From little things, big (and bad) things grow

Nathan Cecil, Partner, Holding Redlich

Most Chain of Responsibility (CoR) breaches don’t arise from an evil masterplan to break the law. Often these issues come about from simple and small oversights or gaps in compliance practices. However, these little failures can result in major problems, fines and costs. In this article, we’ll take a look at some real-life case examples to identify the little things that can go wrong so you can avoid similar outcomes for your business.

CASE STUDY 1: FAILURE TO INTERROGATE GPS DATA

In this case, a company was prosecuted in South Australia for failing to take all reasonable steps to ensure that drivers were not impaired by fatigue (s 229 of the ‘old’ Heavy Vehicle National Law (HVNL)).

The company had installed GPS monitoring systems on all of its trucks. These GPS systems were set up to capture data in relation to particular drivers, distances and working times. However, the company did not routinely access the GPS data or cross-check it with, for example, driver work diaries.

As a result, the company was not actively monitoring the work/rest hours compliance of its drivers. Had the company been monitoring this data, it would have been able to see that two drivers were committing major fatigue breaches.

The maximum fine for the two offences (one for each driver) was $110,000. The company was fined $21,600 plus court costs.

Lesson: If you collect data, you should use it. You should occasionally cross-check records to ensure accuracy and compliance.

CASE STUDY 2: FAILURE TO COMPLY WITH MASS AND DIMENSION EXEMPTION PERMITS

In this case, a company was prosecuted in Victoria for failing to comply with exemption permit conditions. The company was twice observed travelling as a Class 1 heavy vehicle. However, inspections revealed that the vehicles were operating in excess of their mass and dimension exemption permits, including being over length and over height.

For the multiple offences arising from the two vehicles, the company was fined $36,000.

Lesson: Know the terms of your mass/dimension exemption permit; then, know your mass and dimension (which are easily measurable) and know that they are within the limits.

How to strike the right balance between growth and safety for your business

Meshal Althobaiti, Lawyer, Holding Redlich

As a business changes and grows, developing and implementing safety practices often becomes more complex. Expanding businesses require more structured and formal safety and compliance structures. In this article, we look at the case study of Daryl Dickenson Transport to exemplify how a company can manage the transition to greater safety whilst simultaneously managing business growth.

The amendments to the Heavy Vehicle National Law (HVNL) that came into force on 1 October 2018, aligned the safety duties and penalties with existing Work Health and Safety (WHS) laws. As a result, HVNL safety compliance has equal legal standing to WHS compliance and needs to be addressed with the same focus. It is important that your business has adequate compliance frameworks in place to ensure the safety of your transport activities.

HELPDESK QUESTION OF THE MONTH

What are the types of defect notices and what should I do if I receive one? (answer on page 7)

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

DECEMBER 2019
ISSN: 2204-7670
CASE STUDY 3: FAILURE TO COMPLY WITH RESTRAINT AND MASS REQUIREMENTS

In this case, a driver was prosecuted in Victoria for breach of load restraint and mass requirements.

The driver was driving a tipper loaded with soil. The soil had been loaded above the 'waterline'.

You must know your mass – either by having measured or calculated it – for every journey.

The 'waterline' is not a guaranteed load measure, so loading below the waterline doesn’t guarantee that the load will be within limits, which will depend on the actual type and mass of the load. However, loading above the waterline does mean that it is more likely that the load will be above limits and also harder or impossible to properly restrain.

The vehicle was weighed and found to be overloaded by 21%, which is classified as a 'severe' mass breach.

The driver was fined $13,000.

Lesson: Don’t overfill vehicles; load lines are there for a reason. You must know your mass – either by having measured or calculated it – for every journey. For bulk loads and where weighing equipment is not available, it is acceptable to load according to a pre-verified (and occasionally re-verified) loading plan, e.g. ‘for this type of product, load to here or load X buckets’. However, you must be aware that such plans might not hold true if the load type or condition or vehicle configuration is altered.

WHY DO OVERSIGHTS HAPPEN?

From these real-life case examples, we can see that the problems that get businesses into trouble are often day-to-day operational failures. They usually stem from the following common causes:

- failing to understand your compliance obligations or the relevant limits – this is usually best reflected in a written compliance policy;
- failing to put in place a work process that ensures that your obligations or limits are met – this is usually best reflected in written work processes or procedures; and
- failing to properly instruct and monitor employees to ensure that they understand what they are meant to do and actually do it.

One driver, one incident, 14 breaches

Nathan Cecil, Partner, Holding Redlich

On 26 April 2019, a driver walked into the Townsville Magistrates Court with 14 alleged offences trailing behind him, all arising from one incident and inspection. He left with fines just about as long.

A prime mover combination was loaded with a wheel loader, empty pallets and tyres. A tyre fell from the combination and almost hit an oncoming bus. The prime mover, load and driver’s records were inspected and it was found that (you will need to take a breath to get through this):

- the prime mover was missing a tyre on the front axle;
- the prime mover had a split tyre on another axle;
- the vehicle had:
  - a cracked windscreen;
  - a poorly maintained rocker box;
  - poorly maintained leaf springs;
  - worn brakes on its trailer; and
- the vehicle was leaking hydraulic fluid;
- the tri-axle was overloaded by 33%.

The combination did not display the required ‘oversize’ sign; and

the driver’s work diary showed:

- multiple occasions where the driver had worked over the maximum work hours;
- multiple occasions where the driver had not taken the minimum prescribed rest; and
- numerous instances where required information was not recorded.

Unsurprisingly, the driver was convicted and fined $19,648 plus court costs.

Some things for drivers to think about: How many days’ wages was that? How many more days’ wages did the driver lose while the vehicle was grounded and undergoing a series of major repairs? How many more days’ work did the driver lose because others didn’t want to engage the driver after this incident? Was cutting corners worth it in the end?

Some things for others to think about: What if this was your employed driver? What if this was your contractor? What if you had loaded this truck?
CoR compliance in the construction sector

Nathan Cecil, Partner, Holding Redlich

Heavy vehicles are an integral part of major infrastructure projects. The concentration and sheer scale of activity across the highly competitive construction sector makes Chain of Responsibility (CoR) compliance and safety risks unique. In this article, we focus on what your CoR management plan should cover to ensure that your business is in the best position it can be to secure your share of construction project work.

Major construction projects can have hundreds of truck movements per day. It is estimated that the WestConnex M4 East project had more than 2300 people working on the project directly, with another 2000 plus companies supplying components and product to the tunnel. That’s a lot of truck movements.

Similarly, the complexity of operations for Melbourne’s Metro Tunnel project is evident with the extensive excavation currently happening in the heart of the CBD. The sheer volume of truck movements and complexity of operations adds significant complication to the management of CoR compliance on such large-scale projects.

It is imperative that parties involved are aware of their obligations imposed by the Heavy Vehicle National Law (HVNL). Businesses must take the necessary steps to ensure their contracts are in line with these obligations.

MITIGATE RISK WITH CoR MANAGEMENT PLANS

As part of project risk mitigation, principal contractors and transport operators are usually required to submit a CoR management plan to project stakeholders, either as part of the tender process and/or before being permitted to commence any work on a project. The CoR management plan is then one of the keys required to open the lock and be engaged on a project.

Project stakeholders, including private developers and government agencies or corporations, want assurance that principal contractors awarded the design and/or construction work will properly screen and manage the compliance of subcontractors that will be performing the work.

Principal contractors want assurance that the subcontractors they engage to perform the work can either comply with the project’s CoR management plans or design their own CoR management plans to put in place. They don’t want subcontractors to expose them to breaches and potential penalties under the design and construction award.

Subcontractors, including transport operators, equipment suppliers and construction material suppliers, need to be able to demonstrate that they have in place working practices to ensure their own compliance with the project CoR management plan. Their own internal compliance policy and working procedures need to ensure compliance by them and any further subcontractors engaged down the line.

Caution: With maximum penalties for breaches now at $3 million for corporations and $300,000 for executives, non-compliance could have a significant impact on project return. In addition, if non-compliance were to result in the grounding of major contractor fleets, project disruption and delay would be inevitable and extremely costly.

EASY A TARGET FOR ENFORCEMENT?

Directors and other persons concerned with the management of a construction company should also be aware that they may be held personally liable for ensuring that their company complies with its safety duties under the HVNL...

SHARED RESPONSIBILITY IN THE CONSTRUCTION SECTOR

One of the most important aspects underpinning the HVNL, that you should now be familiar with, is the concept of shared responsibility that defines the CoR. The CoR assigns a legal obligation to every party in the supply chain to ensure the safety of their transport activities. This extends to companies and individuals within the construction sector. These transport activities include any business practice or decisions made in relation to the use of a heavy vehicle on the road.

The concentration of heavy vehicles makes enforcement action much easier – it’s like shooting fish in a barrel!

IS THE CONSTRUCTION SECTOR TOO EASY A TARGET FOR ENFORCEMENT?

The concentration and scale of activity, the complexity of managing compliance, and the risks and likely outcomes if compliance is not managed properly mean that the regulators have compliance on large-scale construction projects squarely within their sights.

In NSW, Roads and Maritime Services (RMS) representatives have previously identified the construction sector and civil contractors as having limited awareness of CoR compliance requirements and low implementation of CoR compliance practices, saying: “With a significant increase in the number of infrastructure projects taking place across the state, it is crucial heavy vehicles being operated as part of these projects are compliant with road transport law and any associated risks are properly managed.”

RMS also indicated that the increase in infrastructure project activity would bring with it “… targeted enforcement… to change industry culture and practices.” We have seen this in practice, with police operating targeted enforcement campaigns on trucks servicing almost every significant construction project in recent history. The concentration of heavy vehicles makes enforcement action much easier – it’s like shooting fish in a barrel!

Evidently, comprehensive CoR management plans are crucial in order to minimise penalties, avoid project disruption and to ensure the safety of all parties.
DECEMBER 2019 / HOW TO STRIKE THE RIGHT BALANCE BETWEEN GROWTH AND SAFETY FOR YOUR BUSINESS

The National Road Safety Partnership Program (NRSPP) is a collaborative network aimed at supporting Australian businesses in developing a positive road safety culture. NRSPP achieves this by, amongst other things, providing case studies which can be found under the Knowledge Centre of the NRSPP website: www.nrspp.org.au.

CASE STUDY: DARYL DICKENSON TRANSPORT

Daryl Dickenson Transport (Dickenson) is a family owned and operated steel carrier business that has grown from an owner driver transport operator to a company that operates a 30-strong fleet with more than 50 staff.

In the past, load restraint had been a major issue for Dickenson. However, when a family member was injured at work, Dickenson acted quickly and resolved to make safety a stronger priority. This was not a simple task for a family-owned business, as the business was in the process of expanding. Dickenson had to navigate how to implement more effective safety procedures while managing business growth.

We've set out a useful guide below to help you develop your own business compliance roadmap based on the Dickenson story.

3 KEY FEATURES OF A COMPLIANCE FRAMEWORK:


Compliance risk and safety have become one of the most significant ongoing concerns for businesses in the transport industry – particularly because the transport sector is usually subject to the highest levels of workplace injury. A solution to improving heavy vehicle safety is for transport businesses such as Dickenson to implement a safety management system that includes introducing a handbook to outline to drivers and other suppliers the business’ expectations as to safety and compliance conduct.

Regulators have recognised that business practices can adversely affect the performance of other CoR duties and that positive business practices (rather than just the absence of negative business practices) are an essential compliance tool.

It is prudent to have in place a driver, supplier and/or subcontractor handbook outlining your business’ policies, practices and compliance expectations. CoR compliance policies need to be more than just ‘aspirational’ statements of commitment to the CoR. They need to have substance and set out the following: the roles, functions and responsibilities within your supply chain, how you will comply, how you expect others to comply, how you will share and act on information about non-compliance and what you will do in the event that your supply chain parties can’t or won’t comply with their obligations.

2. Training and Inductions

Dickenson provided initial driver training under its driver handbook, as well as annual refresher training and one-on-one performance training for drivers who encountered compliance issues.

We recommend that all businesses consider providing information, instruction and training to employees and other contractors/subcontractors and supply chain participants they have responsibility over.

You should provide compliance training to any CoR party in your business’ policies and practices. This should be followed with regular handbook updates, with these updates being communicated through an annual induction process. This may also include ad hoc training when learning opportunities arise from near misses and incidents.

3. Using technology to manage CoR compliance

Many transport and logistics businesses actively use technology to drive business management and efficiency. There is a growing recognition that the same or similar technology can also be used by businesses to monitor, manage and demonstrate compliance with the HVNL. For example, another major safety measure that Dickenson undertook was introducing Global Positioning Systems (GPS) in their trucks.

GPS monitoring was used to measure compliance (i.e. speeding) as well as other poor driver behaviour (i.e. harsh braking and excessive engine revs).

Non-compliance incidents were discussed one-on-one with the driver. If the same issues kept occurring, tailored one-on-one training was provided to the driver.

Positive business practices (rather than just the absence of negative business practices) are an essential compliance tool.

Dickenson also aggregated the GPS data to identify recurring safety problems or trends, which it reported monthly to drivers and subcontractors. This enabled Dickenson to target additional awareness and training efforts on those issues which exhibited higher levels of non-compliance and therefore business compliance and safety risk.

Your business can use technology to monitor, manage and demonstrate compliance with the HVNL.

IMPLEMENTATION CHALLENGES

Dickenson faced two key challenges with implementing safety measures. Firstly, that it can be difficult to maintain a focus on safety while dealing with the pressures of a growing business. In Dickenson’s case, in order to address this challenge, it shifted its focus from continued expansion to working with blue chip companies for high levels of safety and service.

Secondly, change can be met with a certain amount of resistance as people are usually comfortable with the procedures they know. In order to overcome this, Dickenson outlined what they were trying to achieve and gave employees and stakeholders the opportunity to voice any concerns. This could also be done through training and induction opportunities.

With implementation challenges, it is important to identify what best suits your particular business needs and to persist with establishing this.

> Continued on page 5
Business compliance project roadmap

Meshal Althobaili, Lawyer, Holding Redlich

As highlighted in the previous article, it is important for businesses to prioritise the safety of their transport activities and to implement systems to ensure this. Getting your safety practices instantly to ‘100%’ is probably unrealistic, so you may benefit from addressing them in stages. Below is a suggested roadmap for when your business is considering to implement a business compliance project.

**REMEMBER**
A staged implementation of safety measures is better than trying to achieve everything at once, unless you have limitless resources and focus.

### BUSINESS COMPLIANCE PROJECT ROADMAP

**Stage 1: Consult with stakeholders**
Ensure that you have an open dialogue with all relevant stakeholders when implementing a compliance project and safety measures. Consult with these stakeholders on a regular basis.

Some of these stakeholders may include:

- **Employees**
- **Suppliers**
- **Contractors**
- **Customers**

Discuss with the relevant stakeholders any concerns and reservations they may have and make sure you take them into account or at least understand how they fit within your organisation. You must ensure that all stakeholders are made aware of their responsibilities whilst at work.

**Stage 2: Conduct research**

- **a. Look for information and resources that are available to help your organisation improve its safety performance.**
- **b. Consider relevant industry bodies in your jurisdiction (e.g. TruckSafe, NatRoads, Safety Leadership at Work Group and the Transport Safety Network) and make contact with ‘friendly’ competitors who are willing to share safety information and practices.**
- **c. Make sure you visit the National Heavy Vehicle Regulator’s website to stay up to date with any relevant news and events:** [https://www.nhvr.gov.au/](https://www.nhvr.gov.au/)

**Stage 3: Assess the key aspects of compliance structure**

Consider what your organisation can introduce by way of safety measures and identify what technology tools or WHS training and guides may be required.

It is recommended that you find out what best suits your particular business needs. For example, consider any mandatory training requirements that may apply to your employees or contractors.

**Stage 4: Develop a training program**

Based on the requirements you have identified in your assessment, develop the appropriate training program and inductions.

**Stage 5: Measure outcomes**

- **a. Monitor and review the compliance project to identify any deficiencies.**
- **b. Provide feedback to employees and other stakeholders.**
- **c. Share what you have learned with others to better your business reputation and increase feedback.**

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**OUTCOMES**

Dickenson’s safety journey has driven a multitude of business benefits for the company. Although balancing growth and safety was a challenging transition, it was certainly worth it. The implementation of safety measures at Dickenson has seen a significant decline in injuries. This decline in the number of injuries has contributed to Dickenson building a reputation for safety, which has seen the company obtaining further work.

Dickenson’s improved reputation and recognition has also led to increased employee loyalty and demand as the business is known to prioritise the safety and wellbeing of its employees.

Additionally, Dickenson’s implementation led to commercial benefits, such as a reduction in WorkCover costs and insurance premiums. The business reported that the number of WorkCover claims had halved and the days between injuries had almost doubled.

**KEY TIPS FOR IMPLEMENTATION**

To improve its safety performance, Dickenson found that participating in the Transport Safety Network and learning from other companies’ safety lessons has been critical in implementing effective measures. The fact that other businesses were on the same journey reassured Dickenson that they were on the correct path. It can be of great benefit for your business to source information through networking and building relationships with other transport businesses.

Your business should always prioritise giving parties an opportunity to raise their concerns. For example, Dickenson explained to each driver individually the reasons for introducing safety measures at the start of their safety journey. Your company’s attitude can help bring employees on board and overcome early reservations from them.

There are many existing compliance networks and groups to assist in the implementation process. Some of the groups and associations that Dickenson mentioned being involved with included:

- a. Queensland and Australian Trucking Associations
- b. NatRoads
- c. Safety Leadership at Work Group
- d. Transport Safety Network

Knowing that you are not alone in addressing safety risks can go a long way. Businesses should keep in mind that the shared safety duty means that it makes sense to share compliance knowledge or resources. For example, when Dickenson realised that they needed more information about their obligations, they invited a small business adviser from Workplace Health and Safety Queensland (WHSQ) to visit its company. Dickenson found out about the WHSQ advisory service through a local Transport Safety Network meeting where it had been a regular attendee at its quarterly meetings.

Further, when considering major safety changes, your business should consider implementing such changes in stages. It is very common to see businesses trying to do too many things at once. This can overburden drivers and employees involved.

**TIP:** Consider staged implementation rather than trying to do it all at once. You can do this by introducing one measure at a time before moving onto the next item once you know the previous item is working.
How Registered Industry Codes of Practice can help your business

Rebecca Niumeitolu, Lawyer, Holding Redlich

Registered Industry Codes of Practice (RICPs) are codes developed by any Chain of Responsibility (CoR) party that is registered by the National Heavy Vehicle Regulator (NVHR). They set out detailed, practical requirements for various CoR parties, they offer industry-focused solutions to compliance issues. For example, the Master Code is an RICP administered by Safe Trucking and Supply Chains Ltd. It focuses on compliance with speed, fatigue, mass, dimension and loading requirements, as well as compliance with vehicle standards. Rather than simply stating the HVNL requirements for various CoR parties, the Master Code offers options and procedures for CoR parties to implement to avoid these breaches. Rather than stating, “Don’t allow a driver to drive in breach of work and rest options”, it tells operators, “If you become aware the driver is impaired by fatigue, stop the driver immediately, and arrange for the driver to have a rest break” (page 50). It further prompts the operator to establish escalation processes to deal with drivers impaired by fatigue.

RICPs are a useful tool for any party in the CoR or industry group to set out practical ways to achieve compliance with HVNL requirements. As they are developed by industry participants, they offer industry-focused solutions to compliance issues. Therefore if a party voluntarily adopted an RICP to set out its standards and procedures for compliance with a particular HVNL obligation and that party were charged for contravening that same obligation, it could produce the RICP as evidence in the proceedings to support a finding that it complied with that particular HVNL obligation.

- RICPs translate HVNL requirements into workable, business solutions

RICPs are admissible as evidence in proceedings as to whether or not a duty or obligation under the HVNL has been complied with.

Arguably, a code addressing this ongoing concern has the capacity to assist industry to comply with effluent load restraint requirements under the HVNL and to obtain the NHVR’s tick of approval to their proposed steps for compliance with that obligation, while also giving industry (in particular drivers and operators) a buffer to defend against charges for failures to restrain effluent.

As the Effluent Management Code may assist CoR parties in the livestock transport supply chain to clarify their HVNL obligations, the same may be said of the capacity for RICPs to assist industries facing regulatory grey-zones to clarify their HVNL obligations.

RICPs are admissible as evidence in proceedings as to whether or not a duty or obligation under the HVNL has been complied with.

HOW DO YOU DEVELOP AND REGISTER AN RICP?

An RICP must comply with the NHVR’s Industry Codes of Practice Guidelines for Preparing and Registering Industry Codes of Practice (Guidelines).

Before formally approaching the NHVR, it is useful for code developers to consider the target areas the code will cover, its purpose and to do an industry call-out to ascertain whether such a code would be adopted if introduced. This is because there are costs associated with developing, registering and maintaining a code.

Formal steps to register a code involve:

1. The developer will speak with the NHVR and prepare a notice of intention to register an industry code of practice. This notice will be published by the NHVR.
2. The developer will need the ‘green light’ from the NHVR before development can start.
3. The developer will prepare the code through research and industry consultation, clarifying the scope of code, identifying risks with transport activities covered by it, suggesting measures to control risks and provide guidance to CoR parties adopting the code to develop their own risk management processes.
4. The code will be checked to ensure it achieves compliance with the HVNL with risks and controls proposed by the code linked to each provision of the HVNL, it is designed to address.
5. An administrator of the code will be appointed to liaise with the NHVR and to manage the review and update of the RICP once it is registered.
6. The developer will submit the code with supporting documents to the NHVR with the assessment fee.
7. A qualified and experienced panel will assess the code.
8. The panel will make a recommendation to the NHVR on whether to register the code and the conditions of registration.
9. The NHVR will determine whether to register the code.
10. Registrations will be subject to conditions for the administrator to engage in a review of the RICP and to update the code as best practice methods change or as the Guidelines are amended.
Each month we publish some of our top questions from the CoR Adviser Helpdesk.
To ask your question today, email: helpdesk@coradviser.com.au.

Please note: All identifying details are removed for reasons of confidentiality.

Whether your concerns are about recent legislative changes, difficulty ensuring compliance of others in the supply chain, or the steps you need to take to protect yourself, our team of lawyers is ready to answer your questions.

### Improvement notices

Q I have been issued an improvement notice. What should I do? How can I appeal it?

A An improvement notice is issued where an authorised officer reasonably believes a person has contravened or is contravening a provision of the HVNL in circumstances that make it likely the person will continue or repeat that contravention.

Improvement notices will identify actions that must be taken to stop a contravention occurring or to remedy matters or activities occasioning a contravention.

If you have received an improvement notice, before rushing to appeal it, make sure you have read it carefully and understand its directions, the alleged HVNL breach on which it has been based, and the authorised officer’s reasons for issuing it. All of these factors are important to determine whether you should comply with it or have grounds to seek review of the improvement notice.

If you want to dispute the improvement notice you have the option to apply immediately for a stay of the decision.

A ‘stay’ essentially puts on hold your obligation to comply with the improvement notice pending resolution of your application for its review. You must apply for internal review to the NHVR within 28 days after being notified of the improvement notice.

Your application should be in writing, include payment of the prescribed fee and state the grounds for review. For example you could contend that there were no reasonable grounds for the authorised officer to reasonably believe that you contravened the HVNL in circumstances that make it likely that it would continue or be repeated, or that the authorised officer formed the decision to issue the improvement notice on irrelevant factors.

If you consider that the internal review decision is affected by error you have a further 28 days to appeal that decision to your relevant appeal body. In doing so you may also apply for a stay of the internal review decision.

### Heavy vehicle modifications

Q I am an owner driver looking to make some changes to my truck. I’ve been told that I may need to seek approval for these changes. Can you please advise whether this is the case?

A Whether you need approval for your proposed changes will depend on two factors:

1. The changes to your truck are a modification covered by the HVNL:
   - The HVNL regulates heavy vehicle modifications that involve adding a component to, or removing a component from, the vehicle or changing the heavy vehicle from the manufacturer’s specifications for the vehicle. This excludes modifications already approved under the Motor Vehicle Standards Act 1989.
   - If your proposed changes meet the above description of a modification then it is regulated by the HVNL and may require approval.

2. The specific modification that you propose to make to your heavy vehicle:
   - We refer you to part 3.5 of the HVNL and the ‘NHVR Code of Practice for the Approval of Heavy Vehicle Modifications’ (CoP), which specify whether and how approval must be obtained before you modify your heavy vehicle.

In respect of approval for heavy vehicle modifications, the CoP provides that:

- a. Minor modifications do not require approval. These are modifications that continue to be within manufacturer’s specifications and comply with the regulations.
- b. Common modifications must be assessed and certified by an accredited Approved Heavy Vehicle Examiner. Common modifications are changes that are regularly performed and understood by regulators and the industry.
- c. Complex modifications require assessment and approval by the NHVR. These are unique modifications to allow a heavy vehicle to undertake a particular task or function.

### Defect notices

Q What are the types of defect notices and what should I do if I receive one?

A A defective vehicle is one that contravenes an applicable heavy vehicle standard, has a part that does not perform its intended function or has deteriorated to such an extent that it cannot be reasonably relied on to perform its intended function.

Defect notices will vary according to the type of defect affecting the vehicle and the safety risks associated with that defect:

- A major defect notice will be issued if there is a safety risk posed by the defect and the risk presented by the vehicle is imminent and serious. If you receive a major defect notice, you must not use the heavy vehicle on a road other than to move it to one or more specified locations as required by the notice. In extreme cases, the vehicle will be immediately grounded and must be fixed on site or towed to a repair point. Inspection and clearance is required by the regulator before you can use the heavy vehicle.

- A minor defect notice will be issued if there is a safety risk posed by the defect, but that risk is not considered imminent and serious. If you receive this notice you cannot operate the heavy vehicle on a road unless specific action is taken to rectify the defect. Inspection and clearance is required by the regulator before you can use the heavy vehicle.

- A self-clearing defect notice will be issued if there is no safety risk posed by the defect, but that risk is not considered imminent and serious. If you receive this notice you may operate the heavy vehicle on a road unless specific action is taken to rectify the defect. However, you must not use the vehicle for any commercial purpose before being inspected and cleared by the relevant authority.

If you receive a defect notice you must comply with it. A person who drives or permits a person to drive a defective heavy vehicle may be liable for maximum penalties of $33,700 for a company or $6,674 for an individual.

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If you have any subscription queries, please contact Customer Services on 1300 782 911. We may monitor and record calls to maintain and improve our service. For editorial queries please email us at: cs@portnerpress.com.au. Publisher: Pippa McKee. Waterman Business Centre, Level 2, UL-40/1314 Dandenong Road, Chadstone, VIC 3148. ACN 134 714 140.
Blitzing court attendance notices

Over a three-day period alone in October 2019, a heavy vehicle traffic blitz on the Barrier Highway saw 187 heavy vehicles stopped and 85 defect notices issued. In August 2019, a five-day traffic blitz saw 150 heavy vehicles inspected resulting in police issuing 72 infringement and defect notices, and seven court attendance notices (CANs).

For those in the transport industry, the word ‘blitz’ is often foreboding. It can mean fines, charges, possible notices to produce, improvement notices or court attendance notices. A ‘blitz’ can mean a lot of paper work and stress for parties in the Chain of Responsibility (CoR).

A common response to these enforcement measures is to say, “Let’s just pay it and make it go away”. Of course, this can be a fair and commercial response, particularly if it’s agreed that a contravention in fact occurred. This approach can also cut down penalties on sentence, as our court system acknowledges the early guilty pleas and cooperation can entitle defendants to a discount on the penalties that would otherwise be imposed on them.

But what about the “This is wrong. I want to fight this” approach? What should CoR parties first consider before pursuing this course of action? How could these CoR parties go about preparing a defence? This article considers your options in respect of defending against charges against you, with a focus on CANs.

COURT ATTENDANCE NOTICES

A proceeding for an HVNL contravention is commenced by way of a CAN. It is a formal written notice requiring the named defendant(s) to attend court to answer to charges for an offence of the HVNL.

If you receive a CAN:

1. Report it to the business’ relevant HVNL compliance officer, if you are an employee
2. Carefully read the CAN
   Key factors that you should be looking for are:
   a. The date, time and place you are required to appear at Court.
   b. The HVNL contravention with which you are charged.
   c. A description of the offence.

   d. A brief statement of the particulars of the offence – e.g. its date, where it occurred or was detected, persons to whom the police spoke and what was said.
   e. Documents in support of the charges – e.g. copies of transport documentation or photos evidencing the breach.

3. Seek legal advice

   A CAN may expose you or your business to legal liability. Therefore, it is critical to understand the charge, the nature of your legal risk and whether you have any defence options available to you.

   For example, a person may be adamant that they did not contravene the HVNL, but this may not be sufficient to demonstrate that fact to the court. Legal advice can assist you to weigh the prosecution’s evidence in favour of the charge against possible evidence that you could lead in your defence.

   It is critical to understand the charge, the nature of your legal risk and whether you have any defence options available to you.

WHAT ARE YOUR OPTIONS?

“To plea or not to plea?” is the ultimate question posed by the CAN.

While factors relevant to deciding this question will vary from case to case, as a guide, factors that may inform your decision include:

a. Does the CAN actually describe the alleged breach and the circumstances in which it arose?

b. Do you agree or disagree that the contravention described in the CAN occurred?

c. Are you a relevant responsible person who could be charged for the alleged breach?

d. What do the driver or other parties involved in the contravention (e.g. loaders, consignors, weighbridge operators and schedulers) have to say about the circumstances of the offence?

e. What evidence could you produce to defend yourself? Do you have transport documentation or sign-off checklists that relate to the charged offence?

f. Can you ask other persons involved in the alleged offence for their supporting transport documentation, CCTV footage or system records that may show your compliance with the relevant HVNL obligation?

g. Can you ask the police for further information or documentation relevant to the charges?

h. Are you prepared to take on the costs of a proceeding? This includes not only the legal costs associated with defending the case, but also reputational and time costs that arise.

i. Are you prepared to bear the risk of being found guilty vis-à-vis the cost of acquittal? You should understand that even the strongest defence does not guarantee an acquittal. You should understand the penalties that could be imposed on you and the steps to appeal a conviction also have their own distinct costs and risks.

HOW TO CAN THE CHARGES IN YOUR CAN

If you decide to plead not guilty, you can notify the court and prosecution of this by attending court at the time scheduled in the CAN, or by completing and sending the ‘plea form’ attached to the CAN to the relevant court registry identified in the CAN.

While the prosecutor bears the onus of providing beyond reasonable doubt that you committed the contravention of the HVNL, a prudent accused would then go about:

- reviewing the brief of evidence filed by the prosecutor;
- compiling documents that can be tendered in the accused’s defence; and
- collecting witness statements to assist the accused or his or her lawyers leading oral evidence in court.

After a plea has been entered, the usual protocol in the local court is for a hearing date to be allocated.

IN THE NEXT ISSUE

OUT JANUARY 2020

- More real-life case studies from the NHVR
- Safety Management Systems
- The safety benefits of electronic fleet management