

From Your Editor-in-Chief



In this issue, we briefly shift our focus from the roads to the skies. A pilot program by the National Heavy Vehicle Regulator (NHVR) plans to use drones to help monitor and identify high-risk vehicles, operators and loads for enforcement intervention.

Given that this represents a leap forward in monitoring and enforcement technology, we consider the potential impact of these forecast changes.

Speed limits and speed limiting of heavy vehicles are not matters of practice or interpretation – they are fixed and firm. We take a look at a case where a transport operator was prosecuted for possessing speed limiter tampering equipment. It has been shown time and time again that speed can be a major contributing factor to accidents and can greatly exacerbate the consequences of incidents when they occur. So, slow down, save a life and don't tamper with speed limiters.

Can you imagine stating to the court that your fatigue breach was 'trifling' and should not be penalised? We examine what would happen if you were tempted to run with this argument and also shine a light on the undesirable complexity of calculating work/rest time.

Happy reading!

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

Look to the skies! Drones to monitor compliance

Nathan Cecil, Partner, Holding Redlich

When we think of the Heavy Vehicle National Law (HVNL), we think of trucks, loads and roads. As technology develops, the NHVR is taking to the skies to monitor heavy vehicle compliance. While this innovation is exciting, what do these proposed changes mean for your on-road behaviour?

The NHVR recently released an Australia-wide tender looking for a supplier who is able to provide 'target or reconnaissance drones' and other Automatic Number Plate Recognition (ANPR) camera technology.

SO, WHAT IS THE NHVR GOING TO DO?

The NHVR has long adopted a risk-based approach to compliance monitoring and enforcement activities. This means that the NHVR will likely focus its compliance monitoring and enforcement efforts on businesses in the road transport supply chain

that have a poor track record of compliance and therefore pose the greatest risk to safety.

HOW DO DRONES FIT INTO THIS?

The NHVR plans to roll out a drove of ANPR-equipped monitoring devices. The initial trial will include two vehicle-mounted cameras, two trailer-mounted cameras and one drone-mounted camera, all equipped with ANPR.

Drones have been used in Australian road policing but typically not with integrated ANPR capabilities.

WHAT IS THE DRONE GOING TO BE LOOKING FOR?

The ANPR capabilities will be used to flag any high-risk vehicles, operators or loads. Examples might be oversized or over-mass loads that are approaching bridges or dangerous goods carriers about to enter tunnels.

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How-to: Count work and rest time

Charlie Coleman, Lawyer, Holding Redlich

The complexity of counting time under the HVNL means that you might stumble in this area of fatigue management. Counting work and rest time correctly is a key part of upholding your safety obligations. No matter how complex the rules are, they exist for the safety of all road users and it is your responsibility to make sure you understand them. In this article, we unpack these issues within the context of a recent case study.

FATIGUE MANAGEMENT

Fatigue management is a critical part of ensuring that logistics service providers and other road users are safe on our roads. That is why the HVNL imposes criminal offences on individuals who breach the counting time requirements that are set out in the HVNL.

Under the HVNL, fatigue-regulated heavy vehicles are:

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

If asked, most of us would be able to list some warning signs of fatigue. These can range from a general lack of alertness, an inability to concentrate or simply making more mistakes than usual to more obvious symptoms such as a more definite feeling of drowsiness, actually falling asleep or being subject to micro-sleeps.

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— HELPDESK QUESTION OF THE MONTH —

What is happening with the Senate Inquiry into the road transport industry? (answer on page 7)

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

Women at the wheel: Pilbara Heavy Haulage Girls

Content Editor, Portner Press

There is no doubt that the heavy vehicle industry can be a high-pressure environment given the schedules, deadlines and on-road risks that come with operating heavy vehicles.

Now, imagine being a woman in this traditionally male-dominated field and the additional challenges that would come with this. Significant work needs to be done to promote positive pathways into the industry for women.

According to the Australian Trucking Association, only 3% of truck drivers in Australia are female. Industry-wide representation is at only 26%, with most women working in administrative roles.

The Pilbara Heavy Haulage Girls (PHHG) is a not-for-profit organisation providing professional development and career pathways for women keen to join the male-dominated industry. PHHG is owned by Heather Jones, who in addition to running a transport business heads up a 'boot camp' for female drivers coming into the heavy-duty segment.

Jones said that the results her boot camp program has produced have been much more than just learning heavy-duty driving skills.

"When we started training I just wanted safe drivers on the highway, I never ever thought we'd be able to change people's lives in such a powerful way, there's been so many amazing roll-on effects for our participants," Jones says.

Jones also brings her trucks to events such as the recent International Women's Day held by the township of Port Hedland where Jones and artist Bobbi Lockyer were invited as speakers.

Until this day, Bobbi Lockyer had never been behind the wheel of a truck. Living in a situation of domestic violence for more than a decade, Lockyer had a very real fear of driving and only recently got her licence.

Jones asserts how empowering driving a truck can be.

"Even the view from up in the cabin gives you a feeling of achievement."

While initiatives like Heather Jones' boot camp can provide a stepping stone for women, there is still a long way to go to redress the gender imbalance in the industry. Everyone has a part to play in normalising these conversations to close the gender gap. ■

► Continued from page 1 "Look to the skies! Drones to monitor compliance"

The drones may be looking for vehicles or operators who have a demonstrated poor track record from prior roadside inspections. A spokesperson for the pilot project said:

"These cameras will assist NHVR's officers in undertaking an intelligence-led and risk-based approach to safety by ensuring enforcement efforts target the greatest safety risks."

WHAT HAPPENS WHEN THE DRONE IDENTIFIES A HIGH-RISK TARGET?

Unfortunately, for those of us who like action movies, the tender does not extend to any explosive engagement with the high-risk target. Any such identified high-risk vehicles, operators or loads can then be flagged for inspection by on-road enforcement units.

WHERE WILL THE DRONES OPERATE?

The initial trial will see the drone used in the NHVR's Southern Operations region covering ACT, South Australia, Victoria and Tasmania.

WHAT ARE THE BENEFITS TO LAW-ABIDING CITIZENS?

The pilot project is aimed at focusing compliance monitoring and enforcement activities where they are needed, not at increasing on-road interventions across the board.

So, if the project is a success and the ANPR cameras are rolled out more widely, law-abiding citizens can expect to be the subject of less on-road interventions. Effectively, if they are

screened and cleared as not being high-risk vehicles, operators or loads, they can expect to be given a 'wave through' more often. Or as a spokesperson for the pilot project said:

"Smarter camera technology will also assist in identifying operators who are doing the right thing, who can then expect to be less regularly intercepted by the NHVR."

HOW LONG WILL THE PILOT PROJECT GO FOR?

The pilot project is expected to commence mid-2021. Once it begins, the pilot is scheduled to run for three months.

WHAT COMES NEXT?

After the initial trial period concludes, the NHVR will provide information on the outcomes to the public. We expect that the NHVR will also indicate its intention to continue with or scrap the project, depending on whether it has delivered real safety benefits.

Overall, the goal of the project is to take as much of the guess-work out of heavy vehicle safety monitoring and enforcement as possible. The Australian heavy vehicle fleet is massive and it must be a bit of a lucky dip to identify vehicles, operators and loads who pose a significant safety risk when relying on random on-road interventions. In the same way that businesses in the supply chain must adopt a risk-based approach to managing safety, it is good to see the NHVR continuing to implement a risk-based approach to monitoring and enforcement. ■

Spotlight on speed limiter tampering

Joshua Clarke, Lawyer, Holding Redlich

A South Australian transport company has been sprung for possessing speed limiter tampering equipment. The NHVR has prosecuted the owner following an investigation by the South Australian Police Heavy Vehicle Investigation Section at the company's Mid-North premises in August 2020.

At these premises, the police discovered a laptop installed with tampering software, along with connecting plugs. Initially, the company owner refused to answer questions about the device. However, at a court hearing last month they pleaded guilty to possessing the speed limiter tampering device without a reasonable excuse; an offence under the HVNL. The owner, who has not yet been identified, is personally liable to pay a fine of up to \$10,000 for the contravention. Where a company commits the offence, fines can reach \$50,000.

Speed limiters have an important role to play in keeping our roads safe. The sheer size

and weight of heavy vehicles means they inevitably pose a greater risk to road users. Ensuring heavy vehicles travel at a safe speed is key in minimising the likelihood of incidents.

Heavy vehicles exceeding 4.5 tonnes GVM must not travel faster than 100km/h. Certain trucks over 12–15 tonnes must be fitted with speed limiters to ensure they do not exceed this limit. Section 60 of the HVNL sets out these prescribed vehicle standards, including the standard requiring the use of speed limiters for such trucks. Fines of up to \$6,000 apply for any breach.

There are also specific offences relating to tampering with speed limiters under s 93 of the HVNL. Contraventions of these provision attract higher maximum penalties of \$10,000.

Following a conviction for a possession offence, the court can order the offender to forfeit the tampering device. In this case, the NHVR indicated that it would ask the court to make such an order. ■

The prosecution process in four steps

Nathan Cecil, Partner, Holding Redlich

The stakes are often always high in on-road incidents. Add heavy vehicles into the mix and the risk increases. As such, the penalties for breaching safety obligations under the HVNL need to reflect this. However, the most important function of prosecution is to educate parties in the supply chain about the correct way to manage their safety duties and responsibilities so that breaches do not occur again. In this article, we walk you through the four steps of the prosecution process.

In the unfortunate event that you are investigated for a breach under the HVNL, it is important that you have a basic understanding of your responsibilities and how the investigation and prosecution process operates. This will help ensure you conduct your future transport activities in a way that meets your safety obligations under the HVNL.

The NHVR makes an example out of companies with deficient CoR policies and procedures. The purpose is not to punish individuals but to prioritise and promote safety. Through outlining four straightforward steps involved in prosecution, we aim to equip you with knowledge on what to expect from this process should you find yourself under investigation.

> IMPORTANT



The NHVR's prosecutorial functions are set out in s 659 of the HVNL. This primarily involves bringing and conducting proceedings in relation to contraventions and offences against the HVNL, as well as conducting or defending appeals.

WHAT STEPS CAN THE NHVR TAKE?

If you are under investigation for a breach of the HVNL, there are certain steps that the NHVR will take. These are as follows:

1. Notice to produce

The NHVR typically commences an investigation process by issuing you with a notice to produce. This notice will require that you produce documents to the NHVR within a specified window of time.

These notices are drafted in broad terms and require parties to produce copies of relevant journey and transport documentation to aid with the investigation.

To give you an idea of what information might be requested, this often includes documents such as:

- entry and exit times of a vehicle to various sites;
- copies of all transport documentation, such as bills of lading, consignment notes, container weight declarations and delivery orders; and
- records of any communication with the operator of the vehicle and other parties in the Chain.

The NHVR makes an example out of companies with deficient CoR policies and procedures. The purpose is not to punish individuals but to prioritise and promote safety.

In many cases, any concerns the NHVR had will be addressed through the production of the documents listed above.

> IMPORTANT



You must comply with the notice to produce. Heavy fines will apply to parties who limit the documents they provide or simply ignore the notice altogether.

2. Improvement notice

Improvement notices are considered one of the more educative and persuasive enforcement options available under the HVNL to ensure compliance with its requirements. If there has been a breach of the HVNL, an authorised officer might issue an improvement notice. These types of notices will require you to take action to stop the contravention from continuing or occurring again, or to remedy the matters or activities causing the contravention.

3. Court attendance notice

> DEFINITION: COURT ATTENDANCE NOTICE (CAN)

A CAN is a formal notice requiring each listed defendant to attend court to answer charges for an offence of the HVNL.

If the NHVR determines that the documents you provided demonstrate deficient CoR procedures, A CAN is issued and filed to commence proceedings for an offence under the HVNL. This is not an ideal path to be on. The time limit for commencing and proceedings for certain mass, dimension load offences under the HVNL by way of CAN is "2 years after the commission of the offence; or 1 year after the offence comes to the complainant's knowledge, but within 3 years after the commission of the offence."

4. Entering a plea

Once you receive the CAN, you will have to decide whether to plead guilty or not guilty to the charge. There are many different factors specific to each individual case that will dictate when or whether it is appropriate to enter a guilty plea, and whether it is appropriate to bring evidence of contrition for the offences as charged.

Some of these factors include:

- what are the defences available to you in relation to the charges; and
- what are the potential fines and costs of defending the charges?

The costs of defending a CoR prosecution are not limited to just the legal costs (which may be significant). The costs to reputation and time are also significant (if not more important), and they can be difficult to measure.

BE PROACTIVE ABOUT PREVENTING PROSECUTION

In recent years, the HVNL has undergone significant changes and it will continue to evolve – so too must your business. Now might be a good time to reflect on how your business is staying on top of your obligations under the HVNL. Are there ways that you can be more proactive about safety?

Many of us wait for something to go wrong before we address the behaviour or systems that lead to the incident. But by this point it is often too late. A failure to regularly critically evaluate the safety procedures your business relies on can leave you wide open to breaches and possible prosecution.

If you find yourself facing an investigation, it is imperative that you identify how to prevent future incidents from occurring and implement any necessary changes to avoid prosecution and ensure the safety of all road users. ■

➤ Continued from page 1 “How-to: Count work and rest time”

However, time and time again, we see instances where individuals neglect to recognise their own symptoms of fatigue.

When driving a heavy vehicle, these can obviously manifest in near misses, not keeping in your lane or overshooting a sign or line. These seemingly innocuous consequences of fatigue can have deadly consequences.

The Supreme Court of South Australia’s (**the Court**) decision in *Ballantyne v National Heavy Vehicle Regulator (2019)* provides insight into how these offences are dealt with by the court and provides practical guidance on how the court calculates working hours under the HVNL.

WHAT HAPPENED IN BALLANTYNE’S CASE?

Mr Ballantyne was convicted in the Magistrates’ Court of South Australia for an offence under s 250(1)(a) of the HVNL.

Section 250 provides:

Operating under standard hours—solo drivers

1. The solo driver of a fatigue-regulated heavy vehicle commits an offence if, in any period stated in the standard hours for the driver, the driver—
 - a. works for more than the maximum work time stated in the standard hours for the period; or
 - b. rests for less than the minimum rest time stated in the standard hours for the period.

Maximum penalty:

- a. for a minor risk breach—\$4 000;
- b. for a substantial risk breach—\$6 000;
- c. for a severe risk breach—\$10 000; or
- d. for a critical risk breach—\$15 000.

➤ IMPORTANT

As with other legislation in Australia, the use of ‘offence’ in this section refers to a criminal offence. That means an individual convicted of a breach will have a criminal record. If you are found guilty by a court for a contravention of the HVNL, it may have further ramifications on your personal and/or professional life.

In his appeal, Mr Ballantyne then sought leave from the Court seeking orders to overturn his conviction.

If a heavy vehicle operator works more than 13.5 hours work time in a given 24-hour period, then that is referred to as a ‘critical risk breach’.

THE JUDGE’S VERDICT

The judge in this case initially detailed the offence that Mr Ballantyne was convicted of in the Magistrates’ Court of South Australia. That is, Mr Ballantyne had been convicted of an offence under the HVNL for having worked more than 12 hours in the particular 24-hour period specified by the prosecution. His work diary, on the prosecution’s case, indicated that he had worked for 13 ¾ hours in that particular 24-hour period.

The combined effect of regulation 5 of the HVNL and the Heavy Vehicle (Fatigue Management) National Regulation is that, if a heavy vehicle operator works more than 13.5 hours work time in a given 24-hour period, then that is referred to as a ‘critical risk breach’. This is the highest of the four levels of breaches set out in s 250 of the HVNL.

Mr Ballantyne was self-represented, and his contention was that the magistrate made an error in agreeing with the prosecution’s calculation of the relevant 24-hour period.

Applying previous cases, such as *Police v Barnes (2017)* and *Roads & Traffic Authority (NSW) v Trinci (2011)*, the Court ultimately held that the prosecution was justified in selecting the end of a particular major rest break as being the start of the relevant 24-hour period. Because Mr Ballantyne had worked 13.5 hours in the 24 hours following the cessation of his major break period, he was deemed to breach the HVNL’s requirements for rest.

You must count work and rest time for the whole 24-hour period following the end of a relevant major rest break.

Notwithstanding the Court’s decision, the judge considered that, in this case, Mr Ballantyne did not intentionally transgress the HVNL’s regulations regarding mandated rest. The Court found that he held an honest belief that he was compliant and that he was calculating his work and rest time accurately. The judge also sympathised with the fact that the HVNL is very long, complex and difficult for ordinary people to understand and that confusing examples were given in the log books issued to heavy vehicle operators, noting how this may lead to confusion as to the calculation of rest hours.

The judge held at paragraph 8:

As to the examples in the logbooks issued to truck drivers, I do consider that they could be more ‘user-friendly’, particularly having regard to the audience to which they are addressed. It seems to me that, without in any way trying to be comprehensive, the single most obvious improvement might be to expressly state, loudly and clearly, that following the end of a major rest break there can be two overlapping 24-hour periods running at the same time. The first such period is the old 24-hour period that was running prior to the beginning of the major rest break (if it did not conclude during the course of that major rest break). The second period running would be the new 24-hour period that commences at the end of that major rest break. The trap for the driver in such circumstances is that when he commences the new 24-hour period following the major rest break he may be concentrating only on that new forthcoming 24-hour period and not appreciate fully that for some hours the old period may also still be running. The result may be in some cases that in working for the first few hours of the new 24-hour period those hours may result in his quota for the old 24-hour period being exceeded, even though he may not exceed his quota for the new 24-hour period. That is only one example that seems very apparent to me; there may well be others.

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► Continued from page 4

Unfortunately, although the law may be confusing and difficult to discern, ignorance of the HVNL is not a defence to a contravention, even though the Court found that Mr Ballantyne's contravention was not intentional. Accordingly, the Court dismissed the appeal and affirmed the sentence handed down by the Magistrates' Court.

WHAT CAN BE LEARNED FROM THIS?

It is widely held that the way that time is counted is relatively unclear and is governed by a confusing set of regulations set out in the HVNL.

► IMPORTANT



You must count work and rest time for the whole 24-hour period following the end of a relevant major rest break. If you take another, subsequent major rest break during that 24-hour period, it does not have the effect of resetting the 24-hour period.

You must continue counting work time for that 24-hour period after the break. You must count all work time before and after the subsequent relevant major rest break in that 24-hour period. There are therefore instances, as with Ballantyne's case, in which you can have two separate and overlapping 24-hour counting periods.

For example, if on a day you started working at 6am and worked:

- 5¼ hrs (7am–12.15pm) then took a 15-minute break
- 2¼ hrs (12.30pm–1.45pm) and took a 90-minute break
- 4½ hrs (4.15pm–8.45pm) then took a 7-hour major rest break.

You have completed the maximum 12 hours work time in any 24-hour period at 8.45pm and may not commence working again until 7am on the next day.

Remember, 'work time' does not mean 12 hours of *driving* time. The HVNL regulates all tasks to do with the operation of the fatigue-related heavy vehicle. This includes loading and/or unloading the vehicle or inspecting, servicing and repair work. That means that, for instance and using the example above, if you loaded the vehicle at 6.30am the next morning, before then starting driving at 7am, you would be in breach of the HVNL.

These are simple and easy mistakes to make, but if Ballantyne's case teaches us anything, it is that regardless of whether the court and regulator is sympathetic towards the complexities of counting time under the regulation, they have no choice but to enforce penalties under the HVNL. ■

Safety alert: Counting time case study

Charlie Coleman, Lawyer, Holding Redlich

In the table below, we provide a summary of our previous article regarding [Ballantyne v National Heavy Vehicle Regulator \(2019\)](#) and explain what you can learn from this case. Readers may want to use this download as a 'safety alert' or the basis for toolbox talks. ■

TABLE: BALLANTYNE v NATIONAL HEAVY VEHICLE REGULATOR

DOWNLOAD 

What happened?	<ol style="list-style-type: none"> 1. Ballantyne was a heavy vehicle operator that was operating a fatigue-regulated heavy vehicle under the HVNL. 2. Ballantyne took a major rest break and then worked, during the next 24 hours after that rest break, 13.5 hours of working time. 3. Ballantyne took another major rest break during that time, so that there were two overlapping 24-hour work periods.
Magistrates' Court	<ol style="list-style-type: none"> 1. The Magistrates' Court convicted Ballantyne of an offence under s 250 of the HVNL. 2. Because of the 1.5 hours over the 12 hour prescribed limit in time, this was deemed as a critical risk breach. 3. Therefore the maximum fine under the HVNL applied.
Supreme Court of South Australia (the Court)	<ol style="list-style-type: none"> 1. Despite the fact that the judge was sympathetic to Ballantyne's argument that the HVNL was overly complex, and that the examples in the logbook were confusing and did not clarify how to count time, the Court upheld the conviction made by the Magistrates' Court. 2. The judge found that there may be cases in which working in the first few hours of the new 24-hour period may result in those hours exceeding the quota for the old 24-hour period. 3. Unfortunately, Mr Ballantyne fit into that category of counting time, and therefore had no lawful excuse on which to rely.
What can you learn from this case?	<p>You must continue counting work time for the entire 24-hour period after the major break that you take.</p> <p>You must also count all work time before and after the relevant major rest break in that 24-hour period, even if you take an additional major rest break during that period.</p> <p>There are therefore instances, where two separate 24-hour counting periods overlap and put you in a compromising situation where you may be in breach of the HVNL.</p> <p>That is why it is important to count time diligently and correctly.</p>
How can you meet your safety obligations?	<p>Ensure that you are counting time correctly and that you have systems in place to stop situations like the one that occurred in Ballantyne's case from happening to you or your business.</p> <p>There are alternatives to the traditional logbooks issued to heavy vehicle operators that streamline and make this process more efficient.</p> <p>Investment in an electronic work diary as approved under the Electronic Work Diary Approval Register as maintained by the NHVR could be a beneficial investment for your business to ensure that you or your business complies with its fatigue management obligations under the HVNL.</p>

Reviews and appeals: When can you have a decision by the NHVR reviewed?

Melanie Long, Associate, Holding Redlich

We often examine the wide-ranging powers of the NHVR and the ways in which it can enforce the law. While you should have every faith that the NHVR exercises its powers appropriately and acts within the scope of these powers, it is possible that they don't always get it right. So, what can you do if you are not happy with a decision taken by the NHVR or believe the NHVR has gone beyond its scope to exercise these powers?

This article looks at the internal review mechanism of the NHVR, what you can do if you are still dissatisfied with a decision after an internal review and other avenues of recourse you may have against the NHVR under the HVNL.

WHAT NHVR DECISIONS ARE REVIEWABLE?

Not all NHVR decisions are reviewable. The decisions that can be reviewed are outlined in Schedule 3 of the HVNL and include, amongst others, an NHVR decision to:

- not grant an access permit;
- not grant a vehicle standards exemption;
- grant a vehicle standards exemption for a period less than the period (of not more than 3 years) sought by the applicant;
- impose on a vehicle standards exemption a condition not sought by the applicant;
- not make a decision sought in an application for amendment or cancellation of a vehicle standards exemption;
- amend or cancel a vehicle standards exemption;
- immediately suspend a vehicle standards exemption;
- not give a replacement permit for a vehicle standards exemption;
- not grant an Advanced Fatigue Management (AFM) or Basic Fatigue Management (BFM) accreditation; and
- issue or not amend a prohibition or improvement notice.

HOW TO HAVE AN NHVR DECISION REVIEWED

If you are dissatisfied with a decision of the NHVR, you can request an internal review by the NHVR via its website. If you choose to do so, it will be handled by a person of equal or higher rank than the original decision-maker. During the period of the internal review process, the original decision remains in force unless you make a stay application to the tribunal or court for the relevant jurisdiction in which you are operating. The result of the review must be made and notified to you as the applicant within 28 days of submitting your lodgement for the review.

If, after, and only after, an internal review is conducted, you are still unhappy with the decision, you can apply to the relevant tribunal or court in your jurisdiction. For example, for Victorian operators this will be VCAT. The effect of this being that only reviewable decisions

are also appealable. This appeal application generally needs to occur within 28 days of receiving the internal review decision.

OTHER AVENUES OF RECOURSE YOU MAY HAVE

The HVNL also provides for avenues of recourse for damage caused as a result of the NHVR exercising one or more of its enforcement powers. For example, under s 581 of the HVNL, you can claim compensation in some circumstances from the NHVR if you incur costs, damage or loss because of the exercise, or purported exercise, of an enforcement power by the NHVR, including those costs, damage or loss incurred because of your compliance. An example of when this compensation may be recoverable is when the NHVR enters and inspects a heavy vehicle or business premises and damages something.

Further, it should be noted that while it does not provide for a statutory right of compensation, under s 578 of the HVNL, in exercising its powers under the HVNL, the NHVR must exercise reasonable diligence to cause as little inconvenience, and do as little damage as possible. In meeting this obligation, the NHVR must restore any damage caused to a thing to the condition it was in immediately before the damage occurred.

AM I LIKELY TO BE SUCCESSFUL IN HAVING MY DECISION REVIEWED?

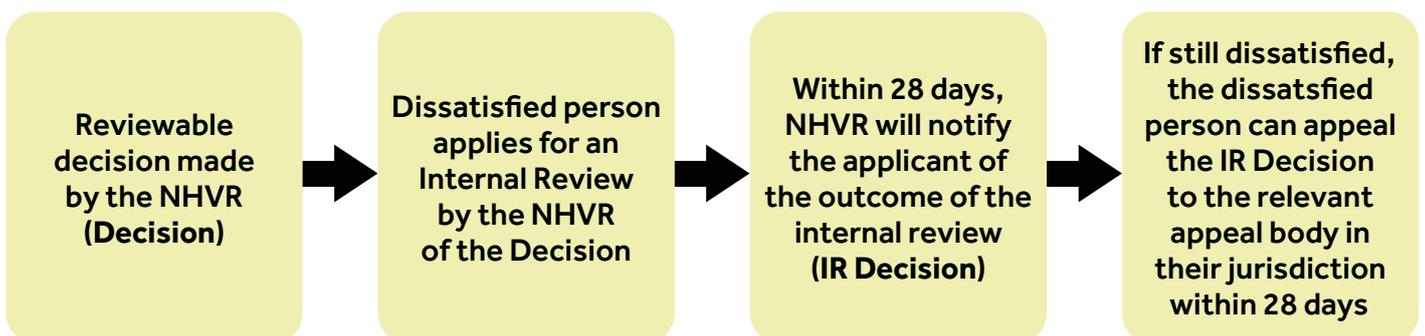
Whether you will be successful in having your decision reviewed (whether this be by way of internal review or in the tribunals/courts) is entirely case dependent. It also unclear how many reviewable decisions the NHVR overturns following an internal review as they are not published on its website. However, as heavy vehicle operators it is important to know that these processes are available to you, and in the case of internal review, that it is a relatively quick, easy and inexpensive process.

OUTLINE OF THE PROCESS

This review process can be summarised in the diagram at the bottom of this page.

TAKEAWAYS

- Not all decisions made by the NHVR are reviewable.
- The first step in having a decision reviewed is to apply for internal review by the NHVR.
- If you are still dissatisfied, you can have appeal to the relevant appeal body in your jurisdiction.
- There are other avenues for recourse against the NHVR under the HVNL including compensation for costs, damage or loss arising from the conduct of the NHVR in exercising its enforcement powers under the HVNL.
- Whether you will be successful in reviewing your decision is entirely case dependent. However, it is important to know that there are mechanisms available to you have these a decision reviewed should you believe a decision made the NHVR is unfair or wrong. ■



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.

Loading requirements under the HVNL

Q What are the loading requirements under the HVNL and how can I make sure I am meeting them?

A Under the HVNL, a load on a heavy vehicle must:

- not be placed in a way that makes the vehicle unstable or unsafe;
- be secured so it is unlikely to fall or be dislodged;
- be restrained using an appropriate restraint method; and
- be placed, secured or restrained in a way that meets the loading performance standards listed in Schedule 7 of the *Heavy Vehicle (Mass, Dimension and Loading) National Regulation*.

To get a better grasp on how to meet these requirements, the *National Transport Commission's Load Restraint Guide 2018 (Guide)* is must-read. The Guide outlines basic safety principles for the safe carriage of loads. It contains guidelines based on engineering principles on how to design a load restraint system that will comply with the loading performance standards. You can use alternative load restraint methods but you will still need to show that these meet the performance standards. The best way to do this is to get your restraint system certified by a qualified engineer.

The Guide sets out simple and useful steps that you can follow when planning the load, loading and unloading the vehicle and driving according to the load and driving conditions.

To check your compliance with loading obligations, you might ask yourself the following kinds of questions:

- What have we done to ensure that we have the ongoing capacity to comply with relevant loading and load restraint requirements? Do we use the restraint methods outlined in the Guide? If not, why not? Have the load restraint methods we use been assessed and certified by an appropriately qualified person?
- Have we communicated our needs with respect to the use of appropriate methods of load restraint to our customers? What assurances as to their compliance with these obligations have we received? Have we done enough to protect our position?
- Do we have a system for regular inspection of vehicles and restraint equipment (including for example straps, chains, anchor points, tensioners, chocks, curtains and gates)? Do drivers, maintenance staff and supervisors have a clear and simple process for checking equipment and raising a defect (or request for work) where it may be unsafe or unserviceable?
- How much consultation have we held with drivers about our loading obligations? Do our drivers know what to do if they attend a pickup point and the load is not appropriately restrained? How much training and support do we provide to drivers (and to packers, loaders and supervisors) about, specifically, our load restraint obligations and, more broadly, about safe and compliant heavy vehicle operations?

- In respect of consultation, training and support, and loading compliance – how do we respond to feedback from our drivers and other staff? What do we do when we detect non-compliance?

Senate Inquiry update

Q What is happening with the Senate Inquiry into the road transport industry?

A Back in 2019, the Australian Senate asked the Rural and Regional Affairs and Transport References Committee to inquire into the importance of a viable, safe, sustainable and efficient road transport industry in Australia. Amidst the disruptions of 2020, the inquiry was delayed several times. Unless further extensions are granted, the inquiry report is now due to be delivered before the end of June.

The scope of the inquiry was broad. Among other things, the committee was tasked with examining the adequacy, relevance and appropriateness of current regulation on road transport industry stakeholders, the development and maintenance of road transport infrastructure and the impact of new technologies in vehicle design and road safety. It has received over 100 submissions and has held numerous public hearings.

Readers will be interested in what changes the inquiry report might recommend to existing CoR laws. One possible change, which the NHVR called for in its submission to the inquiry, is the introduction of an explicit obligation on CoR parties to consult with one another. According to the NHVR:

"Parties in the CoR are not effectively consulting with heavy vehicle operators or heavy vehicle drivers on safety-critical issues which affect the driving task. Under the current HVNL, a party in the chain could hold substantial information regarding a risk to the safety of an activity, but there is no requirement for them to share the information with other parties to enable the [principle of shared responsibility] to operate effectively."

When it is finally published, the report will likely be a weathervane for the future of not only CoR laws but also the Australian road transport industry as a whole. We will be watching closely. ■

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Are fatigue-related offences trifling?

This was one of the questions put before the Supreme Court of South Australia in the recent case of *National Heavy Vehicle Regulator v Obst; National Heavy Vehicle Regulator v Turnbull (2021)*, following a South Australian Magistrates' Court decision which held that in two separate prosecutions cases that they were, in fact, capable of this characterisation.

This case concerned the appeal of a decision of the Magistrates' Court dismissing the charges in two cases without conviction or penalty pursuant to s 23(1)(a) of the *Sentencing Act 2017 (SA) (Act)*, which allows the court to make such an order when the offence 'is so trifling that is inappropriate to impose a penalty.'

The cases involved two drivers, Ricky Obst and Hayden Turnbull, both of who were charged by the NHVR with contravening s 250(1)(a) of the HVNL by driving a fatigue-regulated heavy vehicle operating under standard hours for more than 12 hours in a 24-hour period. In the case of Mr Obst, this involved driving 15 hours in a 24-hour period, and in the case of Mr Turnbull, 14.5 hours in a 24-hour period.

In determining whether an offence is trifling, more weight should be given to the offence itself rather than the explanation for the offending conduct.

In coming to the conclusion that the offences were 'trifling', the Magistrate expressed that the instructions contained in the NHVR Work Diary (**Diary**) issued to drivers were misleading and conveyed that, if a driver took a major rest break of at least seven hours, the clock for counting driving hours during a 24-hour period would automatically be restarted at zero at the end of the major rest break. In particular, the Magistrate relied on the following wording in the Diary:

'Counting 24-hour periods should be counted from the end of the following rest breaks. For a standard solo driver, 7 or more continuous hours.'

The Magistrate said that the above was incorrect in law and that accordingly, Mr Obst and Mr Turnbull, who had relied on this incorrect information, had made an honest mistake. Further, that as a result, convicting them would give rise to a miscarriage of justice, which should be avoided utilising s 23(1)(a) of the Act, by finding the offences trifling and dismissing the charges without conviction or penalty.

With the potential effect of this decision being far-reaching (and expensive) for the NHVR, it appealed by contending that the Magistrate misread the instructions in the Diary and that, in any event, the offences could not be characterised as 'trifling' as the objective conduct comprising the offences was serious.

THE IMPORTANCE OF CONTEXT

The Supreme Court found that in relation to the instructions contained in the Diary, the Magistrate had made a mistake of fact. This is because the Magistrate, in her remarks on penalty, referred only to a single sentence contained on the relevant page 22 of the Diary and that the sentence needed to be read in the context of the balance of the instructions on this page.

In particular, page 22 includes an exact example of the situation both Mr Obst and Mr Turnbull found themselves in with the instructions clearly stating that despite any major rest breaks taken by a driver, if they are still within the 24-hour period, they must wait until this 24-hour period has ended before driving again. Therefore, the Magistrate made a mistake of fact which, regardless of the characterisation of the offences as trifling, meant the appeal should be allowed.

CHARACTERISATION OF FATIGUE-RELATED OFFENCES AS 'TRIFLING'

In any event, the Supreme Court also found that fatigue-related offences are not trifling for the purposes of s 23(1) of the Act. In coming to its decision, the Supreme Court relied on the case of *Siviour-Ashman v Police (2003)*, which considered the meaning of the word 'trifling' in the context of s 47B (3)(b) of the *Road Traffic Act 1961 (SA)*, which empowered a court to reduce an otherwise mandatory period of disqualification on conviction for drink driving if 'the court is satisfied, by evidence given on oath, that the offence is trifling.' In particular, it relied upon the court's statements that in determining whether an offence is trifling, more weight should be given to the offence itself rather than the explanation for the offending conduct.

"The Supreme Court found that the purpose of s 250 of the HVNL is similar to that of s 47B of the Road Traffic Act 1961 (SA), namely to protect the safety of road users and others who may be endangered by vehicles driven by impaired drivers and that this could not be characterised as trifling."

This, coupled with the fact that, objectively speaking, page 22 of the Diary makes it clear that the clock is not restarted merely because a driver has a second major rest period, was the basis upon which the court allowed the appeal and set aside the orders made by the Magistrate.

TAKEAWAYS

- Fatigue-related offences under the HVNL are not trifling.
- In considering whether an offence is trifling, the purpose of the offence is paramount to any considerations of the subjective circumstances surrounding the committing of an offence.
- The Diary's instructions are clear and a correct representation of the HVNL. ■

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