



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

JULY 2021

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## From Your Editor-in-Chief



This month, the National Heavy Vehicle Regulator (**NHVR**) continues its high-rev approach.

We hear directly from the NHVR in a special Q&A that gives us some insight into the NHVR's approach to enforcement.

The good news is that if your business is committed to doing the right thing and can demonstrate how, this might mitigate potential punishment. Bonus points if you are prepared to engage with the NHVR early on in an investigation.

We also look at a prosecution commenced by the NHVR against the directors of a Queensland mining company for an alleged failure to ensure that the company met its primary safety duty.

The NHVR has also accepted an enforceable undertaking from a skip bin company following detection of severe axle mass overloading. The company has committed to implementing at least \$18,000 worth of additional workforce training in procedures to avoid any repeat incidents.

Remember, our team at the CoR Adviser has extensive experience with the investigation process so if you need any guidance with the ins and outs of the NHVR, do get in touch.

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

## Insurer launches free online safety hub

Nathan Cecil, Partner, Holding Redlich

**National Transport Insurance (NTI), Australia's leading specialist transport and logistics insurer, has launched a free online resource 'Better Business Hub'.**

The Better Business Hub provides practical advice and tools for:

- increasing your profitability;
- managing your team; and
- cutting red tape.

The 'cutting red tape' section in particular will grow to provide tools and tips, safety and compliance information and incident management advice.

In addition to Better Business Hub's emphasis on safety, the other sections of

this resource contains broad business advice and tips that are relevant to our readers.

The 'profitable business' section explores asset management, business essentials, contracts and partnerships.

The 'managing your team' section provides guidance on recruiting and onboarding, retention, culture and growth.

The Hub has been partly financed through a Federal Government grant administered by the NHVR.

NTI's Head of Customer and Industry Strategy Staci Clark says:

*"Safety is everyone's business and NTI is proud to support the transport industry in moving to a safer and more sustainable future."*

➤ Continued on page 2

## Q&A with the NHVR Director: Compliance and enforcement advice

Charlie Coleman, Lawyer, Holding Redlich

**Advice from industry experts is always invaluable. In Toll Australia's April 2021 Road Transport Safety and Compliance Newsletter, Ray Hassall, Director of Statutory Compliance at the NHVR, sat down to answer some questions about operators' compliance and the NHVR's approach to enforcement.**

**Q: Can you explain the NHVR's philosophy when it comes to enforcement?**

**A:** The NHVR aims to be a modern regulator, working with partner agencies and industry to drive a safe and productive heavy vehicle industry and supply chain.

Pivotal to our national compliance and enforcement approach are:

- **A collaborative model** for the planning and delivery of compliance and enforcement

activities. By working with partner agencies and industry, we are able to develop strategies that emphasise targeted compliance activities, interventions or enforcement responses that are proportionate to both the industry participant's behaviour and identified safety risks.

- An **intelligence and data-driven** approach to regulatory activities, enabling delivery of a truly intelligence-led heavy vehicle regulatory environment to deliver positive safety and productivity outcomes.
- A focus on **performance-based outcomes** rather than a prescriptive approach to regulation (where appropriate) that allows us to better target enforcement efforts at those parts of industry not doing the right thing, enabling safe operators to get on with doing business.

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### — HELPDESK QUESTION OF THE MONTH —

**As a transport company director, do I have special legal duties separate to the duties of my company? (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)

## Get COVID-19 complacency in check

Content Editor, Partner Press

In the face of more virulent strains of COVID-19 emerging and recent outbreaks in Victoria and NSW, the National Road Transport Association (NatRoad) is urging its members to revisit COVID-19 risk controls. NatRoad reminds operators to update their safety protocols to ensure parties in the supply chain are operating in a COVID-safe manner.

After months of little to no transmission and relatively normal movement across Australia, the recent outbreak in Greater Melbourne and the circulation of more highly transmissible strains is a timely reminder for the heavy vehicle industry to revisit safety protocols that were implemented at the start of the pandemic.

NatRoad CEO Warren Clark highlights the highly transmissible nature of the B.1.617 strain.

"In Victoria, there was only one case at the beginning of May and there are now 4,200 primary close contacts," Clark says.

"It has been a rapidly moving virus and the transmission that has occurred in those high-risk settings has been very substantial."

NatRoad says stopping the spread at the source remains key and urges members to revisit their risk plans and seek advice if needed.

"Current measures to reduce transmission should continue, including frequent hand washing, wearing a face mask, social distancing, good ventilation and avoiding crowded places or closed settings," Clark says.

"For freight operators, it is also reinforcing that contactless delivery procedures should be preferred and negotiating those arrangements with customers made a priority."

Clark said getting vaccinated is also a critical tool in the battle against COVID-19, and there are clear public health and lifesaving benefits.

"As more people get vaccinated, the virus circulation is expected to decrease, the risk of transmission will reduce, which will then lead to fewer mutations. But even when vaccinations become commonplace, it is likely a regime of COVID-19 testing will remain in place. This is because even when vaccinated, people can still carry the virus." ■

► Continued from page 1 "Insurer launches free online safety hub"

NHVR CEO Sal Petrocchio says:

"I'm delighted we could support the NTI program to develop content and tools which will assist transport operators effect change and build a robust safety culture."

### SHARING SAFETY EXPERIENCES IS GOOD BUSINESS

The online hub will also feature case studies of the pressures and issues faced by profiled businesses and share what action they took to respond. Businesses sharing stories about general industry matters is a great way for the whole industry to improve as a whole.

Many of us feel alone when faced with uncertainty or obstacles, whereas the truth is that many other businesses in the industry are facing or will have faced the same issues.

Some businesses may be reluctant to share such information, either not wanting to give their competitors any perceived advantage or through fear that such sharing of information between competitors may offend competition laws.

Provided that the information shared is of a general 'industry wide' or 'industry issue' nature, neither reasons should be a road block.

In terms of not wanting to give a leg up to your competitors, the information about industry issues and available solutions is probably already out there – including through industry representative bodies and/or the providers

of services or solutions in response. Sharing such information merely helps to normalise the issues for all.

On the legal front, the fear of offending competition laws by sharing information with competitors is a real one and the penalties can be significant. However, the sharing of general 'industry wide' or 'industry issue' information and the approach taken by a business is not likely to be a problem.

Competition law prohibitions only apply when competitors share sensitive commercial information (which one would ordinarily keep private and protected, e.g. pricing, business strategy, customer service arrangements) or collude and agree on a joint commercial approach. The sharing of safety problems and solutions in particular is incredibly unlikely to breach any competition laws.

In short, we share NTI's view that creating some shared discourse within the industry is likely to harm none and benefit all.

### WHERE TO FROM HERE?

The NTI Better Business Hub can be found at <https://www.nti.com.au/better-business-hub>.

The content will be delivered in bite-sized blog posts with just enough information to get you thinking. If you need any further guidance or assistance our experienced editorial team from Holding Redlich's Transport, Shipping & Logistics group are here to help. ■

## Repeat offender: 225 breaches and counting

Joshua Clarke, Lawyer, Holding Redlich

**The NHVR has charged a national transport company and its executive with hundreds of alleged fatigue and work diary breaches, following a 9-month investigation into the company's business practices.**

Multiple vehicle collisions and analysis of Safe-T-Cam footage prompted the NHVR's investigation into alleged breaches it identified relating to the transport company.

Safe-T-Cam footage is a network of digital cameras that monitor the movement of heavy vehicles to detect:

- vehicles that are unregistered and/or uninsured;
- fatigue offences relating to travel between two or more cameras;
- attempts to avoid detection at camera sites; and
- failures to enter inspection stations.

NHVR investigators analysed records for 15 drivers that revealed 225 fatigue and work diary breaches by the company.

The NHVR is alleging a further 54 breaches including contraventions of the HVNL, fatigue regulations and Basic Fatigue Management (BFM) rules. These include administrative errors within National Driver Work Diaries, critical breaches of excess work hours and insufficient rest breaks.

The NHVR will allege that there were significant failings within the company's scheduling ability and processes. It will also be alleged that the company failed to provide adequate training to staff or to follow up and address incidents of ongoing fatigue breaches. The subsequent risk to public safety was known to the company, the NHVR says.

The matter was listed for a filing hearing in the Melbourne Magistrates' Court on 31 May 2021 and will return for a committal mention in August. Court records indicate that the company is one that has previously been the subject of NHVR action in recent times, including in response to fatigue management and other safety issues. ■

# Mid-year CoR compliance check-in

Nathan Cecil, Partner, Holding Redlich

As we enter the second half of the year, it might be a good time to review and address any gaps in your compliance. Recently, we have focused a lot on the ins and outs of the prosecution process and NHVR enforcement. Let's take a step back and consider the foundations of a proactive and preventative approach to safety. In this article, we revisit five key components of compliance that your business should be on top of.

Over the last year or so, this preventative and proactive approach to safety has become increasingly normalised in our day-to-day lives due to measures in place as a result of the ongoing global pandemic. However, we often see instances in the road transport industry where parties become complacent with their safety obligations when things appear to be running smoothly. This highlights the importance of reviewing safety systems regularly to ensure they are robust and up to date so that you can rely on them.

## ► IMPORTANT



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

So, let's get into these five components of compliance. Consider the points below within the context of your own business.

### A SOLID FOUNDATION FOR COMPLIANCE

#### 1. Primary safety duty

The primary duty has been at the heart of the HVNL since new laws came into effect at the end of 2018. All parties in the supply chain must understand that heavy vehicle road safety is not just the driver's or the operator's issue. Even if you engage and pay for someone to transport goods, this does not shift all responsibility for safe transport onto them. The primary duty represents an obligation to eliminate or minimise potential harm or loss (risk) by doing all that is reasonably practicable to ensure safety.

#### 2. Prioritise a proactive approach

We often talk about the importance of actively shifting from reactive to proactive behaviour. Your mindset should be forward-looking. This means focusing on what

you are doing to prevent breaches from occurring. Is your business doing everything reasonably practicable to prevent and avoid CoR breaches? Make sure that parties in your supply chain are proactively managing risk and preventing incidents from arising, not merely reacting to them when they do.

#### 3. Implement CoR compliance frameworks

Under current laws, it is mandatory that you have 'business practices' in place that address CoR compliance. These mandatory business practices include:

- CoR compliance policies and procedures;
- training/awareness practices;
- compliance clauses in supply chain contracts;
- compliance monitoring; and
- response/remediation and executive compliance reporting.

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**Using technology in your business practices won't abrogate your obligations under the HVNL but it can certainly be used to track, manage and evidence compliance with them.**

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If you don't have these practices in place, there will be gaps in your compliance that leave you open to prosecution in the event of an incident. We often see compliance frameworks that are not properly documented or rolled out, meaning that they have been applied in an ad hoc manner or inconsistently throughout the business. Apart from undermining all of the time and effort put into them, this also introduces gaps in your safety practices that renders them insufficient thereby exposing parties in your supply chain to risk.

#### 4. Ensure a clean bill of health

Would your business engage with another business or subcontractor if they posed a potential compliance risk to you? It seems like an obvious question but we need to make sure we hold ourselves to the same standards that we hold others to. Other businesses will be less inclined to engage

with you if you are not on top of your CoR compliance and adopting a proactive approach to your safety obligations. You will need to be able to present a clean CoR record to customers in order to be considered for their work.

#### 5. Use technology to facilitate compliance

Technology is increasingly becoming an integral part of the way we conduct business, monitor risk and demonstrate compliance. Tools such as Electronic Work Diaries (EWDs), GPS, telematics, speed limiters and electronic mass measurement technology are becoming commonplace across the road transport industry. Although there are both pros and cons to integrating technology into your transport activities, it is clear that it minimises the chance of human error in tasks that involve measurement and documentation. Technology is fast becoming a valuable compliance tool.

Further to this, businesses can maximise the use of technology (such as those mentioned above) to aid compliance. For example, the capabilities of capturing data in real-time can be paired with safety escalation procedures. If alertness monitoring technology sent a notification that a driver was exhibiting signs of fatigue, there could be a procedure for the driver to pull over and contact their operator/ employer to identify the next steps.

Using technology in your business practices won't abrogate your obligations under the HVNL but it can certainly be used to track, manage and evidence compliance with them.

### HOW DO YOUR SAFETY SYSTEMS AND PROCEDURES STACK UP?

If your business engages with and implements the tips in this article that address five key compliance areas, you will make good strides in taking all reasonably practicable steps to meet your safety obligations.

Your business should think about CoR risks and compliance measures from various different angles and address any gaps or weaknesses. It is important to keep your safety systems and procedures up to date, to review them regularly and provide ongoing opportunities for education and training within your supply chain.

CoR management systems and practices do not begin and end with regulations. It takes the right amount of collaboration, work and understanding. We understand that all these things take a significant amount of time and energy but safety is always worth it. ■

➤ Continued from page 1 “Q&A with the NHVR Director: Compliance and enforcement advice”

This philosophy is underpinned by the National Regulatory Model, our pathway to become a modern intelligence-led, risk-based regulator. This approach can look very different to traditional heavy vehicle enforcement action where a vehicle might be intercepted at random, the driver’s work diary checked and the vehicle weighed for compliance with mass limits, and an infringement notice issued to the driver (usually) for any detected non-compliance with prescriptive rules. We use data to identify higher risk entities and target them on road or off road and look for the underlying causes of noncompliance, wherever they arise.

**Q: Are you able to tell us what resources are dedicated to enforcement across the country?**

**A:** NHVR employs:

- an investigative team of eight based in our Brisbane and Adelaide offices;
- a proactive compliance team of nine in our Victorian office;
- an intelligence branch with seven staff located in our Brisbane and Adelaide offices; and
- more than 70 Safety and Compliance Officers across Victoria, South Australia, Tasmania and the ACT supported by our Brisbane-based National Operations Team.

In addition to these dedicated resources, many other teams within NHVR provide support to the enforcement function.

Compliance and enforcement services for the HVNL in Queensland and NSW are delivered exclusively by the Department of Transport and Main Roads (TMR) and Transport for NSW (TfNSW). TfNSW employs 14 investigation officers delivering HVNL-related services under a service level agreement. TMR most recently reported 12 investigation officers delivering HVNL-related services under a service level agreement. Some police services have also appointed officers under the HVNL.

**Q: Since the NHVR opened its doors in 2014, how many sanctions and what kind of sanctions have been issued against parties other than drivers and operators?**

**A:** All compliance and enforcement services were delivered by road agencies under delegation in 2014 and for several years afterward.

The overwhelming majority of enforcement actions undertaken before the changes to CoR laws in October 2018 were court-based enforcement or infringement notices against drivers, and to a lesser extent operators.

Since that time, the NHVR has actively worked to address this imbalance and in 2020:

- accepted two enforceable undertakings;
- issued two prohibition notices; and
- issued multiple improvement notices.

We have also invested in building capability and systems to better identify and respond to offences committed by parties other than drivers and operators. This includes the formation of an Investigations team to exclusively target serious breaches of the HVNL committed by all parties in the supply chain, including executive officers.

**Q: How aware do you think customers are about their responsibilities under the HVNL and, in particular, their obligations under the primary duty?**

**A:** We regularly survey industry on a range of topics, including their obligations under the HVNL. Our most recent industry-wide survey, in late 2020, indicated a relatively high awareness of primary duty obligations. We work tirelessly to educate industry and raise awareness of safety obligations across a range of channels.

These channels include in-person information days across the country, industry and social media platforms, as well as a suite of website and digital communication tools.

**Q: Is the NHVR currently engaged (or been recently engaged) in any investigations involving parties other than drivers and operators? What can you tell us about those investigations?**

**A:** Yes. In February 2021 alone, the NHVR laid charges in Victoria against a consignor as a result of load shift for containerised goods and in South Australia against a manufacturing company for a breach of duty in relation to an alleged failure to properly restrain a load.

We also recently laid charges against a company director for a breach of the obligation to ensure due diligence in relation to BFM obligations.

While these charges are yet to be heard and the defendants are entitled to a presumption of innocence, they clearly demonstrate our intent to hold the supply chain accountable.

We have an ongoing interest in what we are referring to as ‘engine remapping’, having entered premises with police in several jurisdictions to obtain evidence of this form of offending. These investigations have so far resulted in improvement notices, as well as charges being laid against an operator.

**Q: What can we expect to see from the NHVR in terms of interventions along the supply chain in the future?**

**A:** Implementation of the National Regulatory Model includes:

- expansion of our proactive compliance function to help identify and address issues before adverse events occur;
- increased use of improvement notices and intervention orders to address the underlying causes of unsafe behaviour;
- better risk modelling to target non-compliant activities and reduce our interactions with compliant parties;
- improved awareness and use of the Heavy Vehicle Confidential Reporting line; and
- sharing data with other aligned regulatory agencies.

**Q: What advice does the NHVR have for operators that may be struggling with customers that don’t hold up their end of the CoR bargain?**

**A:** It is vital for all links in the supply chain to be aware of their safety obligations and the consequences of failing to meet them.

While the NHVR devotes significant time and resources to education and awareness, we encourage everyone in the freight and supply chain to be safety advocates. This can be as simple as helping others become familiar with the Master Code or to discuss safety and productivity with the regulator. Importantly, if they aren’t a safe contracting party, don’t deal with them and let us know.

**USEFUL LESSONS**

The NHVR is dedicated to ensuring industry-wide compliance with the HVNL. It has extended its practice to now oversee and ensure the safety of, not only the operators in the industry, but also to customers whose demands are causing operators to breach the HVNL through a breach of the primary duty.

The NHVR is undertaking and implementing new strategies to ensure that all links in the chain comply with all of their safety obligations before an adverse event takes place. It is also critically important that the transport industry does all they can to ensure that they meet their safety obligations to assist the regulator to make the industry safer.

At the end of the day, it is incumbent on the industry to make sure that they are compliant with the HVNL, not because they may incur a penalty for breaches of the law, but because it makes the transport industry a safer place to work. ■

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# The HVNL Sanction Pyramid

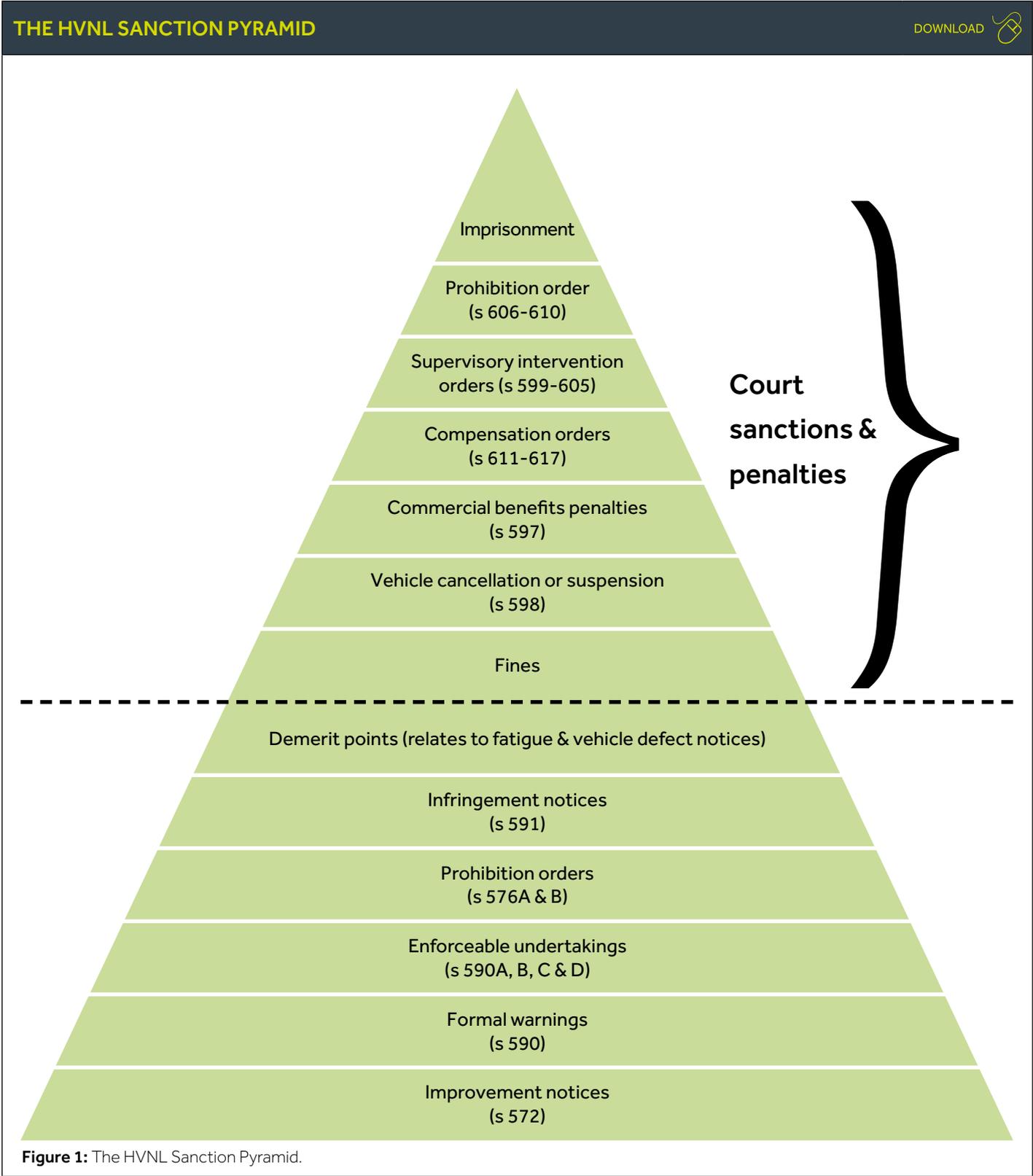
Charlie Coleman, Lawyer, Holding Redlich

The previous article detailed Ray Hassall’s advice about what the NHVR is looking for when checking for compliance and how it enforces breaches of the HVNL.

The HVNL Sanction Pyramid, shown below, graphically sets out the possible enforcement action and penalties associated with breaches of the HVNL. The NHVR will pursue comprehensive enforcement of any breach of the HVNL. This includes improvement notices

and behavioural modification for (more common) minor breaches (represented by the bottom of the pyramid) to the more grievous court sanctions and penalties for more serious offences – which are represented by the top of the pyramid.

Remember, the best way to avoid enforcement action and penalties under the HVNL is to ensure that you don’t commit offences in the first place. The only way of doing that is to ensure that you have robust systems in place to help you and your business do things the right way. ■



# Is this the end of the Written Work Diary?

Melanie Long, Associate, Holding Redlich

**Electronic Work Diaries (EWDs) have been recognised and permitted under the HVNL for some time now. Their use is subject to the developer first obtaining certification for their product. Despite this process, a fifth EWD has already been approved for use. In this article, we consider the increasing prevalence of EWDs and take a closer look at their purpose.**

In January 2021, we reported on the first of these certifications, having been approved on 1 December 2020.

Since then, further developers who have had their EWD approved include Netstar Australia and its 'EWD Garmin Fleet 7XX Series' EWD and MTDData and its 'Talon and Swift Samsung Galaxy Active Tab Samsung Galaxy Active Tab 2' EWD.

More recently, on 25 May 2021, Kynecton's Quallogi became the fifth EWD to receive approval.

The short succession and number of these approvals is a testament to a move away from the Written Work Diary (WWD) and the growing use of EWDs to record the work and rest hours of drivers.

## REFRESHER: EWD

### > DEFINITION: ELECTRONIC WORK DIARY

EWD refers to a device or system that have been approved by the NHVR to monitor and record work and rest times of a driver. It is a voluntary alternative to the WWD.

They are designed to cut the red tape to enable drivers to record their work and rest hours by, as NHVR CEO Sal Petrocitto states, "simply pressing a button, rather than spending time ruling lines and counting multiple time periods on multiple pieces of paper."

EWDs essentially bring the recording of work and rest hours into the (paperless) modern age.

## WHAT IS THE DIFFERENCE BETWEEN EWDs AND WWDs?

As their names suggest, the main difference is that one is electronic and the other is written. Another difference is that when using WWDs, drivers are required to record their work and rest time in 15-minute blocks, whereas EWDs round time in one-minute blocks. Other than that, in terms of compliance, there is very little difference between the two. There are also policies in place to ensure consistency in this regard.

## THE PURPOSE OF EWDs

Driving while fatigued or drowsy is dangerous and as such is heavily regulated by the HVNL which requires drivers to record their work and rest hours in order to show their compliance with these provisions. One of the main areas in which compliance fails in this area is in the accuracy of this recording. Accordingly, EWDs provide a more accurate alternative thereby ensuring greater compliance with the fatigue-related provisions of the HVNL.

## THE BENEFITS OF EWDs

As outlined above and touched on in this month's article on the importance of accurate recording, EWDs remove a lot of the pitfalls drivers fall into when recording their work and rest hours using WWDs.

Drivers are ultimately responsible for ensuring that their recordkeeping is correct and face hefty fines for failing to do so. Further, common so-called 'loopholes' used by drivers are really not loopholes at all and actually land a lot of drivers in trouble. Additionally, EWDs are easy to use and save drivers time. So for those who find paper recording difficult and burdensome, EWDs are likely for you.

In addition to the advantage of EWDs for drivers, many businesses will also experience the benefits of switching to EWDs, with the electronic nature negating the need for many administrative processes when it comes to monitoring compliance with the fatigue management provisions of the HVNL.

The growing use of EWDs is likely to lead to less companies being penalised for the actions of their drivers who are often charged when their driver fails to accurately record their hours and subsequently breaches the fatigue management provisions of the HVNL.

## EWDs give real-time alerts for upcoming potential fatigue breaches before they happen.

Other benefits of EWDs for drivers and business alike are that they:

- can be used in all jurisdictions and thus can be used in cross border travel;
- give real-time alerts for upcoming potential fatigue breaches before they happen; and
- have consistent compliance views meaning faster reviews of driver records during on-road intercepts, getting drivers back on the road sooner.

## BUSTING THE MONITORING MYTH

It is common for change to be met with hesitancy. A major concern that arises with regards to any electronic device is their potential use for monitoring. Rest assured, EWDs are not monitoring devices for authorised officers (including police) to check up on drivers. The Electronic Work Diary Standards require that all relevant information is contained in the diary itself and only transmitted to the driver's record keeper. The NHVR and other authorised officers will only see driver information from EWDs during an interception (and in compliance mode) or if the information is requested as part of an investigation.

## WHAT DOES THIS MEAN FOR THE FUTURE OF WWDs?

The approval of a fifth EWD and the growing use of technology is good news for the whole industry. Fatigue compliance is an important element in ensuring the safety of drivers and our roads, so anything that allows drivers to more accurately record their work and rest hours and thus comply with the fatigue provisions of the HVNL is a positive thing for the industry and the public alike. As such, it is easy to see why EWDs are becoming increasingly popular within the industry and why their growing use may see WWDs phased out. ■

## 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.

## Executive due diligence

**Q** As a transport company director, do I have special legal duties separate to the duties of my company?

**A** Yes. Under the HVNL, if a company, partnership or other body owes a safety duty, a director, partner or management member of that entity must exercise due diligence to ensure the entity complies with the safety duty. So, the director of a company must exercise due diligence to ensure the company complies with its primary safety duty, including of eliminating or minimising public risks so far as is reasonably practicable. This is distinct from the company's duty. The director can be convicted of an offence for breaching the special duty even if no proceedings are brought against the company itself.

Under the HVNL, due diligence means taking reasonable steps:

- a. to acquire, and keep up to date, knowledge about the safe conduct of transport activities; and
- b. to gain an understanding of:
  - i. the nature of the legal entity's transport activities; and
  - ii. the hazards and risks, including the public risk, associated with those activities; and
- c. to ensure the legal entity has, and uses, appropriate resources to eliminate or minimise those hazards and risks; and
- d. to ensure the legal entity has, and implements, processes:
  - i. to eliminate or minimise those hazards and risks; and
  - ii. for receiving, considering, and responding in a timely way to, information about those hazards and risks and any incidents; and
  - iii. for complying with the legal entity's safety duty under section 26C; and
- e. to verify the resources and processes mentioned in paragraphs (c) and (d) are being provided, used and implemented.

Directors should also be aware that they are personally liable for certain offences committed by a company if they knowingly authorised or permitted the conduct constituting the offence.

## Prohibition notices

**Q** What is a prohibition notice and what do I do if I receive one?

**A** A prohibition notice is an order that the recipient of the notice refrain from carrying on a particular activity involving a heavy vehicle. An authorised officer can give such a direction if they reasonably believe that the activity:

- is occurring and involves, or will involve, an immediate or imminent serious risk to the health or safety of a person; or
- may occur and, if it occurs, will involve an immediate or imminent serious risk to the health or safety of a person.

This order can prohibit the person from carrying on the activity at all, or in a particular way, until an authorised officer is satisfied that the matters giving rise to the risk have been remedied. The direction can

be given at first orally, but it must be followed up and confirmed by a formal written notice given to the person as soon as practicable.

The written notice will specify the grounds on which the order is made, the activity involving the serious risk and the provision of the HVNL being, or likely to be, contravened by the activity. It may include directions about measures to be taken to remedy the risk.

If a person fails to comply with a prohibition notice, they are liable for a maximum penalty of \$10,000. This is separate to any penalties that may apply for the potential HVNL breaches identified in the notice. In some circumstances, an authorised officer can also seek a court injunction compelling the person to comply with the notice or restraining them from contravening it.

A prohibition notice has the potential to bring your heavy vehicle transport activities to a screeching halt. Significant interruption to your transport business is a likely consequence of receiving a broad prohibition notice. So, of course, it is best to avoid receiving one in the first place by taking your HVNL primary safety duty seriously.

In other words, make sure you are eliminating or minimising potential harm or loss by doing everything reasonably practicable to ensure the safety of your transport activities. The best way to do this is to have a Safety Management System (**SMS**) and controls in place, such as business practices, training, procedures and review processes that:

- identify, assess, evaluate, and control risk;
- manage compliance with speed, fatigue, mass, dimension, loading and vehicle standards requirements through identified best practice;
- involve regular reporting, including to executive officers; and
- document or record actions taken to manage safety.

If you have been issued with a prohibition notice, consider it carefully. What concerns does the authorised officer have about the activity targeted by the notice? Are there recommendations about how to mitigate the risk in the activity? Are there any systemic issues that could be the root cause of the danger in the way the activity is being carried out?

The NHVR will monitor corrective measures implemented in response to a notice to assess whether they sufficiently address the risk identified in the notice. If they do, the NVHR can repeal the notice. It is therefore best to work with the authority to address its concerns in order to bring your heavy vehicle activities into line with safety expectations and minimise further disruption to your transport business. ■

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## Don't risk it: The importance of accurate recordings

A string of charges laid against drivers for making false or misleading entries in 2020 serves as a reminder for all drivers to ensure the accuracy of their reporting or risk facing the consequences. In this article, we look at your reporting obligations under the HVNL and address some alleged loopholes.

On 7 August 2020, the Wynnum Magistrates Court in Queensland charged a driver and his employer after a NHVR investigation revealed that the company's drivers had committed a number of fatigue management offences.

One of these drivers was employed to drive between Brisbane and Wagga Wagga. While the defendant held a BFM accreditation and was authorised to drive for 14 hours a day, he was still required to have 7 continuous hours of rest. The driver falsified his work diary in an attempt to cover up the fact that he was completing up to 20 hours of work in a single 24-hour period. In one instance, he had as little as just under 2 hours of continuous rest. Therefore, despite the fact that his employer was expecting him to travel between Brisbane and Wagga Wagga in one day, which is theoretically impossible to do while complying with the HVNL, the driver alone was held to be responsible for the falsifying entries of WWD and was fined \$14,000.

This case is just one of many examples in recent times of drivers who were charged for recording false or misleading entries in their WWD. Other examples in 2020 include:

- on 13 May 2020, the Port Adelaide Magistrates Court fined a driver \$4,800 after charging him with five counts of making false and misleading WWD entries and one count of providing a false document;
- on 22 July 2020, the Corowa Local Court in NSW fined a driver \$10,000 for two counts of making false or misleading entries in his WWD; and
- on 27 November 2020, the Elizabeth Magistrates Court in South Australia fined a driver \$10,000 for seven counts of entering false and misleading information into his WWD over the period of about one month. The driver had regularly recorded that he was resting at a particular location in the Barossa Valley when he was undertaking work activity.

Evidently, drivers who enter falsifying or misleading information in their WWD can face hefty fines. Further to this, the accuracy of WWDs is the responsibility of the drivers, even in circumstances where an employer may be instructing its drivers to carry out work that contravene these obligations. So, what exactly are the reporting obligations of drivers under the HVNL? Is there any way around them?

### REPORTING OBLIGATIONS UNDER THE HVNL

Under section 325 of the HVNL, a driver cannot make an entry in a work record that they know, or ought to reasonably know, is false or misleading. If found guilty, a driver faces a maximum penalty of \$10,000 for each offence. In determining whether a driver 'ought to reasonably know' that an entry was false or misleading, the court will

consider the person's abilities, experience, expertise, knowledge, qualifications and training and the circumstances of the offence.

Further obligations imposed on drivers under the HVNL in relation to reporting include (but are not limited to):

- not recording the same information in two different work diaries (section 326);
- not making entries on behalf of another person unless permitted by that person (section 330); and
- not destroying records (section 331), including the removal of pages from the WWD (section 332).

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Additionally, drivers can also be charged under section 702 of the HVNL for providing an official document containing information the person knows is false or misleading. This charge is often linked to a section 325 offence against drivers because by having false or misleading entries in their WWD, a driver is rendering the whole document false and or misleading.

### GAMING THE SYSTEM

There are many alleged loopholes used by drivers looking to avoid liability for false or misleading entries. The common misconception is that courts will let drivers off the hook for honest mistakes when in fact, while courts take into account the circumstances of the offence, they are often strict in their approach.

A common loophole used by drivers is to write 'subject to mistakes' next to entries. Courts will not accept this an excuse for incorrect logging. While genuine mistakes may occur, they cannot be covered by simply acknowledging them. Another 'loophole' is to keep unofficial records in another book so that they can be adjusted at a later date. This is an offence under section 327 and section 329 of the HVNL, which states that a driver cannot keep records other than in a work record and cannot change a work record retrospectively.

Accordingly, it is important that drivers don't try to 'game the system'. The courts have discretion when it comes to the imposition of penalties. So, where it is evident that the offender was intending to deceive or cover themselves, the courts will be more inclined to impose the maximum penalty. As such, drivers should keep in mind, that there really is no supplement for providing accurate reporting, nor, the NHVR and court will say, should there be. ■

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