

Regulatory Advice – The Primary Duty

Note: This information is intended to provide general guidance only and does not constitute legal advice. We encourage you to obtain independent advice about your legal obligations. If you have any feedback on the information provided please contact us at info@nhvr.gov.au

This regulatory advice provides guidance on the primary duty established under the Heavy Vehicle National Law (HVNL) [section 26C](#) and the principles applying to the primary duty.

Who is this advice for?

- Parties in the Chain of Responsibility (CoR parties).

What is the Chain of Responsibility and who is a party?

The Chain of Responsibility (CoR) is a concept in road transport legislation that defines who is responsible for ensuring safety across all parts of the heavy vehicle journey. The HVNL identifies 10 functions within the supply chain and attaches a duty to each party that performs one of those functions. That duty is called the primary duty.



Note: When referring to a CoR party, it applies to both individuals and legal entities. When a breach of the primary duty is committed, the National Heavy Vehicle Regulator (NHVR) is most likely to investigate the company or business as they have control or influence over managing the risks associated with their transport activities.

HVNL [section 5](#) defines a CoR party as a [person](#) (including an individual or a company) performing any of the following 10 functions:

- employing a heavy vehicle driver (employer)
- engaging someone to drive a heavy vehicle under a contract for services (prime contractor)
- directing the control and use of a heavy vehicle (operator)
- scheduling the transport of goods or passengers in a heavy vehicle, or scheduling a driver's work and rest hours (scheduler)
- consigning (coordinating and sending) goods for transport by a heavy vehicle (consignor)
- receiving goods delivered by a heavy vehicle (consignee)
- packing or assembling goods for transport in a heavy vehicle (packer)
- managing premises where five or more heavy vehicles are loaded or unloaded each day (loading manager)
- loading a heavy vehicle (loader)
- unloading a heavy vehicle (unloader)

A heavy vehicle driver is **not** a CoR party unless they are an owner/operator or perform another function that makes them a party. However, a driver is subject to other requirements under the HVNL and other road laws.



More information about the CoR can be found at [Chain of Responsibility](#).

What is the primary duty?

Under the [HVNL section 26C](#), each party has a **primary duty: to ensure the safety of transport activities, so far as is reasonably practicable.**

This is an obligation to eliminate public risks, or to the extent that is not reasonably practicable to eliminate them, to minimise public risks. It also includes a prohibition against directly or indirectly causing or encouraging a driver or another person, including a party in the CoR, to speed or contravene the HVNL. CoR parties should also be aware that they remain a CoR party even when their transport activities are contracted, or subcontracted, to another party.

Under the [HVNL section 26D](#), an executive of a business that is a party in the CoR has a distinct **duty: to exercise due diligence to ensure the business complies with its primary duty to ensure the safety of its transport activities so far as is reasonably practicable.**

Note: [Transport activities](#) ↓ includes all activities and business processes associated with the use of a heavy vehicle on a road.

What happens if my business breaches its primary duty?

The law provides sanctions ranging from education and improvement notices to prosecution for offences. A breach of the primary duty is the most serious breach of the HVNL and carries significant financial

penalties, and in the most serious cases can include imprisonment.

Note: The current maximum penalty for failing to comply with the primary duty for a Category 1 offence (most serious offence) is:

- for an individual - more than \$377,000 or 5 years imprisonment or both
- for a corporation - more than \$3,500,000.[1]

Duty based offences?

Compliance with the primary duty can be approached in the same way as the primary duty of care under WHS law and other duty based offences. The standard is the same, to do what is *reasonably practicable*, but under the HVNL the duty holder must ensure safety beyond their premises and consider how to manage risks across all parts of the heavy vehicle journey they can control or influence.

Reasonably practicable ↓ means what should be done to ensure safety, weighing up all the relevant factors. It is a question of proportionality – ensuring the measures used to eliminate or minimise the risks are proportionate to the likelihood and degree of harm. What will be considered reasonable for your business will depend on individual circumstances.

The primary duty vs prescriptive requirements

The primary duty creates a different kind of legal obligation compared to prescriptive requirements under the HVNL. Whilst prescriptive requirements state what must be done and impose strict parameters such as mass or height limits, the primary duty tells you the outcome that must be achieved but doesn't tell you how to do it. Resources such as [Registered Industry Codes of Practice](#), [Regulatory Advice](#), subject matter experts, industry knowledge and your own experience can help determine the best measures to ensure the safety of your transport activities.

The nature of the duty means it is more flexible than prescriptive requirements. You can tailor safety management to the specific risks and the individual needs, activities, and capacity of your business – so long as the standard of ensuring safety so far as is reasonably practicable is achieved.

A breach of the primary duty is committed when a party fails to eliminate or minimise the risk so far as is reasonably practicable. It is not reliant on non-compliance with prescriptive HVNL requirements.

However, a pattern of non-compliance with prescriptive requirements may be evidence of a primary duty breach.

A recent prosecution highlighted that a company's failure to implement effective systems and procedures to ensure its heavy vehicles did not exceed permissible mass limits, and a failure to maintain, service, and repair its heavy vehicles over an extended period amounted to a primary duty breach under the HVNL section 26C. The fine issued to the company exceeded \$100,000.

What is the scope of primary duty

The scope of the primary duty encompasses all transport activities. The scope is intentionally broad to account for the vast range of activities that could impact heavy vehicle safety on the road. This includes things that a business may not typically consider part of using a heavy vehicle.

For example:

- how heavy vehicle procurement and maintenance is undertaken and managed
- recruitment strategies including considering the skill and experience a driver has and their ability to undertake higher risk driving or carry specialised loads
- induction and training

- the layout and configuration of a premises
- board decisions and their implementation
- organisational structure
- the policies and procedures of the business that influence the use of heavy vehicles on the road
- communication systems, negotiation, and contracts with other parties.

Working with other CoR parties

It's within the scope of the primary duty to also consider what other parties that you share transport activities with are doing to ensure safety. It's **not sufficient to assume** other CoR parties are meeting their primary duty. You **need** to understand how risks are being managed at every stage of the heavy vehicle journey.

Parties can influence how other parties behave through communication, collaboration, negotiation, and contractual terms. Making the most of business relationships with other CoR parties can be one of the most effective tools for managing safety and eliminating or minimising risks.

At the very least, known hazards, risks and controls should be communicated to other relevant CoR parties, and parties should proactively communicate with each other to understand what all parties are doing to ensure safety for shared transport activities.

Principles applying to the primary duty

Heavy vehicle safety is affected by decisions made, actions or omissions, and the policies and procedures of businesses well before a driver gets into a vehicle. Many factors contribute to the overall safety of the transport activities and the use of heavy vehicles on the road, but no single party controls all the factors. This is why a holistic approach, looking at all the elements each party contributes, is necessary to ensure safety.

HVNL section 26A: Principle of shared responsibility

In most situations, there is more than one CoR party who can control or influence the safety of the same heavy vehicle transport activity. [HVNL section 26A](#) states that:

*'Safety of transport activities relating to a heavy vehicle is **the shared responsibility of each party in the chain of responsibility**'.*

This means that each CoR party shares responsibility and has the same duty. It is not a matter of determining which party is responsible for each part or each transport activity; rather all parties share the responsibility.

However, parties may have to do different things to ensure safety and what is reasonably practicable may be different from party to party. This is determined by a range of factors including:

- the type of transport activities undertaken
- the nature of the risk created
- the party's capacity to control, eliminate or minimise the risk.

Regardless of the number of CoR parties involved in a transport activity, the duty never changes. Each party must achieve the same standard – to ensure safety so far as is reasonably practicable.

HVNL section 26B: Principles applying to duties

The HVNL also sets out other principles applying to the primary duty including:

- More than one person can, at the same time, have a primary duty under the HVNL, and each person must comply with that duty to the standard required and to the extent of their capacity to control or influence the activity.
- Where multiple parties have a primary duty for the same activity, the primary duty is not diminished.

Regardless of how many parties there are, the level of responsibility remains the same.

- The primary duty **cannot be transferred or delegated** to another person.

The most important point of these principles is that the primary duty does not change.

Examples

The different parties who share the responsibility in a simple freight task

This scenario will take you through a typical freight movement that occurs every day in the heavy vehicle supply chain and highlight the parties in the CoR that have control or influence over transport activities. CoR parties are highlighted in bold.

- **Company A** orders goods from **Company B**.
- **Company B** engages a **transport operator** to pick up the goods from **Company B's** warehouse and deliver them to **Company A's** premises on a specified date.
- The **transport operator** rosters an employed driver for the job.
- **Company B** contacts the **transport operator** to confirm the timeslot to collect the goods.
- **Company B** contacts **Company A** to confirm the timeslot to deliver the goods.
- The driver arrives at **Company B's** warehouse at the agreed time, where **Company B** employees load the heavy vehicle.
- The driver travels the scheduled route to **Company A's** premises, where **Company A** employees unload the heavy vehicle.

In this scenario, we have three different businesses working together to complete the freight task. In all cases, the functions they perform mean they are CoR parties and hold a primary duty. Below outlines the functions each business performs as a CoR party.

- **Company A:** Consignee, unloader, loading manager.
- **Company B:** Prime contractor, consignor, scheduler, packer, loader, loading manager.
- **Transport operator:** Operator, employer, scheduler.

The different parties who have an influence over heavy vehicle maintenance

The owner of a heavy vehicle has the greatest control or influence over the maintenance and continued roadworthiness of the vehicle as they have the **primary responsibility** for scheduled maintenance and any ad-hoc repairs. However, other parties also have the **capacity to influence** heavy vehicle maintenance and particularly wear and tear.

Heavy vehicle maintenance:

- **Heavy vehicle owner:** Has the greatest influence over maintenance and continued roadworthiness of the heavy vehicle.
- **Owner of the premises:** If a premises has large potholes or requires tight manoeuvring to get to the designated loading or unloading area, this may cause greater wear and tear or repairs being needed.
- **Trip planning:** Heavy vehicle selection and route planning can impact wear and tear. Planning the safest and most direct route will avoid unnecessary travel, which causes general wear and tear.
- **How goods are packed:** If goods are improperly packed and there is leakage or package failure this may cause damage to the vehicle and repairs being needed.
- **Scheduling:** The scheduler must work with the heavy vehicle owner to ensure sufficient time is

allocated for vehicle maintenance and repairs, both scheduled and ad-hoc. This will ensure repairs and maintenance can be carried out in a timely manner, reducing the possible impact on safety.

- **How the vehicle is loaded:** Loads improperly loaded or restrained, becoming dislodged during transport, or careless use of equipment such as a forklift, excavator, or front-end loader to load the vehicle may cause damage to the vehicle.

All the above activities can impact on the heavy vehicle's continued roadworthiness or cause accelerated wear and tear on vehicle components. All CoR parties that engage with heavy vehicles should consider how their actions and omissions could impact roadworthiness. Parties must do everything reasonably practicable to avoid negatively impacting heavy vehicle maintenance and wear and tear.

More information on managing risks associated with transport activities can be found in our [Regulatory Advice](#).

Resources

Safety Management System (SMS)

Management of safety risks can be more effective with the adoption, development and active use of a Safety Management System (SMS).

An SMS is a systematic approach to managing safety, including the necessary organisational structures, accountabilities, policies and procedures, which is integrated throughout the business wherever possible.

An SMS can help you:

- provide a safer work environment for your employees, customers, contractors and the public
- manage your safety duties under the HVNL
- demonstrate your ability to manage risk and ensure safety
- become an employer of choice and preferred supplier to customers
- make informed decisions and increase efficiency
- allocate resources to the most critical areas that have an impact on safety
- reduce costs associated with incidents and accidents.

Regardless of the size of a business, an effective SMS can help your business have an appropriate safety focus and comply with its duty to ensure the safety of its transport activities, so far as is reasonably practicable.

Targeted guidance, tools and information regarding the development and implementation of an SMS is available in the [9 Step SMS Roadmap](#).

Understand the HVNL and your primary duty

Under the [HVNL section 26C](#), each party in the CoR has a primary duty to ensure the safety of its transport activities, so far as is reasonably practicable. This duty includes an obligation to eliminate or minimise public risks and a prohibition against directly or indirectly causing or encouraging a driver or another person, including a party in the CoR, to contravene the HVNL.

Transport activities

Transport activities include all the activities associated with the use of a heavy vehicle on a road. It

includes safety systems, business processes such as contract negotiation and communication and decision making, as well as the activities normally associated with the transport and logistics sector such as training, scheduling, route planning, managing premises, selecting and maintaining vehicles, packing, loading and unloading.

So far as is reasonably practicable

So far as is reasonably practicable means an action that can reasonably be done in relation to the duty, considering relevant matters such as:

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

More information can be found in [Regulatory Advice - Reasonably practicable](#)

Executives of businesses that are parties in the CoR have a distinct duty under the [HVNL section 26D](#) to exercise **due diligence** to ensure the business complies with its duty to ensure the safety of its transport activities.

Due diligence

Exercising **due diligence** includes taking reasonable steps to:

- acquire and maintain knowledge about conducting transport activities safely
- understand the nature of the business's transport activities, including the hazards and risks associated with those activities
- ensure the business has, and uses, appropriate resources to eliminate or minimise the hazards and risks associated with its transport activities
- ensure the business has, and uses, processes to eliminate or minimise the hazards and risks associated with its transport activities and that information about hazards, risks and incidents is received, considered and responded to in a timely way.

Examples of **executive due diligence** activities include:

- fostering a just safety culture ensuring that employees at all levels feel comfortable discussing general safety concerns and reporting incidents and near misses
- collecting information about incident rates to see if the safety management system is working
- participating in industry-led forums and safety seminars
- ensuring work procedures are being followed and result in improvements in safety
- ensuring safety incidents are responded to and investigated
- implementing learnings from the investigation of safety incidents.

[1] These values have been indexed and now are (as of August 2023)

- (a) for an individual \$377,639 or 5 years imprisonment or both; or
(b) for a corporation \$3,546,390.

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www.nhvr.gov.au

E info@nhvr.gov.au

P 13 NHVR (136 487)

PO Box 492, Fortitude Valley QLD 4006

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