

From Your Editor-in-Chief



The National Heavy Vehicle Regulator (NHVR) continues its prodigious output, this time with regulatory advice on managing drug and alcohol risks. Many businesses would already address drug and alcohol risks as part of their work health and safety management. But drug and alcohol use obviously poses a particularly significant risk in the transport and supply chain sectors. As such, businesses must ensure that they give specific consideration to these risks; the new regulatory advice is designed to help with this.

Melanie Long provides insight on a recent NHVR study into the effectiveness of fatigue and distraction detection technology. We're interested to hear if you agree with the NHVR's assessment and the adoption of such technologies within your business.

Unfortunately, a workplace fatality has once again raised questions about the management of vehicle standards risks, and has resulted in the prosecution of a company and its executives. Josh Clarke provides an update, and we'll keep you advised as this case develops.

Happy reading.

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

Managing the risks of employees impaired by alcohol and drugs

Nathan Cecil, Partner, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) has released new regulatory advice on managing the risks associated with alcohol and other drug impairment in the workplace. This follows the NHVR's first regulatory advice notices on managing the risk of transporting freight in shipping containers and managing the risks of light to medium heavy vehicles.

WHAT ARE THE SAFETY RISKS ASSOCIATED WITH DRUG AND ALCOHOL USE?

The main safety risk is the hazard posed by workers that are impaired through drug (whether illicit, prescription or over the counter) or alcohol use (including alcohol consumption below the drink-driving limits) to themselves, their colleagues, road users and the general public. Alcohol- and drug-

impaired workers are more likely to fail to perform their duties in a safe and compliant manner due to their decision-making, physical skills or perception and reflexes being impaired.

WHY IS IT IMPORTANT TO MANAGE THESE RISKS?

Fitness for duty is a fundamental aspect of a worker being able to perform their duties properly and safely. Managing drug or alcohol use, and detecting any adverse impacts of such use, is therefore essential to manage fitness for duty.

The NHVR argues that fitness for duty also forms part of a business' primary duty under the Heavy Vehicle National Law (HVNL) to ensure, so far as reasonably practicable, the safety of its transport activities.

➤ *Continued on page 2*

Contractor compliance: Your business and managing third-party risk

Nathan Cecil, Partner, Holding Redlich

Certain shortcomings and ambiguities with the current Heavy Vehicle National Law (HVNL) – which is now under review – have stirred some debate around the primary duty. Parties in the Chain of Responsibility (CoR) might question the extent to which they are responsible for their contractors' compliance. In this article, we unpack the distinction between monitoring and managing risks in relation to third parties.

There seems to be ongoing uncertainty over what is required under the primary safety duty in any particular circumstance. So, do you have a duty to inspect and confirm the maintenance of vehicles of your contractors? Generally, those who do not own or operate vehicles do not need to start checking under the bonnet or carrying out dipstick tests.

However, if you should notice obvious risks associated with maintenance, or indeed any other CoR aspect, you are required to do something about it.

For example, a business operates a facility from which its goods are consigned by truck and observes that the vehicle supplied is obviously (i.e. to a reasonable observer) unroadworthy and that the driver does not at all restrain the load before departing. It observes the same thing the next day, and the next. Is the business 'ensuring so far as reasonably practicable the safety of its transport activities', including ensuring that its conduct does not directly or indirectly encourage the driver or another party in the CoR to breach the HVNL? No.

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— HELPDESK QUESTION OF THE MONTH —

How do I ensure that I am doing the right thing as a transport customer? (answer on page 7)

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

6 tips for implementing a drug and alcohol policy

Michael Selinger, Partner, Holding Redlich and Jessica Oldfield, Editor, Portner Press

To manage the risks associated with alcohol and drugs in your workplace, you will need to implement a drug and alcohol policy.

Following are six key tips for implementing an alcohol and drug policy in your workplace:

- Your policy should focus on preventing drug and alcohol abuse rather than punishing workers for using drugs or alcohol. This includes emphasising the risks of alcohol and drug abuse, such as risk of health effects like liver damage and increased risks of accidents.
- Before you implement a drug and alcohol policy, consult with relevant stakeholders (e.g. workers, unions, health and safety representatives) about the terms of the policy and the reasons for its introduction. Consultation will help minimise any confusion or concerns regarding a perceived invasion of privacy. It is also likely to increase compliance with the policy.

Consultation will help minimise any confusion or concerns.

- Communicate the policy to all workers and provide appropriate training so there is no confusion about its content. Ensure all workers fully understand the drug and alcohol policy and the consequences of breaching it. Make sure all workers sign off as having read and understood the policy.
- Your leaders must be adequately trained on your policy and how to identify signs of intoxication, approach intoxicated workers and monitor compliance with the policy.
- Ensure you apply the policy fairly and consistently to every worker.
- To ensure continued compliance, provide your workers with timely reminders about the policy. ■

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This aspect of the HVNL hasn't been tested in court yet. Existing decisions focus more on a lack or deficiency in safety management practices or a failure in the implementation of such practices, rather than focusing on a lack of fitness to perform those tasks safely. But, we can expect the NHVR to push this concept in court when an appropriate case arises.

Given that the concept is firmly established in general work health and safety law, it is reasonable to expect that it might be recognised under the HVNL.

WHO HAS A DUTY TO MANAGE THESE RISKS?

Parties in the Chain of Responsibility (CoR) have a duty to manage the risks posed by the use of alcohol and drugs. As such, the executives of parties in the CoR also have an independent duty to ensure that these risks are being managed effectively. This includes ensuring that sufficient resources (financial, human and other) are made available within the business to address these risks and that they are being implemented and monitored effectively.

HOW CAN YOU MANAGE THOSE RISKS?

The regulatory advice recommends implementing a drug and alcohol management plan that may include:

- policy and supporting procedures on alcohol and other drug impairment in the workplace;
- a worker communication plan and safety management expectation setting;
- providing information, education and training to workers on identifying and dealing with drug and alcohol impairment;
- safeguards on tasks, processes and equipment that require a high level of concentration or motor coordination;
- engaging with businesses that have a good safety and compliance reputation, including fit for work and HVNL compliance requirements in supply chain contracts; and
- implementing a drug and alcohol screening program, which may include pre-employment, random or targeted testing based on reasonable suspicion or following an accident or incident. ■



TIP: Visit www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/regulatory-advice/managing-the-risks-of-employees-impaired-by-alcohol-and-other-drugs for the NHVR's regulatory advice.

8-month investigation into Piccadilly driver fatality leads to charges against cement company and executives

Joshua Clarke, Lawyer, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) is prosecuting a South Australian company, its owner/managing director and another manager for breaches of primary safety duties after one of the company's drivers died in a heavy vehicle rollover in October 2020.

The incident occurred when a loaded cement mixer collided with a tree and rolled, crushing the front cabin and killing the driver inside. The company's owner/managing director and another man were previously charged with manslaughter in relation to the driver's death, however those charges were subsequently dismissed.

The NHVR now accuses the company and two individuals of knowing that the heavy vehicle was defective but allowing it to continue to be used on the road. This, the NHVR alleges, constitutes offences under the Heavy Vehicle National Law (HVNL), the most severe of

which is punishable by up to \$341,870 and up to 5 years' imprisonment for an individual and \$3,418,700 for a corporation.

Section 26C of the HVNL sets out the primary duty, which ensures that each party in the chain 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 of course applies to transport operators and employers, who can be prosecuted if they fall short of what the duty requires – as the accused in this case have discovered.

In a media release by the NHVR, the NHVR Director of Prosecutions said, "If the company and its executives had proper procedures and processes in place, and acted on known defects, this death could have been prevented."

The matter was listed for mention in the Adelaide Magistrates Court on 22 April 2022 and we'll keep you updated on the outcome. ■

Healthy Heads in Trucks & Sheds takes the show on the road

Jessica Oldfield, Editor, Portner Press

Healthy Heads in Trucks & Sheds (HHTS), a not-for-profit national mental health and wellbeing initiative launched last year, has taken the show on the road.

HHTS is touring the country in a Roadshow that will visit 18 industry events across 2022 to:

- provide mental health support through resources developed by HHTS;
- promote education materials tailored to the needs of the heavy vehicle and supply chain sector;
- promote the use of the free Healthy Heads app; and
- distribute pocket-sized handbooks with practical mental health and wellbeing tips.

HHTS CEO Naomi Frauenfelder said, "The announcement of the Roadshow comes with great excitement as it allows HHTS to connect with those in the industry who may not have access to the tools they need to take care of their mental health.

"Our long-term ambition is to make mental health part of everyday conversation, and the Roadshow provides HHTS with the means to help people in the sector feel more connected. It's about stopping to have a chat and knowing where to turn when support is needed."

The Roadshow has received significant backing from major industry partners, including PACCAR Australia, Dealer Industry Fund and bp.

PACCAR Australia Managing Director Andrew Hadjidakou said, "At PACCAR, we prioritise mental health as much as we do safety. In partnering with HHTS as a Foundational Sponsor and contributing to the delivery of the Roadshow, we are proud to show our commitment to better mental health and wellbeing for the wider transport and logistics industry."

Crucial funding towards the initiative also comes from The National Heavy Vehicle Regulator (NHVR) via the Heavy Vehicle Safety Initiative, supported by the Federal Government.

NHVR CEO Sal Petrocchio said, "With close to half a million heavy vehicles on our roads, improving the mental health and wellbeing of everyone in the industry is a priority for the NHVR, and is pivotal in keeping all road users safe."

Events will be free and open to anyone who works in road transport, warehousing and logistics.

Visit www.healthyheads.org.au/about-us/events/ to find out about upcoming Roadshow events. ■

New work health and safety laws come into effect in Western Australia

Jessica Oldfield, Editor, Portner Press

The new Work Health and Safety (General) Regulations 2022 commenced on the 31 March 2022, bringing the Work Health and Safety Act 2020 (WHS Act) into full force and effect.

This change brings Western Australia's work health and safety (WHS) laws into line with other harmonised states and territories (all except Victoria).

Although the law is now harmonised, the Western Australian Codes of Practice are still operational. The WA Government has indicated that the Codes of Practice will soon be updated in line with the WHS Act, but at least for now, they still apply.

The Codes of Practice will soon be updated in line with the WHS Act.

There are some key differences between Western Australia and the other harmonised states, including:

- the offence of industrial manslaughter (section 30A);
- insurance against fines and penalties is prohibited (section 272A);
- WHS inspectors are permitted to resolve disputes between parties (section 82(4));
- WHS committees are required to have at least one member with "sufficient authority" within the business (section 76(5));
- WHS service providers have a specific duty of care in WA, like for example occupational hygienists (section 26A);
- union right of entry was retained in the *Industrial Relations Act 1979* and not included in the WA WHS Act; and
- health and safety representatives have the right to choose their course of training. ■

Two companies hit with improvement notices after investigation

Jessica Oldfield, Editor, Portner Press

A recent National Heavy Vehicle Regulator (NHVR) investigation has resulted in two companies being issued with improvement notices for failing to rectify fatigue-related breaches.

The investigation found multiple breaches, including in relation to work diaries, work hours and fatigue issues, and failing to provide adequate fatigue compliance training and appropriate scheduling for workers.

The NHVR issued improvement notices, which require the companies to remedy the breaches. Under the improvement notices, the companies must:

- conduct formal training;
- conduct weekly and fortnightly audits;
- revise their scheduling;

- develop driver safe journey plans; and
- implement non-conformance policies.

NHVR Director of Investigations Steve Underwood said immediate action must be taken by both companies after they put their drivers and the community at risk.

"It was clear from the evidence that the conduct of both companies put road users at risk of harm," Mr Underwood said.

"An improvement notice enables the offenders to improve their safety and compliance systems quickly, with the NHVR monitoring the required notice activities to remedy the situation."

Failure to comply with the improvement notices attracts a maximum court-imposed penalty of \$50,000. ■

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If you observe obvious risks (or one that ought reasonably to have been observed) where a reasonably available solution (such as engaging with the transport operator) could eliminate that risk, it is considered to be ‘reasonably practicable’ for you to take steps to reduce that risk.

SHARED RESPONSIBILITY

Each party in the CoR must ensure, so far as reasonably practicable, the safety of their transport activities. Additionally, the safety of transport activities relating to a heavy vehicle is the shared responsibility of each party in the CoR for the vehicle.

This is a shared responsibility to ensure, so far as is reasonably practicable, that business practices, requests or demands, delivery requirements, schedules, packing, loading or unloading practices do not directly or indirectly cause or encourage:

- the driver to contravene the HVNL and/or exceed the speed limits; or
- another person (including another party in the CoR) to contravene the HVNL.

Whether a person has responsibility depends on:

- the function the person performs;
- the nature of the risk; and
- the person’s capacity to control, eliminate or minimise the risk.

Each party in the CoR must ensure the safety of their transport activities.

ARE YOU RESPONSIBLE FOR YOUR CONTRACTORS’ COMPLIANCE?

Transport activities often involve interactions with third parties who have a shared responsibility for safety. A safety duty under the HVNL may not be transferred to another person, so it is essential that all parties in the CoR cooperate to control, eliminate or minimise any shared transport risks.

► DEFINITION: THIRD PARTY

A third party may be a business or an individual not directly employed by you with which your business interacts in the performance of its transport activities. A third party may perform some transport activities for or alongside you. These interactions can take place between you and, for example:

- customers;
- prime contractors;
- subcontractors;
- warehouses and distribution centres; and
- maintenance and equipment service providers.

The level of responsibility that each business or person has depends on their capacity to influence and control the particular activity, including decision-making relating to the activity. Capacity, in general, means the ability to influence something or the behaviour of someone. Capacity in this context means the ability to control, eliminate or minimise the safety risk.

► IMPORTANT

The more control and influence your business has over a task (e.g. loading or unloading), the greater responsibility your business has to ensure the task is done safely.



TIP: Parties in the CoR only have a positive duty to notify regulators of ‘notifiable incidents’ under work health and safety laws. However, you should consider how to ensure the safety of your transport activities, and/or ensure that you do not encourage others in the CoR to breach their duties. Sometimes this requires you to notify and engage with other parties (not notify the regulators) when you detect a compliance problem.

Businesses do not need to micromanage contractors, try to run their compliance function for them and audit everything they do. But, the HVNL will not permit you to avoid responsibility for unsafe practices merely by saying, “my contractor did that, not me”. Especially if the problem arose as part of a process in which you were involved. If you could and should have readily identified that there was a problem, you cannot turn a blind eye to it.

MONITORING VERSUS MANAGING CONTRACTOR RISK

Parties in the CoR need to identify, analyse, evaluate and mitigate general risks associated with heavy vehicle supply chain safety under the HVNL. This includes monitoring or managing contractors, as appropriate.

You will be required to monitor risks in situations when you have limited control to manage the risk. This may be because:

- the contractor has expertise that you do not have;
- the transport activity occurs outside your geographical control (e.g. a fatigue incident on a public road away from a base); or
- you have limited control of the transport activity (e.g. commercial goods being packed by third-party supplier).

You will be required to manage risks when you possess the knowledge, skills and experience to manage the risk. This may include scenarios where:

- you have the expertise, even though you are contracting with another expert;
- the transport activity occurs within your geographical control, e.g. loading on site; or
- you have a high level of control of the transport activity.

EXECUTIVE DUE DILIGENCE

Executive duties of due diligence will also extend to the appropriate monitoring or management of contractors and, in this context, requires executives to:

- gain and maintain knowledge about the safe conduct of their transport activities;
- understand the hazards and risks associated with their transport activities;
- maintain appropriate resources to implement processes to eliminate or minimise their hazards and risks;
- respond to information received about their hazards and risks in a timely manner; and
- verify that their resources and processes are provided, used and implemented.

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“Contractor compliance: Your business and managing third-party risk”

5 TIPS FOR DEALING WITH THIRD PARTIES

Consider the following when dealing with third parties:

1. Exercise a degree of due diligence in engaging a contractor, e.g. obtaining some assurance that they are aware of and complying with their CoR duties.
2. Establish an incentive for them to comply with their (and your shared) duties. For example, include terms in your contract with them that require them to comply with the HVNL, comply with any site policies that you have and report to you if CoR incidents occur when they are engaged on your jobs. You cannot blindly assume that they will then do their job. It is important to periodically check in with them or observe their actions on your site to ensure they are actually doing what has been agreed upon. If not, you need to engage with them to ensure they improve their performance.
3. Ensure that your transport providers are aware of their CoR safety obligations and have systems in place to manage those risks. One way to do this is to get them to tick a, “Yes, we have compliance systems” box or put a clause in your contract that says that they must do so. However, this is rather passive and cannot be relied on in isolation. Ask for some evidence of those systems, e.g. the underlying CoR compliance policy or accreditation scheme enrolment or a short description of how they manage, for example, mass, but not every compliance record.
4. While conducting your transport activities, periodically observe that those systems are being used and are effective, e.g. make checks to ensure that loads are not arriving obviously poorly restrained or with evidence of load shift.
5. Keep a logbook of observations that raise a red flag, e.g. a truck that arrives on a severe list due to overloading or poor load restraint, or that is very obviously damaged and unroadworthy (the kind of things that cause you to say, “Whoa, that isn’t right”, even if you are not a trucking expert).

So, as a general rule, you are responsible for managing the safety of your own transport activities, and you are not responsible for managing the compliance of your contractors or other third parties in the CoR. But, where a contractor performs tasks for you and under your direction, control or influence, or where you jointly perform a transport activity with a third party, you are responsible for engaging with that party to satisfy yourself that they know what they are doing and monitoring their performance to the extent necessary to ensure they are doing so. ■

How to effectively manage contractors

Nathan Cecil, Partner, Holding Redlich

To effectively meet your safety obligations, it is useful to implement systems that help ensure compliance. To manage Chain of Responsibility (CoR) risks, your business must consider the full extent of its obligations to other parties in the supply chain.

Procedures that can assist you to manage your safety responsibilities in relation to contractor management include:

- risk management;
- supervision;
- training, instruction and information;

- consultation, cooperation and coordination; and
- monitoring or compliance performance review.

When managing your third-party interactions, your business should clearly be able to demonstrate that your safety systems and processes are in order so that you minimise or eliminate the possibility of breaching the Heavy Vehicle National Law.

Following is a simple guide to dealing with contractors. This guide is based on a five-step model based on some prior presentations of the National Heavy Vehicle Regulator. ■

CHECKLIST: HOW TO DEAL WITH CONTRACTORS		DOWNLOAD 
Step 1: Plan		
<ul style="list-style-type: none"> ■ Establish the size and nature of your transport activities. ■ Assign roles and responsibilities. ■ Ensure contractors understand your safety expectations. ■ Choose contractors who can meet your requirements. 		
Step 2: Source		
<ul style="list-style-type: none"> ■ Pre-qualify contractors based on their capability to perform the transport task. ■ Determine how the contractor manages the safety risks of their transport activities. ■ Consider conducting a National Heavy Vehicle Accreditation Scheme or reference check. ■ Determine whether the contractor intends to subcontract any work to another party. If so, find out to whom and how their performance will be assured. ■ Find out whether the contractor has relevant insurances. ■ Determine whether the contractor has been involved in any previous safety incidents. 		
Step 3: Mobilise		
<ul style="list-style-type: none"> ■ Reach agreement, and be clear on your responsibilities and the responsibilities of the contractor. ■ Document these responsibilities in a written agreement. ■ Include terms for how incidents will be notified. ■ Include trigger points for escalation and termination of the contract. ■ Include requirements for any training and induction by either operator and/or contractor. ■ Include requirements to maintain safety management systems, accreditation, certain standards, etc. 		
Step 4: Manage		
<ul style="list-style-type: none"> ■ Monitor the performance of policies, procedures and contracts. ■ Conduct periodic meetings to discuss and manage issues. ■ Nominate a contact point in each party to discuss contractual/safety issues. ■ Consider audits to ensure compliance with the contract. ■ Outline incident notification procedures, e.g. what/how often/to whom. 		
Step 5: Review		
<ul style="list-style-type: none"> ■ Evaluate contractor performance to make sure the contractor is performing the transport activity according to contractual agreement. ■ Provide updates on safety management systems or the nature of the transport activity. ■ Learn from incidents and adjust practices/contracts if required. ■ If unsatisfactory, attempt to negotiate ways to improve their performance. ■ If negotiation fails, consider finding another contractor. 		

The NHVR's current verdict on fatigue and distraction detection technologies

Melanie Long, Associate, Holding Redlich

I was recently shown a YouTube video where a distracted heavy vehicle driver's shaking chair caused him such a shock that he almost leaped out of his seat. The cause of this shaking chair? A fatigue and distraction detection technology (FDDT) device, which registered that a driver's eyes were no longer on the road and then alerted him to this through the automatic shaking of his chair.

The mechanism was obviously quite effective at getting the driver's attention. Following this, I was interested to know how these technologies had been received by the industry. This article explores this question with a review of the National Heavy Vehicle Regulator's fatigue monitoring trial that took place between January 2019 and 2020, the purpose of which was to allow the National Heavy Vehicle Regulator (NHVR) to gain a greater understanding of how FDDT works and is used. The outcomes from this trial are summarised below.

PHASE 1: REVIEW OF FDDTS

Phase 1 of the trial involved a review of the FDDTs being used in the industry. The NHVR determined that there are currently six key areas in which these technologies operate:

1. Fitness for duty tests: Devices that conduct a variety of tests before a driver commences work to determine their current alertness level.
2. Continuous operator monitoring (oculomotor measurements): Fatigue/distraction technologies based primarily on eye movement.
3. Continuous operator monitoring (electroencephalography [EEG]): Fatigue detection based on brain wave activity.
4. Other continuous operator monitoring technologies: Devices that continually measure physiological indicators of fatigue during work, e.g. posture/head nodding and galvanic skin response.
5. Performance-based monitoring: Devices that monitor performance indicators that are associated with fatigue-related incidents.
6. Vehicle-related technologies, including crash-avoidance technologies: Fitted vehicle safety technologies that aim to assist the driver in reducing the likelihood of a crash, e.g. electronic stability control, electronic brake distribution and forward collision warnings.

Of the above technologies, continuous operator monitoring (oculomotor measurements) devices or face monitoring systems were deemed to offer the most value to users. It is for this reason that they were chosen as the focus for phase 2.

Despite this, the NHVR concluded that these devices should not be implemented as a standalone tool for fatigue management. Rather, that they should be used as part of a fatigue risk management system.

PHASE 2: ANALYSIS OF FDDTS

Phase 2 of the NHVR trial into FDDTs involved interviewing key stakeholders currently using or providing these technologies to determine whether the technology was capable of correctly identifying unsafe driving behaviours attributable to fatigue and/or distraction, and the potential capability of such technologies to help reduce fatigue and distraction events, and thus improve safety outcomes within the heavy vehicle industry.

The key findings of this phase in relation to the effectiveness and industry opinion of FDDTs were as follows:

- There was an almost unanimous belief among stakeholders that the effective use of FDDTs will profoundly reduce the frequency of fatigue and distraction events while driving and that, if implemented more broadly across the industry, FDDTs would significantly improve safety outcomes.
- FDDTs are perceived by stakeholders as 'game-changers' that provide safety benefits without:
 - unnecessarily compromising operational efficiency; or
 - producing paradoxical outcomes as can sometimes be the case for things that fall under a 'one-size-fits-all' approach.
- Implementation and evaluation of FDDTs is still in the early stages, with a range of ongoing challenges identified, including:
 - the importance of adopting a collaborative (as opposed to mandated) approach between company management and driver;
 - a stated preference by most drivers to encourage the use of FDDTs that identify unsafe fatigue and/or distraction event alerts rather than approaches based on continuous surveillance;
 - ensuring the NHVR and industry develop a collective view on the best ways to introduce an effective and workable standard for FDDTs that encourages greater operational flexibility under the Heavy Vehicle National Law;
 - the need to develop guidance materials that provides legally defensible policies and procedures on how organisations might reasonably respond to fatigue and/or distraction event alerts; and
 - ensuring complementary guidance material is available to encourage drivers to use the technology to develop a better

understanding of fatigue and to act earlier on their own 'leading indicators' before a high-risk fatigue event occurs.

- Many participants held the view that the NHVR and other regulators must play a leadership role to support industry in reducing fatigue risks by supporting the delivery of a more flexible regulatory framework and culture (through the Heavy Vehicle National Law) that provides for:
 - increased use of FDDTs that meet an agreed standard;
 - the creation of standard operating practices, templates or guidance materials for companies using FDDTs; and
 - the collaborative collection and exchange of data from FDDTs to accelerate organisational and regulatory learning cycles to assist continuing reduction of fatigue and/or distraction related events.

Accordingly, the results were overwhelmingly positive and in favour of further adoption of FDDTs within the industry. Therefore, while there are some challenges to be overcome, it appears that FDDTs will become more and more common within the industry. Further, to promote the adoption of FDDT, legislative and regulatory change is required to address the concerns of industry stakeholders.

NEXT PHASES AND CONCLUSIONS

There were three further phases conducted by the NHVR:

- a phase dedicated to field assessment of the FDDTs to assess their adaptability; and
- validation of key findings from Phase 2; and
- consultation and reporting.

Unfortunately, the NHVR is yet to publish the findings from these phases. However, based on the outcomes of the first two phases, it appears that overall, the NHVR's trial into FDDTs was in favour of the further adoption of FDDTs as they have been found to be effective in reducing fatigue and/or distraction events.

While it is clear there is need for some fine-tuning with the regulatory framework and perhaps even the technology itself, there is no denying they have had a positive impact on industry safety. Considering that one in 10 heavy vehicle crashes are said to result from driver fatigue and possibly even more from distraction, my initial questions about this technology have been quashed, and I can only see the further introduction and implementation of FDDTs as a positive step towards ensuring all drivers on our roads are safer than ever before. ■

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.

Formal warnings

Q When can a formal warning be issued?

A A formal warning can be issued by an authorised officer (being an authorised police officer in the participating jurisdictions to the Heavy Vehicle National Law [HVNL] or any person specified in the HVNL to be an authorised officer) if they reasonably believe that a person has contravened the HVNL but exercised reasonable diligence to prevent the contravention and was unaware of it.

Formal warnings are at the 'less serious' end of the enforcement spectrum, and cannot be given for substantial or severe risk breaches of mass, dimension or loading requirements, or for substantial, severe or critical risk breaches.

Reviewing the regulator's decisions

Q How do I get a decision that has been made by the National Heavy Vehicle Regulator (NHVR) reviewed?

A Usually, the starting point is to make a request to the NHVR to review a decision it has made via an internal review application. Decisions that can be reviewed are listed in Schedule 3 of the HVNL or under regulations, and include:

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

Part 11.2 of the HVNL sets out the process for an internal review. An application must be in writing, stating the grounds on which you want the decision reviewed, must be accompanied by the prescribed fee and be made:

- within 28 days of being notified about the decision; or
- within 28 days after receiving a statement of reasons, if an information notice had not been provided and a statement of reasons has been requested.

If your internal review application is not successful, you can appeal to the relevant appeal body in your jurisdiction. This can be done up to 28 days (but can be extended by the relevant appeal body) after:

- the NHVR has issued a review notice; or
- the end of the internal review period, if the internal reviewer does not make a review decision within the period.

Transport customers

Q How do I ensure that I am doing the right thing as a transport customer?

A As a customer of transport services, you are a part of the Chain of Responsibility (CoR) and therefore have an obligation to ensure so far as reasonably practicable the safety of your transport activities, even if you practically have limited involvement in the provision of transport services itself.

There are several ways to ensure you are not doing the wrong thing and potentially causing or exacerbating HVNL non-compliance up the supply chain.

Firstly, avoid prohibited requests that ask, direct or require drivers or other parties in the CoR to cause a driver to exceed speed limits, drive while impaired by fatigue, drive in breach of work or rest hours options, or drive in breach of other laws.

Secondly, avoid prohibited contracts that would have the same consequences.

Thirdly, undertake detailed pre-engagement operational due diligence. This can be achieved by:

- satisfying yourself that your transport providers are aware of their CoR safety obligations and have systems in place to manage those risks;
- periodically observing service providers' systems to ensure they are effective. This doesn't necessarily mean performing an audit. Instead, it could involve checking that loads aren't arriving poorly restrained or with evidence of load shift; and
- keeping an eye out for red flags of non-compliance, e.g. if a truck were to arrive that was clearly unroadworthy. ■

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When are fatigue-related offences 'trifling'?

Whether fatigue-related offences under the Heavy Vehicle National Law (HVNL) are trifling was one of the questions put before the Supreme Court of South Australia in the recent case of *National Heavy Vehicle Regulator v Obst; National Heavy Vehicle Regulator v Turnbull* (2021). This followed a South Australian Magistrates Court decision, which held that offences in two separate prosecutions cases were, in fact, capable of this characterisation.

BACKGROUND

National Heavy Vehicle Regulator v Obst; National Heavy Vehicle Regulator v Turnbull (2021) concerned the appeal of a decision of the Magistrates Court dismissing the charges in two cases without conviction or penalty pursuant to section 23(1)(a) of the *Sentencing Act 2017* (SA) (Act), which allows the court to make such an order when the offence "is so trifling that it is inappropriate to impose a penalty".

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

The Magistrate considered the instructions contained in the NHVR National Driver Work Diary (**Work Diary**) issued to drivers misleading and that it conveyed that, if a driver took a major rest break of at least 7 hours, the clock for counting driving hours during a 24-hour period would automatically be restarted at zero at the end of the major rest break. In particular, the Magistrate relied on the following wording in the Work Diary: "Counting 24-hour periods should be counted from the end of the following rest breaks. For a standard solo driver, 7 or more continuous hours."

The Magistrate considered the instructions in the NHVR National Driver Work Diary.

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

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

WORK DIARY INSTRUCTIONS – THE IMPORTANCE OF CONTEXT

The Supreme Court found that in relation to the instructions contained in the Work Diary, the Magistrate had made a mistake of fact. This is because the Magistrate, in her remarks on penalty,

referred only to a single sentence contained on page 22 of the Work Diary and that the sentence needed to be read in the context of the balance of the instructions on this page. In particular, page 22 includes an exact example of the situation both Mr Obst and Mr Turnbull found themselves in, with the instructions clearly stating that despite any major rest breaks taken by a driver, if they are still within the 24-hour period, they must wait until this 24-hour period has ended before driving again.

Therefore, the Magistrate made a mistake of fact which, regardless of the characterisation of the offences as trifling, meant the appeal should be allowed.

The Supreme Court found that the Magistrate had made a mistake of fact.

CHARACTERISATION OF FATIGUE-RELATED OFFENCES AS 'TRIFLING'

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

The Supreme Court found that the purpose of section 250 of the HVNL is similar to that of section 47B of the *Road Traffic Act 1961* (SA), namely, to protect the safety of road users and others who may be endangered by vehicles driven by impaired drivers and that this could not be characterised as trifling. This, coupled with the fact that, objectively speaking, page 22 of the Work Diary makes it clear that the clock is not restarted merely because a driver has a second major rest period, was the basis upon which the Court allowed the appeal and set aside the orders made by the Magistrate.

TAKEAWAYS

- Fatigue-related offences under the HVNL are not trifling.
- In considering whether an offence is trifling, the purpose of the offence is paramount to any considerations of the subjective circumstances surrounding the committing of an offence.
- When read as a whole, the Work Diary's instructions are clear and a correct representation of the HVNL.
- A driver of a standard heavy vehicle cannot drive more than 12 hours in a 24-hour period regardless of the amount of major rest breaks taken, such that a major rest break does not re-start the clock on a 24-hour driving period. ■