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CoR ADVISER

Your one-stop resource for practical Chain of Responsibility solutions

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From Your Editor-in-Chief

Dear Reader,

'If poor business practices endanger the lives of other road users, there will be severe penalties for those responsible.' So said the National Transport Commission in July 2008 in its information bulletin introducing heavy vehicle driver fatigue as an element of the Chain of Responsibility.

Welcome to the 'Fatigue Edition' of *CoR Adviser*.

Fatigue management (or 'fat man' as I sometimes call it) is one of the four core elements of CoR, and perhaps the most difficult to administer. Clearly, the focus is on drivers and operators. The use of log books as well as basic and advanced fatigue management accreditation should go a long way to dealing with fatigue.

However, with the press regularly featuring stories of log book fraud and drug abuse, as well as the demands of business for greater efficiencies and 'just in time' supply chains, drivers are still regularly pushing the envelope, sometimes with deadly consequences.

In this edition of *CoR Adviser,* we will be examining the laws and practices relating to fatigue and looking at strategies to help you manage your fatigue risks.

Warm Regards,

Geoff Farnsworth
Partner, Holding Redlich
Editor-in-Chief, *CoR Adviser*

Understanding your fatigue obligations

Geoff Farnsworth, Partner, Holding Redlich

Of the four elements of Chain of Responsibility (CoR), fatigue is perhaps the most difficult to manage. Unlike speed, mass and load securing, fatigue is often a combination of objective and subjective factors.

Anyone can look at a driver's log book and determine whether they are within their hours. But there is much the log book cannot tell you. While drivers obviously have the obligation to avoid driving while fatigued, other CoR parties also have an obligation to prevent drivers from driving while fatigued.

In fact, in a reversal of the reasonable steps defence as it applies to other CoR elements, a person in the CoR has a positive obligation to take all reasonable steps to ensure a person does not drive while impaired by fatigue.

CoR parties include the scheduler or operator of a vehicle, together with the consignor, consignee, loading manager, loader and unloader.

The practical effect of this is that a party must be able to demonstrate that they have a system in place for preventing a driver from driving while fatigued. This includes an express requirement that the terms of consignment will not result in someone driving while impaired by fatigue (i.e. not encouraging or providing incentives for them to do so).

➤ *Continued on page 2*

Case study: Dealing with a fatigued driver

Geoff Farnsworth, Partner, Holding Redlich

Here's the scenario: You are the manager of a distribution centre. A truck driver arrives at your facility to deliver a consignment of goods in a shipping container. You are concerned that he may be fatigued. What should you do?

The definition of fatigue under Chapter 6 of the Heavy Vehicle National Law (**HVNL**) includes feeling sleepy, or physically or mentally tired, and behaving in a way consistent with these factors. Other signs may include a lack of alertness or inability to concentrate.

Given the broad reach of your Chain of Responsibility (**CoR**) obligations to prevent a vehicle being operated by a fatigued driver, you would be advised to err on the side of caution. If the driver is behaving as if they are tired or lacking energy, you have reasonable grounds for believing they are fatigued.

Before proceeding any further, you should call the owner/operator of the vehicle, and/or the consignor, and let them know of your concerns. You should document this correspondence in writing if possible.

If the operator or consignor is not responsive, you may have to speak directly to the driver and advise them of your concerns.

The situation may become difficult to manage, particularly if the driver does not accept that they are fatigued and demands that the vehicle be unloaded, or attempts to leave your premises.

— HELPDESK QUESTION OF THE MONTH —

'What are the obligations of speed limiter suppliers if the device was not correctly configured or maintained?' (answer on page 10)

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

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Landmark fines in transport case overturned

Last month's *CoR Adviser* featured a case study on the 2014 prosecution of Mount Gambier-based transport and logistics operator Scott's Transport, together with a director and two general managers, for a number of speeding offences. Shortly after the issue went to print, news came through that the landmark $1.25m penalty the company received had subsequently been reduced on appeal to $85,000.

Scott's was originally investigated and prosecuted by NSW's Roads and Maritime Services after its trucks were caught driving at speeds of up to 142 km/h. The agency documented 165 speeding breaches.

The case was distinctive not just for the record penalty, but also its ramifications for how second and subsequent Chain of Responsibility (**CoR**) offences would be penalised, as well as just how demanding the 'all reasonable steps' threshold could be. Scott's Transport pleaded guilty to the speeding and speed limiter charges.

The sentence, handed down by a local court magistrate, was appealed in the NSW District Court. The judge in the appeal hearing (which was not published as a written judgement) found that the seriousness of the offence was at the lower end of the scale – both in terms of the speeding instances themselves, and in terms of the failure to take all reasonable steps.

Most significantly, the increased penalties for second and subsequent offences were withdrawn. This was on the basis that Scott's had not been aware of earlier offences when later offences were being committed (it was charged with all offences simultaneously).

As part of the revised result, no fines were imposed on the director, and it was acknowledged that Scott's had since put satisfactory measures in place to prevent drivers from speeding.

➤ *Continued from page 1*

Understanding your fatigue obligations

For example, 'causes of fatigue' is defined as any factor that could cause or contribute to a person being fatigued while driving a fatigue-regulated heavy vehicle on a road, whether or not the cause arises while the person is at work.

➤ DEFINITION: FATIGUE-REGULATED HEAVY VEHICLE

For the purposes of the Heavy Vehicle National Law (**HVNL**) a heavy vehicle is a fatigue-regulated heavy vehicle if it is:

- a motor vehicle with a gross vehicle mass of more than 12 tonnes;
- a combination with a gross vehicle mass of more than 12 tonnes; and
- a fatigue-regulated bus.

It does not include off-road vehicles such as bulldozers or excavators.

The HVNL provides the following examples as causing fatigue:

- physical or mental exertion;
- long periods of time awake;
- not enough sleep or not enough restorative sleep;
- not enough rest time;
- a person's circadian rhythm (body clock);
- environmental stress factors, including heat, noise and vibrations; and
- personal health issues.

'Sign of fatigue' is defined as any sign that a person was, is or will be fatigued while driving a fatigue-regulated heavy vehicle on a road.

The HVNL provides the following examples of signs of fatigue:

- lack of alertness;
- inability to concentrate;
- reduced ability to recognise or respond to external stimuli;
- poor judgement or memory;
- making more mistakes than usual;
- drowsiness or falling asleep while at work (including 'microsleeps');
- difficultly keeping eyes open;
- needing more frequent naps;
- not feeling refreshed after sleep;
- excessive head-nodding or yawning;
- blurred vision;
- mood changes or increased irritability; and
- decreased health or fitness.

Workplace driver health program knocked back by FWC

A proposed workplace health regime at Cement Australia that would have required drivers to attend job-focused physical screenings has been rebuffed by the Fair Work Commission (FWC).

In *Transport Workers' Union of Australia v Cement Australia Pty Ltd (2015)*, the dispute began after Cement Australia developed a risk review program, citing time lost due to incidents and injuries. The intention was that employees would attend screenings and that the employer would receive an assessment of the level of risk of injury in performing their duties.

Cement Australia stipulated that participation in the program would be compulsory and that employees who refused to take part would be subject to disciplinary action. They considered this to be a lawful and reasonable instruction. However, the Transport Workers Union (**TWU**) disagreed and filed an application with the FWC.

In court, the TWU argued that the program was not reasonable and necessary for the employer to meet its legislative duties, including its duties under the Heavy Vehicle National Law (**HVNL**). In particular, it noted that Cement Australia was already accredited under the National Heavy Vehicle Accreditation Scheme (**NHVAS**), and that in order to comply with this, employee drivers were already required to undergo a medical assessment every 3 years.

Cement Australia argued that these assessments did not sufficiently assess employees' ability to perform the non-driving requirements of their role, including checking vehicle roadworthiness, loading and unloading. However, the FWC ruled that this direction went too far. Requiring an entire segment of the workforce to undertake a particular assessment, and then have the information gathered from that assessment supplied to the employer, was neither lawful nor reasonable in this instance.

Under CoR law, 'personal health' can be one of the causes of fatigue a court may consider to determine whether a driver was impaired, but as an employer, you should not take unreasonable steps to ensure the health of drivers. This case is a useful example of the sort of procedures an investigator would not expect you to have in place.

Vertical chain: Court outlines sentencing approach for multiple fatigue offences

Danella Wilmshurst, Partner, Holding Redlich

A recent NSW Supreme Court decision on sentencing for Heavy Vehicle National Law (HVNL) breaches provides an insight into how sentencing is approached within the vertical Chain of Responsibility (CoR) of a road transport company.

In *Palfrey v Spiteri; Palfrey v South Penrith Sand & Soil Pty Ltd; Palfrey v Roberts (2014)*, the charges were brought against the company, South Penrith Sand & Soil Pty Ltd, the owner of the company and its principal director, Mr Spiteri, and another director of the company, Mrs Spiteri. The scheduler employed by the company, Mr Roberts, was also charged.

As a result of two of the company's trucks being involved in a major road accident, the NSW regulator, Roads and Maritime Services (**RMS**), conducted an audit of the business, particularly its practices in relation to fatigue management and the reasonable working hours of the drivers. At the time of the offences, the company had 14 permanent truck drivers, and six casual drivers working primarily on weekends.

The investigation uncovered that particular drivers had driven for periods well in excess of standard work hours, and drove whilst affected by fatigue. In one instance, a driver had been engaged in working for 19 hours straight (starting at 3am and finishing at 10pm).

It was conceded by the defendants (and clearly evident on the RMS audit) that there were 'no systems or practices in place which addressed any issue relating to fatigue management for the drivers of the Company's vehicles'. Further, there were no practices to regulate driving hours or take account of safe working practices as specified by the legislation.

The legislation prohibits the driver of a regulated heavy vehicle from driving a vehicle while 'he or she is impaired by fatigue'. Further, there is a provision that any party in the CoR must take all reasonable steps to ensure that a person does not drive the vehicle on a road while they are impaired by fatigue.

The facts of the matter were substantially agreed to, and all parties had pleaded guilty. It was acknowledged that the drivers drove for the periods specified because Mr Spiteri or Mr Roberts had scheduled them to do so. It was also not in dispute that Mr Spiteri had the power to address the business practices in question and change them, but did not.

The court was left to deal with the individual circumstances of each defendant relevant to sentencing, and the appropriate approach to be taken where there are multiple offences.

In this judgement, it was apparent that there is also effectively an internal chain of responsibility for organisations in breach of the law. As well as the drivers themselves, the employed schedulers, operating company and each of its directors all had a criminal liability for the failure to prevent drivers from driving while impaired. Mrs Spiteri was not proven to have significant involvement in the operational side of the company, but the judge found that she was liable because she was a director.

Senior counsel appearing for the defendants argued that the multiple offences identified by the RMS audit were the product of 'a single act of criminality'. As a result, the defendant counsel argued that in substance it should be treated as though there was only one offence.

This was rejected by the judge, who stated: 'Such an approach would not adequately recognise that each charge represents an occasion of criminality, and an occasion when the road users and travelling public were potentially put at risk by sharing the road with a driver who was, or was at risk of, being affected by fatigue, and thus presented a potential danger to all other road users.'

The judge assessed the seriousness of the offence for each party. In Mr Spiteri's case, he deemed the failure to address issues of fatigue management for the drivers employed by the company to be a very serious failure, and near the top end of the range of seriousness for offences of this kind.

Similarly, the company's failure was described as serious. However, Mrs Spiteri and Mr Roberts were both found to be guilty of less serious criminality than that of Mr Spiteri and the company.

The relevant legislation on sentencing, the *Crimes (Sentencing Procedure) Act 1999* (NSW), provides that where any offence is committed 'without regard for public safety', that this will be treated as an aggravating factor. The judge considered that this should be taken into account for every defendant except for Mrs Spiteri.

Although the defendants entered guilty pleas, they sought to resist an order that they each pay the costs of the prosecutor on the basis that the prosecutor's conduct was unreasonable. Specifically, they highlighted a failure on the prosecutor's part to supply a concise statement of the factual basis of the charges.

Perhaps unsurprisingly, this was not entertained by the judge. He noted that the prosecution had been brought on a proper basis and in discharge of a public obligation to enforce the heavy vehicle transport legislation.

The fines imposed for each party in the vertical CoR are listed below and reflect the seriousness of each party's breach, having regard to the individual circumstances of each defendant. They do not include the prosecution costs each party was ordered to pay.

PARTY	PENALTY
South Penrith Sand & Soil Pty Ltd	$42,900
Peter Spiteri	$40,550
Jason Roberts	$5,050
Tienie Spiteri	$250

How to: Invoke the reasonable steps defence

Nathan Cecil, Partner, Holding Redlich

It is a defence to many offences under the Heavy Vehicle National Law (HVNL) to show that you took 'all reasonable steps' to avoid the offence. However, the HVNL does not contain a prescribed list of the reasonable steps that you are required to take, which will vary depending on the circumstances. So, what do you have to do to take 'all reasonable steps'?

➤ DEFINITION:
REASONABLE STEPS DEFENCE

The reasonable steps defence has two elements. In order to make the defence, you have to show that you:

- did not know and could not reasonably be expected to have known of the offence; and
- took all reasonable steps to prevent the offence (or that there were no steps that you could have reasonably taken).

The first point to note is that the reasonable steps defence requires you to take steps to prevent an offence. That is, the obligation on you is an active one, which requires you to positively do things to avoid breaches of the HVNL. Passive reliance on other parties in the Chain of Responsibility (**CoR**) to do the right thing is no longer an option, and it will not offer you any reliable protection.

Section 620 of the HVNL contains examples of matters that a court can consider when determining whether you took 'all reasonable steps' to prevent mass, dimension or loading offences.

Similarly, s 622 of the HVNL contains examples of matters a court can consider when determining whether you took 'all reasonable steps' to prevent speeding or fatigue management offences.

However, neither list is exhaustive. This means that ticking off each of the examples (some of which are listed here) will not necessarily satisfy the defence.

This is backed up by the wording of the defence, which requires you to take 'all reasonable steps'. A number of cases have confirmed that this means you must take all reasonably available steps to avoid an offence, not just some or most.

Before you can take all reasonable steps, you need to understand the potential offences and breaches your operation is exposed to.

This means undertaking a risk identification and assessment process, which we will look at in further detail in the next issue.

For any identified likely risks, you need to consider what steps can be implemented to avoid or mitigate those risks.

HOW MIGHT A COURT DETERMINE 'REASONABLE STEPS'?

As an example, some of the matters that a court might consider under s 622 of the HVNL include the measures available and taken to:

- prevent, eliminate or minimise the likelihood of a potential contravention happening;
- eliminate or minimise the likelihood of risks to public safety arising from a potential contravention;
- manage, minimise or eliminate risks to public safety arising from a potential contravention;
- include compliance assurance conditions in relevant commercial arrangements with other responsible persons for heavy vehicles;
- provide information, instruction, training and supervision to employees to enable compliance with the law;
- maintain equipment and work systems to enable compliance with the law; and
- address and remedy similar compliance problems that may have happened in the past.

The requirement to exercise supervision and control over other parties in the CoR effectively deputises each party to give notice of – and to some extent monitor compliance with – the HVNL by their business partners, customers, subcontractors and service providers in the supply chain.

DOCUMENTING REASONABLE STEPS

Documenting the steps you take and the reasons for taking those steps (or why you did not take others) is almost as important as taking the steps themselves. Lawyers, judges and courts give high regard to documented proof.

Without cold, hard documentary evidence of your risk assessment process, and consideration and implementation of reasonable steps, you may find it difficult to satisfy a judge that you have acted diligently to discharge your duty under the HVNL.

➤ IMPORTANT

If you do it, document it.

Written materials, which will greatly assist you in establishing the reasonable steps defence, include:

- a written CoR compliance policy, which is communicated to your partners and customers within the CoR (compliance with this policy should be included as a term of engagement);
- written staff training materials, with signed acknowledgment by staff, if possible (these materials may be included in company policy bundles and should be periodically recirculated and refreshed);
- written CoR compliance policy audit checks;
- non-compliance/breach response/remedy implementations; and
- supplementary training records.

If the reasonable steps outlined here are taken and documented, you will have reduced the likelihood of potentially harmful HVNL breaches by your organisation, and also be in a good position to defend any HVNL prosecution.

Checklist: Examples of reasonable steps for mass, dimension and loading

Nathan Cecil, Partner, Holding Redlich

Below are some examples of the particular steps that the major parties in the Chain of Responsibility (CoR) can take to help ensure compliance with the Heavy Vehicle National Law (HVNL) and establish the reasonable steps defence.

In order to determine where you might sit within the CoR, please refer to our article '**How to: Determine whether you are a party in the Chain of Responsibility**' in the May edition of this newsletter, which can be found at coradviser.com.au.

✓ **CHECKLIST:** REASONABLE STEPS FOR MASS, DIMENSION AND LOADING	
OPERATORS/MANAGERS/SCHEDULERS	
Implement work practices to ensure that vehicles and equipment are regularly inspected and properly maintained.	☐
Implement work practices to ensure that the weight of all loads and heavy vehicles are measured and recorded for each trip.	☐
Conduct regular audits of driver timesheets and work diaries.	☐
Ensure that vehicle scheduling systems are structured to provide time for driver breaks, rest and sleep. Ensure these are recorded so that audits can be conducted.	☐
Provide employees with accessible and understandable training and guidance on Chain of Responsibility (**CoR**) compliance, including ongoing training and supervision. Including CoR issues in toolbox meetings is a good way to ensure that CoR compliance becomes part of the daily routine in your workplace.	☐
Provide your CoR policy to your business and CoR partners and customers, and actively raise and resolve any of their practices that impair your ability to be compliant with CoR legislation.	☐
CONSIGNORS/CONSIGNEES	
Implement processes to weigh and measure all goods for road transport and provide this information to your logistics provider and/or trucking company when booking any transport.	☐
Set realistic pick-up and delivery timeframes that allow for unexpected delays, including delays caused by traffic, distribution centres and port terminals.	☐
Ensure that all loads are properly secured and restrained, and that they are capable of withstanding the planned trip without any shifting or movement within the load or freight container.	☐
LOADING MANAGERS/LOADERS/PACKERS	
Develop and use a loading diagram and load restraint guidelines for any standard/uniform repeat loads.	☐
Develop a loading diagram in consultation with drivers for any load in order to ensure that total mass and axle mass limits are not exceeded.	☐
Under-load if the weight of the load or combination cannot be accurately determined prior to the trip. Verify the load at some point prior to arrival at the destination and modify future loads accordingly (this is particularly relevant to field-loading soft commodities).	☐
Fit scales to loading equipment to keep a running check on the total load.	☐
Develop standard load documentation which requires the person in control of loading to verify the load mass, and the driver to verify that the mass and manner of loading does not exceed vehicle limits.	☐
Keep drivers informed of any loading/unloading delays and provide suitable areas for them to rest during periods of delay.	☐
DRIVERS	
Ensure that you know your vehicle's overall mass and axle mass limits.	☐
Ensure that you are provided with load weight documentation prior to planning a load and starting any trip.	☐
Keep all such load weight documentation (e.g. container weight declarations, weighbridge dockets, etc.)	☐
Check that your load is properly distributed and restrained before driving – you are responsible even if you do not physically load it yourself.	☐
Check that all load restraint equipment and gear is in good condition.	☐
Advise operators, managers and schedulers of any unexpected delays in loading, unloading or trip time.	☐

How to: Determine which fatigue management obligations apply to you

Natalie Dyjakon, Lawyer, Holding Redlich

Each party in the Chain of Responsibility (CoR) has obligations to take reasonable steps to ensure that drivers are not at risk of fatigue.

WHAT ARE YOUR OBLIGATIONS IN RELATION TO FATIGUE MANAGEMENT?

The Heavy Vehicle National Law (**HVNL**) and regulations in various states and territories outline the obligations of each party in the CoR to prevent fatigue, and specify maximum hours for work and minimum rest periods for drivers of heavy vehicles.

Here is an overview of some of the relevant fatigue-related obligations under the HVNL:

TABLE:
FATIGUE-RELATED OBLIGATIONS UNDER THE HVNL

Party in CoR	Fatigue-related responsibilities under HVNL
Employer/ prime contractor/ operator	▪ Must take all reasonable steps to ensure that the employer's business practices will not cause the driver to drive while fatigued, or drive in breach of the maximum work requirements and minimum rest requirements applying to the driver. ▪ Must make reasonable inquiries and be satisfied that the scheduler has complied with their relevant obligations.
Scheduler	▪ Must take all reasonable steps to ensure that the driver's schedule will not cause the driver to drive while fatigued, or drive in breach of their maximum work and minimum rest requirements. ▪ Must allow the driver to have the required amount of rest time, while also taking into account traffic conditions and other possible delays.
Consignor/ consignee	▪ Must take all reasonable steps to ensure that the terms of the consignment will not result in, encourage, or provide an incentive to the driver (or a relevant party who could influence the driver) to drive while fatigued, or drive in breach of their maximum work and minimum rest requirements. ▪ Must make reasonable inquiries and be satisfied that each relevant party (i.e. employer, prime contractor or operator) and each scheduler has complied with their relevant obligations. ▪ Must not make a demand that affects or may affect a time in a schedule that may cause the driver to drive while fatigued, or drive in breach of their maximum work and minimum rest requirements.
Loading manager	▪ Must take all reasonable steps to ensure that the arrangements for loading/unloading goods onto and from vehicles at or from the premises where the person is a loading manager will not cause the driver to drive while fatigued or drive in breach of their maximum work and minimum rest requirements. ▪ Must take all reasonable steps to ensure the driver is able to rest while waiting for goods to be loaded onto or unloaded from a vehicle if the time taken to load or unload is delayed, disrupted or otherwise longer than expected.
Driver	▪ Carry a work diary. ▪ Do not drive while fatigued.

WHAT RECORDS DO I NEED TO KEEP?

Under the HVNL, record keepers must keep certain records in relation to drivers.

Record keepers can be any of the following:

- the driver's employer;
- if the driver is operating under a Basic Fatigue Management (**BFM**), or Advanced Fatigue Management (**AFM**) accreditation, the BFM or AFM accredited operator; or
- the driver if the driver is self-employed.

Some of the information that record keepers must keep includes (but is not limited to):

- the driver's name, contact details and driver's licence details;
- the dates when the driver was on the road;
- the registration number of each heavy vehicle driven by the driver;
- the total number of work and rest times each day;
- the driver's rosters and trip schedules; and
- payment records, such as timesheets.

Records must be kept for a minimum of 3 years.

CASE LAW LESSONS:
INSPECTOR CAMPBELL V JAMES GORDON HITCHCOCK (2004)

In this case, a director of a haulage company was convicted of failing to provide a safe workplace after a truck driver employed by the company died in a collision caused by fatigue.

The court found that the company had failed to:

- ensure its drivers took sufficient rest breaks;
- correctly record and audit driving hours;
- provide a safe system of work to reduce the risk of fatigue;
- consider fatigue when preparing driving rosters; and
- adequately warn employees of the hazards of fatigue.

This decision demonstrates that employers must be aware of their obligations in relation to fatigue management and must actively seek to prevent worker fatigue.

Checklist: Effectively manage fatigue

Natalie Dyjakon, Lawyer, Holding Redlich

Here is a list of questions that parties in the Chain of Responsibility (CoR) should consider in relation to managing fatigue. The questions are based on the National Transport Commission (NTC) 'Guidelines for Managing Heavy Vehicle Driver Fatigue', available on the NTC website at www.ntc.gov.au. This checklist can also be used to evaluate the CoR readiness of your supply chain partners.

✓ CHECKLIST: EFFECTIVELY MANAGING FATIGUE IN THE CHAIN OF RESPONSIBILITY	
EMPLOYERS/OPERATORS	
Do you understand your obligations under the Chain of Responsibility (**CoR**) in relation to fatigue management?	☐
Do you understand the obligations of each party in the CoR in relation to fatigue management?	☐
Do you understand what fatigue means, how it may occur and how work systems may create fatigue risks?	☐
Do you provide training to your staff about their obligations in relation to managing fatigue?	☐
Do you give preference to customers who promote effective fatigue management?	☐
Do any of your staff require further training in order to enter a Basic Fatigue Management (**BFM**), or Advanced Fatigue Management (**AFM**) accreditation scheme?	☐
Do your business practices contribute to driver fatigue?	☐
Do you regularly review your fatigue management processes and assess whether any changes should be made?	☐
Do you consider driver fatigue and eliminating excessive work hours and unreasonable deadlines when planning your business practices?	☐
Do the schedules take adverse weather and road traffic conditions into account?	☐
Do you stay on top of developments in relation to fatigue and risk management?	☐
Do you provide a sufficient amount of information and training to your staff?	☐
Do you encourage drivers to have regular medical assessments?	☐
Do you provide assistance to drivers when required?	☐
Do you provide drivers with suitable rest facilities?	☐
Do you provide drivers with information on health and nutrition?	☐
CONSIGNEES / CONSIGNORS / LOADERS / UNLOADERS	
Do you understand your obligations under the CoR in relation to fatigue management?	☐
Do you understand the obligations of each party in the CoR in relation to fatigue management?	☐
Do you understand what fatigue means, how it may occur and how work systems may create fatigue risks?	☐
Do you provide sufficient training to staff?	☐
Do you regularly review your fatigue management processes?	☐
Do you check your business practices to ensure that drivers comply with all relevant legal limits?	☐
Do you have adequate systems in place that result in effective queuing as well as loading/unloading of heavy vehicles?	☐
Do you provide drivers with sufficient flexibility?	☐
Do you review the relevant contracts to see if there is unreasonable pressure placed on drivers?	☐
Do you provide drivers with suitable rest facilities?	☐
DRIVERS	
Do you understand what your obligations are in relation to fatigue management and the required work and rest times?	☐
Do you understand what fatigue means and how it can occur?	☐
Do you comply with your company's fatigue management policies and other related policies?	☐
Do you inform your employer when you think you are fatigued?	☐
Do you take all necessary rest breaks?	☐
Are you able to modify schedules and rosters?	☐
Do you report any fatigue-related problems?	☐
Do you maintain a work diary and any other required records relating to fatigue management?	☐
Do you disclose any conditions that may affect your ability to drive?	☐
Do you read the training material and any other information provided to you by your employer in relation to fatigue management?	☐
Do you exercise regularly?	☐
Do you stretch or exercise during your rest breaks?	☐
Do you take preventative naps before a shift?	☐
Do you generally try to sleep at a comfortable place during the night?	☐
Do you provide your employer with any feedback in relation to schedules?	☐
Do you ensure that your commitments and activities outside of work do not affect your ability to obtain a sufficient amount of sleep?	☐
Do you have any medical conditions that you are aware of that may affect your ability to comply with your work requirements?	☐

Policy update: Counting time and residual fatigue risk

Danella Wilmshurst, Partner, Holding Redlich

The 'Model Fatigue Law' contained in the Heavy Vehicle National Law (HVNL) prescribes how work time and rest time is to be counted for the purpose of the law. But the existing approach to scheduling for driver hours and how time is to be counted has been an area of strong disagreement between the various stakeholders and state agencies since the law was first introduced in 2008.

Concerns have been expressed by transport departments and police in some states that the current 'counting time rule' has the potential to cause a residual fatigue risk.

Before the law's introduction, the National Transport Commission (**NTC**) had developed separate amending regulations to address the enforcement of maximum work time limits. This involved making changes to the Model Fatigue Law. Victoria and SA adopted the NTC's amendments, but Queensland and NSW remained with the original rule.

The difference between the amended rule and the original rule is essentially how each approach treats the audit of a driver's work time over a 24-hour period:

- The original rule, implemented in NSW and Queensland, requires 24-hour periods to be counted from the end of a relevant major rest break.
- The amended rule, which was previously implemented in Victoria and SA, required 24-hour periods to be counted from the end of any rest break.

In practice, the amended rule could create several overlapping 24-hour periods being counted at the same time from each respective rest break. There have been concerns that this made it harder for the industry to use.

In May 2011, hoping to achieve consistency between states, the Australian Transport Council (now the Standing Committee on Transport and Infrastructure) agreed to revert to the original counting time rule. Victoria and SA then agreed to revert to the original counting time rule, but raised concerns that the original rule can give rise to a 'residual fatigue risk'.

The less onerous counting time provisions of the original rule allow for schedules that would not have been possible under the amended rule. Specifically, they permit a driver to work extended shifts on either side of a 7-hour break. These 'nose-to-tail' schedules can see a driver work up to 16.25 hours in a 24-hour period – two long work periods separated by a 7-hour opportunity to sleep.

The concern of relevant agencies and stakeholders in Victoria and SA is that the limited opportunity for sleep and the tendency of the first of the two work periods to be longer can create an overall fatigue risk.

In response, the NTC was directed to assess the residual fatigue risk and recommend any consequential legislative changes to manage it.

The degree and nature of such a residual fatigue risk was considered by the NTC by convening a dedicated working committee, assisted by experts in fatigue issues. Their final report, 'Counting Time and Residual Fatigue Risk', was published in October 2014.

The report concludes that there is no consensus on the degree and nature of fatigue risk associated with the scheduling that is possible under the current rule. Nor was there consensus on two out of the three recommendations included in the report, and circulated to workshop participants and key government and industry stakeholders prior to final publication. All three recommendations are shown below:

NTC REPORT:
COUNTING TIME AND RESIDUAL FATIGUE RISK

Recommendations	Response by key stakeholders
The Heavy Vehicle National Law (**HVNL**) should be amended to clarify that a 'relevant major rest break' means the longest continuous rest break required in a given period for each work and rest hours module.	No consensus.
The National Transport Commission (**NTC**) and National Heavy Vehicle Regulator (**NHVR**) should collaborate with industry and government to develop a national framework to collect real-life operational data to better inform future fatigue policy.	Agreed (subject to scope).
The NTC should lead a review of the Standard Hours module commencing in 2014–2015, instead of a review of the Basic Fatigue Management (**BFM**) module, which is currently scheduled to commence in 2015.	No consensus.

As you can see in the table above, the recommendation to develop a fatigue data framework was endorsed by key stakeholders. The NTC has already commenced this work. It is intended that this will provide a better basis for future policy in this area.

REMEMBER: It is important to note that under Chain of Responsibility (**CoR**) provisions, there is a general duty for all parties in the CoR to prevent drivers from driving a regulated vehicle while affected by fatigue.

This is a broader duty than simply checking that the scheduling is within the requirements of the current fatigue law. This is because there are various factors outside the regulatory requirements that can impact on fatigue risk and the level of fatigue a driver may experience at a given point in time.

TIP: Visit www.coradviser.com.au to access tables of the current required maximum work times and minimum rest times for heavy vehicle drivers.

COMPLIANCE INSIGHTS: COLIN KARLSON DIRECTOR OF KARLSON SERVICES PTY LTD

Making reasonable enquiries: What sources can you trust?

As a party in the Chain of Responsibility (CoR), you are required to make reasonable enquiries along the supply chain to ensure that all parties are compliant with fatigue, speed, mass, dimension and load restraint.

Enquiries can formally start with contracts and/or service level agreements between:

- consignors and transport prime contractors; and
- transport prime contractors and their subcontractors.

Reasonable enquiry can include:

- conducting a compliance audit along the chain;
- induction of new supply chain partners; and/or
- risk assessment of sites and tasks.

SUPPLY CHAIN AUDITS: TOO MUCH DUPLICATION?

It has become very common for consignors to conduct CoR compliance audits of their transport providers. In fact, it is common for transport providers (i.e. prime contractors) to be audited several times a year by multiple consignors. In most cases, there is a lack of recognition of previous audits. This huge duplication is a significant financial and time imposition for all parties.

These issues create a problem where carriers may be encouraged to jump through the hoop for the audit – even if in doing so, they do not achieve compliance.

THE PROBLEM WITH NON-VALIDATED SCORES

If an audit tool produces a score, it would be reasonable to expect that the score is achieved by validating each standard and set of criteria against a CoR risk's likelihood, frequency and consequence. This is not an easy process.

There are a large amount of Excel tools generating scores with no validation. Does the score actually reflect risk, or is it just a number?

For example, there is a lot of crash and accident data showing that speed and fatigue are high-frequency with high-level consequences. So why would an audit's question on the yellow line marking at a depot score the same as driver or scheduler fatigue training?

There are other, more challenging questions when weighing the importance of various risk factors, such as:

- Does it make sense to enquire into drivers being trained in fatigue, but not schedulers?
- Should record-keeping of timesheets score the same as speed monitoring? Do they have similar consequences?

The risk likelihood and consequence varies between tasks, and scores should be altered to reflect this. Unless there is actuarial data and statistics to validate a score, I suggest scores are of questionable value. Yes, it produces a nice fancy Excel tool, but is it delivering a useful benefit?

In my view, the most valuable measure is to consider whether a party has appropriate corrective actions in place to demonstrate compliance with CoR duties. Corrective actions are those actions taken to remedy non-compliance as and when it is identified.

SOME CONSIDERED SOLUTIONS

The Australian Logistics Council (**ALC**) National Logistics Safety Code (**NLSC**) audit tool is the only system I can currently see that:

- provides minimum standards for auditors;
- offers audits of each party in the supply chain, not just one link;
- provides a measureable corrective action process; and
- importantly, satisfies the Heavy Vehicle National Law's (**HVNL**'s) protections for the reasonable steps defence, which provide that compliance with all relevant standards and procedures under a registered industry code of practice will equate to all reasonable steps being taken.

If you do not go down the NLSC path, then consider:

- only using an audit tool aligned to CoR duties;
- having the tool reviewed by competent experts with formal qualifications;
- only using qualified auditors; and
- having your own business independently audited.

Lastly, always question the origin of an audit tool. Who actually built it, and when? And, importantly, is it fit for purpose?

COMMON PROBLEMS WITH COR AUDITS INCLUDE:

- They only operate one way along the chain (i.e. they do not audit the consignor, consignee or loading manager).
- They audit beyond the legislated CoR duties (e.g. they include work health and safety, contract requirements, insurance, and other matters that do not belong in the audit).
- The audits are prescriptive for how a carrier is to comply, not acknowledging that a carrier may have a unique system to achieve compliance.
- The prescriptive requirements are perceived 'best practice', and not an actual CoR duty.
- Auditors have varied qualifications.
- Audit tools are not aligned to legislation.
- Audit tools are producing a 'score' that has never been validated or weighted based on the actual risk being considered, which means the score means little to nothing.
- Non-validated scores are then being used as a means of selecting or standing down carriers.
- Different company audits require different solutions.

*Colin has formal qualifications in auditing, training and Chain of Responsibility (**CoR**), as well as decades of experience. His organisation specialises in the Australian Logistics Council (**ALC**) National Logistics Safety Code (**NLSC**) audits, CoR risk assessments, due diligence, reasonable enquiries and accreditation audits. No part of this article is to be reproduced on third-party websites or social media pages. For his presentations and further information on how to conduct these risk assessments, see alcsafety.com.au and chainofcompliance.com.au.*

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.

Chain of Responsibility (CoR) is a new concept and can sometimes be a difficult one for many participants in the supply chain. Besides CoR, the Heavy Vehicle National Law (HVNL), and associated regulations and rules around heavy vehicle road transport can be complicated. That's why *CoR Adviser* subscribers enjoy access to our exclusive Helpdesk service.

Whether your query is 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.

Q **Dave asked: Our business has all speed limiters maintained and tested by the company we originally purchased them through. As far as I know, they aren't involved in the supply chain as such, but what are their obligations and our rights in the event that the speed limiter was not correctly maintained or configured?**

A As an operator, manager or scheduler of a business involved in road transport, it is your responsibility to ensure that the vehicles are regularly maintained and that any speed limiters that are fitted are functioning properly. You are able to take a number of steps where speed limiters are maintained and tested by your supplier that will help you to meet your responsibility.

First, you should ensure that you have a written agreement with your supplier which makes clear that the supplier is providing maintenance and testing services that comply with the recommendations of the manufacturer of the speed limiters, and that the supplier is promising these services will ensure that the speed limiting devices are functioning correctly, and also correctly configured to meet your business's obligations.

Secondly, you should ensure that there are measures in place that will prevent any tampering with the speed limiter configuration by unauthorised people.

Finally, there should be information provided to drivers, schedulers and management about:

- the purpose of the speed limiters;
- the criminal consequences for not having functioning and compliant speed limiters; and
- the importance of driving at safe and lawful speeds for driver and public safety.

Q **Tammy asked: I understand that our business needs to be making 'reasonable enquiries' of the other parties in the chain we contract to in terms of their CoR compliance. My question is, at what stage are these enquiries sufficient? I have a prime contractor who I have dealt with many times in the past and consider to be reliable and safe, and he insists he has CoR policies in place. However, he has not been able to give me a written copy of these policies when I ask for them. Am I opening myself up to liability by continuing to contract with him despite this?**

A Under the HVNL, there is an obligation on certain parties in the CoR (such as employers, operators, consignees and consignors) to make reasonable inquiries and be satisfied that certain other parties in the CoR comply with their relevant obligations.

There is no definition of 'reasonable inquiries' in the HVNL. However, in the Heavy Vehicle Driver Fatigue Risk Checklist for Operators (available on the National Transport Commission (**NTC**) website at www.ntc.gov.au), some of the questions for operators to consider include:

- Do you review written and verbal instructions from customers to ensure they do not create fatigue risks?
- Do you clearly communicate the importance of fatigue management with parties in the supply chain and encourage them to improve business practices?
- Do you give preference to customers that promote effective fatigue management in their workplace?

Therefore, in your situation involving the prime contractor, it is good practice, as you have done, to request copies of relevant CoR policies. You could also explain that you need to see such policies to comply with your own company CoR policies and encourage the prime contractor to have such policies readily available. Ultimately, you need to feel satisfied that the prime contractor or other parties in the CoR that you deal with are compliant with the relevant rules.

Q **Walter asked: Our dispatch warehouse sees a steady stream of drivers arriving and departing to deliver stock each day. Sometimes there is a wait of up to 90 minutes at peak times from the vehicle's arrival until the vehicle is loaded and ready to go. With this in mind, what should our workplace be providing to drivers to meet our CoR obligations in relation to fatigue?**

A We assume you are either an employer or an operator. Under the HVNL, employers and operators must take all reasonable steps to ensure that the employer's business practices will not cause the driver to drive while fatigued, or drive in breach of the maximum work requirements and minimum rest requirements.

The NTC 'Guidelines for Managing Heavy Vehicle Driver Fatigue' states that one of the factors to consider when determining what controls are appropriate is whether your business provides amenities to help drivers take high-quality rest appropriate to the operation. Some of the examples given include providing lunch rooms, sleeping accommodation and sleeper cabs. Therefore, you should consider whether having lunch rooms or a space to allow drivers to rest or have a nap while they wait for the vehicle to be loaded would be appropriate for your business's operation.

The NTC 'Guidelines for Using Napping to Prevent Commercial Vehicle Driver Fatigue' states that the minimum amount of time for a nap should be at least 10 minutes and in most cases should last up to 30 minutes. These guidelines also explain that when required, employers should encourage employees to take a nap (e.g. before reporting to work and/or during their shift). You should have a company policy on napping in the workplace which will show your company's commitment to safe work practices.

The guidelines mentioned above are available from the NTC website at www.ntc.gov.au.

Q **Raquel asked: We are experiencing continual delays with late delivery of goods to our discount store chain. Having spoken to a number of drivers, we understand that these delays are originating with a dispatching warehouse that in the view of one driver is 'disorganised, understaffed and not efficiently run'.**

We have expressed our dissatisfaction to the dispatch operator, and they in turn have accused us of 'attempting to induce unsafe loading and speeding practices' by demanding that they lift their game. I resent the implication we are doing such a thing and feel that they are hiding behind CoR to justify their own poor performance. What is the best way to resolve this while avoiding any instructions or directions to a supply chain partner that might become a CoR issue?

A The breakdown in the time efficiency of the supply chain appears to be in the time it takes the dispatching warehouse to make the ordered goods available for loading and not any undue delay caused by the road transport operators. You need to be clear that you consider road safety and CoR obligations to be very important and that the current situation must be resolved to make sure that drivers are not placed at risk in any potential attempt to make up lost time. You might provide a copy of your CoR policy to emphasise the importance your business places on CoR compliance.

While a meeting in person might be the most effective way to communicate with your supply chain partner, make sure that you record any outcomes and action points in writing. A summary by email is fine to achieve this. You should continue to monitor the situation (e.g. through feedback from drivers). Hopefully your contract or commercial terms with the distribution depot should require them to be CoR compliant and to be able to demonstrate they have an active policy of compliance in place. You may need to consider changing providers if the situation cannot be resolved.

Finally, you should ensure that any drivers or other relevant people within your business receive additional communications confirming that in no circumstance will speeding provide a solution to the supply chain inefficiencies and/or have additional training to reinforce the importance of not placing demands on drivers that might encourage them to drive at unsafe speeds.

Q **Miguel asked: Our driver employees have requested a meeting asking for more information on CoR in which they could face individual criminal liability or civil liability (i.e. from an insurer). We are aware of our responsibilities and potential liability as the operator. However, when would our employees personally face consequences?**

A The CoR can be considered to consist of 'primary responsibilities' and 'derivative responsibilities'. In many cases, drivers and operators have the primary responsibility to comply with obligations under the HVNL, such as fatigue and load securing.

Breaches of those primary responsibilities may result in breaches of the derivative responsibilities, which are, in short, to take all reasonable steps to prevent breaches of the primary responsibilities.

What may be a little confusing is that while the two aspects are related, they are not necessarily connected in the sense that the HVNR may choose to prosecute a breach of derivative responsibility, but not to prosecute the driver for a breach of a primary responsibility.

So perhaps the best message for your drivers is that you share the responsibility for compliance with the HVNL, and you both have roles to play in ensuring compliance.

Q **Irene asked: We understand the risks open to us where a driver is exceeding a speed limit, depending on the severity of the breach. Do CoR consequences to other parties apply where a driver is within the speed limit, but may have failed to drive to the conditions, for example, driving too fast in wet weather?**

A Chapter 5 of the HVNL relates to speeding and most relevant provisions relate to consequences when a driver 'exceeds speed limits'. Driving at excessive speed in wet conditions, but still within the relevant speed limit is perhaps a safety issue rather than speeding as such. So a driver may be fined under the relevant state law, but their employer (or other party in the CoR) will not be liable.

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INDUSTRY INSIGHTS

With Gordon Martin, Managing Director, the Martin Group

Gordon Martin has been involved in the haulage industry since he began carting gravel as a one-man operation nearly 60 years ago. Today, the Martin Group (www.martinshaulage.com.au) is one of the most highly-respected transport operations in Australia. Gordon also sits on the Board of the Australian Trucking Association (www.truck.net.au).

Q You've been in the trucking industry in some capacity since 1958. When Chain of Responsibility (CoR) legislation was implemented, what were the main obstacles and challenges your business had to overcome?

A We endeavoured very strongly to participate or to accept the CoR legislation, but endeavouring to get our customers, even today, to understand is still very difficult. I wouldn't say they're not aware of it – it's more that some players still want to fly under the radar.

I'm a great believer in compliance, and we are endeavouring to be 100% compliant. That's a big ask, and we wouldn't be that high yet. We'd probably be in the 85–90% bracket. But compliance and regulation I'm 100% for. I think the industry needs some controls, it needs the guidance, and above all it needs everybody to be operating on a level playing field. Sadly, that's not the case in many areas.

Q What are the unique issues that the rural and livestock sector faces?

A The biggest challenge in the bush is without a doubt how you regulate around its specific issues and needs. But as with anyone in the transport industry, first and foremost it's got to be about safety.

Secondly, for rural and livestock parties, animal welfare is incredibly important, but above all you've got to be compliant. We can't have people driving affected by drugs or excessive hours and endangering people other than themselves.

You will always have certain areas of a community that won't want to comply. But if rural people – and I'm talking farmers and so on – if they put a truck on the highway, they should comply the same way an operator has to.

Q There have been news stories recently about regional courts seeing a steady stream of drivers and operators facing charges for failing to keep accurate log books. Do you think electronic work diaries are an answer to this?

A I think the electronic work diaries will become a regulatory factor which everybody has to comply with in time. I understand the log book system is very difficult for some people. But you can't use that as an excuse forever if you want to become compliant, or if you want to be in our industry.

> 'As it is now, the people who choose not to comply have a distinct advantage, which I think is wrong.'

When we're talking livestock, we've got some remote areas that will be very hard when it comes to electronic log books, because sometimes their time might come up and they might have only got through 300km for the day. It might be 200km of winding, narrow track before they even get onto a main road.

But on the main highways, it's got to be regulated – if only to take the pressure off the people that are involved.

Q The law clearly sets out what's covered and what's enforced. How effective do you think the enforcement regime is at present?

A The National Heavy Vehicle Regulator (**NHVR**) is, I think, a great step forward, if we can get that over the line. But it needs money and it needs people, like everything else. If you can bring in a situation with everyone on the same playing field, the good operators will survive and the other ones will go by the wayside, unless they really get stuck into their compliance situation.

As it is now, the people who choose not to comply – and compliance isn't cheap – they have a distinct advantage, which I think is wrong.

Q What's your view on appropriate solutions to enforcement and oversight of vehicle roadworthiness? This has been discussed by both the National Heavy Vehicle Regulator (NHVR) and the National Transport Commission (NTC), including the possibility of it becoming a CoR matter.

A As you can appreciate, we're in the National Heavy Vehicle Accreditation Scheme (**NHVAS**) Maintenance [Management module]. I think we personally do it very well. But I do believe vehicles have to be checked. Not just a paper trail – I think from time to time vehicles on the road must be able to be randomly checked. That's something where there's still a lot of work to do.

I'm not saying that if you've got 100 vehicles that every one of those vehicles has got to be checked. But when the compliance audits are done, the problem is that there are no standards in there to actually check the vehicles. You can be an ex-policeman with no mechanical knowledge, yet right now you can still be a compliance officer in some cases.

IN THE NEXT ISSUE

OUT JULY 2015

- How to conduct an effective risk identification and assessment
- Saving time safely with effective time slotting
- How different jurisdictions ensure speed compliance