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COR ADVISER

Your one-stop resource for practical Chain of Responsibility solutions

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From Your Editor-in-Chief

This issue is a grab bag to help you sharpen your focus on compliance.

We take a look at new cyber security regulatory requirements that are being mooted for the transport sector. Although not CoR-focused, we thought we should give you a heads up before they become law. Now is also the time to have your say on the proposed laws before they are settled.

We also reflect on some of the 'biggest and baddest/best' (depending on your stance) investigations and prosecutions to come out of 2020. Rather than treating them as further examples of the misery that was 2020, we are using them as valuable learning tools. You can learn from the mistakes made by others. In every one of the cases discussed, the breach or incident could have been avoided.

Finally, we provide a refresher on Registered Industry Codes of Practice (**RICP**) and the benefits that they offer. In a related article, we consider another option if there is not a RICP that covers your industry – the development and implementation of a Safety Management System (**SMS**). This is a slightly more formal and 'fancy' version of the CoR risk and compliance management framework that we regularly discuss in this newsletter.

Happy reading!

Nathan Cecil
Partner, Holding Redlich
Editor-in-Chief, CoR Adviser

New cyber security requirements for the transport sector

Nathan Cecil, Partner, Holding Redlich

In 2018, the *Critical Infrastructure Act 2018* (Cth) (the Act) came into force. This Act is part of the Commonwealth Government's focus on ensuring the protection of critical infrastructure from cyber threat. However, it doesn't currently extend across some central sectors. In this article, we take a look at Australia's new *Cyber Security Strategy 2020* that will cover more industries relevant to our readers.

The Act requires the establishment and maintenance of a register setting out the ownership of critical infrastructure assets, a government information request power and a limited directions power. This enables the Minister for Home Affairs to direct owners and operators of critical infrastructure assets to take action to mitigate against national security risks if they do not already do so to the satisfaction of the government.

Presently, the Act applies only in relation to electricity, gas, ports, and water assets that meet certain criteria.

However, Australia's *Cyber Security Strategy 2020* proposes to expand the application of the Act to many other sectors. This includes:

- **the energy sector** – including the production, transmission, distribution or supply of electricity, gas or liquid fuel;
- **the food and grocery sector** – including the manufacturing, processing, packaging, distribution and supplying of groceries;
- **the health care and medical sector** – including the production, distribution or supply of medical supplies;
- **the transport sector** – including owning or operating assets that are used in connection with the transport of goods or passengers on a commercial basis and transporting goods or passengers on a commercial basis; and
- **the water and sewerage sector** – including manufacturing or supplying goods, or providing services, for use in connection with the operation of water or sewerage systems or networks.

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The most compelling CoR cases of 2020

Nathan Cecil, Partner, Holding Redlich

Now that the dust of 2020 has settled and a new year is underway, we can reflect on the more significant Chain of Responsibility (CoR) investigations, enforcement action and court cases of last year. Here is a round-up of those that we can learn the most from.

FEBRUARY 2020: FIRST CoR PROSECUTION LAUNCHED UNDER THE NEW HVNL

The NHVR launched its first prosecution under the revised HVNL against Godfrey Haulage for alleged failure of the business to comply with the conditions of its fatigue management accreditation.

Under s 26D, the executive of a party in the Chain has a duty to ensure that the business complies with its duties under the HVNL. Accordingly, the sole director of the business was also prosecuted for alleged failure to exercise due diligence under the executive duty.

The investigation was commenced after a report was made to the NHVR's Heavy Vehicle Confidential Reporting Line (**HVCRL**). As its name implies, the HVCRL is a confidential and anonymous reporting line that anyone can use to report suspected safety issues involving heavy vehicle use, including suspected breaches of the HVNL.

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— HELPDESK QUESTION OF THE MONTH —

Is TruckSafe accreditation complementary to NHVAS or a significant duplication? (answer on page 7)

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

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Linfox and DHL signed to distribute COVID-19 vaccine across Australia

Content Editor, Portner Press

The massive logistical undertaking to safely distribute the COVID-19 vaccine across Australia is underway as the Federal Government prepares to roll-out the Pfizer vaccine. This will be no simple task, due to the scope of the operation and the conditions in which the vaccine must be kept.

The Federal Government has signed distribution contracts with Linfox and DHL Supply Chain.

These two companies will work collaboratively with the government to design and operate a national vaccine distribution network all across Australia, including in remote and hard-to-reach areas.

Federal Minister for Health Greg Hunt announced that Accenture will provide tracking of vaccine doses and overall program implementation monitoring, and PwC Australia will partner with the Department of Health for the vaccine rollout.

A significant challenge will be the ultra-low temperatures required to store this vaccine. As part of the government's distribution deal with Pfizer, purpose-built dry ice containers will be supplied for moving the vaccine around Australia. The companies will be required to track and report the temperature of the vaccine at all times.

The logistics partners will also be responsible for transport and management of vaccination supplies such as needles, syringes and personal protective equipment.

"Linfox's cold chain network includes temperature-controlled distribution centres and cross-dock facilities across Australia, and a world-class fleet with industry-leading safety and temperature-controlled features including temperature tracking and the highest security standards," Linfox executive chairman Peter Fox says in a statement.

"With our 'Together, Stronger' approach, Linfox will partner with other great Australian businesses such as Australia Post/Startrack and Qantas to deliver a world-class solution for all Australians no matter where they reside.

"We look forward to working closely with the Australian Government's Department of Health, as well as Accenture, PwC and DHL to design and operate a national cold chain distribution network that will safely support Australia's ongoing response to the Covid-19 pandemic." ■

➤ *Continued from page 1* ***"New cyber security requirements for the transport sector"***

- These proposed amendments will dramatically extend the assets to which the Act applies. The broad reach of the proposed reforms reflects the government's view of the importance of these sectors. If such sectors were to be impacted by a cyber-related incident, this would have the potential to significantly impact on national security and the social and economic wellbeing of Australians.

Not all entities that own or operate assets in the expanded range of sectors will be regulated in the same way. The consultation paper suggests that:

- 'Critical infrastructure entities' would refer to all owners and operators in a relevant sector. These entities would have the ability to access government assistance in the event of a cyber-attack. The government would also be able to direct such entities to take particular steps, if considered necessary, in the national interest or to maintain other dependent essential services.
- 'Regulated critical infrastructure entities' would refer to a subset of owners and operators in a relevant sector, having an overall perceived greater level of importance. It has not yet been determined what the criteria for inclusion in this category would be. These entities would be subject to an additional 'positive security obligation,' which would require the implementation of baseline cyber security on top of physical, personnel and supply chain security. Related protections and procedures would be in place to ensure rapid recovery in the event of an incident.
- The third and most important type of entity would be owners and operators of 'systems of national significance,' which would be the most critical assets. These would be subject to the obligations imposed on regulated critical infrastructure entities but *would also be required to comply with a set of enhanced cyber security obligations*. Those obligations would establish a greater level of partnership with government, with entities required to share networks and systems information to enable the development of a national close-to-real-time threat picture. These entities would also work with government to build cyber security capability and develop coordinated response arrangements for cyber-attacks.

Furthermore, the consultation paper speculates about additional powers, including the ability for the government to declare an 'emergency' in the event an immediate and serious cyber threat is identified, as well as the ability to take direct action to protect critical infrastructure in the 'national interest' if an emergency is declared.

All businesses within the above sectors should keep up to date with the proposed amendments and consider putting in submissions on the proposed laws, to ensure that any additional regulatory requirements imposed on them are commensurate with the sensitivity of their operations. ■

Changes to the NHVAS

Nathan Cecil, Partner, Holding Redlich

The National Heavy Vehicle Regulator (NHVR) has recently released changes to the National Heavy Vehicle Accreditation Scheme (NHVAS). These changes come into force on 22 February 2021. Any new NHVAS participants will have to comply with the new rules, while any existing participants will have one accreditation cycle to transition to them.

The NHVR summarises the key changes as follows:

- NHVAS applicants must meet 'fit and proper person' criteria.
- The introduction of a minimum six-month time frame to reapply after an accreditation has been refused or cancelled.
- Owners of subcontractor vehicles will have the right to remove vehicles from accreditation.
- Advanced Fatigue Management Business Rules and Standards will no longer be standalone; a harmonised set of Business Rules and Standards to be used for all modules.
- Vehicles being declared 'safe' instead of needing to be 'roadworthy' after the maintenance daily check.
- Tow couplings will need to be checked daily.
- Vehicles will require inspection by a qualified person annually.
- The need to keep a register of Heavy Vehicle National Law (**HVNL**) related infringements and defects.
- Vehicles nominated for Mass Management will require loaded mass verification at least twice per year.
- Ensuring the vehicle as a workplace meets with workplace safety legislation.
- Vehicle statement of compliance no longer required to be carried in the vehicle.

In addition, the above changes introduce further aspects of an SMS intended to provide a more comprehensive, documented and safety-assured risk management system under the NHVAS. ■

State the weight of your freight

Nathan Cecil, Partner, Holding Redlich

There's no need to overcomplicate it. A container weight declaration (CWD) is exactly what the name suggests. It is a written declaration stating or purporting to state the weight of a freight container and its contents. In this article, we simplify CWDs and look at the crucial role they play in compliance. So, do you know what's in your freight container?

CWDs fall under the broad umbrella of 'transport documentation', which essentially includes any document directly or indirectly associated with:

a. a transaction for the actual or proposed road transport of goods or passengers or any previous transport of the goods or passengers by any transport method; or

b. goods or passengers, to the extent the document is relevant to the transaction for their actual or proposed road transport.

A container weight declaration could be an email, or a placard fixed to a container, but it must be accurate. All loaded freight containers travelling by road, whether originating from land or ship, must carry a CWD.

➤DEFINITION: FREIGHT CONTAINER

A 'freight container' is a reusable container that is designed for the transport of goods via one or more modes of transport.

According to Australian Standard AS 3711.1:2000, a freight container is an article of transport equipment:

a. of a permanent character and accordingly strong enough to be suitable for repeated use;

b. especially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;

c. fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;

d. designed to be easy to fill and empty; and

e. having an internal volume of 1 m3 (35.3 ft3) or more.

The Standard states that the 'term 'freight container' includes neither vehicles nor conventional packing.

A COMPLYING CWD

Although there is no prescribed form for a CWD, there is certain information that your CWD must contain.

According to s 189 of the HVNL, a container weight declaration for a freight container is a 'complying container weight declaration' if:

a. it contains the following additional information:

i. the number and other particulars of the freight container necessary to identify the container;

ii. the name and residential address or business address in Australia of the responsible entity for the freight container;

iii. the date the container weight declaration is made; and

b. it is written and easily legible.

All loaded freight containers travelling by road, whether originating from land or ship, must carry a CWD

A RESPONSIBLE ENTITY

Pursuant to s 190 of the HVNL, the duty of a responsible entity for a freight container must ensure an operator or driver of a heavy vehicle does not transport the freight container by road without a complying CWD for the freight container.

Responsible entity, for a freight container, means:

- the person who, in Australia, consigned the container for road transport using a heavy vehicle; or
- if there is no person as described in paragraph (a)—the person who, in Australia, for a consignor, arranged for the container's road transport using a heavy vehicle; or
- if there is no person as described in paragraph (a) or (b)—the person who, in Australia, physically offered the container for road transport using a heavy vehicle.

The CWD must contain information in the form required under s 192A, unless the responsible entity has a reasonable excuse.

The responsible entity for the freight container must also ensure the CWD for the container that is given to an operator of the heavy vehicle is not false or misleading.

In addition to this, the responsible entity, operator or driver must ensure the information in the container weight declaration is in a form readily available to an authorised officer.

ADDITIONAL DUTIES

The HVNL imposes additional duties in relation to CWDs, as follows:

- each consignor or packer commits an offence if the weight of the container exceeds the maximum rated gross weight for the container;
- a consignee of goods transported by road commits an offence if they intentionally, recklessly or negligently do or omit doing anything which induces, or rewards the breach of, any mass requirement. This includes consigning goods where they knew that a CWD was not provided or was false or misleading in a material particular; and
- each consignor, packer, loading manager, loader, receiver of goods, responsible entity and operator of a heavy vehicle commits an offence if the transport documentation for any freight container is false or misleading in any material particular.

Freight containers for transport by sea must also meet the requirements of the *Navigation Act 2012* (Cth), including Marine Order 42.

CAUTION: Any breach of the above is punishable by a maximum fine of $6,000 for an individual and $30,000 for a corporation, per offence.

HOW TO MITIGATE RISK

In order to mitigate risks associated with non-compliance in relation to CWDs, it is important that businesses have adequate systems and processes in place. For consignees, this could include policies whereby all suppliers and agents are notified in writing of the CWD requirements under the HVNL, and are asked to ensure the consignment information provided when goods are purchased matches the consignment information upon delivery. If the information is different, they should adjust accordingly.

For operators and drivers, a risk mitigation control could be as simple as refusing to load if there is an understated weight or, if possible, weighing the truck and the container. If it is overweight, it would be necessary to change trailers or arrange with the consignor for the container to be repacked.

CWDs are a critical safety issue but that doesn't mean they need to be complicated. Make sure you have a complying CWD for your container. ■

➤ *Continued from page 1* ***"The most compelling CoR cases of 2020"***

The NHVR combined the report with its own risk profile of the business in order to determine that further investigation was necessary. The NHVR uses technology to keep track of the safety and compliance record of road transport supply chain businesses. Businesses which are tracking above the industry average can be identified for targeted investigation and enforcement action. In this way, the NHVR can focus its attention where they are more needed and more likely to make an immediate improvement to on-road safety.

Note: As at the time of writing, the case was adjourned (due to COVID-19) and is awaiting a final hearing.

MARCH 2020: FIRST ENFORCEABLE UNDERTAKING (EU) ACCEPTED UNDER HVNL

On 25 March 2020, the NHVR accepted an enforceable undertaking offered by engineering and construction company Laing O'Rourke Australia Construction Pty Ltd (**LORAC**). LORAC made the offer after being charged with two severe risk breaches of mass requirements under s 96(1)(c) of the HVNL by Transport for NSW. The estimated value of the steps proposed by LORAC to ensure compliance with its mass HVNL obligations is about $249,500, so not a cheap exercise.

The incentive for offering an EU to a regulator is essentially to stop it from advancing a prosecution against a CoR party

A CoR party may consider offering an EU as an alternative to being charged with contravening the HVNL. It is available in relation to all offences except for serious category 1 offences of breaching a primary duty. The incentive for offering an EU to a regulator is essentially to stop it from advancing a prosecution against a CoR party.

EUs can be costly depending on the nature of your business and causes of your breaches. LORAC's EU included a commitment to implement the following HVNL compliance strategies:

- Training for LORAC employees that targeted improved awareness of CoR requirements which LORAC estimated required a minimum commitment by it of $134,500.
- CoR training for supply chain partners in NSW, Victoria and South Australia with an estimated minimum commitment of $80,000.
- A third-party transport safety management system audit estimated to cost LORAC $35,000.

JULY 2020: SPEED LIMITER TAMPERING LEADS TO $10K FINE

In July 2020, a Queensland transport operator was fined $10,000 after investigators detected that a speed limiter in a fleet vehicle was set at 125km/h, 25km/h above the applicable limit.

The vehicle was stopped at a heavy vehicle checking station as part of routine inspection. Tests conducted on the speed limiter showed that it was set significantly higher than the maximum legal speed limit for the vehicle and in breach of the speed limiter obligations under the HVNL.

Even though no speeding offence was actually detected, the company was nevertheless prosecuted. The prosecutor submitted that the penalty should be at the higher end of the spectrum due to the significant extent to which the speed limiter setting permitted a violation of the maximum speed of the vehicle and the significant risks that this posed to safety.

Further, Roads and Maritime Services NSW indicated that the business would be under increased regulatory scrutiny as a result and, if further speed related offences were detected, further enforcement action would be taken.

JULY 2020: OVER DIMENSION ON BRIDGE RESULTS IN $9K FINE

Veolia Environmental Services (**Veolia**) was fined $9,000 for a 2018 over-dimension incident on the Tasman Bridge in Hobart. Veolia was engaged to transport empty jet fuel drums in a 'C-Type', 'non-standard' container with a higher than normal height of 9'6".

Nothing in Veolia's processes flagged the extra height. A typical tilt-tray heavy rigid vehicle was assigned. The driver conducted a visual inspection of the load, but failed to notice visible 'caution' signs indicating the over-height of the container and did not take steps to ensure that the loaded truck was within the overall height limit.

The loaded truck did not comply with the applicable dimension requirements and was 180mm higher than the signposted 4.3m maximum height on the route.

The top of the container hit the bottom edge of an overpass on the Tasman Bridge, causing damage to the bridge and colliding with a following light vehicle when the container was dislodged from the truck.

The court accepted that the driver had relevant training and experience, but further observed:

> *"The defendant's internal procedures ought to have been engaged, to ensure that somewhere between the point in the system or operation where the job request was received and the point at which the container was loaded on the truck, there was a proper response to the unusual height of the container so that when it was being transported, the load height did not exceed 4.3m.";* and
>
> *"It appears that the defendant instead relied too heavily on the experience and training of its employed driver; and the driver had, in breach of his responsibility, relied on those loading the container onto the truck."*

This case highlights that people often mistakenly rely on experience in lieu of having written, tested safety procedures in place.

AUGUST 2020: 'LOSE YOUR WORK DIARIES' RESULTS IN $6K FINE

In August 2020, the depot manager of a WA-based transport company was convicted for making a prohibited request under s 26E of the HVNL.

Two drivers engaged by the company were scheduled to do a Perth-Sydney-Perth run.

On the return leg, the drivers notified the depot manager that they each needed to take their mandatory 24-hour rest break.

The depot manager responded by telling the drivers to 'lose' their work diaries and continue driving. Presumably fearing repercussions for not following the direction, the drivers continued driving.

The vehicle was intercepted by NHVR officers as part of routine inspections near Ceduna. By this time, they had been driving for eight days without the mandated 24-hour rest break.

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Upon being informed by the drivers of the direction they were given to continue driving, an investigation was launched into the conduct of the depot manager.

The depot manager was charged with one offence for each driver for 'asking, directing or requiring the driver to do something that they know would have the effect of causing the driver to drive while impaired by fatigue or drive in breach of work/rest hours'.

The maximum penalty was $11,120. The court imposed fines of $4,000 per offence, reduced by 25% to $3,000 per offence, in recognition that the depot manager entered a guilty plea early in the proceedings, thereby avoiding the time and cost of a contested charge. The depot manager had convictions recorded against them.

AUGUST 2020: $80,000 FINES FOR FATIGUE BREACHES

In August 2020, a Queensland trucking company was fined a massive $60,000 for two breaches of its primary safety duty under s 26C of the HVNL, evidenced by 36 cumulative breaches of work/rest hours by two long-distance drivers employed by the company. In addition, the two drivers were together fined $20,000 for their breaches.

The trucks were fitted with GPS trackers, but the work/rest hours breaches were not detected or acted upon by the company.

Issues considered during the hearing included:

- the business failed to properly identify the risk of fatigue breaches arising from long-distance driving;
- the business failed to put in place measures to prevent fatigued driving, such as scheduling journeys and rostering drivers to ensure that mandatory rest could be taken within and between journeys and putting in place training and direction in relation to fatigue management and the business' policies and expectations; and
- the business failed to implement assurance mechanisms to ensure that its transport activities were being conducted safely, including monitoring the GPS records for vehicles and reviewing them to proactively identify fatigue breaches and address them through performance management with drivers.

SEPTEMBER 2020: SECOND EU ACCEPTED UNDER HVNL

In September 2020, the NHVR accepted the second EU under the HVNL, this time offered by national logistics company Qube Ports Pty Limited (**Qube**).

The regulators alleged that in 2019, Qube failed to comply with mass requirements under s 96 of the HVNL.

As an alternative to being prosecuted, Qube submitted an EU, under which it committed to spending a minimum of $137,000, including in relation to:

- the development of a Critical Risk Awareness video message campaign;
- unbranded companion video messages for use by the broader industry; and
- an externally conducted mass management review of existing Qube processes.

In agreeing to accept the EU in lieu of prosecution, the NHVR noted that there was no available evidence to suggest that the alleged breach was part of a recurring failure to manage mass requirements or any systematic non-compliance with the HVNL. In such circumstances, the value of the EU was significantly in excess of any penalty that a court would be likely to impose and presented a better outcome from a regulatory perspective.

SEPTEMBER 2020: HOW A PROACTIVE APPROACH TO YOUR SAFETY OBLIGATIONS CAN PROTECT YOU FROM PROSECUTION

The business in question operated heavy vehicles and employed the loader and driver of a truck that it owned. They were loading construction fill materials. Neither the truck nor loading equipment had scales. The truck was overloaded at 121%. The maximum penalty was about $59,000 and the prosecutor was pressing the court for a mid-level penalty. The prosecutor would probably have obtained the result that it wanted, until the court was taken through the critical background to the incident.

The business had identified that it had obligations under the HVNL and had designed and implemented compliance policies and practices to meet those obligations. As part of those practices, the business had previously calculated load mass/density profiles for the bulk goods that it typically carried. Unfortunately, this product was contaminated with foreign material that was heavier than the load mass/density profile.

As an alternative to being prosecuted, Qube submitted an EU, under which it committed to spending a minimum of $137,000

The business was an accredited TruckSafe operator and had gone through the rigorous compliance and safety induction audit to obtain accreditation.

As part of a general review and reassessment, the business conducted a boardroom briefing for the executive on the business' and executive's duties. This demonstrated that the executive was actively engaged in ensuring that the business was seeking to meet its HVNL obligations. The business then engaged us to conduct a HVNL compliance review and gap analysis, out of which a 58-point action plan was developed by the business (for clarity, this did not represent 58 items that were necessary for the business to implement to achieve a system that could ensure compliance with the law, but represented a number of things that the business could implement to enhance and further develop its existing system).

The business was part way through ticking off and implementing those items when the above incident occurred. As part of that action plan, but after the incident, the business installed truck scales and rolled out refresher training on loading procedures and checks.

The court was taken through these additional matters, to demonstrate the full extent of the business' proactive, genuinely substantive and multilayered approach to HVNL compliance.

The judge commented that although the nature of the offence gave rise to serious safety risks, no actual harm arose. Further, given the considerable focus and attention that the business had brought to bear on those areas both before and at the time of the incident and the considerable measures implemented by the business as a result, he was satisfied that the risk of such an offence occurring in future was low. In those circumstances, where the business was and continued to do the right thing, it would not be appropriate to impose a penalty or record a conviction against the company.

Did the business get off scot-free? Absolutely not! The business invested significant commitment, time and money in HVNL safety – and it paid off. ■

Does your business need a Registered Industry Code of Practice?

Nathan Cecil, Partner, Holding Redlich

There are numerous steps your business can take to stay on top of its safety obligations under the HVNL. You can use Registered Industry Codes of Practice (RICPs) to help identify, analyse, evaluate and mitigate any risks that may arise. In this article, we look at the ins and outs of RICPs to understand how they can benefit your industry.

In simple terms, RICPs are codes developed by any CoR party that are registered by the NHVR and set out detailed and practical standards and procedures to achieve compliance with the HVNL.

WHY DEVELOP OR ADOPT AN RICP?

RICPs operate on a voluntary 'opt-in' basis.

Advantages that arise from developing and adopting RICPs include:

- **RICPs translate HVNL requirements into workable business solutions**

  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.

  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.

  Instead of simply setting out the HVNL requirements for various CoR parties, the Master Code offers options and procedure for CoR parties to implement to avoid these breaches. For example, 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 drier to have a rest break*". It further prompts the operator to establish escalation processes to deal with drivers impaired by fatigue.

- **RICPs are a buffer to charges**

  RICPs are admissible as evidence in proceedings as to whether or not a duty or obligation under the HVNL has been complied with pursuant to s 632A of the HVNL. If an HVNL contravention arises that is covered by an RICP, the court can invoke the RICP to ascertain the nature of a hazard or risk, risk assessment or risk control and to also determine what would have been reasonably practicable for the accused to do in response to such risks and HVNL obligations.

  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 have the capacity to clarify regulatory grey-zones**

  An industry code of practice that is tabled for development is the Australian Livestock and Rural Transporters Association's, *Managing Effluent in the Livestock Supply Chain* code of practice (**Effluent Management Code**). The issue of restraining livestock effluent has long been an industry concern, particularly where effluent discharge is an inherent risk of transporting livestock and drivers may nonetheless be charged in respect of a failure to contain their loads.

> **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. It also gives 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.

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 conduct an industry call out to ascertain whether a code would be adopted if introduced. This is because there are costs associated with developing, registering and maintaining a code.

STEP-BY-STEP: HOW TO REGISTER A CODE

Formal steps to register a code involve the following:

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 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's with the assessment fee.
7. A qualified and experienced panel will then 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 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. ■

HELPDESK

Each month we publish some of our top questions from the *CoR Adviser Helpdesk*. To ask your question today, email: helpdesk@coradviser.com.au.

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

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.

TruckSafe and NHVAS overlap

Q **We have Mass Management accreditation under NHVAS and may pursue similar accreditation for Maintenance Management. Is TruckSafe accreditation complementary to NHVAS or a significant duplication?**

A There is a significant degree of duplication or overlap between TruckSafe and the NHVAS modules. The way that we describe them is set out below.

- The NHVAS are regulatory/productivity benefits schemes. They provide accredited operators with regulatory/productivity benefits (e.g. greater mass limits) in return for accredited operators:

  a. meeting certain operating standards, including safety; and

  b. sharing information with the regulators.

  While the schemes do include a significant focus on safety, they are not directly aligned with the HVNL/CoR laws or the Master Code issued under them, so accreditation does not necessarily equal HVNL/CoR/Master Code compliance. In support of this, despite the schemes being administered by the regulator, there is no provision in the HVNL that gives NHVAS accreditation an elevated status or recognition as a defence to a CoR prosecution.

  Further, NHVAS only covers mass, maintenance and fatigue, and does not cover dimension, load restraint or speed. So, accredited operators will likely need to go above and beyond accreditation in order to achieve compliance.

- In comparison, TruckSafe is a risk management and quality control program. TruckSafe is directly aligned with the HVNL/CoR laws and the Master Code issued under them, so accreditation is intended to directly assist in achieving HVNL/CoR/Master Code compliance.

  TruckSafe modules cover all CoR/HVNL/Master Code elements (e.g. mass, dimension, load restraint, speed, fatigue, maintenance). Accreditation is intended to provide some assurance that accredited operators who continue to properly implement the systems developed under TruckSafe are compliant.

  Given that TruckSafe is an industry-run (and not regulator-administered) scheme, TruckSafe accreditation does not provide any regulatory/productivity benefits. However, there is a push for TruckSafe members to be afforded the same benefits available to NHVAS members.

  In any event, given its comprehensive coverage, TruckSafe accreditation is increasingly being recognised by buyers of transport services as an independent compliance and quality assurance mark.

So, if you are only interested in the regulatory/productivity benefits, the NHVAS is where you need to look. If you are interested in HVNL/CoR/Master Code compliance, in particular across all HVNL/CoR/Master Code elements, TruckSafe is where you need to look.

SMS compliance

Q **How do Safety Management Systems assist operators in complying with CoR laws?**

A A Safety Management System (**SMS**) is a structured and organised approach to managing safety. It is a tool to ensure daily business compliance with CoR laws, and includes:

- **Safety policies and documentation**

  These set out a business's safety objectives, commitment and accountabilities to achieve CoR compliance, including information about key safety personnel in a business, safety responsibilities and third-party interactions.

- **Safety risk management**

  Businesses must undertake risk management activities to eliminate and reduce safety hazards and risks. This is achieved by identifying and reporting safety risks and various hazards, assessing the potential harm or associated risks, identifying and implementing relevant controls to eliminate or reduce the level of risk and reviewing the effectiveness of these controls.

- **Safety assurance**

  Safety assurance refers to the reliability and performance of the SMS. This is ascertained by putting in place a regular system of monitoring and analysing the SMS and investigating why safety issues have occurred. It is also important that safety management processes are audited and reviewed to ensure they are effective.

- **Safety promotion and training**

  Safety promotion and training can be achieved through regular safety meetings, distributing safety fact sheets and creating safety posters. The purpose is to realise safety objectives by involving employees in the development of the SMS, encouraging them to contribute to improve the safety of the business operations and promoting an awareness of the SMS.

  An SMS is not mandatory; however, it is useful to ensure compliance with CoR laws and the safety of your transport activities. To assist you with developing an SMS, templates and guidance material are available on the NHVR website. ■

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LEGAL UPDATE: NATHAN CECIL PARTNER, HOLDING REDLICH

Produce your own CoR compliance guide

Nathan Cecil, Partner, Holding Redlich

Earlier in this issue, we examined the ins and outs of RICPs. There is no doubt that the process of developing and registering an RICP can be quite involved. In this article, we look at a different way to take CoR compliance into your own hands by producing alternative guides for your industry.

RICP REFRESHER

An RICP is developed through industry consultation and is then approved by the NHVR. It is intended to provide practical, industry-focused guidance on how parties across the Chain can identify and respond to risks associated with their respective HVNL obligations.

It is not mandatory for parties in the CoR to adopt an RICP. A key advantage of operating under an RICP is that if you were to be charged with contravening the HVNL, the court can rely on the RICP to determine what would be reasonably practicable in the circumstances to respond to a known hazard, risk, risk assessment or risk control. Adopting measures set out in an RICP can therefore help demonstrate compliance with a particular HVNL obligation in aid of your defence.

CURRENT RICPS

At the present time, the Master Registered Code of Practice is the only RICP registered under the HVNL. Industry-specific RICPs that are under assessment or development include the Crane Code of Practice, Forest Log Haulage Registered Code of Practice, Managing Effluent in the Livestock Supply Chain, Waste and Recycling Industry Code of Practice for Load Management and the Tasmanian Agricultural and Horticultural Registered Industry Code of Practice.

The registration requirements (e.g. as to the content and broad industry consultation that must be undertaken) and application process are quite involved. Further, the developer of an RICP must undertake to ensure that the RICP is kept up-to-date with any developments in the area, meaning that there is an ongoing administrative and financial cost for RICP developers.

CUSTOMISED COR COMPLIANCE GUIDES

So, what if you want to provide CoR compliance guidance within your business, supply chain or industry, but don't want to go through the formality and cost of developing and registering an RICP? A slightly 'lighter touch' approach is to develop your own CoR compliance guide.

Although any such guide cannot be tendered 'as of right' in court proceedings to evidence the present state of knowledge and practice in terms of risk identification and management, developing or adopting the advice in any such guide still has three important benefits:

1. Increasing CoR compliance awareness and sharing information on compliance measures within your business, supply chain or industry is an important tool to help ensure compliance. This can help promote overall safety, avoid non-compliance as well as any investigation or enforcement action.
2. Even if compliance issues are identified and investigative or regulatory action is commenced, the provision and adoption of such CoR compliance guidance is still a positive and proactive compliance measure that can be put forward to regulators and the courts as evidence of the compliance efforts you have made. This can help avoid enforcement action or mitigate any potential penalty.
3. Increasingly, commercial buyers of goods or services are requiring or welcoming evidence of the CoR compliance measures that are put in place in their suppliers' or contractors' businesses, as a condition of agreeing to work with them. Presenting such a guide can help you demonstrate to them the proactive approach that you are taking to compliance and help assure them that your business does not pose a compliance risk to them.

➤ IMPORTANT

When providing guidance, you must be mindful that you do not overstep the mark and dictate how another party in the CoR must perform transport activities over which you do not have responsibility, control or influence. If you do so, you may end up assuming responsibility for those activities. For this reason, it may be best to pitch such guidance at the level of general awareness and guidance.

We have recently worked with industry representative bodies in the turf growing and transport; livestock sale and transport; agricultural and veterinary chemicals manufacturing and distribution; and steel manufacturing, importing and distribution sectors to develop industry guides within those sectors.

The guides produced:

- assist members of those industry associations to understand their own CoR compliance responsibilities;
- can be provided by the members of those industry associations to other supply chain stakeholders as part of the management of supply chain compliance; and
- can be presented to commercial counterparts to demonstrate to them that the members of those industry associations are adopting a proactive and industry recognised practice approach to CoR compliance.

Similarly, many businesses that operate or manage large supply chains are developing their own CoR compliance guides or handbooks for use within their own supply chains. In addition to providing general awareness and guidance for the above purposes, such guides can also serve to communicate business compliance practices that are expected to be followed within the supply chains of those businesses and set compliance expectations and non-compliance consequences, as part of supply chain compliance management.

So, if your industry does not have an RICP or you do not wish to take on the cost and responsibility of developing one, there is still ample room to develop your own CoR compliance guide that will still meet many important compliance goals within your business, supply chain or industry.

If you have any questions, send an email through to us at: helpdesk@coradviser.com.au. ■

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- **When will the regulators prosecute?**
- **Prohibition notices: What, when and why?**