

From Your Editor-in-Chief



In a Heavy Vehicle National Law (HVNL) first, a Victorian company has received the dubious honour of being the first consignor prosecuted by the National Heavy Vehicle Regulator (NHVR) for serious safety breaches since the 2018 amendments.

We look at the similarities between this recent incident and the Futurewood case of 2014, highlighting how the current proactive and preventative primary safety duty means that the penalty stakes are much higher than they were back then.

One of the most interesting aspects of these two cases is that the goods were packed and shipped from overseas before being consigned to road by the Australian consignor. In this issue, we offer current guidance for consignors.

We also unpack a new report by National Transport Insurance (NTI) and the National Truck Accident Research Centre (NTARC) on whether transport operators with well-maintained vehicles generally score better with safety outcomes. The report looks at the issue through the lens of insurance claims and largely supports the concept that businesses with developed safety approaches in key areas are more likely to be safer-run businesses.

Finally, we bring you up to speed with the revised National Heavy Vehicle Accreditation Scheme (NHVAS) Business Rules and Standards.

Let's get into it.

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

Are good trucks the sign of a great operator?

Nathan Cecil, Partner, Holding Redlich

Do businesses with well-maintained heavy vehicles have fewer and less severe crashes? In a special report issued by NTI, the NTARC and the NHVR, this question is investigated through an analysis of roadworthiness inspection and crash data.

The focus of the recent *Roadworthiness Report*, which can be found on the NTI website, is not simply about whether roadworthiness defects cause crashes. Rather, it is geared towards looking at the implementation of safety practices. Did businesses with safety practices in key areas (in this case, roadworthiness) have generally better safety outcomes (in this case, fewer and less severe crashes) than businesses without such safety practices?

While most of us would assume that businesses in the former category would have enhanced safety performance compared to businesses that do not, there is surprisingly

little available analysis to back this up or to identify the scope and implications of any such positive safety relationship. That is why this special report is so important. Quantifying the positive safety outcomes in a meaningful way will likely help convince more businesses of the productivity and financial benefits to be gained through developing and implementing key safety and compliance practices. This will contribute to greater safety for all road users and the public.

The analysis reveals that problems with two heavy vehicle systems in particular were associated with both increased claims and the severity and cost of the consequences – heavy vehicle couplings and wheels/tyres. From a Chain of Responsibility (CoR) risk-based approach, this would suggest that these two systems should receive increased attention, given that the likelihood of these risks arising and the associated hazards are likely to be greater.

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Are your business documents up to scratch?

Charlie Coleman, Lawyer, Holding Redlich

Under the HVNL, authorised officers are attributed various powers to ensure parties in the supply chain are conducting business in compliance with the law. In this article, we review the ins and outs of notices to produce and look at how, in the event of an investigation, having up to date and orderly business documents can assist you.

Authorised officers have wide-ranging powers from issuing improvement notices to the power to compel forfeiture of items of property to seizing goods from the back of a truck. One of these such powers is the capacity to issue a notice to produce that will compel the recipient to produce relevant documents.

► DEFINITION: AUTHORISED OFFICER

Under the HVNL, an authorised officer is defined as:

- a. a police officer declared by a law of a participating jurisdiction to be an authorised officer for the purposes of this law; or
- b. a person who holds office under this law as an authorised officer.

This definition includes the NHVR who, pursuant to s 583 of the HVNL, may exercise powers that are conferred on police officers in connection with heavy vehicle offences.

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— HELPDESK QUESTION OF THE MONTH —

What does 'reasonably practicable' actually mean? (answer on page 7)

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

NSW blitz sees 200 infringements

Content Editor, Partner Press

Heavy vehicle safety is once again in the spotlight after a huge blitz in southwest NSW between April 11 and 14. This operation saw over 500 heavy vehicles stopped with more than 200 infringement notices handed out to trucking operators.

This comes as the next truck roadworthiness check looms in the months ahead. Between May and July, authorised officers will conduct a mechanical inspection of approximately 8000 heavy vehicles across Australia.

The recent four-day operation, targeted heavy vehicles travelling through NSW via the Cobb, Mid-Western and Sturt highways.

Impaired driving, mechanical standards and load restraints were the focus of the blitz.

It was established by officers from the Traffic and Highway Patrol Command to provide a high-visibility police presence and target unsafe heavy vehicle driver behaviours, NSW Police reports.

The results were:

- Of the 221 random roadside drug tests, seven positive results were obtained.
- More than 200 infringement notices were issued for a range of offences relating to fatigue, load restraints and dimensional breaches.
- A further nine defects and eight cautions were issued against heavy vehicles.

Traffic and Highway Patrol Command acting inspector Brett Collins states recent incidents sparked the police operation.

"Police held concerns following several serious heavy vehicle crashes on regional roads," Collins says.

Collins did not expand on the particulars of the incidents that initiated the safety blitz but revealed that driver error, inadequate load restraints and poor mechanical factors were all contributing factors.

Collins says, "We're also putting employers on notice; if we see heavy vehicle drivers doing the wrong thing you can expect a knock on the door and further investigations to take place.

"Heavy vehicles remain over-represented in serious crashes, and we want to reduce this as much as possible."

These infringements are a timely reminder to all road users to ensure they are prioritising and practicing safety at all times. ■

► Continued from page 1 **"Are good trucks the sign of a great operator?"**

Of lesser but still significant interest were problems with lights, steering/suspension and vehicle structure. Surprisingly, vehicles with detected brake problems were not found to be involved in significantly higher or more costly incidents.

The analysis of vehicle systems suggests that 'good' vehicle operators are aware of the safety-critical heavy vehicle systems and ensure that they are monitored and well maintained. Conversely, operators who do not proactively manage the safety of these systems are probably more likely also not to manage other key safety systems and have overall poorer safety performance, more frequent and more costly incidents. In short, it pays to ensure vehicle roadworthiness.

Given the high correlation between well maintained wheels/tyres and good safety performance, an interesting observation from the analysis was that perhaps one of the easiest ways to gain insight into the effectiveness of a businesses' safety management practices is simply to check the condition of the tyres of their vehicles!

This recent report is reflective of the 2008 Austroads report, 'Analysis of the Safety Benefits of Heavy Vehicle Accreditation Schemes'. This report looked at accreditation as:

"a formal process for recognising operators who have good safety and other management systems in place... [including]...vehicle maintenance, driver fatigue, driver training, vehicle loading and the many other factors that affect heavy vehicle safety and sustainability."

The report identified that "[accreditation] schemes are based on the premise that the adoption of good management practices will lead to improved safety and other benefits."

The report interestingly found:

"From the data available, it would appear that vehicles accredited to TruckSafe or NHVAS are, on average, significantly safer than vehicles that were not accredited. The calculated difference in average crash rates was substantial with vehicles accredited to the schemes having between ½ and ¾ fewer crashes on average than non-accredited vehicles."

This supports the recent findings of the special report conducted by the NTI, NTARC and NHVR.

It is evident that when businesses prioritise and properly maintain their heavy vehicles' key safety systems, they are more likely to be better operators who encounter fewer and less severe on-road incidents. ■

A series of failures leads to first consignor prosecution

Joshua Clarke, Lawyer, Holding Redlich

A string of negligent behaviour and a rollover incident has seen a Victorian company become the first consignor to be prosecuted by the NHVR since the 2018 amendments to the HVNL. As with most prosecution firsts, these incidents are never firsts worth celebrating. However, it can be useful to take a closer look at the circumstances around the incident to see what can be learned.

On 11 November 2019, a truck toppled onto a pedestrian crossing in Dandenong. The truck was loaded with a shipping container carrying 26 tonnes of imported timber plywood products.

It is alleged that the consignor failed to comply with loading and restraint requirements, failed to advise an overseas supplier of Australian safety regulations, failed to have any restraint system in place in the container and failed to advise the driver and operator how the load was packed. According to the NHVR, it appears that the company had neglected to take any such measures since June 2017. Since then, it is alleged that 189 containers had been transported without sufficient restraint.

The NHVR charged the company with offences under s 26G and 26H of the HVNL

for exposing drivers, unloaders and members of the public to a risk of death or serious injury. This case will be a test for the application of the shared duty to consignors of goods for transport by heavy vehicle for the first time since the 2018 amendments. Fortunately, no one was injured in the November 2019 rollover. However, things could have been very different.

In November 2015, we reported on a similar prosecution stemming from a tragic incident that occurred in Liverpool, [NSW In Notaro v Futurewood Pty Limited; Notaro v Elms; Notaro v Major](#) (2014), a truck was carrying a shipping container loaded with 19 tonnes of building products which had not been properly restrained. The truck rolled at an intersection, crushing a car and killing its 33-year-old driver.

The Roads and Maritime Services successfully prosecuted the consignor (a fencing, decking and cladding supplier) and the company and its directors received fines that were close to the maximum available under the legislation at that time.

Under today's HVNL, serious safety breaches attract much higher penalties including up to 5 years' imprisonment for individuals. Jailtime is not on the cards in the present case, but the company still faces a possible fine of up to \$1,500,000. ■

Small shifts can save lives

Nathan Cecil, Partner, Holding Redlich

Speed is one of the major factors contributing to accidents on our roads. We don't need to tell you twice about the fatal consequences of heavy vehicles exceeding the speed limit. In this article, we ask you to consider small shifts you can make in behaviour to improve safety. Are you ready to take speed management compliance into your own hands?

We often emphasise the place for technology in managing compliance and contributing to safer, more efficient transport practices. But it is important to remember the things that you as an individual can do to make our roads a safer place.

Research shows that small changes in speed can lead to a significant reduction in road trauma.

As a starting point, the absolute bare minimum you can do as a road user to protect yourself and those around you is to not exceed the speed limit.

SPEED COMPLIANCE UNDER THE HVNL

Under the HVNL, speed compliance is covered by:

- s 26C which imposes a primary duty that each party in the CoR for a heavy vehicle must ensure, so far as reasonably practicable, the safety of the party's transport activities relating to the vehicle;
- s 26E which prohibits a person from asking, directing or requiring (directly or indirectly) the driver of a heavy vehicle or party to the supply chain to breach speed obligations; and
- the requirement for certain heavy vehicles to be fitted with speed limiters and various sections prohibiting speed limiter tampering.

THE CHAIN OF VULNERABILITY

The primary safety duty and the interconnected nature of the supply chain reminds us that our actions both on and off the road impact others.

The stakes with heavy vehicles, in particular, are high. One driver's negligent behaviour can have disastrous consequences for other road users.

Not to mention the way in which speeding greatly exacerbates other risks such as general road conditions, the weather, vehicle condition, driver skills and experience.

So, how well acquainted are you with the simple steps you can take to promote and prioritise safety when it comes to speed? Does your business provide adequate education and training to tackle these issues? Actions such as taking 5 K's off, not putting pressure on drivers to speed and encouraging discussions about road safety can make a significant difference.

Our connectedness is an asset but it also leaves us exposed.

RISKY BUSINESS

Speeding reduces the time drivers have to avoid crashes, their ability to control the vehicle and lengthens stopping distances, increasing both the likelihood of crashing and the severity of the crash outcome.

Research from the Road Accident Research Unit of the University of Adelaide has shown:

- the risk of involvement in a casualty doubles with each 5km/hr increase in free travelling speed above 60km/hr; and
- a 5km/hr reduction in speed can lead to at least 15% decrease in crashes.

In fact, at any speed, for every extra 1 km/h of speed:

- the stopping distance increases;
- more time is needed to react and avoid a crash;
- the impact of the crash is more severe; and
- damage to road infrastructure and the environment as a result of a crash increases.

In simple terms, the faster you drive, the harder you hit and the likelihood of death or serious injury increases.

 **CAUTION:** Speed compliance is often the target of investigations and prosecutions because it isn't particularly difficult to prove – either the vehicle was travelling above the speed limit or not.

WHAT STEPS CAN YOU TAKE TODAY?

Use the following questions to review the systems and procedures your business has in place to address speed management compliance:

- Is there effective two-way consultation, cooperation and coordination of all parties along the supply chain?
- Do we provide adequate information, training, instruction and/or supervision of speed management obligations and associated policies and procedures?
- Are there enough policies and procedures, or systems to report non-compliance?
- Are there any conflicting commercial arrangements or employment terms between CoR parties?
- Are there any poorly planned trip schedules and driver rosters and/or inadequate oversight to verify suitability?
- Are there flexible loading and unloading schedules or timeslots?
- Are we compliant with speed-limiting requirements and/or inadequate maintenance of speed monitoring components?

- Do we monitor deliberate actions of drivers or other CoR parties?
- Do we consider driver experience and skills?
- Is there adequate monitoring and/or due diligence by all CoR parties to ensure safety and compliance of transport activities?

DON'T LEAVE IT ALL TO TECHNOLOGY

Although there is no question about the importance of technology and its increasing prevalence in the ways we conduct, monitor and document our transport activities – we can't just switch off and leave safety entirely to technology.

When it comes to speed management compliance, there are things that remain the responsibility of parties in the supply chain. We can't solely rely on technology to get safety right – active steps must be taken to ensure speed compliance occurs. The below points are a good place to start:

- never put pressure or unreasonable expectations on drivers that may influence them to speed;
- prioritise and promote safety in the workplace through implementing appropriate safety procedures and providing adequate education and training;
- have appropriate reporting and escalation procedures in place in the event of a breach or incident; and
- foster good relationships between parties in the chain so that there is incentive to communicate/stick to safety procedures.

In addition to adopting the above processes, you also need to be mindful of unique risk factors that apply to your business.

For example, if you have more time-sensitive freight, such as perishable items, they may require different compliance controls to fleets and parties which are not involved in these activities. Slow down and consider if your parties are adequately informed and whether you have the right procedures in place to ensure speed compliance.

SLOWER IS SAFER

The risks associated with speeding for any road vehicle are significant. For heavy vehicles, speeding poses a significantly larger risk due to the size and mass of the vehicle and any possible loads they may be carrying. It's no surprise that the heavier the vehicle, the longer it takes to stop, the greater the impact and potentially more severe the consequences.

Although at the end of the day there is only one driver behind the wheel, other parties in the supply chain need to recognise how they can influence on-road behaviour and the small steps they can adopt to make transport activities safer. ■

► Continued from page 1 "Are your business documents up to scratch?"

WHO CAN ISSUE A NOTICE TO PRODUCE UNDER THE HVNL?

Division 4 of Part 9.4 of the HVNL sets out the powers given to certain individuals relating to information-gathering. For instance, s 567 provides for powers under the HVNL to compel a heavy vehicle driver to provide his or her name, address and date of birth to the relevant authorised officer.

WHAT IS A NOTICE TO PRODUCE?

When the NHVR commences an investigation into wrongdoing or contraventions to the HVNL, it will usually require persons or business associated with the wrongdoing to produce various documents. The way that it compels the production of these documents is to issue and to serve on the recipient a notice to produce.

The notice will set out, in broad terms, the documents that you are required to produce. The notice will also often specify individual people or companies, types of documents (e.g. work diaries) and dates from when the relevant documents were created.

► IMPORTANT



When the NHVR serves a notice to produce, you have the right to consider and seek legal advice on the contents of the notice. The notice will usually not make the recipient produce the requested documents immediately but to produce the relevant documents at a reasonable time and place.

WHY HAVE YOU RECEIVED A NOTICE TO PRODUCE?

As stated above, a notice to produce is a way for the NHVR, police or other authorised authority to compel the production of documents pertaining to an investigation.

That means that an investigation is being conducted regarding an offence under the HVNL and that the documents that you have in your possession may assist or be relevant to that investigation. It is very important that you take the notice seriously.

If you are charged with an offence under the HVNL, the way in which you respond to the notice may assist you or mitigate any punishment that may be given to you. For instance, the documents that you produce may exonerate you completely or may be taken into account in making a plea for leniency.

WHAT DOCUMENTS WILL YOU BE REQUIRED TO PRODUCE?

Section 569 of the HVNL sets out the types of documents that an authorised person can compel you to produce under the HVNL. These are:

- a. a document issued to the person under the HVNL;
- b. a document, device or other thing required to be kept by a person under the HVNL or a heavy vehicle accreditation;
- c. transport documentation or journey documentation in the person's possession;
- d. a document in the person's possession relating to:
 - i. the use, performance or condition of a heavy vehicle;
 - ii. the ownership, insurance, licensing or registration of a heavy vehicle;
 - iii. the load or equipment carried or intended to be carried by a heavy vehicle, including, for example, a document relating to insurance of the load or equipment;
- e. a document in the person's possession relating to any business practices; and

- f. a document in the person's possession showing that a heavy vehicle's garage address recorded on a vehicle register, however named, kept under another Australian road law is or is not the vehicle's actual garage address.

Although the categories of documents under section 569 of the HVNL are broad, the general types of documents that will usually fall within the ambit of the legislation that you may be required to produce are:

1. **Transport documentation** – these are documents evidencing the contract governing the transport of goods or passengers. These documents may be relevant because they can evidence the mode of transport and/or will evidence the transaction between the parties pertaining to the incident under investigation.

The types of documents that are included are:

- a. contracts for the carriage of goods;
- b. bills of lading;
- c. seaway bills;
- d. delivery orders;
- e. invoices; and
- f. delivery confirmation documents.

2. **Journey documentation** – these are documents (aside from the transport contractual documents) that evidence the actual transportation of goods or passengers. These documents may be relevant because it will evidence the journey, and what happened on the journey, that is the subject of the investigation. It may also include documents that relate to how journeys are conducted generally; this will depend on the exact notice and the type of the investigation being conducted.

The types of documents that will fall within this category are:

- a. work diaries;
- b. permits and notices;
- c. container weight declarations;
- d. run sheets;
- e. tollway records;
- f. driver pay records;
- g. mobile phone records; and
- h. fuel dockets and receipts.

3. **Responsible person documentation** – these are documents that evidence the person who is responsible for the heavy vehicle. These documents may be relevant because it will evidence the person who had control of the vehicle at the time that the investigated event took place. In most instances, this will be quite simple, such as the owner of the vehicle.

LIMITATIONS ON NOTICES TO PRODUCE

So, can an authorised officer ask you for anything? In short, no.

There are limitations imposed on notices served under the HVNL. The documents that an authorised person may request from you are confined to the categories of documents expressly provided for under the HVNL referred to above.

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For example, an authorised person cannot serve a notice to produce on you seeking production of your personal bank accounts or tax records on the basis that there is an ongoing investigation into an alleged contravention of the HVNL. Such a notice to produce is impermissible.

Additionally, notices to produce have the tendency to err on the side of compelling wide production of documents; sometimes this can result in a recipient having to produce a voluminous amount of material.

If a notice to produce requires production of, for instance, thousands of documents that were created over a long period of time, then this will be an oppressive request for documents. In this case, you may be able to rely on a 'reasonable excuse' to not immediately comply with the notice and, after, to negotiate its terms.

Further, you are not required to produce documents that are legally privileged. It is important, however, before you decide whether to produce or not to produce various documents, that you get legal advice on how to proceed.

 **REMEMBER:** Lawyers deal with these types of requests for documents all the time and they are well aware of what types of documents the relevant authority can ask for and, more crucially, what they cannot ask for. Do not make the decision for yourself. There are hefty penalties associated with non-compliance with a notice to produce.

HOW SHOULD YOU RESPOND TO THE NOTICE TO PRODUCE?

To respond to a request for documents under the HVNL, follow our step-by-step guide below to ensure compliance with the HVNL.

If your business follows safety procedures and is thorough with record keeping, notices to produce can ultimately assist you in investigations as adequate documentation can show that all reasonably practicable steps have been taken to ensure safety.

In the case that you are presented with a notice to produce, would your business documents be up to the test? ■

Step-by-Step: Respond to a notice to produce

Charlie Coleman, Lawyer, Holding Redlich

In the event that an authorised officer issues you with a notice to produce, use the following step-by-step guide to gather the relevant documentation that has been requested of you in order to comply with your safety obligations under the HVNL. ■

STEP-BY-STEP: RESPOND TO A NOTICE TO PRODUCE DOWNLOAD 		
Steps	Action	Obligations
1.	Prior to service of the notice, ensure that you have all the records required by law	<p>Under the HVNL, record keepers must keep a record of specific information for drivers of fatigue-regulated heavy vehicles.</p> <p>A record keeper may be the:</p> <ul style="list-style-type: none"> ▪ employer, if the driver is employed; ▪ accredited operator, if the driver is working under Basic Fatigue Management or Advanced Fatigue Management accreditation; or ▪ driver (as a self-employed or owner driver). <p>For each driver the record keeper must keep:</p> <ul style="list-style-type: none"> ▪ the driver's name, licence number and contact details; ▪ the dates 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). <p>Drivers must provide their record keeper with their relevant work and rest hours totals and any other relevant vehicle information the record keeper may not reasonably have access to. These are, for instance, registration numbers, dates the driver worked, etc.</p> <p>All records must be:</p> <ul style="list-style-type: none"> ▪ kept for three years after they are created; ▪ kept at a location accessible to an authorised officer for audit or investigation purposes; and ▪ in a format that is readable and reasonably assumed it will be readable in at least three years from the date of its creation.
2.	Review the notice to produce	<ol style="list-style-type: none"> 1. Report the notice to your supervisor, your compliance team and/or your in-house legal team. 2. Check the notice, is it addressed to you? 3. What type of documents are sought? 4. What is the stipulated time and place for production? 5. Consider how long it may take you to gather the requested documents. 6. Request an extension from the relevant authority if you cannot comply with the notice by the specified time and place.
3.	Get legal advice	Ask a lawyer about the notice to produce. A lawyer will be able to determine whether any limitations apply, whether the notice is oppressive or whether you have to produce the relevant documents.
4.	Consult other parties	Some documents that you may be required to produce may be held by third parties. You need to make requests from them to provide you with the relevant documents.
5.	Produce the documents	Attend the time and place and produce the documents that are captured by the terms of the notice. Remember, you do not have to produce irrelevant material or legally privileged material or material that is otherwise beyond the scope of notices to produce served under the HVNL.

Modifications to heavy vehicles: Do you need approval?

Melanie Long, Associate, Holding Redlich

You might think that the extent to which you modify your heavy vehicle is up to you. However, depending on how much these changes depart from the manufacturer’s specifications, you may need to get approval. This article looks at how the HVNL understands modifications, the circumstances in which you need to seek approval and the process for doing so.

The approval of a modification to a heavy vehicle is guided by the NHVR’s *Code of Practice for the Approval of Heavy Vehicle Modifications (Code)* which is encompassed in the *Heavy Vehicle (Vehicle Standards) National Regulation (Regulation)*.

MODIFICATIONS UNDER THE HVNL

Under the HVNL, a modification is defined broadly as adding a component to or removing a component from a vehicle. This involves making any changes that result in the vehicle departing from the manufacturer’s specifications.

TYPES OF MODIFICATIONS

Given the broad definition of modification, it is perhaps not surprising that they are categorised by the HVNL in three ways that carry with them different levels of approval. The types of modification include minor, common and complex modifications.

1. Minor modifications

If, in spite of a modification, a vehicle continues to be within manufacturer’s specifications and complies with the Regulation, the modification will be a minor modification. These types of modifications do not require the approval of the NHVR. Examples of minor modifications include the fitting of optional accessories or those that do not affect the safe operation of the vehicle.

2. Common modifications

As the name suggests, common modifications are those that are regularly performed to heavy vehicles and are well understood by the NHVR and industry. A common modification requires the approval of an appropriately qualified and accredited Approval Vehicle Examiner (AVE) (see below).

3. Complex modifications

Complex modifications are those modifications that allow a heavy vehicle to carry out a particular task or function. Due to their unique nature, complex modifications require the assessment and approval of NHVR on a case-by-case basis and might involve the engagement of a professional engineer to carry out an engineering assessment of the vehicle and modifications.

APPROVAL OF COMMON MODIFICATIONS

Only common and complex modifications need approval. Common modifications are approved by AVEs who will carry out an assessment of the modification. AVEs are persons or organisations that are approved or accredited to approve modifications to heavy vehicles by the State Transport Authority of each of the participating jurisdictions (being all Australian states, except the NT and WA).

Once an AVE approves a common modification they must:

- affix an approved modification plate/label to the vehicle;
- give an approved modification certificate to the registered operator or owner of the vehicle; and
- ensure any necessary evidence required by the AVE scheme, under which the person is approved or accredited, is retained.

To ensure the safety of a vehicle, an AVE may require a modification to meet standards higher than those specified in the NHVR Code. It is important to speak with an AVE prior to undertaking any design or modification work to ensure you embark on the most efficient, fit for purpose and cost effective modification of your heavy vehicle.

APPROVAL OF COMPLEX MODIFICATIONS

Complex modifications must be approved by the NHVR. This can be done via their website through the NHVR portal. Prior to approving a complex modification, the HVNL requires that the NHVR be satisfied that:

- using the modified vehicle on the road will not pose a significant safety risk; and
- the modified vehicle will comply with all relevant noise and emission requirements, other than those for which an exemption has been issued.

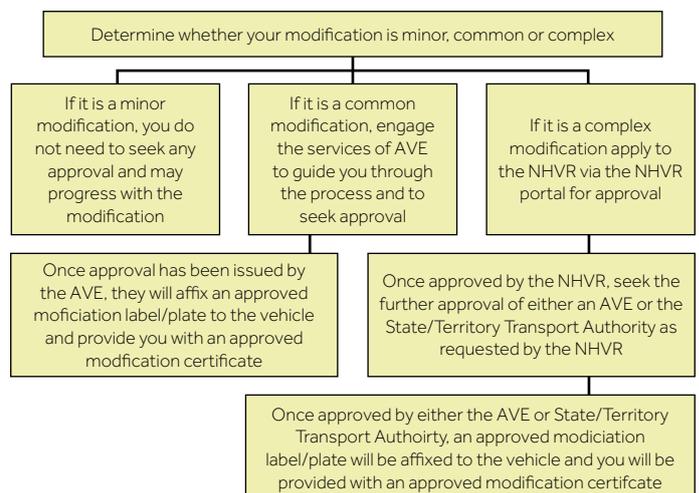
In order to satisfy the NHVR that a modification meets the above requirements, an applicant may be required to provide further information or supporting documentation such as engineering designs and reports, simulations, test results or photographs. If the NHVR decides to approve a complex modification, it will issue a Statement of Requirements that outlines:

- the modifications that are approved;
- the technical requirements that must be met; and
- the conditions of the approval.

Every modification approval issued is also subject to the inspection of either an AVE or the State/Territory Transport Authority to ensure the modification complies with the NHVR’s approval. If the person inspecting the modification confirms that it complies, the inspecting officer will:

- affix an approved modification plate/label to the vehicle;
- give an approved modification certificate to the registered operator or owner of the vehicle; and
- ensure any necessary evidence required by the AVE scheme, under which the person is approved or accredited, is retained.

Given the unique nature of complex modifications, it is recommended that a person modifying a heavy vehicle does not commence any complex modification until a Statement of Requirements has been received. It is also advised that a professional engineer is engaged to provide services and advice on any proposed complex modifications. Once obtained, complex modification certificates are recognised in all participating jurisdictions. Follow the diagram below to work out whether you need approval. ■



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.

Consignor safety obligations

Q As a consignor, how do I know that I am doing all the right things?

A Under the HVNL, you are classified as a consignor of goods when you engage a heavy vehicle operator (through an agent or other party) to transport your goods (consignment) to a consignee (such as a buyer receiving your goods) by road for commercial purposes.

If that is you and you have read this far in this edition of the newsletter, you would be on notice that the NVHR is willing to prosecute consignors for falling short of their safety duties under the HVNL. How do you ensure that you do not end up as the NVHR's next target?

Consignors' key responsibilities include ensuring that:

- loads do not exceed vehicle mass or dimension limits;
- goods carried on your behalf are appropriately secured;
- operators carrying freight containers have a verified Container Weight Declaration; and
- your delivery requirements do not require or encourage drivers to exceed the speed limits, exceed regulated driving hours, fail to meet the minimum rest requirements, or drive while impaired by fatigue.

Effective safety systems and controls should be in place in your business to prevent breaches of your key responsibilities as a consignor.

Another important element is that consignors should only work with supply chain partners that have good safety and compliance records. When entering an arrangement with a (reputable) transporter, whether written or verbal, you should ensure you make it clear that they must comply with regulations and safety requirements. Further, your agreement should specify what happens if the transporter breaches those obligations. Importantly, if a breach of a safety duty occurs, you need to enforce those consequences or you may risk being complicit in the breach.

What does 'reasonably practicable' actually mean?

Q The phrase 'reasonably practicable' comes up a lot in the HVNL. Remind me, what does it actually mean?

A Something is 'reasonably practicable' for a person if it is, or was at the time, reasonably able to be done to ensure the safety of the person's transport activities relating to a heavy vehicle.

As a party in the CoR, you should consider several things when assessing whether something is 'reasonably practicable' for you in the context of your primary duty. These include:

- the likelihood of a safety risk, or damage to road infrastructure, happening;
- the harm that could result from the risk or damage;
- what you know, or reasonably ought to know, about the risk or damage (and about ways of removing or minimising the risk or preventing or minimising the damage);
- the availability and suitability of those ways; and
- the cost associated with the available ways, including whether the cost is grossly disproportionate to the likelihood of the risk or damage.

For example, when dealing with a safety risk, a particular step to reduce or eliminate that risk is probably reasonably practicable if the likelihood of the risk occurring is high and you know of several cost-effective ways you could reduce that risk.

On the other hand, some risks are only very minor. It may not be reasonably practicable to completely eliminate those risks if the only way to do so would blow the budget — especially if you could achieve a healthy reduction in the risk by more modest means.

Remember, it is not only what you know but also what you reasonably ought to know that matters when assessing reasonable practicability. In other words, ignorance is no excuse — this is why it is important to keep up to date with best safety practices and standards. That way you can be sure you are meeting your primary duty under the HVNL.

HVNL penalties

Q What type of penalties are available under the HVNL?

A The HVNL contains three different types of penalties:

- infringement notices;
- court imposed penalties; and
- demerit points.

Infringement notices are issued for infringeable offences. These are essentially on-the-spot fines, generally for strict liability offences. If you receive a notice, you have the option of paying the fine or electing to have the matter dealt with in court. Fines are set at 10% of the maximum court imposable penalty. Some examples of infringeable offences include:

- contravening a heavy vehicle standard;
- operating a heavy vehicle without an appropriate emission control system; or
- a driver's minor risk breach of the rest requirements when operating a fatigue-regulated heavy vehicle.

Court-imposed penalties are generally reserved for more serious offences, such as breaches of the primary safety duty. As the name suggests, these penalties can only be imposed by a court — they cannot be issued as fines via an infringeable notice. Court-imposed penalties for the most serious offences include significant fines and possible imprisonment for individuals.

Demerit points are generally managed through each state and territory's road traffic law. However, eight of the 300 offences under the HVNL impose demerit points. These relate to breaches of the fatigue management obligations on drivers, including the work and rest requirements. ■

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Revised NHVAS Business Rules and Standards

The newly revised Business Rules and Standards (Business Rules and Standards) under the NHVAS came into effect on 22 February 2021. Over the next few editions, we will look at different elements of the NHVAS. In this article, we provide a general overview of the NHVAS and unpack the recent changes to the Business Rules and Standards.

WHAT IS THE NHVAS AND WHAT ARE THE ELIGIBILITY REQUIREMENTS?

The NHVAS is an accreditation scheme operated by the NHVR which recognises operators that have robust safety and other management systems in place. It is also increasingly being used to show compliance with general duty requirements under the HVNL.

To be eligible for accreditation under the NHVAS, operators need to provide evidence that they comply with the relevant NHVAS module's standards. In particular, the operator (being either an individual or corporation) must:

- read and understand the NHVAS Business Rules and Standards;
- develop and maintain an in-house safety management system;
- document procedures that staff must follow to achieve compliance with NHVAS standards;
- produce (and keep for audit) documents and other evidence that prove compliance with the relevant standards;
- undertake internal audits and review; and
- undergo independent audits.

Accordingly, understanding and incorporating the Business Rules and Standards is essential for operators who wish to obtain or otherwise maintain an accreditation under the NHVAS.

BENEFITS OF NHVAS ACCREDITATION

There are a number of benefits of obtaining an NHVAS accreditation across a range of different safety areas including mass management, maintenance management and basic and advanced fatigue management. These include, by way of example, operators with mass management accreditation being able to operate at concessional mass limits and the ability of operators with basic fatigue management accreditation to have more flexible work and rest hours.

CHANGES TO THE BUSINESS RULES AND STANDARDS

In November 2019, a meeting of the Transport Infrastructure Council endorsed changes to the Business Rules and Standards to encourage further alignment with Safety Management System principles and to make the current Business Rules and Standard's clearer so as to avoid misunderstandings.

Major changes to and amendments to the **business rules** include:

- clarification around registration status for nominated vehicles;
- the inclusion of fit and proper assessment criteria;
- the addition of a 6-month timeframe to reapply after accreditation has been refused or cancelled;
- clarification around the criteria for the maximum 3 years of accreditation;
- inclusion for operators to report a significant crash or incident as a Notifiable Occurrence;
- rights given to the owner of a sub-contractor vehicle to remove the vehicle from an accreditation;

- Advanced Fatigue Management (**AFM**) Business Rules and standards are now included as part of a single document covering all modules;
- references to Fatigue Expert Reference Group (**FERG**) replaced with advice from jurisdictions and third parties; and
- FERG requirements replaced with the ability of NHVR to seek external specialist advice.

Major changes to the **standards** include:

- vehicles declared 'safe' instead of 'roadworthy' after the maintenance daily check;
- tow couplings to be checked daily;
- vehicles to be inspected by a qualified person annually;
- register of infringements and defects to be kept;
- mass management nominated vehicle loaded mass to be verified twice per year;
- AFM & Basic Fatigue Management use the same seven standards;
- vehicles as a workplace must meet workplace safety legislation (fatigue modules); and
- vehicle statement of compliance are no longer required to be carried.

HOW TO ENSURE COMPLIANCE WITH THE REVISED BUSINESS RULES AND STANDARDS

If you are an existing accredited operator, before your next audit after 22 February 2021 you will need to:

- become familiar with the new requirements;
- review and update policies and procedures where need;
- educate your staff about the changes; and
- implement the changes made to management systems.

For existing NHVAS accredited operators there is a transition period for the changes to be implemented. This transition period means you have one accreditation cycle after 22 February 2021 to identify any changes needed and then until your following audit to implement the changes. For new operators to the accreditation scheme, any changes that are identified at the first audit will be encompassed in a Transitional Correction Action Request (**TCAR**). Any TCARs will then need to be addressed by the end of your next accreditation cycle.

If either operator wants to get a head start, guides for each module which cover all the new requirements are available on the NHVR's website. By comparing the guide for the relevant module against your current system you will find the gaps for any changes needed.

TAKEAWAYS

- A number of changes to the Business Rules and Standards under the NHVAS came into effect on 22 February 2021.
- The NHVAS is a safety accreditation scheme for heavy vehicle operators.
- There are a number of benefits to obtaining an NHVAS accreditation across a range of different safety areas.
- In order to obtain or maintain your NHVAS accreditation you must understand and implement the changes to the Business Rules and Standards as soon as possible (which can be done with the help of module guides on the NHVR website), but no later than by your second audit date after 22 February 2021. ■

IN THE NEXT ISSUE

OUT JUNE 2021

- **NHVR successful appeal of fatigue-related case**
- **Are you counting rest time correctly?**
- **Sprung with speed limiter tampering device**