

State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Yvette D'Ath MP, Attorney General and Minister for Justice, provide this human rights certificate with respect to the *State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020* (the Regulation) made under the *State Penalties Enforcement Act 1999*.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

To support the existing framework of the national law, offences under the *Heavy Vehicle National Law Act 2012* (HVNL) were reviewed to identify diversionary options and ticketing for lesser offences. As a result, four existing offences under the HVNL were deemed suitable for consideration as ticketed or infringeable offences.

These offences relate to a driver's work and rest hours where the breach is either reducing a major rest break or increasing a driving period by 30 minutes or less. Drivers of these vehicles are aware of their work and rest obligations and the requirement to complete a heavy vehicle work diary showing their driving and rest periods. These offences have been considered appropriate for infringement, because:

- there are a large number of these offences being detected which is placing a strain on the court system
- it is relatively easy to see if there has been a breach which will not be aided by examination in a court
- the risk to safety of these offences is relatively minor.

Following national consultation, Following national consultation, Ministers at the 2 August 2019 Transport and Infrastructure Council (Council) meeting endorsed making the four existing matters infringeable and approved consequential changes to the *Heavy Vehicle National Law Schedule of Infringement Penalties and Demerit Points* (Schedule).

The Schedule is an administrative document managed by the National Transport Commission that outlines the offences in the HVNL that attract an infringement penalty. It is used by participating states and territories to inform amendments to local laws. The Schedule lists the offences that must be heard by a court and offences that could be dealt with by issuing a ticket, known as an infringeable offence. It gives the person issued the notice (ticket) the option of either paying the fine or electing to have the matter dealt with by a court. There are 330 offences in the HVNL, with 144 that are deemed infringeable and 186 that are to be heard by a court.

The changes to the Schedule will allow four matters that must currently be heard by a court to be made an infringeable offence that can be dealt with by a fine. In addition, there are three demerit points attached to each offence that will still apply to the infringeable offence. These proposed changes affect only offences relating to a driver's work and rest hours where the breach is either reducing a major rest break or increasing a driving period by 30 minutes or less. This *does not change* the penalties for critical risk breaches which are generally greater than 30 minutes.

The proposed *State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020* will amend the *State Penalties Enforcement Regulation 2014* (SPER) by inserting the following into Schedule 1, Heavy Vehicle National Law (Queensland), Column 1 'Infringement notice offence':

- s250(1): a penalty unit amount of \$1000 for a severe risk breach where the driver is operating as a solo driver under standard hours
- s251(1): a penalty unit amount of \$1000 for a severe risk breach where the driver is operating as a solo driver under Basic Fatigue Management hours
- s254(1): a penalty unit amount of \$1000 for a severe risk breach where the driver is operating in a two-up driving arrangement under standard hours
- s256(1): a penalty unit amount of \$1000 for a severe risk breach where the driver is operating in a two-up driving arrangement under Basic Fatigue Management hours.

The 'minor' and 'substantial' risk breach categories under these offences already allow for infringement penalties. The difference between a substantial risk breach and a severe risk breach is very small; in most cases just 15 minutes, or up to 30 minutes.

More serious breaches of sections 250(1), 251(1), 254(1) and 256(1) are covered by the critical risk breach category, which may only be prosecuted in Court.

Following Proclamation of Part 3 of the *Heavy Vehicle National Law and Other Legislation Amendment Act 2019* on 28 February 2020, other than sections 10 and 11, the penalty currently provided for in section 529 of the HVNL for a major or minor defect notice is to be relocated to subsection 529(a) and the words 'for a major defect notice or minor defect notice' will be inserted. The penalty currently provided for in subsection 531A(5) of the HVNL for a self-clearing defect notice is to be relocated to subsection 529(b) and the words 'for a self-clearing defect notice' will be inserted.

As a result, subsections 529(a) and 529(b) will be added to SPER Schedule 1 Heavy Vehicle National Law (Queensland) and sections 529 and 531A(5) will be omitted.

The proposed amendments to SPER reflect Council endorsement of changes to the Schedule and the HVNL.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Upon analysis, the subordinate legislation may engage the human right of a fair hearing under section 31, rights in criminal proceedings under section 32, and property rights under section 24 of the *Human Rights Act 2019*.

Right to a fair hearing and rights in criminal proceedings (sections 31 and 32 *Human Rights Act 2019*)

The Regulation interacts with the right to a fair hearing and rights in criminal proceedings by amending existing driver fatigue laws to remove the requirement to attend court for a severe risk breach and creating infringeable offences that can be dealt with by the issuing of a penalty infringement notice.

On one view, the scope of these rights is unlikely to be limited by the Regulation. Individuals retain the capacity to elect to have the matter heard in court instead of paying the penalty amount. Further, this regulation applies to a particular group of drivers who are familiar with the regulation of their industry and who would be likely to challenge a penalty infringement notice in court if they consider it unfairly issued.

However, in the alternative, if the rights are limited, any potential limit is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Further detail supporting this conclusion is set out below.

Consideration of reasonable limitations on the right to a fair hearing and rights in criminal proceedings (section 13 *Human Rights Act 2019*)

(a) the nature of the right

The right to a fair hearing facilitates procedural fairness and protects natural justice. It provides a right for parties to be heard and to respond to allegations made against them, and requires courts be unbiased and independent.

The rights in criminal proceedings protects the right to be presumed innocent until proven guilty and sets out a number of minimum guarantees for criminal proceedings including the right of accused persons to be informed of the nature and reason for a charge and to defend themselves personally or through legal assistance.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

There is a requirement to regulate the movement of specified heavy vehicles for public safety, road infrastructure and public amenity purposes.

The purpose of this Regulation is to implement effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the

criminal courts in Queensland while maintaining the right to a fair hearing and a person's rights in criminal proceedings.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

There is a rational relationship between a potential limitation and the purpose of the Regulation. The Regulation has regulatory benefit to the court system and roadside enforcement that will improve administrative efficiencies to enforce laws which promote industry and community safety.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No other less restrictive or reasonably available way of achieving the purpose has been identified.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, it is considered that the importance of implementing effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the criminal courts in Queensland outweighs any potential limitations imposed on the right to a fair hearing or rights in criminal proceedings.

Any potential limitation would not represent a complete restriction on an individual's right to a fair hearing or rights in criminal proceedings as individuals retain the capacity to elect to have the matter heard in court instead of paying the penalty amount. Arguably, the right to a fair hearing and rights in criminal proceedings are facilitated by creating an infringeable offence with this option to challenge the matter in court.

While there is an additional consequence of three demerit points attached to the offence, this consequence is clear on the face of the tickets and does not result in the loss of a licence until a person has accumulated 12 demerit points.

Property rights (section 24 *Human Rights Act 2019*)

The Regulation interacts with the right to property by imposing a fine on the driver of a heavy vehicle and regulates the use of privately-owned heavy vehicles.

On one view, the scope of this right is unlikely to be limited by the Regulation. However, in the alternative, if the right is limited, any potential limit is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Further detail supporting this conclusion is set out below.

Consideration of reasonable limitations on property rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Property rights protects the right of all people to own property alone or with others. It provides that a person must not be arbitrarily deprived of their property.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of this Regulation is to implement effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the criminal courts in Queensland while maintaining the right to a fair hearing and a person's rights in criminal proceedings.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

There is a rational relationship between a potential limitation and the purpose of the Regulation. There is a requirement to regulate the movement of specified heavy vehicles for public safety, road infrastructure and public amenity purposes.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There is no less restrictive and reasonably available way to achieve the purpose.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Any limitation would not be arbitrary as the identification of when an offence has been committed is clear through the monitoring of a driver's heavy vehicle work diary. The fine amount has been set at 10 per cent of the maximum penalty which is likely less than a court would impose but still at an amount to act as a disincentive for offending behaviour. Authorised officers who issue the fines are trained, and there is always a discretion for driver to challenge in court. The offence and the penalty infringement notice are directed at drivers of heavy vehicles who are aware of their obligations and aware of their right to challenge in court. Therefore, it is considered that any potential interference with a person's property rights would not be arbitrary.

The Regulation will ensure there is an administratively convenient way to enforce this offence without delay, which will support the taking of enforcement action and consequently discourage offending behaviours. Further, the Regulation has regulatory benefit to the court system and roadside enforcement that will improve administrative efficiencies to enforce laws which promote industry and community safety.

On balance, it is considered that the importance of implementing effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the criminal courts in Queensland outweighs any potential limitations imposed on property rights.

Conclusion

I consider that the *State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020* is compatible with the human rights under the *Human Rights Act 2019* because to the extent that it imposes any limitation on a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Honourable Yvette D'Ath
Attorney-General and Minister for Justice

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