



Your one-stop resource for practical
Chain of Responsibility solutions

MARCH 2022

3 Keep in the loop when it comes to COVID-19 in the heavy vehicle industry

6 EWDs revisited: The NHVR approves first two EWDs based on iOS devices

8 Independent contractor versus employee: High Court confirms primacy of contract

From Your Editor-in-Chief



This is a jam-packed issue!

We explore the new 'regulatory advice' issued by the National Heavy Vehicle Regulator (NHVR), which covers the risks arising from the use of light to medium heavy vehicles. This advice is aimed at the non-core parties in the chain, many of whom may not even be aware that the Heavy Vehicle National Law covers their operations.

We also continue the focus on enforceable undertakings, which were the subject du jour for 2021. This regulatory focus is likely to continue into 2022, so it is essential for you to be across it.

Executive compliance is always a topic of interest. This month, we take a deep dive into executive duties, specifically the need for executive compliance performance reporting to enable executives to discharge their duties in ensuring safety.

Finally, we look at two new industry developments. First, there is a new Electronic Work Diary (EWD) in town, so we have a refresher on the use of EWDs. Second, there has been a huge judgement out of the High Court of Australia on employees versus independent contractors, which is very relevant to many businesses across the supply chain and which we unpack for you.

Enjoy!

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

The NHVR issues new regulatory advice on managing safety risks of light to medium heavy vehicles

Nathan Cecil, Partner, Holding Redlich

Readers may recall an article in our January issue in which we wrote about the National Heavy Vehicle Regulator's (NHVR) first 'regulatory advice' issued in relation to the risk of transporting freight in shipping containers. Just 2 months after that regulatory advice was issued, the NHVR has followed it up with new regulatory advice, *Managing the risks of light to medium heavy vehicles*.

Here we provide a snapshot of the key recommendations in the regulatory advice.

WHO IS THIS REGULATORY ADVICE FOR?

This regulatory advice is intended for non-transport businesses that use light to medium heavy vehicles for their operations.

► DEFINITION: LIGHT TO MEDIUM HEAVY VEHICLE

A 'light to medium' heavy vehicle is one with a gross vehicle mass (GVM) between 4.5t and 12t. The GVM is the maximum permitted loaded mass for that vehicle.

Many non-transport businesses use light to medium heavy vehicles for their operations, but probably don't naturally consider themselves as parties in the heavy vehicle Chain of Responsibility (CoR). Examples are manufacturers or distributors that deliver product, and builders, concreters, landscapers, plumbers and small plant operators who move their own plant, tools and materials using such vehicles.

The regulatory advice is intended to educate these businesses that, although their primary focus or function is not transport, they are nevertheless parties in the heavy vehicle CoR.

This education focus is similar to that undertaken by the NHVR over many years in relation to other larger users of transport services who might not own or operate heavy vehicles and might not initially have considered themselves a party in the CoR, e.g. loading managers, packers, consignors and consignees.

► Continued on page 2

Deep dive into your executive reporting obligations

Nathan Cecil, Partner, Holding Redlich

In previous editions of the *CoR Adviser*, we have discussed that it is mandatory under the Heavy Vehicle National Law (HVNL) for businesses to develop, implement and document business practices aimed at ensuring compliance. We've also looked at what I call the 'Big 5' mandatory business practices. This month, we're going to explore the final one: executive reporting.

RECAP ON THE BIG 5 MANDATORY BUSINESS PRACTICES

The HVNL requires all parties in the Chain of Responsibility (CoR) to take all reasonably

practicable steps to ensure the safety of their 'transport activities'. Transport activities is defined to include conduct such as consigning, packing, loading and receiving goods, and a party's 'business practices'. Business practices include:

1. CoR compliance policies and working procedures
2. CoR compliance induction and ongoing education processes
3. CoR compliance assurance contract terms in every supply chain contract

► Continued on page 4

— HELPDESK QUESTION OF THE MONTH —

Is it okay for businesses to overestimate load weights? (answer on page 7)

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

2021: The year the enforceable undertaking came of age

Joshua Clarke, Lawyer, Holding Redlich

Last year saw a big uptick in the number of enforceable undertakings accepted by the National Heavy Vehicle Regulator (NHVR), a trend that confirms a shift in its approach to enforcement and penalising contraventions of the Heavy Vehicle National Law (HVNL).

In 2021, the NHVR accepted a total of seven enforceable undertakings offered by companies alleged to have breached the HVNL. This was up from only two accepted by the regulator in 2020.

The enforceable undertaking regime became part of the HVNL in 2018. But it was not until March 2020 that the NHVR first accepted an enforceable undertaking offered by an alleged offender. Line honours went to a construction company accused of breaching mass requirements, whose undertaking to commit very significant resources to improving the safety of its transport activities persuaded the NHVR not to prosecute.

In general, the NHVR may accept an enforceable undertaking if the alleged offender demonstrates an ability and willingness to:

- undertake organisational reform; and
- implement effective safety measures for transport activities.

Despite the emphasis placed on offenders cleaning up their own act, a notable feature of some recent enforceable undertakings is an investment in the safety of the heavy vehicle industry more broadly. In November 2021, a transport operator committed to funding the development of a web-based driver education platform for the heavy vehicle industry as part of its enforceable undertaking. The platform will provide engaging educational materials around key risks in the industry for use by other transport operators.

The promise to develop heavy vehicle safety awareness campaigns also appears in several other undertakings accepted by the NHVR. Sharp-eyed readers may spot the products of these commitments in the coming months.

If your business faces prosecution for breaching the HVNL, consider whether proposing an enforceable undertaking to the NHVR may be appropriate and achievable. There is no one-size-fits-all approach to crafting such a proposal but, if 2021 is anything to go by, a firm commitment to overhauling safety practices, along with a little creativity, may be rewarded. ■

► Continued from page 1

“The NHVR issues new regulatory advice on managing safety risks of light to medium heavy vehicles”

ASSESSING THE TRANSPORT RISKS

The NHVR recommends that businesses conduct a transport risk assessment covering:

- the type of transport tasks being conducted, including ‘transport-related’ activities such as load planning, consigning and packing;
- the types of loads being transported;
- the environment in which the heavy vehicle is operated; and
- the skill level required by workers to safely operate the vehicle and perform their tasks.

Some of the risks and hazards arising will likely include:

- vehicle collisions, which often result from the other risks and hazards canvassed;
- driver distraction, which is a major cause or contributor to on-road crashes;
- unsafe vehicles – vehicles must meet heavy vehicle standards and Australian Design Rules;
- load shifting or falling off a vehicle, which is often the result of poor load planning, a lack of skill or training in load restraint, or a lack of suitable load restraint equipment;
- driver fatigue, which may be caused by poor rostering practices, underlying medical conditions or lack of sleep;
- health, alcohol and drug impairment, which can lead to driver distraction, fatigue or general impairment;
- inadequate experience and skill, including a lack of knowledge, instruction or training

in relation to the use of equipment, load restraint, basic driver safety and the requirements of the Heavy Vehicle National Law (HVNL); and;

- speed, which greatly increases the likelihood of crashes and includes going above the speed limit or driving too fast for the conditions of the road or load.

MANAGING THE RISKS

You must manage the risks to keep workers, road users and the public safe, and meet CoR legal duties.

The regulatory advice points out that, “If a business engages in operating, driving, loading or unloading a vehicle, the business holds a duty under the HVNL to ensure the safety of its transport activities.”

Ways to manage these risks, include:

- ensuring vehicles are fit for purpose, safe, roadworthy and properly maintained;
- placing loads correctly to maintain vehicle stability and safety;
- securing loads to prevent them falling or being dislodged from the vehicle, including applying appropriate restraints; and
- having systems and processes in place to manage driver fatigue and alcohol and drug use in the workplace. ■



TIP: Find the regulatory advice at www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/resources/regulatory-advice.

New safety campaign educates young drivers on driving safely around trucks

Jessica Oldfield, Editor, Portner Press

The National Heavy Vehicle Regulator (NHVR) has launched a new safety campaign to educate Learner (L) and Provisional (P) licence-holders on driving safely around trucks.

NHVR CEO Sal Petrocchio says the campaign, titled *Don't #uck With A Truck*, demonstrates how L and P licence-holders can drive safely around trucks, including providing rules to follow when trucks are turning or stopping, and explaining how to overtake a truck.

“The campaign is intentionally provocative, and is designed to grab the target audience’s attention and start important conversations around road safety,” Mr Petrocchio says.

“Getting an L or P plate is a big step in a young person’s life – it is essential they have the information and skills to stay safe around trucks and develop positive long-term driving behaviours.”

A survey of 500 L and P licence-holders aged 16–25 found that:

- 78% of respondents couldn’t identify the correct stopping distance for a prime mover semi-trailer truck travelling 80km/h, which is 116m;
- only 45% of respondents knew to keep one lane either side of a truck free when it is turning; and
- 30% of respondents didn’t know that to overtake a truck safely, you should only pull in front of it when you can see its headlights in your rear-view mirror.

“Our goal is to prevent situations where a young driver could be in a lane next to a turning truck, or they pull in front of a truck too soon,” Mr Petrocchio says.

The *Don't #uck With A Truck* campaign will appear on *Instagram*, *TikTok*, *Facebook*, *Snapchat*, *YouTube*, and across billboards and university O-Week pop-ups.

Visit www.dontmuckwithatruck.com.au for more information. ■

Keep in the loop when it comes to COVID-19 in the heavy vehicle industry

Jessica Oldfield, Editor, Portner Press

COVID-19 has brought numerous challenges to businesses and workers in all industries. Not only have we had to fight a highly transmissible virus, we've also been navigating rapidly changing advice and restrictions. The heavy vehicle industry has been no exception.

In fact, the heavy vehicle industry has faced additional challenges because workers are so often travelling between jurisdictions. This can mean that a driver may face one set of restrictions in the morning and a whole new set by evening!

KNOWLEDGE IS POWER

Keeping on top of the changing COVID-19 landscape is essential. And now there is a one-stop-shop for all the information you need when you need it.

The National Heavy Vehicle Regulator (NHVR) has updated its website to include guidance on COVID-19 close contact worker requirements for each state or territory.

The website published the latest information so that drivers understand their obligations if they have been identified as a close contact.

NHVR CEO Sal Petrocitto says, "Heavy vehicles operate across all Australian borders thousands of times a day and it's vital that they are able to find clear information to assist them."

"I'm pleased that we are able to extend our existing information services to include this important information."

"The NHVR will continue to provide updates on changing conditions and requirements across all jurisdictions, such as truck access-friendly COVID-19 testing facilities, roadhouses and service centres."

EASY TO NAVIGATE

Road safety and freight transport assistant minister Scott Buchholz says the dedicated COVID-19 response web page makes it quick and easy for those in the heavy vehicle industry to get the information they need to carry out their jobs safely.

"This information source is providing truck drivers, rail operators and freight managers with the information they need to make decisions, taking some of the stress out of their day-to-day work," Buchholz says.

"This has been no easy feat, as new coronavirus variants keep emerging in Australia and overseas, interstate road and rail workers have worked tirelessly to keep up with changing requirements across jurisdictions."

"We have listened and we have acted."

"The NHVR has updated its website to act as a one-stop shop for the key COVID-19 information our freight workers need to keep moving across all states and territories."

"This builds on our recent decision at National Cabinet to allow transport, freight and logistics industry workers to go back to work immediately, provided they are asymptomatic and record a negative Rapid Antigen Test."

KEEPING THE SECTOR MOVING

Buchholz says COVID-19 has highlighted the importance of Australia's freight and supply chain network.

"Every Australian, everywhere, every day relies on our freight, our logistics, and our supply chain workers – who have been doing a fantastic job keeping supplies moving throughout the pandemic," Buchholz says.

"I thank all our freight, supply chain and logistics workers for their outstanding work in continuing to deliver for communities throughout Australia despite the challenges of COVID-19."

"Your resilience and determination is a true testament to the Aussie spirit – and we will continue to notice your efforts, to listen, and to act to help our freight sector keep moving."

Find the NHVR COVID-19 response web page at www.nhvr.gov.au/about-us/coronavirus-response. ■

World-first project investigates coupling strength

Jessica Oldfield, Editor, Portner Press

The ARTSA Institute, Australian Trucking Association (ATA), Truck Industry Council (TIC) and Heavy Vehicle Industry Australia (HVIA) have come together in a world-first project to investigate dynamic loads on the couplings on heavy high productivity freight vehicles (HPFV) and PBS combinations vehicles.

The project, which is funded by the Commonwealth Government through the National Heavy Vehicle Regulator (NHVR) Heavy Vehicle Safety Initiative, aims to fill a gap in knowledge and provide evidence to update relevant standards and rules.

ARTSA Institute Chair Martin Toomey says, "the current Australian Design Rules cover heavy coupling requirements, but they do

not provide any guidance beyond a road train GCM of just 125 tonnes. As increasingly higher productivity vehicle combinations enter the Australian heavy vehicle fleet, evidence-based guidance is required to support engineers, regulators and fleet managers, so that couplings can be safely specified, inspected and maintained."

The project, which is expected to be completed by June 2023, will investigate coupling dynamic forces using on-road testing followed by laboratory testing, which will confirm the strength of the couplings.

HVIA CEO Todd Hacking says, "Coupling failure on high-productivity vehicles has the potential to lead to death and injuries, major traffic disruption and reduced public confidence in heavy vehicle safety. It is

important for regulators and industry to be confident in the relevance and integrity of the standards that guide the safe selection of components."

TIC CEO Dr Tony McMullan says, "Australia has always pushed truck equipment to its limits, doing what no one else does anywhere in the world. Couplings are a prime example with quad trailer road trains exceeding 150 tonne GCMs. This project will help define coupling safety factors and requirements for multi-trailer configurations around the world."

NHVR CEO Sal Petrocitto says, "The NHVR is proud to support this project that will help mitigate the safety risks posed by non-compliant couplings and enhance the safety of vehicles operating under higher productivity schemes." ■

➤ Continued from page 1 “Deep dive into your executive reporting obligations”

4. CoR compliance assurance systems

5. CoR compliance performance reporting for executive officers.

The last two aren't expressly included in the definition, but they are requirements of the primary duty and referred to in all of the main guidance material issued by the National Heavy Vehicle Regulator.

EXECUTIVE REPORTING

Under the HVNL, executives (directors and any persons concerned in the management of a corporation, partners in a partnership, and managers of an unincorporated association) have a proactive and positive duty to exercise due diligence to ensure their business complies with all its CoR obligations.

The HVNL expressly sets out specific requirements for executive compliance. Mandatory positive executive due diligence includes taking reasonable steps to:

- obtain and keep up to date knowledge about what the business is doing to ensure that its transport activities are safe;
- understand how and in what capacities the business engages in transport activities;
- understand the hazards and risks, including risks to the public, associated with the business' engagement in transport activities;
- ensure the business has, and uses, appropriate resources to eliminate or minimise those hazards and risks;
- ensure the business has, and implements, processes:
 - to eliminate or minimise those hazards and risks;
 - for receiving and considering information about those risks;
 - for responding to information about those hazards and risks; and
 - for complying with the business' duty to ensure, so far as is reasonably practicable, the safety of its transport activities, and ensure it does not cause or encourage contravention of the HVNL; and
- check that the resources and processes referred to above are in fact being provided, used and implemented by the business, its management and staff, and are effective in eliminating or minimising identified hazards and risks.

The HVNL expressly sets out specific requirements for executive compliance.

It is not feasible to expect executives to personally go out and obtain all that knowledge and perform each of those compliance checks. So, for executives to be able to discharge their duty, they will largely depend on receiving information in the form of compliance performance reporting from others within their business. Without receiving such information, executives will not be able to discharge their duties.

WHAT SHOULD BE REPORTED?

For each CoR compliance component, the most meaningful report is the number and severity of breaches that have occurred. Breaches slipping through the cracks are the thing that most needs to be addressed. These incidents suggest defective compliance management, training or implementation.

It is also important to know the level of incidents that are still arising but are, thankfully, being picked up before a truck hits the road – that is, the number of CoR near-misses. These incidents suggest that system and process design is not eliminating incidents at the source, or training on how to conduct processes is not effective, but at least final checks and balances are detecting and remedying problems.

The most meaningful report is the number and severity of breaches that have occurred.

Finally, some general CoR compliance system 'health check' information is useful, e.g. confirmation that all supply chain contracts have mandatory CoR compliance clauses included, and confirmation that all CoR-facing employees and contractors have been properly inducted and received any scheduled refresher training.

However, reporting those figures in a vacuum is of little benefit. The executive needs context. For example:

- how do the compliance reporting figures this period compare with those of the last period and/or the 12-month average;
- are problems more frequently arising in relation to one area of the CoR than others; and
- are detected breaches the fault of the business or are they arising from the activities of suppliers or contractors?

This kind of contextual and trend reporting is essential for the executive to be able to determine the source of any problem and/or any unusual spikes in non-compliance, and get on the front foot.

WHAT TO AVOID

Executives need the right information and only the right information. Anecdotal evidence suggests that where there is any doubt about relevance, information is included and submitted to the executive. The executive ends up with pages of figures and tables, which they typically can't properly assess in context, either in a reasonable time or at all.

Information overload must be avoided. It is just as bad to receive no information as it is to receive information and not be able to understand or act on it. Executive reporting must be targeted only to meaningful information, so that it is not lost in the crowd.

➤ IMPORTANT



CoR compliance reporting should primarily be directed to safety measures, occurrences and incidents, not dollars.

Anecdotal evidence suggests that the majority of executive reporting is comprised of financial reporting measures. These are unlikely to give any advance insight into CoR compliance and performance on a day-to-day basis. At best, financial information might reveal the totality of fines or penalties imposed after the event.

➤ REMEMBER



Executives are under a duty to exercise due diligence to avoid CoR breaches.

➤ Continued on page 5

► Continued from page 4

“Deep dive into your executive reporting obligations”

CoR compliance reporting that is limited to information on breaches and remedial action post-breach only goes half-way to discharging this duty. Ideally, CoR compliance reporting should also be used to forecast non-compliance trends, so that compliance measures or further information, supervision and training can be put in place to prevent breaches from occurring.



TIP: CoR compliance reporting should focus on the bad, not the good.

CoR compliance reporting, especially at executive level, is not a school awards night – participation or encouragement awards don't count. The number of road movements that have been conducted without any compliance issues might deserve an accolade, but it does little to assist in the identification of areas of concern where more focus and action is needed. CoR compliance reporting should mainly be exception or non-conformance based, to focus attention on potential or actual compliance problems.

THE BIGGEST PITFALL IN EXECUTIVE REPORTING



CAUTION: A common thread in CoR prosecutions is that there were either no systems or checks in place, or information was being collected, but not properly analysed and acted upon.

Executive reporting statistics are not merely points of interest. Depending on what the figures show, the executive will be called on to actually *do* something (or ensure that something is done) to address this information.

The biggest pitfall is treating the compliance performance figures as 'for noting'. They are not 'for noting', they are 'for assessment and action'. Where the performance measures indicate a problem, the executive must either develop and implement a response plan, or ensure that their compliance team is doing so.

CONCLUSION

Executive reporting is one of the essential five pillars of CoR compliance. Without it, the executive won't be doing their job or discharging their duties. Thankfully, some relatively straight-forward reporting metrics should easily be able to be put together to ensure that the executive is armed with the necessary information to keep the business and themselves out of trouble. ■

Tips: The who, what, when and where of executive reporting

Nathan Cecil, Partner, Holding Redlich

Providing Chain of Responsibility (CoR) compliance information to executives is essential to enable them to discharge their duty to exercise due diligence in relation to CoR compliance. Here, we offer some tips and tricks on CoR compliance reporting.

WHO?

- Executives have a duty of due diligence to ensure that their business complies with the Heavy Vehicle National Law.
- An executive is a director and “any person, by whatever name called and whether or not that person is a director, who is concerned or takes part in the management of a corporation”, partner in a partnership, or manager in an unincorporated association.

WHAT?

- Only meaningful information should be provided. Extraneous information contributes to information overload.
- Reporting should be predominantly exception or non-conformance based, focusing on the bad, not the good. Reporting that focuses on good performance and compliance does not enable executive officers to identify where problems are and where attention should be focused.
- Although reporting should be exception or non-conformance based, it is essential to record somewhere all steps taken to prevent CoR breaches, and respond to and remedy any breaches that have occurred. Examples may include details of CoR awareness training or breach warnings issued to business partners. This information will be essential to help prove the business has taken all reasonable steps to prevent CoR breaches.
- Key reporting measures should be developed for each area of CoR compliance relevant to the business, e.g. mass, dimension, load restraint, speed, fatigue, and vehicle standards and maintenance.
- CoR compliance reporting metrics must be identifiable, measurable and reported uniformly. It may be necessary to include guidance or definitions in your CoR reporting policy about what constitutes a non-conformance incident or 'near-miss'.
- Within reporting measures, sub-reporting may help identify trends that require further

attention. For example, reporting total CoR non-conformance incidents is good, but reporting whether these are mass, dimension, load restraint, speed, fatigue or vehicle maintenance issues will assist in trend forecasting and rolling out a targeted response plan to prevent problem areas from continuing.

- Reporting should also extend to CoR compliance by your business partners (customers and service providers).

Key reporting measures should be developed for each area of CoR compliance.

WHEN?

- Reporting should be reasonably frequent. Due diligence won't be demonstrated if compliance reporting is only addressed annually.
- Reporting should also be cumulative, at least to some extent, to enable trends to be identified over time. Reporting that is only limited to short time periods and then discarded for the next reporting period will not allow this.
- Executives must exercise due diligence to prevent CoR breaches. Reporting only actual breaches (as opposed to other forms of non-compliance with CoR policies and practices) and information after the fact won't go all the way to preventing future breaches. 'Near-miss' reporting and some trend analysis and future forecasting should be employed.

WHERE?

- CoR compliance source information, reporting and records of remedial action should be considered critical business documents, and must be retained in the business' records.
- From an investigation or prosecution point of view, being able to demonstrate compliance is almost as important as actually complying in the first place. If there are no records of compliance, it will be very difficult to prove compliance in court. ■

EWDs revisited: The NHVR approves first two EWDs based on iOS devices

Melanie Long, Associate, Holding Redlich

At the start of February, the National Heavy Vehicle Regulator (NHVR) announced that the Electronic Work Diary (EWD) by Kynecton, Q by Quallogi, has been approved to operate on an additional Android and two iOS devices. The NHVR confirmed the addition of Apple iPhone SE and iPad (5th Generation), after having approved Kynecton’s EWD in May last year as the fifth official EWD certified for use.

In making the announcement, NHVR CEO Sal Petrocitto said, “more and more drivers and operators are using EWDs, and we expect this trend to increase in the future ... the more device flexibility that can be provided, the more options people have to use an EWD.”

With this in mind, we are revisiting the use and operation of EWDs, and reviewing their benefits and common misconceptions about using them.

OVERVIEW OF EWDs AND THE NHVR-APPROVED EWD PRODUCTS

An EWD is an electronic device or system used to monitor and record the work-and-rest times of a driver. It is currently a voluntary alternative to the Written Work Diary (WWD).

EWDs are recognised and permitted under the Heavy Vehicle National Law (HVNL), however, their use is subject to the developer first obtaining certification for their product from the NHVR. Currently there are six companies that have been approved to provide EWDs. The companies and their respective EWD product names are listed in Table 1.

EWDs are designed to allow easier, faster and more accurate work-and-rest hour recording by enabling drivers to record their work-and-rest hours electronically.

WHAT IS THE DIFFERENCE BETWEEN EWDs AND WWDs?

The main differences between EWDs and WWDs is that one is electronic and the other is written. Another difference is that when using WWDs, drivers are required to record their work-and-rest time in 15-minute blocks, whereas EWDs round time in 1-minute blocks. In terms of compliance, there is very little difference between the two, and there are policies in place to ensure consistency in this regard.

PURPOSE OF EWDs

Driving while fatigued or drowsy is dangerous, and as such, is heavily regulated by the HVNL, which requires drivers to record their work-and-rest hours to show their compliance with these provisions. One of the main ways in which compliance fails in this area is in the accuracy of recording. Accordingly, the purpose of EWDs is to ensure greater compliance with the fatigue provisions of the HVNL.

BENEFITS OF EWDs

EWDs remove a lot of the pitfalls that drivers fall into when recording their work-and-rest hours using WWDs. Drivers are ultimately responsible for ensuring that their record-keeping is correct and face hefty fines for failing to do so. Further, common so-called ‘loopholes’ used by drivers are really not loopholes at all and actually land a lot of drivers in trouble. Additionally, EWDs are easy to use and save drivers time. So, for those who find paper recording difficult and burdensome, EWDs are likely for you.

In addition to the advantages of EWDs for drivers, many businesses will also experience the benefits of switching to EWDs, with the

electronic nature negating the need for many administrative processes when it comes to monitoring compliance with the fatigue management provisions of the HVNL. The growing use of EWDs is likely to lead to less companies being penalised for the actions of their drivers, since companies are often charged when their driver fails to accurately record their hours and subsequently breaches the fatigue management provisions of the HVNL.

Other benefits of EWDs for drivers and business alike are that they:

- can be used in all jurisdictions and thus can be used in cross-border travel;
- give real-time alerts for upcoming potential fatigue breaches before they happen; and
- have consistent compliance views meaning faster reviews of driver records during on-road intercepts, getting drivers back on the road sooner.

BUSTING THE MONITORING MYTH

There is always hesitancy when change is involved. A major concern that arises with regards to any electronic device is their potential use for monitoring. Rest assured, EWDs are not monitoring devices for authorised officers (including police) to check up on drivers. The Electronic Work Diary Standards require that all relevant information is contained in the EWD itself and only transmitted to the driver’s record-keeper. The NHVR and other authorised officers will only see driver information from an EWD during an interception (and in compliance mode) or if the information is requested as part of an investigation.

CONCLUSION

The approval by the NHVR of the first two EWDs based on iOS devices shows its commitment to moving the workforce to being entirely dependent on EWDs.

The growing use of EWDs is good news for everyone in the industry. Fatigue compliance is an important element in ensuring the safety of drivers and our roads, so anything that allows drivers to record their work-and-rest hours more accurately, and thus comply with the fatigue provisions of the HVNL, is a positive thing for the industry and the public alike. ■

Table 1: Companies with approved EWDs and EWD product names

	Company	EWD product name
1.	Hubfleet	Hubfleet
2.	Kynecton	Q by Quallogi
3.	MTData	Talon and Swift
4.	Netstar Australia	Netstar EWD Garmin Fleet 7XX Series
5.	Step Global	Smart eDriver
6.	Teletrac Navman	Sentinel

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.

Overestimating load weights

Q Is it okay for businesses to overestimate load weights (e.g. say it's 15kg when it's actually 8kg) or does that become 'false and misleading'?

A Overstating load weights will not breach the provisions relating to accurate container weight declarations (section 187(4) of the Heavy Vehicle National Law [HVNL]). But, this exception does not apply to consignment documentation generally, which includes transport documents relating to the mass of any and all goods. Accordingly, overstating load weights is not risk-free.

Section 186 states that relevant Chain of Responsibility (CoR) parties (consignors and loaders generally, packers of Australian-packed goods and receivers of overseas-packed goods) must ensure, so far as reasonably practicable, that consignment documentation (including transport documents relating to mass of any or all goods) is not false or misleading.

The best way for you, as a relevant CoR party, to avoid breaching s 186 is to have accurate load weight information. That is, actually weighing or calculating loads, and documenting that weight.

Generally, an overstatement of load weights is preferable to an understatement of load weights. This is because overstatements of load weights are less likely to give rise to risks to road safety (e.g. roll-overs or damage to infrastructure) and result in breaches of mass limits. Nonetheless, a significant underestimate could also contribute to an unevenly distributed load and adverse effects on vehicle handling etc., so accuracy is the best policy.

Protection for complainants

Q What protections are in place to prevent employers from punishing employees for making complaints about alleged contraventions of the HVNL?

A Under section 699(1) of the HVNL, an employer is prohibited from dismissing or prejudicing an employee because the employee has helped or given information to an authority or law enforcement agency in relation to a contravention or alleged contravention of the HVNL, or if an employee has made a complaint relating to same.

A non-exhaustive list of examples of prejudicial conduct is provided by the HVNL, and includes demotion of the employee, unwarranted transfer of the employee and reducing the employee's terms of employment.

Section 699(2) of the HVNL affords some protection to employees from prejudice on the part of prospective or current employers in relation to the employee having helped, given information or made a complaint relating to a contravention or alleged contravention of the HVNL.

An employer that breaches these rules is currently liable to a maximum penalty of \$11,490 if an individual or \$57,450 if a company.

These provisions go some way to deterring punishment or prejudice against employees who have reported or complained about alleged contraventions of the HVNL. This purposefully fosters an environment for employees to be at liberty to voice their concerns over suspected contraventions of the HVNL.

Complying with multiple laws

Q I am in the transport and trucking industry and have duties under both work health and safety (WHS) laws and the HVNL. Which do I follow?

A As a general rule, if a provision of the HVNL and a provision of WHS laws deal with the same subject matter and it is possible to follow both, you should comply with both sets of laws.

It is all about safety, and the HVNL recognises its relationship with WHS laws. In fact, your HVNL obligations are closely aligned with the obligations defined by the primary WHS law.

However, where there is an inconsistency and it is not possible to comply with both sets of law, the HVNL provides (section 18) that the individual is to comply with the provision of the primary WHS law.

We recommend that you consider how your organisation can develop and implement a single safety management framework that will allow you to meet your obligations under both WHS laws and the HVNL.

Registered Industry Code of Practice

Q What is a Registered Industry Code of Practice (RICP) and what does it do?

A An RICP is a code of practice that is developed through industry consultation and approved by the NHVR. They provide practical, industry-focused guidance on how parties across the CoR can identify and respond to risks associated with their respective HVNL obligations.

It is not mandatory for CoR parties to adopt an RICP to achieve compliance with the HVNL. They can however be useful for businesses to facilitate compliance and mitigate risk.

A key advantage of opting to operate under an RICP is that if you were to be charged with contravening the HVNL, the Court can rely on the RICP to determine what would be reasonably practicable in the circumstances for a person in your position to do to respond to a known hazard, risk, risk assessment or risk control. Adopting measures set out in an RICP can therefore help demonstrate compliance with a particular HVNL obligation.

Notably, all RICPs must be consistent with the Master Industry Code of Practice. Businesses should, at the minimum, have an understanding of this code to inform their individual codes of practice. ■

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Independent contractor versus employee: High Court confirms primacy of contract

On 9 February 2022, two landmark decisions were handed down by the High Court of Australia (HCA) that have revised the approach to determining whether a worker is an independent contractor or an employee. This is of importance to supply chain sectors, within which many businesses engage a significant proportion of the workforce as independent contractors.

The decisions – *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (2022)* and *ZG Operations Australia Pty Ltd v Jamsek (2022)* (**Jamsek**) – have concluded that unless there is a dispute about the validity of the contract itself, the nature of the relationship between the parties is to be determined primarily by reference to the written agreement.

These decisions clarify the principles relating to the characterisation of an independent contractor vis-à-vis an employee. They confirm that the primary consideration will be of the written agreement between the parties and the circumstances surrounding the entering of this contract (as opposed to the circumstances surrounding the relationship more generally), unless the contract itself is challenged on the basis that it is a sham or is otherwise ineffective by reason of law.

This article will take a closer look at the Jamsek case, which concerned two truck drivers seeking declarations in respect of statutory entitlements alleged to be owed to them as employees of the company (which, over the years included numerous companies beginning with the prefix ZG) (**company**). These entitlements would not be payable to them as independent contractors. The Court held that by reference to the written agreement, which was not in any way in dispute, the relationship was one of principal and contractor, despite the lower courts determining otherwise.

BACKGROUND TO JAMSEK

The Jamsek case concerned two truck drivers, Mr Jamsek and Mr Whitby, who were initially engaged as employees of the company and drove trucks provided by the company. In late 1985 or early 1986, the company advised that it would no longer employ them, and would only continue to use their services if they purchased their trucks and entered into contracts to carry goods for the company as independent contractors. Mr Jamsek and Mr Whitby agreed to the new arrangement, and each set up a partnership with their wives. Those partnerships purchased their trucks from the company and executed a written agreement for the provision of delivery services.

Some of the relevant aspects of the relationship between the parties were as follows:

- the terms of the independent contractor agreement reflected a traditional principal/contractor relationship;
- the partnership invoiced the company for the delivery services provided, and were paid by it for those services;
- although the drivers were told what to deliver, they were left largely to agree among themselves on their respective delivery areas and each driver structured his own delivery route;
- the partnership purchased trucks (in addition to those initially acquired from the company) and paid all expenses associated with them;
- the net revenue earned was declared as partnership income, and split between husband and wife for the purposes of income tax;
- Mr Jamsek and Mr Whitby worked more or less regular hours;

- at various times throughout their engagement, Mr Jamsek and Mr Whitby were asked to install company logos on their trucks and/or supplied with company uniforms; and
- Mr Jamsek and Mr Whitby were sometimes asked to perform tasks beyond their core delivery duties.

DECISION OF THE HCA

The HCA determined that the relationship between these parties was one of principal and contractor. The judges unanimously held that when the company offered the drivers the opportunity to purchase their own truck and become contractors, the nature of the relationship between the parties changed. This is particularly the case because the origin of this change in agreement was that the company no longer wished to employ them.

Further, a majority of the Court found that:

- where a written agreement between the parties comprehensively regulates the relationship between the parties, the character of the relationship is to be determined by reference to the rights and duties created by the written agreement;
- there is no need to depart from the orthodox approach in the interpretation of contracts unless the validity of the contract itself is challenged as a matter of law; and
- the lower Court was in error by considering the disparity in bargaining power between the parties affected by the contract (more on this below).

It should be noted that the HCA did not determine whether Mr Jamsek and Mr Whitby fell within the expanded definition of employee under the relevant superannuation legislation. Instead, the HCA remitted this question back to the lower court for determination.

CONSIDERATION TO THE BARGAINING POWER OF WORKERS

In this case, the superior bargaining power held by the company weighed heavily on the lower Court, which ruled that, due to the drivers' limited bargaining power, there was a diminished clear mutual intention to alter the nature and structure of the relationship between the parties from employees to contractors. However, the HCA ruled that this had no bearing on the meaning and effect of the relationship struck by the parties at this time.

It should be noted that this is not to say that disparities in bargaining power may not give rise to injustices that call for a legal remedy. However, these were not invoked in this case. As previously noted, the drivers did not claim that the contracts with the partnerships were shams or otherwise challenge their validity.

KEY TAKEAWAYS

- The rights and duties created by the written agreement between the parties reigns supreme when determining the nature of the relationship between the parties.
- The reality of the relationship between the parties outside the written agreement should only be taken into account if the validity of the written agreement is challenged.
- The bargaining power between the parties will not be relevant for the determination of whether a party is an independent contractor or employee. This does not preclude a party from seeking alternative legal remedies on this basis. ■