



Your one-stop resource for practical
Chain of Responsibility solutions

NOVEMBER 2021

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From Your Editor-in-Chief



The most significant series of prosecution charges brought under the Heavy Vehicle National Law (HVNL) in recent years has been issued against the company which engaged the driver of the heavy vehicle responsible for killing four police officers last year on the Eastern Freeway in Victoria.

This tragic incident and the resulting charges will likely set an important new precedent on business' responsibility for fatigue management and fitness to drive, given that it is alleged that the driver in question only had 5 hours of rest in the 3 days leading up to the collision and was a prolific ice user.

The company's managing director, national operations manager and state manager have also been charged with Category 1 and 2 offences. There will be more developments to come, and the CoR Adviser will be following along closely to bring you all the updates.

With these events in mind, this month's issue features a timely article on fitness to drive. We also recommend that our readers revisit the article on fatigue management contributed by FatigueFit that appeared in our September edition.

Stay safe,

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

Updated National Heavy Vehicle Inspection Manual 3.0

Nathan Cecil, Partner, Holding Redlich

As of 18 October 2021, the National Heavy Vehicle Inspection Manual (NHVIM) has been revised. Let's take a closer look at this manual, how to use it and what has changed in the update to version 3.0.

WHAT IS THE NHVIM?

For a heavy vehicle to be considered roadworthy, it must meet the requirements of the Heavy Vehicle (Vehicle Standards) National Regulation (Vehicle Standards) and the Australian Design Rules (ADRs).

The NHVIM is produced by the National Heavy Vehicle Regulator (NHVR) as part of its task to develop and implement a single national approach to ensuring heavy vehicle roadworthiness.

The NHVIM provides authorised inspecting officers and industry with consistent criteria

for heavy vehicle inspections, as against the criteria set by the Vehicle Standards and ADRs. Essentially, the NHVIM sets a range of criteria that a heavy vehicle must meet to be considered roadworthy or fit for use. If a heavy vehicle does not meet those criteria, it should be deemed defective.

NHVIM GUIDING STANDARDS

Taken directly from the updated NHVIM, the following are the guiding standards to the NHVIM:

- Equipment required by the Vehicle Standards or ADRs to be part of a vehicle must be present and work properly.
- Equipment that is essential for compulsory components to function, the safe operation of a vehicle, or the control of its emissions, must be kept in good condition.

➤ Continued on page 2

How to ensure your business addresses all CoR risks

Charlie Coleman, Lawyer, Holding Redlich

In recent months, we touched on the NHVR's increasingly conciliatory approach when dealing with contraventions of the HVNL. However, the best way to manage risk will always be to think proactively about your safety obligations. A helpful tool you can use to address Chain of Responsibility (CoR) risk is a Registered Industry Code of Practice (RICP).

Although it is beneficial that measures such as enforceable undertakings that allow businesses to address their breaches directly, are becoming more commonplace, it is important to consider what proactive steps you can take to manage risk before a breach occurs. A way to manage daily risks associated with conducting transport operations is through implementing an RICP.

WHAT IS A REGISTERED INDUSTRY CODE OF PRACTICE?

RICPs assist transport operators to develop processes for proactive risk management and allows operators to discharge their obligations in the CoR.

RICPs have been assessed by the NHVR as complying with its Guidelines for Preparing and Registering Industry Codes of Practice and qualifies for registration under section 706 of the HVNL.

To achieve this status, an applicant's RICP must promote a risk-based safety and compliance framework and provide guidance to all relevant parties in the chain of responsibility about how to identify and mitigate the risks associated with their transport activities and how to meet their obligations under the HVNL.

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— HELPDESK QUESTION OF THE MONTH —

Do recruitment companies have CoR obligations? (answer on page 7)

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

Disruption to global supply chains create industry skills shortage

Content Editor, Partner Press

Recent pressures on supply chains, volatile global markets, unprecedented world events and rampant developments in technology have created a situation where supply chains are faltering as demand soars.

Dr Hermione Parsons, Director of Deakin University's Centre for Supply Chain and Logistics, attributes this to the 'perfect storm' of the current climate following disruptions to global supply chains due to the COVID-19 pandemic.

Parson states that while "an increase in e-commerce and closed borders" has exacerbated the state of things, the problem was building prior to the pandemic.

Deakin University and Wayfinder: Supply Chain Careers for Women, an industry sponsored initiative which aims to create a diverse talent pipeline for the sector, recently conducted research exploring the issue from the perspective of company executives and senior government officials.

In their research, Dr Parson and Senior Research Fellow Dr Roberto Perez-Franco interviewed 21 Senior Executives from Australia's industry and government about ongoing challenges and the impact of recent events on the ability to recruit and retain the workforce required for today's supply chain sector.

The researchers identified four challenges to recruiting in supply chain:

- poor industry image;
- education gaps in candidates interviewed;
- poaching of staff between industries; and
- the impact of the pandemic.

The biggest skills gaps were in truck driving, robotics, and data analytics.

Parsons says that graduates see the sector "in terms of dirty warehouses and hi-vis vests" that most fall into rather than actively pursuing a career.

"The greatest capacity gap is in the combination of operational supply chain knowledge and data analytics."

The research highlighted the degree to which the modern supply chain workforce must learn new skills and constantly adapt to new ways of doing things.

"It will be critical to sell the next generation of supply chain workers on challenges and opportunities of a supply chain career." ■

► Continued from page 1 "Updated National Heavy Vehicle Inspection Manual 3.0"

- Equipment that is not required by the Vehicle Standards and has no direct effect on the vehicle's safe operation or the control of its emissions does not have to function, as long as it does not interfere with compulsory equipment that is required.
- Manufacturers' recommendations relevant to the safety of particular vehicle parts or to the control of emissions must be considered.

HOW DO YOU USE THE NHVIM?

The NHVIM is used by authorised officers – such as police or roadside inspectors – and approved vehicle examiners to determine whether or not a vehicle is defective. That is, the NHVIM is used by the authorities to assess a heavy vehicle. The idea is that authorities in each HVNL jurisdiction will work off the same manual, thereby ensuring that inspections and assessments conducted in one jurisdiction are exactly the same as those conducted in another.

So, if you know the 'rules' that the authorities are going to judge a vehicle by, you can proactively ensure that any vehicles that you are responsible for are compliant. You can work off the same 'rules' when designing your own working policies as to:

- the pre-trip checks that should be conducted by drivers to ensure that vehicles are fit for use prior to commencing a journey;
- the faults or issues that should be reported by drivers;

- the consequences that apply to specific detected faults e.g. those that require immediate grounding of a vehicle until they are fixed as opposed to those that can be rectified under scheduled or ad hoc maintenance programs; and
- detailed maintenance and workshop inspections to be conducted periodically.

The NHVR has developed a guide on how to develop processes for the creation of heavy vehicle pre-trip checks (this is available on the NHVR website: <https://www.nhvr.gov.au/files/201611-0434-creating-heavy-vehicle-daily-checks.pdf>). You can modify this guide so that your pre-trip checklist suits your specific operations and practices. It can also be expanded to include other items from the more extensive Heavy Vehicle Inspection Checklist contained in the NHVIM v 3.0 (<https://www.nhvr.gov.au/files/202110-0821-nhvim-national-heavy-vehicle-inspection-manual.pdf>).

WHAT HAS CHANGED UNDER THE NHVIM V 3.0?

Each section of the previous NHVIM has been amended to update and align with amendments to the HVNL and Regulations. A consolidated comparison of the changes is available on the NHVR website (<https://www.nhvr.gov.au/files/202110-1267-nhvim-amendment-summary-v3-0.pdf>).

This means that every party in the CoR responsible for a heavy vehicle should review the changes and update or amend their heavy vehicle maintenance, inspection and reporting practices as soon as possible. ■

NHVR to prosecute transport operator, executive and employees following fatal crash

Joshua Clarke, Lawyer, Holding Redlich

Eighteen months ago in Victoria, a sleep deprived and drug-affected heavy vehicle driver caused a tragic crash which resulted in the death of four police officers. Now, the NHVR has charged the driver's company, its executive and key employees in relation to the incident with the most serious offences available under the HVNL.

On 22 April 2020, a prime mover veered into the emergency lane on the Eastern Freeway in Melbourne, where four Victoria Police officers were conducting a roadside intercept. The officers had pulled over a Porsche driver for speeding. The crash killed all four officers.

Earlier this year, the driver was sentenced to at least 18 years and 6 months' imprisonment for offences including culpable driving causing death and drug trafficking. In those court proceedings, it was revealed that the driver had only had 5 hours of rest in the 3 days before the collision and was a prolific ice user.

On 21 September 2021, the NHVR announced charges against the driver's company and the company's owner/managing director, national operations manager and state manager for Category 1 and 2 offences under the CoR provisions of the HVNL. These offences are reserved for the most serious breaches of the duty owed by each party in a heavy vehicle's chain of responsibility to ensure the safety of the party's transport activities. Police detectives identified 'multiple and critical' breaches of the HVNL arising from the incident as part of an 18-month investigation conducted by Taskforce Paragon.

Category 1 offences carry a maximum penalty of \$300,000 and/or 5 years' imprisonment for an individual and \$3,000,000 for a corporation.

Category 2 offences carry a maximum penalty of \$150,000 for an individual and \$1,500,000 for a corporation.

Due to the severity of this incident, the publicity surrounding it and the implications for the HVNL, stay tuned for further updates. ■

3 important areas in HVNL training and awareness

Nathan Cecil, Partner, Holding Redlich

There is no one-size-fits-all training module that can be applied across the board to cover the transport activities of all businesses under the HVNL. How you manage compliance, and the training tools you utilise will depend on your specific circumstances. However, there are three key areas of HVNL training and awareness that you can build your business practices around. We set them out in this article.

The NHVR has moved away from a 'tick the box' approach and towards a CoR culture where parties think proactively and critically about risk management in a way that best suits the needs and activities of each business.

A measure your business can take to ensure the safety of its transport activities, is to adhere to specific business practices that facilitate instruction, training, and supervision to workers so that they can better comply with CoR laws.

There are three main aspects to any awareness and training program:

- induction training;
- periodic refresher awareness/training; and
- special needs training.

1. Induction training

Induction training is your first line of defence against CoR non-compliance. It should be aimed at equipping each worker with an awareness of CoR and an understanding of how compliance is managed in your business. Induction training will need to be more involved than a simple one-page handout on CoR. In fact, training and awareness should be ongoing. They shouldn't end once a person has received their induction training. The courts have, on a number of occasions, been highly critical of businesses that rely on such superficial (and ineffective) 'training'. Initial general awareness training can be relatively high level and uniform. Your general awareness training should cover:

- the structure of CoR laws such as the underlying principle of shared responsibility;
- who is in the supply chain;
- what elements are covered (e.g. mass);
- the nature of the limits for each element (e.g. vehicles have maximum axle and gross mass limits);
- executive liability;
- penalties; and
- an overview of what components are required in the business' compliance framework.

Beyond that, induction training must be specific to the roles and responsibilities of workers. Induction training must cover the individual and equip them with an understanding of how your business manages CoR compliance.

Parties in the supply chain must understand things such as:

- the policies and working procedures that you have implemented;
- how you manage third-party compliance;
- how you assess compliance performance; and
- what you do in the event that you detect a CoR issue.

2. Periodic refresher awareness and training

Induction training needs to be periodically reinforced and supported, so that worker performance continues to be aligned with compliance policies and practices. This training and awareness can be delivered using a variety of methods, in order to enhance its effectiveness.

Common delivery methods include:

- Toolbox talks – these are typically routine daily/weekly operational-level discussions among teams. They should cover general awareness, any changes in or issues complying with policies and working practices, any compliance issues/incidents that have arisen and any necessary 'fix' implemented.
- CoR compliance committee reports, broadcasts or 'lessons learned' circulars – these could include general information broadcasts (e.g. a refresher broadcast on mass compliance requirements), updates from the compliance committee on new compliance initiatives, reports on identified compliance issues and how they have been addressed, or general CoR incident reports and how they have been addressed to ensure compliance in future (i.e. learning from others' mistakes).
- Performance review and feedback sessions – CoR compliance performance at your business should be discussed in detail with those responsible for performing and managing CoR functions. They should focus on the cause of any issues, reminders about compliance practices that should be in place, and discussion of any required change in working practices.

3. Special needs training

Finally, where you identify deficient compliance performance, or where a significant compliance issue arises, you may need special responsive training outside of the usual routine refresher training. Depending on the nature of the weakness in CoR performance, this may be a business-wide (re)training or could be individual remedial (re)training

SHARING RESOURCES

Given that you may be responsible for monitoring or managing the compliance of others within your supply chain (if you control or influence their conduct), it may make sense to share your training and awareness resources. This is certainly true for third parties who will be required to follow your working practices (e.g. your load restraint guide, site queueing rules or loading procedures), but it also extends to others generally.

You may do this if you have identified that their training and awareness program might be lacking, or if their organisation is too small to realistically have a highly developed training and awareness program.

 **TIP:** Use third-party training resources. Third-party materials and expertise are a great way to incorporate another perspective into the training process.

The NHVR has published a series of highly detailed information sheets and videos on its website. Circulating these 'straight from the horse's mouth' could form part of your general induction and routine refresher training. Inviting your supply chain partners to share the NHVR's training and awareness insights is also a great way to share knowledge, and ensure awareness and consistency of compliance practices within your supply chain.

Finally, bringing in an external compliance expert to run general or targeted training programs demonstrates that your business is seeking qualified and 'best practice' views. A well-trained, informed and engaged workforce usually results in better performance – not just on the safety front, but from a commercial standpoint too. ■

► Continued from page 1 “How to ensure your business addresses all CoR risks”

Having a Registered Industry Code of Practice is especially useful in circumstances where breach of the HVNL has occurred. The Court has regard to a business’ RICP as evidence of what is known about hazards, risk assessments or risk controls associated with transport activities and may be relied on to determine what is reasonably practicable in the circumstances.

The NHVR has already registered one code of practice – known as the Industry Master Code – which has been developed to provide guidance across a broad range of industry sectors. The NHVR must ensure that all codes that it registers are consistent with each other, using the Master Code as a reference. Any subsequent RICP must align with the Master Code and should reference it where there is overlap. Supplementary industry specific RICPs are to be read in conjunction with the Industry Master Code.

Adoption of an RICP is not mandatory, but a voluntary choice by an operator or a party in the chain of responsibility is one way to take responsibility for the safety and compliance of their own business.

By incorporating appropriate risk-based systems into their everyday business practices, operators and CoR parties will not only improve the safety and legal compliance of their own activities, they will also be contributing to continuous improvement in best practice within their industry.

HOW TO REGISTER AN INDUSTRY CODE OF PRACTICE

Stage 1 – Developer initiates registration process with the NHVR

1. Prepare and submit a Notice of Intention

The code developer prepares a Notice of Intention to register an Industry Code of Practice and submits it to the NHVR. The NHVR have provided a template to assist in initiating this process here: <https://www.nhvr.gov.au/files/201807-0460-industry-codes-of-practice-guidelines.pdf>.

2. NHVR publishes the Notice of Intention

This notice is published on the NHVR website. Parties interested in being consulted are invited to notify the developer within 28 days.

3. NHVR appoints a liaison officer

A staff member is appointed to liaise and consult with the developer throughout the Code development process. This offers the opportunity to raise internally identified issues, make suggestions or request more information.

4. NHVR provides directions to developer

Twenty-eight days after the notice is published, the NHVR advises the developer to either proceed with the Code as is, proceed with specified modifications, or not proceed at all.

Stage 2 – Developer prepares the Industry Code of Practice

If the developer decides they no longer wish to proceed, they can withdraw from the process at this point without incurring administration fees. Otherwise, all fees and charges to the NHVR are based on cost recovery and are non-refundable.

The following steps are mandatory when preparing an RICP:

5. Research and consult with industry

The developer must consult with the relevant industry sector, incorporating regulatory, technical, industry body and operator advice. A Consultation Checklist is provided to guide this process.

6. Set out the purpose and scope of the Industry Code of Practice

During Code preparation, the developer must define its purpose, intended outcomes and identify:

- a. the industries or sectors to be covered;
- b. the activities to be covered;

- c. those responsible for the activities, and associated parties within the CoR; and
- d. the parts of the HVNL invoked by the Industry Code of Practice.

7. Develop the content using a risk management process

In accordance with AS/NZS ISO 31000:2009 Risk Management — Principles and Guidelines, the developer needs to identify and assess risks.

8. Identify the risk types

As an RICP covers an industry rather than a single business, it must:

- a. identify industry risks;
- b. identify types of risk, rather than specific instances of a risk; and
- c. identify and address the risks associated with each activity and responsibility within the industry that is covered by HVNL legislation.

The legislation is a useful starting point for this. Some examples include:

- i. Roadworthiness and suitability of vehicles and equipment for a task
- ii. Mass, dimension and loading
- iii. Driver fatigue and fitness for duty.

To ensure the most comprehensive analysis, also consider the persons or things put at risk, such as other road users, infrastructure, and the environment.

9. Assess the risks

Once each risk type is identified, consider the range and gravity of consequences that may arise. Developers should review and analyse information about the kinds of incidents that occur within the industry, their causes, frequency, and outcomes.

10. Suggest measures to control risks

For each type of risk identified, indicate appropriate control measures. Where there are a range of controls, weigh the factors in favour of a particular measure.

11. Provide guidance for a code adopter to develop their own risk management process

An RICP cannot anticipate every possible risk to which an enterprise is exposed, and therefore the Code must instruct and assist adopters to apply this to their own enterprise.

This includes guidance on:

- a. developing a risk management process consistent with AS/NZ ISO 31000:2009 Risk Management – Principles and Guidelines;
- b. implementing context specific control measures;
- c. documentation of the customised risk management process and its incorporation into staff training; and
- d. establishing a system for monitoring, feedback and review.

12. Ensure the RICP aligns with the HVNL

The RICP must address the:

- a. relevant parts of the HVNL that apply to each activity;
- b. transport activities performed by participants in the sector;
- c. types of risk that arise in relation to each activity;
- d. duties identified in the HVNL; and
- e. range of controls that may be used to achieve the safety outcomes expected under the HVNL.

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Crucially, the RICP must be sufficiently comprehensive and of a quality that would permit its use in court proceedings.

13. Developer appoints an administrator

The developer must nominate an administrator to ensure the Code is updated following changes to best practice methods for the sector of industry to which it relates. Additionally, the administrator is the point of contact for the NHVR once the code is registered and manages its review following publication.

Stage 3 – Developer submits the Industry Code of Practice

Following satisfaction of all requirements in Stage 2, the developer applies to have the Code registered with the NHVR.

Stage 4 – Industry Code of Practice is assessed

During the publication period, the NHVR appoints a panel consisting of NHVR employees and independent consultants and experts from the relevant field in order to assess the Code.

Stage 5 – NHVR makes decision

14. Assessment panel makes recommendation

Once all information is considered, the panel reports to the NHVR with a recommendation to:

- a. register the code; or
- b. propose changes; or
- c. refuse registration.

If the code is to be registered, the panel must state when it is to be reviewed. Ordinarily, this is 5 years from the date of registration.

15. Conditions of registration

Statutory conditions imposed on every registered RICP include a specified review period and the appointment of an administrator to maintain the RICP. The NHVR may also impose other conditions at its discretion.

Stage 6 – Maintenance and review

The RICP remains valid and available on the NHVR website until its date for review. Twelve months before the review date, the NHVR publishes an alert alongside the relevant RICP, indicating it is due for review. If the developer plans to conduct the review, they must submit the reviewed RICP to the NHVR no later than 6 months before the review date.

The NHVR then reassesses the reviewed RICP to determine if it has been amended appropriately, or if it requires no further changes.

16. Contravention of conditions of registration

During the period of its registration, an RICP is always subject to two statutory conditions:

- a. that the Industry Code of Practice is maintained, and updated (section 706(2)(b)); and
- b. that the Industry Code of Practice must be updated following changes to the Guidelines (section 706(2)(c)).

If any condition is contravened, the NHVR may take action to amend the conditions of registration, including by adding new conditions, or cancelling registration (section 706(5)).

Despite what the idiomatic expression says, just because something isn't broken doesn't mean that you can't fix (or at least improve it). So, how can you take risk management into your hands today? ■

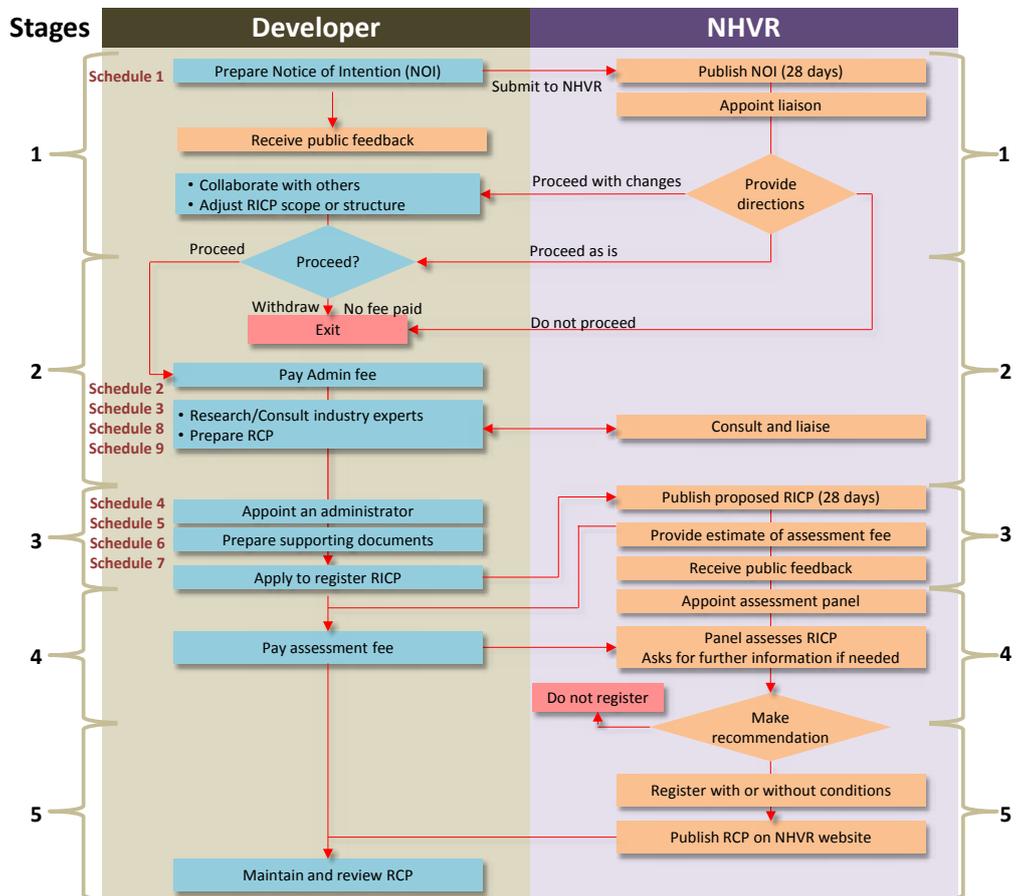
5-STAGE RICP REGISTRATION PROCESS DOWNLOAD

5-stage RICP registration process

Charlie Coleman, Lawyer, Holding Redlich

Recently, the NHVR has shifted towards a more conciliatory approach to contraventions of the HVNL. To facilitate the adoption of practices that support risk management in transport operations, a RICP is an effective tool that promotes an industry specific, risk-based safety and compliance framework. The NHVR guidelines (summarised below) support developers throughout the Industry Code of Practice registration process.

Broadly, this process includes five separate stages as set out in the diagram. ■



How to assess fitness to drive

Melanie Long, Associate, Holding Redlich

While many factors contribute to on-road safety, a key consideration is the state of the driver when preparing to conduct their transport activities. In this article, we look at the important issue of how operators and schedulers can ensure their drivers are fit to drive.

Recently, we've taken things back to basics, unpacking what 'so far as reasonably practicable' means and providing refreshers on what the primary duty under the HVNL involves. To some, assessing a driver's fitness to drive might seem straightforward, but it is such an important part of business practices and decisions associated with heavy vehicles it can't be taken for granted.

Complying with express duties relating to driver fatigue and work and rest hour options is one way to help drivers to drive safely and to achieve compliance with the overarching primary duty.

Applying the primary duty to this could mean that operators and schedulers have a duty to ensure so far as reasonably practicable that the people they employ and direct to drive heavy vehicles are fit to do so safely.

HOW TO ENSURE SOMEONE ELSE DRIVES SAFELY

There are a variety of steps that operators and schedulers can take to ensure drivers are able to drive safely. Complying with express duties relating to driver fatigue and work and rest hour options is one way to help drivers to drive safely and to achieve compliance with the overarching primary duty. Another way to ensure drivers are able to drive safely is by making sure they are fit to drive.

WHAT IS BEING 'FIT' TO DRIVE?

Being fit to drive means that a driver has the requisite sensory, cognitive and motor functions to perform the complex task of driving. It also includes not being affected by certain conditions that could impede the driving task. Examples of this are being fatigued, affected by drugs or alcohol, having certain medical conditions which may impair sensory, cognitive or motor functions (such as being prone to blackouts or having vision problems) that are not treated or managed under appropriate medical advice.

POLICIES AND PRACTICES TO ENSURE FITNESS TO DRIVE

1. Build on current policies

A great place to start is looking at your current policies and practices and building on these to include measures of ensuring your drivers are fit to drive. If you're operating under Basic Fatigue Management or Advanced Fatigue Management, you're likely to have already done the hard yards. This is because you can use your practices around requiring drivers to be certified as being fit to drive by a medical practitioner as well as your procedures for drivers' fitness for duty under those schemes to demonstrate compliance with this aspect of the primary duty.

2. Zero drug and alcohol policies

Zero drug and alcohol policies may seem like an obvious one but, as case law demonstrates, it is still something that needs to be regularly addressed and part of workplace discussions and policies so that parties in the supply chain are cognizant of the risks.

Preparing and distributing zero drug and alcohol policies and practices could be in the form of:

- a policy (such as a document, pamphlet or poster) made available to employees identifying the business' position on drugs and alcohol, identifying how it can impair drivers' ability to drive and consequences of using illicit substances on the job. It may also be helpful in these documents to identify

reporting avenues for persons suspecting others of using illicit substances on the job so that any issues can be managed appropriately, as well as identifying helplines for persons who may want assistance managing addiction and avoiding illicit substances; and

- discussing the risks and circulating relevant materials at employee and contractor inductions so that new employees are aware of your business' policies.

FITNESS FOR WORK CLEARANCE

Businesses may have different approaches to clearing drivers for fitness to work. Options include:

- requiring drivers to be assessed by a qualified health care provider and to provide certification of fitness on a yearly basis or if a driver has some major health or fitness event, after that event on the resumption of work; and
- drivers' self-reporting on their fitness to drive. This may involve drivers completing fitness to drive checklists on a half-yearly or yearly basis and then being able to come forward and notify employers if they feel they are unfit on a given day for any reason (such as feeling dizzy or nauseous).

> IMPORTANT



Self-reporting works on a trust system and requires workplaces and management to take the first step to encourage honest responses. One way to encourage such behaviour is for workplaces to avoid penalising instances of unfitness where they arise in circumstances beyond drivers' control.

In summary, the primary duty goes beyond what traditionally may be viewed as 'transport activities' including a driver's fitness to drive. Ensuring that the drivers you employ or direct to drive heavy vehicles are able to do so safely starts with good policies and practices which should be prioritised and promoted by those responsible for their implementation including the drivers themselves. ■

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.

Recruiter CoR obligations

Q Would a recruitment company who hires drivers under a labour hire arrangement or refers drivers for hire to a company have CoR obligations?

A A recruiter will have CoR obligations only where the recruiter:

- a. is a party to the CoR, most relevantly, if the recruiter were the employer, prime contractor or scheduler of the driver; and
- b. engages in transport activities associated with the use of a heavy vehicle on road, including contracting, directing or employing a person to drive a vehicle.

If the above is satisfied then the contents of the recruiter's obligations under the HVNL (and its exposure to risk of liability) will take into account the following factors:

- a. the recruiter's functions in relation to transport activities, which can take into account the recruiter's functions as provided for in any employment or engagement contract;
- b. the nature of the public risk created by the recruiter's transport activities, such as the public risk associated with the recruiter contracting, directing or employing a person to drive a heavy vehicle; and
- c. the recruiter's capacity to control, eliminate or minimise the risk mentioned in paragraph (b).

Generally recruiters' risk of liability under the HVNL is very limited because they:

- a. are not usually the employer of the driver, the transport operator is;
- b. do not usually undertake transport activities; and
- c. usually exert limited, if not negligible, capacity to control, eliminate and minimise risks associated with transport activities (including those of the transport operator).

Where the driver is employed by the transport operator, we would not ordinarily expect recruiters to be exposed to CoR compliance risk.

Where the recruiter provides the services of a driver pursuant to a labour hire type arrangement, risk areas for recruiters could include:

- a. where a recruiter has responsibilities to manage the performance of work by drivers e.g. as part of the labour hire terms;
- b. where a recruiter repeatedly proposes to offer the services of a driver that has been in breach of the HVNL, or has had disciplinary action in relation to the HVNL or has had several infringement/enforcement orders under the HVNL imposed on the driver; or where a recruiter has responsibilities to train or provide CoR inductions to drivers e.g. as part of the labour hire terms.

A recruiter could foreseeably be in a dubious position under a labour hire type arrangement if it continued to recruit drivers for an operator

where the recruiter was aware that the transport operator had no CoR compliance policies and driver training, and perhaps had a recent history of CoR breaches.

If there is a CoR-related incident, a recruiter's liability will be contingent on its CoR obligations which will be determined by reference to its place in the CoR, its transport activities and its capacity to control, eliminate and minimise risks associated with those transport activities. The mere fact a driver may be liable under the HVNL does not automatically mean the recruiter will also be liable, unless there is some other recourse under the recruiter's contract with the operator or driver.

Is there leniency in mass measurement?

Q I heard that the NHVR can be pretty lenient when it comes to mass measurement. In your experience, do you think that this is true?

A While the NHVR will allow for some leeway when it comes to mass measurement, it is in no way 'lenient'; just cast your eye through our recent issues for multiple examples of NHVR prosecutions for mass breaches. In order to accommodate for situations where the weight and mass of a heavy vehicle is slightly over or under the legal limit, the NHVR recognises that the weight and mass of a heavy vehicle may vary due to the:

- weighing and measuring equipment used;
- characteristics of inspection sites;
- measuring methods used; and/or
- conditions under which the measurements are taken.

By taking into account the above factors, the NHVR is able to determine the 'assessed mass' of a heavy vehicle. The assessed mass is the measured mass (i.e. the amount calculated by the measuring equipment) minus a measured mass adjustment for the factors above. Importantly, the extent of the adjustment will depend on the number of axles in the heavy vehicle's axle group, including the number of tyres. Transport operators should ensure heavy vehicles and their loads comply with the applicable mass requirements and that drivers remain vigilant of their heavy vehicle's weight and mass. ■

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Lessons from an overturned loading conviction

In the case of *Jesse v Roads and Maritime Services NSW* (2020), a driver was able to have his loading conviction overturned after it was found that the prosecutor failed to alert Jesse or the court of a 'dramatic shift' to the case against him. In this article, we look at lessons you can learn from this judgment.

JESSE'S ROAD TO HAVING THE CONVICTION OVERTURNED

In August 2017, Jesse was driving a tipper truck with trailer up the Hume Highway when he was issued a penalty notice for \$540 for a substantial breach of loading requirements contrary to section 111(1) (b) of the HVNL. In the truck were an excavator and other items.

Jesse contested the penalty notice and appeared at the Local Court without a lawyer in February 2018. The Local Court convicted Jesse of the offence and fined him \$2,500 plus \$1,000 in costs.

Jesse then appealed his conviction and the severity of the fine to the District Court. The District Court left his conviction in place but allowed the severity appeal which resulted in Jesse's fine being reduced to \$1,000.

Apparently dissatisfied with the result, Jesse requested the District Court to state his case to the Supreme Court's Court of Criminal Appeal (CCA). Relevantly, the CCA found that the District Court had misdirected itself as to the proper meaning of 'contained' in the *Load Restraint Guide 2004* (NSW) (LRG), in circumstances where the judge had not been directed that the term 'contained' is defined in the LRG. Accordingly, the matter was sent back to the District Court.

It was here in the District Court where Jesse's conviction was overturned.

HOW DID JESSE HAVE HIS CONVICTION SET ASIDE?

A person that is charged with committing an offence is entitled to the 'particulars'. 'Particulars' are the acts, matters or things that the prosecution says amounts to the accused breaking the law. For example, where the alleged offence took place, who was involved, and the details of the alleged offence.

The critical factor that led to Jesse's conviction being dismissed was that the particulars of the loading requirements charge set out by the prosecution did not align with the case that the prosecution ultimately put forward against him at trial.

Prior to trial, the prosecution said that particulars of the charge were that there were a number of excavator buckets and an excavator, comprising part of the vehicle's load, which were not appropriately secured pursuant to the LRG. Whereas at trial, the prosecution added further factors that it said constituted the offence. The prosecutor said that not only were the excavator buckets and excavator improperly secured, but there was also a small jerry can, a pair of loading ramps and some conduit which were also capable of being dislodged from Jesse's vehicle.

The District Court said that adding these new components to the particulars of the charge meant that the hearing was unfair to Jesse because Jesse had come to Court to address one charge and now the case had changed. This unfairness was also exacerbated by the fact that Jesse was not legally represented so did not know that he could object to the prosecutor changing the case against him.

As a result, the District Court did not allow the prosecutor to rely on the additional elements of the case it advanced against Jesse at trial. The prosecutor could only rely on details of the charge which alleged that the excavator buckets and excavator were not properly secured. On this limited case, which Jesse had come prepared to defend, the prosecutor was unable to prove beyond reasonable doubt that the loads contravened loading requirements. The Court set aside the conviction.

LESSONS FOR CoR PARTIES

■ Ensure you are aware of the details of the charges against you

If you receive a Court Attendance Notice identifying a charge against you, be careful to look at the details of the charge. If the prosecutor has not provided you with enough details of the facts, matters or things to allow you to prepare your defence, you can ask for them. Usually this would be by way of a brief of evidence being provided to you. That is, all the materials the prosecutor is intending to rely upon to put forward its case at the hearing.

If a prosecutor raises new details that it says makes up the charge against you at trial, which you were not informed of, you can raise this with the court.

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This is generally something that defence lawyers would be alert to and object to. However, if you do not have the opportunity to be legally represented then, rather than forcing yourself to meet a case that you weren't informed of or needing to produce evidence 'on the fly', you can raise this matter with the court and ask for an adjournment. This means that the hearing is deferred to a later date allowing you time to prepare your case taking into account the new details of the charges against you and, if necessary, obtain legal representation.

■ Seek legal representation if charged under the HVNL

In Jesse's case, had he been legal represented then the charges might have been dismissed at first instance or, at the very least, the hearing would have been adjourned so that the entirety of the case against him could have been defended. While some CoR parties simply won't have the resources to have legal representation at trial, taking that step where practicable can arguably avoid a lot of stress and time defending the charges, particularly if it gets to the stage where an appeal is needed. Jesse was unrepresented until the appeal which ultimately assisted him in getting his conviction overturned. ■

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OUT DECEMBER 2021

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- Heavy vehicle defects – how to ensure compliance and enforcement
- Solo driver's critical risk breaches of BFM hours