

## From Your Editor-in-Chief



The National Heavy Vehicle Regulator's (NHVR) enforcement warpath continues. Actually, it may be more accurate to call it a 're-education' warpath, as the NHVR continues to focus on enforcement options that encourage or force an improvement of practices and safety, rather than just seeking financial penalties.

In this issue of your *CoR Adviser*, we look at a series of recent cases in which the NHVR accepts enforceable undertakings or pursues Supervisory Intervention Orders in favour of monetary penalties. We see this as a positive ongoing trend in the NHVR's approach to enforcement. While financial penalties can grab headlines, they may not succeed in getting people to change their practices.

We also take a tour of some recent regulatory guidance issued by the NHVR in relation to the risks and risk management of transporting freight in shipping containers. Such shipments have resulted in some major Chain of Responsibility prosecutions. The common involvement of overseas parties not directly subject to our laws makes the management of these risks a little trickier than when all relevant parties are in Australia. The NHVR's guidance is (thankfully) in line with what we have been recommending for years. So, let us know if we can assist.

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

## Managing the risks of transporting freight in shipping containers

*Nathan Cecil, Partner, Holding Redlich*

One of the most significant but under-the-radar changes introduced to the Heavy Vehicle National Law (HVNL) in recent years was giving the National Heavy Vehicle Regulator (NHVR) the power to issue regulatory guidance to industry.

The NHVR has published its first 'regulatory advice' article on managing the risks of transporting freight in shipping containers.

By now, the safety and compliance risks of transporting freight in shipping containers should be well known. The 2015 case of Futurewood set a new legal precedent on what those importing shipping containers should do to ensure that the transport of containers within Australia is safe. After that case did the rounds for many years, in March 2021, the NHVR commenced proceedings

against a consignor of a similar imported shipping container load, alleging that it failed to meet many of the requirements set down in Futurewood.

### WHO IS THE REGULATORY ADVICE INTENDED FOR?

The regulatory advice is targeted at the parties within the Chain of Responsibility who are likely to conduct, or have responsibility or control over, relevant transport activities relating to shipping containers. This means consignors, consignees, port facilities (loaders/loading managers), freight forwarders (often consignors) and transport operators. As the NHVR says in the regulatory advice: "If you consign, pack, load or unload goods, you have the most ability to influence and manage the risks associated with transporting freight in shipping containers."

➤ *Continued on page 2*

## Advanced Fatigue Management: Making fatigue management more flexible

*Charlie Coleman, Lawyer, Holding Redlich*

Under the Heavy Vehicle National Law (HVNL), transport operators are subject to stringent rules that regulate their rest and sleep. The reasons why the HVNL was enacted to implement these regulations is because driver fatigue or drowsy driving is not only a significant safety hazard for the road transport industry, but also other road users and the public.

There are jobs that just need to be done. Whether it is an overnight carriage of goods, or a consignment of goods in the early hours of the morning, the physical need and statutory requirement for sleep and rest can often be at odds with the timelines and deadlines imposed on operators. That is why the National Heavy Vehicle Regulator (NHVR) has implemented the Advanced

Fatigue Management scheme – to make fatigue management more flexible.

### WHAT IS ADVANCED FATIGUE MANAGEMENT?

Advanced Fatigue Management (AFM) is the most flexible work-and-rest regime set out in the HVNL. Rather than using prescribed work-and-rest hours, AFM offers operators flexibility to choose their own hours, so long as the fatigue risks associated with their selection are offset by sleep, rest and other management practices in accordance with a fatigue management system.

AFM is a non-prescriptive approach to work-and-rest hours, and allows the NHVR to flexibly enforce compliance regimes against operators with such a fatigue management system.

➤ *Continued on page 4*

## — HELPDESK QUESTION OF THE MONTH —

### What are the changes to signage requirements for long vehicles? (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)

## Can we make the 2022 heavy vehicle fleet as 'healthy' as that of 2021?

Jessica Oldfield, Editor, Portner Press

According to the National Roadworthiness Survey 2021, there was a significant improvement in the roadworthiness of the Australian heavy vehicle fleet. Can we continue this trend in the coming year?

The National Heavy Vehicle Regulator (NHVR) conducted the National Roadworthiness Survey between May and June in 2021 through the inspection of 13,325 heavy vehicle units across 8,338 heavy vehicle combinations in all Australian states and territories.

**“Cases of major non-conformities and groundings dropped from 12% of inspected vehicles in 2016 to 6% in 2021.”**

NHVR CEO Sal Petrocchio said, "In the last five years, we have seen the rate of non-conformities drop from 48% of units inspected to 31%."

"Importantly, the most serious cases of major non-conformities and groundings has dropped from 12% of inspected vehicles in 2016 to 6% in 2021," Mr Petrocchio said.

"The continuing maturity of the industry in adopting better safety practices like whole-of-business safety management systems and daily safety checks have been a key contributor in driving the downward trend.

"While it highlights progress made due to the hard work being undertaken to improve and monitor the Australian heavy vehicle fleet, I'm determined as an industry that we continue to push on and ensure that Australia has one of the safest heavy vehicle fleets in the world."

Find the full survey results at [www.nhvr.gov.au/safety-accr-education-compliance/vehicle-standards-and-modifications/roadworthiness-program/national-roadworthiness-survey](http://www.nhvr.gov.au/safety-accr-education-compliance/vehicle-standards-and-modifications/roadworthiness-program/national-roadworthiness-survey). ■

► Continued from page 1 "Managing the risks of transporting freight in shipping containers"

The regulatory advice identifies the following businesses as likely to fall within these categories: importers, exporters, manufacturers, freight forwarder, freight brokers, shipping agents, container terminal operators, stevedores, freight consolidation or deconsolidation providers.

### WHAT ARE THE RISKS OF TRANSPORTING FREIGHT IN SHIPPING CONTAINERS?

The key risks arise from failure to pack or properly restrain goods within shipping containers. Many people fail to realise that a shipping container is not a magic box; if goods are not packed or restrained properly within a container, they can cause the load to shift and destabilise a carrying vehicle, or even break out of the container.

So, the main risks are:

- unbalanced loading, including loads that are not distributed evenly across the container or with a high centre of gravity;
- inadequate restraint of loads within the container, including insufficient load restraint that permits the load to shift within the container; and
- safety risks for unloaders, including the risk to physical safety when unloading consignments that have shifted in transport as a result of the above risks.

### WHY IS IT IMPORTANT TO MANAGE THESE RISKS?

Unsafe loads lead to unsafe vehicles, which pose safety risks to drivers, road users, the public and road infrastructure.

Further, and with particular reference to transporting containerised loads, the regulatory advice notes that, "Heavy vehicles transporting freight in shipping containers are significantly more likely to be involved in safety incidents than vehicles carrying general freight".

### HOW CAN YOU MANAGE THESE RISKS?

The regulatory advice concludes by providing tailored practical guidance to each party with steps they can take to prevent or minimise the risks or their consequences.

For example:

- consignors can share load plans with packers to ensure that loads are packed inside containers in a way that meets the requirements of the *Load Restraint Guide*;
- transport operators can maintain a register of load shift occurrences to ensure that identified incidents are followed up and remedied in future;
- packers and loaders can ensure they do not pack any additional items over what is stated in a loading plan without obtaining approval; and
- container terminal operators, freight forwarders and consolidators/ deconsolidators can ensure that workers or their supply chain counterparts report any container damage suspected to be caused by poorly secured loads.

Find the regulatory guidance at [www.nhvr.gov.au/safety-accr-education-compliance/chain-of-responsibility/resources/regulatory-advice](http://www.nhvr.gov.au/safety-accr-education-compliance/chain-of-responsibility/resources/regulatory-advice). ■

## Supervisory Intervention Order for driver exceeding maximum work hours

Joshua Clarke, Lawyer, Holding Redlich

**The Supervisory Intervention Order (SIO) appears to be coming of age, with courts in several Australian states having recently put SIOs to use in dealing with offenders' breaches of the Heavy Vehicle National Law (HVNL).**

In November 2021, the National Heavy Vehicle Regulator (NHVR) reported its third successful application for an SIO arising from its prosecution of a driver for six fatigue breaches in a South Australian court.

This case stemmed from NHVR Safety Compliance Officers' inspection of a vehicle's load and driver's work diary, which revealed that the driver had worked a total of 15 hours in a 24-hour period.

Solo drivers operating on standard hours (i.e. without accreditation for fatigue management) must not work for more than 12 hours in a 24-hour period. They must also have a minimum rest break of 7 continuous hours in that period.

The driver appeared in Court and pleaded guilty to breaches of the HVNL, for which the driver faced a maximum penalty of \$103,440.

Rather than seeking a fine of such a punitive amount, the NHVR recommended that the Court make an SIO.

The Court obliged, making an SIO that requires the driver to:

- purchase an NHVR-approved electronic work diary (EWD);
- record their driving and rest breaks in the EWD; and
- lodge their EWD records to the NHVR.

This was the first time that a court has ordered an EWD to address fatigue breaches. The Court also ordered that the driver pay a \$6,000 fine, which was wholly suspended if the driver complied with the terms of the SIO.

Find out more about SIOs on page 8, where Melanie Long discusses two cases in Tasmania in which courts recently made SIOs against transport operators. ■

## National Location Registry launches

Jessica Oldfield, Editor, Portner Press

The Australian Government has launched the National Freight Location Registry. The National Freight Location Registry is an initiative of the Commonwealth Government with support from industry, which facilitates the aggregation and sharing of accurate and up-to-date information about delivery locations.

### WHAT IS THE NATIONAL LOCATION REGISTRY?

#### ► DEFINITION: NATIONAL LOCATION REGISTRY

The National Location Registry (registry) is a digital tool with pick-up and delivery location information. It contains:

- operating hours;
- weight and height restrictions for vehicles;
- entry points;
- driver amenities; and
- safety requirements for each site.

Not-for-profit standards organisation GS1 Australia manages the registry, with support from the Department of Infrastructure, Transport, Regional Development and Communications, and the Department of Health.

The registry is a key element of the Australian Government's National Freight Data Hub project.

### WHAT IS THE NATIONAL FREIGHT DATA HUB?

In May 2021, the Australian Government established the National Freight Data Hub (hub), which is a \$16.5-million investment over 4 years to make a range of data available to support the freight industry.

The hub will deliver 13 data projects that aim to enhance the collection, harmonisation and publication of freight data, and methods and protocols for data exchange. The registry is one of these projects. Other projects include:

- establishing a freight data catalogue;
- reporting on the progress of the National Freight and Supply Chain Strategy;
- publishing new Australian import and export data; and
- promoting the exchange of freight consignment data between supply chain partners.

Find out more about the hub at [www.infrastructure.gov.au/infrastructure-transport-vehicles/transport-strategy-policy/freight-supply-chains/national-freight-data-hub](http://www.infrastructure.gov.au/infrastructure-transport-vehicles/transport-strategy-policy/freight-supply-chains/national-freight-data-hub).

### BENEFITS OF THE NATIONAL LOCATION REGISTRY

The registry, which is based on GS1 global data standards, is designed to support interoperability across the supply chain to help business to transport Australian produce more efficiently.

Deputy Prime Minister, and Minister for Infrastructure, Transport and Regional Development, Barnaby Joyce said the registry will make it easier and quicker for freight operators to pick-up and deliver goods.

"Every Australian, everywhere, every day relies on freight. The National Location Registry will benefit us all by backing a more efficient supply chain for our businesses and truckies," Mr Joyce said.

"For farmers, manufacturers and distributors, the registry will reduce some of the hassle and time it takes to get their products to where they need to go.

"This will make life easier for the more than 50,000 small businesses involved in Australia's road freight sector. These businesses can now encourage location owners to list their pick-up spots and other important information on this one registry, saving time and effort."

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**The registry supports interoperability across the supply chain to help business to transport Australian produce more efficiently.**

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Assistant Minister for Road Safety and Freight Transport Scott Buchholz said the registry will deliver the data the freight industry needs.

"A farmer who diversifies their plots to different crops and sets up a new processing shed can put this shed on the registry so transport operators know exactly how to get in and pick up the produce to haul to markets," he said.

"This will take some of the stress off our transport operators to find the new shed, ensure the produce is picked up quickly and smoothly, and means the farmer doesn't have to give this information each and every trip."

Industry participants include Woolworths, Coles, Sanitarium, PepsiCo, Toll, Linfox and Australia Post.

The registry is available for free at [nlr.org.au](http://nlr.org.au). ■

## NSW Safety Around Your Vehicle Compliance Project

Jessica Oldfield, Editor, Portner Press

SafeWork NSW's Safety Around Your Vehicle Compliance Project promotes safer working practices when loading, unloading and working around vehicles. Stage 2 of the project is now underway and will run until June 2022.

Stage 1 of the project, which ran from 1 March to 30 August 2021, focused on promoting safer working practices for transport operators when loading, unloading and working around vehicles.

During that period, inspectors visited 327 transport and construction businesses throughout NSW, issuing 71 notices.

SafeWork NSW Executive Director Tony Williams said, "Stage 2 is extended to carry out visits across the supply chain including retail,

manufacturing and wholesale sectors. [Inspectors] will focus on high-risk tasks in and around heavy vehicles such as loading/unloading, forklift safety and traffic management.

"We have been carrying out widespread transport industry consultation to identify the highest priority risks. Almost every week we see workers getting injured while working around vehicles, whether that's in a transport depot, unloading on a construction site, loading at a distribution centre, or making retail or home deliveries.

"These visits are about addressing safe loading and unloading practices, forklift safety, and promoting the separation of people, product and plant at all workplaces."

Learn more about the SafeWork NSW Safety Around Your Vehicle Compliance Project at [safework.nsw.gov.au](http://safework.nsw.gov.au). ■

► Continued from page 1 “Advanced Fatigue Management: Making fatigue management more flexible”

In AFM, you choose your own hours based on your individual and business needs, rather than using the prescribed hours under the HVNL. To be eligible for AFM, you must apply to the NHVR and demonstrate that you understand the risks that working these hours can create, and that you can and will take steps to offset these risks effectively.

## AFM provides a significant benefit to the commercial operations of a transport business

To evaluate your application for AFM, the NHVR uses seven fatigue risk principles to judge the likelihood the proposed hours will cause driver fatigue and, additionally, 10 AFM standards to assess the adequacy of your fatigue management system.

### KEY BENEFITS OF AFM

AFM provides a significant benefit to the commercial operations of a transport business, such as allowing you to:

- have the hours available to cover new routes;
- complete routes more effectively than your competitors;
- attract and retain experienced drivers;
- attain a higher level of efficiency;
- demonstrate a commitment to safety; and
- have fatigue risk management systems assist with meeting other related Chain of Responsibility obligations.

AFM simplifies a business' approach to fatigue and rest compliance. For instance, AFM allows you to:

- create a set of work-and-rest rules that are easier to understand;
- develop simpler schedules;
- reduce confusion and compliance stress for drivers; and
- gain more control.

### HOW DO I PREPARE AN AFM APPLICATION?

The NHVR has developed the AFM application toolkit. The toolkit is a series of tools, booklets and templates to guide through the entire process of applying for AFM, from collecting the right information to preparing your application for the NHVR.

#### ► REMEMBER



If you are considering applying for AFM, you should assess your proposed work-and-rest arrangements by using the fatigue risk assessment tool. Doing this will give you a greater understanding of the high and low risk areas within your proposal, and may help you develop suitable countermeasures.

You should prepare a safety case that describes how the fatigue risks are managed by the business practices described in your fatigue management system. Don't worry, you are not locked into what hours you propose to operate in. You will always have the option to amend your approved hours if your circumstances change.

### 5 INFORMATION RESOURCES PROVIDED BY THE NHVR

**1. The introductory booklet:** This provides an introduction to some key aspects of AFM and explains how AFM can be a powerful tool in your business to unlock flexibility, reduce complexity and improve safety. It also explains how obtaining AFM accreditation for your operations may result in a significant return on investment.

**2. The preparation to apply booklet:** This provides information on the seven fatigue management principles (explained below) and the 10 AFM standards, and how they relate to the preparation of your AFM application. The booklet also takes you through the practical aspects of preparing to submit an application for AFM, including the necessary details and points for consideration.

**3. The workbook:** This is designed to help you plan for and collect the information that is required to prepare and submit an AFM application.

**4. The fatigue risk assessment tool:** This tool is an excel spreadsheet that assists in calculating your business' risk with reference to each of the seven fatigue risk principles. The tool will also create a safety case template for you to use.

**5. Setting your own operating limits and countermeasures:** This material explains the type of schedules and work-and-rest hours that are currently approved within AFM. It describes hours that have been used and how operators use them. This booklet also contains examples of a wide range of countermeasures that are currently used.

### 7 FATIGUE RISK PRINCIPLES

The NHVR assesses an applicant's risks, strategies and proposed systems when determining whether an operator is eligible for AFM. When doing this, the NHVR considers the seven fatigue risk principles, which are grouped into three categories:

- 1. Work-related rest breaks (such as short rest breaks):**
  - reduce the time spent continuously working; and
  - the more frequent breaks from driving, the better.
- 2. Recovery breaks (such as major rest breaks):**
  - ensure an adequate sleep opportunity to obtain sufficient sleep;
  - maximise adequate night sleep;
  - minimise shifts ending between 00:00 and 06:00; and
  - minimise extended shifts.
- 3. Reset breaks (such as long periods of rest or extended leave):**
  - prevent accumulation of fatigue with reset breaks of at least 30 hours (and include two night periods, 00:00–06:00) between work sequences.

The fatigue risk assessment tool assists you in calculating the fatigue risks in your proposed work-and-rest hours.

### 10 AFM STANDARDS

In addition to the seven fatigue risk principles, the NHVR has developed 10 fatigue management standards with which you must comply as part of AFM.

- 1. Scheduling and rostering:** Scheduling of trips and rostering of drivers must incorporate fatigue management measures.
- 2. Readiness for duty:** Drivers must be in a fit state to safely perform required duties.
- 3. Fatigue knowledge and awareness:** All personnel involved in the management, operation, administration, participation and verification of the AFM option must be able to demonstrate competency in fatigue knowledge relevant to their position. This includes the effects and management of fatigue, and the operator's fatigue management system.
- 4. Responsibilities:** The authorisations, responsibilities and duties of all positions involved in the management, operation, administration, participation and verification of their operations under the AFM option must be current, clearly defined and documented, and carried out accordingly.

► Continued on page 5

➤ Continued from page 4 “Advanced Fatigue Management: Making fatigue management more flexible”

- 5. **Internal review:** An internal review system must be implemented to identify non-compliances and verify that the activities comply with the AFM standards and the operator’s fatigue management system.
- 6. **Records and documentation:** The operator must implement, authorise, maintain and review documented policies and procedures that ensure the effective management, performance and verification of the AFM option in accordance with the standards. Records that demonstrated the compliant operation of the AFM option must be collected, stored and maintained to verify compliance.
- 7. **Health:** Drivers must participate in a health management system to identify and manage fatigue risks.
- 8. **Workplace conditions:** Workplace environments and conditions must assist in the prevention of fatigue.

- 9. **Management practices:** Management practices must be designed to minimise the risks relating to driver fatigue.
- 10. **Operating limits:** There must be operating limits to provide drivers and operators with the flexibility to effectively manage fatigue.

**HOW TO APPLY**

The AFM is a module of the NHVR’s National Heavy Vehicle Accreditation Scheme (NHVAS). The NHVAS is now the national formal process for recognising operators that have robust safety management systems in place. The AFM module is conducted through the NHVR Portal, which sets out step-by-step instructions to successfully submit an application. ■

## Advanced Fatigue Management application: Classifying and assessing risk criteria

Charlie Coleman, Lawyer, Holding Redlich

Advanced Fatigue Management is a non-prescriptive approach to work-and-rest hours. It allows the National Heavy Vehicle Regulator (NHVR) to flexibly enforce compliance regimes against operators with a fatigue management system, so long as an operator’s risks are managed within the seven fatigue risk principles.

The NHVR prepared a table that sets out how it classifies and assesses the risk criteria when determining an operator’s application for Advanced Fatigue Management. We have reproduced it below:

ADVANCED FATIGUE MANAGEMENT				
Principles	Baseline (Score = 0)	Low fatigue likelihood/ safety risk (Score = 1)	Medium fatigue likelihood/ safety risk (Score = 2)	High fatigue/safety risk (Score = 3)
<b>Work-related rest breaks: Breaks from driving within work opportunity (WO) to reduce performance impairment due to extended time-on-task</b>				
1. Reduce the time spent continuously working in the WO	> 20% of time in the WO	> 15–20% of time in the WO	> 10–15% of time in the WO	> 6–10% of time in the WO
2. The more frequent breaks from driving the better	≥ 15 mins in every 2 hours	≥ 15 mins in every 3 hours	≥ 15 mins in every 4 hours	≥ 15 mins in every 5 hours
<b>Recovery breaks: Sleep opportunities between WOs to ensure sufficient time to obtain sufficient sleep to prevent unsafe levels of fatigue</b>				
3. Ensure an adequate sleep opportunity (SO) to obtain sufficient sleep	Recovery breaks ≥ 12 hours	Recovery breaks > 9 hours	Recovery breaks > 8–9 hours	Recovery breaks 7–8 hours
4. Maximise adequate night sleep	All recovery breaks include 23:00–07:00 period	All recovery breaks include 00:00–06:00 period	More than half of recovery breaks include 00:00–06:00 period	Less than half of recovery breaks include 00:00–06:00 period
5. Minimise shifts ending between 00:00 to 06:00	No WOs end in 23:00–07:00 period	No WOs end in 00:00–06:00 period	Less than half of WOs end in 00:00–06:00 period	More than half of WOs end in 00:00–06:00 period
6. Minimise extended shifts	< 12-hour WO between recovery breaks	< 13-hour WO between recovery breaks	13–14-hour WO between recovery breaks	> 14–17-hour WO between recovery breaks
<b>Reset breaks: Breaks in sequences of WO to eliminate the build-up of unsafe levels of fatigue over an extended sequence of shifts</b>				
7. Prevent accumulation of fatigue with reset breaks at least 30 hours and including two night periods (00:00–06:00) between work sequences	≤ 2 days (48 hours) between reset breaks	≤ 3 days (72 hours) between reset breaks	≤ 7 days (≤ 168 hours) between reset breaks	> 7 days to 12 days (> 168–288 hours) between reset breaks

# NHVR accepts \$750,000 enforceable undertaking from Lindsay Transport Group

Melanie Long, Associate, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) has recently accepted an enforceable undertaking from the Lindsay Transport Group (Lindsay) after the death of a truck driver in November 2018 saw the trucking giant charged with three Category 2 offences under the Heavy Vehicle National Law (HVNL).

Lindsay proposed the undertaking following an NHVR investigation into its safety policies and procedures, and as an alternative to court proceedings.

This case is just one example in a long list of undertakings adopted by trucking companies over the past 12 months.

## WHAT IS AN ENFORCEABLE UNDERTAKING?

### ► DEFINITION: ENFORCEABLE UNDERTAKING

An enforceable undertaking is a voluntary agreement entered into by a party as an alternative to prosecution for an alleged breach of the HVNL.

The NHVR will only accept an undertaking where it is satisfied that the party is willing and capable of complying with its obligations under the agreement.

Given the onerous long-term obligations that they impose, enforceable undertakings are sometimes reserved for major breaches of the HVNL but can be proposed in response to any charge. As part of the undertaking, parties commit to a range of different measures, for example, to:

- cease the behaviours that led to the alleged contravention;
- conduct, facilitate or fund research into a heavy vehicle transport safety issue relevant to the contravention and/or industry;
- conduct promotional and education campaigns targeted to the heavy vehicle transport and supply chain sectors;
- establish and/or maintain transport safety management systems;
- participate in compliance-monitoring activities; and
- donate funds to a not-for-profit organisation with a specific focus on heavy vehicle transport safety, with short, medium and long-term objectives.

## WHAT WAS INCLUDED IN THE LINDSAY ENFORCEABLE UNDERTAKING?

The charges laid against Lindsay stem from alleged breaches of its primary duty, which exposed a driver to a risk of death or serious injury or illness without reasonable excuse.

As part of the enforceable undertaking, Lindsay committed to pledge \$750,000 over a 2-year period to mitigate future risks to driver safety.

The enforceable undertaking imposed five key initiatives with which Lindsay must comply to avoid future prosecution:

- \$125,000 of the undertaking is to be donated to a not-for-profit organisation or research/medical entity with a specific focus on heavy vehicle driver medicals;
- \$350,000–\$450,000 is to be used to design and develop a web-based driver training platform aimed at educating industry members on key risks in the industry, which can be adapted for use by other transport operators;
- \$50,000–\$75,000 is to be allocated to the engagement of an expert to conduct a review of its sleep management practices and procedures;
- \$50,000–\$75,000 is to be used to deliver a training program on topics such as fitness for work, break scheduling and managing driver fatigue issues; and
- the remaining \$25,000 is to be allocated to a media campaign to raise awareness for the health and safety issues facing heavy vehicle drivers.

## WHEN WILL AN ENFORCEABLE UNDERTAKING BE ACCEPTED?

The availability of an enforceable undertaking will depend on the nature of the alleged offence, as well as the stage of proceedings. Section 590A(1) of the HVNL prevents the NHVR from accepting an undertaking in relation to a Category 1 offence except in exceptional circumstances.

### ► DEFINITION: CATEGORY 1 OFFENCE

A Category 1 offence is when a party is found to have recklessly engaged in conduct, without reasonable excuse, that exposes an individual to a risk of death or serious injury or illness.

An undertaking will also most likely be refused where the offence has already been prosecuted and proceedings have been finalised. In this way, a party cannot take a 'wait-and-see' approach with proceedings and then decide on the option they consider the better outcome once they have been finalised.

## ADVANTAGES OF ENFORCEABLE UNDERTAKINGS AND COST OF NON-COMPLIANCE

Enforceable undertakings afford conceivable benefits, offering greater flexibility in outcomes to a party. Besides the obvious benefit of avoiding costly litigation, parties are also given the opportunity to improve their workplace and employee safety practices. However, the obligations imposed by an enforceable undertaking are not to be taken lightly. Any breach of an undertaking will be met with harsh penalties of up to \$10,000. Parties also run the risk of having their enforceable undertaking discharged and their criminal prosecution revived.

**Any breach of an undertaking will be met with harsh penalties of up to \$10,000.**

## KEY TAKEAWAYS

- The Lindsay enforceable undertaking is one of many enforceable undertakings accepted by the NHVR in the last 12 months.
- Enforceable undertakings:
  - are voluntary agreements entered into by a party as an alternative to prosecution for an alleged breach of the HVNL;
  - are usually reserved for the most serious breaches of the HVNL but will generally not be accepted for Category 1 breaches;
  - require the relevant party to commit to a number of measures to improve its own, and the industry's, safety practices and procedures; and
  - have several benefits, including greater flexibility in outcomes and the avoidance of costly litigation, but the cost of non-compliance can be high. ■

## 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.

## Options for drivers when they identify load breaches

**Q** As a driver, I find it difficult to tell my boss or other CoR parties that I won't accept a load because it breaches mass, load restraint or dimension requirements. What other options do I have?

**A** Drivers are in a unique position in the CoR. They are at the forefront of enforcement if something goes wrong with a load on the roads, and yet it can also seem as though they are at the behest of other CoR parties' practices because drivers are either employed by or answerable to their employers or customers.

Telling another party that you won't accept a load is really an end-of-the-line option that should be used after taking prior steps to ensure mass, load restraint and dimension (MLD) compliance. Steps that you could take prior to arrival at a collection point include:

1. Ask for load information to assist in load planning, including discussing either directly with the third party or with your manager who is liaising with the third party. If this is not practicable for every trip, perhaps focus on those depots/consignors/loaders with whom you have encountered MLD non-compliance.
2. If you are aware that MLD compliance issues arise with the third party and not at your workplace, you may consider raising this with your supervisor to consider options to share MLD compliance information. The commercial and safety case for your supervisor to share this information is that HVNL contraventions by third parties could:
  - expose your business to liability;
  - result in damage to goods; and
  - adversely impact on insurance payouts and premiums if an accident arises.
3. If you are concerned about back-lash from your employer and/or the third parties, you may also consider reporting your concerns to the Heavy Vehicle Confidential Reporting Line at 1800 931 785.

If you have no luck with the above options and you know that the load is in breach, then, as difficult as it may seem, you should still refuse the load until it is compliant. Collecting an MLD non-compliant load creates public safety risks, including destabilising your vehicle, and endangering you and other road users. It also exposes you to prosecution under the HVNL even if no incident occurs

## Providing drivers with information

**Q** Do employers have a duty to provide drivers with sufficient information about what speed to travel, the load restraints used for the products to carry, or any other special instructions specific to my load?

**A** All businesses in the supply chain can be held liable for on-road breaches of mass, dimension, load restraint, speed, fatigue and vehicle roadworthiness, to the extent that they perform any task or part of a task relating to those matters – regardless of whether they own or operate a heavy vehicle. In addition, businesses can be in breach of the laws simply for failing to have in place business practices aimed at addressing Chain of Responsibility (CoR) risks as part of their transport activities – without any need for an on-road incident to have occurred.

Each party in the CoR for a heavy vehicle must ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicle. This will apply to a driver's employer and will include a duty to provide the driver with proper instructions about what speed to travel, the load restraints used for the products and any additional instructions, such as taking special care with the payload.

The Heavy Vehicles National Law (HVNL) prohibits drivers, and persons permitting drivers to drive, from driving heavy vehicles that, together with their loads do not, or whose components do not, comply with mass requirements. These mass requirements extend to other CoR parties that also have the capacity to control, eliminate or minimise such mass breaches and associated safety risks.

## Changes to signage requirements for long vehicles

**Q** I have heard the National Heavy Vehicle Regulator (NHVR) made changes recently to the signage requirements for long vehicles. What has changed and how can I check that I am using the correct signage on my fleet?

**A** There are no 'new' changes to vehicle warning signs as such, but the transitional period for the changes to the *Heavy Vehicle (Vehicle Standards) National Regulation (National Regulation)* that took effect in December 2019 has now ended. Specifically, heavy vehicle owners and operators that have been taking advantage of the *National Heavy Vehicle Standards (Warning Signs for Combinations Longer than 22m) Exemption Notice 2019 (No. 1)* can no longer do so from 9 December 2021.

Long vehicles and road trains that had been permitted to continue using the same signage as they did before the 2019 changes are now obliged to display the correct signage for that type of vehicle combination and length as per the National Regulation.

Under the new requirements, combinations more than 22m but not longer than 30m will require a long vehicle sign displayed at the rear, and combinations exceeding 30m in length will require a road train sign to be displayed at both the front and the rear. However, a vehicle operating under a specific authority (e.g. a notice, permit or PBS vehicle approval) may have conditions relating to the type of warning sign it must display that override these general signage requirements.

For more guidance on the National Regulation specifications for vehicle warning signs for these vehicles, view the *Vehicle Standards Guide 19 (VSG-19)* available on the NHVR website at [nhvr.gov.au](http://nhvr.gov.au).

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## Tasmanian courts send a strong message to deter repeat offending

The National Heavy Vehicle Regulator (NHVR) has successfully prosecuted two Tasmanian operators for unsafe vehicles and fatigue-related offences, resulting in \$27,000 in fines and court-ordered Supervisory Intervention Orders (SIOs).

### CASE ONE: INDIVIDUAL FOUND GUILTY OF PRIMARY DUTY CATEGORY 2 OFFENCE

The defendant was an individual partner of a transport operations partnership. The defendant's role was to manage the transport activities of this partnership and maintenance of the heavy vehicles in its fleet.

The Court found that the defendant failed to ensure the safety of transport activities, and that this failure exposed individuals to a risk of death and/or serious injury (Category 2 offence under section 26G of the Heavy Vehicle National Law [HVNL]). These findings were based on NHVR investigations that revealed the defendant has failed to implement adequate systems for inspection, fault finding, recording, maintenance and repairs of its heavy vehicles.

**“the sentence is designed to deter the individual from repeating the offence, [and] condemns the actions that led to the offence”**

In particular:

- between 14 March 2019 and 19 November 2019, the defendant was issued with 46 defect notices (four major and 42 minor) as well as two infringement notices;
- maintenance records kept by the defendant revealed the frequency for inspection of the heavy vehicles were varied and sporadic. In some cases, heavy vehicles remained uninspected and unmaintained for several years. A significant proportion of vehicle maintenance was only undertaken following the issue of defect notices, or voluntary reports made the operator's drivers; and
- further records revealed that the speedometer and odometer of a heavy vehicle was not working for approximately 3 weeks. The heavy vehicle was driven on roads during that time and the defendant directed an employed driver to drive the heavy vehicle (this directive being illegal in itself under section 26E of the HVNL).

The defendant's convictions resulted in a \$25,000 fine and a 12-month SIO, which requires the operator to present its heavy vehicle fleet for an authorised inspection, at commencement and near completion of the SIO. If any vehicles are deemed unroadworthy, the defects must be

rectified within 6 weeks and presented again for re-inspection, or the individual will risk re-prosecution. Vehicle standards and maintenance education must also be completed and paid for by the individual.

In its summary of the impact of the decision, the NHVR stated that “the sentence is designed to deter the individual from repeating the offence, condemns the actions that led to the offence, and protects the safety of the industry and broader community”.

### CASE TWO: FIRST-TIME SIO ISSUED ON TRANSPORT COMPANY

A freight transport company was found to have instructed drivers to operate heavy vehicles beyond the maximum standard work hours (i.e. in excess of 12 hours in a 24-hour period) and while impaired by fatigue.

The company received a conviction, \$2,000 fine and a 12-month SIO valued at \$11,000, where a Chain of Responsibility (CoR) expert will be enlisted to develop and deliver an onsite training program, and report and implement an action plan to all employees.

### WHAT IS AN SIO?

SIOs are orders of the court that require the convicted person, at their own expense and for a stated period of no more than a 1 year, do one or more of the following:

- stated things the court considers will improve the person's compliance with the HVNL, e.g. training and supervising staff, obtaining expert advice about HVNL compliance, and installing equipment for monitoring or managing compliance with the HVNL;
- implement stated practices, systems or procedures for monitoring or ensuring compliance with the HVNL;
- give compliance reports about the convicted person to the NHVR or the court (or both) in a stated way and for a stated period; and
- appoint a person to monitor the convicted person's compliance with the HVNL and give the NHVR or court (or both) compliance reports in relation to the convicted person.

### WHEN MAY A COURT MAKE AN SIO?

The court may make an SIO only if it is satisfied the order is capable of improving the convicted person's ability or willingness to comply with the HVNL. While SIOs are not overly common, these decisions may indicate that this is about to change.

**CAUTION:** A contravention of an SIO without reasonable excuse carries with it a maximum penalty of \$10,000.

These decisions show that Tasmanian courts are taking a strong stance against convicted individuals and companies. Accordingly, these decisions should act as a deterrence to other individuals and companies in the industry. ■

**IN THE NEXT ISSUE**  
OUT FEBRUARY 2022

- 3 key developments from the regulator
- How to pack, secure and load containerised cargo
- Top tips for loading contained loads