



Your one-stop resource for practical
Chain of Responsibility solutions

OCTOBER 2021

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From Your Editor-in-Chief



Are we there yet? As we near a 'new normal' destination, we at the *CoR Adviser* hope that you have all managed to get there more or less intact.

I can certainly say that my journey planning didn't accommodate for these contingencies. I haven't appropriately managed my fatigue and suspect that my mental load is not as securely restrained as at the start of the journey.

Even if your business has managed to roll through relatively unscathed, there's a good chance that you have been operating in 'survival mode', holding your breath, waiting to get through to the other side.

Does this mean that certain safety requirements such as performance monitoring and continued improvement of your Chain of Responsibility (CoR) risk management systems have been put on hold? If so, now might be a good time to start thinking about getting back to 'business as usual'. So, are you ready to dust off some of those projects that might have been pushed to the side?

If you have any questions or if we can help at all, don't hesitate to get in touch.

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

Roadmap to safety: 9 steps you need to know about

Nathan Cecil, Partner, Holding Redlich

In preparation for what we hope is a bumper grain harvest this year, the National Heavy Vehicle Regulator (NHVR) has urged all those involved in grains industry supply chains to revisit the '9 Step SMS Roadmap' (Roadmap).

The 9 Step SMS Roadmap is a tool intended to assist you to develop and improve your heavy vehicle safety systems.

NHVR CEO Sal Petrocetto said the 9 Step SMS roadmap focuses on targeted content to mitigate key safety risks. What's more, it is an adaptive tool and can be tailored for businesses that are just starting out, improving on existing systems or seeking continuous improvement.

"An SMS can be as simple as undertaking a daily visual inspection of your heavy vehicle, not putting pressure on drivers to exceed the speed limits or drive fatigued and loading within your mass limits."

"The Roadmap provides simple templates, quick guides and toolbox talks that can be tailored to suit business needs regardless of the size of your operation."

These nine steps consist of:

1. Introduction to SMS.
2. Risk assessment, treatment and monitoring – which details risk identification and assessment in order to help you improve the control and management of CoR safety risks.

➤ Continued on page 2

On the road with the NHVR: Compliance and enforcement

Charlie Coleman, Lawyer, Holding Redlich

Enforcement is an important part of ensuring that the HVNL effectively regulates the activities of all those in the supply chain. This month, we take a closer look at the principles that underpin the NHVR's policies to remind heavy vehicle operators how the NHVR enforces the HVNL.

As operators and business owners are doubtless aware under the HVNL, on-road compliance and enforcement cover a broad range of activities including, but not limited to:

1. Prescribed work, rest, driver fatigue and work diary requirements.
2. Vehicle standards heavy vehicles must meet when on roads.
3. Maximum permissible mass and dimensions of heavy vehicles used on roads.
4. Loading and restraining of loads on heavy vehicles used on roads.

Heavy vehicle operators benefit from a greater level of consistency in on-road

compliance and enforcement outcomes under the HVNL. That is because, through enforcement, operators are incentivised to comply with the HVNL requirements which has the knock-on effect of ensuring the safety of both people in the transport industry, but the community as a whole.

For heavy vehicle drivers, no matter who conducts an inspection, or in which state or territory it is conducted, drivers and operators should experience consistent and transparent outcomes from on-road compliance and enforcement activities for:

- **Defective heavy vehicles** – a consistent tiered vehicle defect notice categorisation scheme (self-clearing, minor and major) and promoting more standardised defect notices.
- **Driver fatigue and the National Driver Work Diary** – consistent interpretation and application of driver fatigue and work diary requirements.

➤ Continued on page 4

— HELPDESK QUESTION OF THE MONTH —

Are there any new apps that industry should know about? (answer on page 7)

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

New industry app 'one stop shop' for female truck drivers

Content Writer, Partner Press

The male-dominated freight and logistics sector can often make working in the industry an isolating experience for women. A new smartphone app called 'OzTruck' has been designed with the aim of offering tailored support to female truck drivers.

The app, which has been developed by Wodonga TAFE and supported by the Victorian Government, is intended to be a 'one stop shop' to provide support on the road in an attempt to address reports of bullying and intimidation by male counterparts.

"The representation of women in Victoria's freight industry continues to grow and this app is a fantastic example of how we can enhance health and safety and boost the number of women entering the freight industry," Minister for Ports and Freight Melissa Horne said.

OzTruck provides 24/7 emergency support during breakdowns and crashes. Furthermore, it incorporates an online forum for drivers to enable peer support, the sharing of health and wellbeing information, as well as petrol station, weighbridge and rest-stop finders.

The app offers an avenue for increased training for new drivers and support for those from diverse or marginalised backgrounds who may feel alienated in the industry.

"The Oz Truck App is a great example of TAFEs working with industry in innovative ways – creating great opportunities for Victorians, stronger and more diverse workforces, and addressing skills needs," Minister for Training and Skills Gayle Tierney said.

Initially, the project will be trialled using 5000 truck drivers from mid-2021 before being rolled out for free to the broader industry. ■

► Continued from page 1 "Roadmap to safety: 9 steps you need to know about"

3. Hazard and incident reporting – which details how to set up risk and hazard reporting systems to help drive a safety reporting culture.
4. Management commitment and documentation – which details the importance of visible support of safety management from the top and the documentation of safety and risk control working procedures.
5. Internal safety investigations – which details how to implement internal safety investigation so that safety performance lessons are learned and can be fed back into your SMS.
6. Safety training and communication – which details how to develop and roll out a training and awareness program for initial and routine refreshers.
7. Safety performance monitoring – which details how to utilise checks and balances on your businesses safety performance to critically reassess how well your SMS is at targeting and eliminating or reducing the CoR risks that arise from your transport activities.
8. Third-party interactions – which details to what extent and how you should engage with third parties in your supply chain to ensure that your shared safety duties are being met, including the importance of clear expectation management at the outset.
9. Continuous improvement and change management – which details why it is important that your SMS doesn't sit stagnant and how and when to critically re-evaluate how your business is performing against your benchmarks and whether your SMS is truly delivering positive safety outcomes or might need tinkering to do so.

Within each section, tips and resources are provided for businesses that are 'starting out' or 'improving on' their SMS and at the 'continuous improvement' stage. This means that no matter what stage you are at in developing an SMS, you can dive into the Roadmap at a point that corresponds to where you are and take it from there. For those at the earlier stages of development, it also allows you to look ahead and map out your CoR SMS development plan into the future, to get you to the next stage of development.

As a whole, the Roadmap is a great resource to help you to develop and refine your CoR safety management. It doesn't give you the 'answer' though – there is no single solution when it comes to managing CoR – so you will still have to put in the work. But it does act as a helpful guide to plot out what your journey should look like.

If any questions arise or you need further assistance, feel free to get in touch with us via the CoR Help Desk for any tailored assistance. ■

Multinational logistics company hit with improvement notice for serious fatigue breaches

Joshua Clarke, Lawyer, Holding Redlich

The NHVR has issued an improvement notice to a multinational logistics company after an investigation found evidence of falsified records and insufficient fatigue management, compliance, and auditing practices.

The extensive safety duties investigation was sparked by a report through the NHVR's Heavy Vehicle Confidential Reporting Line.

The investigation uncovered evidence that the company had scheduled drivers to drive between Adelaide, Melbourne, and regional NSW without sufficient rest hours. Further, it revealed that multiple drivers had falsified their National Driver Work Diary pages by recording rest breaks during work hours. Some drivers were found to have exceeded the maximum allowable work time by as much as 3 hours in a 24-hour period. The NHVR considered these to be critical risk breaches of the HVNL's fatigue management regulations. This is the most serious category of offence; contraventions that would adversely affect the driver's ability to drive safely.

The NHVR has stated that the notice will require the company to improve its scheduling and auditing practices.

The NHVR Director of Investigations said this would ensure that its drivers:

- recover from fatigue;
- record all long-distance work hours accurately; and
- do not work in breach of work and rest options.

As part of this, the company has been directed to ensure that every vehicle combination in the company's fleet to use an Electronic Work Diary (EWD).

An EWD is an electronic device or system approved by the NHVR to monitor and record the work and rest times of a driver, as an alternative to keeping a written work diary. An EWD removes the administrative burden and limits the scope for human error involved in creating and maintaining paper records; an EWD rounds time to 1-minute blocks, as opposed to the 15-minute blocks used in a written work diary.

To secure compliance with fatigue laws, the notice subjects the company to NHVR monitoring for 6 months. ■

Do your load restraint policies leave you exposed?

Nathan Cecil, Partner, Holding Redlich

In this issue's *Legal Update*, we spotlight recent examples of significant dimension breaches. Last month we underlined how costly penalties can be when you slip up on your HVNL obligations, so we thought it would be useful to set out the basics of mass, dimension and loading to make sure you're not glossing over important steps that might compromise safety.

WHAT DOES THE HVNL SAY?

In order to comply with the primary duty, CoR parties must address the mass, dimension and loading requirements under Chapter 4 of the HVNL. The need for a proactive approach by parties to address risk is paramount. A straightforward first step you can take is to adopt a risk-based approach to safety throughout the supply chain to make sure you are covering all bases.

The HVNL attempts to address mass, dimension and loading requirements by:

- imposing mass, dimension and loading requirements for heavy vehicles;
- restricting access to certain roads by some heavy vehicles; and
- allowing regulatory schemes to apply more flexible mass limits. Another tool provided by the NHVR to help identify and manage risks is the Master Industry Code of Practice (**Master Code**).

The Master Code has legal standing under the HVNL. Section 632A of the HVNL applies in a proceeding for an offence; it allows a registered industry code of practice to be admissible as evidence of whether or not you complied with a duty or obligation under the HVNL.

► IMPORTANT

The Master Code is an industry-led risk-based safety and compliance framework which sets the benchmark for businesses to identify common CoR risks. Your business can utilise the Master Code to guide you on how to identify these potential risks, and assess which of the available methods, systems or tools to use.

The Master Code can assist you in better understanding your mass, dimension and loading obligations to ensure the systems you have in place are thorough and safe.

WHY DO MASS, DIMENSION AND LOAD BREACHES OCCUR?

The below list sets out several contributing factors that may cause safety risks or encourage breaches of heavy vehicle mass,

dimension and loading requirements. You must ensure your business has measures in place to identify and manage the following risks:

- a lack of policy and procedures, or systems to report non-compliance;
- ineffective two-way consultation, cooperation, and coordination of all parties along the supply chain;
- inadequate information, training, instruction and/or supervision of mass, dimension and loading requirements and associated procedures;
- conflicting commercial arrangements between parties;
- poorly planned or prepared loads and/or inadequate oversight to verify suitability;
- incorrect placement and positioning of loads;
- a lack of weighing or measuring equipment or method;
- inflexible loading and unloading practices, including inability to re-adjust loads;
- improperly restrained loads and/or inadequate expertise to verify suitability of load restraint systems;
- non-compliance with vehicle and equipment operating requirements;
- inadequate maintenance of equipment;
- deliberate actions of drivers or other CoR parties; and
- inadequate monitoring and/or due diligence by all CoR parties to ensure safety and compliance of transport activities.

THE RISKS OF NON-COMPLIANCE

Load restraint is a key concern in the transport and logistics industry. Breaches can result in significant damage and injury to road users and road infrastructure. This makes it a pertinent issue for businesses. You must ensure the measures you have in place are appropriate, accessible and subject to continual checks.

Mass breaches are often the target of prosecution because:

- they can be easy to detect in roadside inspections;
- over-mass heavy vehicles have a disproportionate impact on infrastructure; and
- poor performance of an over-mass heavy vehicle often leads to crashes with severe consequences.

Further to this, The Master Code identifies the following as the primary risks associated with noncompliant mass, dimension and load restraint:

- Off-road parties such as consignors, schedulers or loaders are not doing enough to ensure mass compliance. For example, by failing to be aware of the mass of the load

that they are providing, by failing to provide accurate information and instructions to the driver/transport operator in relation to the load mass, or by not being aware of the mass limits applying to a heavy vehicle and its intended route.

- Unsatisfactory load restraint practices affect the stability of a heavy vehicle and its on-road performance, leading to the driver losing control, increased risk of the heavy vehicle rolling over when there are unevenly distributed loads or loads with a high centre of gravity, and risk of significant damage to the vehicle and everything in its vicinity.
- Heavy vehicles in breach of the mass, dimension and load restraint requirements cause significant damage to road infrastructure and result in serious incidents and traffic congestion.

MITIGATING RISK WITH COMPLIANCE FRAMEWORKS

We regularly emphasise the importance of adopting and maintaining risk-based approaches so that you can be well-positioned to meet your safety obligations. Businesses must implement risk-based measures to manage safety and ensure compliance with the HVNL provisions relating to mass, dimension and loading. There are many ways that this can be achieved and there isn't one control that can be implemented to address every risk. Each compliance framework must be agile enough to respond to new and existing risks in a business' commercial activities.

The risks and controls utilised to mitigate these risks will vary between CoR parties. For example, most of you will have a control for the implementation of a business-wide policy not to enter a contract that risks causing a driver or operator to breach mass, dimension and loading requirements. However, other controls will be unique to the specific nature of business and a party's position in the CoR. For example, a scheduler will need to have a control in place to ensure route plans take into consideration mass and dimension requirements, to ensure the route and infrastructure is suitable for the load and complies with any route permits or conditions as applicable.

On the other hand, employers and prime contractors will have to make sure there is a review process to check that a driver or subcontractor is performing the activity in accordance with their employment or contractual arrangements. These arrangements must be effective in managing mass, dimension and loading risks.

To prevent breaches of heavy vehicle mass, dimension and loading requirements, a rigorous and flexible framework is needed. The Master Code can help establish such a framework thereby equipping your business to respond to any existing or new risks that may arise. ■

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- **Load restraint** – consistent application of the National Transport Commission’s Load Restraint Guide.
- **Mass and dimensions** – a focus on applying measurement adjustments for all on-road inspections delivering consistent weighing and measuring assessments.
- **Restricted access vehicles** – uniform, national processes for on-road inspections of Class 1, 2 and 3 vehicles operating under mass or dimensions exemptions (notices or permits).

WHO ACTUALLY ENFORCES THE HVNL?

In most jurisdictions, on-road compliance officers are employed by the state and territory transport authorities and continue to wear their own state or territory issued uniform while performing functions on behalf of the NHVR.

In NSW, the HVNL is enforced by the Road and Maritime Service, in Victoria it is enforced by VicRoads, and so on.

In Tasmania, South Australia and the ACT, enforcement of the HVNL is undertaken directly by the NHVR – in these states and territories the NHVR has boots on the ground, so to speak, and takes a more active role.

While the NHVR only is directly involved in the enforcement of the HVNL in a number of states and territories, the regulator employs a national compliance and enforcement policy in consultation with its partner state agencies.

Aside from the NHVR and their jurisdictional counterparts, state and territory police, and enforcement officers continue to monitor heavy vehicle activities under the HVNL. Police officers also comply with other legislation that regulates their powers and responsibilities and possess additional enforcement powers and responsibilities (such as enforcing road rules).

THE NHVR COMPLIANCE AND ENFORCEMENT TEAM

The NHVR has a dedicated compliance and enforcement team that works with industry and supports police agencies and on-road enforcement officers. The team:

- works with industry and agencies to provide advice relating to the HVNL and on-road compliance enforcement activities;
- shares information relating to the ongoing development of consistent compliance and enforcement processes; and
- engages in on-going consultation with industry.

To achieve improvements in heavy vehicle safety, productivity, and consistency, the NHVR seeks to develop:

- additional strategies to assist in monitoring and reporting of compliance and enforcement actions and outcomes;
- robust compliance standards and enforcement strategies in consultation with road transport authorities and police agencies;
- processes to identify non-compliant heavy vehicle operators – this includes consulting with jurisdictions and coordinating appropriate enforcement strategies to deter, detect and remedy non-compliance and improper practices by businesses and/or individuals who have the potential to cause serious detriment to road safety and infrastructure; and
- a higher level of public awareness and confidence by promoting and achieving sustained compliance with the HVNL.

ON-ROAD AND OFF-ROAD COMPLIANCE ENFORCEMENT ACTIVITIES

So how does the regulator and their state counterpart actually enforce the law?

On-road compliance and enforcement activities include (but are not limited to):

- mobile road patrols, including vehicle intercepts;
- fixed inspection sites (e.g. heavy vehicle safety stations);
- local and national operations targeting identified key safety risks and trends, including joint operations with partner agencies;
- informing and educating industry participants, including the provision of information at roadside interventions, industry forums and toolbox talks in order to assist them in understanding their safety and compliance obligations; and
- undertaking enforcement actions in a proportionate and nationally consistent manner in response to safety risks and non-compliant behaviour, including prosecution where necessary.

On-road activities are not random. They are undertaken and managed in line with regionally-based deployment plans founded on evidence-based assessments of key freight routes, industries, transport hubs and seasonal factors, as well as fatal or serious injury crash data. These plans also inform on-road rostering for compliance and enforcement activities and targeted operations.

There are also off-road compliance and enforcement activities undertaken by the regulator which include:

- providing information and education for industry on their safety and compliance responsibilities through a range of communication channels including face to face sessions, industry forums and various electronic media;
- information/intelligence gathering and analysis of safety and compliance trends across the industry;
- audits relating to accreditation schemes;
- assisting industry in developing Industry Codes of Practice;
- investigating and analysing incidents and offences detected through heavy vehicle safety camera networks and other technologies;
- identifying or assessing the effectiveness of safety management systems; and
- investigating under primary duties legislation to identify, assess and respond to potential unsafe and noncompliant supply chain practices.

WHAT ARE THE PRINCIPLES THAT UNDERPIN NHVR POLICIES?

When devising the National Compliance and Enforcement Policy, the compliance and enforcement team identified various principles that underpinned the compliance and enforcement policy. These principles are:

Collaboration: The NHVR and partner agencies will seek to maintain and nurture collaborative partnerships with industry and each other.

Consistency: The NHVR and partner agencies will apply a consistent compliance and enforcement approach in order to seek the same outcome in the same circumstances. This approach will reduce inconsistency related to enforcement activities and responses.

Effective: The NHVR and partner agencies will plan and conduct efficient and effective compliance, enforcement and investigative activities and encourage industry participants to build a safe, sustainable, productive and innovative heavy vehicle industry.

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Evidence-based: The NHVR and partner agencies will utilise data and analytics to identify strategies to improve the safety of the heavy vehicle industry.

Fairness and transparency: The NHVR and partner agencies will conduct compliance and enforcement activities in a consistent and transparent manner, based on the principles of procedural fairness and accountability.

Intelligence-led: The NHVR and partner agencies will utilise intelligence, data and trend analysis in order to inform compliance and enforcement activities. This will assist with evidence-based risk assessments when prioritising and planning compliance and enforcement activities.

Professional: The NHVR and partner agencies will undertake compliance and enforcement activities in a professional and respectful manner. Staff undertaking these activities will be empowered, appropriately trained, efficient in their duties and motivated to uphold these principles.

Proportionate: The NHVR and partner agencies will undertake compliance and enforcement activities that are proportionate to the identified safety risk and the compliance history and behaviour of the industry participant(s). These activities will be consistent with the HVNL.

Responsive: The NHVR and partner agencies will remain responsive and agile in the face of new data, intelligence, emerging technologies, and any resulting change in identified safety risks. The NHVR and partner agencies will react appropriately to emerging priorities, whilst continuing to carry out compliance activities, investigations, and enforcement responses.

Risk-based: The NHVR and partner agencies will develop evidence-based risk assessments to ensure that compliance activities, investigations and enforcement responses are targeted, proportionate and effective in achieving sustainable improvements to safety, productivity, efficiency and compliance.

Safe: The NHVR and partner agencies will adopt a co-regulatory approach that supports and encourages a strong safety culture owned by the heavy vehicle industry, based on risk management and continuous improvement.

HOW DO I ENSURE THAT MY BUSINESS’ SYSTEMS ARE IN LINE WITH THE NHVR’S POLICY OUTCOMES?

As an operator, it is incredibly important to understand the NHVR’s policies, and the principles underpinning those policies, when devising a CoR risk management system. The NHVR’s policies as to enforcement are especially important – businesses and operators are, naturally, pulled and pushed into compliance by the risk of penalties, infringement notices and other forms of enforcement.

So, when preparing a CoR risk management system, ask yourself the following:

1. Have I considered each of the areas of compliance over which the NHVR has jurisdiction? Have I accounted for:
 - a. defective heavy vehicles;
 - b. driver fatigue and the National Driver Work Diary;
 - c. load restraint;
 - d. mass and dimensions; and
 - e. restricted access vehicles.
2. Have I provided for the education of my workers and controlled subcontractors as to who, and in what form, enforcement will be undertaken?
3. Have I made sure that we are able to comply with any investigation quickly and efficiently?
4. Have I ensured that my CoR risk management system is consistent with the principles of enforcement as advised by the NHVR? ■

THE COMPLIANCE PYRAMID DOWNLOAD 

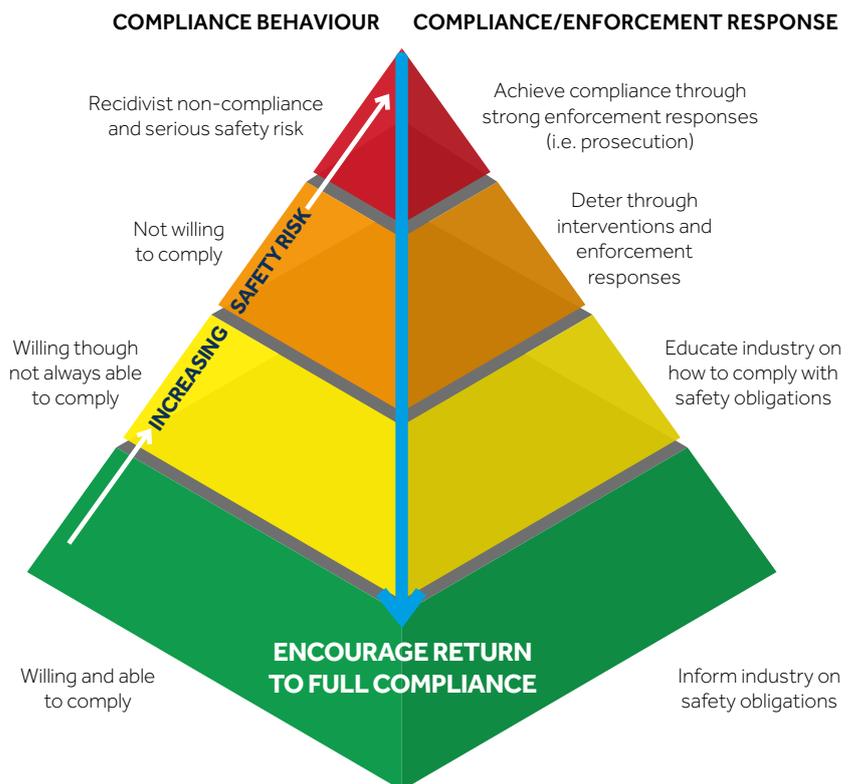
So, we know about who regulates the HVNL, how they do it, and the principles that underpin the NHVR’s approach to compliance and enforcement, but we are yet to discuss the approach that the NHVR uses.

In recent years the NHVR has moved away from punitive enforcement towards a more holistic approach that incentivises businesses to make change.

The NHVR and partner agencies now encourage safety and deter non-compliance through a layered approach of informing, educating and enforcing the HVNL, while conducting continuous monitoring to identify compliance trends and whether measures of success have been met.

In cases of non-compliance, there is a move to undertake graduated and proportionate compliance activities and enforcement responses in line with the compliance pyramid.

This pyramid outlines the relationship between compliance behaviour and risk severity, and how these factors influence the resulting compliance or enforcement responses as a means of deterrence. ■



Why understanding 'reasonable practicability' is vital to your risk management

Melanie Long, Associate, Holding Redlich

Last month, we looked at the concept of 'reasonable practicability' to help demystify this term that crops up so regularly in the HVNL. In this article, we continue the conversation to build on this knowledge and explain why it must be at the forefront of your mind when it comes to risk management. We also provide practical tips on the types of things you can do to ensure compliance.

RECAP: THE IMPORTANCE OF THE PRIMARY SAFETY DUTY

The primary duty is informed by the concept of 'so far as reasonably practicable'. So, what does this mean legally?

The primary duty is contained within section 26C of the HVNL. Without limiting the scope of the primary duty, this same provision states that in meeting this duty, each party in the CoR must, so far as is reasonably practicable:

- a. eliminate and minimise public risks; and
- b. ensure its conduct does not directly or indirectly cause or encourage:
 - i. a driver of the heavy vehicle to contravene the HVNL;
 - ii. a driver of the heavy vehicle to exceed a speed limit applying to the driver; or
 - iii. another person, including another party in the CoR, to contravene the HVNL.

For (b) above, the HVNL provides further direction on the types of actions which will amount to contravening conduct.

This includes asking, directing or requiring another person to do, or not do, something in contravention of the HVNL or entering into a contract which precludes the person to do, or not do, something.

Simplifying the concept of what is 'reasonably practicable'

The HVNL defines 'reasonably practicable' as "that which is, or was at a particular time, reasonably able to be done in relation to the duty, weighing up all relevant matters."

These relevant matters include:

- a. the likelihood of a safety risk, or damage to road infrastructure, happening;
- b. the harm that could result from the risk or damage;
- c. what the person knows, or ought reasonably to know, about the risk or damage;

- d. what the person knows, or ought reasonably to know, about the ways of –
 - i. removing or minimising the risk; or
 - ii. preventing or minimising the damage;
- e. the availability and suitability of those ways; and
- f. the cost associated with the available ways, including whether the cost is grossly disproportionate to the likelihood of the risk or damage.

RISK ASSESSMENT

The first two elements of the above definition are essentially the legal embodiment of a risk assessment.

The first step of any risk assessment is to identify the risks in your transport activities. Then for each of these identified risks, ask yourself the following:

1. What is the likelihood of this occurring?
2. If it does occur, what would be the degree of harm caused?

The answer to each of these questions is going to vary depending on the risk and therefore each risk will need to be dealt with differently depending on the answers. The test for both questions is objective, not subjective.

WHAT IS KNOWN OR WHAT YOU OUGHT TO KNOW

These elements of reasonable practicability set the expectation that you will take the time to identify the potential risks in your transport activities and consider how you can eliminate or minimise them. What is known generally about a risk in the industry is a relevant consideration to this part of the definition. Accordingly, research into industry standards as well as attendance at forums and events where industry can share new ideas and ways to manage safety are good starting points in ensuring continued compliance.

AVAILABILITY AND SUITABILITY

This requires you to consider whether the ways to manage risks are available and the feasibility of these measures to your transport activities and business.

ASSOCIATED COSTS

Cost is the final limb to be considered once all other elements have been satisfied and is connected to the likelihood of the risk occurring in your business. If something is unlikely to occur and the consequence is insignificant, then if the only way to mitigate that minor risk/harm is to spend millions of dollars, it is likely not to be reasonably required.

Alternatively, it is not enough to say that the costs of certain safety prevention policies or equipment are too expensive to implement in circumstances where the likelihood of the event occurring, and the degree of harm is high. Ultimately, the NHVR advise that if you cannot afford to do a transport activity safely, you should not be doing it at all, particularly when there is a risk of serious injury or death.

> IMPORTANT



Cost is very rarely a reasonable excuse for not managing a safety risk.

PRACTICAL TIPS

Although we cannot detail all the 'reasonably practicable' steps that should be taken to prevent breaches of CoR, some of the main issues we see continually cropping up relate to driver fatigue and mass compliance.

Parties in the chain looking to exercise reasonable controls to effectively manage fatigue should consider some of the following:

- a program for assessing fitness for duty;
- a no-blame system that encourages fatigued drivers to stop;
- a system for contingency planning in relation to fatigue and work/rest hours;
- a system to manage work/rest hours of drivers; and
- a system to review driving or work schedules and work records.

From a mass and dimension standpoint, the following should also be considered:

- accurately and safely weigh or measure the heavy vehicle or its load, or to safely restrain the load in the heavy vehicle;
- provide and obtain sufficient and reliable evidence from which the weight or measurement of the heavy vehicle or its load might be calculated;
- include compliance assurance conditions in relevant commercial arrangements with other responsible persons for heavy vehicles; and
- address and remedy similar compliance problems that may have happened in the past.

Reasonable practicability is the benchmark that the law requires and the test the court will apply to your transport activities, therefore it is important that you are doing all you can to meet this requirement. ■

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.

Temporary changes to NHVAS due to COVID-19

Q The NHVR recently made changes to the National Heavy Vehicle Accreditation Scheme (NHVAS) driver and audit requirements. What do those changes mean for me?

A The NHVR has re-instated temporary changes to the NHVAS driver medical and audit requirements, to support industry during the ongoing COVID-19 restrictions. The changes, which will be in place until 31 January 2022, include:

- Drivers operating under AFM or BFM accreditations may continue to drive with an expired driver medical (that expired on or after 31 July 2021), until they can practicably obtain a new one.
- Auditors can undertake all document and records validation and audits remotely, requesting electronic copies be emailed to them (or by another suitable method), and conduct conversations over the phone where applicable.

This easing of the administrative and regulatory burden of NHVAS accreditation will be welcomed by transport companies, which are having to adapt their operations to comply with the various public health orders in effect across most states and territories.

However, it continues to remain the responsibility of all NHVAS accredited operators to ensure drivers under AFM or BFM are fit for duty, which includes the need to undertake related risk assessments and have in place suitable risk controls. Further, accredited operators must also ensure their Register of Drivers is kept up to date, noting any expired medicals to be obtained as soon as reasonably practicable.

To meet auditing requirements, operators must still make relevant documentation available for analysis, and individuals available for interview where necessary, and otherwise follow the normal processes set out in the NHVAS Audit Framework.

Why would a formal warning be issued?

Q What is a 'formal warning' and when are they issued instead of harsher sanctions?

A A formal warning is a tool in the HVNL enforcement toolkit for responding to potential compliance issues. An authorised officer can issue a formal warning to a person pursuant to section 590 of the HVNL where the officer reasonably believes a person has contravened the HVNL, the person has exercised reasonable diligence to prevent the contravention and was unaware of the contravention, and that a formal warning is an appropriate method of addressing the contravention.

Formal warnings are not given for:

- substantial or severe risk breaches of mass, dimension or loading requirements; and
- substantial, severe, or critical risk breaches of work/rest requirements.

Authorised officers who can issue a formal warning include police officers, designated officers of state and territory road transport authorities, and NHVR safety and compliance officers.

Formal warnings can be withdrawn within 21 days after they are given, by providing notice to the person who was the subject of the warning. If a formal warning is not withdrawn within that period, then the person who is the subject of the warning cannot be proceeded against for an offence under the HVNL.

Formal warnings are one of the ways that duties under the HVNL are enforced. They are discretionary and generally issued for minor contraventions, being on the lower end of the scale of HVNL sanctions. Other enforcement measures for HVNL contraventions include enforceable undertakings, infringement notices and court sanctions.

Methods for restraining loads

Q Do my load restraint obligations under the HVNL require me to choose a particular load restraint method for certain loads?

A Schedule 7 of the *Heavy Vehicle (Mass, Dimension and Loading) National Regulation (MDL Regulations)* sets out your obligations with respect to loading requirements and loading performance standards. Under the MDL Regulations, a load on a heavy vehicle must not be placed in a way that makes the vehicle unstable or unsafe and must be secured so it is unlikely to fall or be dislodged.

It is a requirement that 'an appropriate' method is used to restrain the load. You are therefore not required to implement a specific restraint method for certain loads. You must be sure, however, that whatever restraint method you utilise, it is capable of meeting the loading performance standards required under the MDL Regulations. The *NTC Load Restraint Guide 2018* is a good starting point for guidance. As a general statement, if you are implementing loading methods different to those set out in the guide, you should be prepared to demonstrate that they are equal or better to those suggested in the guide.

Useful apps for drivers

Q I am getting good feedback from my drivers about the smartphone apps covered in recent editions of *CoR Adviser*. Are there any new apps that industry should know about?

A We are glad you are finding the Truck Safety Augmented Reality and NHVR Registration Checker smartphone applications useful. Yes, an important app to highlight this October is 'Healthy Heads', which is designed to improve access to information, tools and support in relation to mental health and physical wellbeing for the road transport, warehousing and logistics sector.

The app includes a self-check-in quiz to help increase self-awareness, access to resources to create greater resilience, tools to help better manage day-to-day life and access to urgent support services.

It was developed by the Healthy Heads in Trucks and Sheds foundation, Australia's peak body for mental health and wellbeing in the industry, with the support of the NHVR. ■

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Trend of dimension breaches across Victorian courts

In recent months, a string of court cases in Victoria have featured drivers who have failed to comply with the dimension provisions of the HVNL. In this article, we take a look at three of these cases and their outcomes and explain how these breaches jeopardise on-road safety.

DIMENSION BREACHES UNDER THE HVNL

The main provision for dimension breaches is section 102 of the HVNL which requires the responsible driver or operator of a heavy vehicle to comply with the dimension requirements applying to the vehicle, unless they have a reasonable excuse.

Within this section, the law distinguishes between minor, substantial and severe breaches for heavy vehicles carrying goods or passengers which also carry with them increasing penalty maximums.

The accused was charged with one count of severe breach of the prescribed dimension limits contrary to the HVNL and fined \$30,000.

CASE 1: COMPANY'S SERIOUS BREACH OF DIMENSION LIMITS

The first case concerns a company that was charged with one count of severely breaching the prescribed dimension limits in the HVNL. The breach was discovered after one of its drivers was intercepted driving a 3-axle freightliner prime mover towing a 3-axle low loader trailer, which was loaded with a 40-foot container. The vehicle permitted length was 19m. The vehicles length was measured at 20.3m, an excess length of 1.3m. The vehicle travelled a significant distance (approximately 180km) before being intercepted. In coming to a decision, the judge relied on photos tendered by the prosecutor which depicted the weight distribution on the rear of the load given the excess length. The judge also noted the resulting safety risk of the company's breach before convicting and fining it \$10,000.

A similar case was also recorded on the same day and in the same court for a company whose prime mover vehicle was registered to the incorrect category and travelling with an excess length of 2.9m. In relation to the first charge, the prosecutor particularised the difference in the annual registration fees by an incorrect category as \$11,333 annually while noting the unfair commercial advantage this lent the operator. The accused was charged with one count of severe breach of the prescribed dimension limits contrary to the HVNL and fined \$30,000 and one count in relation to the incorrect registration and fined \$11,000. Again, in coming to the decision, the judge commented on the safety risk of carrying a load of excessive length.

CASE 2: DRIVER PLACED ON A 12-MONTH COMMUNITY CORRECTIONS ORDER

A driver of a heavy vehicle was intercepted and the load was inspected. The inspection revealed that the vehicle was travelling over the prescribed dimension limits by an excess width of 200mm. Furthermore, database checks revealed the driver was driving without a licence and an unregistered vehicle. The driver also initially provided false details to the investigators which was perhaps a ploy to cover up prior convictions for driving offences. The driver did not however have any prior convictions for HVNL offences. Along with breaching several provisions of the Victorian Road Safety Act, the driver was also charged with a severe breach of the HVNL and placed on a 12-month Community Corrects Order to complete 50 hours of unpaid community work.

CASE 3: COMPANY CAUGHT WITHOUT A PERMIT

The last case concerns a company that breached the dimension provisions of the HVNL was ordered to pay a global penalty of \$20,000 in addition to the prosecutor's fees. Here, the heavy vehicle was travelling over the prescribed dimension limits and did not have a permit for the return trip. As a result, the dimensions were assessed against the statutory limits. Had there been a permit, then the dimensions would have been allowed. The company had no prior convictions.

Another case in the Colac Magistrates' Court was recorded against an accused company who also failed to obtain a permit which resulted in a severe breach occurring in relation to the length of overhang on the heavy vehicle that was being driven under the company's direction. Despite being a first-time offender, the company was fined \$10,000.

The Magistrate (or relevant member of the judiciary) will take into account a number of factors and materials including the resulting safety risk and materials such as photos and roadside interviews.

POINTS OF NOTE

- Authorised officers are on the lookout for dimension breaches.
- Always ensure you obtain and are travelling with your permit.
- Both individuals and companies are at risk of breaching the dimension provisions of the HVNL.
- The Magistrate (or relevant member of the judiciary) will take into account a number of factors and materials including the resulting safety risk and materials such as photos and roadside interviews.
- Prior convictions are considered in coming to a decision on the quantum of the fine. ■

IN THE NEXT ISSUE
OUT NOVEMBER 2021

- Lessons to learn from successfully overturned loading conviction
- Spotlight on Industry Codes of Practice
- NHVR accepts another enforceable undertaking