



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

APRIL 2020

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## From Your Editor-in-Chief



Be on your best behaviour – we have a guest joining us this month.

Luke Simmons of Kynecton (formerly Fleet Effect) kicks off this issue with a look at the scope and benefits of addressing Chain of Responsibility (CoR) compliance using a digital platform. We consider why we continue to use sharpened sticks to attack CoR concerns when rocket launchers are available.

This follows our recent article on ALDI Australia's roll out of electronic fleet management technology. It is clear that more and more businesses are seeing the compliance, operational and productivity benefits to be had from using technology to manage supply chain and related safety issues.

In other news, the regulator has struck its first victim under the revised Heavy Vehicle National Law (HVNL). The first prosecution under the new laws has been launched, relating to allegations of failure to manage fatigue. You can be sure that we will follow and report developments as soon as they occur.

Fatigue management is one of the areas that can most benefit from technological assistance. Keeping track of work and rest hours and ensuring that schedules can be modified to accommodate unexpected delays is a diabolical task. It is becoming increasingly apparent that having the computer help you should be a no-brainer for your business.

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

## Let's get digital in 2020

*Luke Simmons, Channel Manager, Kynecton*

Many companies still rely on paper-based systems to manage their Chain of Responsibility (CoR) obligations. However, making the transition to a paperless system can present many benefits to your operational efficiency. In this article, we look at the advantages of digital technology for your business.

Paperless (or, digital) CoR management systems offer many opportunities for businesses to become more efficient and scalable, while ensuring that compliance and real-time awareness of the business can be shared between different parties.

Paper-based systems present a lag in the overall data flow. By definition, continuing down this route in 2020 is knowingly choosing the 'clunky' option.

Even though businesses have operated using paper-based systems for a long time, it doesn't mean that they are still the best systems to use in order to meet your CoR obligations.

Digital technology provides businesses with increased visibility, greater accessibility, and a wider reach across business departments.

There are many innovative companies out there in the marketplace who have benefited from replacing paper with digital, and they're seeing how efficient it can be to manage CoR within the one system. There's no more need for manual data entry or to spend hours tediously filling out spreadsheets. With the right systems, many aspects of CoR management are completed automatically, making everyone's jobs easier and saving your business time and resources.

► *Continued on page 2*

## Your transport documentation under the magnifying glass

*Meshal Althobaiti, Lawyer, Holding Redlich*

Under the Heavy Vehicle National Law (HVNL), some authorities are given a multitude of compliance and enforcement powers which include the ability to require production of documents and the provision of information. This article provides a refresher on how you should respond to such a request from an authorised officer.

The National Heavy Vehicle Regulator (NHVR) usually commences the investigation process by issuing a Notice to Produce. The Notice to Produce will require that you produce documents to the NHVR within a specified time period. These notices are drafted in broad terms and require parties to produce copies of relevant journey and transport documentation.

Documents requested may include:

- entry and exit times of a vehicle to various sites;
- copies of all transport documentation, such as bills of lading, consignment notes, container weight declarations (CWDs) and delivery orders; and
- records of any communication with the operator of the vehicle and other parties in the Chain in relation to a consignment.

It is very important to note that you must comply with the Notice to Produce. Heavy fines will apply to parties who limit the documents they provide or simply ignore the notice altogether.

In many cases, the concerns of the NHVR will be addressed through the production of the documents listed above.

► *Continued on page 4*

## — HELPDESK QUESTION OF THE MONTH —

**What is the difference between 100km work and 100km+ work? (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)

## First prosecution launched under the new HVNL

*Nathan Cecil, Partner, Holding Redlich*

The National Heavy Vehicle Regulator (NHVR) has launched its first Chain of Responsibility (CoR) prosecution under the revised Heavy Vehicle National Law (HVNL) against Godfrey Haulage and its director, for alleged failure to meet the business' primary duty in relation to fatigue management.

The investigation was commenced after a report was made to the NHVR's Heavy Vehicle Confidential Reporting Line (HVCRL). As its name implies, the HVCRL is a confidential/anonymous reporting line that anyone can use to report suspected safety issues involving heavy vehicle use, including suspected breaches of the HVNL.

The NHVR combined the report with its own risk profile of the business in order to determine that further investigation was necessary. The NHVR uses technology to keep track of the safety and compliance record of road transport supply chain businesses. Businesses which are tracking above the industry average can be identified for targeted investigation and enforcement action. In this way, the NHVR can focus its attention where it is needed, thereby increasing the likelihood of an immediate improvement to on-road safety.

It is alleged both that the business failed to manage fatigue and thereby breached its primary safety duty and also that its executive failed to discharge its duty of due diligence. As a result, both the business and director are charged. This will be the first prosecution under the new and vastly enhanced penalties under the revised HVNL.

Previous news reports have referred to at least six active investigations by the NHVR. The NHVR is stated to be focusing on instances of systemic failure to manage safety and also looking to bring charges against executives in any such instances, if possible. So, expect to see more action in this space.

We will follow developments in the case closely and update you as soon as there is more news. ■

► Continued from page 1 "Let's get digital in 2020"

### ENSURE EVERYTHING IS COVERED WITH A PAPERLESS CoR SYSTEM

Electronic CoR systems are capable of managing a range of processes without the need for paper. By adopting a 'one system' approach, you can ensure that all data is captured and stored in one place, providing your business with greater awareness.

The power of a paperless system is that your business will have real-time access to:

- speed management;
- fatigue management;
- electronic work diaries (EWDs);
- maintenance management;
- driver performance;
- mass management;
- incident reporting; and
- integrated runsheets and timesheets.

### HOW DOES AN ELECTRONIC COMPLIANCE SYSTEM BENEFIT YOUR BUSINESS?

Many businesses benefit greatly when switching from 'paper to glass', as productivity and efficiency are significantly improved without the need for cumbersome paperwork. With real-time accessibility, fleet operators will have access to all data through cloud-based technology and will be able to analyse incidents with ease. This is achieved by exception as opposed to random sampling or whole fleet sampling.

When fleet operators are able to manage their drivers using innovative technology

and tools, they are able to decide on corrective actions more easily. They have the accessibility to complete tasks on their phones or tablets from the field, rather than the office. There's no need to store mountains of paperwork when the data can be populated and exported as needed.

### MOVING FORWARD WITH ONE SYSTEM

By using one system for compliance management, you are opening up a range of possibilities for your business to continue to grow and improve, particularly if everything is kept in one unified location but is equally as accessible.

Paperless compliance is already a reality and many businesses are benefiting from 100% compliance performance, using the power of mobile and cloud-based applications.

Technology is constantly evolving and there are new and exciting ways to manage CoR. Take near-field communication for example, where a user can be provided a 'digital tag' (similar to the 'tap to pay' systems at banks) which provide evidence of use for any range of actions required of the user including start/end of day, vehicle pre-starts, repair and maintenance requests and much more.

Capturing data like this can be extremely valuable post-incident, as information is the most powerful ally.

Looking ahead, it is clear that technology can (and will continue to) remove layers of admin across transport operators. Be sure to choose the technology provider that lets you have one system to manage all operations. ■

## Truck company probed after hit-and-run death

**NSW Police conducted a two-day compliance investigation into a company's heavy vehicle fleet following a hit-and-run incident in February. A waste truck fatally struck a 21-year-old man in Sydney's CBD. Emergency services were called when he was found on the footpath.**

NSW Police arrested the truck driver on the same day. He was charged with several offences, including manslaughter and failing to stop and assist.

After the incident, officers from the Traffic and Highway Patrol Command's Traffic Task Force, working with Transport for NSW inspectors, conducted the compliance operation targeting the transport operator's fleet.

A total of 27 heavy vehicles were inspected, with 26 minor defect notices issued in relation to broken tail lights, missing reflectors, engine oil leaks, brake issues and body support braces cracked, broken or insecure.

Four of the heavy vehicles were found to have non-compliant electronic control modules, allowing the trucks the ability to drive more than 100km/h. One heavy vehicle was issued with a major defect notice for having a top speed of 112km/h.

Traffic & Highway Patrol Operations Manager, Chief Inspector Simon Maund said NSW Police will continue conducting heavy vehicle compliance operations to ensure trucks, drivers and operators are utilising the road network safely and responsibly.

"This is the first heavy vehicle compliance operation of 2020 and there will be more to come throughout the year as we work with owners, operators and drivers to ensure their trucks are compliant," Chief Inspector Maund said.

"There is no excuse for complacency, especially when lives are put at risk and these operations will keep dangerous drivers off our roads." ■

# The importance of policies and procedures for uncertain times

*Nathan Cecil, Partner, Holding Redlich*

**Does your business have robust policies and procedures in place? Equipping your business with these frameworks can enable you to meet your Chain of Responsibility (CoR) obligations. Clear policies and procedures encourage a proactive rather than reactive approach and are a useful step in tackling compliance. In this article, we highlight how to develop successful policies and procedures for your business and consider the importance of these systems in fast-changing and uncertain times.**

As the year unfolds and significant environmental and global health challenges persist, it seems that great uncertainty will define much of 2020. Although in unprecedented times much remains out of our control, there are certain structural measures we can implement within our businesses that offer guidance and ensure safety obligations are being upheld.

Under the Heavy Vehicle National Law (HVNL), it is mandatory that you develop, implement and document business practices aimed at ensuring CoR compliance within your business. In doing so, parties in the Chain will have a better understanding of what is expected of them and how to meet safety obligations.

In previous issues, we have explored the various business practices you can perform to meet your primary duty. These include:

- induction and ongoing education processes;
- assurance contract terms in every supply chain contract;
- assurance systems, i.e. verification of the design, implementation and functioning of the above, including an incident reporting and response/remedy register for all CoR near-misses, incidents, accidents and infringements, and periodic internal or external auditing;
- and performance reporting for executives.

If you do not have these practices in place, it is likely that you are not doing everything reasonably practicable to prevent and avoid CoR breaches from occurring.

## UNPACKING COMPLIANCE POLICIES AND WORKING PROCEDURES

Together, compliance policies and procedures should clearly articulate the expectations of the business in relation to its own, its employees' and its business partners' conduct, and provide specific

instruction to those persons on what steps are expected of them to comply with the general policy.

### WHAT IS A COMPLIANCE POLICY?

A compliance policy sets out a business' commitment to ensuring compliance, and outlines:

- who within the business or its network is required to comply; and
- what the business will do to ensure compliance or respond to non-compliance.

### WHAT ARE WORKING PROCEDURES?

Procedures provide guidance for those who are subject to a compliance policy on how they are meant to conduct themselves on a day-to-day basis to ensure they meet the compliance policy. Working procedures are very much operational-level documents.

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## In the event of investigation or prosecution, policies and procedures can help safeguard your business

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### DEVELOPING COMPLIANCE POLICIES AND WORKING PROCEDURES

There is no set format, length or content for these policies and procedures. However, these general pointers that might be helpful to follow when developing your policies and procedures. Ask the following questions:

#### 1. Do the compliance policies have substance?

Many business policies are merely corporate aspirational statements – essentially being check-box exercises at best. They do not provide the business, its employees or any person dealing with the business with any real detail on what standards are being addressed, who the policy applies to or any guidance on how it is to be achieved. Without substance they become vague and unclear. Even when such policies bear the signature of the board or business owners, they are taken with a grain of salt by the regulators and courts, and typically disregarded – or worse, criticised for only paying lip service to compliance, without any real commitment. Compliance policies must offer guidance and direction.

#### 2. Further to that, do the compliance policies have a who, what, and how?

To be more than simply aspirational, compliance policies need to:

- specify to whom they apply, i.e., what activities and who within the business or supply chain is caught by the policy;
- specify what is required, i.e. what standard has to be met (hint: something to do with taking all reasonably practicable steps to ensure safety);
- provide a summary of how the business will ensure the standard is met, which could include referring to the working procedures that will sit below the policy; and
- set out what will be doing in the event that someone does not comply with the policy. That is, they need to refer to the monitoring and enforcement sanctions for a failure to comply, to give some teeth to the policy.

#### 3. Do the working procedures provide guidance?

Working procedures must be more than just a statement of policy. To be useful and effective, they need to tell people what they are required to do to comply with the policy.

Ideally, working procedures will take the form of a step-by-step work process flow instruction. For example, for loading a vehicle, the working procedure would require the mass limits to be ascertained, loading to occur, and the loaded mass to be verified as within mass limits before departure. It would also describe how (using available equipment, systems or process) each step should be done.

Evidently, working procedures should be easy to follow and they should specify who is responsible for each action, what that person is required to do and how they should do it.

### LOOKING AHEAD

When these frameworks are in place, they should ultimately guide parties to help them understand their compliance obligations so that they can fulfil their primary duty. This necessitates a forward-looking approach to ensure you are focusing on what you are doing to prevent breaches from occurring.

To echo the lead article this month, it is also important to consider how technology can help your business implement these policies and procedures in a way that is more thorough, efficient, accessible and beneficial to parties in the Chain. In the event of investigation or prosecution, this documentation can help safeguard your business. ■

► Continued from page 1 “Your transport documentation under the magnifying glass”

### ► DEFINITION: AUTHORISED OFFICER

An authorised officer under the HVNL means any person declared by a law of a participating jurisdiction to be an authorised officer for the purposes of the HVNL. Authorised persons include the Police, the Roads and Maritime Service (RMS) and the NHVR.

An authorised officer can request various documents from a driver of a heavy vehicle or a person responsible for a heavy vehicle. These documents include, without limitation, the following:

- any document, device or anything else that the HVNL requires the driver to keep in their possession;
- any document issued under the HVNL;
- heavy vehicle accreditations; and
- transport or journey documentation.

### WHY HAVE YOU RECEIVED A NOTICE TO PRODUCE?

If you have received a Notice to Produce, then it is likely that you or someone you know is being investigated for an offence. Therefore, it is important that you take the notice seriously. Any information you provide will likely be used as evidence.

If you are charged with an offence, the way in which you respond can assist you. The documents that you provide under the notice may support your defence or plea for leniency on sentencing.

It is therefore important to think strategically and carefully when you reply to a Notice to Produce.

### LIMITATION ON NOTICES TO PRODUCE

You should note that the authorities do not have unlimited powers under the Notice to Produce. The RMS and NHVR have broad powers to investigate alleged breaches of the law, but there are rules around when they can issue a notice, who can be issued with one and what information can be requested.

If an authority has sought to issue a notice beyond their power, you may not be required to comply with some or all of the notice. For example, a notice may be issued to the wrong individual, or the notice may seek information that the authorities are not actually permitted to request.

There may also be a ‘reasonable excuse’ for not responding if the request is oppressive and requires you to produce a substantial amount of documentation. In this case, you may be able to negotiate a sample size to be produced.

Another example of a ‘reasonable excuse’ may be that the production of the document will result in waiving your legal privilege. In such circumstances, it is prudent to obtain legal advice to substantiate the claim for privilege over the document/s to satisfy the authorised officer that you have a ‘reasonable excuse’.

In any event, a Notice to Produce should never be ignored without first seeking legal advice. You need to determine whether or not the notice complies with the legislation. Otherwise the business will likely find itself in trouble if it chooses to ignore the notice.

### TYPE OF DOCUMENTS AND INFORMATION THAT CAN BE PRODUCED

The scope of documentation/information which an authorised officer can request from a party to the supply chain is very broad and the legislation does not afford the recipient of a request with many ways to duck and weave the requests.

The types of documents which can be requested broadly fall under three categories:

**1. Transport documentation:** Any contractual document which is directly or indirectly associated with the actual or proposed road transport of goods or passengers, to the extent that the document relates to the transport method or is relevant to the transaction for their actual or proposed road transport.

Examples of such documents include: bills of lading, consignment notes, CWDs, contracts of carriage, delivery orders and load manifests.

**2. Journey documentation:** Anything (other than transport documentation) which is directly or indirectly associated with a transaction for the actual or proposed road transport of goods or passengers using a heavy vehicle by any transport method or which relates to a particular journey or to journeys generally.

Examples of journey documents include (without limitation) any or all of the following:

- a document kept, used or obtained by a responsible person for a heavy vehicle in connection with the transport of goods or passengers;
- a workshop, maintenance or repair record relating to a heavy vehicle used, or claimed to be used, for transporting goods or passengers;
- a subcontractor’s payment advice relating to goods or passengers or their transport;
- information reported through an intelligent transport system, driver manuals or instruction sheets and mass records; and/or
- records kept, used or obtained by the driver of a heavy vehicle used, or claimed to be used, for transporting goods or passengers, including a driver’s run sheet, a work diary entry, a fuel docket or receipt, a food receipt, a tollway receipt, a pay record, or mobile or other telephone record.

### 3. Documents relating to a responsible person for a heavy vehicle:

A responsible person for a heavy vehicle means any person having, at a relevant time, a role or responsibility associated with road transport using the vehicle.

There are several examples in the legislation of what a ‘responsible person’ may be. A responsible person ranges from the obvious, being the owner of a heavy vehicle, to a person further up the chain, like an owner or registered operator of an intelligent transport system for the vehicle.

### WHAT IF I DON’T HAVE THE REQUESTED INFORMATION OR DOCUMENTS?

Often the documents that are requested are the type that the business was legally required to keep.

Whatever you do, do NOT create fake or false documents to make it seem that you have complied with the Notice to Produce. The production of false documents or information in response to a Notice to Produce is a serious offence and you will be penalised by the court on top of the original offence.

Speak to a lawyer if you do not have the requested documents to assist you in preparing a response that will put you in the best position to avoid further penalty.

### HOW DO I RESPOND TO AN AUTHORISED OFFICER’S REQUEST?

It is important to ensure you are complying with an authorised officer’s request for documents/information, whilst also protecting and not additionally prejudicing any explanation or defence you may have.

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► Continued from page 4

Upon receiving a request for documents or information:

1. Report the request internally to your compliance officer, manager or director.
2. Note how long you have been given to comply with the Notice to Produce. If it is a short period and you are concerned that you will not be able to fully comply in that timeframe, request a short extension. Any requests for additional time should be submitted well before the time for compliance expires.
3. Get legal advice as such requests give rise to potential legal liability and penalties for non- or partial-compliance and should be escalated appropriately. Your lawyer can assist you with understanding the full scope of documents which may need to be produced and will also consider whether the request falls within the scope of powers given to the authorities under the relevant

legislation. If there is a request that goes beyond the power given to the authorised officer, your lawyer can advise you on whether to object to that request.

4. Conduct thorough searches of all your records. This means anything archived or anything which may be in the possession of a third party. The legislation requires that you provide documents/information in your possession or control. If documents are in the possession of a third party, but you have the ability to obtain the document, it is likely within your 'control' and ought to be produced.
5. Consider whether you have a reasonable excuse not to comply with the directions. As stated above, the right against self-incrimination is expressly excluded as a 'reasonable excuse' not to comply. However, there are other instances in which you may have a reasonable excuse. ■

## Step-by-step guide: How to respond to a Notice to Produce

Meshal Althobaiti, Lawyer,  
Holding Redlich

If you receive a request from an authorised officer, you must provide the requested information within the stipulated timeframe unless you have a reasonable excuse not to do so.

If it is a short period and you are concerned that you will not be able to fully comply in that timeframe, request a short extension. Any requests for additional time should be submitted well before the time for compliance expires.

An authorised officer may take a copy, printout, extract or download of the information or documentation. They may seize the original document if they reasonably believe that it is evidence of an offence under the HVNL. If a copy is taken, an authorised officer may require the person providing it to certify the copy.

Please refer to this simple guide when complying with your record-keeping obligations and responding to a Notice to Produce. ■

### STEP-BY-STEP: HOW TO RESPOND TO A NOTICE TO PRODUCE

DOWNLOAD 

Steps	Your obligations
<b>Prior to receiving a notice</b>	Record keepers must keep a record of specific information for drivers of fatigue-regulated heavy vehicles. A record keeper may be the: <ul style="list-style-type: none"> <li>▪ Employer (if the driver is employed).</li> <li>▪ Accredited operator (if the driver is working under Basic Fatigue Management or Advanced Fatigue Management accreditation).</li> <li>▪ Driver (as a self-employed or owner driver).</li> </ul> For each driver the record keeper must keep: <ul style="list-style-type: none"> <li>▪ Driver's name, licence number and contact details.</li> <li>▪ Dates that fatigue-regulated heavy vehicles were driven.</li> <li>▪ Registration number of the vehicle(s) driven.</li> <li>▪ Copies of duplicate work diary daily sheets.</li> <li>▪ Driver's rosters and trip schedules.</li> <li>▪ Driver timesheets and pay records.</li> <li>▪ Total of each driver's work and rest times for each day and each week.</li> </ul> The record location is determined by the record keeper and notified to the driver which is usually the driver's base. All records must be in a format that is readable and reasonably assumed it will remain readable for three years from the date of creation. Records must be kept for three years at a location that is accessible to an authorised officer.
<b>Immediately after being notified of an incident</b>	Upon receiving a request for information, report the request internally to your compliance officer, manager or director. Review the notice carefully and check: <ol style="list-style-type: none"> <li>i. whether the notice has been addressed to the correct entity/individual;</li> <li>ii. what type of documents have been sought; and</li> <li>iii. when the documents are required.</li> </ol> Make a note of how long you have been given to comply with the Notice to Produce.
<b>Get legal advice</b>	When producing documents or information, make sure you provide only what is requested. If you are unsure, seek legal advice. A lawyer can advise you whether you can avoid producing some or all of the documents and information requested.
<b>Consult other parties</b>	Provide any relevant communication with other parties (i.e. email or voice recording of a phone booking).
<b>Consider limitations</b>	Consider whether you have a reasonable excuse not to comply with the directions.
<b>Produce documents</b>	Collate all the relevant documents/information and provide them to the authorised officer and keep a copy of the documents you have produced. Think carefully about providing additional information beyond what is requested. Documentation may include: <ul style="list-style-type: none"> <li>▪ any document, device or anything else that the HVNL requires the driver to keep in their possession;</li> <li>▪ any document issued under the HVNL;</li> <li>▪ heavy vehicle accreditations; and</li> <li>▪ transport or journey documentation.</li> </ul>

## Section 10, your 'get out of jail free' card?

Rebecca Niumeitolu, Lawyer, Holding Redlich

**First time contravention of the Heavy Vehicle National Law (HVNL)? Have a great track record of implementing and monitoring HVNL compliance systems? Charged with a minor breach where no damage or injury occurred? Well, section 10 might just be your 'get out of jail free' card.**

### WHAT IS SECTION 10?

Section 10 is a provision under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (Sentencing Act) that relevantly allows a court not to convict an offender by dismissing the charges even though it finds the offender guilty of an offence. Other jurisdictions have similar provisions.

For example, under section 10 if you were charged with an offence under the HVNL, the court may find you guilty, but could also decide not to record that conviction against you.

### ON WHAT BASIS COULD YOU SEEK ORDERS DISMISSING CHARGES AGAINST YOU?

As a rule of thumb, the court won't easily dismiss charges under the HVNL. You need to show that you and your offending behaviour is an exception to the rule.

When deciding whether to dismiss charges the court must regard to the following factors:

- **Your character and your previous criminal history**

For individuals, the court may also take into consideration your age, health and mental condition. This generally means that you would need to show that you do not have prior convictions under the HVNL, or that if you do, they were a long time ago and also of a trivial nature. If you had 'gold star' HVNL compliance systems, this would also weigh in favour of dismissing charges.

- **The trivial nature of your offence**

In practice, this means that if you were to be charged for a severe-risk breach of mass, dimension or restraint requirements, contravening an executive duty, or primary duty breach, then the court may be less inclined to dismiss charges against you by a section 10 order. Arguably, such offences are by their nature significant. By contrast, if you were to be charged with a minor-risk contravention of the HVNL, then the court may be more inclined to exercise its discretion to dismiss your charge, provided that surrounding circumstances are favourable.

- **Extenuating circumstances in which the offence was committed**

- **Any other matter that the court thinks proper to consider**

For example, if no actual harm or damage arose as a consequence of an offence, then this may weigh in favour of the court dismissing charges.

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## The court may find you guilty but could also decide not to record that conviction against you

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### CAN IT APPLY TO COMPANIES?

Although we typically see section 10 applied to individuals, it can also apply to companies.

### SECTION 10 ISN'T MENTIONED IN THE HVNL, HOW CAN IT APPLY TO ME?

Court sanctions which are specific to the HVNL are identified in Part 10.3. However, section 593(3) provides that that part 'does not limit the powers or discretion of the court under another law', such as the Sentencing Act.

Accordingly, even though section 10 may not be expressly identified as a discretion for the court to exercise in response to a contravention of the HVNL, it is still a discretion which the court may exercise.

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## You need to show that you and your offending behaviour is an exception to the rule

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### SECTION 10 APPLIES IN NSW, WHAT ABOUT IN OTHER HVNL JURISDICTIONS?

There are equivalent legislative provisions to section 10 in NSW in other HVNL jurisdictions. Below we identify provisions in Victoria, Queensland, South Australia, Tasmania and the ACT which allow the court to exercise its discretion to order a person (including an individual or company) to pay a fine without recording an HVNL conviction against that person, or to dismiss a charge for contravening the HVNL against a person altogether.

Each jurisdiction states that the court is required to have regard to the specific circumstances of the case which may or may not warrant a particular order. Factors that are relevant include the nature of the offence, the character and past history of the offender and the impact of recording a conviction on the offender's economic, social well-being, or his/her employment prospects.

- Queensland – section 12 of the *Penalties and Sentences Act 1992* (Qld)
- Victoria – sections 7 and 8 of the *Sentencing Act 1991* (VIC)
- South Australia – sections 23 and 24 of the *Sentencing Act 2017* (SA)
- Tasmania – sections 7 and 9 of the *Sentencing Act 1997* (Tas)
- Australian Capital Territory – section 17 of the *Crimes (Sentencing) Act 2005* (Act).

### HOW CAN YOU PREPARE TO SEEK A SECTION 10 ORDER?

No two cases are the same, nor are the circumstances of offenders. If you are seeking to have a court dismiss charges against you, it is recommended that you seek legal advice. Generally speaking though, you will want to come prepared with evidence as to why a section 10, or section 10 equivalent, order is warranted.

Information and documents which may support your case include:

- Written statements or affidavits attesting to your good character and good compliance history with HVNL requirements, with a particular emphasis on your good track record relating to your compliance with the obligation with which you have been charged. If you are an individual you may ask friends, family or your employer to provide a written statement which identify economic, social or employment factors that may warrant a section 10.
- If you are a company, evidence of your HVNL compliance policies, procedures and training.

### A SECOND CHANCE

Having a conviction recorded against you can have significant employment and reputational consequences. Section 10 is a type of 'get out of jail free' card which CoR parties can turn to where charged with minor offences to avoid the full impact of being charged under the HVNL. Unlike *Monopoly*, section 10 tends to be a one-off spend that is available to those who always play fair and by the rules. ■

**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.

## How is a CoR incident investigated?

**Q** What factors do regulators consider when investigating a potential Chain of Responsibility (CoR) incident?

**A** In the event that a regulator is investigating a CoR-related incident, it is likely a regulator will first issue the company/individual with the following:

- an improvement notice identifying the actual or suspected breach which will require you to set out what has been done, or what you plan to do in response and/or to prevent any similar breaches from occurring in the future; and
- a direction to produce documents, such as contractual terms, CoR policy documents and the transport documents for the relevant consignments.

The regulator will then consider and evaluate the response to the above in deciding whether or not to prosecute. As a guide, you should ensure that you provide prompt and effective responses to any prior notified incidents in accordance with your CoR policy and that you provide any other steps you have taken to ensure CoR compliance by your employees and business partners. The regulator has stated on numerous occasions that it is not the intention of CoR law to make each offence an automatic investigation. As such, CoR investigations will be pursued when it is considered that sufficient information exists to demonstrate an alleged breach and when it is in the public interest to prosecute.

## 100km work vs 100km+ work

**Q** What is the difference between 100km work and 100km+ work? How do my obligations under the HVNL change when I am performing 100km work, as opposed to 100km+ work?

**A** Work is considered 100km work if the driver is driving within a 100km radius or less from the driver's base. It follows that a driver is undertaking 100km+ work if they are driving in an area with a radius of more than 100km from the driver's base.

A driver undertaking 100km+ work under standard hours, BFM hours, AFM hours, exemption hours, or who was undertaking 100km+ or work under those regimes in the last 28 days, is required to carry a work diary.

Under the HVNL, the driver's base in relation to particular work is generally considered the place from which the driver normally performs that work. However, for the purposes of Chapter 6 of the HVNL, which concerns the driver's fatigue obligations, if a driver of a fatigue-regulated heavy vehicle is required to keep a work diary and record the location of their base and has failed to do so, the driver's base is considered the vehicle's garage address.

## Category 1, 2 and 3 offences

**Q** What are the categories of offence that apply to a breach of a primary duty?

**A** Pursuant to the Heavy Vehicle National Law (HVNL), each party in the Chain must ensure, so far as reasonably practicable, the safety of the party's transport activities. Breaches of this primary duty are categorised as either a category 1, 2 or 3 offence.

Category 3 offences apply to any person who breaches a primary duty. The maximum penalties for a category 3 offence are \$50,000 for an individual and \$500,000 for corporations.

A person commits a category 2 offence if they breach a primary duty and the contravention exposes an individual, or class of individuals, to a risk of death or serious injury or illness. Category 2 offences are more severe than category 3 offences and attract a maximum penalty of \$150,000 for individuals, or \$1,500,000 for corporations.

Like category 2 offences, category 1 offences apply to breaches of a primary duty that expose an individual to the risk of death, serious injury or illness. To commit a category 1 offence, the offender must also be reckless as to the risk posed by their conduct. Category 1 offences are the most severe and result in a maximum penalty of \$300,000 or 5 years' imprisonment or both for individuals. The maximum penalty for corporations deemed to have committed a category 1 offence is \$3,000,000.

## Are there business requirements for CoR training?

**Q** Is there legislation or legal requirements to carry out nationally recognised accredited CoR training (Level 1- TLIF0001 and Level 2- TLIF0002)?

**A** There is no strict/formal requirement for accredited training. That said, parties in the Chain are required to take all reasonably practicable steps to ensure safety and that will include ensuring that workers (and contractors, where relevant) are trained in the business' CoR management policies and procedures.

Naturally, having workers etc. complete a nationally accredited course is one way of doing so. But, other equally (or more) effective measures are permitted.

In our view, training in the business' CoR management policies and procedures is more important than generic training in CoR. We are aware that many businesses enrol their management in relevant training modules to assist them to design and implement appropriate policies and procedures and 'line workers' are then trained in those policies and procedures. Provided that the policies and procedures, training and monitoring activities (to ensure that the training has been effective and the policies and procedures are being effectively implemented) are effective, this should meet the legal requirements. ■

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## Livestock supply chain back in the spotlight

According to Meat and Livestock Australia's 2019 *State of the Industry Report*, between 2017 and 2018 the red meat and livestock industry in Australia accounted for the direct or indirect employment of about 404,800 people. Moreover, exports of red meat and livestock were valued at \$13.7 billion.

Needless to say, this significant industry relies heavily on on-road transport to keep its wheels-a-turnin' and with that the National Heavy Vehicle Regulator (NHVR) has determined this March to keep its eye on industry practices around compliance with the Heavy Vehicle National Law (HVNL) by calling for submissions to its issues paper, *Improving awareness and practices in the livestock supply chain*.

It is certainly not the first time the red meat and livestock industry has been called into the regulatory spotlight. In July 2018, the NHVR issued an *Effluent Load Restraint Consultation Report* to manage effluent in on-road transport. In late 2019, the NHVR announced that it was going to review heavy vehicle safety around NSW saleyards.

The current issues paper takes on a new flavour, focusing on industry understandings of HVNL obligations, in particular mass obligations. The NHVR identifies that the review has arisen as a result of a series of livestock mass-breach incidents, apparently related to the transportation of sheep and cattle. It also appears it has arisen off the back of concerns around:

- the lack of industry awareness of HVNL obligations and the mistaken belief that transport operators bear the burden of ensuring compliance;
- drivers feeling pressured to transport full loads of livestock contrary to mass obligations;
- the lack of adequate equipment and practices across industry to ensure compliance with mass obligations;
- industry's reliance on inconsistent or inaccurate information about livestock being loaded onto heavy vehicles;

- industry' reliance on experience to determine how livestock should be loaded rather than preparing loading plans or adequately training loaders and drivers as to their loading and mass compliance obligations;
- industry's significant reliance on road transport in supply chains, notwithstanding insufficient safety measures around stakeholder's transport activities. For example, the NHVR identifies that 'The average journey of livestock from farm gate to processor is estimated to be over 500km' and can involve numerous stops.

Key players in the supply chain that play a role in influencing Chain of Responsibility (CoR) compliance practices include:

- primary producers – they tend to be consignors, loaders and/or loading managers in the CoR of the livestock supply chain;
- saleyard and livestock agents – they tend to play a role as loader and/or loading manager;
- feedlots and abattoirs – they may constitute unloaders, loaders and/or loading managers;
- livestock transport operators – they may take on various CoR roles, including as operators, contractors, employers of drivers, loaders and/or unloaders; and
- exporters – they may be loaders, unloaders, loading managers and sometimes consignors identified on transport documentation.

The NHVR says that the focus of its review will be to identify 'each party's understanding of their roles and responsibilities in the transport supply chain' and to 'Review the decision-making process and influencing factors for loading, transporting and reviewing livestock'.

Questions posed on page 11 of the NHVR's issues paper include:

- "What are the key issues that have not been identified in this issues paper in relation to livestock supply chain practices?"

- 'What approach would you recommend to improve stakeholder awareness of regulatory responsibilities under the HVNL in the livestock supply chain?'
- 'What do you believe to be reasonably practical measures and processes to meet your regulatory responsibilities under the HVNL?'
- 'What other tools/education/equipment/technology would be practiced and help parties to meet their regulatory responsibilities under the HVNL?'
- 'What loading practices would you recommend to improve your understanding of your mass management risk?'
- 'How is your HVNL responsibility impacted by other participants in the livestock supply chain?'
- 'What additional steps could the NHVR take to encourage participants of the livestock supply chain to meet their regulatory responsibilities under the HVNL?'
- 'What risk mitigation strategy to better manage mass can be offered that has not been identified in this issues paper?'

The NHVR anticipates that through submissions on its issues paper it will be able to evaluate current industry practices and risk mitigation strategies to better manage CoR party responsibilities under the HVNL. Strategies may include online inductions and signage informing attendants at saleyards of their various HVNL obligations. It may also involve a roll out of training programs by the NHVR much like those we saw in the broader agriculture industry.

Those interested to see industry input and strategies around effluent management will have to hold tight, as the review will exclude consideration of effluent management, loading schemes, legislative reform and fatigue.

### WHAT NEXT?

Interested stakeholders should submit their submissions on the issues paper to the NHVR by 5pm AEDT, 24 April 2020. ■

## IN THE NEXT ISSUE

OUT MAY 2020

- Managing work and rest
- Key issues arising in HVNL review
- How-to guide: Contractor management