



# Industry Codes of Practice

## Introduction





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# 1. Overview

The transport and logistics industry is a complex mix of multi-faceted industries, operators, regulators, policy makers and legislators and until recently, operated under separate state and territory laws and regulations.

With the introduction of the *Heavy Vehicle National Law* (HVNL) and the establishment of the National Heavy Vehicle Regulator (NHVR), the industry in six Australian states and territories is now subject to harmonised legislation and regulated by a single national body. However, maintaining and improving safety and compliance throughout the whole of the industry is a continuing challenge.

One of the means the NVHR will employ to meet that challenge is to exercise its statutory power to issue Guidelines for Preparing and Registering Industry Codes of Practice (the Guidelines)

## 1.1 Purpose

Incorporating the skill and experience of industry participants, Industry Codes of Practice offer a means of translating the requirements of the law into a practical methodology incorporating best practice for the whole industry.

To meet the requirements for registration, an Industry Code of Practice must be high quality, applicable to the chosen sector, and adaptable for all participants in an industry, from an individual to a large corporation. The Code must also incorporate a detailed risk management approach, a methodology universally recognised as effective for managing safety in safety-critical industries.

The process of registration creates a common point of reference, freely available to the industry as a whole, and encourages the sharing of information about best practice. It should also foster shared responsibility. When each party in the chain is working to the same standards and expectations, their obligations are reinforced. This can also improve efficiency in the industry, particularly in terms of contractual assurance regimes.

## 1.2 What is a Registered Industry Code of Practice?

A *Registered Industry Code of Practice* (RICP) is one that has been developed in accordance with the Guidelines and assessed as qualifying for registration by the NHVR under section 706 of the *Heavy Vehicle National Law* (HVNL).

It must require and assist compliance with all relevant provisions of the HVNL by each party in the chain of responsibility.

A distinguishing feature of an RICP is its evidentiary role in court proceedings pursuant to Chapter 10 of the HVNL.

At present, proven compliance with all relevant standards and procedures of an RICP is one way of establishing a reasonable steps defence (Section 625).

When the amendments from the *Heavy Vehicle National Law Amendment Bill 2016* take effect, code compliance will not afford a defence as such, but the contents of an RICP will be a means of admitting evidence of what is known about risks and controls, and would be able to be used by a court to determine what is reasonably practicable in the circumstances to which the code relates (Section 632A).

## 1.3 Changes to the HVNL

The Guidelines have been drafted with regard to the changes the law will undergo. They refer, for example, to the provisions of Chapter 10, rather than to Section 625 (or Section 632A). The Guidelines themselves should not require substantial amendment, other than to some of the schedules, when the amendments take effect.

On the other hand, Industry Codes of Practice registered prior to the amendments will need to be updated if they refer to provisions in the law that are amended. Keeping an Industry Codes of Practice up to date is one of the conditions of registration.

The Guidelines have also been drafted with regard to the broader changes to the law brought with the shift to a duties-based regime based on workplace health and safety principles.

Consistent with those principles, the Guidelines introduce the requirement that an RICP must be created based on a risk assessment and management process: firstly in the process of developing the RICP, and secondly as a requirement that each adopter of a code must use a similar process – to identify, assess and treat risks – taking into account their particular circumstances to establish and maintain a customised risk management process.

Although a risk-based approach is not a specific requirement of the HVNL in its current form, it is not inconsistent with the objects of the HVNL, and is widely accepted as an appropriate method to manage safety across many industries. When the law is amended, codes already registered may require only minor adaptation to maintain their registration.

## 1.4 Adopting an RICP

Adoption of an RICP is not obligatory, but a voluntary choice by an operator or a party in the chain of responsibility as one way to take responsibility for the safety and compliance of their own business.

By incorporating appropriate risk-based systems into their every-day business practices, operators and Chain of Responsibility (CoR) parties will not only improve the safety and legal compliance of their own activities, they will also be contributing to continuous improvement in best practice within their industry.

Operators in non-participating jurisdictions may not obtain the legal protection of complying with an RICP, but they can still use the guidance in Registered Industry Codes of Practice to improve the safety of their businesses or to satisfy some of the contractual obligations of business partners.

## Industry Codes of Practice



Codes of Practice and Tools: Linking the law to outcomes

## 1.5 A new approach to Industry Codes of Practice

RICPs will differ from previous Industry Codes of Practice in these respects:

Old Industry Codes of Practice	Registered Industry Codes of Practice
<b>Prescriptive and specific</b> They often consist of specific instructions for adopters to follow. Their recommendations may apply to a business of a certain size, but be of less use where the operation is on a different scale. They may provide little guidance for unique or novel businesses or circumstances.	<b>Risk-based approach</b> They take a risk-based approach to managing safety that encourages adopters to design and develop safety systems scaled and appropriate to their own operations. They focus on providing adopters with an understanding of the risk management process so that adopters can take steps to mitigate or control risks within their own business.
<b>Restricted availability</b> Their full content may be restricted to purchasers, or members of the organisation that developed the code. The cost of full implementation may discourage smaller businesses from obtaining the maximum benefit.	<b>Freely available</b> They are published on the NHVR website and freely available to anyone who wishes to use them, subject to the terms of use. This promotes wider adoption of codes and thereby improves safety performance and compliance throughout the industry.
<b>Restrictive auditing and compliance*</b> In some cases, adopters have to be members of an accreditation scheme, where auditing must be done by providers nominated by the entity that owns or manages the code of practice.	<b>Wider auditing options*</b> They are available to any person or business, and there is no requirement for auditing. An RICP adopter can still access the additional benefits of assurance by engaging an appropriately qualified auditor of their choice to audit their practices against the RICP.
<b>Less likely to comply in 2018</b> They are less likely to be consistent with legislative changes scheduled for 2018. They are unlikely to include guidance about identifying a duty and its scope, and the process for assessing and removing or minimising risk in each of the transport activities.	<b>More likely to comply in 2018</b> They are likely to comply with amendments to the HVNL in 2018 and unlikely to need major revision. An RICP is already focussed on risk-based compliance and safety management.

\*Note that neither Section 625(2) of the HVNL (proof of compliance with a code of practice to demonstrate reasonable steps) nor the proposed Section 632A (using code or practice in proceedings) refers to auditing. In each case, a person would be required to "establish" or "introduce evidence" of compliance with a code.

## 1.6 The NHVR's role

The NHVR coordinates development, assessment and registration of Industry Codes of Practice for the heavy vehicle industry.

### Preventing duplication and inconsistency

Rather than the uncertainty and increased regulatory burden of many codes covering the same areas it is better to have a few that are well targeted. During the development and registration phases, NHVR's procedures and its consultation with developers will endeavour to avoid overlap or inconsistency between registered codes.

### Keeping RICPs relevant

The NHVR will also be involved in ensuring that RICPs are reviewed and amended to accommodate new circumstances such as changes to law, advances in technology, modifications to equipment, or altered operating environments.

With the move to codes based on risk management principles, it is less likely that codes themselves will need to be amended with any great frequency. It is envisaged that any adjustments will primarily be made within an adopter's management systems, rather than within the RICEP itself.

When an RICEP is not being kept up to date the NHVR has statutory powers to impose new conditions upon its registration and to cancel its registration. Due to the impact this would have on code developers and adopters, who are both likely to have invested significant time and resources, cancellation will be avoided where possible.

The NHVR will consult with relevant stakeholders, take their interests into account and communicate its decisions in a timely way. In appropriate circumstances, the registration of an RICEP may be temporarily extended to allow those affected to adjust to the change.

### Keeping industry and the general public safe

In all decisions relating to RICPs, the NHVR subject to the provisions of the HVNL, will give primary consideration to the potential impact on public safety.

## 1.7 RICPs at a glance

Here are some of the key things you need to know about an RICEP:

<b>Which industries develop RICPs?</b>	An RICEP may be created for any industry whose activities fall under the provisions of the HVNL. This could include shipping, freight forwarding, exporting and importing, retailing, wholesaling, manufacturing, service industries, mining and resources, primary production and the road transport industry.
<b>Who can develop an RICEP?</b>	Any person, organisation or industry body in consultation with industry experts can develop an RICEP.
<b>Who owns the RICEP?</b>	The NHVR protects the intellectual property of the RICEP developer by signing a licence that allows them to retain copyright and set terms and conditions for use before it can be published on the NHVR website.
<b>How long is it registered?</b>	A code is registered for five years unless otherwise cancelled.
<b>Where does it have legal status?</b>	An RICEP has effect in all jurisdictions covered by the HVNL, unless otherwise specified.
<b>What content should it not contain?</b>	Matters such as dispute resolution, sanctions for non-compliance, competition, insurance, and legal liability indemnity that are beyond the scope of the HVNL cannot be included in an RICEP.
<b>Can the NHVR cancel an RICEP?</b>	The NHVR has the power to cancel registration of an RICEP that is not reviewed after the required period, or that does not comply with the conditions of registration such as the requirement that it be maintained and kept up to date with changes to the law or industry practice.
<b>Who can adopt an RICEP?</b>	Any business or participant in the transport industry and supply chain can adopt an RICEP by downloading the document from the NHVR website and applying it within their business.
<b>Are there any fees?</b>	Fees must be paid by developers of an RICEP as part of the assessment and registration process, but not by adopters, unless they wish to purchase proprietary tools or services.

## 2. For RICP adopters

Any adopter of an RICP must develop and implement a risk management process that enables them to identify, assess and control the risks specific to their own operations. They will use the RICP to better understand risk types within their industry and controls known to be effective and representative of industry best practice.

The RICP will also guide them to identify risks and to devise their own system for managing them. The scale and complexity of that system will vary with the nature of the business but there will be common features such as documented processes or mechanisms for monitoring and review.

Some code adopters will undertake this process without assistance. Others may look for help from industry associations, service providers or consultants or may make use of compliance tools, templates and publications provided by industry or government. In some cases RICP developers may offer services or tools to help adopters comply with requirements.

Adopters may find it useful to participate in audit schemes to verify that they comply with an RICP in order to satisfy contractual requirements, to mount a more compelling defence in the event of legal actions, or for their own peace of mind. The value of an audit will depend on the experience, qualifications and objectivity of the auditor and on how thorough the audit process is.

### 2.1 Benefits of adopting an RICP

These are some of the benefits for any business or organisation wanting to adopt an RICP and implement its requirements:

<b>Better safety performance</b>	Implementing risk management systems in accordance with an RICP raises awareness of risks and the effort needed to mitigate them to satisfy safety obligations rather than just comply with the HVNL leads to: <ul style="list-style-type: none"><li>• more efficient allocation of safety resources</li><li>• improved safety culture and performance.</li></ul>
<b>Better compliance</b>	A risk-based approach to managing safety enables you to comply with the HVNL in a way that best suits your business. It is also likely to improve your compliance with other health and safety and environmental related legislation.
<b>Reduced costs</b>	The adoption of safety and risk management systems means fewer incidents and accidents, which lead to: <ul style="list-style-type: none"><li>• reduced direct costs such as damage, recovery, injury and lost time</li><li>• reduced indirect costs such as insurance premiums, legal exposure, and internal investigations.</li></ul>
<b>Fewer audits</b>	Better compliance records may reduce the number of audits to which a business is subjected.
<b>Fewer penalties, cancellations and claims</b>	Better safety and compliance also means fewer penalties and cancellations of permits or approvals under the HVNL and reduced exposure to civil claims. In the event of a breach, your compliance with a code may assist your defence.
<b>Better reputation</b>	Fewer mishaps and higher efficiency achieved through risk management leads to better regard from staff, customers and suppliers.
<b>Improved productivity</b>	Better safety systems enhance processes and techniques and thereby business productivity: for example, improving loading accuracy allows you to carry loads closer to statutory limits.  It also means improved reliability and assurance for customers.

## 2.2 Use of an RICP as a legal instrument

The reasonable steps defence, as defined in Section 618 of the HVNL, applies to offences in the law where the defence is specifically mentioned (see Schedule 9).

To raise the defence, you must first prove that you “did not know, and could not reasonably be expected to have known, of the contravention concerned” and that you took all reasonable steps to prevent contravention of the law, or that there were no steps you could reasonably be expected to have taken to prevent it.

One way of showing you have taken all reasonable steps, allowed under Section 625 of the HVNL, is to prove that you complied with all relevant standards and procedures under a Registered Industry Code of Practice, relevant to the area to which the offence relates.

Section 625 is also relevant in proceedings for offences that do not have the benefit of the reasonable steps defence *per se*, but include a positive duty to take all reasonable steps (see Schedule 9). Although the prosecution would have the onus of proving that all reasonable steps were not taken, the defendant would also be able to call evidence to prove their compliance with all relevant standards and procedures in an RICP. If they did so, this would be evidence that they did take all reasonable steps, and the charge would be defeated.

Under the proposed 2018 amendments to the HVNL, sections 618 to 625 will be omitted from the law. A large number of offences will be reframed as a positive duty to ensure the safety of transport activities, so far as is reasonably practicable.

The use of RICPs in proceedings will then be covered by the new Section 632A. Under that provision, RICPs will be able to be used by the court to show “what is known about a hazard or risk, risk assessment, or risk control, to which the code relates” and “what is reasonably practicable in the circumstances to which the code relates.”

Note that the new Section 632A also allows a person to prove compliance with the law in a way that differs from an RICP so long as that method of compliance provides a standard of safety and protection equivalent to or higher than the standard set by the RICP.

## 2.3 Using RICPs and other schemes

Many businesses already have to comply with other codes of practice, or schemes required by client companies and may see adopting an RICP as another business burden. In some instances, complying with existing schemes may already satisfy components of an RICP.

Compliance with a vehicle maintenance regime, for example, may be equal to adoption of part of an RICP, provided it demonstrates a risk-based approach. Similarly, the processes necessary to maintain accreditation in mass management may be consistent with the requirements of an RICP.

## 3. For RICP developers

Any person or organisation may develop an RICP but because of its status as a legal instrument, the standard for registration is high. An RICP has to represent best practice, be current, credible and comprehensive while also meeting legal requirements for registration under the HVNL.

### 3.1 You need to liaise with the NHVR

If you plan to develop an RICP, the first step is to provide a Notification of Intention to register (Schedule 1 of the Guidelines) to the NHVR, who then publish it on their website.

The NHVR will then work with you for the remainder of the process, which will involve you:

- consulting with industry
- drafting the RICP in accordance with NHVR guidelines
- appointing an administrator
- formally applying to the NHVR to have the RICP registered
- having the RICP assessed and approved for registration by the NHVR.

### 3.2 You need to consult widely

Before drafting the RICP you need to consult widely or even collaborate within the industry to build as comprehensive a view as possible of the safety situation, and the human, commercial, technical, environmental factors that come into play.

At the outset you should:

- identify all relevant stakeholders
- determine who can contribute to identifying risks and proposing best practice
- determine which other industry bodies may have relevant input
- decide who should be consulted and involved in developing the code
- find out whether there is important data, technical information, or academic studies that ought to be considered
- determine a consultation process, methods and timeframes.

It may be that you set up a working group with wide industry representation or engage technical and safety experts, industry organisations, and other entities with knowledge and experience in the industry to contribute or even prepare specific modules of the RICP.

### 3.3 You need to use the NHVR Guidelines

An RICP has to be developed in accordance with the NHVR's Guidelines.

They require that an RICP be designed and developed in accordance with a risk management methodology applied to each of the activities and duties covered by the HVNL, for each relevant party in the chain of responsibility. They also require that the RICP instructs adopters how to incorporate risk-based systems into their everyday business practices, and use them to improve levels of safety and compliance throughout their industry.

### 3.4 There are fees to be paid

You need to pay two sets of fees during the registration process. These are based on cost recovery and are not refundable if the NHVR decides not to register the code after it is assessed.

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<b>Administrative fee</b>	To be paid after the initial consultation phase when the NHVR advises that you can proceed with developing the RICP. Current estimates are that this will be about \$5000.
<b>Assessment fee</b>	To be paid after a code has been assessed by the NHVR. The fee varies according to the scope and complexity of the code, and resources needed to assess it.

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### 3.5 If there is overlap or inconsistency between RICPs

The NHVR will manage duplication of codes through:

- requiring public notification of a proposed new code on the NHVR website (this alerts other potential developers that someone is heading down the same path)
- discouraging separate developers working on similar codes and where possible, helping many developers collaborate on a single code
- requiring developers to consult widely in the preparation process
- imposing a new condition of registration upon a code – e.g. a condition that parts of it be removed or changed, or
- cancelling registration of a code.

If a proposed RICP must include similar material to the contents of an existing RICP, the NHVR will require it to reference the relevant parts of that existing code, rather than repeat the same information.

If there is likely to be a conflict between the information in a proposed RICP and an existing one, the NHVR advises the developer of the existing code and determines the best means to resolve the conflict.

### 3.6 The NHVR assesses whether the code should be registered

Once you develop the code you need to formally apply for registration and submit the draft RICP to the NHVR. The NHVR then appoints a panel of qualified and experienced persons to assess the code and determine its suitability for registration. Members of the panel may be NHVR employees or independent consultants or experts from a relevant field.

The panel takes into account all relevant information when considering an application, including comments received from the public and may request further information from you. It reports to the NHVR and makes a recommendation to register or not register an RICP, and may recommend conditions of registration, and the stated period before an RICP must be reviewed.

Terms of reference for the functioning of the assessment panel will be published on the NHVR's website.

### 3.7 You retain copyright of the RICP

The NHVR will protect your intellectual property by signing a licence (see Schedule 7 of the Guidelines) that allows you to retain copyright before the RICP can be used and published on the NHVR website.

Copyright protection only covers the form of expression rather than the content of written work. It does not protect the ideas or information contained in a work.

RICPs will be published in a format that embeds the identity of their authors and a set of terms of conditions of use that prevent altering, copying or use without attribution of their authors. They will also prohibit on-selling or profiting of from their use or treatment in a way that would damage the reputation of its authors. When an RICP is accessed on line, the terms and conditions will appear on a new screen that must be accepted by the user before the RICP itself can be viewed.

The terms of use will allow RICPs to be read, downloaded, and printed for individual use and for training purposes so long as there is clear attribution of the authors.

Because RICPs are freely and publically available, developers will not be able to charge a licence fee for their use; however, they will be able to create products, tools and resources, and provide auditing and consulting services to operators wanting to adopt them.

### 3.8 You maintain the RICP even after it is registered

Once a code is registered, you are responsible for maintaining its currency up until its date for review. This includes updating the RICP to reflect changes in the legislation, the Guidelines and in industry practice.

The duty may be carried out by your appointed administrator, but you still need to ensure they are equipped and able to perform their function.

You must advise the NHVR if you appoint a new administrator, or if their contact details change. You must also consult with them if there are any reasons that would require the RICP to be amended.

The NHVR will thoroughly review the RICP at the end of the review period. Meanwhile, it will also monitor RICPs to ensure that they continue to meet the conditions of their registration. If they do not, NHVR can change the conditions of registration, or cancel registration of the RICP.

### 3.9 Changing the conditions of registration of an RICP

The NHVR may change the conditions of registration to manage overlap between codes (see 3.5 above) to ensure that an RICP is up to date, or for another reason. When it decides to take this step it will do the following:

- notify the developer and administrator of the decision and the reasons for it
- consult with the developer to determine whether there is another option
- determine whether the RICP can stay registered for a period of time to provide notice to the industry that will be affected
- publish all relevant information in the NVHR website.

### 3.10 Cancelling registration of an RICP

If the NHVR decides to cancel the registration of an RICP, it will also provide notice to affected parties, and provide reasons for the decision.

Again, it will assess whether the RICP may continue to be registered for a period of time to allow adopters to adjust their circumstances. It will update the NHVR website with relevant information, including details of any new RICP that supersedes the one to be cancelled.

Obsolete codes will be available from the NVHR website for use in Court proceedings.

### 3.11 If you can no longer maintain it

If you can no longer carry out your responsibilities as the developer of an RICP, notify the NHVR immediately.

It may or may not mean the RICP is cancelled. If the NHVR is satisfied that it is still suitable for industry, it may allow registration to continue for a period and temporarily assume developer and administrator responsibilities to prevent disruption to code adopters.

The NHVR will publish a notification on its website explaining the situation and may call for expressions of interest from suitable persons or organisations who may wish to assume responsibility for the RICP.

The terms of the Intellectual Property Licence (Schedule 7 of the Guidelines) will then determine what happens to the developer's copyright.