or fatigue management requirements. In this issue, we explore why these charges have been brought under the Heavy Vehicle National Law (HVNL).

How well do you know the rules around when your vehicle or premises can be searched? We take a look at some recent examples that you can learn from. Even if you have nothing to hide, it is still important to ensure that any searches are conducted in accordance with relevant laws.

Recently, we have highlighted the benefits of Registered Industry Codes of Practice (RICP) and unregistered private guides. This month, we look at an example developed and implemented by the Woolworths Group. We are incredibly grateful to Denise Carroll and Kym Farquharson-Jones of the Woolworths Group for providing us with their take on the aims of this guide and how it has been received in their supply chain.

We continue to answer a wide range of Chain of Responsibility (CoR) questions and invite our readers to drop the CoR Helpdesk a line with any queries – we really enjoy hearing from you.

Happy reading!

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

## Woolworths Primary Connect CoR Guidebook

Nathan Cecil, Partner, Holding Redlich

In our February edition, we explored the benefits of developing your own tailored CoR guide, as an alternative to a RICP. In this article, we see what this might look like applied in a real-world context.

As a refresher, personalised CoR guides serve the following safety and compliance purposes:

- They increase CoR compliance awareness by sharing information on compliance measures within your business, supply chain or industry. This is an important compliance tool; it helps contribute to overall safety while avoiding non-compliance and any investigation or enforcement action.
- Even if compliance issues are identified and investigative or regulatory action is

commenced, the provision and adoption of a CoR compliance guide is still a positive and proactive measure that can be put forward to regulators and the courts as evidence of the compliance efforts made by you. This can help avoid enforcement action or mitigate any potential penalty.

- Increasingly, commercial buyers of goods or services are requiring or welcoming evidence of the CoR compliance measures that are put in place in their suppliers' or contractors' businesses, as a condition of agreeing to work with them. Presenting such a guide can help you demonstrate to them that you are taking a proactive approach to compliance and reassure them that your business does not pose a compliance risk.

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## The dangers of drowsy driving

Charlie Coleman, Lawyer, Holding Redlich

We all know that pumping yourself full of caffeine isn't an effective alternative to a good night's sleep but when we find ourselves drowsy driving, it sometimes seems like the only option. Driver fatigue is one of the biggest killers on our roads so it is important to ensure we are on top of the relevant safety obligations. In this article, we revisit the warning signs of fatigue and look at what you can do to make sure you're not nodding off behind the wheel.

**CAUTION:** Around 20% of all fatalities on the road involve driver fatigue as the main or as a contributing cause to the accident.

### IS A LACK OF SLEEP TOXIC?

It is widely known that alcohol restricts your motor skills, awareness and can make

you more inclined to engage in risk-taking behaviour. It may surprise you to learn that fatigue and lack of sleep can have the same impact on a person's cognitive senses and decision-making as alcohol or other substances. In 2019 alone, 34% of accidents were related to driver fatigue.

A study conducted by the Adelaide Centre for Sleep Research concluded that a driver that has been awake for a period of 17 hours faces the same risk of being involved in a crash as a person who has a Blood Alcohol Content (BAC) reading of 0.05g per 100ml. Further, they found that the effects of lack of sleep were exponential; a person who has been awake for 24 hours – only seven hours longer – will have the same risk of being involved in an accident as someone who has a BAC reading of 0.1g per 100ml – double the BAC.

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## — HELPDESK QUESTION OF THE MONTH —

### What are the different categories of offences 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](mailto:helpdesk@coradviser.com.au)

## Infrastructure Priority List 2021 to address needs of regional communities

Infrastructure Australia's 2021 Priority List has a combined \$59 billion project pipeline with a record 44 new proposals. The updated list recognises Australia's changing infrastructure needs as a result of COVID-19.

The list addresses a variety of key themes that are of particular importance to regional communities. These include export gateways, water security, digital connectivity, new sources of energy and digital health services, to name a few.

All five of the 'Priority Projects' added to the list since August 2020 are road construction projects; the Parkes Bypass, the Prospect Highway Upgrade, the Armadale Road Bridge, the Bunbury Outer Ring Road and the Commonwealth Avenue Bridge Upgrade.

Infrastructure Australia Chief Executive, Romilly Madew said more than half of the investment opportunities on the 2021 Priority List will benefit regional communities.

"We continue to draw focus on equitable service delivery and investments that will deliver affordable and quality infrastructure services for all Australians regardless of where they live," Madew said.

"COVID-19 has had a significant impact on the way Australians use critical infrastructure. We have seen changing work patterns, a pause on Net Overseas Migration, and a 200% increase in people moving from capital areas to regional areas. These changes present a range of new challenges and the Priority List looks to identify infrastructure investments that will meet the diverse needs of our communities in this new environment."

"The importance of a robust, evidence-based investment pipeline has only increased as we look to recover from the dual health and economic crises of COVID-19, and grapple with further shocks and stresses including floods and bushfires, long-lasting drought, and a changing climate," Madew said.

"We are at a crossroads between addressing existing infrastructure gaps and prioritising investments that will secure our future prosperity, with abundant opportunities to deliver infrastructure that responds to community needs. The 2021 Priority List, with its evidence-based proposals and clear focus on community outcomes, is a critical place to start." ■

► Continued from page 1 **"Woolworths Primary Connect CoR Guidebook"**

One business that has developed a personalised CoR guide is Woolworths through its business unit called Primary Connect.

Primary Connect is Australia and New Zealand's largest retail supply chain and an essential part of the Woolworths Group. In September 2019, Primary Connect introduced the CoR Guidebook which aimed to:

- introduce the concept of the CoR to team members in roles where they may not have come across it before;
- explain who is responsible under the HVNL and how that matches to their everyday actions and behaviours;
- provide a clear and simple guide to following the HVNL for both internal teams and external partners; and
- ensure that Woolworths Group is doing everything it can to maintain the safety of all road users, whether they are part of our supply chain or not.

The guidebook is available for Woolworths Group internal teams and external partners in both hard and soft copy as a handy reference tool. It also clarifies Woolworths Group's stance on compliance, such as the fact that Woolworths Group includes WA heavy vehicle operations as having to meet the HVNL requirements.

Denise Carroll, Head of Safety, Wellbeing & Environment for Primary Connect said:

*"The guidebook has been received positively, particularly by our team*

*members, as it simplifies the NHVR Laws into six key areas, with a simple and visual message for each: Mass, Fatigue Management, Dimension, Load Restraint, Speed Management, and Vehicle Maintenance."*

*"By making our requirements easy to understand with basic principles, our team members feel confident in their safety decision-making, and in going about their tasks that relate to the Chain of Responsibility."*

The guidebook is a good example of an information, awareness and compliance resource that can be used as a ready-reference to those within a particular supply chain. Of course, this guidance needs to be backed up by working practices, contracting practices, compliance performance monitoring, an issues resolution framework and periodic compliance performance reporting to the executive.

For those interested in doing something similar, this [particular guidebook](#) is a good place to look for inspiration. Of course, you should bear in mind that any guide that you prepare needs to relate to the specifics of *your* supply chain, how it operates and how it is managed. For this reason, your guide may need to deal with issues in a different way or level of detail.

If your business would like to develop such a guide and needs some help, please get in touch with the team at *CoR Adviser*; we can assist you with developing your own guidelines as we have done with many industry associations and businesses over the years. ■

## SA operator charged over engine remapping

*Nathan Cecil, Partner, Holding Redlich*

**The NHVR has been busy recently circulating a note about another set of charges under the refreshed HVNL.**

In this case, a South Australian transport operator has been charged with a breach of the primary safety duty under s 26C of the HVNL for allegedly remapping the engines of vehicles within its fleet.

It is alleged that the operator remapped the engine in order to disable the emissions controls on heavy vehicles within its fleet. By law, certain vehicles must be fitted with emission control features, to reduce the level of harmful particulate matter in their exhaust fumes.

Although reasons may differ, some people circumvent these measures in order to avoid the cost of emissions control products and maintenance or to increase the performance of their vehicle.

In addition, the operator has been charged with four offences of tampering with

emissions control systems and a further four offences for failing to operate a vehicle in accordance with the manufacturer's design.

You may be wondering why the NHVR has brought charges under the HVNL, which deals with safety. NHVR Executive Director of Statutory Compliance, Ray Hassall, put it this way:

*"Engine remapping is inconsistent with the primary duty to ensure safety under the HVNL, as the resultant increased emissions have the potential to harm the health of the driver and other members of the community".*

The charges are brought as a 'category 3 offence', not involving any recklessness or any exposure of an individual to a risk of death, serious injury or illness but still in breach of the HVNL. The maximum penalty for a corporation is \$500,000.

The first court listing is scheduled for 24 March 2021. We'll keep you updated. ■

# How can safe practices help grow your business?

Positive business practices – rather than the absence of negative practices – should be an essential compliance tool for your business. It is not uncommon for parties in supply chains to view some safety measures as burdensome. It is important to reframe safety compliance obligations as something that can help grow your business. In this article, we look at how a positive and proactive approach to safety ultimately benefits your business.

## SAFETY AND BUSINESS GROWTH

There tends to be a misconception that the time, energy and cost of developing and maintaining frameworks that help you achieve compliance with your safety obligations can be more trouble than it is worth. For this reason, it is often not until something goes wrong before parties take a closer look at the procedures they have in place and critically evaluate them.

What many people in the industry may not recognise is that safe and appropriate business practices can actually grow your business. So, how do you strike the right balance between growth and safety?

The best way to ensure you aren't leaving yourself, your workers and other road users exposed to risk is to implement a central CoR compliance policy, in addition to working procedures, contract clauses and a monitoring and reporting system.

Although learning how to balance growth and safety can be challenging, reducing the likelihood of injuries, accidents and legal proceedings will help you save on unnecessary stress and expenses.

Further to this, by prioritising and promoting this kind of positive and proactive approach, you can help your business develop a reputation for safety. This will have wide-ranging benefits on your business relationships and help your company obtain further work.

Improving reputation and recognition in the industry can also lead to employee loyalty and demand as the business will be known to prioritise the safety and wellbeing of its employees. This will have the effect of improving relationships across the board and creating a positive work culture.

As you can see from the above points, implementing positive business practices is one of the most important compliance tools in your arsenal.

## DEVELOPING A COMPLIANCE FRAMEWORK

Recently at the *CoR Adviser*, we have looked at the benefits of implementing your own CoR guidebook for your business – one that is tailored to the specific circumstances of your transport activities. These sorts of frameworks are useful as they increase compliance awareness, can mitigate possible fines in the event of prosecution, provide specific guidance to employees as to what their obligations are and specify what the business is doing to ensure safety.

Let's take a closer look at some of the features of compliance frameworks and some implementation challenges that may arise.

Establishing unflawed safety practices all in one go that are 100% effective is probably unrealistic. You might like to consider addressing safety in stages. Below, we outline a suggested roadmap for your business to follow when implementing a compliance framework and taking the steps to promote and prioritise safety in your supply chain.

### ► IMPORTANT

A staged implementation of safety measures may be better than trying to achieve everything at once, unless you have unlimited resources and focus.

### 1. Business handbook and policies

Compliance risk and safety have become one of the most significant ongoing concerns for businesses in the transport industry – particularly because the transport sector is usually subject to the highest levels of workplace injury. A solution to improving heavy vehicle safety is for transport businesses to implement a safety management system that includes introducing a handbook to outline to drivers and other suppliers the business' expectations as to safety and compliance conduct.

It is prudent to have in place a driver, supplier and/or subcontractor handbook outlining your business' policies, practices and compliance expectations. CoR compliance policies need to be more than just mere 'aspirational' statements of commitment to the CoR. They need to have substance and set out the following: the roles, functions and responsibilities within your supply chain,

how you will comply, how you expect others to comply, how you will share and act on information about non-compliance and what you will do in the event that your supply chain parties can't or won't comply with their obligations.

### 2. Training and inductions

We recommend that all businesses consider providing information, instruction and training to employees and other contractors/subcontractors and supply chain participants they have responsibility over.

You should provide compliance training to any CoR party in your business' policies and practices. This should be accompanied by regular handbook updates, with these updates being communicated through an annual induction process. This may also include ad hoc training when learning opportunities arise from near misses and incidents.

### 3. Using technology to manage CoR compliance

Many transport and logistics businesses actively use technology to drive business management and efficiency. There is a growing recognition that the same or similar technology can also be used by businesses to monitor, manage and demonstrate compliance with the HVNL.

## IMPLEMENTATION CHALLENGES

There is no doubt that it can be difficult to maintain a focus on safety while dealing with the pressures of a growing business. It is all too easy to neglect to look critically at our safety systems until it's too late. Education and communication have a significant role to play here. It can be helpful to make your employees a part of the process when new compliance frameworks are being implemented so that they feel as though their voices and any concerns are being heard. This can be achieved through training and induction opportunities.

With implementation challenges, it is important to identify what best suits your particular business needs and to persist with establishing this.

## TIPS FOR IMPLEMENTATION

Many businesses in the industry are on the same safety journey with regards to establishing more thorough and proactive practices and this can be reassuring to realise.

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Continued from page 1 "The dangers of drowsy driving"

**CAUTION:** A driver who hasn't slept in 24 hours is seven times more likely to have an accident than someone who is well rested.

In the transport industry, where there is immense pressure on drivers to stick to specific schedules in order to meet delivery deadlines, there might be an inclination to sacrifice sleep to ensure that jobs are completed efficiently. But this sacrifice in the name of expediency exposes drivers and other road users to significant risks. This is why the HVNL has imposed a compulsory regime for regulating the amount of sleep and rest for heavy vehicle drivers.

**WHO DO THESE LAWS COVER?**

The HVNL imposes fatigue laws to drivers of the following vehicles:

- a vehicle with a Gross Vehicle Mass (GVM) of more than 12 tonnes;
- a combination when the total GVM is more than 12 tonnes;
- a bus of more than 4.5 tonnes fitted to carry more than 12 adults including the driver; and
- a truck or combination with a GVM of more than 12 tonnes with a machine or implement attached.

**FATIGUE LAWS UNDER THE HVNL**

The HVNL defines fatigue as feeling physically or mentally tired, weary or drowsy and feeling exhausted or lacking energy.

Section 26E of the HVNL prohibits companies, people or parties in the CoR, so far as reasonably practicable, from making requests or from entering into contracts that would result in:

- a driver driving while impaired by fatigue;
- a driver driving while in breach of the driver's work and rest hours option; or
- a driver driving in breach of another law in order to avoid driving while impaired by fatigue or while in breach of the driver's work and rest hours option.

**REMEMBER:** Aside from the requirements outlined in s 26E, each consignment or transport activity involving a heavy vehicle is subject to the primary duty as set out under s 26C of the HVNL. The primary duty requires each party in the CoR to ensure, so far as reasonably practicable, the safety of the party's transport activities relating to the vehicle.

**FATIGUE WARNING SIGNS**

Sometimes the law can seem vague or complex and it can be difficult to understand how the ideas and legalities translate to your individual circumstances and actions on the road. Let's unpack fatigue by looking at some common warning signs.

You may be fatigued if you:

- are yawning;
- feel that you have sore or heavy eyes;
- notice that your reaction times are slower than usual;
- find that you're daydreaming and that you are not concentrating on your driving;
- notice that your driving speed creeps up or down;
- notice that you are becoming more impatient than usual;
- notice that your driving performance is not up to its usual standard, for instance, you are making poor gear changes;
- feel stiffness and experience cramps;
- notice that you are losing motivation; and/or
- succumb to microsleeps which can be as little as a few seconds, your head may nod and then jerk to wake you up.

**WORK AND REST TIME REQUIREMENTS**

Part 6.3 of the HVNL sets out the work and rest time requirements required for drivers to comply with fatigue laws.

It states that drivers must not:

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

The standard work and rest hours are set out in Schedule 1 to the *Heavy Vehicle (Fatigue Management) National Regulation*. The Regulations provide for different rest requirements for different types of drivers, e.g. a solo driver, a solo driver in the bus or coach sector, or two-up drivers.

For a solo driver, the following table sets out the mandated rest hours:

TIME	WORK	REST
In any period of...	A driver must not work for more than a maximum of...	And must have the rest of that period off work with at least a minimum rest break of...
5 ½ hours	5 ¼ hours' work time	15 continuous minutes of rest time
8 hours	7 ½ hours' work time	30 minutes of rest time in blocks of 15 continuous minutes
11 hours	10 hours' work time	60 minutes of rest time in blocks of 15 continuous minutes
24 hours	12 hours' work time	7 continuous hours of stationary rest time
7 days	72 hours' work time	24 continuous hours of stationary rest time
14 days	144 hours' work time	2 x night rest breaks and 2 x night rest breaks taken on consecutive days

In order to make sure that you comply with these requirements, the HVNL stipulates that drivers are required to complete the National Driver Work Diary. This work diary documents a driver's work and rest hours and shows the regulator that a driver's fatigue is being managed in compliance with the law.

All drivers of fatigue-regulated heavy vehicles who drive more than 100km from their base under standard hours must complete the work diary by setting out their rest and work hours for that given day.

There are, however, more flexible arrangements provided to those who complete fatigue management courses through the National Heavy Vehicle Accreditation Scheme (NHVAS). The NHVAS offers both Basic Fatigue Management (BFM) or Advanced Fatigue Management (AFM) accreditation courses to allow drivers to operate outside of the standard hours. Even though you may be accredited, drivers must still carry and complete a work diary to record their work and rest times.

**COMPLIANCE WITH FATIGUE LAWS**

Under the operation of the HVNL, you must take all reasonable steps to ensure that each of your drivers, or other employees, are trained in fatigue compliance. This compliance extends to administrative record-keeping and self-auditing that ensures that all your drivers are accurately recording their work and rest time. The person responsible for record-keeping has a critical role in, not only making sure that drivers are compliant with the law, but also in keeping drivers and other road users safe.

Record-keepers (e.g. employer, accredited operator under BFM/AFM or self-employed driver) must keep a record of specific information for drivers of fatigue-regulated heavy vehicles.

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For each driver, the record-keeper must keep:

- the driver's name, licence number and contact details;
- the dates that fatigue-regulated heavy vehicles were driven;
- the registration number of the vehicle(s) driven;
- the total of each driver's work and rest times for each day and each week;
- copies of duplicate work diary daily sheets (if applicable);
- driver's rosters and trip schedules (including changeovers);
- driver timesheets and pay records; and
- any other information as required as a condition of an accreditation or exemption (such as driver training and health assessments).

**► IMPORTANT**



All records must be kept for 3 years.

It is crucial for your business to make sure that you have effective record-keeping processes and procedures that ensure that this record-keeping is being done. A good place to start is to ask yourself the following questions:

**1. How are the work diaries being provided to the drivers?**

- a. Where do we source them from?
- b. Are we going to provide them with electronic work diaries?

**2. How will the drivers complete the work diaries?**

- a. Will it be electronically or manually?
- b. When will they complete their entries? At the end of the day or after each period of mandated rest?

**3. How do we know the information in the work diaries is accurate?**

- a. Have we checked the odometer?
- b. Has the driver certified his hours?

**4. How do we process completed work diaries?**

- a. Is there a spreadsheet or internal system recording this?

**5. How do we store the completed work diaries?**

- a. Do we allow the driver to keep them?
- b. Do we house them in a filing system at base?
- c. Do we have a system for organising these work diaries so that they are easily accessible?

Fatigue is a widespread threat to safety on our roads and we can't always objectively judge our own alertness. Although it can seem like common-sense, it is important to put appropriate measures and systems in place to manage the very real risks. By doing so, you can demonstrate a proactive approach to safety and reduce the likelihood of accidents. ■

## Table: How to comply with your EWD obligations

Charlie Coleman, Lawyer, Holding Redlich

The NHVR introduced electronic work diaries (EWDs) in order to improve the safety of heavy vehicle drivers and, additionally, to cut down the administrative burden on the logistics industry by allowing a more streamlined retention of work diary data.

Some benefits of EWDs include:

- improving data accuracy and transparency for drivers, transport operators and authorised officers;
- simplifying record-keeping for drivers of fatigue-regulated vehicles;
- allowing drivers, transport operators and authorised officers to more easily review past work and rest records to ensure compliance with fatigue laws;
- providing real time data, enabling transport operators to respond immediately to actual breaches and monitor performance over time;
- providing in-vehicle driver information, enabling drivers to plan their work and rest and take action when alerted to an imminent or actual breach; and
- assisting transport operators to monitor their business and improve their fatigue risk management.

To apply for an EWD from the NHVR, you must ensure that you comply with the EWD obligations as stipulated by the NHVR. Follow the table below to assist you in doing this. ■

TABLE: HOW TO COMPLY WITH YOUR EWD OBLIGATIONS <span style="float: right;">DOWNLOAD </span>	
EWD obligations	Questions to ask to ensure compliance
<b>1. Setting standards</b>	Have I assured that the technology is approved for use as an EWD? Have I checked the EWD Approval Register? Is my device from: <ul style="list-style-type: none"> <li>▪ MTDData;</li> <li>▪ Netstar Australia;</li> <li>▪ Step Global; or</li> <li>▪ Teletrac Navman?</li> </ul>
<b>2. Deployment</b>	Am I adequately prepared to use an EWD? Have I participated in training on the use of EWDs, including instructions on any conditions specific to the approved EWD and what procedures to follow in the event of the EWD not working properly? Have I been informed on how EWD information will be used and given consent for information to be shared with the EWD technology provider? Have I received a secure authentication method to access the EWD and make records?
<b>3. Day-to-day Operations</b>	Can I log into my EWD? Can I retrieve my past EWD information? Can I commence making EWD entries? Have I submitted my EWD daily records? Does the EWD bring work/rest alerts to my attention? Is the EWD transmitted back to base? Is the EWD otherwise working?
<b>4. Assurance and enforcement</b>	Do I know my obligations regarding EWDs with police? Am I aware that I must provide police or authorised officers records of EWD? Do I know how to navigate the EWD device so that I can provide this information quickly and efficiently? How do I ensure that my device is easily readable in daytime and night-time conditions?

# Lawful searches of heavy vehicles

Melanie Long, Associate, Holding Redlich

Even if everything in your business is above board, it is important to familiarise yourself with the legalities around heavy vehicle searches. Last month we reviewed the NHVR's various enforcement measures. In this article, we continue to focus on this area as we examine the circumstances under which searches of heavy vehicles can legally occur with reference to a recent case.

## IN WHAT CIRCUMSTANCES CAN A HEAVY VEHICLE BE SEARCHED?

Section 521 of the HVNL sets out the circumstances in which an authorised officer (for example, a police officer or state/territory road safety officer), can enter and search a heavy vehicle.

These include when the authorised officer reasonably believes:

- the vehicle is being, or has been, used to commit an offence against the HVNL;
- the vehicle, or thing in the vehicle, may provide evidence of an offence against the HVNL that is being, or has been committed; or
- the vehicle has been or may have been involved in an incident involving the death of, or injury to, a person or damage to property.

## WHAT DOES A SEARCH INVOLVE?

The HVNL also provides guidance on what this search may involve. It is not an exhaustive list, but essentially it includes:

- the inspection, examination, filming or search of any part of the heavy vehicle or any part of its equipment or load;
- the inspection or search of any document, device (for example an intelligent transport system) or other thing;
- taking a copy of, or extract from a document, device or other thing. The copy of the document may be made elsewhere (although it must be returned) and includes, by way of example, a document required to be kept in the vehicle under the HVNL such as a work diary, transport or journey documentation or any other document that evidences that an offence under the HVNL has taken place; and
- producing an image or writing in or near the vehicle from an electronic document in the vehicle or, in circumstances where this is not practicable, do this elsewhere (again, the thing containing the electronic document must be returned).

### > IMPORTANT

It should be noted that an authorised officer is not permitted to search a person under the HVNL.

> Continued from page 3 "How can safe practices help grow your business?"

Learning from other companies' safety lessons can be critical in implementing effective measures.

It can be of great benefit for your business to source information through networking and establishing relationships with other transport businesses. Your business should always prioritise giving parties an opportunity to raise their concerns. Your company's attitude can help bring employees on board and overcome early reservations from them. Knowing that you are not alone in addressing safety risks can go a long way.

When considering major safety changes, your business should consider implementing such changes in stages. It is very common to see businesses trying to do too many things at once. This can overburden drivers and employees involved.

### > IMPORTANT

Businesses should keep in mind that the shared safety duty means that it makes sense to share compliance knowledge or resources.

## CASE STUDY: *R v CARTER (2020)*:

In the case of *R v Carter (2020)*, it was contested whether the search of a vehicle by Senior Constable Petts (**SC Petts**) was lawful under the HVNL. SC Petts received a tip off that the owner of a prime mover was a drug user, had recently purchased a truck which was capable of travelling faster than the heavy vehicle maximum speed and paid in cash. SC Petts located and pulled over the vehicle, which was being driven at the time not by the owner but one of his 'mates', Mr Carter. After determining the driver's identity, SC Petts asked to see his work diary. Upon inspection of the work diary, as well as information from a safety camera, SC Petts formed the belief that the driver had committed an offence under the HVNL. In particular, that Mr Carter had failed to complete his work diary by stating that he started work at 10am, when his truck had been recorded by the safety cameras as being on the road earlier than that. It was at this point that SC Petts searched the vehicle and found evidence of drug offences.

In the lead up to the trial of Mr Carter for drug trafficking, his defence team made an application to exclude the evidence of the heavy vehicle search on the basis that it was undertaken for the purpose of unlawfully searching for drugs. The court dismissed this application on the basis that as soon as SC Petts became aware that the owner of the vehicle was not the driver, he focused on the work diary and breaches of the HVNL.

Accordingly, a lawful search of the heavy vehicle had been undertaken on the basis of a reasonable belief of a contravention under that law and only after this belief had been formed. Furthermore, even if SC Petts had conducted the search for a dual purpose, the unlawful secondary purpose (i.e. a search for evidence of drug related offences) would not have, in this case, invalidated the overriding lawful purpose.

## LESSONS

- An authorised officer can lawfully search a heavy vehicle if they hold a reasonable belief of one of the factors set out in s 521 of the HVNL (summarised above).
- A search of a heavy vehicle can include the inspection or search of any part of the heavy vehicle, equipment or load.
- A search can also include the search and inspection of a document, device or other thing in the heavy vehicle.
- An authorised officer can also take copies of these documents and copies (in various forms) of electronic documents. Anything taken away from the heavy vehicle must be returned.
- A search will be lawful so long as the authorised officer holds the requisite reasonable belief that a contravention of the HVNL has or is being committed and does not conduct the search until after this belief is formed. This is the case, even if an officer conducts a search. ■

## HINDSIGHT IS 20/20

Don't wait for something to go wrong before you evaluate the safety systems and procedures that your business has in place. Although a failure to comply with HVNL obligations can often lead to punishment, it is important to remember that it is also about educating parties on the right way to manage their safety obligations. Ultimately, we all have the common objective of ensuring the safety of all road users and we should do everything within our power to make the roads a safe place for everyone. ■

**HELPDESK**

Each month we publish some of our top questions from the *CoR Adviser Helpdesk*.

To ask your question today, email: [helpdesk@coradviser.com.au](mailto:helpdesk@coradviser.com.au).

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

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

## Categories of offences

**Q** What are the different categories of offences under the HVNL?

**A** Offences that relate to primary duty, fatigue management, mass, dimension and loading are categorised according to the risk (or potential damage) they pose.

Primary duty offences are categorised as 1, 2 and 3 offences.

Category 1 offences are the most serious and thus carry the highest maximum penalty. The other risk-based categorisation offences are grouped as follows:

### 1. Minor breaches

Minor breaches are when a person gains a minor unfair commercial advantage over compliant persons but where there is minimal risk to safety. For example, a minor breach of a restraint requirement might occur where a load shifts but it does not necessarily pose an appreciable risk to safety or road infrastructure.

### 2. Substantial breaches

A substantial breach typically involves a risk of damage to infrastructure causing an adverse effect on public amenity. The HVNL often identifies what is the upper and lower limit or the threshold for a substantial breach to be committed. Broadly speaking, a substantial breach is anything more than a minimal risk to safety but under the threshold of an appreciable risk to safety.

### 3. Severe breaches

A severe breach arises where an offence involves an appreciable or substantial risk to road infrastructure, safety and public amenity.

### 4. Critical breaches (for fatigue offences only)

The HVNL defines a 'critical risk breach' by reference to the Fatigue Management National Regulations and the maximum work and minimum rest requirements outlined by these regulations. For example, in a 24-hour period the maximum work time is 12 hours and a critical risk breach is classed as working more than 13.5 hours in a 24-hour period.

Not surprisingly, the more serious the breach, the higher the potential maximum penalty.

## Fatigue management in WA and NT

**Q** Fatigue-related driving regulations are different in WA and NT, what must I do if I'm driving in those states or interstate?

**A** WA fatigue management regulations require:

- that there can be no more than 17 hours between breaks of at least 7 continuous hours of non-work time;
- a Commercial Vehicle Driver must have 27 hours of non-work time in any 72-hour period; and
- it is possible to work for 17 hours on two consecutive days but no more than 11 hours the next day.

The WA laws additionally require:

- at least two periods of 24 continuous hours of non-work time in any 14-day period; and
- a maximum of 168 working hours in any 14-day period.

Remember, working hours include driving hours and work incidental to driving, so for instance, time on a header operating other equipment counts as working time and, therefore, is included as part of the 17 hours.

All operators entering WA must ensure their drivers meet the requirements of the WA Commercial Vehicle Driver Regulations in order to operate under the WA fatigue system which includes completing the WorkSafe WA online assessment.

Unlike WA (and the rest of Australia), the NT does not regulate driving hours under transport law.

However, the NT has preferred an outcome-based approach to regulating and managing driver fatigue. Under the Workplace Health and Safety Act, employers have a general obligation to provide a safe workplace, which does not endanger workers or others. This applies to heavy vehicle drivers. Operators can choose, however, to comply with the more stringent and safer national regulations by adopting one of the National Heavy Driver Fatigue options (Standard, Basic or Advanced) and this will ensure they are doing all things necessary to meet their health and safety obligations in the NT.

## The HVNL and private roads

**Q** Do the HVNL fatigue management regulations apply to heavy vehicle activities on private roads?

**A** All work performed in relation to a fatigue-regulated heavy vehicle, is subject to the HVNL in this area, even if some of that work (for example, refuelling or unloading the vehicle) is performed on private property. Remember, this is different to say, mass limitations on heavy vehicles. Work hours are work hours.

However, if work which would otherwise be subject to the HVNL is mostly or entirely performed on private property, an application may be made to the NHVR for an exemption.

Drivers performing work within 100km of their driver base (whether on a private or public road), are not required to carry or complete a work diary for that work. The record-keeper still has obligations, however, and may too, apply for an exemption. ■

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## NHVR investigations: Are your business premises next?

In early February, the NHVR and Queensland Police entered the Sunshine Coast premises of a transport company to investigate the company's compliance with the HVNL. This comes off the back of a number of other similar entries by the NHVR to business premises late last year. So, could your business be next? This article outlines the number of different purposes for which the NHVR can enter premises and explores the reason for this latest entry by the NHVR – investigation purposes.

### PURPOSES FOR ENTRY

There are number of purposes under which the NHVR can enter premises, premises being, for the purposes of this article, a reference to the place of business of a responsible person for a heavy vehicle. These purposes include:

1. Advice purposes including by way of information and education.
2. Monitoring purposes.
3. Investigation purposes.

The NHVR can also, of course, enter premises by consent, or on the opposite end of the spectrum, pursuant to a warrant.

### ENTRY TO PREMISES FOR INVESTIGATION PURPOSES

As previously mentioned, the most recent entries by the NHVR have been for the purpose of investigation, in particular for the purposes of collecting evidence of a contravention of the HVNL. In relation to the Sunshine Coast transport company, the evidence they were seeking was in relation to an investigation of engine remapping, which meant emissions controls and speed limiting systems were not operating in accordance with the Australian Design Rules.

Section 489 of the HVNL outlines the circumstances in which the NHVR can enter premises if it suspects that evidence of a contravention of the HVNL is at these premises. For it to apply, the NHVR must reasonably believe that either a heavy vehicle, or transport or journey documentation is at the premises and that these may amount to evidence of an offence against the HVNL. Additionally, the NHVR must reasonably believe that this evidence may be concealed or destroyed unless the place is immediately entered and searched.

It should also be noted that in these circumstances, the NHVR cannot enter when the premises are unattended and therefore can only effectively enter premises during business hours or when it is otherwise being used for the carrying on of business.

### WHAT HAPPENS AFTER THE ENTRY?

Once the NHVR has entered a premises it has a wide range of powers to essentially find and gather the evidence it originally suspected to be there. These powers are similar to those of an authorised officer while searching a heavy vehicle, and include, but are not limited to:

- the inspection of any part of the premises including any vehicle, relevant documents or devices;

- taking copies or extracts from a relevant document or device; and
- producing an image or writing from any relevant electronic documents.

Again, anything that is taken away from the premises for any of the purposes outlined above must be returned. The difference with a search of a heavy vehicle, is that the NHVR also has the power to open an unlocked door or an unlocked panel or thing at the premises.

### WHAT HAPPENS AFTER THE SEARCH?

Generally speaking, any evidence found by the NHVR will be used to further its investigations and may not necessarily result in immediate adverse action against the occupier. However, in the case of the Sunshine Coast transport company, once their premises had been searched, the NHVR issued defect notices for the relevant vehicles and a direction was given to the operator to remedy the issues while investigations continued. Accordingly, the entry itself may lead to immediate measures being taken by the NHVR even in circumstances where the full investigation is yet to be concluded.

### HOW TO PREVENT THE NHVR FROM ENTERING YOUR PREMISES

The easy answer to this is to ensure you are complying with your HVNL obligations! However, if the NHVR has requested to or otherwise entered your premises, the best thing to do is to seek professional advice about your rights.

In the case of a search having already taken place, you should ensure that it was done lawfully and within the NHVR's powers as described above. The important point to note in relation to a request for entry is that while consent can be withheld, it is usually best to cooperate with the NHVR. As we have seen, the NHVR can easily escalate matters should they come to the conclusion that a contravention has or is being committed.

### COMPLY, DON'T CONTRAVENE

Ultimately, the NHVR has wide-ranging powers to inspect and search premises and there are many purposes under which they may enter your business premises. However, although it is usually best to cooperate with their requests, remember that the occupier can withhold consent to enter the premises.

The NHVR will usually enter for investigation purposes if they suspect that evidence of a contravention of the HVNL is at the premises.

The NHVR may immediately take action against the occupier of the premises even before their full investigations have been concluded.

Ultimately, the best way to prevent your premises being searched is to ensure that you are complying with your HVNL obligations and always remember to seek professional advice. ■

**IN THE NEXT ISSUE**  
OUT MAY 2021

- **An HVNL first: Load consignor prosecution**
- **Your obligations under the NHVAS Business Rules and Standards**
- **What to do when hit with a court order**