



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

JUNE 2022

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## From Your Editor-in-Chief



In this month's issue, we consider the implications of three new regulatory advice articles issued by the National Heavy Vehicle Regulator (NHVR): two covering the risks arising from construction activities and one covering the risks arising from time slot bookings. These regulatory advice articles continue to be a very practical illustration of how to manage the specific safety risks arising from the scenarios covered. We'll make sure that you stay across new regulatory advice as they are issued so that you can ensure that your safety and compliance practices are keeping pace.

Fatigue remains one of the biggest contributors to serious on-road accidents. In this issue, we take a refresher look at one of the most significant and tragic fatigue cases of recent years. We also take a look at two recent cases in which the NHVR issued improvement notices centred on inadequate fatigue management practices. This is one of the hardest risks to manage properly, so we're making every effort to ensure that you get the latest updates on the regulator's expectations.

Finally, we take another look at designing and implementing safety management systems, which are the 'gold standard' in managing safety and risk relating to your transport and supply chain operations.

Happy reading.

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

## New regulatory advice: Managing the risks of time slot bookings

*Nathan Cecil, Partner, Holding Redlich*

The National Heavy Vehicle Regulator (NHVR) continues to provide the industry with targeted regulatory guidance, in the form of its series of regulatory advice articles. In the last 2 months, the NHVR has released new regulatory advice articles: two on the risks in the construction sector (see page 6 of this issue) and one on managing the risks of time slot booking. Here we explore the latter.

One of the questions that comes up time and time again when we are working with businesses to improve their chain of responsibility (CoR) risk management practices is, "Can I impose scheduled pick-up or delivery times?"

Scheduled time slots assist consignors, consignees and operators of distribution centres and warehouses with their planning and traffic/queue management. They also assist transport operators, providing them with greater assurance that they will be

loaded or unloaded without delay if they arrive during their scheduled slot.

However, some transport operators push back on scheduled time slots, saying that they put undue pressure on drivers to cut corners to ensure that they don't miss slots.

So, what is the answer? It's this: the benefits of scheduled time slots can be achieved without unintended adverse consequences if the risks and hazards associated with time slots are mapped out and addressed at the outset.

### WHAT ARE THE SAFETY RISKS ASSOCIATED WITH THE USE OF SCHEDULED TIME SLOTS?

The NHVR puts it best: "The demand on drivers to meet time slots can have unintended consequences. They can feel pressured to drive when fatigued or exceed speed limits. Both behaviours create serious safety risks to drivers, other workers, road users and the community.

➤ *Continued on page 2*

## How to implement a safety management system

*Nathan Cecil, Partner, Holding Redlich*

Every person conducting transport activities in the heavy vehicle supply chain has a responsibility to prevent or minimise potential injury, danger or loss by ensuring their transport activities are safe. Having a safety management system (SMS) in place in your business can be one of the most effective ways of meeting your safety obligations under the Heavy Vehicle National Law (HVNL).

Adopting and actively using an SMS has proven to help reduce safety-related incidents in other heavy transport industries, such as maritime, rail and aviation.

This article highlights the benefits of implementing an SMS and demonstrates

how an SMS can assist you to meet your safety obligations under the HVNL.

### WHAT IS AN SMS?

#### ➤ DEFINITION: SAFETY MANAGEMENT SYSTEM (SMS)

An SMS is a systematic approach to managing safety. It is a structured set of guidelines that details an organisation's processes for maintaining safety in accordance with established regulations, specifications or legislation.

As with any compliance framework, it seeks to implement communication processes, risk controls and governance practices for maintaining compliance.

➤ *Continued on page 4*

## — HELPDESK QUESTION OF THE MONTH —

**What are my allocation duties under the chain of responsibility? (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)

## Giving young workers the skills to secure our future

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

**World Youth Skills Day, which falls on 22 July, is a good reminder of the importance of bringing young workers into our workforce and training them effectively to secure the future of our organisations.**

According to the United Nations, globally, young people aged 15–24 have been even more severely affected by the COVID-19 crisis than adults, with youth employment falling by 8.7% in 2020, compared with 3.7% for adults.

With Australia embarking on a new 'COVID normal', it's time to recommit to bringing young people into the workforce and providing them with adequate training and instruction so they can work effectively, safely and in compliance with their chain of responsibility (CoR) obligations.

Young workers are often at greatest risk of injury in the workplace because they may:

- lack the experience, knowledge and skills to fully appreciate the risks in the tasks they are performing;
- not be able to protect themselves and their co-workers from injury as competently as a more experienced worker;
- try to perform tasks that are physically or mentally beyond their current capabilities;
- not have received appropriate training and instruction; and
- not ask questions or raise safety issues.

Because of the higher risk to young workers, you must be diligent in your training, instruction and supervision. Induction is key. You must conduct a comprehensive induction program into your business that thoroughly explains all health and safety and CoR policies and procedures in the organisation.

An induction for young workers is also a good opportunity to test their level of competence to perform the role. Ensure young workers can demonstrate competence before starting work and before commencing any new task.

Make the most of the young pool of potential workers out there. But make sure you do all you can to equip them with the tools they need to work to the best of their ability, safely. ■

► Continued from page 1 **"New regulatory advice: Managing the risks of time slot bookings"**

"There are other risks associated with slot booking systems that can impact safety in and around the facility: queuing vehicles may lead to increased traffic and traffic congestion around the site; time constraints during loading can limit the chance for drivers or other workers to restrain and secure their load properly; and rushed unloading can compromise safe work practices."

### WHY IS IT IMPORTANT TO MANAGE THESE RISKS?

Poor time slot practices can have unintended negative impacts on fatigue, speeding, loading and traffic congestion, and result in a greater risk of road accidents.

### WHO HAS A DUTY TO MANAGE THESE RISKS?

Responsibility to manage time slot bookings falls mainly on two parties in the CoR:

- Businesses that own or operate facilities at which vehicles are loaded or unloaded. These businesses are 'loading managers' under the Heavy Vehicle National Law. As the businesses that impose time slot bookings and responsible for managing the flow of loading and unloading activities at a site, these businesses must ensure that their time slot booking system and operations do not adversely impact a transport operator's or driver's ability to plan their load, load and secure their load, or drive safely.
- Transport operators and schedulers must ensure that their rostering and load planning accommodates slot bookings,

and that they have practices in place to ensure that any delays to their schedule are accommodated or for alternative arrangements to be made if delays prejudice their ability to do their job safely.

### HOW CAN YOU MANAGE THE RISKS?

The regulatory advice includes a great table of suggested risk controls for loading managers, and transport operators and schedulers, including the following:

- loading managers should:
  - ensure sufficient staff are available to load or unload vehicles;
  - ensure loaders and unloaders work efficiently; and
  - in the event of a delay, communicate with operators and drivers to allow drivers the opportunity to better manage their fatigue along the journey; and
- transport operators/schedulers should:
  - when developing a driver's schedule, allow the driver adequate time to complete the entire freight task lawfully; and
  - minimise queuing times by planning the journey to arrive at scheduled times and using any extra time around bookings to rest where possible.

You can find the regulatory advice at [www.nhvr.gov.au/safety-accrreditation-compliance/chain-of-responsibility/regulatory-advice/managing-the-risks-of-time-slot-bookings](http://www.nhvr.gov.au/safety-accrreditation-compliance/chain-of-responsibility/regulatory-advice/managing-the-risks-of-time-slot-bookings). ■

## Revisiting a deadly wake-up call for fatigue-affected drivers

Joshua Clarke, Lawyer, Holding Redlich

**Tragedies sometimes occur in the heavy vehicle industry that serve as a stark reminder of the importance of taking Heavy Vehicle National Law (HVNL) obligations seriously. This month, we revisit the case of *R v Crockford (2020)*, which arose from a fatigue-related incident in 2018. The incident killed two people, injured 10 (three very seriously) and earned one heavy vehicle driver a sentence of imprisonment for 9 years and 6 months.**

On 16 January 2018, driver Robert Crockford headed south on the Newell Highway in regional NSW in his Argosy Freightliner prime mover with a Halmark tri-axle trailer while carrying pre-fabricated concrete panels. The vehicle weighed 35 tonnes.

Eyes heavy, Mr Crockford fell in and out of sleep while his truck wandered in and out of its lane and passed, without pause, bright yellow, red and flashing signs that cautioned 'roadwork ahead', 'reduce speed' and 'prepare to stop'. As the truck approached a queue

of cars at 85 km/h, the driver did not break, swerve, decelerate or take any evasive action.

The truck collided with the rear of a Toyota Camry, followed by several more vehicles, in a moment that the Chief Judge of the District Court of New South Wales said, "irrevocably changed the lives of many people and the lives of many people in the communities in which the victims, their families and friends live".

The Court held that the collision was caused by driver fatigue, which brought about micro-sleeps and inattention. Two nights before, the driver had 4 hours and 45 minutes of rest, and the night before, he had 5 hours and 45 minutes of sleep.

Section 228 of the HVNL prohibits a driver from driving while impaired by fatigue. Section 26E prohibits other CoR parties from asking, directing or requiring or entering contracts that would cause drivers to drive while fatigued. Financial penalties apply for any contraventions of these provisions. But these pale in comparison to the potential consequences when driver fatigue causes an accident, as this case shows. ■

# Disciplining workers for breaching your CoR policies and procedures

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

Each party in the chain of responsibility (CoR) has obligations. This includes your employees. An employee breaching their obligations under the Heavy Vehicle National Law, or your own policies and procedures, is likely to be committing misconduct. As an employer, you may be required to discipline your workers if they have been found to have engaged in misconduct.

Generally, any unacceptable or inappropriate behaviour by an employee in the workplace that breaches company policies is considered misconduct. Examples include:

- deliberate non-compliance with safe work procedures;
- being verbally abusive to colleagues; and
- working while intoxicated.

## > IMPORTANT

Before taking any disciplinary action in response to misconduct, you need to properly investigate the matter. Workplace investigations help you to provide a proper factual basis to exercise your power to discipline a worker.

## WHAT DISCIPLINARY ACTION CAN YOU TAKE?

Disciplinary action can include:

- issuing a warning;
- suspending a worker from their duties or employment; and
- dismissing a worker.

When deciding what disciplinary action to take, you should consider:

- the seriousness of the misconduct, i.e. whether it is a large departure from acceptable workplace behaviour or a breach of a company policy or lawful and reasonable direction;
- any extenuating circumstances, e.g. the worker had been stressed and working long hours, or had been provoked by someone else's poor behaviour;
- the worker's performance history and record of service;
- whether the worker has apologised and taken responsibility for their misconduct; and
- action you have taken for any similar incidents that have previously occurred in your business.

## > IMPORTANT

You must follow the disciplinary provisions outlined in relevant industrial instruments (e.g. modern awards or enterprise agreements), your company policies and the worker's employment contract.

## ISSUING A WARNING

You will usually issue a worker with a warning before considering other disciplinary action. You may choose to give the worker a verbal warning or a formal written warning.

Verbal warnings may be more suitable for minor performance issues. If you verbally warn a worker, ensure that you document the discussion.

A formal warning letter should be written concisely and include:

- an outline of the allegations;
- a summary of the misconduct or work performance issue, e.g. a breach of policy;

- the findings of the investigation that gave rise to the warning, if relevant;
- an outline of an action plan that sets out:
  - your expectations for improvement;
  - dates for improvement; and
  - review dates, i.e. when the worker's performance or conduct will be reassessed;
- a statement confirming that further disciplinary measures, including dismissal, may be taken if:
  - the worker's performance or conduct does not improve; or
  - the worker has any other performance or conduct issues.

## SUSPENDING A WORKER

If a worker's poor performance or misconduct causes serious safety risks to themselves or others in the workplace, a formal warning may not be enough to minimise the risks. In that case, it may be necessary to suspend a worker from a particular activity or employment while they receive further training, counselling or instructions, or while an investigation takes place.

If you decide to suspend a worker's duties or employment, you must determine how long the suspension should last. To determine this period, you should review the terms of the workers' contract of employment and any applicable policies.

Other than if there is an express clause in a contract or policy, a worker may only be suspended for a reasonable period (1 to 2 weeks) and they should continue to be paid their wages.

## DISMISSING A WORKER

You may consider dismissing a worker if the misconduct is sufficiently serious or they have failed to improve after you have taken other disciplinary measures or performance management.

When dismissing a worker for misconduct, you must undertake a fair process that includes providing notice of dismissal or payment in lieu of notice. However, for serious misconduct, you can dismiss the worker instantly (i.e. undertake a summary dismissal). Serious misconduct is misconduct by a worker of such a nature that it would be unreasonable to require the employer to continue employing the worker. Examples include theft, fraud, violence, and serious breaches of health and safety policies and procedures.

## FAIR DISMISSAL PROCESS

If you decide to dismiss a worker, take the following steps to ensure the dismissal is lawful:

1. Meet with the worker to discuss their dismissal. Allow them to bring a support person if they wish. Explain the reasons for the dismissal and allow the worker the opportunity to respond before making the final decision to dismiss them.
2. Ensure you meet your notice obligations. Generally, you must provide workers you are intending to dismiss with notice of dismissal or a payment in lieu of notice. However, you don't need to give the worker notice of dismissal if they are employed on a casual basis, are employed for a specified task or period (i.e. a fixed-term contract) or have engaged in serious misconduct.
3. Provide the worker with a letter of dismissal. You may also need to provide the worker with other information or documents, such as a separation certificate or a statement of service, if this is specified in the employment contract or agreed to in settlement negotiations with the worker. ■

► Continued from page 1 **“How to implement a safety management system”**

An SMS helps businesses continuously improve the safety of operations through the following four components:

### 1. SAFETY POLICY AND DOCUMENTATION

Your entire business should be committed to establishing and maintaining policies and procedures that ensure work is performed safely.

Business owners or executives have direct duties under the HVNL and are accountable for the business' use of safe practices throughout its commercial operations. Of course, executives can delegate tasks to implement those safe practices, but ultimately, they cannot delegate their duties under the HVNL.

As a first step for limiting liability and ensuring safety across a business' commercial activities, you should put a documented safety policy in place to point the business in the right direction.

A safety policy should:

- acknowledge that executives and the organisation are committed to safety;
- reflect the business' operating environment;
- outline the business' approach to safety;
- explain how safety and risks will be managed and by whom; and
- show how the business will continuously improve its safety performance.

As a second step, you should implement safety objectives. The purpose of these safety objectives is to complement the safety policy, and help workers envision how safety can be achieved in practical terms. Some examples of safety objectives include:

- conducting weekly safety meetings with employees;
- responding to all hazard reports within 24 hours;
- reviewing all risks and risk controls at least every 6 months; and
- promoting reporting of maintenance issues to reduce vehicle downtime.

As a third step, you should clearly establish the safety responsibilities of each employee. Responsibilities should be clearly defined and appropriately allocated to the right person in the business, and there should be a direct reporting line to upper management/executives to report safety issues.

Establishing a direct reporting line is a critical part of ensuring compliance. It allows executives to demonstrate that not only are safety measures in place, but they are also taking proactive steps to ensure that any safety issues during the day-to-day operations of the business are appropriately reported.

Lastly, all staff members should make an effort to gain operational experience and boost their knowledge of safety in their organisation. Everyone within a business has some responsibility to ensure safety, and appropriately trained staff is a major step in the right direction.

Underpinning all this is a need to document each step. It is often the most burdensome but it needs to be done. While you may be confident that your business is compliant, you need to ensure the documentation can demonstrate to someone outside the business that you are compliant. Documents may include procedures, checklists, forms, etc, which can all be used to support the steps you take to ensure safety.

### 2. SAFETY RISK MANAGEMENT

There are five subcomponents to safety risk management:

- 1. Hazard identification:** Employees engaged in the day-to-day operations of the business are best placed to identify different hazards, such as physical objects that are clearly visible, behaviours, and a business' policies or procedures.
- 2. Risk assessment:** A risk assessment is useful in identifying the consequences if a hazard materialises, the extent to which hazards may interact or compound, and the manner and timeframe in which these hazards should ideally be resolved.
- 3. Risk mitigation/treatment:** Once risk has been identified and assessed, the next step is to ensure that the risk has been addressed and mitigated. This requires implementing a control to mitigate the risk.
- 4. Risk monitoring:** You must then monitor and review how the control is addressing the risk. Don't wait until something goes wrong – it's important to review the effectiveness of your risk controls periodically.
- 5. Incident reporting:** Despite a business' efforts, incidents and near misses will inevitably occur. When those incidents do occur, you must have a system in place to allow employees to report those incidents to the appropriate person, to gather that information, document it, and allow the event to be investigated and analysed to improve future safety outcomes. The incident reporting framework should specify the following:
  - the types of incidents or near misses that need to be reported;
  - who needs to report incidents, when and to whom;
  - instructions for dealing with larger incidents, such as contacting emergency services and preserving the site of the incident; and
  - attending to injuries and ensuring the safety of those involved.

Together, each subcomponent ensures there is a proactive approach to managing safety, and creates a process of identifying, assessing, treating and monitoring risks the business encounters.

### 3. SAFETY ASSURANCE

You should prioritise safety assurance in your business. Safety assurance is achieved by making a commitment to the following four aspects in your organisation:

- **Internal safety investigations:** This is a commitment to monitoring and evaluating any incidents or near-misses that your organisation encounters. Importantly, we recommend that organisations are mindful of how processes can change and be improved, as opposed to merely identifying and punishing those who are responsible.
- **Safety performance monitoring and management:** Your organisation should be mindful of how your SMS operates and any potential shortfalls it may have. You should also put mechanisms in place to allow stakeholders in your organisation to amend and improve the SMS. A significant consideration is how your SMS acknowledges and reacts to areas that are of increasing risk to your organisation.
- **Change management:** Safety risks often evolve out of an organisation's inability to adapt to change. As a result, it is crucial that your SMS ensures the safety of your organisation by developing a structured approach to change management. This may involve increasing the participation of all employees in safety initiatives or even consistently evaluating the risk that a change may bring in an organisation.

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**"How to implement a safety management system"**

- **Continuous improvement:** While it may be helpful to collect data on risk management and safety, it is of equal importance that organisations are mindful of how the data collected can shape an SMS. Accordingly, we highly recommend that your organisation periodically evaluate your SMS, and implement any recommended changes to your SMS.

**4. SAFETY PROMOTION AND TRAINING**

An effective SMS can be achieved by promoting and communicating safety at all levels of your organisation. In practical terms this means:

- **Establishing adequate training and education programs:** Your organisation should offer safety training that provides employees with the knowledge and skills necessary to help identify, manage and resolve safety risks, as well as perform their responsibilities safely. Provide refresher courses throughout the year to ensure that all employees are up to date.
- **Encouraging safety communication throughout the organisation:** You should encourage employees at all levels to communicate their thoughts on safety in your organisation. Conveniently, by opening up avenues for employees to express their thoughts when it comes to safety, your organisation's SMS may improve more holistically.
- **Prioritising safe practices:** A successful SMS is one that is supported by all employees. Best practice states that senior management should set an example for safe working practices. Ideally, this means that a new employee entering your organisation should be able to recognise the entire organisation's commitment to safety.

It can often seem like an insurmountable task to develop and implement a well-functioning SMS. But it can be done one step at a time. ■

 **TIP:** For more information, visit [www.nhvr.gov.au/files/201805-0798-sms-introduction-to-sms-in-the-heavy-vehicle-industry.pdf](http://www.nhvr.gov.au/files/201805-0798-sms-introduction-to-sms-in-the-heavy-vehicle-industry.pdf) for the *Introduction to Safety Management Systems in the Heavy Vehicle Industry* published by the NHVR.

# Implementing an effective safety management system in your business

A robust safety management system (SMS) will significantly assist your business in meeting its safety responsibilities under the Heavy Vehicle National Law.

Your business will benefit by having a means to manage risk and enhance safe practices, as well as a means to assist you in allocating resources to the most critical areas that have an impact on safety.

Here is a short checklist to get you thinking about what is required for an effective SMS:

CHECKLIST: HOW TO DETERMINE WHETHER YOUR SMS IS EFFECTIVE <span style="float: right;">DOWNLOAD </span>	
<b>Safety policy and documentation:</b>	
✓	Is there a commitment from business owners and managers to ensure and improve the safety of the transport activities the business performs?
✓	Are roles and responsibilities related to safety clearly defined?
✓	Is there a process in place to manage safety when interacting with other parties?
✓	Are there policies and procedures in place that document how work is performed safely?
✓	Does your business have sufficient resources (financial, human, material) to support the SMS?
✓	Has your business identified and documented safety objectives that support the safety policy?
✓	Does your business have a safety manager/officer or someone appointed to implement, manage, communicate and promote the SMS?
✓	Does your business have an SMS manual that outlines the safety requirements and direction for the business?
<b>Safety risk management:</b>	
✓	Does your business have a process in place to identify and record hazards?
✓	Do you have a culture encouraging hazards to be reported to senior management?
✓	Does your business have a risk register in place to assess risks created by hazards, develop and implement controls, and ensure the ongoing effectiveness of risk controls?
✓	Are controls in place to eliminate or minimise risks?
✓	Does your business have a formal process in place for reporting incidents and near misses?
<b>Safety assurance:</b>	
✓	Does your business have an internal safety investigation framework to deal with incidents or near misses?
✓	Are controls regularly reviewed to ensure they're appropriate?
✓	Does your business conduct regular checks of work activities associated with documented procedures and processes?
✓	Does the business have a process to monitor and measure the control's effectiveness?
✓	Are improvements made to the SMS following outcomes of risk management and safety assurance activities?
<b>Safety promotion and training:</b>	
✓	Are employees provided with appropriate and ongoing training?
✓	Does your business conduct ongoing safety promotion activities (e.g. regular briefings, toolbox talks, newsletters, display board)?
✓	Does management/leadership play an active role in ensuring workplace safety is a top priority?

# New regulatory advice: Managing the risks of heavy vehicle transport activities in the construction industry

Melanie Long, Associate, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) has released new regulatory advice on managing the hazards and risks associated with heavy vehicles in the construction industry. This release comes off the back of reports from compliance officers and the 2021 National Roadworthiness Survey indicating that heavy vehicles have an observed pattern of non-compliance when used in construction activities.

## WHO IS THIS REGULATORY ADVICE FOR?

The NHVR has released two regulatory advice articles on this topic: one for operators and the other for principal contractors. Accordingly, the regulatory advice is for heavy vehicle operators who engage in transport activities within the construction industry and their executives.

'Transport activities' includes all the activities associated with the use of a heavy vehicle on a road including safety systems, business processes such as contract negotiation, communication and decision making, as well as activities normally associated with the transport and logistics sector such as training, scheduling, route planning, managing premises, selecting and maintaining vehicles, packing and loading.

## WHAT ARE THE LEGAL OBLIGATIONS OF OPERATORS AND EXECUTIVES IN THE CONSTRUCTION INDUSTRY?

Both operators and executives must comply with the primary duty under the Heavy Vehicle National Law (HVNL) to ensure, as far as reasonably practicable, the safety of their transport activities. Executives have the additional duty to ensure the business complies with its primary duty.

Failure to comply with these primary duty obligations can result in one or more enforcement measure being taken, including formal warnings, enforceable undertakings, infringement notices, improvement notices, prohibition notices, injunctions and prosecution.

## WHY IS THIS AN ISSUE FOR THE CONSTRUCTION INDUSTRY?

According to the NHVR, there is evidence to suggest that there is a pattern of non-compliance in the construction industry. Additionally, recent state and federal government agency initiatives that have been implemented to assist the economy to recover from the effects of the COVID-19 pandemic have meant a significant increase in infrastructure and construction projects. This has resulted in an associated increase in heavy vehicle use, which has meant a greater potential for safety breaches and hazards.

## WHAT ARE THE SAFETY RISKS AND HAZARDS?

Businesses should undertake a risk assessment to identify the specific risks and hazards applicable to either the operator or primary contractor, and consider what control measures are required to prevent those risks.

Some of the risks and hazards in the construction industry identified by the NHVR are:

- mechanical safety of vehicles, especially heavy rigid truck and trailer combinations;
- loads not being properly restrained; and
- vehicles exceeding mass and/or dimension limits.

These tie into related hazards that are known across industries, including:

- driver fatigue;
- alcohol and drug impairment;
- vehicles complying with access requirements;
- time slot allocation/queuing (principal contractor); and
- prohibited requests/contracts (principal contractor).

## MANAGING THESE RISKS AND HAZARDS

The NHVR recommends a number of ways to manage these risks and hazards. Examples of some of these recommendations in relation to the construction-related risks are outlined below.

### Mechanical safety

Operators should:

- implement a daily checklist for the mechanics of heavy vehicles;
- have a maintenance, fault and defect history recording and reporting system;
- ensure any reported faults or defects are responded to in a timely manner; and
- monitor the age of the heavy vehicle fleet (vehicles with an age of 12 years or more are generally associated with higher levels of defects).

Principal contractors should:

- view an operator's maintenance regime and records;
- request that the operator provides details of their compliance history;
- give preference to operators who hold relevant safety accreditations; and
- be aware of the age of an operator's heavy vehicle fleet.

## Load restraint, mass and dimension limits

Operators should:

- identify the mass and dimension requirements that apply to each vehicle or combination, and communicate that information to employees and other relevant parties;
- provide drivers with training and the requisite equipment to ensure dimension requirements are met and to safely restrain loads;
- provide drivers with accurate load weights and dimensions before or at the point of loading;
- develop load restraint systems for common loads, and communicate them to employees and other relevant parties;
- not enter contracts or arrangements that have a risk of causing a driver to breach mass, dimension and loading requirements; and
- have regular check-ins with employees and other parties to (openly and transparently) communicate risk, controls and best practice.

Principal contractors should:

- install relevant equipment and infrastructure on construction sites to assist operators with properly restraining, weighing and measuring loads on heavy vehicles;
- ensure that on-site loaders, excavators and operator vehicles are fitted with relevant weighing systems; and
- use other methods for ascertaining load mass in addition to traditional methods, e.g. test weighs, calculation by use of known mass of loads (equipment, concrete, common steel products).

The regulatory advice provides operators and principal contractors with further resources to assist them with their regulatory compliance.

## CONCLUSION

NHVR regulatory advice is a great starting point for understanding your legal obligations under the HVNL. The advice is easy to read and understand, and provides practical guidance about the steps individuals and businesses can take to start managing and, in some cases, eliminating their safety risks and hazards. However, remember that the regulatory advice is only a starting point; there is no substitute for proactive action and personalised risk assessment and management.

You can find the regulatory advice at [www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/regulatory-advice](http://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/regulatory-advice). ■

## 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.

## What are my allocation duties under the chain of responsibility (CoR)?

**Q** I am involved in allocations. As a part of my role, I allocate performance-based standard (PBS) route specific loads. What are my direct allocation duties under the CoR?

**A** As part of your direct allocation duties, you should provide accurate information on the loads to enable the transport operators to assess route compliance and ensure loads do not exceed vehicle mass or dimension limits.

You should then exercise some form of compliance assurance and/or supervision activities. For example, you could undertake a mix of some or all of the following steps:

- pre-screen the transport providers to ensure that they are aware of route restrictions, and that they have compliance, scheduling and allocation practices in place to ensure compliance;
- make complying with PBS an express requirement in your contract terms with transport providers;
- check route-planning documentation prior to permitting vehicle departure;
- discuss route and route restrictions with drivers prior to departure;
- provide the PBS route diagram to the transport operator and drivers as part of their loading paperwork; and
- keep an eye and ear out for any instances of route breach (e.g. if a driver tells you that they went off-piste, or if their departure or arrival times indicate that they did so, then take it up with the transport operator; if the message doesn't get through, sanction them).

## Responding to request for information by the National Heavy Vehicle Regulator (NHVR) and other authorities

**Q** We sometimes get requests from regulators for information and documents. What is best practice for dealing with such requests?

**A** If you receive a request for information, documents or evidence from a regulator, we suggest you respond as follows:

1. Make sure the request is reported internally to the appropriate person, e.g. a compliance officer, manager or director of the business.
2. Make a note of how long you have been given to comply with the notice to produce. If it is a short period and you are concerned that you will not be able to comply fully in that timeframe, request a short extension. Make sure to do this well before the time for compliance expires.
3. Get legal advice. Requests for information give rise to potential legal liability, and penalties for non-compliance or partial compliance and should be escalated appropriately. Your lawyer can help you to understand the full scope of documents that may need to be produced and will also consider whether the request falls within the scope of powers given to the authorities under the relevant legislation.

4. Conduct thorough searches of all your records. The law requires that you provide information in your possession or control. If documents are in the possession of a third party or are archived, but if you have the ability to obtain them, they are likely within your control and ought to be produced.
5. Consider whether you have a reasonable excuse not to comply with the directions. If, for example, the request is oppressive and requires you to produce a substantial amount of documentation, you may be able to negotiate a sample size to be produced.
6. Collate all the relevant documents/information and provide them to the officer, and keep a copy of the documents you have produced. Think carefully about providing additional information beyond what is requested.

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

Failure to comply with a notice to give information, documents or evidence to an authorised officer can attract significant penalties: up to \$11,490 for an individual or \$57,450 for a corporation.

## Registered Industry Codes of Practice

**Q** What are the benefits of having a Registered Industry Code of Practice?

**A** Registered Industry Codes of Practice (**Registered Codes**) are codes developed by any CoR party registered by the NHVR. They set out detailed, practical standards and procedures to achieve compliance with the HVNL.

Although they are not mandatory, a Registered Code can be an excellent and very valuable tool to help you comply with the HVNL, and to defend any investigation or prosecution.

A Registered Code sets out the current state of industry knowledge of compliance hazards and risks, and best practice for how to respond to them. If you can demonstrate that you have followed a Registered Code, it will be easier for you to defend a prosecution because you will be able to show that you have applied current industry best-practice risk assessment and response measures. ■

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## Tackling fatigue-related breaches with improvement notices

The National Heavy Vehicle Regulator (NHVR) recently issued improvement notices to two companies to rectify fatigue management breaches under the Heavy Vehicle National Law (HVNL). This is the latest example of the NHVR favouring improvement notices as an enforcement tool to quickly deal with fatigue management breaches, and consequently prevent any potentially immediate harm to drivers and the wider community.

### WHAT IS AN IMPROVEMENT NOTICE?

Improvement notices are used as an enforcement tool by authorised police officers and the NHVR under section 572 of the HVNL. A notice is issued where it is reasonably believed that an individual or company has breached, or is contravening, the HVNL in circumstances that make it likely that the contravention will continue or be repeated.

The notice identifies the grounds upon which the reasonable belief for the breach of the HVNL is held and details the course of action needed to resolve it. Its purpose is to educate parties about the right ways to manage their obligations under the HVNL by improving their behaviour. It also has the advantage over other enforcement mechanisms (such as prosecution) of enabling offenders to improve their safety and compliance systems quickly with the oversight of the NHVR. It is for this reason that improvement notices may be issued in anticipation of a repeated offence, so that the individual or company and the NHVR may prevent it from happening.

Failing to comply with an improvement notice without reasonable excuse can result in a fine of up to \$10,000 for an individual and \$50,000 for a company.

### RECENT IMPROVEMENT NOTICES ISSUED FOR FATIGUE-RELATED BREACHES

The NHVR recently investigated two companies for fatigue-related breaches. In both cases, it identified multiple work diary, work hours and fatigue issues, and failures to provide adequate fatigue compliance training and appropriate work scheduling for employees.

Improvement notices were issued, requiring both companies to take corrective action and deliver activities to prevent further breaches, including implementing:

- formal training;
- weekly and fortnightly audits;
- revised scheduling;
- drive safe journey plans; and
- non-conformance policies.

In August 2021, an improvement notice was issued under similar circumstances to a multi-national logistics company. This came after the NHVR received a report through its Heavy Vehicle Confidential Reporting Line.

The NHVR completed an extensive safety duties investigation and found the company had scheduled drivers drive between Adelaide, Melbourne and regional NSW without enough rest hours. Additionally, several drivers had falsified their work diary pages by recording breaks during work hours.

The improvement notice issued required the company to:

- improve its scheduling and auditing practices;
- ensure every vehicle combination in the company's fleet used an electronic work diary; and

- undergo monitoring by NHVR investigators for 6 months to ensure it complied with the notice.

In both cases, the companies' activities were identified as breaching the fatigue management regulations under the HVNL. Relevantly, it appears that the improvement notices related to the following driver duties under the HVNL:

- not to drive a fatigue-regulated heavy vehicle while impaired by fatigue;
- to comply with set work and rest limits;
- to keep accurate and complete work and rest records, and carry a work diary (written or electronic); and
- to provide these records to their record keeper.

Employees who record false or misleading entries are in breach of section 325 of the HVNL. They will also be in breach of sections 701-2 if they make false or misleading statements, or give false or misleading documents to an official.

In addition to their primary duty to ensure the safety of their transport operations as far as reasonably practicable, companies must ensure they prevent drivers from driving while fatigued, and should not direct or allow employees to exceed their set work and rest hours.

### HOW TO AVOID RECEIVING AN IMPROVEMENT NOTICE AND WHAT TO DO IF YOU DO

The best way to avoid receiving an improvement notice is to continually ensure your compliance with the HVNL. If you ever find yourself on the receiving end of an improvement notice, you must take steps to stop the breach from occurring or reoccurring by following the steps suggested in the notice or steps of similar effect. The set timeframe is the period in the notice, which is generally 7 days after it is given. It can be shorter if it is reasonable and isn't likely to involve a higher cost or disrupt your business operations.

Once you have complied with an improvement notice, you should ensure that you do not revert back to your old ways. As previously stated, improvement notices should also act as an educational tool to improve your overall business practices, ensure continued compliance with the HVNL, and ensure the ongoing safety of drivers and the wider community.

### TAKEAWAYS

- Improvement notices are issued where it is reasonably believed that an individual or company has breached, or is contravening, the HVNL in circumstances that make it likely that the contravention will continue or be repeated.
- Improvement notices are an effective way of dealing quickly with breaches or potential breaches of the HVNL with the assistance of the NHVR.
- The NHVR is increasingly using improvement notices as a way of dealing with fatigue-related breaches.
- If you receive an improvement notice, you must take immediate (normally within 7 days) steps to comply with the notice to stop the breach or prevent it from reoccurring.
- Improvement notices not only ensure immediate compliance with the HVNL but act as educational tools to businesses to improve compliance in the future so that our roads and their users are safer. ■