



**NRSPP**  
NATIONAL ROAD SAFETY

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**PARTNERSHIP**  
PROGRAM

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# Light Vehicles – Legal Implications For Businesses

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Prepared by Associate Professor Tania Leiman<sup>1</sup>, Flinders University



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# 1. Executive Summary

This project aims to investigate legal implications of the use of light vehicles where vehicles under 4.5 tonnes are

- owned or leased and used by a business
- owned or leased and used by workers to conduct business
- hired occasionally and used for business<sup>2</sup>

Various descriptions and definitions are used to describe these light vehicles including light commercial vehicle, light rigid truck, passenger vehicle. Australian light vehicle stock is expected to increase to 25.2 million in 2034,<sup>3</sup> with the number of light rigid trucks is growing faster than other vehicle types.<sup>4</sup>

Light commercial vehicles in Australia are on average older (10.5 years in 2017) than the average for vehicles overall (10.1 years) and for passenger vehicles (9.8 years), with all of these significantly older than those categories in similar countries.<sup>5</sup>

Light vehicles are 'involved in at least 90% of all crashes reported to police'.<sup>6</sup> Nearly two thirds of worker fatalities involved vehicles.<sup>7</sup>

This project has identified following legal issues in relation to light vehicles, which are discussed in more detail below:

- Lack of consistent definition of light vehicle
- Road trauma and ageing light vehicle fleet
- Regulatory Frameworks
- Vehicle safety and maintenance
- Monitoring drivers and vehicles
- Light vehicles transporting goods and towing trailers
- Vehicles as part of employment and remuneration.

This project aims to identify relevant regulatory frameworks and any case law touching on these issues.

This report includes several hypothetical case studies are designed to illustrate some of the difficulties and issues that may arise. They are intended to provide a prompt for employers and organisations to review their current practice and identify possible risks.

This report builds on previous research undertaken into grey fleet in Australia, which now forms the basis of the report, ***Grey Fleet: Legal Implications for Business***, which can be accessed at [www.nrspp.org.au/resources/grey-fleet-legal-implications/](http://www.nrspp.org.au/resources/grey-fleet-legal-implications/)

Feedback received from industry about ***Grey Fleet: Legal Implications for Business*** identified grey fleet light vehicle usage as an issue of particular concern and interest.

<sup>2</sup>Caroline Falls, Ground breaking grey fleet survey highlights the risk to organisations, Fleet News 21 October 2016

<http://fleetautonews.com.au/ground-breaking-grey-fleet-survey-highlights-the-risk-to-organisations/>

<sup>3</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf)

<sup>4</sup>Australian Bureau of Statistics, Motor Vehicle Census, Australia, 31 January 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/9309.0Main%20Features131%20Jan%202018?opendocument&tabname=Summary&prodno=9309.0&issue=31%20Jan%202018&num=&view=>

<sup>5</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 6

<sup>6</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 8

<sup>7</sup><https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>



## 2. Scope of Project

I have been asked by the National Safety Partnership program (NRSP), delivered by the Australian Road Research Board (ARRB), to:

- Explore case law surrounding the liability and legal risk relating to *light fleet* use
- Provide a series of hypotheticals underpinned by research and case law highlighting the risks and exposure for organisations regarding their use of light vehicles. Light vehicles refer to any vehicle owned by the organisation that are not classed as heavy vehicles under national law. *Light vehicles* can include light commercial vehicles, passenger vehicles, vans, light trucks, motor bikes, etc.

This report should be read in conjunction with the 2017 report ***Grey Fleet: Legal Implications for Business***<sup>8</sup> which can be accessed at [www.nrspp.org.au/resources/grey-fleet-legal-implications/](http://www.nrspp.org.au/resources/grey-fleet-legal-implications/)

### 2.1 Limitations of Report

This project does not undertake any review of the rights of action and recovery in workers compensation legislation for liability for motor vehicle damages arising out of the use of a light vehicle, nor any review of interacting obligations between workers compensation insurers and compulsory third party insurers in relation to personal injury or death caused by motor vehicle accidents.

This project does not canvas the taxation implications of ownership or use of light vehicles, or the taxation implications of characterising workers as employees or independent contractors.

### 2.2 Disclaimer

The information contained in this research report is of a general nature and not the provision of legal advice or professional services advice. Readers should seek their own legal advice.



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<sup>8</sup>[www.nrspp.org.au/resources/grey-fleet-legal-implications/](http://www.nrspp.org.au/resources/grey-fleet-legal-implications/)

### 3. Definitions

#### 3.1 'Worker' and/or 'Employee'

'Worker' in this report has the same meaning as in the *Work Health & Safety Act*, and covers employees, volunteers and other roles.<sup>9</sup>

There is no consistent definition of 'light vehicle'. Various descriptions and definitions are used to describe these light vehicles including light commercial vehicle, light rigid truck and passenger vehicle. Australian light vehicle stock is expected to increase to 25.2 million in 2034,<sup>10</sup> with the number of light rigid trucks growing faster than other vehicle types.<sup>11</sup>

'Light vehicle' has been legislatively defined as 'a vehicle that is not a heavy vehicle'.<sup>12</sup> A heavy vehicle is 'a vehicle that has a gross vehicle mass (GVM) or aggregate trailer mass (ATM) of more than 4.5 tonnes' or 'a combination that includes a vehicle with a GVM or ATM of more than 4.5 tonnes is a heavy vehicle'.<sup>13</sup> Use of heavy vehicles is regulated nationally (except in NT and WA) by the *Heavy Vehicle National Law (HVNL)*,<sup>14</sup> and significant obligations are imposed not only on drivers, but all those in the chain of responsibility.

The Australian Bureau of Statistics in its '*Motor Vehicle Census*' distinguishes between passenger vehicles, campervans, light commercial vehicles and light rigid trucks, identifying those vehicles 'using information obtained from state and territory motor vehicle registration authorities'.<sup>15</sup> The Glossary to the 2018 ABS '*Motor Vehicle Census*' includes the following (narrower) definitions:

*Light commercial vehicles - 'Motor vehicles constructed for the carriage of goods and which are less than or equal to 3.5 tonnes GVM. Included are utilities, panel vans, cab-chassis and goods carrying vans (whether four-wheel drive or not).'*

*Passenger vehicles - 'Motor vehicles constructed primarily for the carriage of persons and containing up to nine seats (including the driver's seat). Included are cars, station wagons, four-wheel drive passenger vehicles, campervans and passenger vans or mini buses with fewer than 10 seats.'*

*Rigid trucks - 'Motor vehicles exceeding 3.5 tonnes GVM, constructed with a load carrying area. Included are normal rigid trucks with a tow bar, draw bar or other non-articulated coupling on the rear of the vehicle.'*<sup>16</sup>

In the ECON 2017 report, '*Benefits Of Reducing The Age Of Australia's Light Vehicle Fleet*', the following definitions were used:

*'Light commercial vehicles are motor vehicles constructed for the carriage of goods or specialised equipment which are less than or equal to 3.5 tonnes gross vehicle mass (GVM). These include utility vehicles, panel vans, cab chassis, and goods carrying vans with a GVM of less than 3.5 tonnes (for example, the Toyota Hilux or Ford Ranger).*

*'Light passenger vehicles are motor vehicles constructed for the carriage of persons and contain less than 10 seats, excluding motorcycles (two and three wheeled vehicles) and buses (10 or more seats).'*

<sup>9</sup>Work Health & Safety Act 2011 (Cth) s.7

<sup>10</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf)

<sup>11</sup>Australian Bureau of Statistics, Motor Vehicle Census, Australia, 31 January 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/9309.0Main%20Features131%20Jan%202018?opendocument&tabname=Summary&prodno=9309.0&issue=31%20Jan%202018&num=&view=>

<sup>12</sup>See for example Road Traffic Act 1961 (SA) s.5

<sup>13</sup>See for example Heavy Vehicle National Law (South Australia) s.6

<sup>14</sup>Heavy Vehicle National Law (South Australia); Heavy Vehicle National Law (Queensland); Heavy Vehicle (Adoption of National Law) Act 2013 (NSW); Heavy Vehicle National Law Act 2013 (ACT); Heavy Vehicle National Law Application Act 2013 (Tas)

<sup>15</sup>Australian Bureau of Statistics, Survey of Motor Vehicle Use, Australia, 12 months ended 30 June 2016, Explanatory notes, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/9208.0Explanatory%20Notes112%20months%20ended%2030%20June%202016?OpenDocument>

<sup>16</sup>Australian Bureau of Statistics, Motor Vehicle Census, Australia, 31 January 2018, Glossary, <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/9309.0Glossary131%20Jan%202018?opendocument&tabname=Notes&prodno=9309.0&issue=31%20Jan%202018&num=&view=>

In various states' road safety regulations and rules:

*'car means a motor vehicle built mainly to carry people that—*

*(a) seats not over 9 adults (including the driver); and*

*(b) has a body commonly known as a sedan, station wagon, coupe, convertible, or roadster; and*

*(c) has 4 or more wheels'<sup>17</sup>.*

Driver's licence classes and condition codes are uniform across Australia, even though they are sometimes worded slightly differently in different jurisdictions. 'Light Rigid' class licences are required to drive vehicles greater than 4.5 tonnes GVM but not more than 8 tonnes GVM or a bus or minivan seating more than 12 adults. Confusingly, this class includes the designation 'Light' even though the vehicles to which it applies come within the definition of 'heavy vehicle' in the HVNL.<sup>18</sup>

Distinctions in these definitions have been the basis for litigation.

In **Morey v Transurban City Link Ltd**<sup>19</sup>, Morey alleged that the prospectus issued by Transurban in relation to the public issue of securities as part of the Melbourne City Link project was likely to mislead and deceive. He argued that:

*'First, the estimated traffic volumes appearing in s. 5.3 of the prospectus define a Light Commercial Vehicle (LCV) as a commercial vehicle of between 1.5 and 4.5 tonnes. This is the same definition that appears in the Concession Deed. In fact, it is said, the Report used a different definition, that of the Australian Bureau of Statistics, which defines an LCV as a commercial vehicle up to 3 tonnes. This definition would include commercial vehicles such as utilities which are less than 1.5 tonnes. Thus, it is said the prospectus mis-states the nature and effect of the Report. The figures for LCVs coming from the Report use a less restrictive definition and hence are likely to be inflated as compared with figures which would be obtained if the prospectus and Concession Deed definition were used.'*

On appeal, the Full Federal Court set aside the original judgement and ordered a new trial to consider whether 'the use of the definition of Light Commercial Vehicles being 1.5–4.5 tonnes in the calculations of Traffic Flow and Revenue Forecasts in the Traffic Report used in the compilation of the prospectus' was appropriate.<sup>20</sup> Despite a number of arguments about legal costs, the project has been unable to find any record of that new trial subsequently occurring.<sup>21</sup>

The term 'High Occupancy Vehicles' (HOV) is used to include people movers, school buses, troop carriers and All Terrain Warriors including brands such as Toyota Coaster, Mitsubishi Fuso, Isuzu NPS300, Toyota Landcruiser troop carriers. Depending on GVM, some of these vehicles may be characterised as 'light vehicles', other will fall within the definition of 'heavy vehicle'.

<sup>17</sup>See for example *Road Safety (Vehicles) Regulations 2009* (Vic) Schedule 2, reg 3; *Road Traffic (Light Vehicle Standards) Rules 2018* (SA) rule 3

<sup>18</sup><https://www.sa.gov.au/topics/driving-and-transport/drivers-and-licences/drivers-licence/driver-s-licence-classes>; <http://mylicence.sa.gov.au/my-heavy-vehicle-licence/light-or-medium-rigid-vehicle>; [https://www.transport.tas.gov.au/licensing/information/licence\\_classes](https://www.transport.tas.gov.au/licensing/information/licence_classes); <https://www.vicroads.vic.gov.au/licences/licence-and-permit-types/licence-categories>; <https://www.transport.wa.gov.au/licensing/light-rigid-licence-lr.asp>;

<sup>19</sup>*Morey v Transurban City Link Ltd And Anor* BC9702999

<sup>20</sup>*Morey v Transurban City Link Ltd And Anor* BC9702999 at page 22.

<sup>21</sup>*Philip James Morey v Transurban City Link Ltd & Anor* [1998] FCA 459 (18 March 1998)

### 3.2 Key Points

- Descriptors and definitions may apply in different Australian jurisdictions.
- Determining which definition is relevant will depend on jurisdiction, which legislation (if any) is applicable, context, and the purpose for which the definition is to be applied.
- It is crucial to ensure that the definition appropriate to the relevant context is used, and critical to do so when considering whether specific legislative requirements apply. This is particularly so for vehicles with a GVM or ATM between 3.5 tonnes and 4.5 tonnes, as these vehicles may fall within some definitions but not within others.

### 3.3 Implications for organisations using light vehicles

- When developing policies, procedures or other documents that relate or refer to light fleet, key terms should be clearly defined and ideally defined consistently with legislation relevant to the context and jurisdiction.
- Particular care should be taken in relation to vehicles with a GVM or ATM between 3 tonnes and 4.5 tonnes, as these vehicles may fall within some definitions but not within others.
- Where organisations rely on workers or others using light commercial vehicles or light rigid trucks, drivers of those vehicles must hold the appropriate class of driver licence.





## 4. Road Trauma and Aging Fleet

According to SafeWork Australia, 'over the 10 year period from 2007 to 2016, 64% of worker fatalities involved vehicles, of which just over 45% were due to a vehicle collision on a public road'.<sup>22</sup> This data 'includes everyone killed:

- *while working including unpaid volunteers and family workers, carrying out work experience, and defence force personnel killed within Australian territories or territorial waters or travelling for work (worker fatalities)*
- *as a result of someone else's work activity (bystander fatalities).*<sup>23</sup>

This SafeWork data does not collect information about workers injured in road crashes while working or bystanders injured as a result of those crashes.

The 2017 annual BITRE summary of Australian road trauma statistics revealed 1,226 deaths in 2017– down 5.2 per cent compared to 2016 with a 'reduction in deaths over the ten years to 2017 [of] 14.7 per cent, [and] an estimated trend annual reduction of 2.0 per cent'.<sup>24</sup> It also revealed that '[b]etween 2013 and 2015 hospitalised injury counts increased by 5.8 per cent', with in excess of 240,000 hospitalised injuries for 2008-2015 inclusive.<sup>25</sup> It is likely that additional persons who sustained injuries in road crashes would not have been hospitalised.

'[T]he costs to the government of 2015 road trauma was estimated at \$3.7 billion'.<sup>26</sup>

Light vehicles are 'involved in at least 90% of all crashes reported to police'.<sup>27</sup> Nearly two thirds of worker fatalities involved vehicles.<sup>28</sup>

The ECON 2017 report identifies light commercial vehicles (LCVs) as 'an increasingly popular vehicle choice in Australia [that] have less stringent safety and environmental standards than passenger vehicles'.<sup>29</sup>

<sup>22</sup><https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>

<sup>23</sup><https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>

<sup>24</sup>Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2018, Road trauma Australia 2017 statistical summary, BITRE, Canberra ACT, 1 [https://bitre.gov.au/publications/ongoing/files/Road\\_Trauma\\_Australia\\_2017III.pdf](https://bitre.gov.au/publications/ongoing/files/Road_Trauma_Australia_2017III.pdf)

<sup>25</sup>Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2018, Road trauma Australia 2017 statistical summary, BITRE, Canberra ACT, 22 [https://bitre.gov.au/publications/ongoing/files/Road\\_Trauma\\_Australia\\_2017III.pdf](https://bitre.gov.au/publications/ongoing/files/Road_Trauma_Australia_2017III.pdf)

<sup>26</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 12

<sup>27</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 8

<sup>28</sup><https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>

<sup>29</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 12



Light commercial vehicles in Australia are on average older (10.5 years in 2017) than the average for vehicles overall (10.1 years) and for passenger vehicles (9.8 years), with all of these significantly older than those categories in similar countries.<sup>30</sup>

Modelling in the ECON 2017 report notes 'benefits of fleet regeneration on fatalities through the introduction of newer, safer vehicles into the fleet and the removal of older less safe vehicles. It indicates an annual saving of around 350 fatalities after 10 years.'<sup>31</sup>

Older vehicles generally produce greater pollutants and carbon emissions than newer vehicles. Many light commercial vehicles are diesel internal combustion engines. Many automotive manufacturers are already committing to significantly increasing electric vehicle production, with those vehicles to be widely available within the next five years.<sup>32</sup> Bans on petrol and diesel vehicles will come into force in some international jurisdictions as early as 2030. Should Australia adopt a similar approach, this may have a very significant impact on both the composition and age of Australia's light vehicle fleet.

Organisations who make claims about the amount of vehicle emissions they produce should consider if and how they take into account current emissions from grey fleet.

In the longer term, possible bans on vehicle emissions may pose financial challenges for organisations and workers who need to upgrade to electric vehicles.



<sup>30</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 6

<sup>31</sup>Phil Potterton and Anthony Ockwell, BENEFITS OF REDUCING THE AGE OF AUSTRALIA'S LIGHT VEHICLE FLEET (2017) Economic Connections Pty Ltd, [https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON\\_Benefits-of-reducing-fleet-age-summary-report\\_Dec-2017.pdf](https://www.aaa.asn.au/wp-content/uploads/2018/03/AAA-ECON_Benefits-of-reducing-fleet-age-summary-report_Dec-2017.pdf), page 8

<sup>32</sup>CISION PR Newswire, Electric Vehicle Market - Global Forecast to 2025: Market is Dominated by Tesla, Nissan, BYD, BMW and Volkswagen, 25 June 2018 <https://www.prnewswire.com/news-releases/electric-vehicle-market--global-forecast-to-2025-market-is-dominated-by-tesla-nissan-byd-bmw-and-volkswagen-300671659.html>; Giles Parkinson, AEMO has just doubled its forecast for EV uptake in Australia, 19 April 2018 <https://reneweconomy.com.au/aemo-just-doubled-forecast-ev-uptake-australia-66789/>; International Energy Agency, Global EV Outlook 2018 <https://www.iea.org/gevo2018/>

## 4.1 Key Points

- 64% of worker fatalities involved vehicles.
- A vehicle can be a 'workplace'.<sup>33</sup>
- A person conducting a business or undertaking has a primary duty of care to eliminate risks as far as is reasonably practicable or if not possible to eliminate risks, then to minimise them so far as reasonably practicable.<sup>34</sup>
- Older vehicles are less safe than newer vehicles.
- Light commercial vehicles have less stringent safety and environmental standards than passenger vehicles.
- In 2017, the average age of light commercial vehicles in Australia was 10.5 years, older than passenger vehicles.

## 4.2 Implications for organisations using light vehicles

- Organisations and businesses who own and/or use light vehicles should carefully consider the age and condition of those vehicles, including any safety features fitted to the vehicle, and to what risks users of those vehicles are as a consequence exposed.
- Workers using grey fleet light vehicles should carefully consider the age and condition of those vehicles, including any safety features fitted to the vehicle.
- Wherever possible, newer safer vehicles should be used.
- It may be safer to use a passenger vehicle rather than a light commercial vehicle.

<sup>33</sup>See definitions in *Work Health & Safety Acts* and discussion in *Grey Fleet: Legal Implications for Businesses* at page 8

<sup>34</sup>See *Work Health & Safety Acts* and discussion in *Legal Implications for Businesses* at pages 8-9

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## 5. Regulatory Frameworks

The 2017 report **Grey Fleet: Legal Implications for Business**<sup>35</sup> canvases various issues for grey fleet in relation to work health and safety, workers compensation, CTP compensation, legislation regarding motor vehicles, road traffic and licensing. Specific references to that legislation can be found in that report.

Feedback received from industry about **Grey Fleet: Legal Implications for Business** identified light vehicle usage as an issue of particular concern and interest.

This project therefore aims to investigate legal implications of the use of light vehicles where vehicles under 4.5 tonnes are

- owned or leased and used by a business,
- owned or leased and used by workers to conduct business
- hired occasionally and used for business.<sup>36</sup>

### 5.1 Search Methodology

For this project, search terms were entered into various legal databases<sup>37</sup> to identify cases, legislation, subordinate legislation or other resources relating to light vehicles. Search terms included: light vehicle, light fleet, light commercial vehicle, van, truck, delivery vehicle and tool-of-trade vehicle.

Apart from light vehicle standards rules applying in some states and rules that relate to mass and loading requirements, searches located very little specific legislative reference to any of the search terms listed above. Searches revealed very few cases that refer to light vehicles, with those that do making that reference in the context of broader legal issues.

Additional regulatory frameworks identified as of potential relevance include:

- Light vehicle standards rules
- Heavy vehicle national law
- Owner-driver contract and disputes legislation
- Public and private codes.

### 5.2 Light Vehicles Standards

*'The Australian Light Vehicles Standards Rules<sup>38</sup> are based on the Australian Design Rules (the ADRs) that are developed and administered by the Commonwealth.*

*The ALVSRs require vehicles that are subject to ADRs when they are being built or imported to continue to comply with the ADR. The ALVSRs also have combination requirements, such as some dimensional limits, which are not specified in the ADRs.<sup>39</sup>*

<sup>35</sup>[www.nrsp.org.au/resources/grey-fleet-legal-implications/](http://www.nrsp.org.au/resources/grey-fleet-legal-implications/)

<sup>36</sup>Caroline Falls, *Ground breaking grey fleet survey highlights the risk to organisations*, Fleet News 21 October 2016 <http://fleetautonews.com.au/ground-breaking-grey-fleet-survey-highlights-the-risk-to-organisations/>

<sup>37</sup>Austlii, LexisAdvance, CaseBase

<sup>38</sup><https://www.ntc.gov.au/roads/rules-compliance/australian-light-vehicle-standards-rules/>

<sup>39</sup>National Transport Commission, <https://www.ntc.gov.au/roads/rules-compliance/australian-light-vehicle-standards-rules/>; see for example Road Transport (Vehicle Registration) Regulation 2017 (NSW), Schedule 2 Light Vehicle Standards Rules; Road Traffic (Light Vehicle Mass and Loading Requirements) Regulations 2013 (SA), Road Traffic (Light Vehicle Standards) Variation Rules 2016 (SA), Road Traffic (Light Vehicle Mass and Loading Requirements) (Light Vehicle Standards Rules) Variation Regulations 2018 (SA), Road Traffic (Light Vehicle Standards) Rules 2018 (SA); <https://www.vicroads.vic.gov.au/safety-and-road-rules/vehicle-safety/vehicle-standards-information>



## 5.3 Heavy Vehicle National Law

The Heavy Vehicle National Law (HVNL)<sup>40</sup> has been adopted in all states and territories except WA and NT.

Australian heavy vehicle standards are now included in the Heavy Vehicle (Vehicle Standards) National Regulation.<sup>41</sup>

Persons, organisations and businesses that send or receive goods using a heavy vehicle with a gross vehicle mass of more than 4.5 tonnes become part of the supply chain, and therefore have a shared safety management responsibility to prevent breaches of the HVNL, and reduce risks related to the safety of transport tasks.<sup>42</sup>

In WA, legislative Chain of Responsibility provisions regarding mass, dimensions and load restraint [MDLR] apply not only to heavy vehicles but to all vehicles.<sup>43</sup>

A heavy vehicle is 'a vehicle that has a gross vehicle mass (GVM) or aggregate trailer mass (ATM) of more than 4.5 tonnes' or 'a combination that includes a vehicle with a GVM or ATM of more than 4.5 tonnes is a heavy vehicle.'<sup>44</sup>

Since amendments in October 2018, the HVNL imposes a primary duty on '[e]ach party in the chain of responsibility for a heavy vehicle [to] ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicle.'<sup>45</sup>

'Transport activities' are defined to include 'activities, including business practices and making decisions, associated with the use of a heavy vehicle on a road', and potentially could include breakdown services dispatched to assist immobilised or damaged vehicles, chaplaincy or counselling services assigned to assist drivers and other road users in distress or difficulty post-incident, and light vehicles sent to collect heavy vehicles drivers that have run out of hours or are unfit to drive. Businesses utilising light vehicles in this way should be aware of the potential application of the HVNL, and in particular their responsibilities as parties in the HVNL 'chain of responsibility'.

## 5.4 Owner-Driver Contracts and Disputes

A legislative framework governing owner-driver contracts and disputes exists in Victoria and WA.<sup>44</sup>

To come within the definition of owner-driver a natural person or a body corporate must carry on the business of transporting goods in one or more heavy vehicles they supply.<sup>46</sup> 'Heavy vehicle' has the same meaning as in the HVNL,<sup>47</sup> a vehicle with a GVM of more than 4.5 tonnes.<sup>48</sup>

<sup>40</sup>Heavy Vehicle National Law (South Australia); Heavy Vehicle National Law (Queensland); Heavy Vehicle (Adoption of National Law) Act 2013 (NSW); Heavy Vehicle National Law Act 2013 (ACT); Heavy Vehicle National Law Application Act 2013 (Tas); Heavy Vehicle National Law Application Act 2013 (Vic).

<sup>41</sup><https://www.ntc.gov.au/roads/rules-compliance/australian-light-vehicle-standards-rules/>

<sup>42</sup>National Heavy Vehicle Regulator, (2018) 'Chain of Responsibility and heavy vehicle safety' <https://www.nhvr.gov.au/files/201810-0917-brochure-cor.pdf>

<sup>43</sup>Road Traffic (Administration) Act 2008(WA), Road Traffic (Vehicles) Act 2012 (WA)

<sup>44</sup>See for example Heavy Vehicle National Law (South Australia) s.6

<sup>45</sup>Heavy Vehicle National Law s.26C

<sup>46</sup>Owner Drivers And Forestry Contractors Act 2005 (Vic), Owner Drivers And Forestry Contractors Regulations 2017 (Vic); Owner-Drivers (Contracts And Disputes) Act 2007 (WA), Owner-Drivers (Contracts And Disputes) (Code Of Conduct) Regulations 2010 (WA)

<sup>47</sup>Owner-Drivers (Contracts And Disputes) Act 2007 (WA) s.4

<sup>48</sup>Owner Drivers And Forestry Contractors Act 2005 (Vic) s. 3, Road Safety Act 1986 (Vic) s.3; Owner-Drivers (Contracts And Disputes) Act 2007 (WA) s.3, Road Traffic (Vehicles) Act 2012 (WA) s.3(1)

## 5.5 Public and Private Codes

SA has a Code of Practice for the Transportation of Clients for the SA Disability Service Sector 2017.<sup>49</sup> This project has not been able to locate similar codes in other jurisdictions. The SA Code covers vehicles including buses defined as:

*'a motor vehicle, other than a taxi—*

*(a) designed for the principal purpose of carrying passengers; and*

*(b) 'designed to carry at least 13-seated persons.'*

It imposes obligations on drivers, and in relation to passenger safety, record keeping, maintenance, registration, insurance and CTP, and licensing. The reference in the SA Code to 'private vehicle owner's responsibility' in relation to insurance may suggest that coverage of this Code is intended to extend to persons using their own vehicles to transport clients. This Code contains checklists, which can provide useful guidance more broadly.

Some private organisations have developed their own policies in relation to employees or volunteers transporting clients, which set out similar obligations.<sup>50</sup>

As at the date of writing, the **NDIS Code of Conduct – Guidance for Service Providers** was still in draft form, but does not refer to use of vehicles other than in one scenario illustrating work health and safety requirements.<sup>51</sup>

<sup>49</sup><https://dhs.sa.gov.au/services/disability-sa/disability-sa-policies-and-guidelines/transportation-of-people-with-disability>

<sup>50</sup>See for example the Paraplegic and Quadriplegic Association SA Inc, Transportation of Clients Policy and Procedure <http://www.pqsa.asn.au/wp-content/uploads/Transportation-of-Clients-Policy-and-Procedures.pdf>

<sup>51</sup>[https://www.ndiscommission.gov.au/sites/default/files/documents/2018-06/code\\_of\\_conduct\\_providers.pdf](https://www.ndiscommission.gov.au/sites/default/files/documents/2018-06/code_of_conduct_providers.pdf)

## 5.6 Key Points

- Light vehicles must comply with various design and dimensional standards and rules.
- The **Heavy Vehicle National Law** applies to 'heavy vehicles' in all states and territories except WA and NT.
- 'Light vehicle' is not a term used regularly in legislation or case law.
- Owner-drivers in Victoria and WA (such as couriers) will only be covered by owner-driver legislation if they carry on the business of transporting goods in one or more heavy vehicles they supply.
- Persons using work vehicles or their own vehicles to transport passengers (particularly passengers with disability) may be covered by a Public or Private Code, and are likely to be covered by employer or organisation policies and procedures.
- In some instances, transporting clients in private vehicles may place workers or volunteers driving those vehicles at risks of harm from the actions of those clients, or at risk of allegations of inappropriate behaviour being made against them by those clients. These risks may increase when the worker is alone with the client in the vehicle.

## 5.7 Implications for Organisations Using Light Vehicles

- Organisations and workers using light vehicles should consider whether those vehicles have been modified in any way, and if so whether they comply with all applicable standards and rules.
  - Larger or heavier vehicles may be covered by the **Heavy Vehicle National Law** and, if so, organisations and businesses may incur responsibilities as part of the heavy vehicle supply chain, even though they do not own the vehicle or have any responsibility for ensuring it is maintained safely.
  - Organisations whose workers, including volunteers, transport clients or patients in vehicles should identify all applicable Codes of Practice, Codes of Conduct, policies and procedures, communicate these to workers, and ensure workers comply with them.
  - Where such Codes, policies or procedures do not exist, organisations should consider developing their own.
  - To minimise risks to clients and workers, organisations should minimise the transportation of clients in private vehicles.
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## 6. Vehicle Safety and Maintenance

The 2017 report **Grey Fleet: Legal Implications for Business**<sup>52</sup> discusses obligations pursuant to *Work Health & Safety Acts* on persons conducting a business or undertaking in relation to ensuring that vehicle workplaces are as safe as reasonably practicable for users of that vehicle and other persons.<sup>52</sup>

Choosing a vehicle appropriate for the task is important. Features on some vehicles may enhance or reduce safety in particular situations. After market modifications or additions may enhance or compromise safety, the latter particularly the case where those modifications or additions have not been carried out in accordance with manufacturer instructions and/or by appropriately qualified persons.

Proper maintenance is essential to ensure continued safety. This includes ensuring that the persons carrying out the maintenance are appropriately qualified, that service schedules are appropriately followed, and that all checks and work carried out on vehicles are appropriately recorded. For passenger vehicles, particularly for high occupancy vehicles such as mini-vans or people carriers, such maintenance should extend to the interior passenger compartment of the vehicle. Ensuring safe passenger use includes ensuring methods of entry and exit to the vehicle are safe.

The capacity to produce comprehensive documents and records regarding service history will be critical in responding to any claims that a vehicle was not as safe as reasonably practicable because it had not been properly maintained, or that the persons carrying out the work were not appropriately qualified.

Private owners of light vehicles are much less likely than business fleet managers to replace their vehicles regularly or to calculate the optimum replacement point for their vehicles. Grey fleet light vehicles are therefore more likely to be older than business fleet vehicles, and in many cases may exceed the average Australian fleet age. Ageing vehicles are likely to pose increased safety risks as not only will they not incorporate the latest safety features common in late model vehicles, they may not have been consistently maintained.

The cases that follow illustrate types of issues that might arise in relation to light vehicles.

The Fair Work Australia<sup>53</sup> decision in **COMCARE**<sup>54</sup> dealt with union concerns about safety of new postal delivery vans to replace Australia Post's ageing fleet of Ford Transit vans (which had a window in the sliding door to the cargo compartment on the passenger side).

<sup>52</sup>[www.nrsp.org.au/resources/grey-fleet-legal-implications/](http://www.nrsp.org.au/resources/grey-fleet-legal-implications/)

<sup>53</sup>now the Fair Work Commission

<sup>54</sup>*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Services Union Of Australia (CEPU) v COMCARE* BC201071272, [2010]FWA 2685

*'Australia Post selected a Mercedes Sprinter van as the replacement but ordered those vans without a window in the sliding door to the cargo compartment on the passenger side of the vehicle...[CEPU members were concerned] 'that the reduced visibility on account of the absence of a window in the rear passenger side sliding door was an unacceptable safety hazard, both to drivers and members of the public.'*<sup>55</sup>

The union contended:

*'that the Mercedes van without a rear passenger side sliding door window is unsafe to use in the Australia Post work environment; that existing Mercedes vans in Australia Post's fleet should have such windows retrofitted and new Mercedes vans should be ordered with such windows installed.'*<sup>56</sup>

In determining whether to affirm an Improvement Notice issued by the health and safety representative requiring risk identification, assessment and implementation of risk control measures, Fair Work Australia concluded that:

*'The evidence suggest[ed] that Australia Post undertook the evaluation and assessment process that led to the selection of the Mercedes van without the window in question in a responsible manner. It appears that concerns over the risks presented by the absence of the relevant window were not expressed to Australia Post until after a number of the vans had been introduced into service.'*<sup>57</sup>

*'The pattern of driving that Australia Post drivers engage in makes it desirable for Australia Post to take readily available steps that are easily identified and practicable to control what is an accepted risk. Further, it seems to me obvious that if a decision is made not to introduce special cameras of the sort addressed in the evidence, then the installation of the relevant window is an obvious measure to control the risk as part of a suite of control measures. On the evidence, any security concerns can be addressed through the use of pinhole decals on such windows. On the evidence, it does not seem that the additional cost including the relevant window when vans are purchased is unreasonably high.'*

<sup>55</sup>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Services Union Of Australia (CEPU) v COMCARE BC201071272, [2010]FWA 2685 at paragraph 18

<sup>56</sup>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Services Union Of Australia (CEPU) v COMCARE BC201071272, [2010]FWA 2685 at paragraph 26

<sup>57</sup>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Services Union Of Australia (CEPU) v COMCARE BC201071272, [2010]FWA 2685 at paragraph 45

In **Dalliston v Taylor**,<sup>58</sup> a mine ‘used light vehicles [king cab utilities] which were modified by having a rollover protection system (ROPS) installed.’ The modifications had ‘been done on an ad hoc basis’, ‘there was no common standard for ROPS on the light vehicles’ and ‘there was no evidence that any of the particular ROPS had been tested to determine their capacity to protect the occupants of a ROPS fitted vehicle’ although they were accepted to provide protection.’ The mine operator determined to replace those vehicles with new vehicles with a higher ANCAP 5 Star rating but without a ROPS.’ The case concerned a dispute about a directive issued by an Industry Safety and Health Representative under the *Coal Mining Safety and Health Act 1999* (Qld) to stop the use of any mobile plant ‘not protected by a structure shown to be of an equivalent (or better) engineered standard than in place at the mine prior to the change.’ In considering whether the new vehicles constituted an acceptable level of risk, the court heard evidence from five experts in engineering or vehicle safety. Those experts agreed that ‘5 Star safety rated vehicles are safer than vehicles with lower star safety ratings’, ‘Electronic Stability Control (ESC) is required to be fitted in order to attain a 5 Star safety rating. It will reduce the number of rollover crashes but will not eliminate them’ and ‘Addition of an after-market ROPS will increase rollover propensity.’<sup>59</sup> ‘The experts considered the following proposition—the addition of after-market “safety” devices, which have not been designed and validated thoroughly may have unintended consequences for aspects of other vehicle safety.’<sup>60</sup> Ultimately the court was satisfied that the new vehicle had ‘a level of risk as low as reasonably achievable.’<sup>61</sup>

**Lees v Hallow Pty Ltd**<sup>62</sup> concerned a crash by a chartered coach, resulting in the death of the driver and injuries to 27 of 28 passengers. Although the case relates to a heavy vehicle, it is of interest for grey light fleet purposes that the judgement includes extracts from the Bus Safety Investigation Report, paragraphs 1.72 and 1.73:

*Currently in NSW any person qualified as a motor mechanic can work on all classes of motor vehicles including heavy vehicles. Despite the major differences in critical systems such as brakes in light and heavy vehicles, there is no impediment to a mechanic with only light vehicle training and experience working on heavy vehicles.*

*Although the Technical and Further Education system [TAFE] provides a range of specialised courses related to heavy road transport and other heavy vehicle categories, a single Tradespersons Certificate covers all categories and makes it legal for the holder of a certificate as a Motor Mechanic to work on all categories of vehicle. It is likely that the poor brake and retarder maintenance found on TV 35 74 in this investigation was due, in part, to a lack of expertise on the part of the (light) vehicle mechanic performing the basic maintenance work.*

<sup>58</sup> *Dalliston v Taylor* [2015] ICQ 17

<sup>59</sup> *Dalliston v Taylor* [2015] ICQ 17 at paragraph 101

<sup>60</sup> *Dalliston v Taylor* [2015] ICQ 17 at paragraph 112

<sup>61</sup> *Dalliston v Taylor* [2015] ICQ 17 at paragraph 130

<sup>62</sup> *Lees v Hallow Pty Ltd* [2015] NSWDC 357 (14 August 2015)



**Pugh v Brambles Security**<sup>63</sup> concerned injuries to a Brambles employee sustained in an explosion that occurred as a result of trying to start the employer's van with jumper leads. The injured worker was a security guard, crew of an armoured security van, and an authorised driver. He was directed to collect a van from some premises. He located the van but the battery was flat. He spoke to his supervisor by radio who said "Well, just see if you can't get it going". The worker was under time pressure, had no technical background, and received offers of assistance from employees of Industrial [the business occupying the premises where the van was located] to use jumper leads. After one Industrial employee made a few attempts at connecting the van's battery with that from another vehicle in different ways, an explosion occurred and the Brambles employee was sprayed with acid. On appeal, Brambles argued that starting the van was a simple task which required little more than a technique well appreciated by the injured worker and which in fact he used. The Court found Industrial was vicariously liable for the acts of its employees, Brambles was in breach of its duty of care and the injured Brambles worker was not contributorily negligent. Olsson J (with whom Mohr and DeBelle JJ agreed) noted:

*In the case at bar [the supervisor] full well realised that he was despatching the [worker] to undertake a task that was normally the duty of a mechanic. That, of itself, would not have given rise to difficulty had there been no problem with the van. However, once mechanical difficulties arose, the situation was that a totally unqualified person was left to deal with a situation which was known in the trade (although not by [the supervisor]) potentially to be fraught with a danger of explosion if not properly handled. Moreover, the [worker] was told, in effect, to do the best he could - the implicit message being that, if a mechanic was not readily available, to make some attempt himself. This was reinforced during the brief two way radio conversation. The situation was compounded when equally incompetent and unqualified employees of Industrial [the business occupying the premises where the van was] attempted to assist the [worker]. It was, truly, a case of "the blind leading the blind."*<sup>64</sup>

In **Wilson v Catering Concepts Aust Pty Ltd**<sup>65</sup> BC9840139 a mobile takeaway food business was operated by means of vans or utilities modified to carry hot and cold snack foods and beverages, with 44 vehicles in use. A delivery driver was injured when the steering wheel of the van she was driving spun violently. The injured driver alleged that her injuries occurred because the vehicle had not been properly repaired and maintained. The business had a documented procedure for responding to reports of problems with vehicles. They employed a fleet manager and two mechanics. They contracted with an outside agency to check tyres and wheel alignment. Evidence of the record keeping of the service history of the vehicles was a significant factor in the court's decision that 'the vehicles operated by the [business] were serviced and maintained to a good standard'<sup>66</sup> and that the business was not negligent.

<sup>63</sup>Pugh V Brambles Security Services Ltd And Anor BC9503094 (1995) Supreme Court of South Australia Full Court

<sup>64</sup>Wilson V Catering Concepts Aust Pty Ltd BC9840139

<sup>65</sup>Wilson V Catering Concepts Aust Pty Ltd BC9840139 page 22

<sup>66</sup>Pugh V Brambles Security Services Ltd And Anor BC9503094 (1995) Supreme Court of South Australia Full Court

**Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam**<sup>67</sup> concerned injuries sustained by a flight attendant when the hem of her uniform skirt caught on a protruding lever in the passenger section of the Volkswagen Transport mini-bus operated by Dallarooma to provide airport transfers. Dallarooma argued :

*‘that it had purchased the mini-bus new and that it had engaged an apparently competent bodyworks modification supplier, Canberra Motor Works, to install three rows of passenger seats. It contended that, following the work, that installer certified that the mini-bus was structurally sound in its design and construction and met the requirements prescribed by the ACT Transport Authority. [Dallarooma] argued that it could not be required, reasonably, to second guess that certification. It had a fleet of 23 vehicles of capacities varying between 7 and 22 seats, including one other that was identical to the mini-bus.’*<sup>68</sup>

The majority of the court held that ‘[Dallarooma]

*‘was the operator of a commercial fleet of buses and mini-buses used to transport, among others, aircraft crew. It was, or ought to have been, aware that female flight attendants that it would carry in the ordinary course could, and did, wear skirts and that they and other persons carried bags that had straps or wore clothes with other features that might catch on protrusions. It was, or ought to have been, aware that persons of normal height would have to crouch down so as to exit or enter the 132 cm aperture comprising the doorway through which passengers passed. That being so, it was, or ought to have been, aware that alighting passengers would bend or twist in a variety of ways when getting out of the mini-bus and that, in doing so, some of them would pass their bodies and or their clothing or other items that they were carrying such as handbags, laptop cases or the like, over the protruding lever as they were exiting the vehicle.’*<sup>69</sup>

The majority rejected Dallarooma’s ‘argument that that it was reasonable for it to have relied simply and only upon the self-certification of the installer responsible for performing the bodywork to fix the new seating in place in 2003’<sup>70</sup>, dismissing the appeal and holding Dallarooma liable. By contrast, the dissenting judgement noted that there had been no similar incidents previously, and there was nothing to suggest that risks in relation to the internal fit-out of the vehicle ‘(especially to the extent that the fit-out was subject to vehicle registration requirements)’ were anything other than low risk, leading to a conclusion Dallarooma was not liable.

<sup>67</sup>Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 (26 June 2014)

<sup>68</sup>Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 (26 June 2014) at paragraph 18

<sup>69</sup>Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 (26 June 2014) at paragraph 27

<sup>70</sup>Dallarooma Pty Ltd t/as CDB Chauffeured Transport v Hyam [2014] ACTCA 22 (26 June 2014) at paragraph 28

## 6.2 Key Points

- Vehicles should be appropriate for the purpose for which they will be used, and risks of unacceptable safety hazards, both to drivers and members of the public should be minimised or eliminated.
- Organisations and businesses using vehicles as part of their business have a responsibility to ensure their vehicles are properly maintained.
- That responsibility will not necessarily be discharged by engaging external third parties to carry out that maintenance.
- Maintenance and assessment of serviceability and safety should be carried out by appropriately qualified and experienced persons, even for simple tasks.
- Responsibility to maintain and ensure safety may extend to ensuring the vehicle is safe to enter and exit and the interior is safe for passenger use.

## 6.3 Implications for Organisations using Light Vehicles

- Organisations and businesses who use light vehicles should consider whether those vehicles are appropriate for the particular use intended or whether they pose safety hazards to users or others.
  - Vehicles used to transport passengers must be maintained appropriately inside and out.
  - Workers who carry out maintenance work on light commercial vehicles when they are not qualified or have no appropriate training or experience, may increase safety hazards.
  - Where high occupancy vehicles are used to transport passengers on worksites, in remote areas, in the course of caring for children, elderly persons or persons with a disability, or by sporting or community organisations, it may be necessary to consider the particular characteristics of the likely passengers and how they are expected to use the vehicle in assessing whether the interior of the vehicle and the entry and exit points of the vehicle are safe.
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## 7. Monitoring Vehicles and Drivers

Various commercial fleet management tools and real time GPS vehicle tracking systems are now widely available and can be used by organisations to effectively manage light and heavy fleet, automate trip reporting, and identify and track driver behaviour.

Grey fleet light vehicles cannot be managed in the same way unless the owners of those vehicles give consent for such telematic devices to be fitted to their vehicles. Tracking privately owned vehicles in this way raises significant privacy implications not only for workers, but also other users of those vehicles.

It is not yet clear how these provisions would apply to driver monitoring systems such as eye tracking software and interior vehicle algorithms, which are designed to improve driver and vehicle safety.

Legislation in some jurisdictions requires prior written notice be given to employees about surveillance or tracking.<sup>71</sup> Additional requirements apply to camera surveillance.<sup>72</sup>

Where workers have a history of crashes, traffic infringement notices, parking fines, loss of licence demerit points, vehicle unroadworthiness or other behaviour connected with the use of a vehicle, this may suggest that their driving or their use of a particular vehicle poses safety risks.<sup>73</sup>

Where that behaviour occurs as the result of use of a business fleet vehicle, employers or owners of that fleet vehicle are likely to become aware of that behaviour when they receive notification of insurance claims, speeding tickets, parking fines, defect notices or other breaches relating to that vehicle. Where employers or organisations rely on workers using grey fleet light vehicles they are unlikely to become aware of such behaviour unless it is disclosed to them by the worker or another person.

Vehicles may be defected for a variety of reasons. Mechanical and safety-related faults increase the risk that the vehicle will be involved in a crash or cause injury to users or others.

Workers relying on light commercial vehicles as a tool-of-trade or for transport may face significant pressures to continue to drive even when their licence has been disqualified or when their vehicle has been defected.

These pressures may be further compounded for small to medium enterprises and workers:

- in rural and remote areas
- on lower incomes (such as apprentices or younger workers) who may not have the financial resources to immediately remedy faults (e.g. replacing bald tyres)
- whose primary work responsibility involves driving, such as couriers, delivery drivers, carers
- culturally and linguistically diverse workers, especially those who are recent migrants to Australia.

In most jurisdictions (except SA and Qld) it is an offence to employ or engage a worker to drive if that worker does not hold a valid drivers licence, or to continue to employ or engage them to drive if the organisation becomes aware that the driver no longer holds a drivers licence. Making all reasonable enquiries and belief on reasonable grounds that the driver held a valid licence or permit may provide a defence to organisations charged with an offence under these sections.<sup>74</sup>

Victoria is the only jurisdiction that requires an employee to advise an employer if they lose their license.<sup>75</sup> Whether or not organisations can access the information to enable them to acquit their obligations is an entirely different matter.

<sup>71</sup>see for example Workplace Surveillance Act 2005 (NSW) s.10

<sup>72</sup>see for example Workplace Surveillance Act 2005 (NSW) s.11

<sup>73</sup>Such as those systems developed by SmartEye <https://smarteys.se/automotive-solutions/>

<sup>74</sup>see for example Road Safety Act 1986 (Vic) s. 32

<sup>75</sup>Road Safety Act 1986 (Vic) s. 32(3)

## 7.1 Key Points

- Monitoring vehicle usage and driver behaviour can identify safety risks.
- Monitoring private usage of fleet vehicles has privacy implications and will require specific consent.
- When organisations rely on grey fleet usage, they are unlikely to have any effective means of ensuring they are alerted to issues relating to driver behaviour or vehicle faults.

## 7.2 Implications for Organisations Using Light Vehicles

- Reliance on light commercial vehicles as tools-of-trade may place workers under pressure to continue to use those vehicles even when their licence has been disqualified or when their vehicle has been defected.
- Light commercial vehicles are an ageing high-use fleet in Australia and therefore may be more at risk of not being roadworthy than passenger vehicles.
- Some workers encounter significant challenges in keeping private or leased vehicles roadworthy.
- Some workers may be subject to significant pressures to drive when disqualified or when their vehicle is not roadworthy.





## 8. Light Vehicles Transporting Loads and Towing Trailers

Passenger vehicles and light commercial vehicles are regularly used to transport loads, with and without trailers. Privately owned trailers may be used and maintained irregularly, and may have been modified in various ways. Trailers may be considerably older than the vehicles that tow them, and are commonly stored outside for long periods without cover and exposed to the elements.

Fleet vehicles owned by an organisation are sometimes used to tow privately owned trailers. Trailers that are part of fleet owned by organisations are sometimes used by workers and towed by the worker's own vehicle, either as part of the worker's duties to the organisation, or if the organisation permits the worker to borrow the trailer for private use. These combinations blur the distinction between business fleet and grey fleet.

Drivers have legal obligations to ensure that all appropriate safety measures have been taken when loading vehicles (including trailers) and securing those loads.

Drivers of light vehicles are less likely to be professional drivers.

Workers who are not professional drivers are less likely to have received training in:

- driving vehicles that transport loads
- how to properly secure loads, and how to use appropriate load restraints
- how to ensure loads do not project or overhang beyond prescribed limits
- how to calculate the maximum Gross Vehicle Mass (GVM) of a loaded motor vehicle<sup>76</sup>
- how to affix a trailer properly or how to manoeuvre a vehicle towing a trailer
- compliance with regulations as to towing mass limits, trailer braking specifications, trailer load projections, trailer lighting and wiring and towing rules
- how to calculate the gross combination mass of the vehicle towing a trailer.<sup>77</sup>

It is also important to note that combination of vehicle and trailer that includes a vehicle with a GVM or ATM [aggregate trailer mass of a heavy trailer] of more than 4.5 tonne is a heavy vehicle.<sup>78</sup> This definition would apply to a light vehicle towing a heavy trailer and would engage the obligations of the HVNL.

Any organisations using light vehicles to transport small quantities of dangerous goods should ensure compliance with the Australian Code for the Transport of Dangerous Goods by Road & Rail.<sup>79</sup>

<sup>76</sup>[https://www.sa.gov.au/\\_\\_data/assets/pdf\\_file/0008/8747/MR143-Carrying-Loads-4.5-tonnes-or-less.pdf](https://www.sa.gov.au/__data/assets/pdf_file/0008/8747/MR143-Carrying-Loads-4.5-tonnes-or-less.pdf)

<sup>77</sup>[https://www.sa.gov.au/\\_\\_data/assets/pdf\\_file/0003/6375/MR25-Light-vehicle-towing-trailer-regulations-GVM-4.5-tonnes-or-less-1.18.pdf](https://www.sa.gov.au/__data/assets/pdf_file/0003/6375/MR25-Light-vehicle-towing-trailer-regulations-GVM-4.5-tonnes-or-less-1.18.pdf)

<sup>78</sup>HVNL 5.5 AND 5.6

<sup>79</sup>Australian Code for the Transport of Dangerous Goods by Road & Rail, Edition 7.6, 2018 [https://www.ntc.gov.au/Media/Reports/\(A890348C-BEE7-3C64-A770-E98CFD8DDEFA\).pdf](https://www.ntc.gov.au/Media/Reports/(A890348C-BEE7-3C64-A770-E98CFD8DDEFA).pdf)

## 8.1 Key Points

- Loads should only be transported on vehicles appropriate for that purpose.
- Loads must be loaded and secured properly in compliance with applicable regulations and using appropriate load restraints.
- Workers may not have had training in transporting loads safely or in driving vehicles towing trailers.
- Adding a load may increase the risks to safety posed by that vehicle.
- Trailers should be regularly and properly maintained, and be registered.
- Vehicles (including trailers) manufacturer or modified to transport loads must comply with applicable regulations.

## 8.2 Implications for Organisations Using Light Vehicles

- Organisations that rely on workers to transport loads using vehicles should consider developing policies for safe transport of such loads, including training for workers and including appropriate use of load restraints.
  - Organisations that provide workers with fleet vehicles fitted with tow bars should develop policies about use of those vehicles to tow private trailers.
  - Organisations that permit workers to use grey fleet light vehicles to tow business fleet trailers should develop policies about use of those trailers.
  - Organisations that require or permit workers to use business fleet trailers should have effective systems to ensure that trailers are registered, properly maintained, and that storage or exposure of the vehicle does not compromise ongoing safety.
  - Organisations that rely on workers to use private vehicles towing private trailers to transport loads should consider how risks to safety can be managed, minimised or eliminated.
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## 9. Vehicles as Part of Employment and Remuneration

Vehicles may be provided by employers to workers in a variety of ways including as tool-of-trade vehicles, package entitlement vehicles, salary sacrifice or pool vehicles. Leaseback arrangements or amounts of permissible personal usage are often unclear, leading to disputes about the terms of employment, whether the provision of the vehicle is part of a remuneration package, included in calculations of income, a tool-of-trade or a piece of equipment necessary for the worker to carry out their work.

Legal issues arising from this lack of clarity may include tax liability, liability for damage caused by use of the vehicle in a private context, the extent of obligations under a contract of employment and whether the high income threshold applies for the purpose of unfair dismissal claims pursuant to the Fair Work Act. The following cases illustrate some of the issues that may arise. Even though the vehicles that are the subject of these cases do not come within the definition of grey fleet included in this report, they form a useful foundation for considering the types of issues that might arise in relation to grey fleet.

**NSW LGCAEU Union and Blue Mountains City Council**<sup>80</sup> concerned a dispute between the Union and the Council. The dispute arose in 2005 when the Council reviewed its light vehicle fleet requirements, and gave a number of employees (who were also union members) '12 months notice that their leaseback vehicle agreements with Council were to be terminated.'<sup>81</sup> The judgement of the New South Wales Industrial Relations Commission illustrates the importance of certainty regarding vehicle provision and usage in discussions with workers about their employment. The evidence suggested a lack of clarity from the parties as to a number of matters including

- what the leaseback scheme entailed
- whether the leaseback policy had been provided to employees
- whether the vehicles were a benefit or necessary to carry out employment duties or a condition of employment
- how the split of private and business usage was to be determined
- renewal procedures.

<sup>80</sup>New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union and Blue Mountains City Council [2006] NSWIRComm 127

<sup>81</sup>New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union and Blue Mountains City Council [2006] NSWIRComm 127

In **Page v Nylex Water Solutions**,<sup>82</sup> an employee was provided with a fully maintained service vehicle in his role as Field serviceman, and had personal use of the vehicle outside working hours. Changes were made to the role and instead of spending 90% of the time on the road, the employee was required to spend 90% of the time in the office. The employee was told he no longer had access to the service vehicle for personal use and subsequently was given a new position description. '[A]part from the change in designation and the removal of all reference to maintenance of vehicles the position descriptions [were] not materially different.'<sup>83</sup> The employee argued his employment had been terminated, or alternatively, he had been demoted and had suffered a loss of remuneration. The Fair Work Commission concluded that the provision of the vehicle was as a 'tool of trade... in his capacity as a field serviceman'<sup>84</sup> it did not form part of his remuneration, and depriving him of the vehicle did not constitute a reduction in remuneration.<sup>85</sup>

**J McDonnell v QUBE Ports & Bulk Pty Ltd**<sup>86</sup> considered whether the value of the private usage of Ford Crew Cab fully maintained and fuelled by QUBE and provided to the employee be included in calculation of the employee's earning for the purposes of the high income threshold in relation to unfair dismissal claims pursuant to the Fair Work Act. It cited the earlier decision in '**Rofin Australia Pty Ltd v Newton**'<sup>87</sup>, where the Full Bench of the Australian Industrial Relations Commission (AIRC) drew a distinction between the provision of a motor vehicle as part of a salary package and the provision of a motor vehicle as a piece of equipment supplied by the employer to enable the employee to perform the job. The AIRC stated:

*Where a motor vehicle is provided to an employee in lieu of salary that might otherwise have been paid, it is appropriate that the private benefit derived by the employee from the provision of the motor vehicle be counted as part of the employee's remuneration. Where, however, the vehicle is provided for business purposes and the employee's entitlement to private use is purely incidental, the provision of the motor vehicle should be treated no differently to the provision by the employer of any other tool or piece of equipment essential to the performance of the job.*<sup>88</sup>

In **Leanne Lawson v Novetec Building Products**,<sup>89</sup> the Fair Work Commission cited an earlier Full Bench decision, **Fewings v Kunbarllanjnja Community Government Council**, which set 'out a preferred approach to the calculation of the non-monetary benefit of the provision of a motor vehicle which is directed towards calculating actual private usage, not some notion of available private usage in a working week.'<sup>90</sup> **Lawson** adopts the **Fewings** method of calculation to consider whether an amount claimed for private vehicle usage is reasonable, and whether it brings the employees remuneration under the high income threshold in the Fair Work Act, thus protecting her from unfair dismissal.

**AFMEPK Union and NEC Australia Pty Ltd and NEC Australia Pty Ltd Redundancy Agreement**<sup>91</sup> also considered whether a tool-of-trade vehicle provided to workers was part of a remuneration package and should therefore be taken into account in connection with redundancy.

<sup>82</sup>Page V Nylex Water Systems BC200670297

<sup>83</sup>Page V Nylex Water Systems BC200670297 at paragraph 7

<sup>84</sup>Page V Nylex Water Systems BC200670297 at paragraph 11

<sup>85</sup>Page V Nylex Water Systems BC200670297 at paragraph 14

<sup>86</sup>J McDonnell v QUBE Ports & Bulk Pty Ltd T/As QUBE Ports BC201370414

<sup>87</sup>Rofin Australia Pty Ltd v Newton [1997] 78 IR 78

<sup>88</sup>J McDonnell v QUBE Ports & Bulk Pty Ltd T/As QUBE Ports BC201370414 at paragraph 30

<sup>89</sup>Leanne Lawson V Novetec Building Products BC201370198

<sup>90</sup>Leanne Lawson V Novetec Building Products BC201370198 at paragraph 19

<sup>91</sup>Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union And NEC Australia Pty Ltd And NEC Australia Pty Ltd Redundancy Agreement 2000-2003 BC200470032

In **Australian Soccer Pools Pty Ltd v Gair**,

*'an employee was supplied by his employer with a "fully subsidised company vehicle". There was no discussion as to what was meant by the expression "fully subsidised company vehicle". The employer did not impose any restrictions on the use of the car. The company was responsible for all expenses involved in the use of the car, including the cost of petrol. The company had an ordinary comprehensive motor policy in respect of the car. The employee allowed his son to drive the car. His son drove the car negligently when it rolled over and was damaged. The employer claimed the cost of repairs from the employee and his son.'*<sup>92</sup>

The majority of the Supreme Court of NSW Court of Appeal held that:

*'The expression "fully subsidised motor vehicle" in the contract of employment should be construed as covering a motor vehicle owned by the employer and supplied to the employee for use by himself and his family for ordinary domestic purposes and in respect of which the employer would obtain and keep in force a comprehensive motor policy to indemnify both parties to the contract and members of the family of the employee against loss.'*

Further that:

*'The employer made the car available to its employee under a contract whereby it agreed to accept responsibility for damage occasioned to it while being used by the employee or members of his family for ordinary domestic use.'*<sup>93</sup>

Mine sites and other workplaces where heavy vehicles and equipment is used may limit the access or use of light vehicles on site for safety reasons. In **Smith v Mt Arthur Coal** failure to abide by traffic management plans, policies and procedures in relation to light vehicles was upheld as an appropriate basis for dismissal of a worker.<sup>94</sup>



<sup>92</sup>Australian Soccer Pools Pty Ltd V Gair (1989) 9 MVR 115

<sup>93</sup>Australian Soccer Pools Pty Ltd V Gair (1989) 9 MVR 115

<sup>94</sup>Smith v Mt Arthur Coal Pty Ltd [2015] FWC 4194 (22 June 2015)



## 9.1 Key Points

- Vehicles are provided to workers in a variety of ways, giving rise to a variety of legal issues.
- Rights, responsibilities and obligations relating to vehicle usage should be made clear in writing.
- Vehicle usage may be relevant in a variety of ways when employment is terminated.

## 9.2 Implications for Organisations Using Light Vehicles

The cases above demonstrate a variety of ways that vehicle usage may impact on employment, with disputes arising where a lack of clarity as to arrangements exists.

Grey light fleet usage is likely to be even less clear.

Organisations where workers access light vehicles as part of remuneration and employment should carefully consider:

- what vehicle usage is expected by organisations or by workers, and whether that has been explicitly agreed.
  - does any contract of employment refer to an expectation that the worker will use a fleet vehicle for private use.
  - whether the organisation has a vehicle usage policy and, if so, how this has clearly been communicated to workers.
  - whether the worker's capacity to use a private vehicle for work purposes is necessary to obtain employment.
  - does any contract of employment refer to a requirement or expectation that the worker will use a private vehicle to carry out their work.
  - whether the availability of a light vehicle to the worker is necessary for them to carry out the work – i.e. whether or not the vehicle is a 'tool-of-trade.'
  - whether private usage of the vehicle will be subsidised by an organisation, and if so to what extent, and whether any such subsidy forms part of the worker's remuneration.
  - how the split of private and work usage is to be determined.
  - whether workers have been properly advised about their obligations and the organisation's obligations arising from the use of the vehicle in relation to work health and safety, workers compensation, taxation, criminal and civil liability, insurance, registration and licensing.
  - whether inappropriate vehicle usage forms the basis for dismissal from employment.
-

## 10. Hypothetical Scenarios

The hypothetical scenarios on the following pages are designed to illustrate some of the difficulties and issues that may arise. They are intended to provide a prompt for organisations to review their current practice and identify possible risks. There are no clear legal answers to any of the questions raised below.

Each question incorporated in the hypothetical scenarios adds a level of nuance and complexity. The legal outcomes in each scenario will be entirely situation specific, dependent on the laws of each Australian jurisdiction. Given the inconsistencies across jurisdictions, outcomes are likely to differ. Persuasive arguments could potentially be constructed both for and against imposition of liability on an organisation or individual in each case.

This means that organisations should give careful thought to how they can identify risks existing in each of the scenarios below, either eliminate where possible or minimise those risks, and take reasonably practicable action to ensure the safety of workers using light vehicles.

It is important to note that moral and ethical perspectives on where responsibility should lie may or may not coincide with legal apportionment of liability or eligibility for compensation, especially where that apportionment or eligibility is governed by specific legislative provisions.

Organisations, employers, workers and others should seek their own specific legal advice on any issues that arise that are relevant to them.

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## Scenario 1 - Monitoring Vehicles and Drivers

Benefits of telematics that monitor driver behaviour have been shown to include fleet optimisation, increased productivity and regulatory compliance and improved road safety.<sup>95</sup> An organisation has fitted telematics devices in all its commercial heavy vehicles in order to analyse and improve driver performance and safety. It does not fit telematics to its light vehicles (below 4.5 tonne GVM). A light vehicle owned by the organisation and driven by the organisation's worker is involved in a collision that causes serious injury.

Should the organisation have fitted telematics to its light vehicles as well as its heavy vehicles?

*Employers have an obligation under Work Health and Safety (WHS) legislation to eliminate risks to health and safety if reasonable practicable, or if they cannot be eliminated, to minimise those risks so far as reasonably practicable. If the employer has not done so, they may be in breach of their WHS obligations. A vehicle may be a 'workplace' for WHS purposes. For more detail see Grey Fleet: Legal Implications for Business, pages 8-10.*

*There may be a variety of reasons why fitting telematics to light vehicles was not reasonably practicable. Where light vehicles are provided to workers for both business and personal use, those reasons may include worker privacy and confidentiality.*

*Ultimately, this will depend on assessing the risk posed by light vehicles, taking into a variety of factors including vehicle usage, location, type of vehicle, and worker training.*

What if the organisation had previously received a number of speeding fines, parking fines and red light fines incurred by that particular driver?

*Where an organisation has information about a specific risk (in this case, the driving history of an identifiable worker), it will be difficult to justify ignoring that information or taking no action to eliminate or minimise that risk. Reasonably practicable responses by the organisation here could vary, including fitting telematics to the light vehicle to be driven by that worker, completely prohibiting the worker from driving for work purposes, or other responses.*

*In light of potential privacy implications, workers required to use or provided with vehicles fitted with telematics devices should be informed that those devices are present and what sort of data they collect.*

<sup>95</sup><https://www.forconstructionpros.com/construction-technology/equipment-monitoring-logistics/article/21017473/telematics-data-can-help-improve-driver-behavior-safety>

What if the organisation had fitted telematics devices to all vehicles (both heavy and light), but had not reviewed the data regularly from light vehicles regularly to identify any problems with driver behaviour?

*This raises complex issues, and may depend on a multitude of issues including what sort of and how often data is generated; the terms of contract between the organisation and an external telematics provider; whether the organisation or the external telematics provider has access to the data; how granular the data is; the purpose for which the telematics had been fitted; and what consent had been obtained from drivers of those vehicles.*

*As above, where an organisation knows or ought to know about a specific risk of harm (in this case, telematics data revealing unsafe driver behaviour or vehicle usage or performance), it will be difficult to justify ignoring that information or taking no action to eliminate or minimise that risk. Reasonably practicable responses by the organisation here could vary, including driver training, prohibiting certain workers from driving for work purposes or from using work vehicles, or other responses.*

*If that identified risk eventuates and causes harm, whether or not liability could be imposed on the organisation (either under WHS legislation or at common law in negligence) will depend on all the circumstances including the reasonableness of the response. Specific legal advice will be required.*

What if the organisation had reviewed the data, which showed the worker regularly cornered at high speeds and often did not wear a seat belt on short trips, but did not act on the data or address with the driver?

*Given that this is information about an identified risk to a worker, it will be difficult for the organisation to justify not acting on that data and not addressing it with the driver. Reasonably practicable responses could include worker training, counselling, or completely prohibiting the worker from driving for work purposes, or other responses.*

What if the organisation had installed telematics into all its vehicles but its agreement with the union allows the organisation to use the data collected only for lone worker location and asset protection, not for performance management of driver behaviour. The data is collected but ring fenced and not viewed as a result of the agreement. A driver is involved in a crash injuring third parties, speed was identified as the cause. Review of the telematic data shows systemic speeding by the driver.

*This raises even more complex issues. The terms of any enterprise agreement or other agreement with the union will be the starting point. If, in compliance with the agreement, the organisation does not review the data and so is not aware of the history of systemic speeding, it is likely to be very difficult to argue that the organisation was or should have been aware of a risk or had any obligation to take reasonably practicable action to eliminate or minimise that risk. Not all workers at the organisation may be union members. Specific legal advice will be required.*

## Scenario 2 - Modifications

Fitting a light vehicle with a bull bar reduces the crumple zones and the collapsible steering column of the vehicle. Bull bars also increase the likelihood of serious injury and fatality to pedestrians.<sup>96</sup> Recent Australian standards for bull bars do not apply retrospectively.<sup>97</sup>

An organisation orders several new fleet vehicles to be custom-fitted with common accessories (e.g. bull bar, winch, driving lights, side steps and a skid plate), potentially exceeding the front axle capacity with two average sized front seat occupants.

*In light of the information publicly available regarding the safety risks inherent in some after market modifications (particularly bull bars), organisations should carefully consider the purposes for which those modifications are being made in light of the intended use of the vehicle, and whether those modifications increase any safety risk either to the occupants of the vehicle or to other persons.*

What responsibility does the organisation have if a collision occurs and both the driver and a third party are injured?

*Employers have an obligation under Work Health and Safety (WHS) legislation to eliminate risks to health and safety to workers and others if reasonably practicable, or if they cannot be eliminated, to minimise those risks so far as reasonably practicable. If the employer has not done so, they may be in breach of their WHS obligations. This vehicle will be a 'workplace' for WHS purposes. For more detail see **Grey Fleet: Legal Implications for Business**, pages 8-10.*

*Even though standards do not apply retrospectively, and so earlier vehicles with existing bull bars may not be in breach of road traffic legislation, continued use of vehicles with non-compliant bull bars, particularly in urban areas, poses a foreseeable risk of harm to other road users that in the event of a collision injuries would be sustained or would be more serious than if the bull bar had not been fitted.*

*Organisations should review their fleet and vehicles used by workers for business purposes to identify which vehicles are fitted with bull bars or other modifications, whether those modifications are appropriate given the expected and intended vehicle usage, taking into account locations, driver training, and all other relevant factors.*

*Where an organisation knows or ought to know about a specific risk of harm (in this case, non-compliant bull bars), it will be difficult to justify ignoring that information or taking no action to eliminate or minimise that risk. Reasonably practicable responses by the organisation here could vary, including driver training; prohibiting workers from using certain vehicles for work purposes; driving for work purposes or from using work vehicles; removal of the bull bar; or other responses.*

<sup>96</sup><https://www.vicroads.vic.gov.au/safety-and-road-rules/vehicle-safety/bullbars>

<sup>97</sup>See for example [http://mylicences.sa.gov.au/\\_data/assets/pdf\\_file/0014/146030/MR1505-Bull-Bars-Frontal-protection-system-2.14.pdf](http://mylicences.sa.gov.au/_data/assets/pdf_file/0014/146030/MR1505-Bull-Bars-Frontal-protection-system-2.14.pdf)



Would it matter if the workers who would be using the vehicles for business and personal use had ordered the modifications?

*The starting point here is careful consideration of the contract of employment and the conditions on which the vehicle is provided and, in particular, the conditions relating to service of the vehicle.*

*If the vehicle is to be used for business purposes, then the organisation should give consideration to the matters referred to above.*

What if the vehicle was owned by the worker, who had a non-compliant<sup>98</sup> bull bar fitted, and was being used by the worker for the organisation's business at the time the collision occurred?

*Organisations are unlikely to have control over what modifications a worker makes to their own vehicle. Organisations should review their fleet and vehicle use policies to ensure that they cover vehicle modifications, and consider training for drivers and workers regarding the safety risks of such modifications.*

An organisation's light vehicles were used primarily in urban areas, but also used in rural and remote areas. They were not fitted with bull bars. A worker driving in a rural area hits a kangaroo and without the bull bar, the car is severely damaged, stranding the driver.

*Expected and intended vehicle usage, including location, will be significant here. Organisations should consider what precautions are appropriate in response to the safety risks inherent in rural and remote travel. Hiring a vehicle suitable for use in rural and remote areas when required may be an appropriate precaution.*

A utility vehicle is modified to include a 10 inch tablet, which is mounted on the centre console of the vehicle. The vehicle is involved in a serious crash at speed resulting in it rolling several times. Although restrained by the seat belt, the driver is injured by the mounting bracket. The bracket was approved by Department for Transport as suitable. Had the bracket and device not been fitted the driver would not have suffered such injuries. Who might be liable?

*Eligibility for motor vehicle accident personal injury compensation is determined differently across Australian jurisdictions. Some schemes require proof of fault by another road user, some do not require fault, and some are hybrid schemes. It is not clear here whether another driver was at fault, or whether this was a single vehicle accident.*

*If this journey was for work purposes, the worker may be eligible for workers compensation. For more detail see **Grey Fleet: Legal Implications for Business**, pages 13-16.*

*The Department's approval of this modification suggests it met relevant standards and was carried out with reasonable care. The fact that the driver has sustained injuries does not necessarily mean that someone else is liable for those injuries.*

*Given the Department's approval, it is arguable that the employer has minimised risks to health and safety of workers so far as reasonably practicable, in compliance with WHS obligations.*

<sup>98</sup><https://www.vicroads.vic.gov.au/safety-and-road-rules/vehicle-safety/bullbars>

## Scenario 3 - Vehicles as Part of Employment and Remuneration

A worker is supplied with a car as part of her employment. The car is branded all over with her employer's logo, which makes it easy to find in car parks. The worker is entitled to use the car for personal use. The employer's fleet management system arranges and documents regular maintenance with nominated service providers paid for by the employer. The worker noticed the tyres kept going flat. She took the vehicle to the provider nominated by the fleet management system who carried out repairs paid for by the employer. The tyre problems kept recurring, and the vehicle was returned to the repairer on several further occasions.

*Under WHS legislation, workers 'may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.'<sup>99</sup> Health and Safety representatives 'may direct a worker who is in a work group represented by the representative to cease work if the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard.'<sup>100</sup>*

*Workers who believe vehicles provided to them are unsafe may refuse to use them.*

Is the employer justified in refusing reimbursement because the work was not carried out by a nominated service provider?

*The starting point here will be careful consideration of the contract of employment and the conditions on which the vehicle is provided and, in particular, the conditions relating to service of the vehicle.*

*Unfortunately, many employment contracts lack clarity regarding provision of vehicles. It is much better to address these issues in advance when the contract is drafted rather than later when the parties are in dispute.*

*If the worker can provide documentation showing that the previous repairs were not carried out appropriately, and given the safety implications that arise from that, it would be potentially be a breach of their obligation under work health and safety legislation to provide a safe system of work for an employer to require the worker to continue to use the vehicle.*

What if the worker had not taken the vehicle to her personal mechanic, and then the vehicle was involved in a serious crash when the tyres failed. Who is responsible?

<sup>99</sup>See for example Work Health And Safety Act 2012 (SA) s.84

<sup>100</sup>See for example Work Health And Safety Act 2012 (SA) s.86

*This presents numerous very complex legal issues. Specific legal advice will be required, and outcomes may differ depending on the state or territory in which events occurred.*

*Eligibility for motor vehicle accident personal injury compensation is determined differently across Australian jurisdictions. Some schemes require proof of fault by another road user, some do not require fault, and some are hybrid schemes.*

*If this journey was for work purposes, the worker may be eligible for workers compensation. For more detail see **Grey Fleet: Legal Implications for Business**, pages 13-16.*

*In some Australian jurisdictions, injured workers can also bring common law damages claims for negligence against their employers. In those jurisdictions, if the worker could prove that the employer could have foreseen the risk of harm and did not take reasonable precautions against that risk, the employer may be liable. Here, while it is arguable that the employer knew or ought to have known about the risk that the tyres were unsafe (because they had paid for several repairs to the vehicle), the employer is also likely to argue that they took appropriate precautions by getting the tyres serviced. Unless the worker told them that the tyre problems kept recurring even after all services by the nominated service provider had been carried out, it may be difficult to prove that the employer knew there was still a problem.*

*Documentation regarding the service schedule, the outcomes of each service undertaken, and any further notifications made by the employer will be critical evidence in proving any negligence.*

*If this journey was for work purposes, then the vehicle is a 'workplace' under Work Health and Safety legislation. The employer therefore has an obligation to eliminate risks to health and safety if reasonable practicable or if not to minimise those risks so far as reasonably practicable. If the employer has not done so, they may be in breach of their WHS obligations. For more detail see **Grey Fleet: Legal Implications for Business**, pages 8-10.*

*If it could be established that the nominated service provider had not carried out the service correctly, then they may be liable to both the worker and the employer for any losses they have suffered. Documentation of the work carried out will also be critical evidence here.*

## Scenario 4 - Driver Licensing

A worker had recently lost their licence due to speeding.

What if the worker was driving a work vehicle, and injured another road user while speeding?

*The worker is likely to face traffic or criminal charges.*

*If the organisation knew that the worker was driving for work purposes while not having a valid licence, they may be in breach of their WHS obligations, including obligations to other persons. In Victoria, the worker is required to disclose they have lost their licence. Organisations should ensure they comply with any legislative prohibitions regarding employment of unlicensed drivers.<sup>101</sup>*

*Organisations that require workers to drive vehicles for business purposes should ensure they have accurate up-to-date information regarding workers' driver licences, including any change to licence conditions. The terms of contracts of employment, travel policies and procedures and vehicle packages arrangements will be relevant here, particularly obligations on workers to notify of any loss, suspension of or imposition of conditions on their licence. It may be appropriate to suspend or terminate a worker's access to a work vehicle during any period of loss of licence. Whether or not organisations can access the information to enable them to acquit their obligations is an entirely different matter.*

*In most jurisdictions (except SA and Qld) it is an offence to employ or engage a worker to drive if that worker does not hold a valid driver licence, or to continue to employ or engage them to drive if the organisation becomes aware that the driver no longer holds a driver licence. Making all reasonable enquiries and belief on reasonable grounds that the driver held a valid licence or permit may provide a defence to organisation charged with an offence under these sections. Victoria is the only jurisdiction that requires an employee to advise an employer if they lose their licence.<sup>102</sup>*

What if the worker was driving a vehicle on an organisation's private property (not a public road) and injured another person or caused property damage?

*An organisation's private property may not be a 'road' as defined in road traffic legislation.<sup>103</sup> If so, it may not be an offence to drive there without a licence. The organisation will nevertheless have obligations under WHS legislation to ensure the workplace is safe. Allowing workers who do not have a current driver licence to drive is likely to breach those obligations.*

Would the organisation be responsible for the worker's actions?

*This may depend on whether the worker was driving without a licence at the direction or with the organisation's knowledge. For more detail see **Grey Fleet: Legal Implications for Business** pages 20-23. Specific legal advice will be required as to the extent of the organisation's liability for any injury or damage caused by the worker, and in particular as to the extent of any insurance coverage.*

<sup>101</sup>Road Safety Act 1986 (Vic) s. 32(3)

<sup>102</sup>Road Safety Act 1986 (Vic) s. 32

<sup>103</sup>See for example Road Traffic Act 1961 (SA) s.6

## Scenario 5 - High Occupancy Vehicles

A mining organisation with a large and ageing light vehicle fleet is concerned that high numbers of light-vehicle single-occupant commutes is costly and poses a risk to worker safety. It shifts worker commutes to high occupancy vehicles [HOV], reducing its fleet size significantly. Although the HOVs are new, they do not have all of the safety technology of the light vehicles they replace. The HOV picks up a shift of workers and whilst driving to the mine site rolls killing several workers.

*Any number of different causes may have resulted in the vehicle rolling. The absence of the safety technology may or may not have been a cause and may or may not have exacerbated the severity of injuries. The evidence of vehicle safety experts will be critical in establishing this.*

*As this incident has occurred in a workplace context, WHS and workers compensation legislation will apply. Injured persons or dependants of workers killed in the accident may be eligible for Compulsory Third Party [CTP] compensation for a motor vehicle accident. Eligibility for CTP schemes is determined differently across Australian jurisdictions. For more detail see *Grey Fleet: Legal Implications for Business* pages 17-18.*

*Employers have an obligation under Work Health and Safety [WHS] legislation to eliminate risks to health and safety if reasonable practicable, or if they cannot be eliminated, to minimise those risks so far as reasonably practicable. If the employer has not done so, they may be in breach of their WHS obligations. This vehicle will be a 'workplace' for WHS purposes. For more detail see **Grey Fleet: Legal Implications for Business** pages 8-10.*

*There may be a variety of reasons why using HOVs instead of light vehicles was an appropriate response to minimise risk, including distances travelled, driver training, vehicle monitoring and maintenance, risk of fatigue related injuries, road conditions, cost, and other reasons.*

*If the HOVs are 'heavy vehicles' (i.e. GVM of 4.5 tonnes or more) the Heavy Vehicle National Law will apply.*

*HOVs built on light commercial vehicles may be required to meet less stringent safety standards than passenger vehicles.*

*Any regulatory frameworks applying to relevant industry sectors must be considered and complied with, including those imposing obligations that new plant is at least as safe as existing plant.*

*Vehicle safety ratings should be carefully considered when choosing appropriate vehicles for use. Organisations should ensure they have clear policies in relation to transporting workers or other persons, and ensure thorough records are kept in relation to those vehicles.*



## Scenario 6 - Light vehicles transporting loads

A worker loads a light vehicle with a payload slightly in excess of the manufacturer's specifications, but which results in a GVM of less than 4.5 tonnes. The worker does not know the curb weight of the vehicle (i.e. how much the vehicle weighs on its own without cargo or passengers), has not read the vehicle manual or the gross vehicle weight rating (usually listed on the vehicle's doorframe) and has had no training in calculating the GVM of a vehicle. The weight of the vehicle poses an increased safety risk, particularly if the vehicle is required to brake suddenly.

What obligation does the organisation that owns the vehicle have to ensure that the worker is properly trained regarding the load carrying capacity of that vehicle?

*Vehicle drivers have an obligation to ensure that all appropriate safety measures have been taken when loading vehicles (including trailers) and securing those loads. This obligation cannot be avoided by a driver on the basis that the organisation did not train them properly.*

*Organisations who require workers to use vehicles to transport loads, and who do not provide such training may be in breach of their WHS obligations. For more detail see **Grey Fleet: Legal Implications for Business** pages 8-10.*

What obligation does the organisation have to ensure that the vehicle is not loaded in excess of the manufacturer's specifications?

*Loading a vehicle in excess of manufacturer's specifications is likely to breach requirements to ensure all appropriate safety measures have been taken when loading vehicles. Drivers cannot avoid this obligation on the basis that the organisation did not train them properly or allowed them to load in excess of the manufacturer's specifications.*

*Organisations who allow workers to use vehicles when their loads exceed the manufacturer's specifications may be in breach of their WHS obligations. For more detail see **Grey Fleet: Legal Implications for Business** pages 8-10.*

Who is responsible if the vehicle is involved in an accident caused by the loading beyond specification?

*As this incident has occurred in a workplace context, WHS and workers compensation legislation will apply. Injured persons or dependants of workers killed in the accident may be eligible for Compulsory Third Party [CTP] compensation for a motor vehicle accident. Eligibility for CTP schemes is determined differently across Australian jurisdictions. For more detail see **Grey Fleet: Legal Implications for Business** pages 17-18.*

*The organisation may also be liable at common law in negligence for other injury or loss. Injured parties would have to prove that the accident was caused by the excess load, and that the organisation could have taken reasonable precautions to prevent the loading beyond specification. Such precautions might include proper training for workers, making information about loading specifications clearly available, processes for ensuring loads did not exceed specifications, and others.*

*Organisations should ensure they have clear policies in relation to the loading specifications and practices for vehicles used for their business purposes, and ensure thorough records are kept in relation to loads transported by vehicles.*

An organisation has a fleet of station wagon vehicles. Some of those vehicles have been fitted with cargo barriers, some have not. The types of cargo barriers in use vary. A worker fills the cargo compartment of one vehicle to the roof, including with unrestrained heavy hard items. The vehicle does not have a cargo barrier. The vehicle is involved in a collision and the vehicle's occupants are injured by the unrestrained cargo.

*As this incident has occurred in a workplace context, WHS and workers compensation legislation will apply. Injured persons may be eligible for Compulsory Third Party [CTP] compensation for a motor vehicle accident. Eligibility for CTP schemes is determined differently across Australian jurisdictions. For more detail see **Grey Fleet: Legal Implications for Business** pages 17-18.*

*The organisation may also be liable at common law in negligence for other injury or loss. Injured parties would have to prove that their injuries were caused by the failure to properly restrain cargo, and that the organisation could have taken reasonable precautions to restrain that cargo either by use of an appropriate cargo barrier or by other appropriate means of loading the cargo. Such precautions might include proper training for workers, auditing vehicles for installation of appropriate cargo barriers where required, use of other appropriate restraint devices, processes for ensuring loads were properly stowed, and others.*

*Organisations should ensure they have clear policies in relation to cargo barriers and other restraint devices in vehicles used for their business purposes, and ensure thorough records are kept in relation to devices in those vehicles.*

A worker uses a light vehicle towing a trailer to transport a load. The vehicle is involved in an accident after the worker has difficulty controlling the vehicle with the trailer attached.

*Vehicle drivers have an obligation to affix a trailer properly and to properly tow and manoeuvre that trailer. This obligation cannot be avoided by a driver on the basis that the organisation did not train them properly.*

*Organisations who require workers to use vehicles to tow trailers, and who do not provide such training may be in breach of their WHS obligations. For more detail see **Grey Fleet: Legal Implications for Business** pages 8-10.*

*If this incident has occurred in a workplace context, WHS and workers compensation legislation will apply. Injured persons may be eligible for Compulsory Third Party [CTP] compensation for a motor vehicle accident. Eligibility for CTP schemes is determined differently across Australian jurisdictions. For more detail see **Grey Fleet: Legal Implications for Business** pages 17-18.*

*The organisation may also be liable at common law in negligence for other injury or loss. Injured parties would have to prove that their injuries were caused by the organisation's breach of a duty to take reasonable care, for example by failure to ensure that the trailer was properly controlled, and that the organisation could have taken reasonable precautions including by properly training the worker in how to tow and load a trailer, ensuring the worker was competent before allowing them to tow the trailer or using other forms of transport for the load.*

*It is not clear whether this trailer is owned by the organisation, the worker, or a third party (e.g. hired, borrowed). If the trailer was not owned by the organisation, then the organisation may also be in breach of a duty to take reasonable care if they do not have procedures in place to ensure the safety of the trailer, for example by ensuring trailers are hired from an appropriate agency, and that they are registered. Where organisations allow workers to use private trailers for business purposes it may be very difficult to ensure those trailers are safe for use to transport loads or that they are currently registered and insured.*

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