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COR ADVISER

Your one-stop resource for practical Chain of Responsibility solutions

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From Your Editor-in-Chief

Amidst the string of lockdowns and subsequent disruptions across Australia, the last thing you need on your plate is a prosecution.

This month's issue is packed full of articles to help you steer clear of penalties and avoid getting into trouble with the National Heavy Vehicle Regulator (**NHVR**).

Did you know that there is an alternative to prosecution? On several occasions, our clients have used enforceable undertakings to avoid charges or having a conviction recorded against them.

For any business facing prosecution head on, it pays to consider whether proposing an enforceable undertaking might be an appropriate course of action. We examine when to pursue an enforceable undertaking and how to know if it could be a viable option for your business.

We also revisit one of the most perilous on-road issues: fatigue and its associated risks. Fatigue is a problem throughout the supply chain, so it is important to include it in conversations about compliance. Steven Perlen of Fatiguefit talks us through the benefits of using validated, evidence-based tools to support your fatigue-management practices.

We love Steven's parting advice to anyone experiencing uncertainty or problems with Chain of Responsibility (**CoR**) regulation: "You better get a lawyer, son, better get a real good one!"

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

Recent NHVR prosecutions net $161,000 in penalties

Nathan Cecil, Partner, Holding Redlich

The NHVR has released the following details of some significant prosecutions and penalties doled out by the courts. In this article, we go through the specifics of these recent prosecutions so you can learn about what you should be looking out for.

CASE 1: WERRIBEE MAGISTRATES' COURT, 13 MAY 2021

The defendant was intercepted driving a 3-axle freightliner prime mover towing a 3-axle low loader trailer, which was loaded with a 40-foot container.

The vehicle permitted length was 19m. The vehicle's length was measured at 20.3m, an excess length of 1.3m.

The vehicle travelled some 180km prior to being intercepted.

The accused was charged with one count of breaching the prescribed dimension limits contrary to section 102(1)(b) of the HVNL. This was classified as a severe breach.

Photographs were tendered to depict the vehicle's load and submissions were made as to the potential weight distribution on the rear of the load, given it was in excessive length.

The court relied on photographs tendered by the prosecutor and noted the weight distribution on the rear of the load given it was in excessive length. The judge commented on the safety risks due to the excessive length of the vehicle. The accused was convicted and fined $10,000.

CASE 2: WERRIBEE MAGISTRATES' COURT, 13 MAY 2021

The corporate accused permitted another to drive a 3-axle prime mover, in a b-double combination, loaded with 2x40-foot containers.

Upon being intercepted and inspected, it was found that the vehicle was travelling over the prescribed dimension limits and the prime mover was registered to the incorrect category.

The vehicle measured 28.9m, which was 2.9m over its limit of 26m.

Had the vehicle been correctly registered, the operator would have paid an additional $11,333 annually. The prosecutor made submissions as to the potential for unfair commercial advantage.

➤ *Continued on page 2*

How-to: Propose an enforceable undertaking

Charlie Coleman, Lawyer, Holding Redlich

A hot topic in heavy vehicle compliance is the NHVR's new approach to enforcement and penalising contraventions of the HVNL. This was demonstrated in a recent case where Laing O'Rourke Australia Construction Pty Ltd (LORAC) avoided prosecution by making an undertaking to resolve its business practices to mitigate against the risk of future breaches of the HVNL.

So, what happened in LORAC's case and what will the NHVR take into account when determining whether or not to accept an enforceable undertaking? Let's take a closer look.

LORAC was charged by the NHVR for two severe breaches of mass requirements. Historically, this would attract the imposition of a strict penalty from the NHVR and, perhaps, may have involved the matter being contested in a court proceeding. However, upon a submission by LORAC to make an undertaking to resolve its business practices to mitigate against the risk of future breaches of the HVNL, the NHVR decided not to prosecute.

➤ *Continued on page 4*

— HELPDESK QUESTION OF THE MONTH —

Are drivers permitted to get a COVID-19 test while on the job? (answer on page 7)

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

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Freight-friendly COVID-19 testing facilities in operation

Content Editor, Portner Press

Accessible and appropriate COVID-19 testing facilities emerge as a priority for the industry as mandatory testing requirements for heavy vehicle drivers become more widespread.

It is clear that we must learn to live with COVID-19 for some time to come which means being proactive about health and safety in the freight industry.

A step in this direction has been the introduction of freight-friendly COVID-19 testing facilities in NSW and Queensland.

Not only does this make it more accessible for drivers of heavy vehicles but will also ease bottlenecks in other testing sites.

In the Greater Sydney area, a site has opened at Wetherill Park, where regular testing remains of utmost importance amidst the ongoing outbreak in NSW.

Minister for Regional Transport and Roads, Paul Toole, said the Sydney pop-up site was in addition to the five sites already open along key freight routes across the state to keep freight moving and freight workers COVID-safe.

"The NSW Government has been working closely with the freight industry, which is doing a phenomenal job to keep essential goods moving into our communities through this pandemic," Toole said.

"We know that heavy vehicles are not able to easily access the large majority of the current community testing locations, and these pop-up sites make it easier for our truckies to get tested and get back on the road."

Meanwhile, a second testing facility for truck drivers has opened at the BP in Charlton, west of Toowoomba.

Queensland Transport and Main Roads Minister Mark Bailey said the temporary testing sites were needed to support the mandatory testing regime that came into effect on 30 July for freight and logistics drivers coming into Queensland and working around the state.

"Mandatory testing is vital to help stop the potential spread of COVID-19 and keep essential drivers, their families and their colleagues safe," Bailey said.

"These are challenging times for everyone, and the freight industry has continued to step up to meet the additional requirements that have been asked of them since the pandemic began." ■

➤ *Continued from page 1* ***"Recent NHVR prosecutions net $161,000 in penalties"***

The accused was charged with one count of breaching the prescribed dimension limits contrary to section 102(1)(b) of the HVNL, which was also a severe breach, and one count in relation to the incorrect registration.

Prosecutions referred to prior sentencing outcomes in similar matters at Horsham Magistrates' Court published on the court outcomes website. The company had no prior convictions, but the judge commented on the very real risks to safety resulting from the excessive length.

The accused was convicted and fined $30,000 on charge 1, and $11,000 on charge 2.

CASE 3: WERRIBEE MAGISTRATES' COURT, 13 MAY 2021

The corporate accused permitted another to drive a 3-axle prime mover, towing two 3-axle semi-container carriers, loaded with a 20-foot and 40-foot container.

Upon being intercepted and inspected, it was found that the vehicle was loaded at 150% of the applicable mass limit for the tri-axle. The company was also not carrying container weight declarations for the two containers.

The accused was charged with multiple breaches of the HVNL. A severe breach for exceeding the prescribed mass limits contrary to section 96(1) and two counts of failing to ensure the driver was carrying a complying weight declaration contrary to section 191(1).

The prosecutor submitted that charges could have simply been avoided by the driver carrying weight declarations, which would have alerted to being over mass.

The company had no prior convictions. However, in recording a conviction, the judge noted that the conduct put other road users at significant risk. The accused was convicted and fined a global amount of $100,000.

CASE 4: BROADMEADOWS MAGISTRATES' COURT, 23 APRIL 2021

The defendant was intercepted driving a heavy vehicle, being a 3-axle freightliner tow truck, coupled to a 3-axle refrigerated trailer.

The vehicle was loaded at 124% of the applicable mass limit of the tandem drive. The driver had a permit which authorised a length of 26m. However, due to breaching this permit, the length reverted to the statutory limit of 19m. The length of the vehicle was 29.06m, an excess length of 10.06m.

The accused was charged with one count of a severe breach for exceeding the prescribed mass limits contrary to section 96(1) and one count of a severe breach of the prescribed dimension limits contrary to section 102(1)(b) of the HVNL.

The defendant had prior driving matters, but no priors for HVNL matters. The court was told that the accused did not measure the length of the vehicle.

The judge asked for a sentencing range. The prosecutor made submissions with respect to case law sentencing guidelines, and SA Supreme Court judgments. The prosecutor also referred to recent sentencing outcomes in Victoria.

In recording a conviction, the judge noted the significant safety risk. The accused was convicted and fined a global amount of $10,000. ■

District Court of NSW court sends a message

Joshua Clarke, Lawyer, Holding Redlich

An Australian transport company has failed to convince a NSW court that its conviction for contravening mass requirements should be scrubbed from the record, even though the company had pleaded guilty to a severe risk breach of the requirements.

In *Transport for NSW v SRK Transport Pty Ltd (2021)*, the Melbourne-based company was charged with permitting a heavy vehicle to be driven while neglecting to comply with mass requirements, contrary to section 96 of the HVNL. In particular, the company's employed driver had driven a trailer containing pallets that had been loaded irregularly, such that the entire weight of the pallets rested upon the tri-axle section of the trailer.

Due to the severity of the particular breach, the company faced a maximum penalty of $73,000. After pleading guilty, the company received a fine of $1,000. The company appealed to the District Court of NSW in an attempt to avoid a conviction being recorded for the breach.

Among other (ultimately unsuccessful) arguments, the company claimed it was not responsible for the improper loading of the vehicle since this had already occurred when its driver arrived at the pick-up location.

The judge responded that liability for non-compliance with mass requirements is strict, and the company should have raised this as "a reasonable excuse" rather than pleading guilty to the section 96 offence as it did.

The company also pointed to the fact it had subsequently engaged a consultant to perform an audit and implement mass and fatigue modules of the National Heavy Vehicle Accreditation Scheme (**NHVAS**). The judge observed that the company had only done so after being convicted of this offence and one other, but acknowledged this did demonstrate it had taken steps to reduce the risk of reoffending.

Although the company might have avoided a conviction notwithstanding the finding of guilt under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the judge considered that this would be inappropriate in this case, given the severity of the offence and the need for deterrence. ■

The core of the primary safety duty

Nathan Cecil, Partner, Holding Redlich

One of the most common phrases in the *CoR Adviser* is 'so far as reasonably practicable'. This is not simply legal jargon – although it often sounds like it – and it is important that parties in the CoR thoroughly grasp the obligation this places on them. In this article, we take a closer look at what this means for you and your business to help make sure everyone is across their primary safety duty.

The notion of 'so far as reasonably practicable' shapes the positive primary safety duty. It represents the obligation of everyone in the supply chain to eliminate or minimise potential risks by doing all that is reasonably practicable to ensure safety. So, what are some steps you can take to be proactive about meeting this obligation?

'REASONABLY PRACTICABLE' IN SIMPLE TERMS

Simplistically, the inclusion of 'so far as reasonably practicable' in the primary duty signals to CoR parties that their obligation to ensure the safety of their transport activities is something less than absolute.

Section 5 defines 'reasonably practicable' as that which is, or was at a particular time, reasonably able to be done in relation to a duty, weighing up all relevant matters.

Relevant matters include:

- the likelihood of a safety risk, or damage or road infrastructure happening;
- the harm that could result from the risk or damage;
- what you know, or ought reasonably to know, about the risk or damage;
- what you know, or ought reasonably to know, about the ways of removing or minimising the risk, or preventing or minimising the damage and the availability and suitability of those ways; and
- the cost associated with the available ways, including whether the cost is grossly disproportionate to the likelihood of the risk or damage.

STEPS TO PERFORM YOUR PRIMARY DUTY

Let's take a closer look at how the standard of what is reasonably practicable determines what you need to do to fulfil your safety obligations by performing your positive duty.

1. **Your standard for compliance considers what a person standing in your shoes would know and do.**

The standard of what is reasonably practicable requires that you respond to risks by reference to what you know and would do and by what you ought reasonably to know.

> IMPORTANT

The practical implication of this is that you can't use ignorance as an excuse for failing to identify a safety risk or to remove, minimise or prevent it.

Conduct the following safety activity to assess whether you are meeting your safety obligations: Next time you are considering a particular safety risk, pause and ask yourself, "If damage or harm were to arise, would I tell a person in my position 'you should have known better'?" If the answer is "Yes" then you should reconsider how you can adjust your safety systems or conduct to get to a place where you can comfortably say, "No, I couldn't have known better" or, "Yes, I have done what anyone in my shoes would or could have done in relation to that risk".

2. **Your standard for compliance takes account of the viability and efficacy of steps to alleviate risk.**

The definition of reasonably practicable takes account of the availability, suitability and (to a lesser extent) cost of such steps to remove, minimise or prevent risks or damage. In practice, this suggests that when devising responses to risks, you need not financially cripple your business with costly compliance measures.

You should favour efficacy over expense and attend to safety risks according to their likelihood and seriousness.

For example, take a small to mid-size operator with robust fatigue policies and procedures, fatigue training for drivers, schedulers and managers, and diligent work diary practices and monitoring. That business could argue that measures to implement driver distraction/fatigue monitoring cameras and corresponding administrative systems are not necessary considering the appropriate and effective roll-out of these measures.

You don't necessarily have to roll out the most technologically advanced or most expensive fix, if there is something else that you can do which is appropriate and effective. However, you generally can't use cost/inconvenience as an excuse not to do anything, or not to do something which is appropriate and effective. Cost only comes into it if the cost of the only available means to respond to a risk is grossly disproportionate to the risk or harm is likely to result.

3. **Your primary duty is embedded in your business activities and your business's ability to respond to safety risks.**

Pegging the standard of your primary duty on what you can reasonably do informs you about the scope of your obligations in relation to other CoR parties. It coheres with the notion that a person's responsibility is limited by their capacity to influence and control the matter (e.g. a safety risk or transport activity) under section 26B of the HVNL.

Take, for example, a consignor that has a comprehensive CoR compliance system. It enters into a contract with an operator and does a general scan of its CoR compliance policies and procedures. Everything looks good on paper. Soon after entering the contract, the consignor receives feedback from its several buyers (consignees) over time that their goods are severely damaged and appear to have shifted in transit under the operator's care. After issuing several warnings to the operator around load restraint requirements, the consignor is aware of persistent breaches and is concerned about its own risk exposure for the operator's noncompliance with the HVNL. What does the standard of doing so far as reasonably practicable require the consignor to do in this situation? The standard for compliance does not require the consignor to run the operator's safety compliance system for it. Arguably that is not something that the consignor would be reasonably able to do. However, a step that would be available and suitable for the consignor in the circumstances would be to consider, and perhaps take, escalation or termination procedures under its contract with the operator. ■

➤ *Continued from page 1* ***"How-to: Propose an enforceable undertaking"***

THE FACTS OF LORAC'S CASE

Transport for New South Wales (**TfNSW**) (formerly Road and Maritime Services) charged LORAC with two offences in 2018 and 2019. It was alleged by TfNSW that:

1. On 16 October 2018 at 11:04am, a registered heavy vehicle operated by LORAC was weighted at Mount White on the Pacific Highway and that the weight detected on axle group 1 of that vehicle was 7.88 tonnes, 21.2% in excess of the 6.5 tonne-weight allowed; and
2. On 24 May 2019 at 6:42am, a registered heavy vehicle operated by LORAC was weighed at Kankool on the New England Highway and it is alleged that the weight detected on that vehicle was 26.92 tonnes, 34.6% in excess of the 20-tonne weight allowed.

Both of these were offences that contravened section 96(1)(c) of the HVNL.

TfNSW commenced prosecutions against LORAC based on the above alleged contraventions.

In response to the prosecutions, LORAC requested, under part 10.1A of the HVNL, for the NHVR to accept an enforceable undertaking in lieu of a penalty.

➤ IMPORTANT

For serious category 1 offences that are prosecuted under section 26F of the HVNL, a person cannot apply to have their penalty commuted to an enforceable undertaking. These offences are those where a person, without a reasonable excuse, engages in conduct that exposes an individual to a risk of death or serious injury or illness.

WHAT IS AN ENFORCEABLE UNDERTAKING?

An enforceable undertaking (**EU**) is a written statutory undertaking or agreement by a person or a company that:

- proposes an alternative to prosecution for their alleged contravention under the HVNL;
- is entered into voluntarily to take specified steps to address shortfalls in their compliance; and
- demonstrates to the NHVR the alleged offender's ability to effect profound reform of their transport activities, by implementing effective measures to improve the management of public risks and benefit the community, in ways not able to be achieved by other sanctions.

➤ IMPORTANT

An enforceable undertaking creates substantial obligations for the person or company bound by the agreement.

THE DETAILS OF LORAC'S ENFORCEABLE UNDERTAKING

In LORAC's case it committed to put in place a national interventional CoR training program, to implement a national supply chain intervention program which extended the training program to its suppliers, and to engage a third-party auditor to monitor and provide substantive recommendations to their Safety Management System (**SMS**). These undertakings were estimated to cost around $249,500 (significantly more than what the total penalty that would have been applied to LORAC).

NHVR CONSIDERATIONS FOR ENFORCEABLE UNDERTAKINGS

Whether the NHVR accepts an enforceable undertaking instead of proceeding with prosecutions against a contravener of the HVNL is a matter of discretion for the NHVR. The NHVR must consider various factors which are set out against the NHVR Policy – Enforceable Undertakings.

The NHVR takes the following matters into account:

- the nature and extent of the act or omission alleged;
- the person's compliance history;
- whether the enforceable undertaking delivers benefits to the public beyond the concerned party demonstrating compliance with the law;
- the quality of the strategies proposed and the extent to which they are likely to achieve measurable improvements in heavy vehicle transport safety;
- the benefits of the proposal to persons who might be affected by a similar contravention;
- the likely improvements in safety within the person's business or operations;
- the likelihood that the proposed undertaking will result in sustained improvement in compliance after its completion;
- the person's ability, including their financial ability, to meet the terms of the proposed enforceable undertaking;
- the significance of the commitment compared to the capability of the person;
- the support the person has provided, and has committed to provide into the future, to an injured or affected person(s);
- input from injured and affected persons;
- the likely outcome should the matter be dealt with through legal proceedings; and
- reports or assessments of investigating or prosecuting agencies who have had conduct of the matter.

In LORAC's case, the NHVR considered that:

1. LORAC had not been the subject of an enforceable undertaking under the HVNL or otherwise.
2. LORAC had not been convicted of any offence under the HVNL.
3. Prior to the proposal of further works, LORAC had already made significant inroads in rectifying their compliance and transport systems – which showed a commitment and willingness for positive change.
4. The three-tiered approach the subject of the undertaking was considered to deliver benefits to the drivers, other parties in the chain of responsibility, the wider transport community and the broader community.
5. The value of the undertaking far exceeded the penalties that would have been imposed.
6. The undertaking is likely to achieve successful outcomes.
7. The commitment to deliver the undertakings was realistically achievable.

As a result, the NHVR preferred to accept the enforceable undertakings provided by LORAC, as the undertakings were likely to achieve lasting organisational change within LORAC. As the NHVR further noted, this is a more beneficial outcome because the reforms subject of the undertakings proposed would not have been achieved in this case because they were not compellable by way of prosecution alone.

WHAT DOES THIS MEAN FOR YOU?

LORAC's case indicates that the NHVR is willing to take a pragmatic approach to enforcement. This is a good thing for both operators and the wider community. It ensures that, whilst offences under the HVNL are taken seriously by the regulator, the main goal of the legislation is still in the centre of the decision makers' minds – that is to make the heavy vehicle industry safer for both its operators, other people in the chain of responsibility and the general community.

➤ *Continued on page 6*

TABLE: Required material for an enforceable undertaking

Charlie Coleman, Lawyer, Holding Redlich

What material will you be required to provide to the NHVR when you propose an enforceable undertaking in order to avoid a penalty against you or your business?

The NHVR has published guidance through the Proposing an Enforceable Undertaking Guideline which sets out the relevant criteria for applicants to include in the undertaking.

Contents of the enforceable undertaking comprises two sections: 'general information' and 'enforceable terms'. Go through the items below to ensure you have everything required to put forward for an enforceable undertaking.

TABLE: REQUIRED MATERIAL FOR AN ENFORCEABLE UNDERTAKING

DOWNLOAD

Section 1: General information

This section provides the NHVR with background information on the person and relevant matters surrounding the contravention.

Make sure you provide the following general information:

1. Details of:
   - **a.** the person proposing the EU;
   - **b.** the alleged contravention;
   - **c.** the events surrounding the alleged contravention (for example, incident details) or any injury or financial loss that arose from the alleged contravention;
   - **d.** any notices issued that relate to the alleged contravention; and
   - **e.** any existing transport safety management systems at the workplace including the level of auditing currently undertaken or any consultation undertaken within the company regarding the proposal of an EU.
2. A statement:
   - **a.** of assurance about future HVNL compliance o of regret that the incident occurred (i.e. not an admission of guilt);
   - **b.** of ability to comply with the terms of the EU;
   - **c.** granting the NHVR a licence to use the person's intellectual property developed as part of the EU.
   - **d.** acknowledging that the NHVR has alleged a contravention has occurred.
3. When an alleged contravention is associated with an injury/illness, details of the:
   - **a.** type of workers compensation provided (if the injured person is a worker of the person); and
   - **b.** support provided, and proposed to be provided, to the injured person to overcome the injury/illness.
4. Any rectifications made as a result of the alleged contravention and acknowledgement that the EU will be published and may be publicised
5. Where a term involves a donation, details of the relationships held with any beneficiaries and details of how the reason for the donation will be communicated to the beneficiary.

The person may be required to complete a statutory declaration outlining details of any prior HVNL or WHS convictions, convictions for dishonesty or entry into another EU. This information will not be published in the EU, but will be used as part of the EU evaluation process.

Section 2: Enforceable terms

The undertaking must set out enforceable terms, which the person will be accountable for completing.

Each of the terms must be relevant, achievable and clearly defined with a way to assess or measure whether the obligation has been carried out. Where possible, all terms are to have a nominated cost and timeframe for delivery. Where delivery will be progressive, the term should include interim goals.

An undertaking must include the following enforceable terms:

1. A commitment:
   - **a.** that the behaviour that led to the alleged contravention has ceased and will not reoccur;
   - **b.** to the ongoing effective management of public risks associated with transport activities;
   - **c.** to disseminate information about the undertaking to workers and other relevant parties in the chain of responsibility and in its annual report (if applicable);
   - **d.** to participate constructively in all compliance monitoring activities of the EU so that any benefit arising from the EU will clearly link the benefit to the undertaking and make clear that the undertaking was entered into as a result of an alleged contravention.
2. Strategies that will deliver:
   - **a.** benefits to drivers and parties in the CoR of transport industry benefits
   - **b.** community benefits – proposed initiatives must focus on delivering transport safety outcomes within the community, rather than merely being a general financial donation that can be used as the recipient determines.
3. Where the NHVR considers appropriate in the circumstances, a commitment to:
   - **a.** establish and maintain (or maintain if a system already exists) a transport safety management system, acceptable to the NHVR, that meets the principles of occupational health and safety guidance;
   - **b.** ensure the transport safety management system is audited by third-party auditors that meet the principles of occupational health and safety guidance with guidance for use as set by the NHVR;
   - **c.** provide a copy of each finalised transport safety management system audit report to the NHVR, along with a letter certifying that the report has not been altered from the copy provided by the transport safety management system auditor;
   - **d.** implement the recommendations from the audits (unless otherwise negotiated with the NHVR).

The daily challenge of determining driver fitness for duty

Steven Perlen, COO, FatigueFit

Determining driver fitness for duty is a daily challenge in our industry. On the one hand, there are unending operational pressures to meet delivery schedules and contractual agreements. On the other, there is the requirement to take reasonable steps to ensure your drivers are fit for duty.

Every time you make the decision on how to balance these seemingly conflicting demands you could be called to account.

The gravity of these kinds of decisions was evidenced recently in a worst-case scenario example, where supervisor Simiona Tuteru is currently facing four counts of manslaughter. Mr Tuteru has been charged over allegations he knew or ought to have known that one of his employees, Mohinder Singh, was fatigued and not in a proper state to drive on the day that he fell asleep at the wheel. Singh recently pleaded guilty to culpable driving causing the death of four police officers in Victoria. Whilst incidents of this nature are rare, the decisions that led to them are very common. Consider how many times you have had to make a similar call.

For supervisors, this example highlights the major issue that many do not have a solid basis for decision-making in relation to driver fatigue. Without legally and scientifically defensible criteria for allowing or not allowing an individual to drive, supervisors will continue to make the best call they can based on their experience. Where this results in a major incident, the supervisor may well find themselves as the 'meat in the sandwich' left to justify their actions before the court.

Given that safety is a shared responsibility, what role should we expect of drivers themselves? Drivers also face the same challenges of not having legally and scientifically defensible criteria for determining fitness for duty.

In the absence of a solid basis for decision-making they will also rely on their experience. In the case of Singh, there is evidence that whilst he did not feel fit for duty, he was worried that he was going to be fired and insisted on going to work. This perception of a coercive environment adds an additional level of complexity to the way an employee weighs up the assessment of their fatigue.

Use validated, evidence-based tools to support your decision-making and implement them in cooperation with your team.

So, when faced with the daily challenge of determining driver fitness for duty, what should you do? Let's consider the options.

1. You can look at the drivers' schedule and make a judgement based on what your experience tells you. But you don't really know what they did between shifts, they probably won't tell you and you're loathe to ask.
2. You can ask them if they think they are good to go. But this has its problems, especially if they're hungry for overtime.
3. You can try to judge if they look too tired to drive. But not even the researchers can do that reliably enough to convince a judge.
4. You can get them to sign a form indicating they are fine to drive. But how do they decide whether they are or not and how do you know that they are telling the truth?
5. Or you can decide it's all too hard and avoid the issue entirely.

The problem for most transport owners and managers is that in today's regulatory environment any one of those choices can potentially land you in jail.

To provide greater certainty around fitness for duty, businesses are turning to a growing suite of fatigue assessment tools and technologies. These range from evidence-based assessments such as Fatiguefit and Fatigue Guru that operate at a business and individual level respectively, to in-vehicle telematics and fatigue detection systems that act as the last line of defence in accident prevention.

As there is great variation in the efficacy of fatigue risk management tools, it's buyer beware when it comes to exercising due diligence in your selection. It is critical to understand whether the solution is a proven system and will be legally and scientifically defensible in court. You'll want to know that whichever approach you use, the technology or tool has been tested and the results have been independently verified. Failure to do so could leave you at risk of prosecution and jail time.

To keep yourself and your business safe, take the subjectivity out of fatigue risk assessment. Use validated, evidence-based tools to support your decision-making and implement them in cooperation with your team.

Otherwise, you better get a lawyer, son. Better get a real good one! ■

With thanks to Steven Perlen of Fatiguefit for submitting this article for publication.

➤ *Continued from page 4* ***"How-to: Propose an enforceable undertaking"***

The flexible approach to penalties provides for the intended outcome effectively and affords businesses the opportunity to ensure their business practices are up to par – without having a blemish on their records.

However, this is all in the hands of the contravening person. The NHVR will not suggest or solicit the undertaking. Remember, this is a voluntary promise and may only be initiated by the party to which it applies and not by the NHVR notwithstanding that the proposal may arise as a result of a discussion between the party and the NHVR. The NHVR cannot even be approached to assist with the drafting of the undertaking which must be done by the person, or their legal representative, at their own expense.

Further to this, undertakings like LORAC's must be robust and detailed. Acceptance of the undertaking under the HVNL is not guaranteed.

Where a proposed undertaking is not accepted, the NHVR will not rely on the proposal as an admission against interest in a subsequent prosecution. Note that, while the submission does not permit a denial of guilt, it does not require an admission either.

In any event, should you find yourself in the unfortunate position that LORAC found itself where it had breached the HVNL, your business can seek a present a robust set of systems in the form of an undertaking to avoid an adverse conviction and penalty.

Noting NHVR's new approach to enforcement, this may present an opportunity for operators to modernise and update their approach to statutory compliance and ensure that the objectives of the legislation are being fulfilled – without being taken to the principal's office. ■

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.

Road access application refusal

Q **I am worried about my road access application getting approved. When can the council refuse an application?**

A YA council (or other road manager) can only refuse an access application if the heavy vehicle journey will or is likely to:

- pose a significant risk to public safety arising from heavy vehicle use that is incompatible with road infrastructure or traffic conditions;
- cause damage to road infrastructure; or
- impose adverse effects on the community (specifically noise, emissions, congestion or dust).

Councils must have regard to the Approved Guidelines for Granting Access when making heavy vehicle access decisions. Before a road manager can refuse, consideration must be given to imposing conditions to minimise or avoid the above.

If conditions are imposed on an access request or if a council declines to grant access, a statement of reasons will be provided.

COVID tests: Permitted personal activities

Q **We are a COVID-safe workplace and I ask my drivers to get tested immediately if they notice any symptoms while on the job. Are there any allowances in place so that drivers can use their fatigue-regulated heavy vehicles to do this, rather than catching public transport and potentially putting themselves and others at risk?**

A For all fatigue-regulated heavy vehicle (**FRHV**) drivers operating under standard hours, BFM or AFM, taking a COVID test is a permitted personal activity under the National Heavy Vehicle Work and Rest Hours Personal Use Exemption Notices (Notices).

This exemption recognises that FRHV drivers may need to use their vehicle for personal reasons from time to time if they cannot reasonably access alternative means of transport.

The Notices allow a driver up to one additional hour of time to complete permitted personal activities if the vehicle is unloaded and certain conditions are met. The exemption only applies to activities at either end of a shift, or during a 24-hour break. The extra time must be taken in a single continuous period of work and cannot be conducted in the first and last three hours of any 24-hour rest break.

Examples of permitted personal activities provided by the NHVR in its guidance on the exemption include driving the heavy vehicle to obtain medical support and supplies. The NHVR made clear in a recent announcement that getting a COVID test qualifies as a permitted personal activity to which the exemption applies.

However, drivers and their employers still need to take heed of the conditions applying to the use of the exemption. For example, FRHV drivers must record work time allocated for driving to/from a COVID test in the comments section of their current work diary for the day it took place. Also, employers cannot ask a driver to use the extra time for any activities creating a commercial benefit for the employer (or other party in the driver's chain of responsibility). So, while creating a COVID-safe environment for drivers is laudable, be mindful of the limits of the exemption when instructing drivers to take a test.

For the full requirements on using the exemption, refer to the Notices published on the NHVR website.

Induction materials for new drivers

Q **We are updating our induction materials for new drivers. Are there any new resources out there that we could include for driver safety?**

A Yes. A new truck safety training tool has been released for the induction of drivers in the NSW road freight industry to promote safer practices.

The free smartphone application, which is called 'Truck Safety Augmented Reality' (**App**), is designed to help drivers understand basic safe operating procedures when working with delivery trucks. Transport companies could usefully incorporate the App into their safety management system for safety promotion and training. As its name suggests, the App uses augmented reality features to teach drivers how to perform the following tasks:

- safely entering and exiting truck cabins;
- safely coupling delivery trucks and trailers;
- conducting safety inspections; and
- preventing vehicle rollaway incidents.

The App can either be operated in an on-screen studio mode or used with the truck in a real-world environment.

The App was developed as part of an enforceable undertaking given by Lindsay Transport to SafeWork NSW, a transport, logistics and rural supply company, following a fatal incident involving one of its workers in 2015. ■

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LEGAL UPDATE: MELANIE LONG ASSOCIATE, HOLDING REDLICH

From education to prosecution: NHVR targets illegal engine remapping

After announcing the launch of a safety education campaign targeting illegal engine remapping in June, the NHVR has successfully prosecuted two operators in South Australia. In this article, we take a closer look at these incidents and learn more about illegal engine remapping and its consequences.

The first of these prosecuted operators was a produce company which, following a police investigation, was found to have remapped the engines of four heavy vehicles to disable the vehicles' emission limits. The operator pleaded guilty to four charges of tampering with an emission control system fitted to a heavy vehicle. For these contraventions, the operator was fined $3,000 and required to spend over $32,000 to fix the compliance issues.

The second company charged was found to have software and electronic equipment associated with speed limiter tampering. This operator also pleaded guilty and was fined $1,200 and required to forfeit the offending equipment.

In announcing the above charges, NHVR Executive Direction Statutory Compliance, Ray Hassal, stated the following:

> *"We're currently undertaking an education campaign to highlight the harmful effects engine remapping can have on heavy vehicle drivers and logistics workers as well as communities and the environment. By ensuring all engines are compliant with current regulations, the transport industry can better protect the health and safety of truck drivers, the supply chain, and the general public...we won't hesitate to prosecute operators who ignore the law."*

Accordingly, NHVR's is targeting illegal engine remapping at both an education and compliance level for the benefit of industry and public alike.

THE 'WHAT' AND THE 'WHY' OF ILLEGAL ENGINE REMAPPING

Illegal engine remapping occurs when a heavy vehicle's engine is deliberately or recklessly tampered with to allow for the release of emissions beyond acceptable levels and or so that the vehicle is able to travel beyond its requisite speed limit of 100km/h.

The NHVR estimates that up to one in 10 heavy vehicles are operating on Australian roads with illegally remapped engines. There are two main reasons cited by the NHVR as to why engine remapping poses a risk to public safety and endangers all road users:

a. the excessive exposure of toxic diesel emissions. According to the NHVR remapped engines release up to 60 times more pollutants; and

b. further speed related accidents and road deaths involving heavy vehicles.

Accordingly, by targeting illegal engine mapping, the NHVR is ensuring the better protection of the health and safety of the industry and general public as well as ensuring the sustainability of the industry while helping combat the wider climate crisis.

LEGAL OBLIGATIONS OF OPERATORS AND HEAVY VEHICLE SERVICE AGENTS

Operators and heavy vehicle service agents (such as mechanics), have a legal obligation to ensure compliance with the engine mapping provisions of the HVNL and must not:

a. use, or permit to be used, on a road a heavy vehicle that contravenes a heavy vehicle standard applying to the vehicle;

b. use, or permit to be used, on a road a heavy vehicle that is not fitted with an emission control system for each relevant emission if and as required by an applicable heavy vehicle standard;

c. tamper with an emission control system fitted to a heavy vehicle;

d. tamper with a speed limiter that is required under an Australian road law or by order of an Australian court to be, and is, fitted to a heavy vehicle; or

e. have in their possession a device that is designed, or is adapted, to enable tampering with a speed limiter.

Operators also have a primary duty to ensure, so far as is reasonably practicable, the safety of their transport activities relating to a heavy vehicle which extends to engine remapping.

WHO ELSE MAY BE LIABLE FOR ILLEGAL ENGINE REMAPPING?

Parties in the CoR also have this primary duty to ensure, so far as is reasonably practicable, the safety of their transport activities. Accordingly, if you suspect parties within your supply chain are participating in illegal engine remapping then you should contact and report it to the NHVR or police.

CONSEQUENCES OF ILLEGAL ENGINE REMAPPING

The NHVR and police services investigate individuals and companies suspected of engine remapping. Penalties for serious breaches can be up to $300,000 or five years' imprisonment for an individual and up to $3 million in fines for a company. There may also be compliance costs such as that of the second company in the case above. Finally, there could also be commercial implications for deliberate engine manipulation in the warranties and policy coverage.

TAKEAWAYS

a. The NHVR is targeting illegal engine remapping through an education campaign targeted at relevant stakeholders and by prosecuting those who choose to ignore the law.

b. Illegal engine remapping occurs when a heavy vehicle's engine is deliberately or recklessly tampered with and results in allowing the truck to exceed:

  i. the 100km/h speed limit that would otherwise apply; and

  ii. its emissions allowance.

c. Operators and heavy vehicle service agents (such as mechanics), have a legal obligation to ensure compliance with the engine mapping provisions of the HVNL.

d. Parties in the CoR may also be liable should they have suspicions and or know of illegal engine remapping in the supply chain but not do anything about it.

e. The consequences of illegal engine remapping for individuals and companies include hefty fines and in the case of individuals may include imprisonment for serious breaches. ■

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- **How the NHVR enforces the HVNL**
- **Infringement notice for falsified work diaries**