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**Chain of Responsibility** solutions

DECEMBER 2021

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## From Your Editor-in-Chief



This month we have something for everyone.

We provide an update on the charges laid against the logistics company involved in the tragic April 2020 Eastern Freeway incident and its executives. The exhaustive approach adopted by the regulators and prosecutors shows how far they will go to identify both businesses and individuals responsible for significant safety breaches in our industry.

On a similar note, we look at a recent prosecution arising from a breach of basic fatigue management obligations.

Given the recent spate of prosecutions, we thought it was timely to start a conversation around what happens when you challenge charges. When should you defend charges brought against you?

Finally, we consider two regulatory issues. First, a refresher on the heavy vehicle defect scheme. Second, an in-depth look at the strategic direction of the National Heavy Vehicle Regulator (NHVR) for 2022. We get you up to speed on what the NHVR has identified as its goals, how it expects to get there and what this means for your business.

From all of us at the *CoR Adviser*, happy holidays!

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

## NHVR announces strategic direction for 2022

*Nathan Cecil, Partner, Holding Redlich*

In 2016, the NHVR outlined its initial 10-year strategy for the regulation of transport safety and productivity. The NHVR has just conducted a midlife review of that strategy to ensure that it is on course. Let's take a closer look at how the NHVR is tracking for insight into the future of regulation.

The key pillars of the NHVR's strategy are:

1. Safety.
2. Productivity.
3. Sustainability.
4. Regulatory capability.

Together, the aim is to provide a nationally consistent, risk-based approach to regulation that allows for innovation by supply chain parties and removes roadblocks to productivity in order to prioritise safer and more productive supply chains.

The NHVR's midlife assessment of its strategy provides good insight into the future of regulation and operations in this space, so we take a look at each of the pillars in more detail below. The full report can be viewed at [www.nhvr.gov.au/files/202110-1274-strategic-directions-2021.pdf](http://www.nhvr.gov.au/files/202110-1274-strategic-directions-2021.pdf).

### 1. Safety

#### Where we're at

The ongoing acquisition of compliance and safety data by the NHVR is enabling it to advance its intelligence capability and develop a reliable safety profile for the heavy vehicle sector and broader supply chain.

There is increasing focus on fitness for work (mental and physical health) and its contribution to safety outcomes.

Emerging technology is delivering measurable improvements in safety.

➤ *Continued on page 2*

## The ins and outs of heavy vehicle defects

*Charlie Coleman, Lawyer, Holding Redlich*

**When your heavy vehicle is unsafe, you are not only putting your own safety at risk but also the safety of other road users, the general public, the environment and road infrastructure. It is crucial that you can identify heavy vehicle defects, understand how they are regulated and ensure that your heavy vehicle (and those owned by your business) are compliant. In this article, we address some common questions about defect notices.**

### COMPLIANCE AND ENFORCEMENT

The NHVR is committed to reducing the risks associated with the use of defective and unsafe heavy vehicles on the road network.

It is an offence under the HVNL for a person to use, or permit to be used on a road, a heavy vehicle, that contravenes the heavy vehicle

standards applying to the vehicle, that is unsafe and/or that is in contravention of a defect notice. A heavy vehicle is unsafe if the condition of the vehicle, or any of its components or equipment, makes the use of the vehicle unsafe or endangers public safety.

### WHAT IS A DEFECTIVE HEAVY VEHICLE?

#### ➤ DEFINITION: DEFECTIVE HEAVY VEHICLE

A defective heavy vehicle is a vehicle that does not comply with the heavy vehicle standards or has a part that does not perform its intended function or has deteriorated to an extent that it cannot be reasonably relied on to perform its intended function.

➤ *Continued on page 4*

## — HELPDESK QUESTION OF THE MONTH —

### When does the NHVR decide to prosecute for a breach of the HVNL? (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)

## New digital roadmap to address pandemic freight delays

Content Editor, Partner Press

**A new national pilot program led by Curtin University has been launched by researchers seeking to remove obstacles to efficiency resulting largely from the pandemic and other supply chain constraints.**

The project hopes to give the green light to speed up deliveries and ease traffic congestion. Importantly, it demonstrates the role technology can play filling in the gaps with freight-transport data voids.

The project, called 'FreightSync Roadmap', aims to track the near-live movements of a fleet of freight vehicles via a new digital roadmap developed over the last 18 months, in conjunction with transport agencies and industry partners nationally.

The project follows the release of a 2020 report on the concept, titled 'Introducing the 'FreightSync Roadmap – A Pathway to Linking Freight Vehicles and Transport Systems'.

Lead researcher Dr Charlie Hargroves, from the Curtin University Sustainability Policy Institute, said the FreightSync Roadmap had the potential to enhance the efficiency of the national freight network. This is vital as the freight network is a significant driver of Australia's economy.

"Given the contribution to the nation's gross domestic product, there is a real need to find ways to increase the efficiency of freight movement while improving overall traffic congestion," Hargroves said.

"Currently, freight vehicles are effectively invisible to the traffic management system with transport agencies largely relying on periodic surveys to get a glimpse of how they move around our streets.

"Through near real-time data, the FreightSync Roadmap offers a clear and progressive approach to sharing vital data between the private freight and logistics sector and transport agencies to ultimately ease traffic congestion, improve road safety and enhance the efficiency of freight movement."

Following implications of the COVID-19 pandemic, rapid advancements in technology and urban development, industry recognises now is a pivotal time for improved efficiency in the nation's supply chain. ■

► Continued from page 1 "NHVR announces strategic direction for 2022"

### Where we're going

The NHVR wants to work towards a truly nationally consistent safety framework.

The NHVR wants to develop a system of assurance that recognises safe and compliant businesses.

The NHVR will focus its compliance and enforcement activity on those operators and supply chain parties who pose the greatest risk to supply chain safety.

### 2. Productivity

#### Where we're at

Network access is currently constrained and prescriptive.

The freight task is growing quickly and cannot be constrained by an unwieldy access system.

Outcomes-based access decisions are needed to unlock productivity and reward safe operators and supply chains.

#### Where we're going

The creation of an open or 'as of right' network, removing the need for access applications for those routes.

The development of a single and intelligent national access map, showing routes, conditions, and intelligent routing options.

The adoption of risk-based access assessments, intended only to bar access to those operations assessed as higher risk.

Increased education and awareness with local government access decision-makers, to attempt to align decision-making nationally.

### 3. Sustainability

#### Where we're at

Uptake of environmental technologies continues to rise.

There is increasing uptake of modern, efficient, and cleaner vehicles, raising the baseline of the national fleet.

More effort is needed to ensure that truck driving is seen as a viable opportunity for school leavers.

#### Where we're going

A reduction in the average age of the national fleet.

Incentives to uptake newer vehicles or environmental technologies, including improved access to cleaner, safer vehicles.

Transition of proven Performance Based Vehicle designs to the 'ordinary' national fleet, to alleviate the additional regulatory burden currently imposed on supply chains in which such vehicles are used.

Standard fitting of new technologies to all new vehicles.

### 4. Regulatory capability

#### Where we're at

Ongoing review of the Heavy Vehicle National Law (HVNL).

Growing establishment of national intelligence capabilities, enabling targeted compliance and enforcement action.

#### Where we're going

A national regulator, with the NHVR assuming control and responsibility for HVNL administration across all HVNL jurisdictions.

Increased data sharing between the NHVR and industry, to provide immediate guidance to industry on safety, compliance and performance.

Recognition of the NHVR as a trusted mentor in heavy vehicle and supply chain safety.

There is still a way to go before we reach the end of the NHVR's current 10-year strategy. It is a positive sign that the NHVR is conducting a performance health check along the way and that so many of the opportunities or targets identified involve greater information, support, and productivity outcomes for industry. ■

## Solo driver's critical risk breaches of BFM hours

Joshua Clarke, Lawyer, Holding Redlich

**Drivers who might be tempted to squeeze an extra hour or two into their workdays will think twice after a Queensland court hit a driver with a fine of \$4,750, plus court costs, for multiple fatigue-related breaches of the HVNL.**

On 4 April 2021, Queensland Transport Inspectors intercepted the driver of a heavy vehicle combination travelling northbound on the Bruce Highway, at the Maryborough weigh site. Upon request, the driver presented his work diary. He was operating under Basic Fatigue Management (BFM) hours as a solo driver.

An inspection of the driver's work diary revealed four instances in which he had exceeded permissible BFM work hours on various journeys around Queensland:

- on 8–9 February 2021, the driver had worked a total of 16 hours in a 24-hour period;
- on 6–7 March 2021, the driver had worked a total of 16 hours in a 24-hour period;
- on 17–18 March 2021, the driver had worked a total of 15 ¾ hours in a 24-hour period; and
- on 27–28 March 2021, the driver had worked a total of 16 hrs in a 24hr period.

These constituted critical risk breaches of section 254(1)(a) of the HVNL, which makes it an offence for a solo driver of a fatigue-regulated heavy vehicle to exceed the maximum work time specified for a period under BFM hours. Though the fine imposed by the court on 15 September was not small, the driver should count himself lucky; each offence exposed him to a maximum penalty of \$17,240 per breach. ■

# The importance of legally enforceable supply chain contracts

Nathan Cecil, Partner, Holding Redlich

**In the heavy vehicle industry, not every risk management plan will be entirely foolproof and not every party will hold up their end of the bargain to fulfill safety obligations. For this reason, it can be a good idea to implement legally enforceable terms in your contracts to ensure your business is adequately protected. In this article, we consider what compliance assurance conditions mean for your business.**

As the year draws to a close, it is a great time to review your current safety protocols, business practices and procedures. If you have any uncertainties around your safety obligations, now is the time to address these matters to ensure you have a clean bill of health going into 2022!

A good place to start is to review your supply chain contracts as this is often where businesses can be exposed to risk. Contractors won't always follow their CoR responsibilities. Are there any grey areas in your contracts? And are these contracts legally enforceable?

A legally enforceable contract essentially means that it can be upheld in a court of law, which can prove very useful in the event that something goes wrong.

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**Remember, wishful thinking that other parties will do the right thing is not enough to discharge your CoR duties!**

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The HVNL and courts recognise that one of the best proactive and positive steps a business can take to ensure safety and compliance within their supply chain is to include legally enforceable terms between parties that:

- require performance; and
- discourage or do not reward non-compliance.

This sets you up for protection. An enforceable contract is an agreement carried out by the assenting parties – in this case, the parties in the Chain of Responsibility (CoR). They are legally obligated to execute the conditions of the contract.

Compliance policies and procedures form part of the broader business practices that should govern your workplace. The compliance assurance conditions should clearly articulate the expectations of the business in relation to its own, its employees' and its business partners' conduct, and provide specific instruction.

## ► DEFINITION: COMPLIANCE ASSURANCE CONDITIONS

Compliance assurance conditions are terms that are included in a contract or arrangement between two or more parties in the Chain that require compliance with the relevant CoR obligations that apply to the transport activities being conducted under that contract or arrangement.

## WHAT SHOULD THE TERMS INCLUDE?

The contract or engagement terms between parties in the CoR primarily govern the relationship between them. Those terms should set out:

- the role and responsibilities of each party;
- the standard of performance required;
- how that performance will be measured; and
- what will happen if that standard is not met.

The courts have indicated that meaningful compliance assurance conditions are necessary in all supply chain arrangements between parties in the CoR. So, don't exclusively focus on including them in transport or logistics contracts. You must consider all parties and relationships in your supply chain.

## WHERE SHOULD YOU INCLUDE COMPLIANCE ASSURANCE CONDITIONS?

Compliance assurance conditions should be included in:

- supply or procurement contracts for goods or materials required to be transported by road;
- contracts for the purchase or sale of goods required to be transported by road;
- warehousing, storage and handling contracts;
- transport, logistics and distribution contracts; and
- employment arrangements for workers involved in each of the above, e.g. within employment contracts or included in mandatory applicable company policies and procedures.

## ARE YOUR ASSURANCE CONDITIONS LEGALLY ENFORCEABLE?

Compliance assurance conditions must have teeth in order to help you effectively meet your safety obligations. This means that it is important to set out clear consequences if other parties operating under the supply chain contract do not meet the standards required, such as:

- a right to issue a 'show cause' notice that requires an explanation of steps implemented to avoid non-compliance occurring again;
- suspension of performance of the contract until assurances of ongoing compliance are provided;
- rights to withhold or deduct payment or withdraw performance bonus payments;
- a right to report breaches to the relevant authorities; and
- termination of the contract or arrangement.

## ► REMEMBER

If you do or can exercise control or influence over a transport activity (such as through ensuring compliance by your contractors) then you have an obligation to ensure compliance with the HVNL.

## PROACTIVE AND POSITIVE TERMS

Remember, wishful thinking that other parties will do the right thing is not enough to discharge your CoR duties! These approaches are passive, not proactive and positive.

You can support compliance assurance condition consequences by including some clear CoR key performance indicators (KPI) in the contract or arrangement.

## ► IMPORTANT

The legally enforceable terms that you set out and subscribe to must require performance and discourage non-compliance.

Compliance assurance conditions must be included in every supply chain contract so that your business is well positioned to promote and ensure safety and compliance in the work environment. When writing these clauses, simply requiring compliance with all obligations is not sufficient. It is highly recommended that you include CoR KPIs, as mentioned above, and consequences for non-compliance to encourage satisfactory performance from all parties and ensure these obligations are effective. ■

► Continued from page 1 “The ins and outs of heavy vehicle defects”

When a heavy vehicle is defective, a defect notice can be issued by officers authorised under the HVNL, including state and territory transport inspectors and police officers. Heavy vehicles will continue to be subject to inspections by authorised officers and police to determine compliance with the relevant heavy vehicle standards.

A defect notice may be issued to the registered operator of a heavy vehicle under the HVNL in relation to a vehicle that is found to be defective and its use on a road may or may not pose a safety risk. The defect notice will specify, among other things:

- the faults identified;
- the period of time to have the faults repaired; and
- any conditions of use the authorised officer (AO) considers appropriate for its continued use on a road.

The time within which you have to repair your vehicle will vary depending on the safety risk the continued use of the vehicle on the road poses. For faults that pose a minor safety risk, you might be given a number of days, whereas for faults that pose a major safety risk, the vehicle must be moved to the stated location in the specific manner described in the defect notice.

In more serious cases, the vehicle will need to be repaired immediately before it can be used on a road. If repairing the vehicle is not possible, it will need to be carried or towed.

The defect notice will contain information regarding the:

- vehicle's identification;
- driver and/or operator details;
- day and time the notice was issued;
- details of the AO who conducted the inspection;
- type of inspection carried out;
- faults identified;
- type of inspection required to clear the defect notice; and
- conditions regarding the on-going use of the vehicle.

The defect notice will also contain specific information, including how and where to get the defect cleared and contact details for information and assistance.

### WHAT ARE THE DIFFERENT TYPES OF DEFECT NOTICES?

Under the HVNL, the regulator (or an authorised officer) can serve one of the three main categories of defect notices: self-clearing, minor and major.

#### 1. Self-clearing defect notice

This notice applies in cases where a defective vehicle does not pose a safety risk; or a number plate is obscured, defaced or otherwise not legible. Although the vehicle may continue to be used on the road, the faults must be repaired within the time specified in the defect notice.

#### 2. Minor defect notice

This notice applies in cases where the safety risk is not imminent and serious. The vehicle may continue to be used on the road, as long as faults are repaired within the period specified in the notice. The defect notice may specify conditions about the vehicle's continued use on the road after the defect notice is issued.

#### 3. Major defect notice

This notice applies where there is an imminent and serious safety risk. The defect notice will specify conditions about the vehicle's use on a road after the defect notice is issued.

### WHAT ARE DEFECT LABELS?

A defect label may be affixed to a vehicle when a defect notice is issued. If a defect label is affixed to a vehicle, it must not be removed or defaced.

The defect label may only be removed by a person authorised to do so.

### HOW DO I CLEAR A DEFECT NOTICE?

A minor or major defect notice must be cleared according to the instructions in the defect notice, including:

- the type of inspection required (for example, a partial or full inspection);
- the type of facility where the inspection must be conducted; and
- the type of approved or authorised person who must conduct the inspection.

Operators may have the necessary inspection conducted in any state or territory providing the inspection is carried out by a suitably qualified person and in accordance with the instructions on the defect notice.

For a self-clearing defect notice, there are no requirements to have the vehicle inspected.

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**In more serious cases, the vehicle  
will need to be repaired immediately  
before it can be used on a road.**

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### CAN I USE A VEHICLE THAT HAS BEEN ISSUED A DEFECT NOTICE?

#### Self-clearing defect notice

A vehicle that has been issued a self-clearing defect notice can continue to be used on a road up to the due day indicated in the notice. However, if repairs have not been carried out within the time specified in the defect notice, the vehicle cannot continue to be used on a road from that time.

#### Minor defect notice

A vehicle that has been issued a minor defect notice can continue to be used on a road up to the due time indicated in the notice and its use is in accordance with any instructions or conditions stated in the defect notice. If repairs have not been carried out within the time specified in the defect notice, the vehicle cannot continue to be used on a road.

When the stated faults have been repaired and the vehicle is otherwise compliant with the standards applying to it, the vehicle may be used on a road. However, all conditions of the defect notice must be complied with, including the requirement for the defect notice to be cleared.

#### Major defect notice

A vehicle issued with a major defect notice may only be used on a road subject to the specific conditions stated for the use of the vehicle and clearance of the defect notice.

For all defect notices – if you are unable to comply with the conditions of the defect notice (e.g. you need more time to have the vehicle repaired) you should contact the authority that issued the defect notice as soon as possible.

► Continued on page 5

➤ Continued from page 4 “The ins and outs of heavy vehicle defects”

**➤ IMPORTANT**



If you fail to comply with a defect notice, including noncompliance with any of the conditions stated in the notice, it will be considered an offence under the HVNL which may result in further action. If a defect notice is not cleared, a registration authority may initiate action. For example, the authority may suspend or cancel the vehicle's registration.

**DRIVER RESPONSIBILITIES**

- It is an offence under the HVNL to use a defective heavy vehicle on a road.
- A driver must not use a heavy vehicle on a road in contravention of a defect notice.

If the driver or the person in charge of the vehicle is issued with a defect notice and they are not the owner/operator, they must give the owner/operator a copy of the defect notice as soon as practicable but not more than 14 days from when the notice was issued. The driver must also adhere to any conditions stated in the defect notice regarding the continued use of the vehicle.

**OPERATOR RESPONSIBILITIES**

- It is an offence under the HVNL to permit a person to use a defective heavy vehicle on a road.
- An operator must not permit a heavy vehicle to be used on a road in contravention of a defect notice.
- Vehicle operators must ensure that the stated faults are repaired within the period specified and that all conditions stated in the defect notice are met. The defect notice will include instructions for vehicle inspection and clearance of the defect notice.
- The instructions are included on the defect notice and will generally include the inspection location and contact details.

**THE IMPORTANCE OF REGULAR VEHICLE SERVICING AND MAINTENANCE**

Remember, regular servicing and maintenance of your vehicle:

- can improve reliability of the vehicle;
- can help reduce the risk of defects and lost productivity that they may cause; and
- can help you meet your legal obligation under the HVNL, and will ensure your vehicle is in a safe condition for use on the road. ■

# Your guide to heavy vehicle defects and compliance

Charlie Coleman, Lawyer, Holding Redlich

It is an offence under the HVNL for a person to use, or permit to be used on a road, a heavy vehicle, that contravenes the heavy vehicle standards applying to the vehicle, that is unsafe and/or that is in contravention of a defect notice.

The following table summarises the NHVR's guidance with respect to heavy vehicle defects. We look at the regulations provided for by the HVNL and how you can ensure your heavy vehicles are compliant. ■

**YOUR GUIDE TO HEAVY VEHICLE DEFECTS AND COMPLIANCE** DOWNLOAD 

MEANING OF DEFECTIVE HEAVY VEHICLE

A vehicle that:

- a. does not comply with the heavy vehicle standards;
- b. has a part that does not perform its intended function; or
- c. has deteriorated to an extent that it cannot be reasonably relied on to perform its intended function.

The registered operator of a vehicle falling within one of these categories can be issued a defect notice by HVNL authorised officers (AO). This defect notice will contain information including:

- the vehicle's identification;
- driver and/or operator details;
- date/time notice was issued;
- details of the AO and the type of inspection conducted;
- the faults identified;
- the nature and period of time to have the faults repaired; and
- any other conditions of road usage the AO considers appropriate.

The timeframe available to have your heavy vehicle repaired will vary depending on the context specific safety risk the vehicle poses. If repairing the vehicle is not possible, it will need to be carried or towed.

TYPES OF DEFECT NOTICES

	Self-clearing defect notice	Minor defect notice	Major defect notice
Characteristics	No safety risk posed.	Safety risk not imminent or serious.	Imminent safety risk.
Vehicle usage once defect notice has been issued	The vehicle may continue to be used on the road up to the due day indicated in the notice. However, repairs must be carried out within this time period.	The vehicle may continue to be used on the road up to the due day indicated in the notice. However, road usage must be in accordance with any stated conditions.	Can only be used on a road subject to the stated conditions in the defect notice.

COMPLIANCE AND RESPONSIBILITIES

Failure to comply with a defect notice, including noncompliance with any of the stated conditions is an offence under the HVNL, which may result in further action.

If a defect notice is not cleared, a registration authority may initiate action. For example, the authority may suspend or cancel the vehicle's registration.

Responsibilities to note:

- It is an offence under the HVNL to use or permit usage of a defective heavy vehicle on a road in contravention of a defect notice.
- The vehicle owner must be notified of the defect notice as soon as practicable but not more than 14 days from when the notice was issued.
- Vehicle operators must ensure that the stated faults are repaired within the period specified and that all conditions stated in the defect notice are met.
- Regular vehicle servicing and maintenance will help you meet legal obligations under the HVNL.

## Case update: Tragic Eastern Freeway incident

Melanie Long, Associate, Holding Redlich

A series of significant charges have been filed against the logistics company responsible for the fatal incident on the Eastern Freeway last April. In this case update, we touch on the NHVR's extensive investigative powers, the category 1 and 2 offences that occurred and the tragic outcomes resulting from a failure to ensure safe transport activities.

Last month, we provided a quick summary of this case. If you didn't catch that issue, many of you will remember that on 22 April 2020, a heavy vehicle tragically hit and killed four Victorian police officers on the Eastern Freeway while they were conducting a roadside intercept. You might also remember the public outcry that ensued, particularly surrounding the actions of the driver who the police had intercepted, Richard Pusey, who filmed and is alleged to have mocked the dying police officers.

Following this incident, Mr Pusey was sentenced to 10 months' jail. The driver of the heavy vehicle, Mohinder Singh, was sentenced to 22 years.

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

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Now, following an 18-month investigation, the company behind the incident and its owner/managing director, national operations manager and state manager have officially been charged with category 1 and 2 offences under the HVNL.

These are the most serious offences available under the HVNL. Category 1 offences carry a maximum penalty of \$300,000 and/or 5 years' imprisonment for an individual and \$3,000,000 for a corporation while category 2 offences carry a maximum penalty of \$150,000 for an individual and \$1,500,000 for a corporation.

The charges, according to the NHVR are a 'sobering reminder of the consequences that can occur when there is a failure to ensure safe transport activities.'

### THE INVESTIGATION

Part of this 18-month investigation involved a search of the company's head office in May 2020. Under section 497 of the HVNL, the NHVR and authorised officers have the power to enter places for investigative purposes. These include when the NHVR suspects that evidence of a contravention of the HVNL is at these premises. For it to apply, the NHVR must reasonably believe that either a heavy vehicle, or transport or journey documentation is at the premises and that these may amount to evidence of an offence against the HVNL. Additionally, the NHVR must reasonably believe that this evidence may be concealed or destroyed unless the place is immediately entered and searched. News reports state that following the above searches, authorised officers seized logbook documentation.

It should be noted that the NHVR and authorised officers cannot enter premises in circumstances where they are unattended or a primarily used for residential purposes. Accordingly, they can effectively only enter premises during business hours or when it is otherwise being used for the carrying on of a business.

### THE CHARGES

The company and its executive and senior managers have been charged with breaches of the primary duty contained with section 26C of the HVNL. As you are all aware, and as discussed in detail in recent editions, this primary duty requires parties in the CoR to ensure, so far as is reasonably practicable, the safety of their transport activities. This includes, but is not limited to:

- a. eliminating and minimising public risk; and
- b. ensuring that their conduct does not directly or indirectly cause or encourage a driver of a heavy vehicle to contravene the HVNL.

For (b) above, the HVNL provides further direction on the types of actions which will amount to contravening conduct, including, for example asking, directing or requiring another person to do, or not do, something in contravention of the HVNL. According to reports, Mr Singh allegedly informed his

employers that he was not in a suitably fit state to perform his driving task safely and competently, but nothing was done in response. The company also allegedly did not require him to undergo independent drug and alcohol testing and either directed or allowed Mr Singh to submit falsified work and rest records.

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**In this case, there is a clear public interest element in the prosecution.**

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In this case, it is plainly evident why the most serious category of charges under the HVNL were laid against the company and its executive and senior managers who, if all the allegations are proven, will have failed to ensure the safety of their transport activities. Further, in this case, there is a clear public interest element in the prosecution, particularly when you consider it resulted in the death of four public servants. The NHVR have also decided to prosecute a number of executive employees. In this situation, the NHVR would consider these individuals to be collectively directly responsible for the contraventions of the HVNL.

### WHAT'S NEXT?

After a hearing on 28 September 2021, the matter was adjourned until November, so watch this space!

### TAKEAWAYS

- The NHVR is armed with extensive investigative powers under the HVNL including the searching of places for the purpose of collecting evidence of contraventions under the HVNL.
- All the CoR parties responsible for contraventions of the HVNL will be prosecuted. This not only includes the driver but those officers or senior employees of any business responsible for the contravention(s) of the HVNL.
- The more serious the offence and the consequences of the offences, the more serious the charge. ■

**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.

## Decisions behind prosecution

**Q** When does the NHVR decide to prosecute for a breach of the HVNL?

**A** Factors that the NHVR takes into account when deciding whether to prosecute are contained in its Prosecution Policy and the Prosecution Policy of the Commonwealth.

According to these policies, not all offences under the HVNL result automatically in a prosecution. As a public agency, the NHVR considers the public interest when deciding whether to prosecute. Sometimes the public interest weighs in favour of discontinuing a prosecution. However, the NHVR is committed to prosecuting significant breaches of HVNL offences. Significant breaches generally include cases involving fatalities and/or serious injury or where potential risks to personal/community safety are high.

Factors that the NHVR takes into account include:

- whether the case is worthy of prosecution having regard to the NHVR's limited resources;
- the prevalence of the alleged offence and the need for deterrence, both personal and general;
- the age, intelligence, physical health, mental health or special vulnerability of the accused, a witness or victim;
- whether there are reasonable prospects of conviction based on an assessment of admissible, substantial and reliable evidence that the accused committed the offence; and
- the availability and appropriateness of any alternatives to prosecution.

There are certain factors the NHVR cannot take into account when determining whether to prosecute, which include:

- the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively);
- possible political advantage or disadvantage to the government or any political party, group or individual; and
- possible media or community reaction to the decision.

Some serious HVNL breaches may also rise to a breach of a primary duty to ensure safety (under Chapter 1A of the HVNL). These attract much higher penalties. Relevant considerations to commencing a primary duty prosecution include whether:

- death or serious injury occurred, or there was a real possibility that either could have occurred;
- the safety risk was caused by serious or systemic non-compliance with the HVNL;
- the safety risk was caused by business practices and/or company culture; and
- there was a demonstrable preference for commercial benefit over safety.

The NHVR prioritises the prosecution of such primary duty offences, as well as offences committed by executives of legal entities that

owe such duties. The NHVR is also more likely to take certain types of offence to court, such as providing false or misleading information to the NHVR and police officers, or failing to comply with their directions; critical fatigue-related offences; record keeping failures; and tampering with safety devices fitted to ensure HVNL compliance.

## BFM accreditation and compliance

**Q** We have recently obtained BFM accreditation. How do we take advantage of this additional flexibility while remaining compliant with the HVNL fatigue laws?

**A** Once you have attained BFM accreditation, compliance is as simple as one, two, three, four, five, six. There are six fatigue management standards that apply to accredited operators and their drivers:

1. Scheduling and rostering – scheduling of individual trips and rostering of drivers must be in accordance with limits prescribed in legislation.
2. Fitness for duty – drivers must be in a fit state to safely perform required duties and meet the specified medical requirements.
3. Fatigue knowledge and awareness – personnel involved in the management, operation, administration, participation, and verification of the BFM option must be able to demonstrate competency in fatigue knowledge relevant to their position on the causes, effects and management of fatigue and the operator's fatigue management system.
4. Responsibilities – the authorisations, responsibilities and duties of all positions involved in the management, operation, administration, participation, and verification of their operations under the BFM option must be current, clearly defined, documented and carried out accordingly.
5. Internal review – an internal review system must be implemented to identify non-compliances and verify that the activities comply with the BFM standards and the operator's fatigue management system.
6. Records and documentation – the operator must implement, authorise, maintain and review documented policies and procedures that ensure the management, performance and verification of the BFM option in accordance with the standards.

That's it! You can read more about each standard in the NHVR's Fatigue Management Accreditation Guide. ■

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## When should you contest a Court Attendance Notice?

Fines, charges, notices to produce, improvement notices and Court Attendance Notices (CANs) are all mechanisms of enforcement that can be used in circumstances where there has been an alleged contravention of the HVNL.

A common response to these enforcement measures is simply to comply and move on. Of course, this is often a fair and commercial response, particularly if it's agreed that a contravention has in fact occurred. In the case of CANs, this approach can also mean a reduction in penalties and/or sentence, as our Court system acknowledges that cooperation and early guilty pleas can entitle defendants to a discount on the penalties and/or sentence that would otherwise be imposed on them.

But what if you want to fight the alleged contravention? What should CoR parties consider before taking this approach? This article considers your options in respect of defending charges against you, with a focus on CANs.

### WHAT TO DO WHEN YOU RECEIVE A CAN?

A proceeding for a HVNL contravention is commenced by way of a CAN. It is a formal written notice requiring the named defendant(s) to attend court to answer to charges for an offence of the HVNL.

If you receive a CAN you should:

1. Report it to the relevant business HVNL compliance officer if you are an employee.
2. Carefully read the CAN and take note of the details.

Key factors that you should be looking for are:

- a. the date, time and place you are required to appear at court;
- b. the HVNL contravention with which you are charged;
- c. a description of the offence;
- d. a brief statement of the particulars of the offence – e.g. its date, where it occurred or was detected, persons to whom the police spoke and what was said; and
- e. documents in support of the charges – e.g. copies of transport documentation or photos evidencing the breach.

3. Seek legal advice.

A CAN may expose you or your business to legal liability. Therefore, it is critical to understand the charge, the nature of your legal risk and whether you have any defences available to you.

For example, a person may be adamant that he or she did not commit a contravention of the HVNL, but this may not be sufficient to demonstrate that fact to the Court. Legal advice can assist you to weigh the prosecution's evidence against possible evidence that you could tender in your defence.

### YOUR OPTIONS – HOW SHOULD YOU PLEAD?

While factors relevant to deciding this question will vary from case to case, as a guide, factors that may inform your decision include:

- a. Does the CAN actually describe the alleged breach and the circumstances in which it arose?
- b. Do you agree or disagree that the contravention described in the CAN occurred?
- c. Are you a relevant responsible person that could be charged for the alleged breach?

- d. What do the driver or other parties involved in the contravention (e.g. loaders, consignors, weighbridge operators, schedulers) have to say about the circumstances of the offence?
- e. What evidence could you produce to defend yourself? Do you have transport documentation or sign-off checklists that relate to the charged offence?
- f. Can you ask other persons involved in alleged offence for their supporting transport documentation, CCTV footage or system records that may show your compliance with the relevant HVNL obligation?
- g. Can you ask the police for further information or documentation relevant to the charges?
- h. Are you prepared to take on the costs of a proceeding? This includes not only the legal costs associated with defending the case but also reputational and time costs that arise.
- i. Are you prepared to bear the risk of being found guilty vis-à-vis the cost of acquittal? You should understand that even the strongest defence does not guarantee an acquittal. Furthermore, the penalties that could be imposed on you and that steps to appeal a conviction also have their own distinct costs and risks.

### ENTERING YOUR PLEA

If you decide to plead not guilty, you can notify the court and prosecution of this by attending court at the time scheduled in the CAN or by completing and sending the 'plea form' attached to the CAN to the relevant court registry identified in the CAN.

While the prosecutor bears the onus of providing beyond reasonable doubt that you committed the contravention of the HVNL, a prudent accused would then go about:

- reviewing the brief of evidence filed by the prosecutor;
- compiling documents that can be tendered in the accused's defence; and
- collecting witness statements to assist the accused or his or her lawyers leading oral evidence in court.

After a plea has been entered, the usual protocol in the Local Court is for a hearing date to be allocated and then to argue your case.

### KEY POINTS

- The HVNL can be enforced by way of a CAN.
- A CAN is a formal written notice requiring the named defendant(s) to attend court to answer to charges for an alleged offence of the HVNL.
- It is worth considering if you should contest the alleged contravention of the HVNL particularly if you dispute that the contravention ever happened or some or all of the facts listed in the CAN as making up the contravention.
- Regardless of how you chose to plea, it is important to seek legal advice so that you can properly respond to the CAN.
- There are number of factors to consider in deciding whether you should enter a plea of guilty or not guilty.
- If you choose to plead guilty, make sure you are prepared and ready put on your best defence. ■

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- Unpacking enforceable undertakings
- How to manage container transport risk
- Court makes supervisory intervention orders for unsafe vehicles and fatigue offences